

Intervention strategies in native title mediation

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1. Introduction

The purpose of this paper is to provide an insight into some of the intervention strategies used by the National Native Title Tribunal (the Tribunal) in the mediation of native title claims in Australia.

Since the establishment of the Tribunal in 1994 under the *Native Title Act 1993* (Cth) (the Act), the Tribunal has developed a body of practices to mediate native title claims.¹ Substantially these practices follow an orthodox model of mediation, however a range of intervention strategies has emerged which relate specifically to the mediation of native title claims and reflect conditions that are particular to this type of mediation.

This paper identifies three interrelated themes that influence the development of the Tribunal's mediation practices for native title claims. They are:

- the mediator has dual functions as:
 - a strategic manager involved in shaping the regional working environment for the mediation of individual native title claims or clusters of claims, and
 - the mediator of individual native title claims
- the demand for the mediator-manager is a product of the complex nature of native title and the time span required for multi-party mediations, and
- mediation practices and intervention strategies have been shaped significantly by how the processes for proving native title are managed within mediation.

The paper has six sections:

- context - outlining the legal basis for the recognition of native title, the process for resolving native title claims, and the dominant conventions (evidence, time scale) of native title mediation
- case studies - describing two case studies of multi-party native title mediation
- statutory powers of the Tribunal mediator
- specialist services provided by the Tribunal support mediation
- Federal Court responses to delays in native title mediation, and
- summary.

In the interest of brevity, a generalised approach has been taken to some features of native title claim mediation. Similarly, there is no exposition of native title case law in Australia since the landmark High Court decision in *Mabo v Queensland (No 2)*² in 1992. It should be sufficient to note that, although native title case law is constantly developing, it is generally accepted that certain key principles have been settled. Furthermore, the paper makes no reference to the Tribunal's functions in the mediation and arbitration of 'future acts',³ that is, mediation between native title claimants or holders, governments and grantee parties (such as miners seeking government tenements over areas of land).⁴

Finally, it should be noted that the members of the Tribunal have the authority under the Act to convene and conduct the mediation of native title claims.⁵ The member is assisted by Tribunal case managers and can

¹ *Native title agreement-making in Australia: a guide to National Native Title Tribunal practice*, 2nd edition, National Native Title Tribunal, 2005.

² *Mabo v Queensland (No 2)* (1992) 175 CLR 1.

³ 'future act' is defined in s 233 of the *Native Title Act 1993* (Cth).

⁴ *Native Title Act 1993* (Cth) ss 26, 31(3).

⁵ *Native Title Act 1993* (Cth) ss 136A-136F.

also draw on a range of other specialist personnel. For the purposes of this paper the term ‘member’ is replaced by the term ‘mediator’ and ‘mediation team’ refers to the presiding member assisted by another member and/or employees of the Tribunal.

2. Context

2.1 A national system to recognise and protect Indigenous Australians’ rights to land and water

In 1982 a group of Torres Strait Islanders, including the late Eddie Mabo, commenced legal action against the State of Queensland on behalf of the Meriam people asserting that the Meriam people held native title to the island of Mer, in the Murray Island group in the Torres Strait. Their statement of claim acknowledged that the Islands came under the sovereignty of the Crown in 1879, as part of the Colony of Queensland, but were subject to the rights of the plaintiffs to the lands according to (a) their local custom, (b) their original native ownership and (c) their actual possession, use and enjoyment of the islands.⁶ In simple terms, they asserted that they had rights in the land based on their continuing residence and customs that had survived sovereignty and subsequent statutory Acts.

On 3 June 1992 the High Court of Australia handed down judgment, upholding the plaintiffs’ claim to native title. By a 6:1 majority,⁷ the Court ruled that:

the common law of this country recognises a form of native title which, in the cases where it has not been extinguished, reflects the entitlement of the Indigenous inhabitants, in accordance with their laws and customs, to their traditional lands.⁸

The decision in *Mabo (No 2)* was the first time that an Australian court recognised the entitlements of Indigenous people to their traditional lands under their traditional laws. It followed 10 years of legal proceedings.⁹ In the process, the Court rejected the notion that Australia was ever *terra nullius* (land belonging to no one). The Order of the Court declared that (with exceptions for specific areas) ‘the Meriam people are entitled as against the whole world to the possession, occupation, use and enjoyment of the lands of the Murray Islands’.¹⁰

In December 1993 the Federal Parliament of Australia enacted the *Native Title Act 1993*, the objects of which include ‘to provide for the recognition and protection of native title’ across Australia.¹¹ The Act established the National Native Title Tribunal¹² with functions that include ‘providing assistance, mediating or conducting a review in accordance with any provision of this Act’.¹³ Amendments to the Act in 2007 confirmed that, as a general rule, the Federal Court must refer all claims, in the first instance, to the Tribunal for mediation.¹⁴

Between the commencement of the Act on 1 January 1994 and 30 June 2008, some 1774 native title claim applications were made (1467 claimant, 33 compensation, 274 non-claimant). Of those, 1228 have been resolved, 85% of which were settled by administrative means (including the withdrawal and the amalgamation of claims). As at 30 June 2008 there were 504 outstanding claimant applications across Australia, with approximately half allocated to the Tribunal for mediation.¹⁵ There are currently 10 members of the Tribunal allocated to specific regions around Australia.

⁶ Bartlett R H, ‘Mabo: Another Triumph of the Common Law’ (1993) 15(2) *Sydney Law Review* 178 in McRae et al (eds), *Indigenous Legal Issues: commentary and materials* (3rd ed, 2003), 232-233.

⁷ Mason CJ, Brennan, McHugh, Deane, Toohey and Gaudron JJ; Dawson J dissenting.

⁸ *Mabo v Queensland (No 2)* (1992) 175 CLR 1 at 15.

⁹ For a detailed history of the litigation, see BA Keon-Cohen, ‘The Mabo litigation: a personal and procedural account’, (2000) 24 *Melbourne University Law Review* 893-951.

¹⁰ *Mabo v Queensland (No 2)* (1992) 175 CLR 1 at 217.

¹¹ *Native Title Act 1993* (Cth) s 3(a).

¹² *Native Title Act 1993* (Cth) s 107.

¹³ *Native Title Act 1993* (Cth) s 108 (1B) (a).

¹⁴ *Native Title Act 1993* (Cth) s 86B(1).

¹⁵ *National Report: Native Title*, June 2008 at www.nntt.gov.au.

2.2 Native title: the conceptual basis

Sui generis nature of native title: In the leading judgment in the *Mabo (No 2)* case, Justice Brennan wrote:

The term ‘native title’ conveniently describes the interests and rights of indigenous inhabitants in land, whether communal, group or individual, possessed under the traditional laws acknowledged by and the traditional customs observed by the indigenous inhabitants.¹⁶

His Honour continued:

Native title has its origin in and is given its content by the traditional laws acknowledged by and the traditional customs observed by the indigenous inhabitants of a territory. The nature and incidents of native title must be ascertained as a matter of fact by reference to those laws and customs.¹⁷

Native title, as recognised by the High Court, is not sourced from the common law and its content in any given case is not discerned from the common law. Rather, as was pointed out in the joint judgment of the High Court in *Fejo v Northern Territory*:¹⁸

Native title has its origin in the traditional laws acknowledged and the customs observed by the indigenous people who possess the native title.¹⁹ Native title is neither an institution of the common law nor a form of common law tenure but it is recognised by the common law.²⁰ There is, therefore, an intersection of traditional laws and customs with the common law. The underlying existence of the traditional laws and customs is a *necessary* pre-requisite for native title but their existence is not a *sufficient* basis for recognising native title. [emphasis in original]

The High Court has also pointed out that:

Because native title has its origin in traditional laws and customs, and is neither an institution of the common law nor a form of common law tenure, it is necessary to curb the tendency (perhaps inevitable and natural) to conduct an inquiry about the existence of native title rights and interests in the language of the common law property lawyer.²¹

As Justice Gummow explained in *Yanner v Eaton*:²²

Native title is not treated by the common law as a unitary concept. The heterogeneous laws and customs of Australia’s indigenous peoples, the Aboriginals and Torres Strait Islanders, provide its content. It is the relationship between a community of indigenous people and the land, defined by reference to that community’s traditional laws and customs, which is the bridgehead to the common law.

In an earlier case²³ Justice Gummow said: ‘The content of native title, its nature and incidents will vary from one case to another.’

¹⁶ (1992) 175 CLR 1 at 57.

¹⁷ (1992) 175 CLR 1 at 58.

¹⁸ (1998) 195 CLR 96 at 128 [46] per Gleeson CJ, Gaudron, McHugh, Gummow, Hayne & Callinan JJ; quoted with approval in *Commonwealth v Yarmirr* (2001) 208 CLR 1 at [10] per Gleeson CJ, Gaudron, Gummow and Hayne JJ.

¹⁹ *Mabo v Queensland (No 2)* (1992) 175 CLR 1 at 58 per Brennan J.

²⁰ *Mabo v Queensland (No 2)* (1992) 175 CLR 1 at 59-61 per Brennan J.

²¹ *Commonwealth v Yarmirr* (2001) 208 CLR 1; 184 ALR 113 at [11] per Gleeson CJ, Gaudron, Gummow and Hayne JJ also quoting *Tijani v Secretary, Southern Nigerian* [1921] ZAC 399 at 403 and 404 per Viscount Haldane. See also *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422 at [40]; *Bodney v Bennell* [2008] FCAFC 63 at [139].

²² (1999) 201 CLR 351 at [72].

²³ *Wik Peoples v Queensland* (1996) 187 CLR 1 at 169.

Because it is sourced in traditional law and custom, judges have stated that native title is *sui generis* or legally unique.²⁴ Unlike most other rights it is ordinarily communal and not personal.²⁵ Consequently, there are inherent difficulties in ascertaining and expressing the relationship between native title holders and land and waters in terms of ‘rights and interests’.

Native Title Act definition of ‘native title’: The judgment in *Mabo (No 2)*, ‘though the herald’ of the Native Title Act, was a decision at common law.²⁶ The starting point for considering a native title determination application under the Act is the definition of ‘native title’ in s. 223 of the Act.²⁷ That definition requires an examination of whether:

- the claimed rights and interests are ‘possessed under’ the relevant traditional laws and customs,²⁸
- the native title holders, by those laws and customs, have a ‘connection with the land or waters’ claimed,²⁹ and
- the ‘rights and interests are recognised by the common law of Australia’.³⁰

Aboriginal people and Torres Strait Islanders bear the onus of proving that they have native title. In practice, the Act requires native title claimants to adduce evidence on a range of matters³¹ that can involve anthropological,³² archaeological,³³ genealogical,³⁴ historical,³⁵ linguistic³⁶ and other areas of research and expertise.³⁷

²⁴As early as 1971, Australian Courts recognised that ‘the fundamental truth about the aboriginals’ relationship to the land is that whatever else it is, it is a religious relationship’ per Blackburn J *Milirrpum v Nabalco Pty Ltd* (1971) 17 FLR 141 at 167. In *Wik Peoples v Queensland* (1996) 187 CLR 1 at 215, 141 ALR 129 at 252, Kirby J wrote: ‘Aboriginal rights are *sui generis*, difficult if not impossible to describe in the terminology of traditional property law, being communal, personal and usufructuary’. Subsequently, in *Western Australia v Ward* (2002) 213 CLR 1, at [578] Kirby J stated that ‘there has been little need to elaborate the well-established principle that native title is *sui generis* and should not be restricted to rights with precise common law equivalents. This principle has been accepted in Australia and other jurisdictions.’ See also *Mabo v Queensland (No 2)* (1992) 175 CLR 1 at 85, 89, reinforced by the reference in the Preamble to the *Native Title Act 1993* (Cth) to native title’s ‘unique character’; *Fejo v Northern Territory* (1998) 195 CLR 96 at 130 [53], 152 [108].

²⁵*Mabo v Queensland (No 2)* at 110 per Deane and Gaudron JJ: ‘Ordinarily, common law native title is a communal native title and the rights enjoyed under it are communal rights enjoyed by a tribe or other group.’ However, native title ‘rights and interests’ ‘may be communal, group or individual rights and interests’ per Gleeson CJ, Gaudron, Gummow and Hayne JJ *Western Australia v Ward* (2002) 213 CLR 1 at 66 [17]. See the detailed discussion of ‘Communal native title’ at common law and under the Native Title Act in *Bodney v Bennell* [2008] FCAFC 63 at [132]-[159].

²⁶*Bodney v Bennell* [2008] FCAFC 63 at [136] per Finn, Sundberg and Mansfield JJ.

²⁷The statutory definition draws on passages in the judgment of Brennan J in *Mabo v Queensland (No 2)*, but the statutory definition is the starting point: see *Commonwealth v Yarmirr* (2001) 208 CLR 1 at [7]; *Western Australia v Ward* (2002) 213 CLR 1 at [16]; *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422 at [31]-[32]; *Bodney v Bennell* [2008] FCAFC 63 at [137]-[143].

²⁸*Native Title Act 1993* (Cth) s 223(1)(a).

²⁹*Native Title Act 1993* (Cth) s 223(1)(b).

³⁰*Native Title Act 1993* (Cth) s 223(1)(c).

³¹For examples and discussion of the types of evidence see D Ritter, ‘Native Title Claims Before the Court: Proof and Evidence’ in *Native Title* loose-leaf service, Butterworths, Volume 1.

³²See e.g. *Rubibi Community (No 5) v Western Australia* [2005] FCA 1025 at [252] where Merkel J outlined why anthropological evidence was important.

³³See e.g. *De Rose v South Australia* [2002] FCA 1342 at [314] – [316] and *Sampi v Western Australia* [2005] FCA 77 at [719] – [759].

³⁴Genealogical material (charts, reports etc) were referred to in *Neowarra v Western Australia* [2003] FCA 1402 at [42] and [49] and *Alyawarr, Kaytetye, Warumungu, Wakay Native Title Claim Group v Northern Territory* (2004) 207 ALR 539 at 545 [26].

³⁵See e.g. *Neowarra v Western Australia* [2003] FCA 1402 at [50], [55].

³⁶The Court has received linguistic reports – see e.g. *Sampi v Western Australia* [2005] FCA 777 and oral evidence from linguists – see e.g. *De Rose v South Australia* [2002] FCA 1342 at [306] – [313] and *Daniel v Western Australia* [2003] FCA 666 at [208].

³⁷In *Lardil Peoples v Queensland* [2004] FCA 298 at [19] a report on fish traps was presented by the Senior Curator Archaeology at the Queensland Museum.

Native Title as a compromise: Essentially native title is a legal compromise between the rights of settlers in a ‘new’ land and the land ownership rights of Indigenous people. Critically it is a concept that has been applied after the fact, after settlement and after the grant of land titles by the colonial power, to validate what has already been done and establish a system to protect those remaining Indigenous rights that might be acknowledged over land and waters.

Aspects of the compromise were apparent from the statement in the *Mabo (No 2)* judgment, quoted earlier, that the common law of Australia recognises native title ‘in the cases where it has not been extinguished’.

An aspect of the sometimes uneasy fit between rights under traditional laws and customs and their recognition under introduced law was recognised in the joint majority judgment of the High Court in *Western Australia v Ward* when dealing with the definition of ‘native title’ in the Act: ‘The spiritual or religious is translated into the legal. This requires the fragmentation of an integrated view of the ordering of affairs into rights and interests which are considered apart from the duties and obligations which go with them.’³⁸

There is also a fundamental tension embedded in the Act which asserts its intention to both ‘rectify the consequences of past injustices’³⁹ related to Indigenous dispossession and to meet the ‘needs of the broader Australian community [who] require certainty and the enforceability of acts potentially made invalid because of the existence of native title’.⁴⁰

That native title and the legislative scheme that recognises and protects it has been depicted as a legal compromise is not inconsequential in terms of the perspective native title claimants bring to the mediation process.

2.3 The evidentiary threshold

The Act gave effect to the recognition of Indigenous laws and traditional rights on the same fundamental terms as the reasoning of the *Mabo (No 2)* determination with regard to (a) the definition of native title,⁴¹ (b) how that recognition is validated before the Court, and (c) where that recognition is legally unavailable because of the effect of previous statutory and other acts in relation to areas of land or waters. Both (b) and (c) place substantial limitations on the recognition of native title rights and interests. In order to obtain a determination that native title exists,⁴² whether by negotiation or after a Court hearing, the claim group bears the onus of proving that they have native title rights and interests in relation to the land or waters claimed.

In 2008, informed by the Act and by the common law, and reflected in the native title policies of most state and territory governments,⁴³ the expectation is that to establish native title rights a claim group must demonstrate that:

- before the British Crown asserted its sovereignty (1788 in most parts of Australia, 1829 in Western Australia, and later in the Torres Strait) there existed a society united by their observance of a body of laws and customs

³⁸ *Western Australia v Ward* (2002) 213 CLR 1 at 64-65 [14].

³⁹ *Native Title Act 1993* (Cth) Preamble.

⁴⁰ *Ibid.*

⁴¹ See *Native Title Act 1993* (Cth) which draws on the judgment of Brennan J in *Mabo v Queensland (No 2)*; see *Bodney v Bennell* [2008] FCAFC 63 at [137]-[143].

⁴² *Native Title Act 1993* (Cth) s 225.

⁴³ For example: ‘Preparing Connection Material: A practical guide’ Office of Native Title, Department of Premier and Cabinet, Western Australia (April 2006); ‘Consent Determinations in South Australia: A Guide to Preparing Native Title Reports’ Crown Solicitor’s Office, Government of South Australia (2004); ‘Guide to Compiling a Connection Report for Native Title Claims in Queensland’ Native Title and Indigenous Land Services, Department of Natural Resources and Mines, State of Queensland (2003).

- the pre-sovereignty society has substantially maintained its identity from generation to generation in accordance with the traditional laws and customs through to the present claim group, and
- the contemporary claim group as a whole acknowledges and observes the traditional laws and customs which give rise to their native title rights and interests within the claim area.

Critically, even if claimants can demonstrate a substantially uninterrupted observance of their ancestors' laws and customs over land or waters - allowing for some modification in practices - Crown grants of estates or interests in land (freehold title, leases, licenses, reservations) have wholly or partly extinguished, or have impaired the exercise of, their native title rights and interests. Thus a determination of native title may describe:

- a full complement of native title rights and interests over areas of unallocated Crown land (for example, the right to possess, occupy, use and enjoy the area to the exclusion of all others⁴⁴), and/or
- a set of coexisting rights over areas that are subject to other leases or reserves (for example where the right to exclusive possession has been extinguished but the rights to hunt, fish and gather remain), and/or
- areas where all native title rights have been extinguished (for example, by freehold grants).

2.4 Resolving native title claims by agreement: the scheme under the Native Title Act

Overview: The scheme set out in the Act clearly favours mediation rather than litigation as the primary means of resolving native title claims. The Act makes numerous references to mediation in relation to claimant applications,⁴⁵ and various judges have drawn attention to the importance of mediation to the resolution of native title matters. Justice Wilcox, for example, stated that mediation is 'an integral element of the scheme embodied in the Act.'⁴⁶

According to a Full Court of the Federal Court:

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

Orders resolving native title litigation are usually extremely complex. They usually deal in detail with the entitlements of people who will have an ongoing relationship with each other. Because of these factors, it is preferable that the affected people discuss, and attempt to reach agreement about, those entitlements.⁴⁷

The High Court has also endorsed the desirability of mediated agreements on native title issues. In one case, five High Court Justices stated:

If it be practicable to resolve an application for determination of native title by negotiation and agreement rather than by the judicial determination of complex issues, the Court and the likely parties to the litigation are saved a great deal in time and resources. Perhaps more importantly, if the persons interested in the determination of those issues negotiate and reach an agreement, they are enabled thereby to establish an amicable relationship between future neighbouring occupiers.⁴⁸

⁴⁴ *Native Title Act 1993* (Cth) s 225 (e) states that, in specified circumstances, a determination of native title is a determination of 'whether 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'.

⁴⁵ E.g. *Native Title Act 1993* (Cth) ss 4, 86A, 86B, 86C, 86D, 86E, 108, 123, 131A, 131B, 136A, 136D, 136G, 136GA, 136GB, 136GC, 136GE, 136H, 138E, 138F, 183.

⁴⁶ *Wilkes v Western Australia* (2003) FCA 1206 at [17].

⁴⁷ *Attorney-General of the Northern Territory v Ward* (2003) 134 FCR 16, introductory statement of the Court, per Wilcox, North and Weinberg JJ.

⁴⁸ *North Galanjanja Aboriginal Corporation for and on behalf of the Waanyi people v Queensland* (1996) 185 CLR 595, 617 per Brennan CJ, Dawson, Toohey, Gaudron, Gummow JJ.

The Federal Court has jurisdiction to hear and determine native title applications, and that jurisdiction is exclusive of the jurisdiction of all other courts except the High Court.⁴⁹

If a matter goes to trial, the Federal Court can make a determination that native title exists,⁵⁰ but the Court cannot and will not determine all the consequences of such a determination. There is work for the parties to do to make the Court's orders effective on the ground.⁵¹

Steps in the resolution of native title applications: From the time that an application is filed with the Federal Court, there are distinct steps that need to be taken involving a close relationship between the Court and the Tribunal (including the Native Title Registrar). Responsibility for processing or advancing the resolution of each claimant application shifts between the institutions from stage to stage.

In broad terms the scheme in the Native Title Act is that:

- the Tribunal is responsible for registration testing, notifying and mediating claimant applications (under the supervision of the Federal Court); and
- the Court is responsible for deciding questions of fact or law (either as referred to it by the Tribunal or in hearing an application where the parties have not reached a mediated outcome) and making determinations of native title.

The Court refers all claimant applications to the Registrar of the Tribunal for the application of the registration test and for direct and public notification. More importantly, the Act requires⁵² the Court to refer every s. 61 application for mediation as soon as practicable after the Court has settled the party list unless it considers that mediation will be unnecessary or there is no likelihood of agreement between the parties. In other words, this is Court-ordered mediation as mandated by the Act.

⁴⁹ See *Native Title Act 1993* (Cth) ss 81, 61, 13 and 213. It should be noted that the exclusive jurisdiction of the Federal Court does not include applications referred to in s 69(2) – *Lardil Peoples v Queensland* (2001) 108 FCR 453 at [156] per Dowsett J and [68] per French J. Consequently s 81 does not totally oust the jurisdiction of State Supreme Courts in relation to native title issues – see *Wilson v Anderson* (1999) 156 FLR 77.

⁵⁰ Section 225 of the *Native Title Act 1993* (Cth) states:

A ***determination of native title*** is a determination whether or not native title exists in relation to a particular area (the ***determination area***) of land or waters and, if it does exist, a determination of:

- (a) who the persons, or each group of persons, holding the common or group rights comprising the native are; and
- (b) the nature and extent of the native title rights and interests in relation to the determination area; and
- (c) the nature and extent of any other interests in relation to the determination area; and
- (d) the relationship between the rights and interests in paragraphs (b) and (c) (taking into account the effect of this Act); and
- (e) 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.

Note: the determination may deal with the matters in paragraphs (c) and (d) by referring to a particular kind or particular kinds of non-native title interests.

⁵¹ See *Smith v Western Australia* (2000) 104 FCR 494 at 500 [27].

⁵² *Native Title Act 1993* (Cth) s 86B(1). The only exception is where the Court determines that mediation will be unnecessary or there is no likelihood of the parties reaching agreement – s 86B(3). The factors which the Court are required to take into account are set out in s 86B(4). It is extremely rare for the Court to make an order that an application not be referred to the Tribunal for mediation.

The Flow Chart (Attachment A to this paper) might suggest a simple, step-by-step process from the filing of a native title application to its finalisation by the Federal Court, either by agreement of the parties or following a hearing (unless the application has been withdrawn, struck out or dismissed). In practice, applications do not necessarily follow in a strict order or a simple progression (although the progress of a matter might be regulated by a program endorsed in orders of the Federal Court).⁵³ Applications may move backward and forward between the Court and the Tribunal a number of times. The Court may refer the application as a whole, or particular discrete issues, to the Tribunal for mediation at various times and not only immediately following the notification of an application and the joinder of the parties.⁵⁴ The Court may also order that mediation cease in relation to the whole or part of a proceeding.⁵⁵ The Tribunal in turn can refer to the Court questions of law or fact that arise in the mediation, for the Court to determine,⁵⁶ and the Tribunal may make recommendations regarding the continuation or scope of the mediation before it, when it makes mediation progress reports to the Court, whether reporting at the Court's request⁵⁷ or on the initiative of the presiding member.⁵⁸

The purpose of native title mediation – a determination of native title: When the Federal Court refers a claimant application (or part of it) to the Tribunal, the application is referred 'for mediation, including the ascertaining of agreed facts.'⁵⁹

Subsection 86A(1) of the Act states that the purpose of mediation in those circumstances is to:

assist the parties to reach agreement on some or all of the following matters:

- (a) whether native title exists or existed in relation to the area of land or waters covered by the application;
- (b) if native title exists or existed in relation to the area of land or waters covered by the application:
 - (i) who holds or held the native title;
 - (ii) the nature, extent and manner of exercise of the native title rights and interests in relation to the area;
 - (iii) the nature and extent of any other interests in relation to the area;
 - (iv) the relationship between the rights and interests in subparagraphs (ii) and (iii) (taking into account the effects of this Act);
 - (v) 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.⁶⁰

Agreement on those matters may lead to agreement between the parties on the terms of a determination of native title to be made by the Court.⁶¹ Such a determination is an 'approved determination of native title'⁶² and deals with the matters listed in paragraph 86A(1)(b) of the Act quoted above.

⁵³ See e.g. *Frazer v Western Australia* (2003) 128 FCR 458.

⁵⁴ *Native Title Act 1993* (Cth) ss 86B(1) and 86B(5).

⁵⁵ *Native Title Act 1993* (Cth) s 86C.

⁵⁶ *Native Title Act 1993* (Cth) s 136D(1).

⁵⁷ *Native Title Act 1993* (Cth) ss 86E, 136G(2).

⁵⁸ *Native Title Act 1993* (Cth) s 136G(3).

⁵⁹ *Native Title Act 1993* (Cth) s 86B(1).

⁶⁰ *Native Title Act 1993* (Cth) s 86A(1). The terms 'native title' and 'native title rights and interests' are defined in s 223.

⁶¹ *Native Title Act 1993* (Cth) ss 87, 94A, 225.

⁶² *Native Title Act 1993* (Cth) ss 13(3), (4) and (7), 253.

Non-determination outcomes: In some cases, parties may wish to explore options other than, or in addition to,⁶³ a determination of native title if those options might satisfy their interests and hence deal with some or all of the issues that prompted the claim group to make a native title application. These options are known as ‘non-native title’ or ‘non-determination’ outcomes.⁶⁴

Such outcomes are increasingly being considered because many groups of Aboriginal people in many areas of Australia have little prospect of securing a determination that native title exists. To have the issue unresolved is often not in any party’s interest.

As a Full Federal Court has stated: ‘Not all agreements include a determination of native title, but nonetheless they may involve recognition of the historic association of the claimants with the relevant land.’⁶⁵ The outcomes could include statements of formal recognition of traditional ownership of lands in which native title had been or might have been extinguished, consultation or joint management agreements in relation to the use of traditional lands and the grants of interests in those lands under State or Territory land rights legislation or other legislation.⁶⁶

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

Consequently, although the mediation of native title applications is focused on matters specified in subsection 86A(1) of the Act, the parties may negotiate about those and other matters leading to creative and flexible solutions that deliver benefits beyond narrowly prescribed ‘native title’ outcomes, including various land use, ownership, management, access and planning agreements.

Distinctive features of native title mediation: Native title mediation is quite distinct from most other types of mediation.⁶⁷

- Most mediation (e.g. commercial or matrimonial) involves a small number of parties. In contradistinction, native title mediation often involves scores if not hundreds of parties. Of the claims referred to the Tribunal for mediation at the end of 2006, most had more than 10 respondents and about 10% had more than 100 respondents. The Wotjobaluk People’s native title determination application originally involved 447 parties and was resolved by agreement of all the parties.⁶⁸ The Barkandji #8 claim, recently referred to the Tribunal for mediation, has 393 listed parties including 586 identifiable individuals.
- Most mediations involve people who know each other or at least have had some form of commercial or personal relationship. Native title proceedings usually involve people and/or institutions who have never met, and consequently the Tribunal is involved in developing relationships for the purposes of mediation.

⁶³ A State or Territory or other party may want a determination that native title does not exist before it will settle a claim on the basis of non-native title elements.

⁶⁴ The statutory basis for negotiating procedural and other non-native title outcomes is found in s 86F of the *Native Title Act 1993* (Cth).

⁶⁵ *Attorney-General (NT) v Ward* (2003) 134 FCR 16, introductory statement of the Court, per Wilcox, North and Weinberg JJ.

⁶⁶ See *Frazer v Western Australia* (2003) 128 FCR 458 at [24]. For other examples see the National Native Title Tribunal, *Annual Report 2003-2004*, pp 62-63.

⁶⁷ A fuller discussion of these features can be found in G Neate ‘Reconciliation on the ground: Meeting the challenges of native title’ Pt 1 (2002) 6 *ADR Bulletin* 89, Pt 2 (2002) 7(1) *ADR Bulletin* 112; G Clark ‘Mediation under the Native Title Act’ (2002-2003) 9 *James Cook University Law Review* 74 at 103-105; and L Boule, 2005, *Mediation: Principles, Process, Practice*, 2nd edn, LexisNexis Butterworths 348-356.

⁶⁸ See *Clarke on behalf of the Wotjobaluk, Jaadwa, Jadwadjali, Wergaia and Jupagulk Peoples v Victoria* [2005] FCA 1795.

- Most mediation is supported by a common understanding of the background of the matters in issue. Native title, on the other hand, constantly involves reconciling culturally different views of land and waters.
- Most mediation is a form of alternative dispute resolution, however native title mediation does not necessarily commence because of a dispute but by an application for the determination of pre-existing rights that may affect the rights and interests of others.⁶⁹ Paradoxically, as Professor Boule has noted, mediation in these circumstances can precipitate disputes between the native title claim group and others whose rights and interests could be affected by a determination of native title.⁷⁰
- Native title mediation usually takes years before the issues are resolved.⁷¹

The mediation of native title issues by the Tribunal is the management of a negotiation or conflict by one or more impartial persons who have limited or no alternative decision-making power but who assist the involved parties in voluntarily reaching a mutually acceptable settlement of those issues.⁷²

Consequently the Tribunal has developed an interest-based model for the multi-party and cross-cultural mediation of native title applications in a rights-based context.⁷³

As a general rule, mediation conferences are conducted on a ‘without prejudice’ basis and must be held in private.⁷⁴

Given the numbers of parties and issues, and the range of factors involved in native title mediation, Tribunal members need to use the procedural tools available to them to design an effective mediation program in relation to each application. That involves answering such questions as:

- Who should meet?
- In what order should parties meet?
- Where should parties meet?
- When should parties meet?

⁶⁹ National Alternative Dispute Resolution Council (NADRAC) defines ‘native title mediation’ as follows: ‘The Native Title Act 1993 (Cth) provides for mediation as a way of reaching agreement about native title. The Act does this in the context that native title is essentially a recognition of traditional Indigenous rights in land and waters. In many instances, these rights will now co-exist with the rights and interests of others. A claim is often made without any history of past relations or dispute between the claimants and other persons with interests in the area claimed. The native title process aims at reaching agreement between parties about a number of specific matters. These matters include whether native title exists and, if so, who holds native title; what the native title rights and interests are; and the relationship between those rights and interests and any other interests in relation to an area of land or waters. **The native title process does not necessarily involve a matter in dispute** and includes the mediation of issues involving practical workability. The involvement of different interests and groups, however, means that native title claims may, and often do, give rise to disputes. The term ‘ADR’ could therefore be seen as limited to particular aspects of the native title mediation process, rather than as wholly applicable to the native title jurisdiction.’ *ADR terminology: a discussion paper*, June 2002. Emphasis added.

⁷⁰ L Boule, 2005, *Mediation: Principles, Process, Practice*, 2nd edn, LexisNexis Butterworths, 22.

⁷¹ An analysis of the 110 claimant applications that had been determined at 30 June 2008 shows that:

- for the 63 determined by *consent*, the average time for achieving a determination was 68 months (five years and eight months)
- for the 47 *litigated* determinations, the average time for achieving a determination was 84 months (seven years).

⁷² See *Native title agreement-making in Australia: a guide to National Native Title Tribunal practice*, 2nd edn, National Native Title Tribunal, 2005, p 13 and Chapter 2 for a fuller discussion of principles and theory in native title mediation. The definition of mediation is adapted from C Moore, 1996, *The mediation process: practical strategies for resolving conflicts*, Jossey-Bass, San Francisco, p 10. This definition focuses on negotiation and is not necessarily premised on the existence of a dispute.

⁷³ *Ibid* pp 15-16.

⁷⁴ *Native Title Act 1993* (Cth) ss 136A(4) and 136E.

- How often should parties meet?

Although hundreds of applications have been referred to the Tribunal for mediation, there has been relatively little judicial comment on the role of Tribunal mediation or the respective roles of the Court and the Tribunal in relation to the mediation of claimant applications. The most detailed judicial exposition of the role of the Tribunal in the mediation of claimant applications, and the most expansive characterisation of that role, is found in the judgment of Justice French in *Frazer v Western Australia*.⁷⁵

2.5 Factors that affect the pace and progress of native title mediation

Apart from difficulties inherent in recognising the relationship between native title based on traditional laws and customs and other interests under a statutory regime which recognises and protects them, the Tribunal faces a range of issues which impact on the nature and ultimate success (or otherwise) of the mediation services it provides.

The pace and progress of mediation on a case-by-case basis will be influenced by factors which may vary in the course of mediation, particularly when mediation extends over many years. Some factors will affect merely the timing and pace of mediation. Others will go to the heart of what is being mediated and the possible outcomes. The factors include the following:

The state of readiness of the application: Many claimant applications were lodged before sufficient research was undertaken to support substantive negotiations or litigation (e.g. connection reports or comparable information have not been prepared). In other words, there is insufficient information to provide the basis for substantive negotiations with respondent parties. Some applications will need to be significantly amended (e.g. in relation to the area covered, the composition of the group, or the native title rights and interests claimed) before a negotiated outcome (particularly a determination of native title) can be reached, or even before the claimants will attract resources to engage in substantive mediation

The number of parties, the range of interests and the variety of issues involved: As noted earlier, there can be scores and sometimes hundreds of parties to one proceeding. Consequently, numerous interests, issues and attitudes will be brought to the mediation table. Where there are many parties, they may be grouped according to common interests (e.g. pastoralists, explorers, small miners) with common representatives. However, parties with similar legal interests do not necessarily approach the mediation with the same perspective and not all will seek the same outcomes. Mediation has to be designed and conducted with these differences in mind.

The willingness of the parties to participate in the process: Many people and bodies are drawn into the mediation of native title proceedings not because they want to be there but because they consider that they need to be involved, at least to some degree, to protect their interests. Some are reluctant participants and may resent the process. The willingness of parties to be involved at relevant stages and to provide options for possible settlement is essential to the progress and any outcomes of the process. If key parties are unwilling to take an active role in mediation, the progress and potential outcomes will be impeded.

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

In *Frazer v Western Australia*,⁷⁶ Justice French took note of the ‘harsh practical realities of resource limitations on all parties, the fact that some parties are unrepresented, the fact that there are outstanding

⁷⁵ (2003) 128 FCR 458, 198 ALR 303.

⁷⁶ (2003) 128 FCR 458 at [32].

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.’

Different government policies: There can be significant differences in the approach over time of State and Territory governments to mediating native title claims, both within the same jurisdiction and between jurisdictions.⁷⁷ The Tribunal has had to mediate in a sometimes highly charged political environment. The timing of electoral cycles with their caretaker conventions and perhaps unstated political realities, together with changes of Ministerial portfolio or change of government, can significantly affect the pace and direction of mediation.

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

The resolution of threshold issues: Some parties will not wish to be actively involved in mediation until a threshold issue is resolved (e.g. overlapping and disputed claimant applications, or the establishment of a claim group’s connection to the area). Many claimant applications overlap other applications (in part or in whole) and many of the overlaps illustrate disagreement between neighbouring Indigenous groups about the extent of their traditional country. Governments and some other respondent parties will usually not participate in substantive mediation unless and until the overlaps are resolved (e.g. by a native title representative body exercising its dispute resolution functions, the Tribunal mediating between neighbouring groups, or the Federal Court delivering judgment about who are the correct people for each area).

External time constraints or deadlines: There are no statutory time limits on the mediation of native title applications under the Act. In that sense, the mediation process is ‘open-ended’. However, because the mediation of native title applications is initiated when an application is referred by the Federal Court to the Tribunal, and the Court then 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 trial and may order that mediation cease.⁷⁸

Changes in the external environment: Native title law and practice continues to change. Developments in the law (e.g. by way of judicial decisions or legislative enactment) can affect the range of outcomes that might be available to the parties or the conditions that need to be satisfied in order to achieve a particular outcome (e.g. a consent determination of native title).⁷⁹ Because the process of resolving a native title

⁷⁷ See e.g. *Bullen v Western Australia* [2002] FCA 992 at [7].

⁷⁸ See e.g. *Frazer v Western Australia* (2003) 128 FCR 458 at [29].

⁷⁹ Until recently, the law was constantly changing, resulting in ongoing uncertainty and negatively impacting on ascertaining what the various parties’ ‘rights and interests’ are. While the Act itself has only been substantially amended in 1998 and 2007, it has been subject to ongoing interpretations by the Federal Court and the High Court. Major High Court decisions include:

(i) *Wik Peoples v Queensland* (1996) 187 CLR 1, which determined that the Queensland pastoral leases in question did not necessarily extinguish native title;

(ii) *Fejo v Northern Territory* (1998) 195 CLR 96, which determined that native title is extinguished by a freehold grant of fee simple;

(iii) *Commonwealth v Yarmirr* (2001) 208 CLR 1, which determined that native title could exist over the sea and seabed, but not exclusive native title as it would be inconsistent with the common law public rights of navigation and fishing and the right of innocent passage;

(iv) *Western Australia v Ward* (2002) 213 CLR 1, which determined whether various tenures in Western Australia and the Northern Territory extinguished native title, the nature of native title (bundle of rights) and the relationship of the Native Title Act and the common law;

application usually takes some years to complete, some of the parties may change or the attitude of a party may change during the mediation (e.g. as a result of a change of government after an election). Where judgments on significant points of law are subject to appeal, negotiated outcomes may be delayed for some years while the appeal process is completed.⁸⁰ It should be acknowledged, however, that agreement-making now takes place in an environment in which the law about where native title exists and what native title rights and interests might be recognised is much clearer than in the early years of the Native Title Act. Parties also are more aware of the options for settlement and the process for reaching agreement. Although some matters of detail are being litigated, parties are better placed now than ever before to know what might or must not be included in a determination that native title exists. There are examples of claims being settled by consent even where there was some uncertainty about aspects of the law.⁸¹

Such factors must be taken into account in each phase of the mediation process and must be factored into the design of the mediation of each application. They operate as constraints on both the design and the progress of mediation, and provide opportunities to the Tribunal to assist parties by developing their capacity to participate appropriately in the process.

2.6 The native title connection process

The evidentiary criteria cited above set the threshold for establishing that any particular Indigenous claim group holds native title rights and interests to a particular area of land or waters. The process of providing sufficient evidence of native title – generally referred to as the ‘connection’ process - forms the centrepiece of native title mediation as contemplated by subsection 86A(1), i.e. whether native title exists and, if it does, who holds the native title and the nature, extent and manner of exercise of the native title rights and interests in relation to the area. More than any other factor, the management of native title connection has shaped native title mediation and has influenced the development of specific mediation practices. How specialised those practices are, and whether the focus on native title connection has ‘captured’ the mediation process to its detriment, is a recurring issue in any analysis of the mediation of native title claims.

The dominant convention in native title mediation is that native title claimants will prepare material containing evidence of their ‘connection’ to substantiate their claimed native title rights and interests in relation to their claim area. The evidentiary material – often described as the ‘connection report’ (which may be a number of written and/or audio-visual texts) – is usually developed by an historian and/or an anthropologist working with the claimants and assisted by a lawyer.⁸² The material is usually then presented to the relevant State or Territory government which conducts or commissions an expert assessment of the material. The completion of all connection research and its assessment by a state government can take anywhere between one and six years,⁸³ particularly if supplementary connection reports are called for to fill perceived ‘gaps’ in the original material.

(v) *Wilson v Anderson* (2002) 213 CLR 401, which determined that leases granted under the *Western Lands Act 1901* (NSW) gave exclusive possession and thus extinguished native title; and

(vi) *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422, which determined the nature of native title and the relationship between the rights and interests the subject of the Act, and the rights and interests recognised by the common law.

Each case decided by the High Court was extensively litigated in the Federal Court, with numerous and lengthy decisions being delivered over extensive periods of time. In some cases there were substantial differences in the interpretation of key aspects of the legislation by the trial judge, the Full Court of the Federal Court and the High Court.⁸⁰ For example, there was a virtual halt of mediation of claimant applications over pastoral land in the Northern Territory in light of the April 2004 decision of the Federal Court in *Alyawarr, Kayetye, Warumungu, Wakay Native Title Claim Group v Northern Territory* (2004) 207 ALR 539, the subsequent judgment of the Full Federal Court on appeal ((2005) 145 FCR 442, 220 ALR 431), and the resolution of a special leave to appeal application to the High Court.

⁸¹ See *Ngalpil v Western Australia* [2001] FCA 1140 at [30]; *Nangkiriny v Western Australia* [2004] FCA 1156 at [6].

⁸² For the role of lawyers in this process see statements of Federal Court judges in *Harrington-Smith v Western Australia (No 2)* 130 FCR 424 at [18]-[27]; *Jango v Northern Territory* [2004] FCA 1004 at [8]-[20].

⁸³ Bauman T, Catlin J & Farrell R, ‘Getting Outcomes Sooner’, National Native Title Tribunal and AIATSIS, July 2007, 10.

The length of time for connection research and its assessment to be completed has been the focus of concern and comment. Both the Federal Court and the Tribunal have taken initiatives in attempts to expedite native title mediation. The Court has:

- on occasion directed applicants to explain why preservation evidence or limited evidence should not be taken by the Court for claims that have been in mediation for a long time⁸⁴
- supported early neutral evaluation of claimant evidence as part of mediation,⁸⁵ and
- commissioned expert reports on some questions of native title evidence⁸⁶ while mediation is underway.

Conferences of experts (or ‘hot tubbing’), which have been conducted in connection with native title litigation⁸⁷ (and Tribunal mediation), have also been a factor in some native title claims settled by consent.

The Tribunal has historically favoured other forms of intervention earlier in the mediation cycle, for example, by providing parties with a compendium of publicly available anthropological and historical reference materials before other research commences. In recent years the Tribunal has explored a number of innovations in the management of geospatial and genealogical data aimed at expediting agreement on connection (described in part 5 of this paper).

None of the strategies promoted by either the Federal Court or the Tribunal has as yet had more than limited take up within native title mediation or has significantly reduced the period taken to resolve claims. A central factor in the lack of engagement seems to be the ultimate acceptance by native title claimants and their legal representatives of the conventions established by most State and Territory governments for receiving and assessing connection as a first step in mediation. For most State and Territory governments, ‘substantive’ mediation does not commence until after they have assessed connection material and established to their satisfaction that the claimants have a legally defensible case for recognition of their native title rights. This means that, in most jurisdictions, the development of an informed position on native title evidence is confined to a bilateral exchange between the claimants and the relevant government, ostensibly during mediation but in practice at a remove from the mediator and all other respondents. Furthermore, after a government has satisfied itself on its position on proof, it will not usually assist other respondents to obtain access to the same material or relevant sources of information apart from, in some instances, by providing parties with a summary of the evidence and the government’s assessment of it. Nor will a government address other respondents’ concerns with the claimants. Native title claimants likewise usually resist providing their connection material to other respondents. There are a range of consequences. This convention:

- serves to block potential interventions by either the Federal Court or the Tribunal that might expedite the connection assessment process, even when the claimants and the state reach an impasse
- means there are effectively two processes related to native title evidence: one in which the claimants share information with the state, followed by a second process in which the claimants resist sharing the same range of information with other respondents
- removes the primary question of the substance of native title proof from most if not all of the mediation process, and

⁸⁴ See various orders made by French J at the Pilbara and Geraldton regional Case Management Conference held 29 July 2007.

⁸⁵ Ritter M, ‘Preservation Evidence and Early Neutral Evaluation’ (Paper presented at the 2004 AIATSIS Native Title Conference, Adelaide, 3-4 June 2004) 12.

⁸⁶ *Talking Victoria October 2006* (2006) National Native Title Tribunal, <http://www.nmtt.gov.au/News-and-Communications/Newsletters/State-E-Newsletters-Archive/Documents/State%20e-newsletter%20TNT%20Vic%20Oct%202006.pdf> at 10 June 2008.

⁸⁷ *Harrington-Smith on behalf of the Wongatha People v Western Australia (No 9)* [2007] FCA 31 at [15] and [404]-[406].

- maintains a primary focus on right-based negotiation over interest-based mediation, thus narrowing the substance of mediated agreements.

The secondary impact is that this process quarantines much of the claim mediation to a timeframe largely determined by the State or Territory government, delaying mediation on both connection and on matters that are not about connection but are relevant to achieving a consent determination. Notwithstanding that:

- the Act (s. 86A(1)) provides that the purpose of Tribunal mediation is to assist parties to reach agreement on whether native title exists, who are the native title holders and what the native title rights and interests are, and
- that, generally speaking, all parties have to agree before a consent determination of native title can be made,⁸⁸

the State-centric assessment of evidence in its current form accounts for the observation that the mediation process has in most instances 'simply relocated the evidentiary process from the Court to, largely, State or Territory governments'.⁸⁹

2.7 The time factor

Concern has been expressed about the long time it usually takes to resolve native title claims.

Ultimately the native title system concerns the recognition and protection of traditional rights of Indigenous persons. It is clear that changes to the system ... are needed to ensure those rights are enjoyed by native title holders within their lifetimes. [Former Attorney-General Phillip Ruddock, May 2006.⁹⁰]

The tragedy of Native Title cases languishing for years, sometimes for so long that Indigenous elders pass away before any settlement, is something that must be addressed. [Attorney-General Robert McClelland, June 2008.⁹¹]

The dominant challenge in the mediation of native title claims is to increase the rate of claim resolution while maintaining the highest standards of accountability and fairness. An analysis of the 110 claimant applications that had been determined by 30 June 2008 shows that:

- for the 63 determined by *consent*, the average time for achieving a determination was 68 months (five years and eight months), and
- for the 47 *litigated* determinations, the average time for achieving a determination was 84 months (seven years).

Those averages are likely to increase rather than decrease in the immediate future. Of the 504 current claimant applications as at 30 June 2008:

- 118 (or 23 %) were lodged in or since 2003, i.e. in the past five years
- 277 (or 55%) were lodged between 1998 and 2002, i.e. in the past six to 10 years, and
- 109 (or 22%) were lodged earlier, i.e. have been in the system for between 11 and 14 years.⁹²

The majority of the native title claims that have been resolved by mediation are over areas of land and waters with a limited number of parties and where remoteness has served to protect cultural traditions. By

⁸⁸ *Native Title Act 1993* (Cth) s 87, *Munn v Queensland* (2001) 115 FCR 109. In 2007 the Act was amended to allow the Federal Court to make a determination for a part of an area with the agreement of specified categories of parties: s 87A.

⁸⁹ Bauman, Catlin & Farrell, 'Getting Outcomes Sooner', National Native Title Tribunal and AIATSIS, July 2007, p. 32.

⁹⁰ Ruddock P, 'Native Title: The Government's Proposals for Reform' (Speech delivered at the AIATSIS Native Title Conference, Darwin, 26 May 2006).

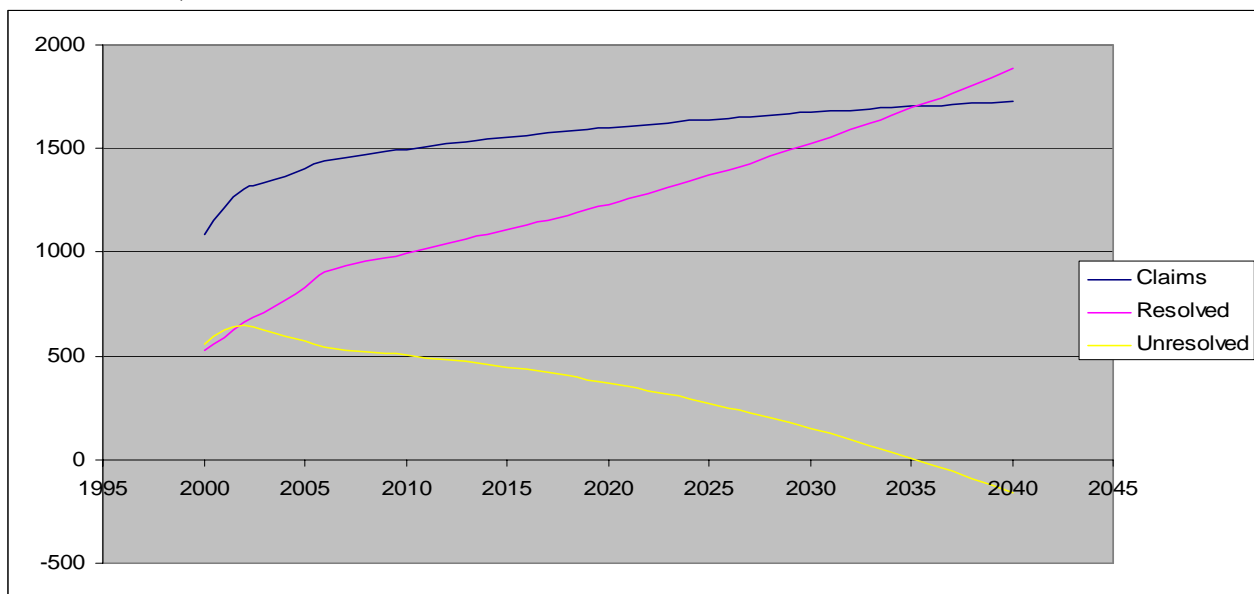
⁹¹ McClelland R, (Speech delivered at the 2008 Non-Government Organisation Forum on Domestic Human Rights, Canberra, 10 June 2008).

⁹² See *National Report: Native Title*, June 2008, at www.nntt.gov.au.

contrast most of the remaining claims fall over areas where there has been a longer history of European land settlement and land title and, consequently, a higher level of Indigenous dispossession and cultural displacement. In some remote area claims there are as few as two active parties – the State Government and the native title applicants - whereas claims with an urban-rural mix can have dozens or even hundreds of parties.

The graph below shows the recent and projected rate of resolution of claimant applications to the number of applications lodged. At the current rate of claim lodgment and claim resolution (averaged since 2000) native title will not be concluded until about 2035.⁹³

The graph assumes that claims lodged continue to increase at the average of the past seven years (3.6% cumulative) and resolutions continue to increase at the average of the past seven years (2.15% cumulative)



For the purposes of this paper, it should be evident that the current mediation process is greatly attenuated. Significant (and unnecessary) delay contributes to justice denied as many senior custodians of cultural knowledge are not surviving until the end of the claims process. Their passing logically places more pressure on the processes for obtaining, preserving, conveying and making use of their knowledge as part of resolving native title claims.

2.8 Defining ‘in mediation’

Applications referred to the Tribunal for mediation: At 30 June 2008, approximately 54 per cent of the 504 native title claimant applications had been referred to the Tribunal for mediation. However, it is likely that only about half of those could be described as being ‘in mediation’ with the Tribunal. Many of the claims are not being substantively mediated because they are not sufficiently prepared for that purpose or parties lack the resources to engage in mediation at that stage.

The dominant scenario is that a claim will enter a timeline that may span 7-10 years, within which it may be formally ‘in mediation’ under Federal Court orders within a year of registration testing but where practical mediation may not occur for more than five or more years.⁹⁴ The scenario outlined in Table 1 below is not atypical.

⁹³ Ibid.

⁹⁴ The National Native Title Tribunal’s *Annual Report 2006-07* stated: ‘although 52 per cent of current applications have been referred to the Tribunal for mediation, many of them are not being substantively mediated. Indeed it may be

Table 1

Month	Claim Status
0	Claimant application is lodged with the Federal Court
4*	Application is registration tested and, where all statutory conditions are satisfied, registered on the Native Title Register ('prima facie evidence')
17*	Federal Court refers the application to the Tribunal for mediation
41	Connection research commences
53	Connection research completed; State assessment commences
59	State assessment completed; supplementary report requested
65	Supplementary report completed; State assessment commences
71	State agrees for the purpose of mediation to recognise native title rights over some/all of the claim area; mediator convenes conference/s of all parties. In the view of the States/Territories substantive mediation usually commences here.
83	All parties agree to a consent determination
86	Federal Court determines native title

* average time span post-1998 ⁹⁵

Mediation of related issues: Mediation need not be 'on hold' in the period during which connection material is prepared, examined, supplemented and accepted. Other important work can be done with parties. Tenure research can be undertaken to identify areas where native title will not be recognised because it has been extinguished by prior grants of tenure. Some respondent parties may be willing to negotiate land use and access agreements with the native title claim group. If such agreements are not conditional on a determination of native title, they might be negotiated before connection is proved. Those respondent parties may withdraw from the proceedings on the basis that their interests have been accommodated in the agreements. Alternatively, those parties may take a less active role in the mediation until the final determination stage is reached, when the various agreements provide a suite of agreements referable to, and giving effect to, the determination of native title.

Regional context of each native title claim: An unusual feature of native title mediation is the regional context in which native title claims are considered, managed and resolved. Various factors point to the need for the development of regional programs for the mediation of claimant applications.

- Native title representative bodies and native title service providers are recognised and funded under the Act to perform a range of functions to assist groups make and advance their native title claims.⁹⁶ These bodies usually cover extensive areas (in some instances an entire state) and they coordinate

that only half of those applications could be described as 'active' because mediation is occurring, or because the Tribunal is involved in developing research reports or undertaking geospatial analysis to assist the parties: p 20.

⁹⁵ Table created by the National Native Title Tribunal Operations Division, April 2008.

⁹⁶ The *Native Title Act 1993* (Cth) confers on each native title representative body facilitation and assistance functions (e.g. to research and prepare native title applications and assist claimants in mediations and negotiations), dispute resolution functions and other functions: ss 203B-203BK. Other bodies can be funded to perform all or some of the functions of a native title representative body: s 203FE.

the preparation of supporting materials and assist groups in the mediation of their claims. Such bodies do not have the resources to deal with all claims simultaneously.

- By operation of the Act, the relevant State or Territory minister is a party to every proceeding that is commenced by an application over an area in the State or Territory.⁹⁷ In some jurisdictions there are more than 100 current claimant applications to be resolved, and the government does not have the resources to deal with all claims simultaneously.
- Some other respondent parties and their representatives are involved in numerous proceedings and have constraints on how many proceedings can be actively progressed at the same time, even when the parties receive assistance from the Attorney-General.⁹⁸
- As noted earlier, many claims overlap (in part or in whole) one or more other applications and many of the overlaps illustrate disagreement between neighbouring Indigenous groups about the extent of their traditional country. Consequently, it is sometimes difficult to mediate one claim in isolation from one or more others. Indeed, people from neighbouring groups may be respondents to one group's claim.

For those and other reasons it is preferable to develop, and revise from time to time, regional programs for mediation so that limited resources are applied in a coordinated way to achieve outcomes. Regional planning and the roles of the Tribunal and the Court in relation to it are discussed in part 4.2 of this paper.

3. Case studies

As noted earlier, native title mediation is almost always multi-party mediation. In any context, multi-party mediation can be complex. This is simply because with more parties the number of pathways to an agreement increases, as do the number of potential diversions away from an agreement. Lawrence Crump noted that:

[N]egotiations involving multiple parties are complex because of the potential of interacting variables. Understanding multi-party mediation is hindered by the lack of theory that can adequately explain the diversity of interactions that typically characterise such negotiations. Negotiation sides, parties, roles and issues are just some of the many variables that interact to produce outcomes.⁹⁹

Another commentator refers to the problems associated with 'coalition formation' and 'problems of process management'¹⁰⁰ as key differences between multi-party and two-party negotiation.

Both observations have direct resonance with native title mediation in Australia where even a relatively straightforward claim can have a high level of 'diversity of interactions'. That diversity is magnified laterally by:

- the cross-cultural facets of interactions between the parties and their representatives involved in interest-based mediation in a rights-based context, and
- the fact that a region may have 10-20 claims that are moving at different speeds through the mediation cycle described in Table 1 above. Baumann alluded to the same factor in her statement that:

Native title and other agreement and decision-making processes are diverse and complex, particularly in moving from single issue approaches to more comprehensive

⁹⁷ *Native Title Act 1993* (Cth) s 84(4). A Minister may give the Federal Court written notice that the Minister does not want to be a party to a particular proceeding.

⁹⁸ *Native Title Act 1993* (Cth) s 183. See *Guidelines on the Provision of Financial Assistance by the Attorney-General under the Native Title Act 1993*.

⁹⁹ Crump L, 'Multiparty Negotiation: What is it?' (2006) 8 *ADR Bulletin*, 125.

¹⁰⁰ Susskind L et al, 'What We Have Learned About Teaching Multiparty Negotiation' (2005) 21(3) *Negotiation Journal*, 395-408.

regional ones. Numerous process issues arise in incorporating Indigenous priorities and requirements and a range of interventions might be required.¹⁰¹

The two case studies that follow provide some insight into the substance of native title claim mediation and the interactions that occur. Both draw on mediation reports distributed to the parties as a record of each mediation conference and on mediation progress reports made by the Tribunal to the Federal Court.¹⁰² Some details have been omitted and others simplified and no confidential material is exposed. Broader observations are based on analysis by members of the mediation team.

Case Study 1¹⁰³ profiles the matters that occurred during approximately 18 months of mediation towards a consent determination of native title. Case Study 2¹⁰⁴ describes mediation between representatives of six overlapping native title claims.

As examples of mediation methodology, both cases followed a largely orthodox pattern of identifying the issues and setting agendas, albeit in a lengthy time frame and with some forms of interventions that are specific to native title. Both case studies should provide some fundamental understanding of the demand for the mediator to have an ongoing focus on process design and time frames while simultaneously mediating on particular matters between two or more parties. They should also illustrate the flexible nature of native title claim mediation with, according to need, the mediators drawing on elements of facilitative, transformative, interest-based and rights-based mediation.

It should be noted that in Case Study 1 there was not an overt centre of conflict at the outset as no party necessarily disputed the State's finding that the claimants could demonstrate that they had native title rights and interests. There were multiple issues in mediation, however, related to how to articulate the claimants' native title rights and interests at law and how those rights coexist with the rights of other landholders. By contrast, Case Study 2 has a vivid point of conflict in the form of competing claims from different groups over who could legitimately claim traditional cultural rights to an area of land. That conflict essentially negated the potential for any of the individual claims to be resolved.

3.1 Case study 1

Case Study 1 is based on the mediation of a claim over 18 months from the time that the State Government accepted a claim group's evidence of native title rights to a point relatively close to a consent determination of native title. Only the State Government, the first respondent, had access to evidentiary material about connection provided by the claimants. The claim was in a remote area, including a long coastal strip, pastoral leases and arid unallocated state lands. It had six active participants in mediation conferences, most of whom represented multiple parties (e.g. commercial fishers, pastoral leaseholders). State and Commonwealth Government representatives also participated on behalf of the full spectrum of government interests and agencies. The table below, drawn from an analysis of mediation conferences over 18 months, provides a sample of the individual issues that the mediation raised and the duration it took to finalise a position in relation to those matters.

¹⁰¹ Bauman T, 'Final Report of the Indigenous Facilitation and Mediation Project July 2003-June 2006: research findings, recommendations and implementation', Australian Institute of Aboriginal and Torres Strait Islander Studies, 11.

¹⁰² *Native Title Act 1993* (Cth) s136G.

¹⁰³ Sackville A & Catlin J, 'NNTT Table of Matters Raised in a Native Title Claim Mediation', National Native Title Tribunal internal document, May 2008.

¹⁰⁴ Quinn R, Willaway P & Catlin J, 'NNTT Analysis of a Mediation of Overlapping Claims - 2006-2007', National Native Title Tribunal internal document, May 2008.

degree of difficulty but simply a reflection of negotiation tactics by one or more parties. The practical dynamic was that:

- On some matters, initial in-principle agreement was not difficult, but final agreement demanded greater specificity and opened up other questions. In particular the development of the minute of the consent determination, which spanned the entire schedule, generated new requests for specific information or proof as the process became more finite.
- Some matters were prerequisites for the determination. For example, an indigenous land use agreement (ILUA) between the claimants and the pastoralists was a vehicle for bilateral matters that would not be covered by the consent determination but were complementary to it.
- Informal coalitions formed between respondents over some issues, although coalitions were not automatic or necessarily lasting. While there was common ground between respondents on some issues, there was no shared interest on others.
- No disputes of themselves delayed the mediation process. Most delays emanated from either the time taken to obtain resources to address a matter (affecting both claimants and respondents), from external factors (e.g. the impact of the wet season on travel, Indigenous peoples' funerals, and mustering time) and from negotiation strategies.
- Both the claimants and some respondents withheld a definitive view on some matters while they ascertained what trade-offs were involved across the board. Thus the weight given to some matters rose and fell depending on how other matters were being treated.

The dynamics of Case Study 1 are consistent with the features of multi-party mediations in other contexts where there may be a shifting set of issues that takes time to narrow into an agreement. Case Study 1 should also provide some indication that the mediator needed to shift between a general facilitation or planning role and direct mediation between different parties. In what is standard Tribunal practice, the mediation team regularly reviewed progress on specific issues and this informed feedback to the parties and to the Federal Court. The mediator presence was relatively high within the framework of regular all-party conferences, the production of meeting agendas, meeting summaries and correspondence tracking sheets, and in the management of some bilateral and trilateral mediation conferences. The Tribunal also provided mapping assistance to expedite certain discussions related to boundaries and the location of specific sites within the claim area. This included one mediation session using Google Earth.

Ostensibly minor decisions by the mediation team, like whether to convene a conference within the claim area or to seek the presence of landholders (in addition to their lawyers) at particular conferences, at times had a significant influence on the dynamic. Similarly, the eventual adoption of the connection evidence, sight unseen, by certain non-government respondents was the result of the mediator's intervention. As in most mediations, small or large, the mediator's capacity to identify and propose options for the parties to consider was a significant factor.

3.2 Case study 2

Case Study 2 involves mediation between six disputed overlapping native title claims. The claim groups had a history of friction despite (or perhaps because) most of the claim groups had blood relations in other groups. A number of previous attempts to mediate between the claim groups had failed. Mining companies had, at some stage or other, entered agreements with each of the six groups, theoretically on the assumption that each had exclusive rights to 'speak for country'. The distribution of benefits from such agreements was a source of conflict between and within the groups.

Case Study 2 has a number of particular features:

- There was very close involvement between the mediation team and the parties. Nine mediation conferences took place over 12 months with all parties and there were multiple one-to-one meetings with different groups or families. During the mediation an uninterrupted dialogue took place between the mediation team and the participants. There were scores of phone calls, centred largely on whether individuals would put trust in the mediation process.

- The mediation team was directly involved with threshold issues of whether native title could be proved to exist.
- The mediation gave some glimpse of the complex social interactions associated with many native title claims.
- It provides some insight into the interplay between claim mediation and the Federal Court.

Of the six claims, the most recent had been in mediation for seven years and the oldest for 11 years. After a lengthy history of false starts, the Federal Court ordered mediation aimed at ending the impasse between the six claim groups. A Tribunal mediator convened a conference to assess whether constructive mediation was feasible but, due to the volatility of the parties, was forced to terminate the meeting. The mediator advised the Federal Court against further mediation but the Court ordered all claim groups to attend further mediation with the Tribunal. The mediation unfolded in a number of steps, each step taking one to two months:

Step 1 - setting ground rules: In the first joint mediation conference the mediator confronted the fundamentals of settling:

- who was authorised to represent each of the different groups, and
- how the meetings would be conducted.

Five groups ultimately adopted a rigorous set of meeting rules and agreed to send two authorised representatives to each meeting.

Step 2 - clarifying the legal status of the claims: The next critical step was to have the parties acknowledge that their claims risked dismissal by the Court if claimants did not engage in a strategy to resolve overlaps. In brief, their Best Alternative To A Negotiated Agreement (BATNA) between themselves was to see the claims dismissed or referred to trial.

Step 3 - clarifying the options: Recognition that the status quo was unsustainable (Step 2) did not mean ready acceptance of potential solutions (Step 3), all of which required compromise between conflicting groups. While a process did emerge for a way ahead, longstanding tensions between the groups never disappeared.

Step 4 - establishing the scope of existing evidence: Six months into the mediation process, the parties were still strongly disputing each other's right to claim traditional links to land. After a volatile joint session, representatives agreed to share all their documentary evidence (research reports, family records, etc.). In blunt terms, this was the mediator's 'put up or shut up' initiative which meant that the groups had to move from general assertions to exposing what specific proof of connection each group held. The material was subsequently tabled and analysed by all groups, but disputes continued on its interpretation. In response, the mediator proposed that an historian employed by the Tribunal would audit the material. The historian then spent two months collating the material, refining family trees and consulting individual families.

Step 5 - recasting the representative structure around ancestors: The Tribunal's historian affirmed that most of the claim groups could establish links to ancestors who could be located in the region of the claims, but noted that some of the same ancestors were being cited in different claims and given varied cultural identifiers. After more debate, the parties agreed with the mediator that further planning had to be conducted along family lines, defined as 'descendants of' a particular ancestor. In effect, this meant people with the same ancestors had to re-engage to see if they could agree on:

- their cultural history, and
- who would represent them.

Step 6 - defining ancestor lands and who might be included: Following extensive consultations each of the family representatives reported back to the combined group along the following lines:

We are the descendants of [Ancestor Name].

We identify as people traditionally described as [Tribal/Group Name].

We claim native title rights over [Defined Area of Land].

We include [Other Named Ancestor/s] in our traditional grouping and accept [Named Families] as part of our traditional grouping.

(If relevant) We are uncertain about the inclusion of [Named Ancestor] and [Named Family/ies].

We are seeking more research into these [Named Matters].

A matrix produced by the mediation team had an appearance along these lines:

Descendants of Ancestor	Traditional Naming or Grouping	Traditional Lands	We include ... (other ancestors, families)	We are uncertain about ... (ancestors, families)	Research required into ...
Ancestor 1	A	Alpha	No ancestors, no descendants	Ancestors 2, 3, their descendants	Tribal origins of ancestors 2, 3
Ancestor 2	B	Alpha+	Ancestor 1; descendant families	Ancestor 3, descendant family	Origins of ancestor 3
Ancestor 3	A-B	Alpha-	Ancestor 1 and descendants	Ancestor 2, descendant family	Origins of ancestor 2
Ancestor 4	C	Beta	Ancestor 5	Ancestors 2,3	Origins of ancestor 2, 3
Ancestor 5	B-C	Alpha-Beta	Ancestor 1, 4, some of descendant families	Ancestor 3	Origins of ancestor 3

The matrix showed where there was a substantial intersection of interests and where there were competing or disputed interests. In effect, it distilled the basis for the competing claims and provided a platform for future planning (e.g. where a new claim or claims could be lodged based on a consensus of interests). That goal, however, was contingent on the parties being able to maintain a focus on their own decision-making process and on being able to continue to 'agree to disagree' for the time being about some competing interests.

Step 7 - forward planning: The next step relied essentially on the combined group attracting the support of the regional Aboriginal land council (the native title representative body).¹⁰⁵ The land council considered the outcomes of the mediation and agreed to assist the groups to work towards new un-overlapped claims. The land council's key proviso was that the combined group continued to function cooperatively.

Step 8 - mediator withdrawal: Land council support essentially meant the Tribunal mediators would withdraw and report to the Federal Court on the existence of a plan that would, in theory, see replacement claims lodged. At the last planned mediation conference with the combined group, less than a quorum attended and the meeting was deferred. In the following week members of one claim group renewed legal action against other members of the same claim group about access to funds held in trust. This ended any capacity for that group to participate in joint planning effectively. Within days, a second group advised of their determination to pursue their original claim and distanced themselves from the working group. The final meeting of the combined group was cancelled and the land council suspended its offer of support. The mediator then reported to the Federal Court that there was no agreement and that the Tribunal would cease mediation.

¹⁰⁵ See *Native Title Act 1993* (Cth) Part II – Representative Aboriginal/Torres Strait Islander Bodies.

In terms of the Tribunal's input to the management of some key issues of proof, in this instance success in identifying ancestors and family trees may have meant the mediation courted its own demise as it brought the points of difference into the foreground. Once the fundamentals were identified, the parties had a factual basis on which to proceed or, as the case study revealed, possibly a clearer motive to retreat to the temporary safety of their fixed legal positions. In the end, a conflict over financial entitlements provided the impetus for that retreat.

With regard to the role of the Federal Court, it is appropriate to comment that the Federal Court has been reticent to dismiss native title claims that fail to progress even after intensive mediation. The Court's reticence to act, however, should also be balanced with the reluctance of a party to any of those claims to seek to have the application struck out for failure to comply with requirements of the Act¹⁰⁶ or to apply for orders that mediation cease.¹⁰⁷ This is not an insignificant factor in terms of the expectations brought to native title mediation.

4. Mediation interventions – statutory powers

4.1 Individual claims

The role of the Tribunal is to mediate in accordance with the provisions of the Native Title Act. The Act does not define 'mediation' but confers on the Tribunal wide discretionary powers and ancillary functions in relation to the mediation of each application referred to it by the Court.

Although native title claims mediation around Australia varies from region to region and claim to claim, the two case studies should provide some insight into the general methodology. In both cases the mediator functioned as a manager and process designer as well as a 'hands-on' mediator in multilateral and bilateral negotiations. To some extent those dual roles are also implicit in the Act, more evidently since the 2007 amendments to it which now provides Tribunal mediators with a series of powers to:

- influence how claims are prepared for mediation, and
- manage participation in the actual mediation.

The member of the Tribunal who the President directs to conduct mediation in a particular proceeding¹⁰⁸ has considerable scope in establishing and managing a timetable for the mediation of the application. The Act, fittingly, offers no advice on how to conduct individual mediations.

Based on 2007 amendments to the Act that followed a review of key aspects of native title mediation commissioned by the Australian Government,¹⁰⁹ it would seem clear the Federal Parliament agreed that the Tribunal should have increased authority to influence mediation planning both at a regional level and in individual mediations. The statutory powers available to the mediator are listed below, showing those that existed before 2007 and those that were added in 2007. The pre-2007 powers, which were retained in 2007, are largely self-explanatory and centre predominantly on the management of individual claim mediations. The post-2007 powers provide the mediator with more scope for direct intervention in individual matters and formalise the mediator's capacity for strategic intervention.

Pre-2007 amendments: After the 1998 amendments but before the 2007 amendments, the mediator could:

- hold such conferences of the parties or their representatives as the Tribunal considered would help them in resolving a matter¹¹⁰
- organise a mediation conference of all of the parties, but¹¹¹ need not do so

¹⁰⁶ *Native Title Act 1993* (Cth) s 84C.

¹⁰⁷ *Native Title Act 1993* (Cth) s 86C(2)-(4).

¹⁰⁸ *Native Title Act 1993* (Cth) s 123(1)(b).

¹⁰⁹ Hiley G & Levy K, 'Native Title Claims Resolution Review', Commonwealth Attorney-General's Department (31 March 2006).

¹¹⁰ *Native Title Act 1993* (Cth) s 136A(1).

¹¹¹ Unlike the requirement under s72(1) of the *Native Title Act 1993* (Cth) before the 1998 amendments to the Act.

- limit who attended a mediation conference by directing that only one or some of the parties may attend, and be represented, at a mediation conference¹¹²
- with the consent of all of the parties present at a conference, direct that other persons be permitted to attend as observers or participate in a mediation conference¹¹³
- allow a person to participate by telephone, closed-circuit television, or any other means of communication¹¹⁴
- refer a question of fact or law to the Federal Court for determination if the mediator considered that it would expedite reaching agreement on a matter that is the subject of mediation¹¹⁵
- restrict or prohibit the disclosure of information given, statements made or documents produced at a mediation conference¹¹⁶
- provide mediation progress reports to the Court.¹¹⁷

Post-2007 amendments: Following the 2007 amendments, the mediator could also:

- direct a party to attend at a conference¹¹⁸
- direct a party to produce documents that the party has and which may assist the parties to reach agreement¹¹⁹
- refer a question about party status (i.e. whether a party should be dismissed) to the Court¹²⁰
- provide regional mediation progress reports and regional work plans to the Court¹²¹
- report absence of good faith by a party or their representative in relation to the conduct of the mediation¹²²
- conduct a review on whether there are native title rights and interests¹²³
- restrict or prohibit disclosure of information received in the course of a review¹²⁴
- conduct a native title application inquiry¹²⁵
- appear before the Court in relation to matters before, or to be referred to, the Tribunal for mediation.¹²⁶

Since the 2007 amendments to the Act, Tribunal mediators have exercised the right to appear in Court and provide information and recommendations to the Court about individual mediations or regional matters. While most Tribunal mediators prefer to let their mediation progress reports speak for themselves, there are some matters that are highly fluid and require clarification by the mediator during hearings. As at 30 June 2008 no mediator had issued directions for a party to attend a mediation conference or to produce particular documents. Similarly no mediator has reported on an absence of good faith by a party or its representative. The fact that Tribunal mediators have been cautious about exercising powers that could polarise relationships in mediation should not be surprising. Despite this, the clear intention of the Act is that the mediator can take a more directive role if the mediator considers there is a reasonable case that such action will expedite productive mediation.

Some caution has been applied by parties to the new powers given to the Tribunal:

¹¹² *Native Title Act 1993* (Cth) s 136B.

¹¹³ *Native Title Act 1993* (Cth) s 136C.

¹¹⁴ *Native Title Act 1993* (Cth) s 136A(6).

¹¹⁵ *Native Title Act 1993* (Cth) s 136D.

¹¹⁶ *Native Title Act 1993* (Cth) ss 136F and 176.

¹¹⁷ *Native Title Act 1993* (Cth) s 136G.

¹¹⁸ *Native Title Act 1993* (Cth) s 136B.

¹¹⁹ *Native Title Act 1993* (Cth) s 136CA.

¹²⁰ *Native Title Act 1993* (Cth) s 136DA.

¹²¹ *Native Title Act 1993* (Cth) ss 136G(3A), 86E(2).

¹²² *Native Title Act 1993* (Cth) ss 136B(4) and 136GA.

¹²³ *Native Title Act 1993* (Cth) s 136GC.

¹²⁴ *Native Title Act 1993* (Cth) s 136GD.

¹²⁵ *Native Title Act 1993* (Cth) ss 138 to 138G.

¹²⁶ *Native Title Act 1993* (Cth) s 86BA.

- to carry out a review on whether a native title claim group holds native title rights and interests in relation to land or waters,¹²⁷ or
- to conduct an inquiry into an issue relevant to a determination of native title.¹²⁸

Each function can be performed if certain statutory conditions are met, including the voluntary participation of relevant parties. To date neither has been used. As a general rule, neither would involve the mediator of that particular claim¹²⁹ and, while the review or inquiry is underway, the mediation of other matters can continue.¹³⁰ A review or an inquiry is an evaluative tool that arises from the mediation and is to assist mediation but occurs outside it and may or may not reference further mediation.

- A *review* requires the presiding member/mediator to consult the parties and then make a recommendation to the President of the Tribunal who can authorise the review. The findings are not binding on the parties.¹³¹
- An *inquiry* may commence with a request from the President of the Tribunal or a party or the Chief Justice of the Federal Court. The President must be satisfied that:
 - resolution of the matter or issue concerned would be likely to lead to an agreement on findings of fact; or lead to action that would resolve or amend the application; or lead to something being done in relation to the application, and
 - the applicant in relation to any application affected by the proposed inquiry agrees to participate in the inquiry.¹³²

The President then gives advance written notice to the Commonwealth Minister, the relevant State or Territory Minister, the Chief Justice of the Federal Court, the native title representative body for the area concerned, the applicant(s) themselves, and any other party to the proceeding related to the application. The findings of an inquiry are not binding on the parties, but the Court could take them into account.¹³³

The President of the Tribunal has issued procedural directions in relation to the conduct of a review¹³⁴ and the conduct of a native title application inquiry.¹³⁵

It is noteworthy that both the review and inquiry powers continue the pattern of engaging with matters of native title proof one step removed from the actual mediation of an individual claim. The potential merit of those powers should be considered in the context of earlier comments in this paper about the narrow framework for connection management in mediation, the resistance to Tribunal intervention in that process, and the implicit bias towards a rights-based result. Although the review and inquiry powers are instruments that could assist mediation about the facts of a native title claim,¹³⁶ their capacity to have an impact of mediation practices remains to be seen. If current practices continue they are unlikely to have an impact on the dominant framework of claim mediation where, it is suggested, there might be more gains from innovation. In that context the Tribunal is currently exploring strategies that require more open communication between all parties about the nature of a claim much earlier in the mediation cycle, in order to be able to identify threshold issues and potentially dispense with them sooner. Initial informal responses from state governments on this approach have, however, been mixed.

¹²⁷ *Native Title Act 1993* (Cth) ss 136GC-136GE.

¹²⁸ *Native Title Act 1993* (Cth) ss 138A-159, 163A.

¹²⁹ *Native Title Act 1993* (Cth) ss 136GC(8), 138C(2).

¹³⁰ *Native Title Act 1993* (Cth) ss 136GC(9), 138E(1).

¹³¹ *Native Title Act 1993* (Cth) s 136GE(1).

¹³² *Native Title Act 1993* (Cth) s 138B(2).

¹³³ *Native Title Act 1993* (Cth) ss 163A, 164, 86(2).

¹³⁴ Procedural Direction No 6 of 2007, available at www.nntt.gov.au/applications-and-determinations/procedures-and-guidelines/pages/procedural-directions.aspx.

¹³⁵ Procedural Direction No 7 of 2007, available at www.nntt.gov.au/applications-and-determinations/procedures-and-guidelines/pages/procedural-directions.aspx.

¹³⁶ The *Native Title Act 1993* (Cth) provides that an application is referred to the Tribunal for mediation 'including the ascertaining of agreed facts': s 86B(1).

4.2 Regional planning

Of more practical significance to date with regard to the mediator's influence is the mediator's capacity to provide regional progress reports¹³⁷ and regional work plans¹³⁸ to the Court. This function was not unknown prior to the 2007 amendments (where a practice had developed of providing such reports to some judges), but it has been more widely used and with greater consistency since the amendments.

In brief, mediators may provide the Federal Court with an overview of progress on the mediation of multiple claims in a particular region. To that end, periodically (about every six months) the mediator/s allocated to a region convene/s a meeting with the regional native title representative body (NTRB) and any other independent lawyers representing claimants plus the representatives of the relevant State or Territory government, other active respondents in the same region and the relevant Commonwealth funding agency. The meeting systematically reviews progress on each claim across the region, its status (as a high, medium or low priority claim), and its performance against milestones (which may be noted in a mediation protocol filed with the Court). The progress on individual claims and the regional performance is then reported to the Federal Court. The integrated regional report will usually contain maps identifying each claim, an environmental scan which tracks the status of the claim and its history, the number of overlapping claims, and may include a reference to the volume of land development applications. Regional reports include a timeline showing all claims in the region and individual claim milestones, and comment on whether agreed mediation protocols and schedules have been complied with. In particular cases the mediator may also provide mediation progress reports on individual claims and seek individualised orders from the Court for single claims.

The following extract from a 2007 regional report illustrates the scope and how particular issues might be reported to the Court:

One of the Tribunal's primary concerns in any region is whether there is a critical pathway for the management of connection research that will lead to the resolution of all native title claims within the region over a reasonable period of time. ... The [native title representative body] has set an ambitious schedule for 2007-09 ... noting that meticulous management is needed to avoid obstacles that have confronted previous research in this region ... and caused extensive delays ...

and

The Tribunal also noted the urgent need for preservation of evidence hearings.¹³⁹

As the extract indicates, the mediator takes an analytical role, explicitly stating the mediator's view on the organisational strategy seen to be necessary for the NTRB to assist productive mediation of the claims in the region. In this instance the mediator acknowledged the progress made by the NTRB but also registered caution about potential pitfalls. While there is no explicit mandate for what can or cannot be included in a regional report to the Court (other than the boundaries of 'without prejudice' and possibly confidential mediation),¹⁴⁰ the overall process is an extension of fundamental reality testing. The mandate that is being exercised is the mediator/s knowledge of the claims in the region and their individual histories and his/her capacity to identify structural or systemic issues as much as to focus on individual matters. This is referenced to some extent by the Tribunal's national overview and ongoing national case flow management scheme, in the context of open recognition in recent years that mediation output is too slow.

Apart from the Tribunal's own analysis on the poor rate of productivity in native title mediation and Australian Government statements, such 'open recognition' is consistent with Chief Justice Black's Notice to Practitioners 13 June 2007, which advised that the native title list judge for each region will manage the

¹³⁷ *Native Title Act 1993* (Cth) ss 86E(2)(a), 136G(3A)(a).

¹³⁸ *Native Title Act 1993* (Cth) ss 86E(2)(b), 136G(3A)(b).

¹³⁹ Extract from a 2007 Regional Report to the Federal Court.

¹⁴⁰ *Native Title Act 1993* (Cth) ss 136A(4), see also ss 136E, 136F.

native title list with a view to ensuring, among other things, that a ‘specific and credible mediation timetable on a case specific and/or regional basis is prepared and complied with’ and that ‘timely resolution of cases is pursued’.¹⁴¹ On 5 May 2008, Chief Justice Black issued a further Notice – not exclusively to native title parties - reiterating that ‘[t]he overarching purpose of individual case management ... is the *just* resolution of disputes as *quickly, inexpensively* and *efficiently* as possible’. Item 3.2 of the same Notice is even more explicit on the desirability of ‘(a) identifying and narrowing issues in dispute as early as possible; (b) ascertaining the degree of difficulty or complexity of the issues really in dispute’ and ‘(e) exploring options for assisted dispute resolution as early as practicable’.¹⁴²

While the Federal Court has in-principle endorsed the need for relevant close management of individual claims, it should be emphasised that the Court exercises its discretionary power to adopt, amend or not adopt recommendations made by Tribunal mediators with regard to, for example, granting orders for more prescriptive mediation schedules for individual claims or for addressing systemic regional problems through particular mediation processes. The role of the Tribunal claims mediator has, however, gone beyond the normal ambit of most court-ordered mediation in Australia, largely due to the particular nature of the subject matter and the unusual statutory relationship between the Court and the Tribunal, with the consequent attenuated pathway of native title claims through the justice system. Clearly, the mediator is not without scrutiny, both within the Tribunal and externally, and there are functional limits on what can be achieved with this manner of intervention. Nevertheless, the mediator’s strategic input to regional planning aligns native title claims mediation with multi-party mediations in other contexts where the mediator is also a facilitator and strategist, with a much higher focus on management and process design.

5. Specialist services supporting mediation

A parallel development in native title claim mediation has been the mediators’ increased access to technical and information services. While capacity-building strategies (for both claimants and respondents) have been part of mediation since the inception of the Tribunal, some services have developed more direct utility for mediation, to improve the clarity of and to narrow the issues being mediated. The main Tribunal services related to claims mediation are:

- information services - providing online information about relevant case law¹⁴³ and claim processes and specialised library services
- legal services - providing legal education to parties, including presentations to explain the claims process and updates on case law
- geospatial services - providing a spectrum of maps and other geospatial products,¹⁴⁴ and
- research services - providing various products on the history and anthropology of claim areas. (The Act empowers the Tribunal to ‘carry out research for the purpose of performing its functions’ including research into history, anthropology and linguistics).¹⁴⁵

These services can be used collectively or individually to enhance particular aspects of mediation, along similar lines as the use of a Tribunal historian in Case Study 2. Research materials are predominantly taken from data on the public record but occasionally, by agreement, from a wider set of sources including the claimants themselves. Maps and other spatial data similarly have been used directly to improve aspects of mediation, to identify tenure and boundaries and also as a means to visualise what has been agreed in particular negotiations.

The value of visual aids in mediations where all parties may not necessarily be literate or necessarily English-speakers should not be underestimated. Mediations have also used geospatial experts in situ to print out instant maps that illustrate what has been agreed or to identify locations of interest precisely. On more

¹⁴¹ Black CJ, Notice to Practitioners in native title proceedings, 13 June 2007.

¹⁴² Black CJ, Notice to Practitioners and litigants – Case Management and the Individual Docket system, 5 May 2008.

¹⁴³ *Native Title Hotspots* can be accessed at <http://www.nntt.gov.au/News-and-Communications/Newsletters/Talking-Native-Title-Archive/Pages/default.aspx>

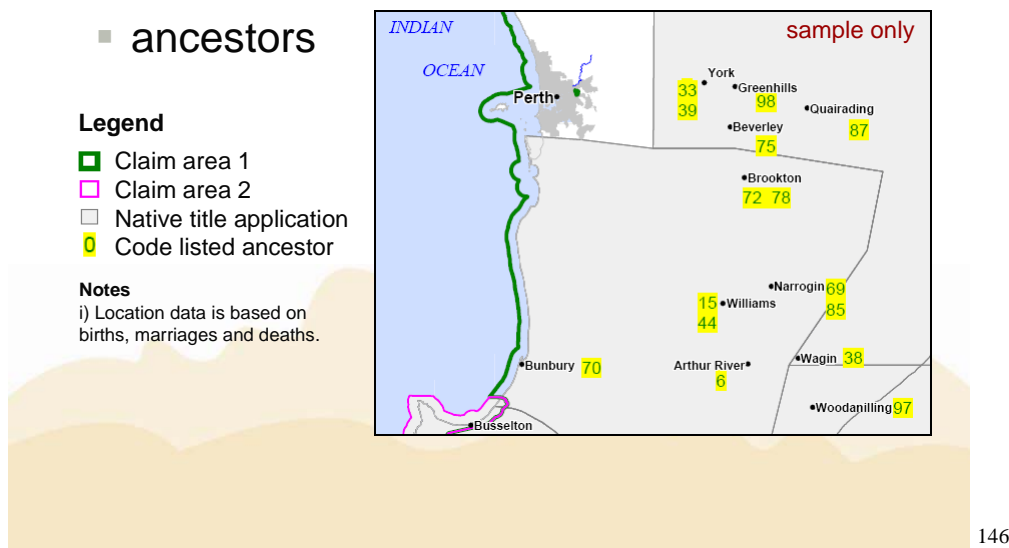
¹⁴⁴ See <http://www.nntt.gov.au/Publications-And-Research/Maps-and-Spatial-Reports/Pages/default.aspx>.

¹⁴⁵ *Native Title Act 1993* (Cth) s 108 (2), (3)

than one occasion an instant picture of claim boundaries has been physically signed off by the parties as the most effective way to record an agreement, with the parties' lawyers to translate information about the map into a more formal agreement later.

Further innovation has taken place as a result of a marriage between historical research and geospatial services (usually referred to as 'geo-enabled research'). The geo-enabled services include the capacity to literally merge historical and genealogical data with maps to give greater depth of understanding to the nature of a claim and the history of the claimants. In a limited number of cases, a form of 'ancestor mapping' has taken place, within which historical records and family trees are joined with geospatial data. The following image illustrates a process of matching named ancestors, coded as numbers, to locations in or near the native title claim. This tool does not obviate the need for other evidence but it can assist in narrowing the issues and focusing negotiations. Some respondents to native title claims may only want fundamental assurances about the identity and credibility of the claimants and in the example reproduced below the map establishes that identified ancestors can be verified (born, married or died) at locations in or near the claim area during (in this case) the mid to late 19th century.

Map a generation



In 2007 the President of the Tribunal issued a procedural direction¹⁴⁷ to members and employees of the Tribunal to, among other things, prompt the use of geospatial and research resources available to the Tribunal to assist with four critical tasks that need to be carried out to ensure the steady progress of applications to resolution, namely:

- timetabling and managing the preparation and assessment of connection material
- timetabling and working on tenure analysis (to identify areas where native title has been extinguished)

¹⁴⁶ Extract of mediation map, produced with the permission of the South West Aboriginal Land and Sea Council, May 2008.

¹⁴⁷ Procedural Direction No 9 of 2007 'Specific actions to be taken by the Registrar, members and employees of the National Native Title Tribunal; in relation to native title applications', available at <http://www.nntt.gov.au/Applications-And-Determinations/Procedures-and-Guidelines/Pages/Procedural-Directions.aspx>

- resolving overlapping claims, and
- reducing the number of parties and clarifying their interests in relation to an application.

6. Judicial responses to delays in mediation

Judicial frustration that the mediation of native title claims is overly long has been evident for some time. In February 2008, Justice Greenwood commented poignantly that:

To everyone's surprise, as time has washed away down the river, we suddenly find that individuals who are in frail communities and frail circumstances are endangered and may be at risk of losing their lives and so preservation of evidence applications have to come forward. What is really critical in these kind of matters is that the interests of the claimant groups be protected by advancing these matters to conclusion within timeframes that enable rational people, who are not infirmed but are old, to be able to formulate and give their evidence. So this is the very dilemma that arises when matters linger on for 12 years.¹⁴⁸

Notwithstanding this level of candour, it is notable that at the time of writing few native title claims are programmed for trial and there have been relatively few preservation of evidence hearings. This may, in part, be a product of a lack of confidence within the Court about the effectiveness of native title litigation to resolve the range of issues raised¹⁴⁹ and the conviction that native title claims are more suited to alternative dispute resolution.¹⁵⁰ Such a conclusion is consistent with the presentation to the 2005 AIATSIS Native Title Conference by Justice North who reminded those present that the Native Title Act is about the spirit of compromise. Justice North asserted that native title mediation should focus on reaching agreement between the parties, along the same lines as mediation in other commercial or social contexts where compromise is a fundamental expectation. He stated:

The mediation contemplated by the Act is to be interest based. Parties must rethink the process adopted for mediation under the Act, and reshape it so that it becomes interest based. Otherwise, the purpose of statutory mediation will be lost.¹⁵¹

When delivering subsequent reasons for a consent determination in relation to the Gunditjmarra People's native title application, Justice North referred to 'the importance placed by the Act on mediation as the primary means of resolving native title applications'.

He also stated that, when considering the appropriateness of an agreement for a consent determination, the Court needs to be satisfied that the state party 'has taken steps to satisfy itself that there is a credible basis for the application'. His Honour continued:

There is a question as to how far a State party is required to investigate in order to satisfy itself of a credible basis for an application. One reason for the often inordinate time taken to resolve some of the cases is the overly demanding nature of the

¹⁴⁸ Greenwood J Federal Court orders made on 29 February 2008 in *Naghir People 1 v State of Queensland* [2008] FCA 192 at [28].

¹⁴⁹ See e.g. *Ward v Western Australia* (1998) 159 ALR 483 at 639, *Smith v Western Australia (No 6)* (2000) 104 FCR 494 at 500.

¹⁵⁰ See e.g. Introductory statement of the Full Federal Court (Wilcox, North and Weinberg JJ) in *Attorney-General of the Northern Territory v Ward* (2003) 134 FCR 16, and the summary statement of Lindgren J in *Harrington-Smith v Western Australia (No 9)* (2007) FCA 31 including: 'The experience of hearing the case and resolving it has exposed me to what I consider to be an unsatisfactory state of affairs in the native title area. Perhaps the heart of the problem is that the legal issue that the Court is called upon to resolve is really only part of a more fundamental political question...Several times during the hearing I encouraged the parties to attempt to find a solution by mediation. I was given to understand that mediation had previously taken place but without success. Apparently mediation continued, even following the hearing...Finally, however, mediation came to nothing and the parties informed me that a decision would be required. I do not know or wish to know why mediation failed. I will only say that it is to my mind sad that the matter has had to be resolved by an imposed solution.'

¹⁵¹ *Abstracts and Biographical notes* (2005) AIATSIS <http://ntru.aiatsis.gov.au/conf2005/speakers/speakers.html> 18 June 2008.

investigation conducted by State parties. The scope of these investigations demanded by some States is reflected in the complex connection guidelines by some States...The Act does not intend to substitute a trial, in effect, conducted by State parties for trial before the Court. Thus, something significantly less than the material necessary to justify a judicial determination is sufficient to satisfy a State party of credible evidence for an applications. The Act contemplates a more flexible process than is often undertaken in some cases.¹⁵²

This approach, which may not be shared by other Federal Court Justices, nevertheless goes to the heart of whether mediation of native title claims can adopt more open and flexible approaches to the evidence of native title or, as some jurisdictions are now exploring, adopt a blend of policy-driven and legally-derived strategies to assist in reaching an outcome.

Other critical comment on the connection-centric nature of native title mediation¹⁵³ has focused on the interpretation of ss. 87 and 87A of the Act which set out what the Federal Court takes into consideration when making an order in relation to a consent determination.¹⁵⁴ Experience has shown that judges will require some factual material to be satisfied that a determination of native title is appropriate. When giving written reasons for consent determinations, some judges have referred to parties having access to competent and independent legal advice¹⁵⁵ so that an agreement is entered into freely and on an informed basis,¹⁵⁶ or to an affidavit filed by the State setting out the basis for the State's agreement with the proposed orders.¹⁵⁷ However, judges have also sought to satisfy themselves that a factual basis exists for making the determination sought. Indeed, Justice Bennett has stated that if an agreement were reached 'where there was nothing to support the claimed connection of the applicants to their country ... the Court might conclude that a determination would be inappropriate and decline to make the orders sought'.¹⁵⁸ In recent years, judges have expressly referred to and relied on documents in various forms (affidavits, reports and other material¹⁵⁹) summarising evidence of connection, and have even taken additional evidence,¹⁶⁰ when deciding whether it is appropriate to make a determination in the terms sought by the parties.

The question, in that context, is what depth of evidence is required to satisfy the Court. As the courts have generally taken a beneficial approach to agreements about connection, it might be inferred that, for the purposes of making a consent determination, a Court can be satisfied with a less forensic detail than a State Government, particularly if the Court is satisfied that the parties have had informed and competent legal advice available to them and that the proposed determination is one which the Court has power to make.¹⁶¹ This line of reasoning of itself does not preclude a government party setting its own evidentiary threshold

¹⁵² *Lovett on behalf of the Gunditjmara People v Victoria* [2007] FCA 474 at [37], [38]).

¹⁵³ Bauman, Catlin & Farrell, op cit, 39.

¹⁵⁴ In essence the Court has to be satisfied that an order in, or consistent with, the terms agreed by the parties would be within the power of the court and that it would be 'appropriate' to make such an order.

¹⁵⁵ *Hughes (on behalf of the Eastern Gurama People) v Western Australia* [2006] FCA 356 (Bennett J), *Brown v Western Australia* [2007] FCA 1025 (Bennett J), *Patta Warumungu People v Northern Territory* [2007] FCA 1386 (Mansfield J).

¹⁵⁶ *Lovett on behalf of the Gunditjmara People v Victoria* [2007] FCA 474 (North J).

¹⁵⁷ See *Riley v Queensland* [2006] FCA 72 (Allsop J).

¹⁵⁸ *Brown v Western Australia* [2007] FCA 1025 at [24].

¹⁵⁹ E.g. see *Riley v Queensland* [2006] FCA 72 (Allsop J), *Manas v Queensland* [2006] FCA 413 (Dowsett J), *Mundraby v Queensland* [2006] FCA 436 (Dowsett J), *Yankunytjatjara/Antakirinja Native title claim group v South Australia* [2006] FCA 1142 (Mansfield J), *Hughes (on behalf of the Eastern Gurama People) v Western Australia* [2006] FCA 356 (Bennett J), *Cox on behalf of the Yunggora People v Western Australia* [2007] FCA 588 (French J), *Brown v Western Australia* [2007] FCA 1025 (Bennett J), *Malachi on behalf of the Strathgordon Mob v Queensland* [2007] FCA 1084 (Greenwood J), *Patta Warumungu People v Northern Territory* [2007] FCA 1386 (Mansfield J), *Ngadjon-Jii People v Queensland* [2007] FCA 1937 (Spender J), *Walker on behalf of the Eastern Kuku Yalanji People v Queensland* [2007] FCA 1907 (Allsop J).

¹⁶⁰ *Mundraby v Queensland* [2006] FCA 436 (Dowsett J).

¹⁶¹ *Native Title Act 1993* (Cth) s 87.

before giving its consent to the Court, although it may diminish the capacity for a government to cite expectations from the Court as a rationale for demanding a high threshold of native title evidence.

7. Summary

This paper has sought to show that the mediation of native title claims involves a spectrum of intervention strategies in a complex setting, drawing on examples of particular forms of intervention and mediation assistance. Some strategies give a mediator input into the organisation of mediation schedules regionally (i.e. managing multiple mediations) and the capacity to identify and comment on the aggregate or strategic use of resources by third parties. Other strategies focus more on the design of individual mediations (e.g. managing multiple parties and multiple issues). At the centre of these processes, individual native title mediations follow what is essentially an orthodox model in terms of issue identification, issue exploration, option generation and negotiation development. In varying manifestations native title claim mediations may move from a predominantly facilitative (process-oriented) approach into some features of evaluative (substance-oriented) mediation. Furthermore, there are some circumstances where the Tribunal's mediation practice (or at least pre-mediation practice) is dominated by capacity-building tasks or remediation functions that could be described as 'transformative' mediation practices. Many native title claim mediations would borrow from all three models.

This paper has also detailed the statutory powers and functions that enable Tribunal mediators to make measured interventions on matters related to how parties perform in mediation and, to a lesser degree, on the fundamental content of mediation. The operative term in that regard is 'measured'. Tribunal mediators have historically made conservative use of any statutory power that might be seen to be punitive or counter-productive to facilitating a consensus agreement. Some other powers, like the scope for a mediator to revert to the Federal Court to settle a point of law, have never been used, partly due to the difficulty of framing questions that do not require a full examination of native title evidence (i.e. precipitating a trial by default) and partly due to the reluctance of parties to support such a reference.

The closed nature of connection evidence management has been highlighted as the most significant factor in the development of both Federal Court and Tribunal intervention strategies due to the influence of both rights-based and interest-based features of native title mediation on mediation time frames. In the face of this, the Tribunal has sought to use strategically some specialist services (e.g. geospatial input or genealogical assistance) to streamline the parties' understanding about matters that can inform a final decision on connection. It also has recourse to some statutory powers that can be brought to bear on aspects of the connection development process. Neither has, at this stage, had a major impact on the dominant convention for managing native title connection.

This paper has not discussed mediator skills in any detail. Within individual claims it should be clear that an individual mediator has substantial scope to make constructive judgments about when or how to address a particular issue, whether it is of a regional nature and impacts on multiple claims or whether it is confined to a specific claim. This inevitably draws on a range of personal mediator skills and the mediator's strategic understanding of the circumstances.

Finally, this report has noted the concerns that the mediation of native title claims is very slow. In considering how that might change, there is no evidence that either the Federal Court or governments in Australia or most other respondents are likely to support a greater reliance on native title litigation. On the contrary, even in those matters where the Tribunal has ceased to provide mediation services, most of the claims have not been removed from mediation, or dismissed or programmed for trial, even where their continued existence compromises other mediations. In that context there is a clear inference that native title claims mediation has a number of social and symbolic reference points that go beyond the legal merits of any individual claim. The paradox is that while there has been a commitment to a particular form of mediation, which has some particularly limiting features, we have yet to see a widespread commitment to innovations that might make that process more just and effective.