Resolving native title issues: travelling on train tracks or roaming the range?

Native Title and Cultural Heritage Conference 2009

Graeme Neate, President, 26 October 2009
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Introduction

Native title is not the headline issue it once was. A decade or more ago there were many articles and arguments about the legal character of native title and its potential social and economic impacts. In more recent years, native title has attracted less attention. That does not mean that the system is perfect, or that all the procedural and substantive issues have been resolved. Indeed, critics and commentators regularly call for a substantial overhaul of the native title system.\(^1\)

But even in the Australian Parliament, the record breaking debates about native title legislation and the multitude of contested amendments of years ago have given way to shorter discussions about procedural change. These days, it seems, a government of whatever political persuasion can secure passage of amending legislation through the Parliament without amendment or robust opposition.\(^2\)

There are various reasons for this. In essence, there are clear legal and procedural ground rules for dealing with native title claims and future acts (such as exploration and mining) proposed on areas where native title does or might exist. Judicial rulings, legislative amendments and, most importantly, negotiated agreements provide the context in which native title issues in the future may be resolved. As a consequence, most of the apprehension, uncertainty and fear that was associated initially with native title has dissipated. Parties engage in the business of dealing with native title issues in ways that recognise, respect and protect each other’s interests.

In the period between the commencement of the *Native Title Act 1993* (Cwlth) on 1 January 1994 and 30 September 2009, 1,813 native title applications were made. Most of them (1,494 or 82 per cent) were claimant applications. There have been fewer non-claimant applications (285) and compensation applications (33).

Of those claimant applications, 1,045 (or 70 per cent) are no longer in the system. Many have been discontinued, struck out or combined with other claims. Some have secured a determination of native title. As at 30 September 2009, there had been 128 court decisions relating to determinations of native title, 91 that native title exists. Most of the determinations, particularly in recent years, have been made by the consent of the parties.

Native title determinations cover 993,928 sq km or about 13 per cent of the land mass of Australia as well as offshore areas. The map at Attachment A shows the areas of determinations of native title.

So what is the current state of play? As at 30 September 2009, there were 449 claimant applications, 22 non-claimant applications and 7 compensation applications at some stage in the

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\(^1\) See e.g. the annual *Native Title Report* of the Aboriginal and Torres Strait Islander Social Justice Commissioner; Australian Law Reform Commission, *Reform*, Issue 93, 2009, ‘Native Title’.

\(^2\) See e.g. the *Native Title Amendment Act 2007*, *Native Title Amendment (Technical Amendments) Act 2007*, *Native Title Amendment Act 2009*. 
system. Most of the claimant applications are in the Northern Territory (35%), Queensland (29%) and Western Australia (21%). The map at Attachment B shows the extent of the external boundaries of the current claimant applications.

How will the native title issues in those applications (as well as applications yet to be lodged) be dealt with in the future?

In this paper, I will consider the following issues:

- What native title issues need to be resolved?
- Can these be sequenced or must they be dealt with together?
- How do the parties deal with competing demands on their time and resources?
- What are the options for broader or alternative settlements?
- What roles do the Federal Court and the National Native Title Tribunal have in resolving these issues - or helping parties to resolve them?
- What difference will the 2009 amendments to the Native Title Act make to how the Court and the Tribunal operate?

The focus of this paper is on the resolution of native title claims, although occasional reference will be made to native title issues as they arise in relation to proposed exploration and mining activity, cultural heritage issues and some Aboriginal land rights matters in New South Wales.

To help visualise the possibly different approaches to resolving native title claims, I will outline two contrasting metaphors.

**Locomotive train journey:** The first is of a locomotive train journey. The front carriage shows the destination as ‘Determination of Native Title’. Its capacity to reach its destination depends on a range of factors such as how well the train is built, whether it is well fuelled, how energetic and competent the crew (which includes a mediator) are, and how many passengers are on board. Most passengers remain on board for the entire journey, though some alight and others board at different stations along the way. Some powerful, well constructed trains will proceed across the undulating and sometimes steep terrain of native title law and practice towards the destination, often at a lumbering pace, and will reach it to the acclaim of passengers on board and others gathered on the final station platform. Less robust trains will reach their destination, or possibly a different destination (say ‘Alternative Settlement’) as much by the ‘I think I can’ attitude of the driver and crew, and the support of key passengers and an able mediator, as by the construction and resourcing of the locomotive. Some other trains, because they are poorly built or lack power are incapable of completing the journey. Some might be derailed along the way. Others may be shunted to a siding where they remain stationary, apparently forgotten. However far each train travels, and whichever destination it reaches, it will proceed along well laid tracks. Its progress, including whether it arrives on time at each station along the way, will be monitored by a station master (who happens also to be a judge or senior officer of the Federal Court) who might also revise the train’s timetable and broadcast announcements to waiting passengers if the train is running late. If the Court is not satisfied with progress, it might redirect the train and set out a trial timetable for the train and its passengers and crew.
Long bushwalk: The alternative metaphor is of a claim group and other parties setting off from an agreed place or near the claim area from where they go to explore how a claim might be settled. Assisted by a mediator guide, geospatially aware and equipped with GPS and the Native Title Act in their backpacks, they set out over the undulating and sometimes steep terrain of native title law and practice to see what solution might suit some or all of them. They might decide that particular areas which are marked ‘Keep Out’ because of extinguishment really could be inspected for possible inclusion in the settlement. Sometimes the claimants and one or two other parties head off to explore a grove or gully, leaving the remaining parties for long periods, figuratively if not literally in the dark about what the favoured few are up to. From time to time, the mediator and main parties report to a judge or senior officer of the Federal Court to let them know how things are progressing. There is no obligatory route to be followed or timetable to be adhered to, and the destination is not necessarily ‘Determination of Native Title’.

People who are familiar with the native title system will see flaws in each metaphor, and I acknowledge their limitations. But, as will be apparent in various parts of this paper, they serve to illustrate contrasting ways of thinking about and acting in relation to native title claims.

What native title issues need to be resolved?

The statutory requirements

The Native Title Act sets out the substantive issues to be resolved, and the procedures to be followed, in relation to various types of native title proceedings – whether they be some form of native title application, future act proceeding under the right to negotiate provisions of the Act, or a particular form of indigenous land use agreement.

For present purposes, the focus is on claimant applications, so the issues in those proceedings are set out below.

Claimant applications: Each native title claim begins formally with an application 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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3 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.\(^4\)

The Native Title Act lists the matters as those on which the parties need to reach agreement. In essence, if they agree that native title exists in relation to the area of land or waters covered by the application, they need to agree on:

• who holds the native title;
• the nature, extent and manner of exercise of the native title rights and interests in relation to the area;
• the nature and extent of any other interests in relation to the area;
• the relationship between the native title rights and interests and any other interests in relation to the area (taking into account the effects of the Native Title Act); and
• to the extent that the area is not covered by a non-exclusive agricultural lease or a non-exclusive pastoral lease - whether the native title rights and interests confer or conferred possession, occupation, use and enjoyment of the land or waters on its holders to the exclusion of all others.\(^5\)

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.\(^6\)

The agreement may involve matters other than native title.\(^7\) 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.\(^8\) On 18 September this year, the Native Title Act was amended to give the Federal Court express power to make orders that give effect to terms of an agreement between parties ‘that involve matters other than native title’.\(^9\)

In summary, it is notionally possible for native title claim groups and respondents to negotiate one or more of a range 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)

\(^4\) Native Title Act 1993 s 225.
\(^5\) Native Title Act 1993 s 86A(1).
\(^6\) Native Title Act 1993 s 86F(1).
\(^7\) Native Title Act 1993 s 86F(2).
\(^8\) Native Title Act 1993 s 86F(2).
\(^9\) Native Title Act 1993 ss 87(5)-(7), 87A(5)-(7).
- 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 interests, aspirations and attitudes of the parties**

Given that the Native Title Act sets out the range of issues that need to be resolved before a determination of native title can be made, but also allows for additional or alternative outcomes, the issues to be resolved will depend on which outcome is being sought.

Although each party may help shape the outcome, the native title claim group has a pivotal role in deciding the way in which to proceed.

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 change their minds in the years that it usually takes to get to substantive negotiations.

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 34 percent were lodged more than 10 years ago, before the substantial amendments were made to the Act in 1998, and many more were lodged before the High Court’s landmark judgments in the *Ward* and *Yorta Yorta* cases. Only 21 percent were lodged in the past five years.

In other words, a large majority 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 of native title as a consequence of the grants of past and present land tenures that has removed any prospect of recognition of their native title rights, or has confined recognition to very limited native title rights and interests

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12 Other significant judgments were not delivered by the High Court until late 2001 (*Commonwealth v Yarmirr* (2001) 208 CLR 1) or 2002 (*Wilson v Anderson* (2002) 213 CLR 401).
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 native title claim 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. They need to understand 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 Indigenous Land Use Agreements (ILUAs).

Some groups might seek to use the options available under section 86F of the Native Title 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.

**Can these issues be sequenced or must they be dealt with together?**

Let us assume that the native title claim group wants to obtain a determination that native title exists over their traditional land and waters. Whether or not such a determination is accompanied by ILUAs or other agreements, there will be three clusters of issues that need to be resolved:

- whether the claimants have native title rights and interests
- whether native title will not be recognised because it has been extinguished in part or whole over some or all of the claim area
- how the interests of others in relation to some or all of the claim area are to be recognised, and how the various rights and interests over the same areas are to be exercised.

Whether these clusters should be dealt with sequentially or concurrently may depend on a range of factors. Indeed, as will be seen, there are sequencing questions in relation to issues within each of those clusters.
Establishing whether the claim group has native title rights and interests

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.13

That definition has been the subject of considerable judicial analysis.14 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 question15
- 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 time16 whether by physical presence on the country or otherwise17
- 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.18

It should be noted that sometimes proof of the native title claim group’s connection is not required for a negotiated settlement of a claim (e.g. by way of an ILUA rather than a determination of native title). However, 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’.

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13 Native Title Act 1993 s 223(1).
14 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.
15 Bodney v Bennell (2008) 249 ALR 300 at [148].
16 Bodney v Bennell (2008) 249 ALR 300 at [168].
17 Bodney v Bennell (2008) 249 ALR 300 at [171]-[174].
18 Bodney v Bennell (2008) 249 ALR 300 at [175]-[179]; for the practical effect of this for the Perth metropolitan claim see [180]-[190].
There is an ongoing issue about the standard and form of material sufficient to satisfy respondent parties, particularly governments, that they should consent to a determination of native title. That issue is not dealt with in this paper. It is, however, appropriate to note that the Guidelines for Best Practice Flexible and Sustainable Agreement Making released in August 2009 by Commonwealth, state and territory ministers responsible for native title include the following statements:

52. Where government parties consider a formal native title determination is required to meet their needs, they should recognise that there may be differing but legitimate views regarding the evidence required to reach a positive determination of native title under the NTA. (emphasis added)

53. In considering the evidence available, government parties should therefore ensure that they do not become entrenched in unyielding positions on the particular evidence they consider is required, and carefully consider whether their view of the evidence is overly burdensome or unnecessary given the requirements of the NTA.

For the purposes of this paper, the many issues around establishing whether a particular claim group has native title rights and interests include:

- how best to collate and present the relevant material
- whether all the material should be prepared at once or whether it should be prepared in units on specific topics
- whether and when to preserve evidence of old or vulnerable witnesses
- when and how to resolve disputed overlapping claims by other native title claim groups.

The resolution of those issues has both substantive and sequencing facets.

**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.

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\(^{19}\) (giving rise to requests for revision or supplementation)

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\(^{19}\) 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.
Dealing with connection issues separately, sequentially: Given the magnitude of the task in preparing comprehensive connection materials, and the delays often occasioned in commissioning and producing them, it might be thought helpful to divide the work into discrete segments so that reports are produced on individual topics in a logical sequence. If the parties can agree on one significant matter, work could proceed on the next topic. If agreement could not be reached on that significant matter, the parties could consider their procedural and substantive options. Such an approach, if it works, could save resources.

That seems to have been the thinking behind recent Federal Court orders, made in relation to some claimant applications in Queensland, for the production of ‘pre-sovereignty’ reports. The order in one claim was that, by a specified date, the applicant:

- file and serve a description of the pre-sovereignty society and its laws and customs which it alleges, for the purposes of these proceedings, including identification of all facts upon which it relies and inferences which it will invite the Court to draw from those facts.  

The basis for this order seemed to be that, because any current native title rights and interests must have their origins in the laws and customs and society that existed when the Crown asserted sovereignty, then the appropriate starting point was whether there was a pre-sovereignty society with laws and customs for the claim area. If the answer was yes, the next stage of research could be undertaken. If the answer was no, then the foundation of the claim would not exist and no further work (at least towards a determination of native title) need be done.

The consideration of the material produced in compliance with that order, and reports in response to other orders, occurred in the course of mediation conferences under the Native Title Act. Consequently, it is not appropriate to disclose in detail what transpired. It is worth noting, however, that the process of breaking down the connection research into historical segments has not produced an outcome to date, and may have delayed (and added to the cost of) producing

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20 Order 1 made by Dowsett J on 9 June 2009 in relation to Doyle and Ors on behalf of the Kalkadoon People #4 v State of Queensland, QUD579/2005.
comprehensive connection materials. The process has exposed the very real problems of finding sufficient documentary or other evidence about circumstances at the time of sovereignty (say 1788) or even the date of ‘practical sovereignty’ (usually many decades later) to satisfy the parties or the Court. At least one judge has expressed reservations about setting down such an issue for trial separately from the other issues that have to be dealt with in order to determine whether native title exists.21

In light of those experiences, it would appear that the most practical approach is to collate and analyse all relevant connection materials and then consider whether, in the absence of probative materials at or around the time of sovereignty but in reliance on later records, inferences can be drawn back in time which would satisfy the parties (or, if necessary, the Federal Court) that the native title claim group has native title rights and interests.

Preserving evidence to support a determination of native title: 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 disclosure22
- filming witness statements in the course of a mediation conference
- conducting a native title application inquiry by the Tribunal23
- preserving evidence as part of a hearing by the Federal Court in advance of the general hearing (if any) of the claim.

Resolving disputed overlapping claims: 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% 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

21 See transcript of directions hearing in relation to Doyle and Ors on behalf of the Kalkadoon People #4 v State of Queensland, QUD579/2005, 5 October 2009, per Dowsett J.
22 Native Title Act 1993 s 136F.
23 Native Title Act 1993 ss 138A-138G.
determinations of native title to date\textsuperscript{24}, 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 matters going for hearing by the Federal Court.\textsuperscript{25}

Historically governments and some other respondent parties have not participated in substantive mediation unless and until the overlaps were resolved (e.g. by a native title representative body exercising its dispute resolution functions, the National Native Title 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 did 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 would engage in substantive mediation.

That approach may be changing, at least so far as the Australian Government and state and territory governments are concerned. At their meeting on 28 August 2009, ministers with portfolio responsibility for native title issued \textit{Guidelines for Best Practice Flexible and Sustainable Agreement Making} which deal with overlapping claims as follows:\textsuperscript{26}

17. Where appropriate, government parties should proactively engage to do what they can to resolve overlaps that occur in negotiations. It is not equitable to deny negotiations to particular Indigenous groups simply because their claim is relatively difficult due to overlapping claims. Nor does it provide certainty for other potential land users.

18. Overlaps should be considered on a case by case basis. For example, some marginal or unsubstantiated overlaps can be more practically dealt with by excising part of the claim subject to the overlap, consenting to a partial determination where there is no overlap, or agreeing to a degree of shared rights in the overlapping area.

19. For more substantive overlaps, tools such as land summits, regional settlements and targeted mediation and litigation could be used.

20. The production of connection and tenure information early on may assist to focus the negotiations through early assessment of the magnitude of overlaps, the degree to which native title has already been extinguished, and claim boundaries.

21. Government parties should provide information in their possession where possible, including:
   a. relevant tenure material, and
   b. access to any relevant connection material (taking into account confidentiality requirements).

\textsuperscript{24} E.g. see \textit{James (on behalf of the Martu People) v Western Australia} [2002] FCA 1208 at [11], \textit{James on behalf of the Martu People v Western Australia (No 2)} [2003] FCA 731.

\textsuperscript{25} A notable example was the Wongatha litigation, the hearing of which went for 100 days: see \textit{Harrington-Smith v Western Australia (No 9)} (2007) 238 ALR 1.

While disputed overlapping claims remain, however, 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 (although partial determinations are permitted under Native Title Act^{27})
- 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 constituents,^{28} possibly with the assistance of the Tribunal^{29} (as happened at Spear Creek in South Australia)
- if the claims have been referred for mediation,^{30} having the mediator mediate between the groups
- asking the Federal Court to direct the Tribunal to conduct a native title application inquiry^{31} 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^{32}
- asking the mediator to refer the issue to the Federal Court for determination^{33}

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.

**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

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^{27} Native Title Act 1993 s 87A.
^{28} Native Title Act 1993 s 203BF.
^{29} Native Title Act 1993 s 203BK(3).
^{30} Including referral for the purpose of mediating the resolution of the overlaps, see Native Title Act 1993 s 86B(5).
^{31} Native Title Act 1993 ss 138A-138G.
^{32} Native Title Act 1993 ss 136GC-136GE.
^{33} Native Title Act 1993 ss 94H, 86D(1).
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 D 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\textsuperscript{34}) 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.

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 subject of negotiation. On occasions it becomes 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. Ideally, this occurs early in the process and saves time and effort in fashioning an outcome.

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\textsuperscript{35}
- 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.\textsuperscript{36}

\textsuperscript{34} See Native Title Act 1993 ss 47, 47A, 47B.
\textsuperscript{35} Procedural Direction No 9 of 2007.
\textsuperscript{36} Procedural Direction No 9 of 2007.
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) 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).

Dealing with the interests of other parties

As noted earlier, a determination of native title includes:

- a determination of the nature and extent of any other interests in relation to the determination area, and
- a determination of the relationship between the native title rights and interests and the other interests (taking into account the effect of the Act).

Determinations of native title should list all relevant interests (whether or not the interest holders are parties to the proceeding). How the respective rights and interests will be exercised on the ground is not something that a determination will deal with. It is up to the parties to negotiate bilateral or multi-lateral agreements, such as ILUAs, to set out the detail of the arrangements. Such agreements can be tailored to meet local circumstances.

The sequencing of the various agreements is up to the parties. Some parties are happy to negotiate ILUAs well in advance (and even independently of) a determination of native title, ensuring that their interests are protected irrespective of the outcome (e.g. local government ILUAs being negotiated in parts of Queensland).

Some parties want the consent determination to be contingent upon the conclusion of other agreements and so will ensure that all agreements are in place before the determination is made, or will ensure that the effect of a determination is contingent upon the prior registration of one or more ILUAs.

Others may be happy to negotiate agreements after the determination is in place.

Adopting an interest-based approach to native title negotiations

The present Commonwealth Attorney-General, Hon Robert McClelland, has been encouraging parties to native title proceedings to take an interest-based approach to native title proceedings.

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37 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.

38 See R McClelland, Negotiating Native Title Forum, 29 February 2008.
While that approach is not new (the Tribunal and some judges have been encouraging the same approach for many years), it seems to be more widely accepted by governments.

The recently released *Guidelines for Best Practice Flexible and Sustainable Agreement Making* ‘encourage government parties to adopt an interest-based approach to negotiations’ and ‘to remain flexible as to the potential benefits that might be provided’. The Guidelines state:

45. An interest-based approach should be employed in negotiations with the aim of providing benefits based upon the aspirations of the parties, as opposed to narrow and technical definitions of what may constitute native title rights. Government parties should be open to considering and initiating innovative solutions, rather than holding a fixed bargaining position.

Aspects of those Guidelines suggest that a strict sequencing of connection and tenure research should not occur. What work is done and when it is done would be influenced by what the parties want to achieve and what is most useful to reaching that goal. Guideline 14, for example, states:

14. In some circumstances tenure material will inform the negotiation process, particularly in circumstances where a native title outcome is not being sought. Where possible, government parties should be prepared to share tenure information and any other information that may assist a negotiation, subject to confidentiality and privacy requirements. In some cases, tenure information could shape the negotiations, rather than connection reports or connection evidence.

The Guidelines also suggest that sufficient time should be taken in preparation for negotiations, as well as in the substantive negotiations, to secure ‘sustainable outcomes’. They include the following statements:

54. An interest-based approach requires flexibility on the part of government parties, in regard to the process

... 

44. Governments recognise the importance of allowing sufficient time for Indigenous methods of decision-making.

The Guidelines read as a whole seem to be cast in a way that is consistent with the bushwalk approach to native title negotiations rather than the locomotive train journey approach. By characterising native title proceedings as an opportunity for broader settlements, governments seek to emphasise flexibility in relation to processes and sustainable outcomes (which may, but need not, include determinations of native title). On occasion, there could be tension between that approach and the case management regime administered by the Court.
How do the parties deal with competing demands on their time and resources?

Limited resources – money people and time

The performance of the native title system depends on the performance of each of the participants. One participant can only effectively engage with the others if they have access to appropriate financial and human resources. Both claimants and state and territory governments have cited inadequate funds and a lack of appropriate specialist or expert services as key reasons for failure, in certain cases, to meet agreed or Court imposed timetables. In addition, applicant and respondent parties may have different views about the ways in which scarce resources should be applied to resolve particular claims.

There may be delay in progressing a claim simply because the claim group members live in many places, long distances apart. In such cases, it may be difficult to arrange timely meetings for the endorsement of particular proposals (such as whether to accept an alternative settlement and withdraw an application, or to replace the current applicant). Organising and holding meetings of dispersed claimants may be expensive.

It should be noted that these issues are not confined to individual claims. Some participants have a role in relation to numerous claims. Each state or territory government is the first respondent to every claim in its jurisdiction, and has to allocate its staff and other resources appropriately between them. Each native title representative body or service provider represents many (if not all) of the claim groups within its area, and has to allocate its resources between the various proceedings. About half of the current claimant applications have been referred to the Tribunal for mediation, and the Court has case management (and potentially mediation) responsibilities in relation to current claims. Each body needs to allocate its limited resources (e.g. staff, consultants, finances and time) appropriately.

For some years now, the major participants in the system have engaged in regional planning and regional directions hearings or case management conferences, in order to establish some order of priority as between claimant applications and to assist in the appropriate allocation of resources to those applications. These processes have helped to ensure that resources are not wasted and claims are progressed in accordance with a scheme that the participants know of and, usually, agree to.

In recent years, many judges of the Court have managed the native title matters in their dockets closely. However, parties may still find themselves unable to harness sufficient financial or human resources to comply with Court orders within agreed or imposed timeframes.

In a judgment in 2003, Justice French wrote:

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, are recognised.\textsuperscript{39}

Elsewhere in the judgment he referred to the ‘very substantial resource burdens that the native title process places on all parties’. It is ‘quite legitimate’ to have regard to the resource limitations and other constraints under which parties and the Tribunal must operate when developing mediation protocols and programs. ‘At the same time’, however, ‘the court has a responsibility to ensure that the mediation processes for which the Act provides are applied and are applied in a timely fashion’.\textsuperscript{40}

There might be fewer financial constraints in the next few years, at least so far as many claim groups are concerned. The 2009 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
- $4.3 million to improve claims resolution by working with state and territory governments to develop new approaches to other settlements of claims through negotiated agreements.\textsuperscript{41}

\textbf{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. some 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

\textsuperscript{39} Frazer v Western Australia (2003) 128 FCR 458, 198 ALR 303, at [32].

\textsuperscript{40} Frazer v Western Australia (2003) 128 FCR 458, 198 ALR 303, at [28], [29].

\textsuperscript{41} 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.
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.

Justice Dowsett has stated that future act negotiating rights cause problems in case management. ‘They frequently distract attention from the Native Title claim which supports them. Much greater effort is put into the negotiation regime than into the primary litigation’. In some cases, the existence of the right to negotiate is ‘an absolute disincentive to prosecution of the Native Title claim, simply because it is well-known that the claim cannot proceed. There is therefore no incentive to prosecute it to ultimate dismissal’.42

Procedures introduced by amendments to the Native Title 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.43 To date, no claims have been dismissed under those provisions.

Mediation of 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 Aboriginal Land Rights Act 1983 (NSW). In the latter circumstances the issue in contention is not necessarily a determination of native title rights and interest but a desire to prevent the sale of Aboriginal freehold land.

Most non-claimant applications are made by or on behalf of Aboriginal people in New South Wales because of the operation of the Aboriginal Land Rights Act. In summary, the applicants seek a determination that native title does not exist because an Aboriginal Land Council may not sell, exchange, lease, dispose of, mortgage or otherwise deal with land vested in it subject to native title rights and interests under subsection 36(9) or (9A) unless the land is subject of an ‘approved determination of native title’ within the meaning of the Native Title Act.44 Usually the determinations are made unopposed by the parties.

Thus, state or territory laws might:

- prompt the lodgement of some claimant applications to secure benefits under that legislation

43 Native Title Act 1993 ss 66C, 94C.
44 Aboriginal Land Rights Act 1983 (NSW) s 40AA(1).
- 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)
- prompt the lodgement of non-claimant applications to deal with other Aboriginal land issues.

**Competing demands and priorities**

Many native title claimants and their representatives find it difficult to comply with Court orders about mediation or negotiations to resolve their claim while responding to ‘right to negotiate’ future act notices (where tight timeframes are often imposed), negotiating ILUAs with other stakeholders such as local government, dealing with cultural heritage and the myriad of issues that arise within and between claim groups because of the nature of the proceedings. Further, if a claimant application is amended in certain ways, the applicant may also need to put time and resources into ensuring the amended application meets the requirements of the registration test under the Native Title Act.45

Some provisions of the Native Title Act are relevant to this issue, at least where claim groups are represented by a lawyer employed by a native title representative body or a body funded to perform the functions of a representative body.46 The Native Title Act imposes certain duties on such bodies in carrying out their statutory functions. When performing its assistance and facilitation functions in relation to (among others) a claimant application, such a body ‘must act in a way that promotes an orderly, efficient and cost-effective process for making such applications’.47 The Native Title Act also requires that such a body ‘must give priority to the protection of the interests of native title holders’.48 In any given case, discharging the latter duty may require the allocation of scarce resources (including legal practitioners) to future act matters, rather than to proceedings before the Court. Further, such a body must, among other things, use best efforts to ‘perform its functions in a timely manner, particularly in respect of matters affected by ... time limits under this Act’ or other relevant statutes.49 Generally speaking, that obligation applies to future act matters, not the associated proceeding before the Court.

**What are the options for broader or alternative settlements?**

**Reasons for and objectives of broader settlements**

As is apparent from the text and attachments to this paper:

45 Unlike most other proceedings before the Court, merely maintaining the application in the system ensures that valuable benefits are available to the applicant that have nothing to do with the prosecution of proceedings before the court.
46 *Native Title Act* 1993 s 203FE.
47 *Native Title Act* 1993 s. 203BC(3)(a).
48 *Native Title Act* 1993 s. 203BC(4).
49 *Native Title Act* 1993 s. 203BA.
• 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.

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’\(^50\) of native title claim groups.

As Commonwealth Attorney-General Robert McClelland stated in 2008:

[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, we need to move away from technical legal arguments about the existence of native title.\(^51\)

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.\(^52\)

In the same speech, the Attorney-General said that the Australian Government’s objectives for the native title system are:

• Where-ever possible, resolving land use and ownership issues through negotiation, because negotiation produces broader and better outcomes than litigation
• Facilitating the negotiation of more, and better Indigenous Land Use Agreements and ensuring that traditional owners and their representatives are adequately resourced for this
• Making native title an effective mechanism for providing economic development opportunities for Indigenous people

\(^50\) See the Preamble to the Native Title Act 1993.
\(^51\) R McClelland, Negotiating Native Title Forum, 29 February 2008, paragraph 5.
\(^52\) R McClelland, Negotiating Native Title Forum, 29 February 2008, paragraphs 45-47, 49.
• Avoiding unduly narrow and legalistic approaches to native title processes that can result in the further dispossession of Aboriginal and Torres Strait Islander people.

‘Above all’, he said ‘my objective is to ensure that native title is not seen as an end in itself.’

These objectives for a broader approach to native title proceedings are evident in the Attorney-General’s second reading speech on the Native Title Amendment Bill 2009 (noted below).

As noted earlier in this paper, 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. 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

In summary, 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.

The Act also provides that some or all of the parties to a claimant proceeding may negotiate with a view to agreeing to other actions. The agreement may involve matters other than native title. In other words, 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. The Native Title Act was amended on 18 September 2009 to give the Federal Court 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.

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)

53 Native Title Act 1993 ss 86A, 94A, 225.
54 Native Title Act 1993 s 86F(1).
55 Native Title Act 1993 s 86F(1).
56 Native Title Act 1993 s 86F(2).
57 House of Representatives, Native Title Amendment Bill 2009, Explanatory Memorandum, para 1.10.
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’.

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Options for matters to be included in broader settlements

Some options that might form part of broader settlements that include determinations of native title, or comprise the elements of an alternative settlement, are:

- 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
  - ongoing commitment to collaborate on future programs
  - 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 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
  - licences to hunt, fish, camp or organise cultural events in the agreement area
  - multi-lateral land access agreements between Commonwealth, state and local governments and third parties

- 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, education, mentoring, training 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)

58 House of Representatives, Proof Hansard, 19 March 2009, 21, 22.
• enterprise development grants and support systems (e.g. commercial fisheries quota allocation)
• equity participation in commercial enterprises on traditional land
• business start-up assistance or provision of an established business
• provision of longer term assets and investments

• 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 or prescribed body corporate)
  • enterprise development.

The Guidelines for Best Practice Flexible and Sustainable Agreement Making include many of those items, characterising them as ‘sustainable benefits’ that governments can provide. The Guidelines suggest that government parties should ‘spend time researching and considering the nature of the benefits they can possibly provide. This will ensure that when substantive negotiations commence parties have a clear idea of the parameters within which agreement can be found’.\(^59\) Having done that, government parties ‘should remain open and flexible throughout negotiations. A range of benefits, tailored to concerns and interests will enhance commitments to long term relationships and the negotiation of agreements’.

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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.

\(^{59}\) Guidelines for Best Practice Flexible and Sustainable Agreement Making, at [28].

\(^{60}\) Guidelines for Best Practice Flexible and Sustainable Agreement Making, at [30].
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.

By their nature, broader settlement negotiations about such a range of options seem more consistent with the long bushwalk metaphor than the locomotive train journey metaphor. Indeed, 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. One is a national initiative, the other involves the state of Victoria.

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’.  

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 comprise officers from all jurisdictions including the Commonwealth.

After their meeting on 28 August 2009, the Ministers issued a communiqué that restated their commitment to ‘taking a more flexible view of the ways to achieve the broad range of practical outcomes possible from native title processes’. The *Guidelines for Best Practice Flexible and Sustainable Agreement Making*, prepared by the Joint Working Group, were released. They were described in the communiqué as emphasising ‘the desirability for government parties to provide

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broader practical and sustainable benefits attuned to the interests of Indigenous native title claimants’. The Guidelines ‘provide practical guidance for governments on the behaviours, attitudes and practices that can achieve the efficient resolution of native title, from early stages of negotiation through to implementation’.63

The Guidelines record the Ministers’ agreement, among other things, that the ‘native title system can facilitate broader settlement packages that offer a range of real opportunities and practical outcomes for Indigenous Australians’.64 The Guidelines are divided into three parts, which reflect distinct phases of broader land settlement negotiations:

- Part One provides guidance on how to adequately prepare for the early stages of a negotiation. These guidelines encourage government parties to adopt behaviours, attitudes and practices early in the negotiation process that will ensure agreements deliver outcomes attuned to the needs and interests of all parties.

- Part Two provides guidance on the substantive stage of the negotiation process. These guidelines encourage government parties to adopt an interest-based approach to negotiations, to remain flexible as to the potential benefits that might be provided and to act in good faith throughout the negotiation.

- Part Three provides guidance on the successful implementation of agreements, so that appropriate corporate and governance frameworks are in place to ensure the delivery of sustainable benefits into the future.65

The detailed terms of the Guidelines, some of which are quoted or referred to elsewhere in this paper, seem to support the long bushwalk approach to resolving native title issues. Indeed, because the issues surrounding each claim or the development of a regional agreement will have individual features, it would seem impractical to be too prescriptive as to the timetabling or sequencing of events.

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,66 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,67 the features of the Framework include:

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64 Joint Working Group on Indigenous Land Settlements, Guidelines for Best Practice Flexible and Sustainable Agreement Making, August 2009, at [4].
• 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.

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 gave no commitment to Commonwealth financial support for the Victorian scheme, and it appears that issue remains unresolved.

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:

68 Attorney-General for Australia, Speech, AIATSIS National Native Title Conference, Melbourne, 5 June 2009.
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.

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.

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. Part A of the Kowanyama claim was determined by consent on 22 October 2009.

In summary, although there has been discussion about regional agreements, the focus of negotiations 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. 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.

Looking ahead, options for regional agreements might attract more support, at least so far as the Australian, state and territory governments are concerned. The Guidelines for Best Practice Flexible and Sustainable Agreement Making issued on 28 August 2009 contain the following statements about regional agreements:

32. In some circumstances, it might be appropriate to use a settlement on a regional basis to reach an agreement. A regional settlement may involve claims brought by different claim groups in the same region, or an amalgamation of claims by the same claim group within a region.

33. Regional settlements do not necessarily require the collective resolution of every issue in every claim within particular regions. For example, claims could involve collaboration on specific aspects such as research into, or negotiation or mediation of common issues, and leave any issues of substantial difference, such

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70 Kowanyama People v Queensland [2009] FCA 1192.
as the actual determination of native title, for resolution on an individual claim basis. In some circumstances, however, it may be possible to achieve substantive resolution of all claims within a region through a smaller number of sub-regional processes, or possibly a single process.

34. Regional resolutions may assist in overcoming specific issues, including overlaps and cross-jurisdictional claims. For example, regional settlements offer the possibility of negotiating shared rights or withdrawal of one group, by offering practical benefits in lieu of continuing to assert native title rights in the overlapping area.

35. In determining the appropriateness of a cross-jurisdictional approach, parties should engage early in the negotiation process and look for synergies between:
   a. the types of tenure and legislative schemes involved
   b. policies and programs of respective governments
   c. the resources and views of respective NTRBs, and
   d. the willingness or capacity of non-government and non-Indigenous parties to be involved in cross-jurisdictional negotiations.

What roles do the Federal Court and the Tribunal have in resolving these issues – or helping parties to resolve them?

Statutory objects and procedures – focus on resolving issues by agreement

The Native Title Act has always favoured the resolution of native title issues by agreement. The Preamble to the Act, for example, states:

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 main objects of the Act include providing for the recognition and protection of native title and establishing a mechanism for determining claims to native title. 72

Although neither the preamble nor those objects have changed in the 15 years since the Native Title Act commenced, the procedures for achieving the objects and the respective roles of the Federal Court and the Tribunal have changed as a result of various amendments to the Act.

In summary:

- The original scheme provided that every native title claim and compensation claim was made to the Tribunal which could make a determination in, or consistent with, the terms agreed by the parties. Once registered, determinations of the Tribunal were given effect as if they were orders of the Federal Court. Only if a claim could not be resolved by

72 Native Title Act 1993 s 3(a) and (c).
agreement would the Registrar of the Tribunal lodge the application to the Federal Court for decision.

- The High Court held that a similar scheme was constitutionally invalid,73 and a Full Federal Court held subsequently that aspects of the scheme in the Native Title Act were invalid because they purported to vest judicial power in a non-judicial body.74

- In 1998, the Act was amended to provide that every current claimant application became a proceeding in the Federal Court and every new application was made in the Court. As a consequence, the Court has had general control of native title proceedings since 30 September 1998.

- The 1998 amendments provided that, as a general rule, the Court would refer each application to the Tribunal for mediation, and set out in detail the powers and functions of the Tribunal in conducting mediation.

- In 2007, following a comprehensive independent review of the claims revolution process, the Act was amended to expand the Tribunal's powers and functions in relation to mediation and to make it clear that the Court could not mediate while an application was with the Tribunal for mediation.

- The amendments made on 18 September 2009 provide that both the Court and the Tribunal may mediate and, for the first time in the history of the Act, that another ‘appropriate person or body’ may mediate (effectively deregulating the provision of mediation services).

More specifically, the Native Title Act was amended in September to:

- enable the Court to determine who would mediate in relation to a native title claim (the Court, the Tribunal, or another ‘appropriate person or body’)75

- extend the existing provisions concerning the conduct of mediation by the Tribunal to all native title claim related mediation

- enable the Court to direct the Tribunal to hold a native title application inquiry76 or refer certain native title issues to the Tribunal for review77

- enable the Court to rely on a statement of facts agreed between the parties to make consent determinations of native title78

- enable the Court to make consent orders that cover matters beyond native title so that parties can resolve a range of native title and related issues at the same time79

- allow the amended evidence rules made by the Evidence Amendment Act 2008 (Cwlth) that concern evidence given by Aboriginal and Torres Strait Islander people to apply to native title claims where evidence has been heard and either the parties agree the rules should apply or the Court has considered the views of the parties and considers it is in the

75 Native Title Act 1993 s 86B(1)-(2A).
76 Native Title Act 1993 s 138B.
77 Native Title Act 1993 s 136GC.
78 Native Title Act 1993 ss 87(8)-(11), 87A(9)-(12).
79 Native Title Act 1993 ss 4(7)(ab), 87(4)-(7), 87A(5)-(7).
interests of justice for the rules to apply expand the current assistance provisions to allow assistance in relation to all mediations

The Court will also be able to utilise new provisions in other Bills to assist with the resolution of native title claims, such as changes to the Federal Court of Australia Act 1976 (Cwlth) to allow the Court to refer a proceeding, or one or more questions arising in a proceeding, to a referee for report. This could assist in native title claims to resolve overlaps and specific legal questions, and determine claim group membership. Other legislative reforms, such as those in the Access to Justice (Civil Litigation Reforms) Amendment Bill 2009, might also have a bearing on how native title issues are resolved.

In summary, the current position is that the Federal Court has an even more central role in the management of native title claims than previously. However, the requirement that, as a general rule, each application must be referred to mediation remains. So do the statutory list of issues that are to be the subject of mediation, and the statutory framework allowing broader or alternative settlements involving matters other than native title.

**Timetables and case management**

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’. However, if there ever was a time that parties could roam the range unfettered in search of an outcome to native title claims, the end of the era was signalled by the 1998 amendments to the Native Title Act. Since 1998, the mediation of native title applications has been 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.80

Judges have long bemoaned the pace at which native title negotiations proceed and the delays in outcomes. They have expressed concerns about the attitudes of parties and the apparently unfocussed approach taken to mediation, particularly where there the particulars of what is being claimed are not clear and little connection material is available to respondent parties.

It is reasonable to expect that judges of the Federal Court will take an even more ‘hands on’ approach to case management in the future, for reasons based on principle and practical experience. In a conference paper delivered in July 2009, Justice Dowsett stated that the Federal Court’s role is ‘simply ... to determine Native Title claims, whether that be after a long trial or by accepting and acting upon agreement reached between the parties’.81 His Honour continued:

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80 See e.g. *Frazer v Western Australia* (2003) 128 FCR 458.
81 Justice JA Dowsett, ‘Beyond Mabo: Understanding native title litigation through decisions of the Federal Court’. In the introduction to the paper, his Honour stated that a more appropriate title is ‘Native Title after Mabo – the Frustration of a Federal Court Judge’.
It is for the Court to supervise every aspect of each case so as to bring it to trial at the earliest practicable time and to resolve it according to law. That role, in no sense, excludes the possibility, or probability, of the parties reaching agreement. However, the Court cannot properly leave the matter to the parties, or anybody else, to resolve in their own time. The public, as well as the parties, have a clear interest in the speedy resolution of all litigation, including Native Title litigation.

... I believe that the key to understanding Native Title litigation is acceptance of the fact that it takes place in a court and therefore must proceed in a way which is appropriate to such proceedings. That proposition may be obvious, but it is frequently challenged, at least implicitly, in Native Title litigation. Such challenges contribute significantly to the delay which has become endemic in this area.

... In general, litigation, once started, must proceed to a determination at the earliest practicable time. ... Our case management system is designed to bring that about, but many aspects of the Native Title system stand in the way.

In some cases the Court has sought to firmly case manage the proceedings, but the Court’s orders have not been complied with. There are various reasons for this, some of which are referred to in this paper.

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. In his reasons for judgment in making the consent determination in Hayes on behalf of the Thalanyji People v Western Australia, 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

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82 For detailed reasons for decision in relation to a claim group who had been in default of Court orders see McLennan on behalf of the Jangga People v Queensland [2009] FCA 236.
84 [2008] FCA 1487.
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’.

It remains to be seen what impact the recent amendments to the Native Title Act will make on the case management by the Court of native title proceedings. For example, will the Court not only monitor but more closely direct the stages of mediation and be more prescriptive about what steps have to be taken, by whom and when?

Given that since 1998 judges and senior officers of the Court have had case management of native title matters, any changes might be more of degree than kind. But, in light of the often expressed frustration of judges about the age of many applications and the long periods taken to resolve them, and the Australian Government’s expectation that the Court will actively manage native title claims in a way that will lead to their resolution in the shortest possible time frames, it seems likely that claim mediation will increasingly resemble the locomotive train journey metaphor.

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.

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.86 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 2007.87 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.

86 See Button Jones (on behalf of the Gudim People) v Northern Territory of Australia [2007] FCA 1802.
Tribunal mediation and assistance

The Tribunal has a range of statutory functions and powers, including providing assistance, mediating, conducting reviews and inquiries and making some determinations.88 The Tribunal may carry out research for the purpose of performing its functions. The Native Title Registrar may give assistance to:

- help people prepare applications and accompanying material, and to help them, at any stage of a proceeding, in matters related to the proceeding, and
- help other people, at any stage of a proceeding, in related matters.89

Consequently, the Tribunal can be involved in each stage of an application from preparation to resolution.

Under the 2009 amendments, the Federal Court can also refer applications to persons or bodies other than the Tribunal to conduct mediation, the Tribunal retains that role. It offers a range of mediation services, including specialised flexible multidisciplinary agreement-making teams. These teams, led by Tribunal members, are created according to the particular requirements of individual claims and can call on a range of geospatial, research and legal resources.

What difference will the 2009 amendments to the Native Title Act make to how the Court and the Tribunal operate?

The purpose of the amendments

Speaking on the introduction of the Bill, the Commonwealth Attorney-General 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. He said that the amendments would ‘contribute to broader, more flexible and quicker negotiated settlements of native title claims’. The key amendments support the Australian Government’s objective of ‘achieving more negotiated native title outcomes in a more timely, effective and efficient fashion’—an objective that is reflected in the Tribunal’s Strategic Plan 2009–2011.

The Australian Government has expressed its confidence in the Court as the body to advance the resolution of native title claims in that way by coordinating case management. According to the Commonwealth Attorney-General, having ‘one body actively control the direction of each case with the assistance of case management powers means opportunities for resolution can be more easily identified’. In giving it that role, the Government is confident that the Court has the skills to ‘actively manage’ native title claims in a way which will lead to resolution of claims ‘in the shortest possible time frames’. The ensuing debate in the House of Representatives indicated the

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88 Native Title Act 1993 s 108.
89 Native Title Act 1993 s 78.
degree to which that confidence is shared by other members of Parliament, and the high expectations they have of the Court.

The practical impact of the amended scheme will be influenced by how individual judges administer it. The Court has stated that it welcomed the amendments and the responsibility and accountability that will go with them.

Factors that might influence the effect of the amended scheme
The success of the amended scheme will be influenced by, if not dependent on, factors that are, at best, incidental to the legislation. They include:

- the resources available to the parties, Court and Tribunal
- the extent of communication, cooperation and coordination within and between the institutions (principally the Court and the Tribunal)
- primarily, the attitudes of, and approaches taken by, the parties.

Taking into account the resources of the parties, Court and Tribunal: The Court’s written submission to the Senate Committee’s inquiry into the Native Title Amendment Bill 2009 stated that the Court, as with the Tribunal and others, ‘has been and continues to be mindful of the resources available to all in the jurisdiction and as such understands the need for a coordinated approach to the management of the list’. As noted earlier, the Australian Government has included additional money for native title representative bodies in the 2009 budget, but has reduced the amount available for respondent parties.

The issue here is not just the amount of resources but how they are prioritised and used. As noted earlier, the progress of claims can be delayed because the resources of the claim group and their representatives are directed to what (from their perspective at least) are more tangible, immediate and beneficial outcomes than a bare determination of native title (e.g. the negotiation of ILUAs or various future act agreements).

Although the Court has been given additional powers and functions, the Senate Committee was informed that, at this stage, the Court did not ‘envisage any immediate need to seek any additional resources to take over this responsibility’.

So far as the National Native Title Tribunal is concerned, the reduced levels of Tribunal membership and annual budgetary allocations for the next four years create challenges to deliver timely and effective services across Australia as required by the Court and the parties.

Communication, cooperation and coordination: At the end of the debate about the Bill in the House of Representatives, the Attorney-General said:

The government has confidence in the ability of the Federal Court to provide a nationally coordinated approach to the resolution of native title. ... [T]he court has also
made clear that it will be approaching native title claims in a consistent and nationally coordinated way.\textsuperscript{90}

The Court’s written submission about the Bill to the Senate Committee referred to the requirement for ‘coordination, consistency, and a refined focus on appropriate case management and ADR responses with a view to arriving at consent determinations that encompass broad outcomes, as soon as possible’. It might be expected that any new approach will build on the regional focus on claim management and resolution adopted by the Court since 2007.

The amendments will realign the relationship between the Court and the Tribunal. It remains to be seen what the practical operational effect will be. For example, to what extent will the Court conduct mediation of claimant applications, including in relation to issues of traditional connection to land or waters? There are also issues about how mediators other than the Court or the Tribunal are to be identified, paid and supported administratively and with specialist geospatial, research, legal and other resources.

Implicit in the proposed amendments is the possible fragmentation of the current regional approach to planning and case management. Much of the success of regional planning, and the progress of individual claimant applications to date, result from a coordinated approach between the Court and the Tribunal. Such an approach has involved:

- clear communication between the Court and Tribunal
- the Court making orders consistent with those proposed by the Tribunal to provide greater imperative to mediation
- the reinforcement through the Court or Tribunal of identified time frames for mediation.

Since 2007, the Tribunal has had the right to appear before the Court at a hearing in relation to a matter while that matter is with the Tribunal for mediation for the purpose of assisting the Court in relation to a proceeding. The Tribunal may also appear at a hearing to determine whether a matter should be referred to the Tribunal. Under the amendments, the Tribunal’s right to appear before the Court and to provide voluntary regional mediation progress reports and regional work plans has been removed.

The Tribunal will work to the best of its ability to implement whatever changes the Parliament makes, as it has done in relation to numerous amendments to the Act over the past 15 years.

**The attitudes and approaches of parties, and broader settlement options:** Many parties (including native title claim groups and government) see the proceedings as an opportunity to negotiate outcomes that may, but need not, include a determination of native title. The Native Title Act clearly contemplates that possibility, and provides for the Court to adjourn proceedings to allow for negotiations that might result in an application being withdrawn or amended, the parties to a proceeding being varied or some other thing being done in relation to the application. An agreement may involve matters other than native title.

\textsuperscript{90} House of Representatives, Proof Hansard, 14 May 2009, 25.
The *Guidelines for Best Practice Flexible and Sustainable Agreement Making* clearly articulate the approach to broader settlements that governments can be expected to adopt. However, as noted earlier, 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.

It remains to be seen whether (and, if so, how) the amendments will affect case management practices of the Court where parties are pursuing broader or alternative settlements.

It should also be understood that there are numerous factors that delay the resolution of claims, most of which will *not* be met by the proposed amendments to the Act. Any improvement to the processes and practices of the Tribunal and the Court will have a negligible effect on the resolution of native title claims by agreement if the parties to the proceedings are unwilling or unable to participate productively or in a timely manner.

In the same vein, the Attorney-General has stated that ‘real advances in native title will only come through changes in the behaviour of all parties, rather than legislative overhaul’.\(^91\)

**Relationships between the Federal Court and the Tribunal**

The productive relationship between the Court and the Tribunal was reflected in the reasons for judgment of Justice North when making a consent determination that native title exists in the north-west region of Western Australia. His Honour wrote:

> The respective roles of the Court and the Tribunal in the management of applications for native title determinations have been the subject over recent years of legislative ping pong. At times the Court is put in charge of the process and at other times the Tribunal is put in charge of the process. Through the apparent turbulence of these changes the management of applications has continued unaffected in many cases as a result of the well established and professionally based relationships between judges of the Court and members of the Tribunal.\(^92\)

In that case the Tribunal members ‘worked in close and harmonious cooperation with the Court’. They ‘facilitated the making of the agreement between the parties, and the Court ... supervised the overall progress of the mediation’.

\(^{91}\) R McClelland, Negotiating Native Title Forum, 20 February 2009, paragraph 9.

\(^{92}\) *Hunter v Western Australia* [2009] FCA 654 at [31].
Conclusion

The resolution of native title issues, whether they are associated with native title claims, future acts or other proceedings, can be complex, time consuming and expensive.

The Native Title Act promotes the resolution of native title issues by agreement. It provides options for agreements and procedures by which agreements might be reached. It creates or nominates bodies to assist parties to negotiate agreements or make decisions if they do not reach agreement.

As the law provides and experience demonstrates, there is no ‘one size fits all’ approach to successfully resolving native title issues by agreement. In some respects, whether, when and how agreements will be reached, and what those agreements will contain, is in the hands of the parties to the negotiations.

But, at least insofar as they are involved in native title claim proceedings, the parties will not be permitted to proceed without any deadlines or clear objectives. The days of the long bushwalks, if they ever existed, have passed. The process of reaching agreement will be increasingly supervised and directed by the Federal Court.

While it remains to be seen how judges of the Federal Court will administer the amended scheme, it is likely that the Court will play an even closer role in the management of each application. To use the locomotive train journey metaphor, it is may be that:

- The Court will treat each application as headed for a determination of native title and will manage it accordingly
- If parties want to go along the alternative settlement or broader settlement track (as expressly contemplated by the Native Title Act), they will need to inform the Court and put an alternative timetable for the necessary stages to be reached
- The Court will set, monitor closely, and expect compliance with the timetable for steps to be taken in relation to each claim
- The Court will not let applications sit in a siding unnoticed but will want to see some progress (or at least a specific program) for each claim
- The Court may move some claims from a siding to the track marked ‘hearing’
- The Court will not expect all applications on the hearing track to go to a full hearing, but will expect that the fact that they are headed in that direction will encourage timely settlement negotiations to occur.

It is likely that the passengers will be given time to alight from the train from time to time, to consider options and obtain instructions. But any thought that bushwalkers can continue across the native title countryside unfettered as to time or destination should be discarded.

On the basis that the locomotive train journey metaphor is of some use for this purpose, I reiterate that, although the process might become more regulated, there are many destinations that the
parties might consider. Which destination is chosen and whether it is reached is very much in their hands.

In that respect it might be useful to conclude with a quote from English novelist EM Forster, who wrote about railway termini:

They are our gates to the glorious and the unknown. Through them we pass out into adventure and sunshine’. 93

But the quote doesn’t end there. It concludes, ‘to them, alas! We return’.

I would hope that, with the ongoing assistance of the Tribunal facilitating timely and effective native title and related outcomes, parties will return from ‘adventure’ in the ‘unknown’ to railway termini with agreed outcomes that the Court can endorse, and the parties can move on to a brighter future.

93 EM Forster, Howards End, 1910, chapter 2.
### Overlap Activity Map as per the Schedule - Federal Court

**As at 30 September 2009**
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#### Area and Percentage Statistics

<table>
<thead>
<tr>
<th>Area of Land Covered</th>
<th>ACT</th>
<th>NSW</th>
<th>NT</th>
<th>QLD</th>
<th>SA</th>
<th>TAS</th>
<th>VIC</th>
<th>WA</th>
<th>Total</th>
</tr>
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</table>
| by determination     | 0.0 | 0.0 | 2.0| 0.2 | 18.8| 1.4 | 26.7| 1.5 | 68.3  | 7.0  | 0.0  | 0.0  | 12.3 | 5.4 | 840.1| 32.2| 969.1| 12.0%
| by a single application | 0.0 | 0.0 | 184.8| 23.1 | 388.8| 27.3 | 1,086.7| 61.3 | 570.5 | 58.0 | 0.0  | 0.0  | 42.0 | 18.5 | 906.0| 35.8| 3,132.5| 40.7%
| by more than 1 application | 0.0 | 0.0 | 1.6 | 0.2 | 6.9 | 0.5 | 12.5 | 0.7 | 23.7 | 2.4 | 0.0  | 0.0  | 28.2 | 12.4 | 434.1| 17.2 | 507.6 | 6.6%
| not covered          | 2.4 | 100.0| 612.3| 76.5 | 564.8| 70.6 | 650.8| 38.4 | 32.0 | 32.5 | 68.4 | 100.0| 144.9| 63.7 | 349.7| 13.6 | 3,063.3| 40.1% |

*Area* and *Percentage Statistics* calculated based on the estimated area of land covered by overlap at that time (area in thousand sq km).

#### Data Source
- States and Territories: Department of Environment and Heritage, Commonwealth of Australia.
- Commonwealth: Department of the Prime Minister and Cabinet, Commonwealth of Australia.

#### Acknowledgments
- The Commonwealth of Australia
- The Commonwealth of Australia (2009) for the graphical design.

**Note:** The information is not exhaustive and is subject to change. The Commonwealth of Australia accepts no liability for any errors, omissions or consequences of reliance on the information provided. The information is current as of the date of this submission and is subject to change. The Commonwealth of Australia assumes no responsibility for any loss or damage arising from the use of this information.
Potential effect of existing broad land tenure on the existence of native title
(based on High Court decisions since 2002)

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<table>
<thead>
<tr>
<th>Broad Tenure Class</th>
<th>Native Title Status</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>* Extinguished</td>
</tr>
<tr>
<td></td>
<td>* Partially extinguished and may co-exist with other interests.</td>
</tr>
<tr>
<td></td>
<td>* May exist as exclusive or non-exclusive rights and interests.</td>
</tr>
<tr>
<td></td>
<td>* May or may not exist. If subject to s47A, extinguishment by grant of a prior interest must be disregarded.</td>
</tr>
</tbody>
</table>

* Note that the status accorded here is not necessarily set in stone and does not necessarily reflect the findings of any court or the status of any particular area. It is based on current data and is indicative only of the potential effect of various dealings. In particular, it does not generally include any judicial or expert information which, upon which may affect the status shown. The final determination of the status of any particular area is a matter for the courts. Note also that the status under the non extinguishment principle, including as a result of the application of ss 46, 47A and 48 of the NTA, has not been taken into account in preparing this information product. Note also that this depiction does not reflect the application of a presumption of validity.