Negotiating comprehensive settlements of native title claims

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Mr Graeme Neate, President, National Native Title Tribunal, 15 July 2009
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Introduction

The resolution of native title issues by agreement of the parties, rather than litigation or some other imposed form of outcome, has been at the heart of the *Native Title Act 1993* (Cth) (the Act) since it commenced on New Year’s Day 1994. The preamble to the Act provides, among other things, that:

A special procedure needs to be available for the just and proper ascertainment of native title rights and interests which will ensure that, if possible, this is done by conciliation and, if not, in a manner that has due regard to their unique character.

The preamble also states that, in future, acts that affect native title should only be validly done ‘if, whenever appropriate, every reasonable effort has been made to secure the agreement of the native title holders through a special right to negotiate’.

The Australian Government recently confirmed its support for the legislative objective. Speaking on the introduction of the Native Title Amendment Bill 2009 in March this year, Commonwealth Attorney-General Robert McClelland said that the Australian Government’s ‘key objective’ for the native title system is ‘to resolve land use and ownership issues through negotiation, where possible, rather than through litigation’ – an objective that has been ‘a central plank’ of the Act since its introduction in 1994.¹

The Native Title Act not only expressly contemplates that the multiplicity of native title issues will be resolved by agreement of the parties, it provides that agreement-making is to be facilitated by mediation. The use of mediation in native title proceedings is consistent with the increasing use of mediation as a form of alternative dispute resolution in relation to a wide range of litigation.

The National Native Title Tribunal (the Tribunal) which was established under the Native Title Act² has, among other things, functions to mediate and assist people to negotiate agreements.³ The Tribunal’s initial mediation practice was developed under the presidency of Justice French (as he then was) on a most slender statutory basis. The heading to the original section 72 of the Act read ‘Mediation conference to be held’. That was the only reference to mediation in the Act. Since the Act was amended extensively in 1998, references to mediation and agreement-making have pervaded its text. As a general rule since the 1998 amendments, the Federal Court

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¹ House of Representatives, Proof Hansard, 19 March 2009, 21.
² *Native Title Act 1993* s 107, see also ss 108-181 on the structure, powers and functions of the Tribunal.
refers each native title claim to the Tribunal for mediation, and supervises the progress of mediation informed by reports from the Tribunal.

In recent years agreement-making has become the usual way of resolving native title claims and most determinations that native title exist have been made by consent of the parties, sometimes after evidence has been given to the Federal Court.

Most future acts (such as the proposed grants of exploration and mining tenements) over land where native title has been or might be determined to exist proceed by agreement with, or unopposed by, native title holders or registered native title claimants, or by way of consent determinations made by the Tribunal, rather than by determinations following an inquiry.

Amendments to the Native Title Act in 1998 added provision for indigenous land use agreements (or ILUAs). These are voluntary agreements, primarily about the use of land, made between a native title group and others (such as companies, governments and individuals).

It is increasingly common for ILUAs to be part of a package of agreements which record the settlement of a native title application. As a result there is not only a formal declaration by the Federal Court that native title exists, there are agreements showing how the various rights and interests will be exercised on the ground.

Other ILUAs are ‘stand alone’ agreements for specific projects or purposes. The flexibility of ILUAs is illustrated by the subject matter of agreements registered and lodged for registration, ranging as they do from mining projects to Air Force facilities, a marina development and the construction of a city esplanade, a gas pipeline and the creation of a national park, community living areas, management of national parks, and access to and use of pastoral lease land.

Around the country, these agreements are playing an important role for business, governments and local communities which are benefiting on many levels.

This paper focuses on the resolution of native title claims by negotiated outcomes and looks at the range of options for settlement expressly contemplated, or permitted, by the Native Title Act. The paper looks in some detail at the various factors that can affect the pace and outcomes of negotiations, and discusses how and

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4 Native Title Act 1993 ss 86B, 86BA.
5 Native Title Act 1993 ss 86E, 136G.
6 See examples in Chris Sumner, ‘Getting the most out of the future act process’, (Paper presented at the AIATSIS Native Title Conference, Cairns, 7 June 2007) and Annual Reports of the National Native Title Tribunal.
why an interest-based approach to settlements is appropriate in many native title claim proceedings.

Native title claims in context

To begin, however, it is important to understand that even interest-based negotiations in relation to native title claims are conducted in a rights-based statutory context. That is, applications for determinations of native title are commenced as proceedings in the Federal Court and remain as such until their disposition by determination, withdrawal, strike-out or dismissal. Although the Native Title Act expressly contemplates settlement, and provides a range of settlement options, the parties are well aware that if negotiations are unsuccessful, the claimant application can (and usually will) be set down for hearing before a Judge of the Federal Court. Accordingly, it is appropriate to commence this discussion by looking at the legal context by which native title claims are resolved, in particular:

- what claimants have to prove in relation to their traditional connection to land or waters in order to secure such a determination from the Court (whether by consent or otherwise)
- the implications of the law whereby parties identify areas where native title has been extinguished (that is, areas where native title will not be recognised by the law of Australia), and
- the practical need to resolve disputed overlapping claims by different Aboriginal groups.

What claimants have to prove – traditional connection to land or waters

An application may be made to the Federal Court for a ‘determination of native title’ in relation to an area of land or waters. A determination of native title is a determination whether or not native title exists in relation to a particular area of land or waters (known as the ‘determination area’). If native title exists, the determination is of:

- who the persons, or each group of persons, holding the common or group rights comprising the native title are, and
- the nature and extent of the native title rights and interests in relation to the determination area, and
- the nature and extent of any other interests in relation to the determination area, and
- the relationship between the native title rights and interests and the other interests (taking into account the effect of the Native Title Act), and

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7 Native Title Act 1993 ss 13, 61.
• to the extent that the land or waters in the determination area are not covered by a non-exclusive agricultural lease or a non-exclusive pastoral lease – whether the native title rights and interests confer possession, occupation, use and enjoyment of that land or waters on the native title holders to the exclusion of all others.8

One of the most complex aspects of native title proceedings is ascertaining whether a claim group has native title rights and interests in relation to the land or waters claimed. The Act defines native title to mean the communal, group or individual rights and interests of Aboriginal peoples or Torres Strait Islanders in relation to land or waters where:

• the rights and interests are possessed under the traditional laws acknowledged, and the traditional customs observed, by those people, and
• the people, by those laws and customs, have a connection with the land or waters, and
• the rights and interests are recognised by the common law of Australia.9

That definition has been the subject of considerable judicial analysis.10 In essence, the claimants (who bear the onus of proof) have to show that they have native title rights and interests in relation to the claimed area under a system of traditional laws and customs which has its roots in a society that preceded the date on which the Crown asserted sovereignty (between 1788 and 1879 depending on where in Australia the claim is made) and which has maintained a substantially continuous connection with the area under those traditional laws and customs.

In the reasons for judgment on the appeal in relation to the Noongar claim to the Perth metropolitan area, a Full Court of the Federal Court stated, among other things, that:

• the existence, character and extent of native title rights and interests depend upon the traditional laws and customs of the community in question11
• the acknowledgment and observance of the traditional laws and customs must have continued ‘substantially uninterrupted’ from the time when the Crown asserted sovereignty, and the connection must have been ‘substantially maintained’ since that time12 whether by physical presence on the country or otherwise13

8 Native Title Act 1993 s 225.
9 Native Title Act 1993 s 223(1).
10 The main High Court judgements are Western Australia v Ward (2002) 213 CLR 1 and Members of the Yorta Yorta Aboriginal Community v Victoria (2002) 214 CLR 422.
11 Bodney v Bennell (2008) 249 ALR 300 at [148].
12 Bodney v Bennell (2008) 249 ALR 300 at [168].
13 Bodney v Bennell (2008) 249 ALR 300 at [171]-[174].
the connection inquiry can have ‘a particular topographic focus within the claim area’ so that there may need to be evidence that connection has been substantially maintained to a particular part of the claim area since sovereignty.14

Mediation and traditional connection: One of the statutory purposes of mediation under the Native Title Act is to assist parties to reach agreement on whether native title exists and, if it does exist, who holds the native title and the nature, extent and manner of exercise of the native title rights and interests in relation to the area claimed.15

If claimants want a determination of native title they need to convince other parties or the Federal Court of their traditional connection to the claimed area. Most respondent parties, including governments, will not engage in substantive mediation with claimants unless and until they have received satisfactory ‘connection material’.

There is an ongoing debate about the best way to deal with connection issues, including debate about the role of state and territory governments and the role of the Tribunal in this process. Although, as the Act suggests and Justice French has ruled:

- the Tribunal has responsibility to undertake mediation of all aspects of the application
- the mediation process covers the exchange of information between parties, including connection information (rather than the provision of connection evidence being outside or antecedent to the mediation process)16

that approach is not always taken.

The Tribunal’s Procedural Direction No. 9 of 2007 directs Members and employees of the Tribunal to:

- ascertain whether proof of traditional connection of the native title claim group to the claim area is likely to be relevant to the resolution of the claimant application, and
- if it is, prepare with the parties a program for ascertaining for the purposes of mediation whether the claim group has connection by traditional laws and customs to the claim area.17

The program could take a different form for each claimant application depending on relevant circumstances.18 In some parts of the country, connection issues are dealt

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14 Bodney v Bennell (2008) 249 ALR 300 at [175]-[179]; for the practical effect of this for the Perth metropolitan claim see [180]-[190].
15 Native Title Act 1993 s 86A(1).
16 Frazer v Western Australia (2003) 128 FCR 458, 198 ALR 303 at [27], [28].
17 Paragraphs 30-35.
with bilaterally between the applicants and the relevant government, with little if any involvement by the Tribunal or other parties (each of whom must consent to any determination that native title exists, and some of whom will want to be satisfied independently that connection has been established).

The Tribunal’s existing role in the mediation of connection is potentially enhanced by its capacity, in certain circumstances, to:

- carry out a review of whether there are native title rights and interests,\(^\text{19}\) or
- hold an inquiry in relation to a matter or issue relevant to a determination of native title.\(^\text{20}\)

To date the Tribunal has not carried out a review of whether there are native title rights and interests or held a native title application inquiry. Consequently it is not possible to say whether such an exercise would materially affect the outcome of mediation in a particular case, or significantly reduce the resources spent on securing an agreed (or litigated) outcome.

Even if agreement is reached between the parties, some judges will require information about the native title claim group and its connection to the area before the Court will be satisfied that it is appropriate to make orders \textit{in rem} that are in, or consistent with, the terms agreed by the parties.\(^\text{21}\)

\textbf{Preparation of connection material:} The collation and presentation of relevant material, whatever its form(s), is a multidisciplinary process. Research to establish whether a group has native title can involve archaeological, historical, anthropological, linguistic and genealogical materials as well as oral histories from the claim group and neighbouring groups. Written compilations and analyses of that material are often referred to as ‘connection reports’. Preparing them can be a lengthy and expensive exercise.

It should be noted that sometimes proof of the native title claim group’s connection is \textit{not} required for a negotiated settlement of a claim (e.g. by way of an ILUA rather than a determination of native title). In most cases, however, proof of connection will be critical to the conduct and outcome of negotiations.

\(^\text{18}\) Paragraph 33.
\(^\text{19}\) \textit{Native Title Act} 1993 s 136GC. See also Procedural Direction No 6 of 2007.
\(^\text{20}\) \textit{Native Title Act} 1993 s 138B. See also Procedural Direction No 7 of 2007.
\(^\text{21}\) For recent discussions of this issue see \textit{Hayes on behalf of the Thalanyji People v Western Australia [2008] FCA 1487} at [15]-[31], and the overview by Chief Justice French in ‘Rolling a rock uphill? – Native title and the myth of Sisyphus’, paper delivered to the Judicial Conference of Australia Colloquium, 10 October 2008, pages 23-24. See also the paper delivered by Justice Reeves of the Federal Court to the Law Society of the Northern Territory, ‘Consent Determinations under the Native Title Act 1993 (Cth)’, 18 February 2009.
Among the practical obstacles to resolving connection issues more quickly are:

- the shortage of suitably qualified and experienced researchers (particularly anthropologists) available to prepare connection reports or assess them (e.g. to advise governments) – with consequent delays in researching and producing reports, or the preparation of some reports that do not address requirements of government guidelines\(^\text{22}\) (giving rise to requests for revision or supplementation)

- the lack of interdisciplinary collaboration in preparing connection materials (including insufficient involvement of lawyers to ensure that reports are fit for the purpose for which they are prepared)

- limited resources generally to prepare and assess such material

- limited access to relevant state government records with information about people and places

- the practice of restricting access by other respondents to connection reports while they are assessed by governments, thereby limiting the scope of other respondents to participate in the process

- the general practice of restricting access to connection reports, thus limiting the opportunities to educate other researchers and to share understandings about how connection material was assessed.

**Preserving evidence to support a native title determination:** Because it will be many years before most claims are resolved, it is likely that some of the most knowledgeable and authoritative members of the groups will not be able to participate actively in the proceedings (particularly if the claim goes to a hearing in the Federal Court) or may pass away before the claims are resolved.

Native title claim groups need to consider whether the evidence of old or vulnerable members of the group should be preserved and, if so, how that should occur. The options include:

- recording witness statements in documents and, if appropriate, producing them in the course of a mediation conference subject to restrictions on their disclosure\(^\text{23}\)

- a native title application inquiry by the Tribunal\(^\text{24}\)

- preservation of evidence as part of a hearing by the Federal Court in advance of the general hearing (if any) of the claim.

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\(^{22}\) Some governments have published guidelines about the content and form of the connection material that they require in order to be satisfied that native title exists. Others (including the Commonwealth) do not have published guidelines. There are different processes for reporting on and assessing connection materials. Some governments require proof of connection as a pre-condition to entering into substantive negotiations with a claim group.

\(^{23}\) *Native Title Act 1993* s 136F.

\(^{24}\) *Native Title Act 1993* ss 138A-138G.
Options for procedural reform: In July 2007, the Tribunal and the Australian Institute of Aboriginal and Torres Strait Islander Studies (AIATSIS) convened a native title workshop about the processes used by parties for dealing with connection issues. It involved 40 practitioners engaged by native title representative bodies, state and territory governments, and others with significant experience in native title. A survey of participants before the workshop indicated that most believe that problems encountered in resolving connection issues are systemic in nature. In other words, there is no one way to solve the problem and several approaches must be undertaken to effect change.

Various suggestions for improving the current system were made in the context of the stated preference of governments to reach mediated (rather than litigated) outcomes. Chief among these are:

- improving regional and operational planning (including claims prioritisation) between state and territory governments and native title representative bodies
- mitigating the adversarial nature of the relationships between parties
- clarifying the needs and expectations of all parties in relation to connection material as early as possible (e.g. at a plenary conference convened by the Tribunal)

Other suggestions included:

- providing simpler, cheaper access to government records and/or using limited discovery orders for easier access to relevant information
- revising government guidelines to ensure that they are flexible, clear (e.g. with checklists) and consistently applied
- producing a template for research and a manual with sample documents
- arranging collaborative research between native title representative bodies with access to each other’s archives
- providing access to best practice models of writing connection reports, and the use of edited or ‘sanitised’ publicly available reports for training purposes
- developing specialist training and mentoring/supervision programs
- developing a standard and clear brief which sets out the requirements of the Act that the research must address, and the involvement of lawyers with researchers throughout the research process
- arranging collaboration between external researchers, native title representative bodies and governments to:
  - scope the research that is necessary for each claim before that research is undertaken (e.g. by identifying matters that are not contentious and do need detailed research and clarifying the information required in light of intended or possible outcomes), and
- settle the form in which the material should be presented (including the best ways to incorporate more direct evidence from claimants)
- conducting tenure research, at least to major areas of land in question, before active connection research is undertaken
- incorporating the preparation and assessment of connection material as part of the mediation framework and not as a precursor to it
- mediating connection and other issues in parallel rather than sequentially.\textsuperscript{25}

Some of the suggestions made at the workshop would require a significant shift in the policies of governments including:
- state and territory governments removing their requirement for comprehensive proof of connection \textit{before} entering into negotiations
- developing a national framework and standards for the assessment of connection.

There are indications of support for some of these suggestions. In February 2008, Commonwealth Attorney-General McClelland suggested that, rather than start by considering connection with its attendant problems,\textsuperscript{26} there might be benefits in starting with a consideration of tenure and having a connection process run in parallel with discussions about a range of outcomes, native and non-native title.\textsuperscript{27}

**Options for substantive legislative reform:** Other suggestions have been made for more substantive legislative reform to improve the pace, and potentially the number and geographic extent, of determinations that native title exists. In a paper delivered in July 2008, reprinted in 2009,\textsuperscript{28} Chief Justice French (then a judge of the Federal Court and former President of the National Native Title Tribunal) suggested that a presumption could be applied in favour of native title applicants to ‘presume continuity of the relevant society and the acknowledgement of its traditional laws and observance of its customs from sovereignty to the present time’. Such a presumption could be engaged where a native title claim group ‘acknowledges laws and observes customs which members of the group reasonably believe to be, or have been, traditional laws and customs acknowledged and observed by their ancestors’.


\textsuperscript{26} For example, the shortage of experts and no straightforward way to make them more readily available, the delay and cost of securing reports, competing arguments about connection to specific areas.

\textsuperscript{27} R McClelland, Negotiating Native Title Forum, 29 February 2008, paras 34-38.

If, by those laws and customs, the people have a connection with the land or waters today, then a continuity of that connection might also be presumed.

According to his Honour:

Such a presumption would enable the parties, if it were not to be challenged, to disregard a substantial interruption in continuity of acknowledgment and observance of traditional laws and customs. Were it desired, the provision could expressly authorise disregard of substantial interruptions in acknowledgment and observance of traditional law and custom unless and until proof of such interruption was established.29

As his Honour noted:

A presumption can be challenged by a respondent party, including the relevant state or territory. And if there were concerns on the part of states about expanding the scope of compensation claims in respect of historical extinguishment, it may be that the presumption might not be applied to such cases. It would be important that any presumption be robust enough to withstand the mere introduction of evidence to the contrary. Some presumptions are little more than platforms for inferences and collapse upon the introduction of evidence to the contrary whatever its probative value. A presumption subject to proof to the contrary is to be preferred. 30

Chief Justice French wrote that it may be possible to ‘lighten some of the burden of making a case for a determination, whether in litigation or mediation’, by such a change to the law ‘so that some elements of the burden of proof are lifted from applicants’.

Not surprisingly, this suggestion gained publicity and support from key Indigenous representatives. The National Native Title Council (NNTC) endorsed the suggestions in its submission to the Senate Standing Committee on Legal and Constitutional Affairs in relation to the Committee’s inquiry into the Native Title Amendment Bill 2009.31

The NNCTC submitted that, given that in many instances (particularly in remote locations) there is little foundation for significant dispute over continuity, the adoption of a rebuttable presumption ‘should help reduce the resource burden on

31 National Native Title Council, Submission, Senate Inquiry: Native Title Amendment Bill 2009, submission No 6.
the system (especially where continuity is undisputed), helping facilitate the expeditious resolution of native title claims’. By reversing the onus of proof, the evidential burden is placed ‘more appropriately’ on the State, which, ‘by virtue of its “corporate memory”, is in a better position to elucidate on how it colonized or asserted its sovereignty over a claim area’. This has the ‘additional benefit of placing responsibility for investigating connection and extinguishment in the lap of the one entity; potentially leading to a more comprehensive understanding of the evidence in a given case’.

Importantly, the NNTC submitted, the burden placed on the State by virtue of such a presumption:

may also result in positive behavioural changes; with the State having little incentive to expend resources in difficult disputes over continuity and connection or to assert, for example, that continuity had effectively been broken because of actions that in our modern human rights climate would be considered abhorrent (e.g., genocide or other breaches of international human rights law). In this respect, the introduction of a rebuttable presumption may act as a significant catalyst for change, facilitating a paradigm shift in the way negotiations are conducted and in the quality and quantity of positive outcomes for claimants.

The NNTC also submitted that a rebuttable presumption would also have a ‘significant impact’ on the negotiation process. If state governments were required to rebut continuity and justify extinguishment (with the associated costs involved) they might be ‘more inclined to negotiate earlier and more openly with the aim of spending less on the process and more on possible opportunities for Traditional Owners.’

In his 2008 Native Title Report, the Aboriginal and Torres Strait Islander Social Justice Commissioner, Tom Calma, recommended that the Native Title Act be amended to:

• provide a presumption of continuity (which could be rebutted if the non-claimant could prove that there was a ‘substantial interruption’ to the observance of traditional law and custom by the claimants), and

• address the Federal Court’s inability to consider the reasons for interruption in continuity. 32

In a conference paper delivered on 4 June 2009, 33 Justice North of the Federal Court and Tim Goodwin revised and expanded on the presumption of continuity option. In summary, they proposed the following reforms:

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• A reverse onus of proof in applications for determinations of native title so that applicants would need to show that there were Indigenous people at sovereignty occupying the land in question according to traditional laws and customs and, if they did, the onus would shift to the respondents to demonstrate that the other requirements of the *Yorta Yorta* test did not exist.

• Section 223 of the Native Title Act (which includes the definition of ‘native title’) would be amended with a new subsection to provide that where the respondent (under the reverse onus provision) establishes that the society which existed at sovereignty has not since then continuously and vitally acknowledged laws and observed customs relating to land as required by the *Yorta Yorta* test, any lack of continuity which resulted from the actions of settlers is to be disregarded. For that outcome to be achieved, the applicants would bear the burden of showing that the lack of continuity resulted from the actions of settlers.

The authors then described a range of possible benefits flowing from such reforms.

Two questions are worth asking at this stage:

• Is the Australian Government likely to introduce amendments of that type to the Native title Act?

• If such amendments are enacted, would they make as much difference in practice as their advocates suggest?

As to the first question, it is not clear whether reforms along the lines suggested by Justices French and North, and moved by Mr Oakeshott MP in relation to the Native Title Amendment Bill 2009, will find favour with the Australian Government. In the debate on the Bill in the House of Representatives, Attorney-General McClelland said that he had held some discussions with Mr Oakeshott about his proposed amendments. Although the Attorney has ‘an open mind to further legislative change that may facilitate resolution of native title claims’, he said that the Australian Government ‘will not rush into such changes without first consulting stakeholders. It is very important that there be genuine community support for measures that are ... designed to or intended to promote the welfare of Indigenous owners and their descendants’.  

34 Mr Oakeshott was unable to find another Member of Parliament to second his call for a division on a vote on his amendment.  

35 On 5 June 2009, in a conference paper, the Attorney-General said that ‘while legislative change is not a panacea’ he is willing to explore ideas proposed by current and former judges who have a wealth of experience in native title’. Having referred briefly to suggestions

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including that made by Chief Justice French, he repeated that the Australian Government ‘will not rush into such changes without first consulting stakeholders.’ He is ‘determined to ensure that the way we consult, and the relationships we forget along the way, distinguish this Government’s approach to native title’.

As to the second question, at least two things have been said in favour of such amendments. First, by lifting a burden from the applicants and shifting it, if at all, to respondents (primarily the relevant government(s)), the change could be said to be more consistent with the spirit of the Mabo (No 2) decision and the policy considerations set out at length in the preamble to the Native Title Act. When moving his amendment, Mr Oakeshott stated that it ‘is doing no more or no less than making the Native Title Act more just’. He went further to give a second justification for the amendment: it would make the Act and the determination process ‘more efficient’. Indeed it would save taxpayers’ dollars. Justice North and Tim Goodwin also suggest that a reverse onus provision would be likely to have ‘an immediate and dramatic effect’ in a number of applications. It would reduce the task of the applicants to ‘a very manageable scale’ and, if the respondents did not seek to establish loss of continuity or some other failure to qualify under the Yorta Yorta test, the ‘delays would be eliminated and the costs reduced to a fraction of the costs presently incurred’.

Such arguments proceed on the basis that the amount of work currently being done in support of claims would not be replicated by others in an attempt to provide evidence to rebut the presumption. In those cases where the claim is likely to result in a consent determination of native title, the costs and delay could be substantially reduced by a reconfiguration of the statutory requirements. It would be unwise to speculate as to what might occur in other, less clear cases. The response of one or more respondents might be influenced by the nature and extent of other interests in the area, and a prospect of liability for compensation at a later date. In other words, the higher the stakes are perceived to be, the more attention might be given to attempting to rebut the presumption. In their paper, Justice North and Tim Goodwin quite appropriately stated that ‘much would depend on the position taken by State respondents’ and it remains to be seen whether they or other respondents ‘would attempt such proof’. States might be expected to continue to carefully examine each case, but unless State respondents were to ‘react to the spirit of the change as well as

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40 Ibid p 15.
to the letter, the benefits of the reduction of cost and delay otherwise available might not eventuate'.

Identifying where native title will not be recognised: the effect of extinguishment
It has been clear for many years, both from the provisions of the Native Title Act and judgments of the High Court and Federal Court, that:

- native title will not be recognised over large areas of Australia where, as a matter of law, native title has been extinguished completely by certain dealings as specified in the Act and in some High Court judgments
- in other areas (such as those subject to ‘non-exclusive’ pastoral leases), any native title right to exclusive possession has been extinguished, with the remaining ‘bundle’ of native title rights and interests being recognised and exercised alongside the rights and interests of other land-holders but subject to those other rights
- where there have been no prior dealings with the land, or where those dealings must be disregarded, and other conditions are satisfied, there may be a determination that native title rights and interests confer possession, occupation, use and enjoyment of that land on native title holders to the exclusion of all others.

The map at Attachment A shows in broad terms those areas where by reference to current tenures (assuming the dealings are not to be disregarded under a provision of the Act) native title will not be found to exist, irrespective of whether Aboriginal people have retained strong traditional links to those areas. Those areas cover much of eastern and southern Australia.

Over much of the rest of the land mass of Australia, current tenures (mostly forms of pastoral lease) have partially extinguished any native title rights and interests that might otherwise exist.

The map at Attachment B shows the geographic extent of current native title claims by reference to their external boundaries. One challenge in relation to any claimant application (or cluster of claims) is to identify with certainty those areas where native title (or some native title rights and interests) might exist because:

- there have been no extinguishing tenures or the tenures have a limited effect on native title, or
- any extinguishment by specified acts must be disregarded.

Sometimes neither the claimants and their representatives nor respondent parties know precisely which areas are the subjects of negotiation. On occasions it becomes

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41 Ibid pp 15-16.
42 See Native Title Act 1993 ss 47, 47A, 47B.
clear during the mediation process that, having regard to current tenures and previous dealings in relation to the land, native title might only survive over small areas. Such a revelation can change the focus, tone and potential outcomes of the mediation.

To assist parties to gain a clear appreciation of the maximum possible extent of native title within a claim area, Tribunal Members and the Native Title Registrar are to ensure that, in respect of specified categories of claimant applications:

- tenure mapping (showing the current tenure or tenures in relation to land in a claim area) is prepared and is made available to the parties\(^\text{43}\)
- a ‘preliminary tenure analysis’ is prepared in relation to each claim area, that is, an analysis involving an ascertainment of the current tenure of a claim area to ascertain whether native title rights and interests may have been extinguished in whole or in part, or are not affected, in relation to land and waters within the outer boundary of the claim area.\(^\text{44}\)

These steps are to be taken for strategic, as well as claim management, purposes. For example, the early preparation of a map of current tenures across a claim area and a preliminary tenure analysis should assist parties to identify the areas where native title has been extinguished (in whole or in part)\(^\text{45}\) and over which areas native title may be recognisable (in whole or in part). This process will not be definitive, particularly as tenure histories may disclose previous dealings that had the effect of extinguishing native title rights and interests, but they will give a snapshot of the potential scope of any determination in relation to the claim area. In some parts of the country, it may be immediately apparent that very small areas of land might be susceptible to a determination of native title. Such a picture may encourage parties to look to a range of options for a negotiated outcome (some of which are discussed below).

**Where claims overlap – resolving disputed overlapping claims**

**Extent of overlaps:** Many claimant applications overlap other applications (in part or in whole) and many of the overlaps illustrate disagreement between neighbouring Indigenous groups about the extent of their traditional country. The map at Attachment C shows areas where claimant applications overlap.

As at 31 March 2009, of the 473 active claimant applications – 53.5% of claims had no overlaps and the other 46.5% of claims comprised 23.3% with one overlap, 11.2%


\(^{45}\) Subject to the operation, if any, of ss 47, 47A or 47B of the Native Title Act 1993 to areas of land within the claim area.
with two overlaps, 5.7% with three overlaps, 3.2% with four overlaps and 3.2% with five or more overlaps.

**Implications of overlaps for resolving claims:** Although some groups acknowledge that others have traditional rights and interests over the same area (and that has been recognised in some determinations of native title to date\(^{46}\)), the existence of disputed overlaps is a threshold issue that needs to be resolved. Some longstanding disputes between groups are revived or exacerbated by the native title process. These disputes can result in long delays in progressing any of the claims, or to trials in Court.

Governments and some other respondent parties will not participate in substantive mediation unless and until the overlaps are resolved (e.g. by a native title representative body exercising its dispute resolution functions, the Tribunal mediating between neighbouring groups, or the Federal Court delivering judgment about who are the correct people for each area). Although willing to negotiate about native title issues, they do not want to decide between competing groups. In their view, that is a matter for the disputing groups (or the Federal Court) to decide before they will engage in substantive mediation.

**Issues for claim groups and their representatives:** The risks for disputing claim groups include:

- they will not secure sufficient resources to advance their claims to substantive mediation
- their claims will not be given priority in the regional planning of the native title representative body with the state or territory, the Tribunal and others
- the areas of their claims that are not overlapped will not progress until the overlaps are resolved or removed
- there may be an application to have the claims struck out
- the Court may make programming orders for the hearing of the claims on the basis that there is no prospect of a mediated outcome within a reasonable period.

The options that those groups should consider for dealing with the overlaps include:

- sorting out the issue between themselves, perhaps in accordance with traditional decision-making processes
- asking the Tribunal for mapping and possibly research assistance to inform discussions between the disputing groups
- getting the relevant native title representative body to exercise its dispute resolution function to promote agreement, or to mediate, between its

\(^{46}\) E.g, see *James (on behalf of the Martu People) v Western Australia* [2002] FCA 1208 at [11], *James on behalf of the Martu People v Western Australia (No 2)* [2003] FCA 731.
constituents,\(^\text{47}\) possibly with the assistance of the Tribunal\(^\text{48}\) (as happened at Spear Creek in South Australia – see the case study below)

- if the claims have been referred to the Tribunal for mediation,\(^\text{49}\) having the Tribunal mediate between the groups
- asking the Tribunal to conduct a native title application inquiry,\(^\text{50}\) or a review of materials to see whether a native title claim group holds native title rights and interests in relation to the overlap area,\(^\text{51}\) to assist in the mediation of the dispute
- asking the Tribunal to refer the issue to the Federal Court for determination.\(^\text{52}\)

Given the extent of disputed overlapping claims, it is important that steps be taken as early as practicable (preferably before claims are lodged) to resolve them.

**Options for settlement**

**Options for types of agreement and factors in choosing an option:** As is apparent from the text and attachments to this paper:

- native title will only be recognised in some parts of Australia because native title has been extinguished, in whole or in part, over substantial areas
- in many areas where native title can be shown to exist, the recognised native title rights and interests will be limited to those few of the ‘bundle of rights’ that can exist and be exercised alongside the rights of others in relation to the same areas of land or waters
- many groups will find it difficult, if not impossible, to demonstrate that the relationship with their traditional country meets the standard of proof required for a determination that native title exists.

In a paper delivered in 2008, Commonwealth Attorney-General Robert McClelland illustrated this approach when he said:

[N]ative title is but one way of recognising Indigenous peoples’ connection to land. Where Indigenous people have lost their native title by removal or through the passage of time, we should be able to find a way to recognise their relationship with the land. In summary,

\(^{47}\) Native Title Act 1993 s 203BF.
\(^{48}\) Native Title Act 1993 s 303BK(3).
\(^{49}\) Including referral for the purpose of mediating the resolution of the overlaps, see Native Title Act 1993 s 86B(5). See Procedural Direction No 9 of 2007 paragraphs 36-40.
\(^{50}\) Native Title Act 1993 ss 138A-138G.
\(^{51}\) Native Title Act 1993 ss 136GC-136GE.
\(^{52}\) Native Title Act 1993 ss 136D, 86D(1).
we need to move away from technical legal arguments about the existence of native title.\textsuperscript{53}

Later in the speech he said:
Importantly, being unable to meet the required standard for a determination of native title at a particular point in history does not mean those Indigenous people do not have strong relationships with the land and with each other. But it does mean that claimants need to consider what other results they may be willing to achieve from a claim. And Governments need to consider how they might achieve those aspirations... Much can be achieved if parties are up front about what they really want and open-minded about finding creative solutions.\textsuperscript{54}

Native title claim groups and their representatives, governments, other parties and the Tribunal have been forced to consider how best to proceed in this more clearly delineated legal context. Consequently, it is worth considering the extent to which
the native title scheme provides a platform for negotiating broader settlements in relation to the ‘claims to land, or aspirations in relation to land’\textsuperscript{55} of native title claim groups.

In summary, it is notionally possible for native title claim groups and respondents to negotiate one or more of a range of types of agreed outcomes to resolve claims. The options include:

- determinations of native title (bare determinations)
- broader agreements involving determinations of native title together with associated agreements (such as ILUAs) about matters including the operation of the determination on the ground (e.g. land use and access)
- no determination of native title but alternative agreements about issues that satisfy the interests of the parties and involve the withdrawal of the claim
- regional agreements involving more than one native title claim group.

Which option is chosen will be influenced by, or even depend on, a range of legal and factual circumstances, as well as the attitude of the parties.

**The legal context:** As noted earlier, the Native Title Act provides for parties to a native title claim proceeding to reach agreement on matters that are to be included in a determination of native title.\textsuperscript{56}

\textsuperscript{53} R McClelland, Negotiating Native Title Forum, 29 February 2008, paragraph 5.

\textsuperscript{54} R McClelland, Negotiating Native Title Forum, 29 February 2008, paragraphs 45-47, 49.

\textsuperscript{55} See the Preamble to the *Native Title Act 1993*.

\textsuperscript{56} *Native Title Act 1993* ss 86A, 94A, 225.
The Act also provides that some or all of the parties to a claimant proceeding may negotiate with a view to agreeing to action that will result in any one or more of the following:

- the application being withdrawn or amended
- the parties to the proceeding being varied
- any other thing being done in relation to the application.57

The agreement may involve matters other than native title.58 The possible outcomes are not limited to native title rights and interests, but need only relate to the resolution of the claim or some aspect of it. The parties may request assistance from the Tribunal in negotiating the agreement.59

Under proposed amendments to the Native Title Act recently introduced, the Federal Court will have express power to make orders, under sections 87 and 87A of the Act, that give effect to terms of an agreement between parties ‘that involve matters other than native title’. The Explanatory Memorandum on the Bill illustrates the potentially very broad scope of such agreements and orders. It states:

Examples of matters other than native title that may be covered by agreements include matters such as economic development opportunities, training, employment, heritage, sustainability, the benefits for parties, and existing industry principles or agreements between parties or parties and others that might be relevant to making orders about matters other than native title.60

In his second reading speech on the Native Title Amendment Bill 2009, Attorney-General McClelland stated that the amendments would ‘help to encourage a broader and more flexible approach to the resolution of native title’ and ‘facilitate more, broader and more relevant agreements’. Negotiated settlements (to be reached faster under the amended Act) could ‘extend beyond the bare recognition of legal rights. They can include sustainable benefits that deliver improved economic and social outcomes for generations of traditional owners’. To ‘assist in facilitating broader agreements like these’, the amendments will enable the Federal Court to make consent orders concerning matters ‘beyond native title’.61

**Options for matters to be included in broader settlements:** Some options that might form part of settlements that include determinations of native title or in an alternative settlement are:

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57 Native Title Act 1993 s 86f(1).
58 Native Title Act 1993 s 86f(1).
59 Native Title Act 1993 s 86f(2).
60 House of Representatives, Native Title Amendment Bill 2009, Explanatory Memorandum, para 1.10.
61 House of Representatives, Proof Hansard, 19 March 2009, 21, 22.
• recognition of traditional land, without native title rights, for example:
  - recognition under state or territory legislation or by other means of statutory protection
  - recognition of traditional boundaries and traditional owner entities on state land title systems
  - signage in appropriate locations and publications
  - place naming rights and provision of ‘welcome to country’ on official occasions

• grants of land or interests in land or water, for example:
  - grants of Crown land or land purchased by government(s), and possible leaseback of some land (e.g. national parks) to governments
  - access to public land for cultural purposes (such as seasonal camping) or for business enterprise development (such as education, tourism)
  - the creation of special reserves for use by traditional owners
  - the lease of government land to traditional owners
  - revenue sharing, such as from land tax (e.g. Aboriginal Land Rights Act 1983 (NSW)), or mining royalties (e.g. Aboriginal Land Rights (Northern Territory) Act 1976 (Cth)), or land sales (e.g. in a subdivision of Karratha, Western Australia under the Burrup Agreement) or by other means (e.g. tenement rental) to provide ongoing support

• roles in managing what happens on land, for example:
  - joint management or co-management of conservation areas (e.g. national parks) or Crown reserves
  - membership of boards advising on land management (e.g. Landcare, natural resource programs)
  - involvement in and increased resources for the protection of cultural heritage
  - participation in relevant town planning and other aspects of cultural heritage protection

• employment and economic opportunities, for example:
  - in areas related to public land management (e.g. tourism, fishing, conservation)
  - public-private agreements related to skills development and joint ventures in land and resource management (e.g. farming, mining)
  - enterprise development grants and support systems (e.g. commercial fisheries quota allocation)
  - equity participation in commercial enterprises on traditional land

• financial payments or grants to the group, for example:
  - for capital works on the land (e.g. for commercial or cultural development)
  - to administer the land (such as funding of a traditional owner group)
  - enterprise development.
There are various examples of settlement ‘packages’ negotiated in different parts of Australia. It should be stressed that:

- the state and territory land management systems are not uniform
- the state and territory cultural heritage systems are not uniform
- the contents and implementation of state and territory native title policies are not uniform
- each settlement package is a product of local circumstances (e.g., remote area or not, mining or farming, existing business imperatives) and state or territory government priorities
- some packages were the result of imperatives other than native title (e.g., industrial access to land)
- no single package will necessarily be suitable elsewhere.

Accordingly, the examples should be seen not so much as templates but as illustrations of what can be achieved when parties negotiate creatively and in good faith.

Such settlement ‘packages’ can be negotiated through agreements:

- as part of a consent determination of native title
- in exchange for the withdrawal, where appropriate, of claimant applications
- as part of a wider social justice package involving Indigenous people where it is commonly recognised that the native title has been extinguished over much or all of those peoples’ traditional countries.

Whatever form a proposed settlement ‘package’ takes, its content needs to be such that claimants have an incentive to consider their options (e.g., amending or foregoing their claim, or surrendering native title) and substantive negotiations can occur.

It must be recognised that claims can take years longer to resolve if negotiations involve a broader settlement of indigenous issues (by including, for example, land grants under state or territory legislation, or joint management of conservation reserves) because other processes (e.g., the surveying, gazettal or de-gazettal and creation of titles for parcels of land) have to be undertaken in addition to the native title processes. A bare determination of native title might be a quicker outcome, but a comprehensive land settlement (whether or not it involves a determination of native title) might be much more satisfactory for all the parties.

**The trend toward broader settlement of native title claims:** In addition to the agreements already reached involving broader settlements than native title determinations, there have been two significant indications from governments that a broader approach to settlements is likely to occur in the future.
First, at the conclusion of their meeting on 18 July 2008, the Commonwealth, State and Territory Native Title Ministers issued a communiqué in which they recorded their agreement that a ‘flexible and less technical approach to native title was needed throughout Australia’. They committed their governments to ‘taking a more flexible view of the ways to achieve the broad range of practical outcomes possible from native title processes – achieving real outcomes for Indigenous people and providing certainty for other land users’. Ministers ‘recognised that resolution of native title issues may or may not involve native title determinations; and that land justice and social justice outcomes can meet the needs and aspirations of this and future generations of Indigenous people’.62

Ministers agreed to establish a Joint Working Group on Indigenous Land Settlements to ‘develop innovative policy options for progressing broader and regional native title settlements. It would seek to complement, not override, existing processes in place for the negotiation of non-technical and flexible native title settlements’. The Joint Working Group comprises officers from all jurisdictions including the Commonwealth and will report back to the next Native Title Ministers’ meeting scheduled for August this year.

Second, on 4 June 2009, the Victorian Attorney-General and Deputy Premier, Hon Rob Hulls, announced the Victorian Native Title Settlement Framework which is to become ‘the preferred method for negotiating native title settlements in Victoria’. The Framework adopts recommendations made by the Native Title Settlement Framework Steering Committee,63 which was established in March 2008, included representatives of Victoria’s traditional owners and was chaired by Professor Mick Dodson.

According to a State Government media release,64 the features of the Framework include:

- traditional owner groups will be able to choose to negotiate directly with the State to settle their native title claim rather than go through the courts
- native title claims could cover only Crown land, not private property
- public access would continue to be determined by principles of sustainability and environmental protection consistent with current policy
- traditional owner groups asserting native title rights and interests would still need to demonstrate their connection to their predecessors at the time Victoria was settled, that they were an inclusive group representative of all traditional owners for the area, and that they had sufficient organisational capacity.

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Settlements under the Framework could include a range of benefits tailored to local circumstances, such as options for the management and transfer of land, access to natural resources, and support for economic and cultural development opportunities.

High hopes are held for the success of the Framework. The Victorian Government suggested that it would ‘result in quicker resolution of claims, stronger partnerships with Indigenous Victorians and better outcomes including increased economic opportunities’. It would also ‘save taxpayers money’.

In announcing the Framework, Mr Hulls stressed that its ‘final implementation’ was subject to securing Commonwealth funding. He argued that the Commonwealth ‘has everything to gain from supporting Victoria’s approach and would be well placed to provide financial assistance to support agreement making under the framework’.

The Commonwealth Attorney-General, Hon Robert McClelland, expressed the Australian Government’s support for the approach announced by Victoria. He described the approach as ‘a significant milestone in native title’ and ‘an example of how, by changing behaviours and attitudes, and by resolving native title through settlements that include the provision of practical benefits ... we can make native title work better’.

He said that the Victorian announcement ‘recognises the importance of State Governments taking a proactive approach to recognising native title through negotiation rather than litigation’. He was ‘optimistic that through the measures the Commonwealth is taking and measures such as the Victorian alternative framework, further significant progress can be made’. He gave no commitment to Commonwealth financial support for the Victorian scheme.

Settlements that are comprehensive in area: One settlement option that has been little explored or used under the Native Title Act is to negotiate regional agreements which involve not only extensive areas but also more than one native title group.

The preamble to the Act states:

Governments should, where appropriate, facilitate negotiation on a regional basis between the parties concerned in relation to:
(a) claims to land, or aspirations in relation to land, by Aboriginal peoples and Torres Strait Islanders; and
(b) proposals for the use of such land for economic purposes.

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65 Attorney-General for Australia, Speech, AIATSIS National Native Title Conference, Melbourne, 5 June 2009.
In South Australia, state-wide ILUAs have, in the past, been a focus for native title resolution. There have been no state-wide ILUAs to date and the focus is now on the resolution of individual native title determination applications by consent with sectoral related ILUAs (e.g. local government, parks, petroleum and mineral activity) being negotiated concurrently. While large scale or regional ILUAs might have the potential to address a number of issues, including backlogs of future act applications, the individual and sometimes complex circumstances of a particular region, project area or state will determine the likelihood of a registered ILUA of this kind being achievable. While the Tribunal supports the policy of attempting to resolve matters in this way, the evidence and practical experience to date suggests that they have not been a successful way of resolving matters more quickly, or indeed at all.

On 20 August 2008, the Commonwealth Attorney-General and the Queensland Minister for Natural Resources and Water met representatives of traditional owners to discuss options for broader native title outcomes in Cape York Peninsula, Queensland. The parties confirmed that they would ‘participate in negotiations to resolve native title, tenure and related issues on a sub-regional basis in the Cape’. The sub-regions identified were the Kowanyama, Olkola and North-West Cape areas.66

In summary, although there has been much talk about regional agreements, the focus of agreement-making to date has been on reaching agreements with single native title claim groups or individual groups of native title holders rather than taking a regional approach. There are no doubt practical reasons for that. Apparently, however, the Native Title Ministers agreed in July 2008 that, in addition to native title determinations, ‘the native title system can facilitate broader regional native title settlements comprising a range of practical benefits for Indigenous people’.67 The Joint Working Group on Indigenous Land Settlements is to develop policy options for progressing regional native title settlements. Governments might look toward such settlements in the future.

Factors affecting the place and outcomes of negotiations

The circumstances in which native title mediation takes place are different in many respects from the circumstances surrounding other types of mediation. The following five examples highlight key differences.

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Most mediation (such as the mediation of commercial or matrimonial issues) involves two parties, yet native title mediation often involves scores if not hundreds of parties.68

While most mediation involves people who know each other and have an existing relationship, native title mediation often involves people who do not know (or even know of) the native title claimants.

Most mediation is supported by a common understanding of or background to the matters in issue, yet native title mediation involves an attempt to understand and reconcile culturally different (and divergent) views of land and waters.

Most mediation is a form of alternative dispute resolution, yet native title mediation does not commence because of a dispute but by an application for a determination of pre-existing rights which may affect the rights and interests of others.

Native title mediation can take a long time – it can often take years, and sometimes a decade, between the lodgement and resolution of a claim (although in most cases mediation is not undertaken throughout that period).69

Because of those differences, native title mediation poses particular challenges for the parties and the mediators. Accordingly, different techniques or strategies need to be developed and employed for the purpose of native title mediation generally, and often on a case by case basis.

The factors affecting the pace and outcomes of negotiations include:

- the state of readiness of the application
- whether claimants want a determination that native title exists
- the number of parties (sometimes scores or hundreds), the range of interests and the variety of issues involved
- the willingness of the parties to participate in the process
- the capacity of parties (and their representatives) to participate in the process
- the extent to which parties participate personally in the process

68 E.g., the application by the Wotjobaluk people of Victoria originally involved 447 parties organised into 17 groups according to their interests. The claim was resolved by agreement of all the parties: see Clarke on behalf of the Wotjobaluk, Jaadwa, Jadwadjali, Wergaia and Jupagulk Peoples v Victoria [2005] FCA 1795. The Barkandji #8 claim, referred to the Tribunal for mediation in 2008, has 393 listed parties including 586 identifiable individuals.

69 An analysis of the 145 applications the subject of registered determinations of native title between 1 January 1994 and 31 December 2008 shows that:

- the average time span for determining an application by consent was five years and eleven months (71 months)
- the average time span for obtaining a litigated outcome was six years and eleven months (83 months)
- the average time span for obtaining an unopposed determination was 12 months.
• different government policies
• the predictability or consistency of the parties’ approaches to the mediation
• the resolution of threshold issues (e.g. disputed overlapping claims, proof of connection)
• external time constraints or deadlines
• changes in the external environment (e.g. by way of judicial decisions or legislative enactment)
• the operation of some state and territory laws
• the procedural requirements of the Native Title Act
• the use of template determinations of native title.

Not all of the factors will be relevant in every case. Indeed it is the variability of factors which makes the rate and nature of resolution of native title claims so unpredictable.

Such factors must be taken into account in each phase of the mediation process and must be considered in the design of the mediation of each application. They operate as constraints on both the design and the progress of mediation, and provide opportunities to the Tribunal to assist parties by developing their capacity to participate appropriately in the process. If the proposed 2009 amendments to the Native Title Act are enacted, these factors will also affect the work of other mediators, be they officers of the Federal Court or any other person or body.

The state of readiness of the application: Some applications need to be significantly amended (e.g. in relation to the area covered, the composition of the group, or the native title rights and interests claimed) before a negotiated outcome can be reached, or even before the claimants will attract resources to engage in substantive mediation.

Many claimant applications were lodged before sufficient research was undertaken to support substantive negotiations or litigation (e.g. connection reports or comparable information have not been prepared). Native title claim groups are taking some years to meet the connection requirements of a government or other respondent parties. An audit in 2007 of claims referred to the Tribunal for mediation showed that:
• connection material had been prepared, and in most instances provided to some other parties, in relation to 101 (19%) of the applications
• connection material was not required for an agreed outcome in relation to 30 (6%) of the applications
• connection material had not been prepared in relation to the other 75% of applications, although there was a timetable for preparation in relation to 95 (18%) of them.
These statistics do not indicate whether the material was of a sufficient quality for this purpose.

That situation can be illustrated by a regional mediation progress report provided by the Tribunal to the Federal Court in May 2009 for the Greater Mount Isa region. The report noted that there are currently 15 claimant applications, made between 1996 and 2006. A full connection report has been provided to the State in one case. Provisional or partial connection reports have been provided to the State in relation to three other claims.

**Whether claimants want a determination that native title exists:** Because registered claimant applications attract procedural rights under the Native Title Act or other legislation (e.g. cultural heritage laws), the claimants may not see a determination of native title as their immediate goal. Approximately one quarter of current claimant applications were lodged in response to future act notices, many of them to attract procedural rights under the Act. Most of these were in the Northern Territory and Queensland.

Although the timing of the applications (including polygon claims) may have been prompted by the publication of future act notices, it should not be assumed that such claim groups do not want a determination that native title exists. Experience shows, however, that some groups with registered claims continue to exercise their procedural rights and negotiate agreements for their benefit without pursuing a determination of native title. If the main advantages of the native title system for such groups are derived from the use of their procedural rights, there is no incentive for them to advance the resolution of their claims, particularly if:
- resources would be diverted from future act negotiations
- there is a risk that they might not obtain a determination that native title exists or that a determination would include fewer native title rights and interests than their registered claim.

Procedures introduced by amendments to the Act in 2007 allow for the dismissal of claims where the future act requirements are satisfied and the applicant has not taken steps to have their claim resolved.70 To date no claims have been dismissed under those provisions.

**The number of parties, the range of interests and the variety of issues involved:** Most of the claims referred to Tribunal for mediation have more than 10 respondents, and some have more than 100 respondents. Consequently, numerous interests, issues and attitudes will be brought to the mediation table.

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70 *Native Title Act 1993* ss 66C, 94C.
Where there are many parties, they may be grouped according to common interests (e.g. pastoralists, explorers, small miners) with common representatives. Staged mediation may deal with particular parties’ issues separately (concurrently or sequentially as appropriate).

As a general rule, every party must agree before there can be a consent determination of native title. Consequently it is important to ensure that only parties with relevant interests remain involved in the proceeding.

The Act has been amended to make it slightly more difficult to become a party to new applications,\textsuperscript{71} and to facilitate partial determinations with fewer parties having to consent to them.\textsuperscript{72} The Act also enables the Tribunal to refer to the Court an issue of whether a party should cease to be a party\textsuperscript{73} (e.g. because they never had or no longer have a relevant interest).

**The willingness of the parties to participate in the process:** Many people and bodies are drawn into the mediation of native title proceedings not because they want to be there but because they consider that they need to be involved, at least to some degree, to protect their interests. Some are reluctant participants and may resent the process. The willingness of parties to be involved at relevant stages and to provide options for possible settlement is essential to the progress and any outcomes of the process. If key parties are unwilling to take an active role in mediation, the progress and potential outcomes will be impeded. To some extent that factor may be overcome by the statutory obligation on parties and their representatives to act in good faith in relation to the conduct of mediation,\textsuperscript{74} and the expanded powers of the Tribunal to direct parties in relation to aspects of mediation.\textsuperscript{75}

**The capacity of parties (and their representatives) to participate in the process:** Whatever their attitude to the proceedings, the involvement of parties to actively engage in mediation will be influenced by their capacity to participate. In this context, capacity can include the resources available to them to participate (such as financial resources, properly qualified representation and professional advice, e.g. anthropologists) and their own knowledge of the system and mediation process.

Many native title claimants, for example, experience difficulty in juggling mediation and complying with Court orders, responding to future act notices (particularly those asserting the expedited procedure), negotiating ILUAs, engaging in other bilateral negotiations, dealing with related issues (e.g. cultural heritage), and dealing

\textsuperscript{71} Native Title Act 1993 ss 84(3)(a)(iii) and 84(5).
\textsuperscript{72} Native Title Act 1993 s 87A.
\textsuperscript{73} Native Title Act 1993 s 136DA.
\textsuperscript{74} Native Title Act 1993 ss 136B(4), 136GA, 136GB.
\textsuperscript{75} Native Title Act 1993 ss 136B(1A), 136CA.
with the myriad of issues/problems that constantly arise within claim groups and their communities.

Not all claim groups are legally represented by native title representative bodies or native title service providers (NTRBs), and even when they are, there are divergent approaches adopted by NTRBs throughout Australia. One of the problems faced by NTRBs is the high turnover of staff. This is a particular issue so far as legal, anthropological, historical and archaeological personnel are concerned. Retention of experienced staff is a key factor for these bodies being able to engage constructively in agreement-making. High staff turnover leads to a stop/start approach to negotiations that could result in some matters defaulting to a Court hearing.

Some governments lack the resources or tenure recording systems to undertake detailed tenure research or assess connection reports in a timely manner, or to substantively mediate numerous claims concurrently.

In *Frazer v Western Australia*, Justice French took note of the ‘harsh practical realities of resource limitations on all parties, the fact that some parties are unrepresented, the fact that there are outstanding unresolved and quite difficult intra-Indigenous issues, and the fact that many respondents do not have the time or resources to engage directly at all stages of the mediation process.’

Although the Federal Court recognises that limits on financial and human resources and a range of other factors affect the progress of individual claims or clusters of claims, the Court is anxious to ensure that steps are being actively taken to advance the resolution of claims whether in mediation or trial. Lack of resources may not be sufficient for the Court to treat the claim as, in effect, in abeyance. Judges may request reports showing that some steps, however small, have been taken between each directions hearing in relation to each application in a state, territory or region.

**The extent to which parties participate personally in the process:** It is increasingly common for legal or other representatives, rather than the parties, to attend native title mediation conferences. Often a person will represent more than one party (e.g. an industry group’s nominee may represent scores of the group’s members). Sometimes one person will represent a range of parties with different interests. The nature and extent of the representation may directly affect how mediation is conducted. Some representatives can operate as ‘gatekeepers’ when they attend meetings without their clients, preventing parties from having direct contact with each other.

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76 (2003) 128 FCR 458 at [32].

77 See *Harrington-Smith v Western Australia (No 6)* [2003] FCA 663.
Different government policies: There can be significant differences in the approach over time of state and territory governments to mediating native title claims both within the same jurisdiction and between jurisdictions.78

The Tribunal mediates in a sometimes highly charged political environment. The timing of electoral cycles with their caretaker conventions and perhaps unstated political realities, together with changes of Ministerial portfolio or change of government, can significantly affect the pace and direction of mediation.

The predictability or consistency of the parties’ approaches to the mediation: Some parties are involved in many native title proceedings. For example, the relevant state or territory government will be the first respondent to every claimant application in its jurisdiction. Some governments have a publicly known policy on key issues (e.g. what types of information are required to prove a native title claim group’s connection to the claim area) or publicly known practices in relation to steps in the process (e.g. what information it will need from the applicants before undertaking tenure research in relation to the claim area). Such policies and practices will inform, and affect the pace and possible outcomes of, the mediation.

The resolution of threshold issues (e.g. overlapping claims, proof of connection): Some parties will not wish to be actively involved in mediation until a threshold issue is resolved (e.g. overlapping and disputed claimant applications, or the establishment of a claim group’s connection to the area).

Many claimant applications overlap other applications (in part or in whole) and many of the overlaps illustrate disagreement between neighbouring Indigenous groups about the extent of their traditional country. The map at Attachment C shows the number and extent of overlapping claims at 31 March 2009.

Some longstanding disputes between groups are revived or exacerbated by the native title process and can result in long delays in progressing any of the claims. They can lead to hearings in Court. Governments and some other respondent parties will not participate in substantive mediation unless and until disputed overlaps are resolved.

The Tribunal has worked with NTRBs to resolve disputed overlapping claims.

Case study - Spear Creek, South Australia: In South Australia, a Mediation Strategy was developed to use the authority and decision-making processes of Aboriginal law to help claimants resolve overlapping claim boundaries in nine native title claims in the Central West of the State. The Strategy was an initiative of the former South

78 See e.g. Bullen v Western Australia [2002] FCA 992 at [7].
Australian native title representative body (the Aboriginal Legal Rights Movement Native Title Unit (ALRM-NTU)) that was supported and assisted by the Tribunal through the conduct of mediation conferences under the Act.

From 20 May to 25 May 2004, approximately 350 people attended mediation conferences at Spear Creek, near Port Augusta. Around 200 of these people were members of the nine participating native title claim groups, about 100 were senior people from the Anangu Pitjantjatjara lands, Tjuntjuntjara, Oak Valley and Yalata. The remainder included staff of the ALRM-NTU, claimants’ legal representatives, interpreters, legal consultants, and consultant anthropologists.

The four Tribunal members were assisted by Tribunal staff including two geospatial specialists who provided mapping and other geospatial information to support the resolution of the overlaps. This included preparing maps of specific areas of overlap in relation to identified topographical features or tenures, and claim specific and regional maps.

After days of intensive mediation and numerous meetings, various agreements were made and documented. As a result, some claims were combined, other claims were withdrawn, some overlaps were removed and other groups agreed to share specified areas of claimed land. The agreements reached significantly reduced the number of overlaps between claimant groups, enabling those groups to enter into negotiations with the State government to resolve the claims.

Factors that contributed to the successful outcomes of the mediation meetings included: the role of senior Aboriginal people with knowledge of Aboriginal traditional law, the appropriate venue, focussed but flexible programming, the collaborative relationship between the Tribunal and ALRM-NTU, and the role of the Tribunal’s geospatial staff.

The Strategy has also demonstrated that, if properly and carefully planned, there can be value in mediation meetings (including large meetings) where all necessary expertise and resources – traditional law, ‘whitefella’ legal, geospatial, and anthropological – are readily available on-site to ensure that the majority of arising issues can be dealt with promptly and are not allowed to delay negotiations.

**External time constraints or deadlines:** There are no statutory time limits on the mediation of native title applications, or on other types of negotiations under the Act. In that sense, the mediation process is ‘open-ended’.

The mediation of native title applications is initiated when an application is referred by the Federal Court to the Tribunal. Because the Court supervises the progress of mediation, the Court can impose a timetable and set various deadlines by which
progress should be shown (or an agreement reached) or it will set the matter down for hearing and may order that Tribunal mediation cease.\textsuperscript{79}

Even when there has been close coordination by the Court and the Tribunal, claims have not necessarily been resolved quickly. For example, the mediation of the Thalanyji People’s claim in Western Australia took four years of intensive activity between the Court hearing preservation evidence in September 2004 and the determination in September 2008. There were 28 Court directions hearings, 37 formal mediation conferences and 19 mediation reports by the Tribunal. There were innumerable other meetings between the parties, with and without the Tribunal. The overwhelming majority of the meetings and directions hearings took place in the four years after the hearing of preservation evidence.

The respective roles of the presiding judge, officers of the Court and the Tribunal and the reasons why it took four years to resolve the claim are discussed in ‘Negotiating consent determination: co-operative mediation – the Thalanyji experience’ by Tribunal Member Daniel O’Dea.\textsuperscript{80} In his reasons for judgment in making the consent determination in \textit{Hayes on behalf of the Thalanyji People v Western Australia}\textsuperscript{81}, Justice North described some of those matters and the approach taken by the state government in reaching an agreed outcome.

More recently the Nyangumarta people’s native title to more than 33,843 square kilometres of land in Western Australia’s Pilbara region was recognised in a consent determination on 11 June 2009. Tribunal member John Catlin said that the mediation had been exemplary for the willingness of the parties to consider each other’s interests. ‘This was a conflict-free mediation to the extent that it was conducted with the greatest harmony between the parties at all times. No single issue turned into a tug-of-war’. Even so, the Tribunal conducted 18 mediation conferences, with about a third of these held in or near the claim area and the remainder in Perth. The mediation took two-and-a-half years to conclude after parties reached an in-principle agreement on the existence of the Nyangumarta native title rights and interests. As Mr Catlin put it, this ‘relatively straightforward claim’ over unallocated Crown land and pastoral leases had taken 11 years to reach an outcome, with some of the group not living to see the result. ‘The clear message is that more effort is needed to speed up the native title claims process’.\textsuperscript{82}

\textsuperscript{79} See e.g. \textit{Frazer v Western Australia} (2003) 128 FCR 458.
\textsuperscript{80} The paper can be accessed at www.nntt.gov.au/News-and-Communications/Speeches-and-papers
\textsuperscript{81} [2008] FCA 1487
In his remarks at the on-country determination ceremony, Commonwealth Attorney-General Robert McClelland said:

Speedier resolution of native title claims through mediation rather than litigation is in the interests of all participants in the native title system and the wider Australian community. ... I was most concerned to hear that even though this was a quick determination by relative standards some of the people who were involved in making the claim were not here for this important day.\(^3\)

If the proposed 2009 amendments are enacted, the Court is likely to take more control over the case management and mediation of individual claims and clusters of claims.

**Changes in the external environment:** Native title law and practice continues to change. Developments in the law (e.g. by way of judicial decisions or legislative enactment) can affect the range of outcomes that might be available to the parties or the conditions that need to be satisfied in order to achieve a particular outcome (e.g. a consent determination of native title). Where judgments on significant points of law are subject to appeal, negotiated outcomes may be delayed for some years while the appeal process is completed. It should be acknowledged, however, that agreement-making now takes place in an environment in which the law about where native title exists and what native title rights and interests might be recognised is much clearer than in the earlier years of the Act. Parties also are more aware of the options for settlement and the process for reaching agreement.

Because the process of resolving a native title application usually takes some years to complete, some of the parties may change (e.g. as a result of the change of lessees of land) or the attitude of a party may change during the mediation (e.g. as a result of a change of government after an election).

**The operation of some state and territory laws:** Mediation of some aspects of claimant applications in some jurisdictions is rendered difficult because of, in effect, the competing operation of local laws. For example, it is difficult to mediate the removal of overlaps between registered claims in Queensland because of the operation of the State’s cultural heritage legislation which gives registered claimants certain rights. In New South Wales claimant applications are sometimes filed by native title holders as a means of preventing the disposal of land granted to a Local Aboriginal Land Council under that State’s land rights regime.\(^4\) In the latter

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\(^4\) *Aboriginal Land Rights Act 1983* (NSW).
circumstances the issue in contention is not necessarily a determination of native title rights and interests but a desire to prevent the sale of Aboriginal freehold land.

Thus, state or territory laws may:

- prompt the lodgement of some claimant applications to secure benefits under that legislation
- be used to develop broader settlement of claims (e.g. by grants of title to land or the involvement of claimants in the management of conservation areas).

**The procedural requirements of the Native Title Act:** Formal mediation will not commence until various statutory requirements are satisfied. In particular, the claimant application will have to be registration tested (and any reconsideration of or appeal against the Registrar’s decision is finalised) and notified, the respondent parties have to be identified and (subject to certain exceptions) the Court has to formally refer the application to the Tribunal for mediation. That process can be completed in as little as eight months but can take much longer.

Once mediation commences, the period taken will be largely though not entirely in the hands of the parties. Depending on how the person (or persons) who constitute the applicant proceeds, and the scope of the applicant’s authority to deal with all matters arising under the Native Title Act in relation to a particular claim and the nature of the proposed settlement package, significant delays might occur if it becomes necessary to convene a meeting of the native title claim group in accordance with the requirements of the Act to:

- change the person or persons who constitute the applicant\(^85\)
- significantly amend the claimant application\(^86\)
- authorise the terms of settlement such as a consent determination of native title, one or more ILUAs,\(^87\) or some other action in relation to the claim.

If the making or registration of a determination of native title is contingent of the registration of an ILUA, a period of at least six months will be added to the process to enable the ILUA to be assessed for registration and notified, any objections to be considered or withdrawn, and registration to occur.

**Providing template determinations following test case decisions:** As more determinations of native title are made over different categories of land, it should be possible to use such determinations as templates for agreements in relation to other claims where the facts and law are similar.

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\(^{85}\) *Native Title Act* 1993 ss 66B, see also s 62A.

\(^{86}\) *Native Title Act* 1993 ss 64, see also ss 190C(4), 251B.

\(^{87}\) *Native Title Act* 1993 ss 24CG, 251A.
In the Northern Territory, the Federal Court has developed a strategy of grouping claims with similar key features and identifying a lead matter to be litigated.\textsuperscript{88} Parties anticipate that, once the relevant legal principle is authoritatively determined, it should be possible to settle other claims in that group. Such groupings include sea claims, town claims and pastoral lease claims.

Judgment in the lead pastoral lease case (dealing with the claim to Newcastle Waters and linked claims) was delivered in 2007.\textsuperscript{89} No appeal was lodged. The Federal Court is working with key participants to pursue a program for the negotiation and resolution of other claims which raise the same legal issues and have similar facts to the Newcastle Waters case.

\section*{Adopting an interest-based approach to settlements}

\textbf{An interest-based approach to native title mediation:} From its inception, the Tribunal has attempted to conduct interest-based mediation. The Tribunal’s internal guide to mediation, for example, states that the Tribunal ‘conducts multi-party, cross-cultural mediation in relation to areas of land or waters, and seeks to use a primarily interest-based model in a rights-based context.’\textsuperscript{90}

The Commonwealth Attorney-General’s encouragement to parties to adopt an interest-based approach is entirely consistent with the Tribunal’s long-standing approach to native title mediation.

In essence, the interest-based approach the Attorney-General advocated has elements that involve process and outcomes.

\begin{itemize}
\item As to \textit{process}, he suggested that, rather than start by considering connection, the starting point could be the consideration of tenure. Early consideration of tenure may identify where native title may continue to exist and where it may have been extinguished. It may assist in resolving overlapping claims and provide parties with an opportunity to consider possible outcomes. A connection process could run in parallel with discussions about a range of outcomes.\textsuperscript{91}
\item As to \textit{outcomes}, the Attorney-General suggested that they could be native title (such as determination of native title) or non-native title outcomes, or a combination of the two. If native title is the desired outcome, then connection
\end{itemize}

\textsuperscript{88} See \textit{Button Jones (on behalf of the Gudim People) v Northern Territory of Australia} [2007] FCA 1802.
\textsuperscript{90} National Native Title Tribunal, \textit{Native title agreement-making in Australia: a guide to National Native Title Tribunal practice}, 2\textsuperscript{nd} edn, 2005, p 15, para 2.4.1
\textsuperscript{91} R McClelland, Negotiating Native Title Forum, 29 February 2008, paras 38, 43 and 44.
evidence will be required to determine the claim. If connection is not made out, the parties can consider whether alternative agreements can be reached.92

Five years before the Attorney-General’s 2008 speech, a Full Federal Court stated: ‘Not all agreements include a determination of native title, but nonetheless they may involve recognition of the historic association of the claimants with the relevant land.’93 The outcomes could include statements of formal recognition of traditional ownership of lands in which native title had been or might have been extinguished, consultation or joint management agreements in relation to the use of traditional lands and the grants of interests in those lands under State or Territory land rights legislation or other legislation.94 The wide variety of options that have been agreed or considered as, or as part of, the settlement of claimant applications is illustrated earlier in this paper.

It is possible that if non-native title outcomes can be negotiated, at least some of those applications will be withdrawn, or will be resolved by a determination that native title does not exist. That will dispose of the proceeding so far as the Federal Court is concerned, but will also lead to a mediated outcome which gives a measure of substantive satisfaction to the parties.

Consequently, although the mediation of native title applications is focussed on matters specified in subsection 86A(1) of the Act, the parties may negotiate about those and other matters leading to creative and flexible solutions that deliver benefits beyond narrowly prescribed ‘native title’ outcomes.

The Attorney-General stated:

By sitting down at the start and discussing what interests they have and what outcomes they are seeking, parties may be more readily able to identify opportunities for the timely and satisfactory resolution of the claim.95

He continued:

Much can be achieved if parties are up front about what they really want and open-minded about finding creative solutions96…Through parties focussing on their interest in claims, and how these might be

93 Attorney-General (NT) v Ward (2003) 134 FCR 16, introductory statement of the Court, per Wilcox, North and Weinberg JJ.
94 See Fraser v Western Australia (2003) 128 FCR 458 at [24].
95 R McClelland, Negotiating Native Title Forum, 29 February 2008, para 39.
96 R McClelland, Negotiating Native Title Forum, 29 February 2008, para 49.
As noted earlier, although the Tribunal seeks to use a primarily interest-based model, native title mediation takes place in a rights-based context. Mediation occurs within a legal framework whereby parties may seek a judicial determination of their respective rights and interests at law.

Given that:

- the parties will determine whether native title proceedings are resolved by agreement
- there is a wide range of options open to parties to settle native title claims, and
- parties are being encouraged to adopt an interest-based approach to their negotiations

it is important that the parties identify what outcome they want to achieve.

**Issue for native title claim groups:** There is a fundamental, threshold question which each native title claim group must answer: what do we want to obtain from the native title proceedings that have been commenced by our claimant application?

The answer may be different for different groups, and some groups who lodged claims for one purpose may have changed their minds.

The reason for asking the question and why different answers might be given can be summarised briefly. Most claims have been in the system for many years. Approximately 27% were lodged before the substantial amendments were made to the Act in 1998, and a further 52% were lodged before the High Court’s landmark judgments in the *Ward* ⁹⁸ and *Yorta Yorta* ⁹⁹ cases.¹⁰⁰

In other words, almost 80% of current claims were lodged before claimant groups could have understood, or been advised comprehensively about, such matters as:

- the high evidentiary standard necessary to prove that they have native title
- the legal concept of native title being a ‘bundle of rights’ and the limited content (from the standpoint of traditional laws and customs) of the native title rights and interests that the law will recognise
- the nature and extent of extinguishment from the grants of past and present land tenures that has resulted in any prospect of recognition of their native

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⁹⁷ R McClelland, Negotiating Native Title Forum, 29 February 2008, para 64.
¹⁰⁰ Other significant judgments were not delivered by the High Court until late 2001 (*Commonwealth v Yarrnr* (2001) 208 CLR 1) or 2002 (*Wilson v Anderson* (2002) 213 CLR 401).
title rights being removed, or in such recognition being confined to very limited native title rights and interests

- the consequent loss of exclusivity in relation to native title over most of the land mass of Australia (and the implications of that for possible compensation claims)
- the vulnerability of native title to extinguishment and the ways in which native title may be extinguished after a determination of native title, e.g. by acquisition like any tenure.

For many groups, the most they could obtain is a determination that is limited to a small proportion of their traditional country (perhaps a few parcels of land separated by significant distances), and a few non-exclusive native title rights and interests.

To obtain even that limited result:

- the claimants will need to do (or have done on their behalf) a substantial amount of specialised research (potentially involving such professionals as anthropologists, historians, linguists and lawyers)
- others (usually the relevant state or territory government) will need to be satisfied that the results of the claimants’ efforts will be sufficient for them to agree to a consent determination of native title
- all parties will have to wait while the relevant state or territory government investigates current and historical tenures, and all parties agree on the effect of those tenures on native title rights and interests that would otherwise be recognised.

In short, for many groups the cost in time, money, specialist personnel and personal involvement that is necessary to obtain a determination of native title will be inversely proportional to the benefits to the group of obtaining it.

This stark picture might not have been clear when many of the claims were made. It still might not be clear to many groups, irrespective of when their claims were made or amended. Someone needs to explain to them in plain terms what is or is not potentially achievable, and what the alternatives to a determination of native title might be.

On the basis of relevant information (such as a map of the claim area showing the extent of extinguishing tenures) and advice, groups need to decide what they hope (and can reasonably expect) to achieve from the native title proceedings that they have commenced.

Their aspirations might include:

- being recognised as the traditional owners of an area of land or waters
• obtaining the right to have a say in what happens on their traditional land or waters
• the protection of areas of particular cultural significance to the group
• developing an economic base on which the community or group can build for itself and future generations.

Some of the aspirations of a native title claim group might only be realised if there is a determination that native title exists. Other aspirations may be realised without the need to obtain a determination of native title.

However their aspirations might be realised, it is important that native title claim groups whose claims are still in the early stages of negotiation (even though they may have been lodged many years ago) obtain sound advice and make strategic decisions about how to proceed.

Some groups may decide to proceed towards a determination that native title exists, with or without ancillary agreements (such as ILUAs).

Some groups might seek to use the options available under section 86F of the Act and invite the Tribunal to assist them to negotiate outcomes other than a determination of native title in return for withdrawing their claim (and possibly surrendering any native title that they have to the Crown).

Other groups might simply withdraw their claims permanently or with a view to reformulating them to better accord with legal requirements and to enhance their prospects of a negotiated outcome.

The options which native title claim groups might consider seriously could be influenced by the attitude of, and approach taken by, the main respondents (particularly governments) to connection requirements and options for alternative settlements. Having made a native title claim which, in part at least, is an assertion of group identity and rights, native title claim groups are unlikely to withdraw or vary their claims significantly unless meaningful offers are made which meet their reasonable aspirations for themselves and their descendants. For that reason, the implementation of the Victorian Native Title Settlement Framework may provide guidance on the content of comprehensive alternative settlement packages.

The cumulative effect of such informed decisions in relation to hundreds of current claimant applications could influence significantly the rate of progress of claims that are pursued and the cost of delivering just and enduring outcomes for the parties.
Role of governments: Governments have a pivotal, if not determinative, role in whether when and how native title claims are resolved or otherwise removed from the system. In summary:

- governments are the first (and effectively principal) respondents to native title proceedings
- governments are expected to look after the interests of the community generally\(^{101}\) (including indigenous citizens)
- governments have, or have access to, technical expertise to assess connection materials and to conduct tenure analyses
- governments have the legislative, political and financial capacity to provide alternative or additional components for the settlement of native title claims (e.g. the grant of freehold or leasehold tenures, and arrangements for the joint management of conservation areas)
- many (although not necessarily all) other respondent parties will be influenced by or will adopt a government’s assessment of connection as a basis for deciding whether and in what form a claim will be settled
- governments are meant to behave as model litigants.

One significant factor is the attitude and approach taken by the relevant government or governments in relation to each claim. Individual State and Territory governments have adopted different practices or requirements in relation to:

- the amount of ‘connection material’ that they require in order to agree to a settlement (either by a determination of native title or some other agreement such as an ILUA), and
- whether the provision of appropriate connection material is a prerequisite to substantive negotiations or whether that material can be prepared, assessed and accepted at some other stage in the negotiation process
- whether bi-lateral negotiations between the government and applicants occur outside (or even as a pre-requisite to) Tribunal mediation, irrespective of the provisions of the Act.\(^{102}\)

Justice North has discussed in detail the role of governments in resolving claims, and has provided a critique of some governmental practices, in his reasons for judgment in making the consent determination in *Hayes on behalf of the Thalanyji People v Western Australia*\(^{103}\) and elsewhere.

\(^{101}\) In one case, Emmett J said that ‘the State, or at least a Minister of the State, appears in the capacity of *parens patriae* to look after the interests of the community generally. ...The Court needs to be satisfied that the State has given appropriate consideration to the evidence that has been adduced, or intended to be adduced, in order to reach the compromise that is proposed’: *Munn v Queensland* (2001) 115 FCR 109 at [29].

\(^{102}\) See *Frazer v Western Australia* (2003) 128 FCR 458.

\(^{103}\) [2008] FCA 1487.
The Commonwealth Attorney-General recently reiterated his call for all governments to act to improve the rate of resolving native title claims. At a ceremony to mark a consent determination of native title in favour of the Nyangumarta people in Western Australia, he said:

It is a Government priority to speed up the resolution of claims so that other Indigenous people ... can celebrate and benefit from the recognition of their connection to country. ... Governments – including the Commonwealth – need to take a less technical and more collaborative and innovative approach to issues like connection. Above all, it is important for all Governments to take a proactive and flexible approach to resolving native title.104

The Australian Government (as well as state, territory and local governments) has a direct financial interest in reducing the time taken by, and hence the costs of, native title proceedings. The Commonwealth provides funding for most of the key participants in the native title system including:

- native title representative bodies and native title service providers, and, through them, native title claimants and native title holders
- the National Native Title Tribunal
- the Federal Court
- some respondent parties to native title proceedings of various types and those who want to negotiate some type of agreement under the Native Title Act, and
- public servants who administer parts of the native title scheme.

The cost of native title processes to the taxpayer is considerable. In their 2006 report of the Review of the Claims Resolution Process, Mr Hiley QC and Dr Levy noted that in the financial years from 1997-98 to 2005-06 the Commonwealth allocated over $900 million to native title. That amount did not include the amount expended by state and territory governments.105

The recent Commonwealth budget papers included announcements that an additional $50.1 million will be provided over four years ‘to build a more efficient native title system that focuses on achieving resolution through agreement-making rather than costly and protracted litigation’. The additional funding includes:

- $45.8 million to improve the capacity of native title representative bodies to represent native title claimants and holders, and

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• $4.3 million to improve claims resolution by working with State and Territory governments to develop new approaches to other settlement of claims through negotiated agreements.

It should be noted that there are some offsets within the native title system. While additional moneys are to be appropriated for native title representative bodies, the amount allocated to the Tribunal will be reduced by $2.474 million (or 7.7 per cent) compared with the amount allocated in 2008-09, and the amount allocated for respondent funding through the Attorney-General’s assistance program will be reduced annually by some $1.6 million in the coming financial years with that money to be reallocated to native title representative bodies.

To put these financial considerations in a broader context, it is interesting that in an address to the Commercial Bar Association of Victoria on 10 June 2009, Commonwealth Attorney-General Robert McClelland described the range of ‘disparate institutions and services’, including alternative dispute resolution providers, ‘intended to assist people resolve their legal problems’. He contended that a person or commercial entity that has information and resources ‘should not be able to use the justice system in ways that exploit the significant public cost of the justice system. After all the cost is ultimately worn by the taxpayer.’

He illustrated this point by reference to the recent Bell litigation in Western Australia where the trial went for 400 days. It was estimated that parties contributed around $900,000 to the cost of the court cases, yet the full cost to the taxpayer was around $6.19 million. Of the $3.72 million in hearing fees, the amount of fees collected totalled only $490,000. Overall, parties to the case paid less than 15 per cent of the cost of running the case.106

**Issues for all parties:** At some point (and possibly a number of points) in the native title claim process, each party needs to consider what they will accept as an outcome rather than have the matter heard and decided by the Federal Court. In other words, what outcome would they rather fashion for themselves than submit to a Court-imposed outcome. There are two important components to this:

- what each party will put on the table as an offer to, or request of, the other party or parties, and
- what each party will accept in order to settle.

Native title claim groups who want to explore alternative settlements (including or instead of a determination that native title exists) should be specific about what they

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want to achieve and how they want to achieve it. They should not wait to see what others might offer. For example, are the claimants seeking particular forms of recognition as traditional owners, a role in the management of specific areas, title to other areas, assistance with capital works, or financial assistance for ongoing management of their interests or other specific outcomes?

Governments need to consider what they are willing to offer to native title claim groups to encourage settlement and what they will require in return, e.g. a lower standard of evidence from the claimants, the withdrawal of a claim, the surrender of native title (if any) or a determination that native title does not exist.

Each state and territory government has different requirements before it will consider a settlement ‘package’. Some governments have published guidelines on what they require in order to be satisfied that native title groups have native title. Others have not. Some governments have published policies in relation to settlement ‘packages’. The issues for governments to consider include:

- when might negotiations of alternative settlements begin?
- how long should be allowed for other options to be delivered?
- what arrangements about native title claims will provide sufficient certainty for the government to agree to an alternative package?
- what are the basis and threshold requirements for negotiating an alternative agreement?

The Tribunal convenes ‘scoping conferences’ for this purpose. Claimants, respondents and their representatives work with Tribunal Members to identify the parties’ concerns. If that can be done before the connection material is prepared, the contents of that material can be directed to respond to the needs of both claimants and respondents. Recent experience in Western Australia has been positive.

**The need to compromise:** Whatever is being negotiated, there will be a time when each party needs to compromise.

For many years, judges of the Federal Court have been pointing out the need for parties to compromise in relation to native title proceedings. Here are three examples of statements made by judges in quite different circumstances.

In the course of delivering a consent determination that native title exists over part of the area covered by the Wik claim, Justice Drummond said in 2000 that he accepted, ‘at least for the moment, that an agreed resolution’ of the balance of the Wik peoples’ claim was preferable to a Court-imposed result because such an outcome was ‘more likely to provide a more useful framework than a court decision
limited to specific issues’. But he urged the parties to ‘engage in the process of compromising, by giving up part of what each considers to be their full legal rights, that is essential if there is to be an agreed rather than a Court-imposed result’. He cautioned:

It is worthy of note that litigation rarely results in the complete vindication of the position of any one party. Much more commonly the Court, after having the opportunity to hear and consider all the evidence from all the parties, comes to the conclusion that there is at least some merit in the arguments put forward by each party. Few litigants win 100 per cent of their cases. I do not expect native title litigation to be any different in this respect.

A Full Court of the Federal Court delivering its 2003 judgment in the final stages of the Miriuwung Gajerrong litigation stated:

It is generally true, in relation to any type of litigation, that the best outcome is one resolved between the parties, rather than one imposed by the court. This is particularly true of native title litigation.

Orders resolving native title litigation are usually extremely complex. They usually deal in detail with the entitlements of people who will have an ongoing relationship with each other. Because of these factors, it is preferable that the affected people discuss, and attempt to reach agreement about, those entitlements...

Agreements on resolution of a claim always require readiness to compromise. That is often difficult to achieve.

In 2006, near the end of his final judgment in the Rubibi case (where he found that native title existed over land in the Broome district), Justice Merkel stated that parties to native title disputes should see the resolution of native title claims as ‘a means to an end, rather than an end in itself’. ‘Obtaining a final determination of native title, where that is achievable, can be a stepping stone to securing’ a range of outcomes but it ‘cannot, of itself, secure them’. Those observations were intended to:

prompt parties to other native title disputes to increase their endeavours to reach compromises. Those endeavours will necessarily involve give and take on the part of all parties. Native

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107 Wik Peoples v Queensland [2000] FCA 1443 at [5].
108 Wik Peoples v Queensland [2000] FCA 1443 at [7], see also [8].
109 Wik Peoples v Queensland [2000] FCA 1443 at [9].
title litigation, like other litigation, need not be conducted on an ‘all or nothing’ basis.\textsuperscript{111}

He referred to the risk to Indigenous communities of failure in a native title claim, a risk which ‘is far from hypothetical’ and which ‘can have devastating consequences for the claimant community’. But if claimant communities and state parties can achieve a mediated outcome ‘they can ensure that a broad spectrum of mutual benefits can follow the resolution of native title claims’.\textsuperscript{112} He continued:

[I]f compromises are able to be achieved, the cause of reconciliation between Australia’s past and present will be greatly advanced and the economic, social and educational benefits available to all Australians may be better able to be accessed by members of claimant communities.\textsuperscript{113}

Other judges have expressed the view that courts are unsuitable forums for native title issues to be resolved.\textsuperscript{114} In any case, it is up to the parties to work out the on-the-ground practicalities of any determination that native title exists.\textsuperscript{115}

Recent determinations in relation to the Adnyamathanha people’s native title claims in South Australia illustrate how parties can agree to disagree on some issues but compromise in order to secure a determination that native title exists. The recitals to two of the three determinations state, in essence that:

- the State asserts that the vesting of specified parts of the land in the Crown means that the exercise of all native title rights and interests in relation to those areas were suppressed at the date of vesting pursuant to the non-extinguishment principle established by the Native Title Act and accordingly all native title rights and interests remain suppressed for as long as those areas remain vested in the Crown under relevant State legislation
- the first and second applicants assert with regard to those areas that some native title rights are not suppressed by the vesting but acknowledge the operation of the non-extinguishment principle
- the parties have agreed to the orders in relation to the native title rights and interests reflecting (insofar as the orders relate to those specified parts) a compromise of that issue.\textsuperscript{116} (emphasis added)

\textsuperscript{111} Rubibi Community v Western Australia (No 7) [2006] FCA 459 at [166].
\textsuperscript{112} Rubibi Community v Western Australia (No 7) [2006] FCA 459 at [167].
\textsuperscript{113} Rubibi Community v Western Australia (No 7) [2006] FCA 459 at [168].
\textsuperscript{114} See e.g. Members of the Yorta Yorta Aboriginal Community v Victoria [1998] FCA 1606 at [130], De Rose v South Australia [2002] FCA 1342 at [89], [144].
\textsuperscript{115} See e.g. Ward v Western Australia (1998) 159 ALR 483 at 639, Smith v Western Australia (2000) 104 FCR 494 at 500 [27].
\textsuperscript{116} Adnyamathanha No 1 Native Title Group v South Australia (No 2) [2009] FCA 359, see what the Court notes in relation to the Second Determination and the Third Determination.
Partial determinations: In some cases it might be in the interests of parties to negotiate a consent determination over part of a claimed area. Subject to it being within power and appropriate, the Federal Court may make a determination of native title in relation to the area in the terms sought by the persons specified in section 87A. This means that a consent determination may be made without the consent of a party to the proceedings where that party does not hold a specified type of interest in the determination area and who is not otherwise listed. That includes:

- parties with lesser interests in the determination area
- those parties who have an interest in the area covered by the application but outside the determination area.

Those parties may object to the Court making a determination in the terms sought. In deciding whether to make the consent determination the Court must take into account any objections from those parties.117

The Adnyamathanha people’s native title claims provide recent examples of claims being partially determined while outstanding issues over other areas are resolved. In his reasons for judgment in relation to those claims, Mansfield J discussed the practical scope of the partial determination provisions in the Native Title Act.118

Agreements even where there is some legal uncertainty: For some years after the Act commenced, there was uncertainty about important legal matters. After a series of test cases had run their course to the High Court, the law was much clearer, and more native title determinations were made, many of them by consent of the parties.

Although legal certainty is desirable, it has not always been necessary for the settlement of claims. In 2001, before the Ward judgment of the High Court, parties to two claims in Western Australia secured consent determinations from the Federal Court. In his reasons for decision in one case, Justice Carr noted that parties to the application had incorporated into their agreement clauses which provided a mechanism to enable a variation to be made to the determination if the High Court were to overturn or set aside the Federal Court’s decision in the Ward matter. His Honour had examined these clauses and was satisfied that they were an entirely appropriate way of reserving the rights of the parties pending the High Court’s decision.119 In similar circumstances, Justice French said that he was satisfied that it is appropriate that there should be scope for a variation of the form of the

117 Native Title Act 1993 s 87A(5).
118 Adnyamathanha No 1 Native Title Group v South Australia [2009] FCA 358, Adnyamathanha No 1 Native Title Group v South Australia (No 2) [2009] FCA 359.
119 Ngadpi v Western Australia [2001] FCA 1140 at [30].
determination in light of the High Court’s judgment which was yet to be delivered.120

In February 2008, the Commonwealth Attorney-General urged parties to continue to take such an approach. He said:

As in all areas of the law, there are, and will continue to be, outstanding questions in native title. However, fifteen years of experience with the native title system should enable parties to accept that an outcome does not have to be legally perfect to work in a practical sense. In particular, it is clear that in this area, there will sometimes not be clear cut legal answers or the court’s decision will not be entirely predictable. So unless participants want to risk an all or nothing legal throw of the dice, there must be a will on both sides to devise workable solutions.121

Conclusion

Native title determination applications are particular forms of proceeding that are commenced in the Federal Court that seek specific relief, in the form of a determination of native title.

However, each application referred to mediation provides an opportunity to assist the parties to reach agreement on the matters specified in section 86A of the Act or122 some other form of agreement that satisfies the needs, aspirations and other interests of the parties. For the reasons outlined earlier in this paper, many parties (not just native title claim groups) see the proceedings as an opportunity to negotiate outcomes that may, but need not, include a determination of native title.

Despite the conceptual and evidentiary difficulties, legal obstacles and practical hurdles, outcomes are being negotiated.

The map at Attachment D shows the extent of determinations of native title across Australia, most of them by agreement.

The map at Attachment E shows the extent of ILUAs across Australia.

Increasingly, parties are negotiating outcomes rather than having native title claims heard and determined by the Federal Court. Those outcomes usually extend beyond

120 Brown v Western Australia [2001] FCA 1462 at [12].
121 R McClelland, Negotiating Native Title Forum, 29 February 2008, paragraph 63.
122 Particularly where s 86F of the Native Title Act 1993 is invoked.
bare determinations of native title and deal with a range of practical matters. Sometimes they include grants of title to, or a say in the management of, areas where native title might not be recognised.

The trend toward comprehensive settlements of native title claims can be illustrated by agreements around the country and, prospectively, by the implementation of the Victorian Native Title Settlement Framework.

Although there is an understandable and oft-stated desire for the faster resolution of native title claims, it must be recognised that claims can take longer to resolve if negotiations include a settlement of broader issues. A bare determination of native title might be a quicker outcome, but a comprehensive land settlement might be more satisfactory for all the parties.

The Tribunal stands ready to assist parties by facilitating timely, effective native title and related outcomes.
Potential effect of existing broad land tenure on the existence of native title (based on High Court decisions since 2002)
Determinations* of Native Title
31 March 2009

Legend
- Native title found to exist in the entire or part of the determination area
- Native title not found to exist in the determination area
- Areas not within the determination where native title not found to exist - s159CD

* Note:
1. Some or parts of some determinations may not be in effect or on the National Native Title Register.
2. Some determinations are subject to appeal or are being processed.
3. Small areas are symbolised.

Data Statement:
Spatial data sourced from and used with permission of:
- Lastpage, WA
- Data of the Environment & Resource Management (DERM), NT
- Data of Local, NSW
- Data of Planning & Infrastructure, NT
- Data of Environment & Heritage, SA
- Data of Sustainability & Environment, Vic
- Government of Australia, Australian Govt

© The State of Queensland (QSRM) for that portion where their data have been used.

Summary Determination Geometrics in SqKm**

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Note:
- Where possible determination outcomes have been mapped. Areas based on spatial calculations from sample data records and are indicative only.
- As shown in legend.