



Native title claims: Overcoming obstacles to achieve real outcomes

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Introduction

Sixteen years after the historic High Court judgment in *Mabo v Queensland (No 2)*¹ and more than 14 years after the *Native Title Act 1993* (Cwlth) (the Act) commenced, critical assessments of the native title system are being made by some of its key participants and closest observers.

This year, the Commonwealth Attorney-General,² the Minister for Families, Housing, Community Services and Indigenous Affairs,³ and the Aboriginal and Torres Strait Islander Social Justice Commissioner⁴ have identified what they see as deficiencies in the system as well as the opportunities it offers.

Their statements give mixed assessments of the system. Quite properly, they acknowledge the positive outcomes achieved to date, but they express understandable frustration at the lengthy periods taken to obtain determinations of native title and concerns at the prospect of decades of activity to resolve the current and future claims.

At their meeting in July 2008, Commonwealth, State and Territory Native Title Ministers agreed that 'the backlog of native title claims and the time estimated to resolve them using current approaches are unacceptable'. They 'committed to working proactively to resolving native title claims in their jurisdictions' and agreed to 'establish and pursue jurisdiction-specific targets to benchmark progress'.⁵

The Attorney-General has recently foreshadowed legislative changes to improve the operation of the native title system by giving the Federal Court greater control over native claims brought before it.⁶

This paper focuses on native title claims and provides:

- a stocktake of key outcomes achieved to date and an estimate of how long it will take to finalise native title claims
- an assessment of the main obstacles to resolving claims
- an analysis of an approach which *all* participants could take to resolve the remaining claims and those to be made in the future.

¹ (1992) 175 CLR 1.

² R McClelland, Negotiating Native Title Forum, 29 February 2008.

³ J Macklin, 'Beyond Mabo: Native title and closing the gap', 2008 Mabo lecture, James Cook University, 21 May 2008 and the opening address, Sustainable Indigenous Communities Forum, Minerals Council of Australia, Canberra, 27 May 2008.

⁴ Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2007*, 2008.

⁵ Communiqué, Native Title Ministers' meeting, 18 July 2008.

⁶ Attorney-General, News Release, 'Government improvements to native title system', 17 October 2008.

Current situation and a 30 year forecast

Determinations of native title

In the more than 14 years between the commencement of the Act on 1 January 1994 and 30 September 2008:

- 1,787 native title applications were made (1,475 claimant, 33 compensation, 278 non-claimant)
- 1,248 (70%) of the applications were resolved (978 claimant, 23 compensation, 246 non-claimant).

There have been 114 Federal Court decisions relating to determinations of native title affecting 142 applications.⁷ Of these determinations:

- 81 are determinations that native title exists over the whole or part of the application area
- 33 are determinations that native title does not exist (most of them in New South Wales).

Determinations cover some 920,244 km² (or 12%) of the land mass of Australia. The locations of areas covered by determinations of native title are shown on the map at [Attachment A](#).

The chart at [Attachment B](#) shows the cumulative number of determinations made since 1994, with a steady rise in the number of determinations in recent years, particularly following landmark decisions of the High Court up to 2002. The legal ground rules having been established, there is a framework for negotiating outcomes rather than going to a Court hearing.

Indigenous land use agreements

The Act provides for Indigenous land use agreements (ILUAs) which are specific forms of agreements that can be negotiated, registered and given particular legal effect by the Act. ILUAs can be negotiated over areas where native title has been shown to exist or might exist. They can be:

- used in conjunction with determinations of native title, or
- 'stand alone' agreements negotiated before, and independently of, any determination of native title.

ILUAs have been used to cover a range of land uses including the creation and management of national parks, community living areas, mineral exploration and mining, petroleum activity, marina development, defence facilities, pipelines, and the use of and access to pastoral leases.

At 30 September 2008 there were 347 registered ILUAs. The number of registered ILUAs for each jurisdiction was:

NSW	NT	QLD	SA	VIC	WA	TOTAL
8	85	187	24	33	10	347

⁷ 111 applications where the determination covers the entire application area and 31 applications where the determination covers part of the application area.

Most of the ILUAs are in Queensland (54%) and the Northern Territory (24%).

Registered ILUAs cover some 1,036,988 km² (or 13.5%) of the land mass of Australia. The locations of areas covered by those registered ILUAs are shown on the map at [Attachment C](#).

Current claims

As at 30 September 2008, there were 539 applications in the system, 497 of them claimant applications.

	ACT	NSW	NT	QLD	SA	TAS	VIC	WA	TOTAL
Claimant	1	31	169	145	23	0	15	113	497
Compensation	0	0	3	4	0	0	0	3	10
Non-claimant	0	29	0	2	0	0	0	1	32
Sub-total	1	60	172	151	23	0	15	117	539

Most of the claimant applications are in the Northern Territory (34%), Queensland (29%) and Western Australia (23%). Most of the non-claimant applications (91%) are in New South Wales.

The geographic extent of the areas covered by claimant applications and determinations of native title as at 30 September 2008 is shown on the map at [Attachment D](#).

Although about 54% of the current applications have been referred by the Federal Court to the Tribunal for mediation and are described as being ‘in mediation’, many of them are not being substantively mediated. Indeed it may be 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 is undertaking geospatial analysis to assist the parties.

Various factors delay or impede the active mediation of claims. I will identify the main obstacles and suggest means of overcoming them later in this paper.

Long-term forecast

Projected period to resolve claims: How long will it take to resolve the current claims and those that are likely to be lodged in the next few years? The Tribunal estimates that, on current trends, it will take about 30 years.

An analysis of the 142 applications that had been determined as at 30 September 2008 shows that:

- for the 69 determined by *consent*, the average time for achieving a determination was 72 months (six years)
- for the 49 *litigated* determinations, the average time for achieving a determination was 84 months (seven years)
- for the 24 determined *unopposed*, the average time for achieving a determination was 12 months.

Those averages are likely to increase rather than decrease in the immediate future. Of the 497 current claimant applications as at 30 September 2008:

- 118 (or 24%) were lodged in or since 2003, i.e. in the past five years
- 274 (or 55%) were lodged between 1998 and 2002, i.e. in the past six to 10 years
- 105 (or 21%) were lodged earlier, i.e. have been in the system for between 11 and 14 years.

The estimated period for resolving native title claims needs to be put in context.

Historical trends: As the chart at [Attachment B](#) shows, there were relatively few determinations of native title in the early years of the Act's operation. The history of the Act, including amendments to it and judgments about it, shows that:

- many claims were made under the original Act when the law on native title was unclear and the process allowed multiple overlapping claims (often by members of the same family or group) all of which attracted procedural rights
- there was some reluctance to settle claims while the law was new, uncertain and politically controversial – in the first six years of the Act's operation there were eight determinations of native title, and after 10 years there were 46 determinations
- the High Court's judgment in the *Wik* case⁸ meant that claims could be made to many areas of Australia where most people (and the Act)⁹ had thought native title was extinguished
- there was little, if any, involvement of the Federal Court in relation to most claims until the Act was substantially amended from 30 September 1998 (including to remove constitutionally invalid provisions in relation to the Tribunal)
- all the claims at that date became proceedings in the Court and most were subject to the new registration test which, for some years, became the focus of the attention and resources of the claim groups, their representatives, state and territory governments, and the Native Title Registrar, and which led to a substantial reduction in the number of claims in the system
- it took years for various 'test' cases to work their way through the appeals processes so that significant legal issues could be resolved.

There has been a steady rise in the number of determinations in recent years, particularly following landmark decisions of the High Court up to 2002. The legal ground rules having been established, there is now a clearer framework for negotiating outcomes rather than going to a Court hearing.

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

In the Northern Territory, the Federal Court has developed a strategy of grouping claims with similar key features and identifying a lead matter to be litigated.¹⁰ Parties anticipate that, once the

⁸ *Wik Peoples v Queensland* (1996) 187 CLR 1

⁹ See e.g. the statement in the preamble to the *Native Title Act 1993* that 'native title is extinguished by ... the grant of ... leasehold estates'.

¹⁰ See *Button Jones (on behalf of the Gudim People) v Northern Territory of Australia* [2007] FCA 1802.

relevant legal principle is authoritatively determined, it should be possible to settle other claims in that group. Such groupings include sea claims, town claims and pastoral lease claims.

Judgment in the lead pastoral lease case (dealing with the claim to Newcastle Waters and linked claims) was delivered in 2007.¹¹ No appeal was lodged. The Federal Court is working with key participants to pursue a program for the negotiation and resolution of other claims which raise the same legal issues and have similar facts to the Newcastle Waters case.

Relatively difficult claims ahead: The figures and the estimates of time taken to resolve the outstanding native title claims should also be considered in the context that the claims that have been resolved to date have been relatively straightforward in terms of tenure and connection issues. Most of the areas involved are in the northern and more remote parts of Australia, where Aboriginal or Torres Strait Islander communities have maintained a physical and traditional connection with the land and there have been few, if any, dealings in land which have extinguished native title rights and interests.

Many of the remaining claims are in more densely settled areas where native title has been extinguished (in part or in whole) and it will be more difficult to demonstrate the continuity of traditional laws and customs and the native title rights under them.

Some of the obstacles to be overcome

Four critical tasks – an overview

The Tribunal's analysis of the current applications indicates that the following critical tasks need to be carried out to ensure the steady progress of applications to resolution:

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

The following discussion outlines steps that are being taken, or could be taken, by parties and by the Tribunal to improve the effectiveness and efficiency of dealing with individual claimant applications. The discussion of each issue highlights particular provisions in the Act, any relevant Federal Court Rules, and Procedural Directions issued by the President of the Tribunal.

For example, Procedural Direction No. 9 of 2007 sets out the procedure to be followed by Members and employees of the Tribunal:

- when developing programs and taking certain strategic actions in relation to claimant applications
- when monitoring and reporting on significant delays in achieving milestones in relation to the mediation by the Tribunal of claimant applications.

¹¹ *King v Northern Territory* [2007] FCA 944, (2007) 162 FCR 89; *King v Northern Territory* [2007] FCA 1498.

The objective of Procedural Direction No. 9 and other initiatives taken by the Tribunal in relation to its role in the claims resolution process is to narrow the issues between the parties and reduce the numbers of parties so that participants can focus on the main issues before them and work towards appropriate substantive outcomes with the optimum use of resources. Those resources could include, on occasions, the resources of the Tribunal, for example in the preparation of research reports and geospatial products.

Establishing traditional connection to land or waters

Some practical issues

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

- the rights and interests are possessed under the traditional laws acknowledged, and the traditional customs observed, by those people, and
- the people, by those laws and customs, have a connection with the land or waters, and
- the rights and interests are recognised by the common law of Australia.¹²

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

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

- the existence, character and extent of native title rights and interests depend upon the traditional laws and customs of the community in question¹³
- the acknowledgment and observance of the traditional laws and customs must have continued 'substantially uninterrupted' from the time when the Crown asserted sovereignty, and the connection must have been 'substantially maintained' since that time¹⁴ whether by physical presence on the country or otherwise¹⁵
- the connection inquiry can have 'a particular topographic focus within the claim area' so that there may need to be evidence that connection has been substantially maintained to a particular part of the claim area since sovereignty.¹⁶

¹² *Native Title Act 1993* s 223(1).

¹³ *Bodney v Bennell* [2008] FCAFC 63 at [148].

¹⁴ *Bodney v Bennell* [2008] FCAFC 63 at [168].

¹⁵ *Bodney v Bennell* [2008] FCAFC 63 at [171]-[174].

¹⁶ *Bodney v Bennell* [2008] FCAFC 63 at [175]-[179]; for the practical effect of this for the Perth metropolitan claim see [180]-[190].

One of the statutory purposes of mediation under the Act is to assist parties to reach agreement on whether native title exists and, if it does exist, who holds the native title and the nature, extent and manner of exercise of the native title rights and interests in relation to the area claimed.¹⁷

If claimants want a determination of native title they need to convince other parties or the Federal Court of their traditional connection to the claimed area. Even if agreement is reached between the parties, judges will require some information about the native title claim group and its connection to the area before the Court will be satisfied that it is appropriate to make orders in rem in, or consistently with, the orders agreed by the parties.¹⁸

Most respondent parties, including governments, will not engage in substantive mediation with claimants unless and until they have received satisfactory connection material.

The collation and presentation of that material, whatever its form(s), is a multidisciplinary process. Research to establish whether a group has native title can involve historical, anthropological, linguistic and genealogical materials as well as oral histories from the group and neighbouring groups. Written compilations and analyses of that material are often referred to as 'connection reports'. It can be lengthy and expensive, all the more so because of a shortage of people who are suitably qualified, experienced and available to do the work.

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

A Tribunal audit of current claims in 2007 showed that:

- connection reports had been prepared and provided in just under 20% of the claims
- connection was not necessary for an outcome in another 6% of the claims
- connection material had not been prepared (and in most cases was not scheduled for preparation) in relation to the remaining 75% of the claims.

Among the practical obstacles to resolving connection issues more quickly are:

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

¹⁷ *Native Title Act 1993* s 86A(1).

¹⁸ For recent discussions of this issue see *Hayes on behalf of the Thalanyji People v Western Australia* [2008] FCA 1487 at [15]-[31], and the overview by Chief Justice French in 'Rolling a rock uphill? – Native title and the myth of Sisyphus', paper delivered to the Judicial Conference of Australia Colloquium, 10 October 2008, pages 23-24.

- the lack of interdisciplinary collaboration in preparing connection materials (including insufficient involvement of lawyers to ensure that reports are fit for the purpose for which they are prepared)
- limited resources generally to prepare and assess such material
- limited access to relevant state government records with information about people and places
- the practice of restricting access by other respondents to connection reports while they are assessed by governments, thereby limiting the scope of other respondents to participate in the process
- the general practice of restricting access to connection reports, thus limiting the opportunities to educate other researchers and to share understandings about how connection material was assessed.

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

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

- recording witness statements in documents and, if appropriate, producing them in the course of a mediation conference subject to restrictions on their disclosure¹⁹
- a native title application inquiry by the Tribunal²⁰
- preservation of evidence as part of a hearing by the Federal Court in advance of the general hearing (if any) of the claim.

Issues for governments

Role of governments: The relevant state or territory government is the first respondent to each claimant application. It has a role on behalf of the whole community in the negotiations. It has (or has access to) suitably qualified people to assess whether the claim group can establish the native title rights and interests asserted.

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

As at June 2007 there were approximately 78 connection reports, in a range of forms, awaiting assessment around Australia. Most were the product of a two to three year research process and most will enter an assessment process that can take up to three years.

¹⁹ *Native Title Act 1993* s 136F.

²⁰ *Native Title Act 1993* ss 138A-138G.

It is appropriate for the relevant governments to assess the strength of a claim. Other (though not necessarily all) respondent parties will follow, or be assisted by, a government's assessment when deciding their approach to the resolution of the claim. It has been contended, however, that the current practice has largely relocated the evidentiary process from the Court to the relevant state or territory. Indeed, Justice North has questioned 'how far a State party is required to investigate in order to satisfy itself of a credible basis for an application'. He wrote that '[o]ne reason for the often inordinate time taken to resolve some of these cases is the overly demanding nature of the investigation conducted by State parties'. In his view, 'something significantly less than the material necessary to justify a judicial determination is sufficient to satisfy a State party of a credible basis for an application. The Act contemplates a more flexible process than is often undertaken in some cases.'²¹

Although that view may not be universally held, it illustrates the issue about the role and requirements of governments in dealing with connection issues.

Role of the Tribunal

Mediation in relation to connection: One of the statutory purposes of mediation is to assist parties to reach agreement on whether native title exists and, if it does exist, who holds the native title and the nature, extent and manner of exercise of the native title rights and interests in relation to the area claimed.²² There is an ongoing debate about the best way to deal with connection issues including debate about the role of state and territory governments and the role of the Tribunal in this process.

Although, as the Act suggests and Justice French has ruled:

- the Tribunal has responsibility to undertake mediation of all aspects of the application
- the mediation process covers the exchange of information between parties, including connection information (rather than the provision of connection evidence being outside or antecedent to the mediation process)²³

that approach is not always taken.

In some parts of the country, connection issues are dealt with bilaterally between the applicants and the relevant government, with little if any involvement by the Tribunal or other parties (each of whom must consent to any determination that native title exists, and some of whom will want to be satisfied independently that connection has been established).

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

- ascertain whether proof of traditional connection of the native title claim group to the claim area is likely to be relevant to the resolution of the claimant application, and
- if it is, prepare with the parties a program for ascertaining for the purposes of mediation whether the claim group has connection by traditional laws and customs to the claim area.²⁴

²¹ *Lovett on behalf of the Gunditjmarra People v Victoria* [2007] FCA 474 at [37], [38]; *Hayes on behalf of the Thalanyji People v Western Australia* [2008] FCA 1487 at [20]-[23].

²² *Native Title Act 1993* s 86A(1).

²³ *Frazer v Western Australia* (2003) 128 FCR 458, 198 ALR 303 at [27], [28].

²⁴ Paragraphs 30-35.

The program could take a different form for each claimant application depending on relevant circumstances.²⁵ The program developed in relation to a particular claimant application should identify:

- who is responsible for conducting the connection research
- who is responsible for compiling or collating the connection material for purposes of mediation
- the form that the connection material will take (e.g. a connection report in accordance with a state or territory government's connection guidelines)
- which parties are to receive some or all of the connection material
- when and in what form the connection material is to be provided
- whether any conditions are to apply to the access to and use of any of the connection material, and whether such conditions are to be by agreement between the parties involved or are to be contained in directions made by the presiding member under section 136F of the Act.

Whatever procedures are put in place, it has to be recognised that (as noted earlier) there are practical obstacles to resolving connection issues more quickly.

Amendments to the Act in 2007 enhanced the Tribunal's existing role in the mediation of connection, by enabling the Tribunal, in certain circumstances, to:

- carry out a review of whether there are native title rights and interests, or
- hold an inquiry in relation to a matter or issue relevant to a determination of native title.

Review of whether there are native title rights and interests: The President of the Tribunal is empowered, on the recommendation of the Tribunal Member presiding over the mediation, to refer for review by another Member (or Presidential consultant) the issue of whether the native title claim group holds native title rights and interests in relation to land or waters within the application area.²⁶ The presiding Member can only make the recommendation if he or she considers that the review would assist the parties reach agreement in relation to matters listed in subsection 86A(1) of the Act.²⁷

Parties who give documents or information to the review can participate in the process.²⁸ According to the Explanatory Memorandum, '[i]t will be essential to have at least one participating party to a review, although it may only be necessary to have one such participating party'.²⁹ Presumably a review would not be conducted unless the applicant agrees to participate.

The Member conducting the review cannot direct the production of documents. Only a Member presiding at a mediation conference has that power.³⁰ Nor can the Member conducting the review compel parties to participate in it. Participation is purely voluntary. Reviews are meant to be

²⁵ Paragraph 33.

²⁶ *Native Title Act 1993* s 136GC(1), (2), (4). See also Procedural Direction No 6 of 2007.

²⁷ *Native Title Act 1993* s 136GC(3).

²⁸ *Native Title Act 1993* s 136GC(6).

²⁹ *Native Title Amendment Bill 2006*, Explanatory Memorandum para 2.136.

³⁰ *Native Title Act 1993* s 136CA.

done 'on the papers'. There is no facility for holding hearings and if these are required an inquiry would be preferable.

Mediation may continue during the conduct of the review³¹ and the Member undertaking the review may give progress reports to the presiding Member if the reviewer considers that providing the report would assist in progressing the mediation.³²

The written report of the review *must* be made available to the presiding Member and the participating parties.³³ A copy *may* also be given to the Court and the other parties to the proceeding³⁴ (that is, such provision is discretionary).

Native title application inquiries: The President of the Tribunal (on his or her initiative, at the request of a party, or at the request of the Chief Justice of the Federal Court) may direct the holding of an inquiry by the Tribunal in relation to a matter or an issue relevant to the determination of native title under section 225 of the Act. The direction can only be made if the applicant agrees to participate and the President is satisfied that the resolution of the matter or issue concerned would be likely to lead to:

- an agreement on findings of fact
- the resolution or amendment of the application, or
- something else being done in relation to the application.³⁵

Inquiries may only be undertaken where the relevant proceeding is in mediation with the Tribunal and the proceeding raises an issue relevant to a determination under section 225. A request to hold an inquiry may be made, however, before the proceeding is referred to the Tribunal.³⁶ While inquiries can cover more than one proceeding, each proceeding must have been referred to the Tribunal for mediation.

Participation in an inquiry is voluntary. Unlike other inquiries conducted by the Tribunal, there is no capacity to subpoena witnesses or documents.³⁷

As these inquiries are intended to assist in the mediation of applications, hearings are generally to be held in private. The Tribunal may direct instead that they be held in public. The customary and cultural concerns of Aboriginal peoples and Torres Strait Islanders must be given due regard in making such a direction.³⁸

³¹ *Native Title Act 1993* s 136GC(9).

³² *Native Title Act 1993* s 136GE(3).

³³ *Native Title Act 1993* s 136GE(1).

³⁴ *Native Title Act 1993* s 136GE(2).

³⁵ *Native Title Act 1993* s 138B(1), (2). See also Procedural Direction No 7 of 2007.

³⁶ *Native Title Act 1993* s 138B(3).

³⁷ *Native Title Act 1993* s 156(7).

³⁸ *Native Title Act 1993* s 154A.

Mediation may continue while an inquiry is underway if the presiding Member considers that it is appropriate.³⁹

The report of an inquiry must state findings of fact and may make recommendations, but these are not binding on the parties to the inquiry.⁴⁰ A copy of the report must be given to the Federal Court and each of the parties to the inquiry.⁴¹ The Court must consider whether to receive into evidence the transcript of evidence of an inquiry and may adopt any recommendation, findings of fact, decision or determination of the Tribunal in relation to the inquiry.⁴²

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

Options for reform

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

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

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

Other suggestions included:

- providing simpler, cheaper access to government records and/or using limited discovery orders for easier access to relevant information
- revising government guidelines to ensure that they are flexible, clear (e.g. with checklists) and consistently applied
- producing a template for research and a manual with sample documents
- arranging collaborative research between native title representative bodies with access to each other's archives

³⁹ *Native Title Act 1993* s 138E(1).

⁴⁰ *Native Title Act 1993* s 163A.

⁴¹ *Native Title Act 1993* s 164.

⁴² *Native Title Act 1993* s 86(2).

- providing access to best practice models of writing connection reports, and the use of edited or 'sanitised' publicly available reports for training purposes
- developing specialist training and mentoring/supervision programs
- developing a standard and clear brief which sets out the requirements of the Act that the research must address, and the involvement of lawyers with researchers throughout the research process
- arranging collaboration between external researchers, native title representative bodies and governments to:
 - scope the research that is necessary for each claim before that research is undertaken (e.g. by identifying matters that are not contentious and do not need detailed research and clarifying the information required in light of intended or possible outcomes), and
 - settle the form in which the material should be presented (including the best ways to incorporate more direct evidence from claimants)
- conducting tenure research, at least to major areas of land in question, before active connection research is undertaken
- incorporating the preparation and assessment of connection material as part of the mediation framework and not as a precursor to it
- mediating connection and other issues in parallel rather than sequentially.⁴³

Some of the suggestions made at the workshop would require a significant shift in the policies of governments including:

- state and territory governments removing their requirement for comprehensive proof of connection *before* entering into negotiations
- developing a national framework and standards for the assessment of connection.

There are indications of support for some of these suggestions. In February this year, Commonwealth Attorney-General McClelland suggested that, rather than start by considering connection with its attendant problems,⁴⁴ there might be benefits in starting with a consideration of tenure and having a connection process run in parallel with discussions about a range of outcomes, native and non-native title.⁴⁵

Identifying where native title will not be recognised: the effect of extinguishment

It has been clear for many years, both from the provisions of the Native Title Act and judgments of the High Court and Federal Court, that:

- native title will *not* be recognised over large areas of Australia where, as a matter of law, native title has been extinguished completely by certain dealings as specified in the Act and in some High Court judgments

⁴³ See R Farrell, J Catlin and T Bauman, *Getting Outcomes Sooner, Report on a native title connection workshop*, 2007, National Native Title Tribunal and Australian Institute of Aboriginal and Torres Strait Islander Studies.

⁴⁴ For example, the shortage of experts and no straightforward way to make them more readily available, the delay and cost of securing reports, competing arguments about connection to specific areas.

⁴⁵ R McClelland, *Negotiating Native Title Forum*, 29 February 2008, paras 34-38.

- in other areas (such as those subject to ‘non-exclusive’ pastoral leases), any native title right to exclusive possession has been extinguished, with the remaining ‘bundle’ of native title rights and interests being recognised and exercised alongside the rights and interests of other land-holders but subject to those other rights
- where there have been no prior dealings with the land, or where those dealings must be disregarded, and other conditions are satisfied, there may be a determination that native title rights and interests confer possession, occupation, use and enjoyment of that land on native title holders to the exclusion of all others.

The map at [Attachment E](#) shows in broad terms those areas where by reference to current tenures (assuming the dealings are not to be disregarded under a provision of the Act⁴⁶) native title will *not* be found to exist, irrespective of whether Aboriginal people have retained strong traditional links to those areas. Those areas cover much of eastern and southern Australia.

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

The challenge in relation to any claimant application (or cluster of claims) is to identify with certainty those areas where native title (or some native title rights and interests) might exist because:

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

Role of the Tribunal

Although some claimant applications specify the parcels of land claimed, many claimant applications cover all the land within a described boundary other than those categories of land where native title has been extinguished. Such descriptions are sufficient to satisfy the registration requirements of the Act,⁴⁷ but it will not always be apparent which areas are claimed. Indeed, it is sometimes the case that neither the claimants and their representatives nor respondent parties know precisely which areas are the subjects of negotiation. On occasions it becomes clear during the mediation process that, having regard to current tenures and previous dealings in relation to the land, native title might only survive over small areas. Such a revelation can change the focus, tone and potential outcomes of the mediation.

Procedural Direction: To assist parties to gain a clear appreciation of the maximum possible extent of native title within a claim area, Procedural Direction No. 9 of 2007 directs Tribunal Members and the Native Title Registrar to ensure that, in respect of specified categories of claimant applications:

- tenure mapping (showing the *current* tenure or tenures in relation to land in a claim area) is prepared and is made available to the parties⁴⁸

⁴⁶ See *Native Title Act 1993* ss 47, 47A, 47B.

⁴⁷ *Native Title Act 1993* ss 62(2)(a) and (b), 190B(2).

⁴⁸ Paragraphs 13, 19-21.

- a 'preliminary tenure analysis' is prepared in relation to each claim area, that is, an analysis involving an ascertainment of the *current* tenure of a claim area to ascertain whether native title rights and interests may have been extinguished in whole or in part, or are not affected, in relation to land and waters within the outer boundary of the claim area.⁴⁹

These steps are to be taken for strategic, as well as claim management, purposes. For example, the early preparation of a map of current tenures across a claim area and a preliminary tenure analysis should assist parties to identify the areas where native title has been extinguished (in whole or in part)⁵⁰ and over which areas native title may be recognisable (in whole or in part). This process will not be definitive, particularly as tenure histories may disclose previous dealings that had the effect of extinguishing native title rights and interests, but they will give a snapshot of the potential scope of any determination in relation to the claim area. In some parts of the country, it may be immediately apparent that very small areas of land may be susceptible to a determination of native title. Such a picture may encourage parties to look to a range of options for a negotiated outcome.

The preparation of maps and a preliminary tenure analysis may also assist in:

- resolving overlapping claims, particularly where there is little or any land in the overlap area where native title might survive, or
- identifying that some parties have interests that would not be affected by a determination of native title and providing the basis for those parties to be encouraged to withdraw from the proceedings early on.

Resolving disputed overlapping claims

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

As at 30 September 2008, 50.5% of the land mass of Australia was either covered by determinations or single claimant applications, 9.4% was covered by two or more claimant applications and the remainder (40.1%) was not covered by any claimant applications.

As at 30 September 2008, of the 497 active claimant applications – 52.1% of claims had no overlaps and the other 47.9% of claims comprised 18.1% with one overlap, 14.5% with two overlaps, 6.2% with three overlaps, 3.8% with four overlaps and 5.2% with five or more overlaps.

Although some groups acknowledge that others have traditional rights and interests over the same area (and that has been recognised in some determinations of native title to date⁵¹), the

⁴⁹ Paragraphs 13, 21-24.

⁵⁰ Subject to the operation, if any, of ss 47, 47A or 47B of the *Native Title Act 1993* to areas of land within the claim area.

⁵¹ E.g. see *James (on behalf of the Martu People) v Western Australia* [2002] FCA 1208 at [11], *James on behalf of the Martu People v Western Australia (No 2)* [2003] FCA 731.

existence of disputed overlaps is a threshold issue that needs to be resolved. Some longstanding disputes between groups are revived or exacerbated by the native title process. These disputes can result in long delays in progressing any of the claims, or to trials in Court.

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

Issues for claims groups and their representatives

The risks for disputing claim groups include:

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

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

- sorting out the issue between themselves, perhaps in accordance with traditional decision-making processes
- asking the Tribunal for mapping and possibly research assistance to inform discussions between the disputing groups
- getting the relevant native title representative body to exercise its dispute resolution function to promote agreement, or to mediate, between its constituents,⁵² possibly with the assistance of the Tribunal⁵³ (as happened at Spear Creek in South Australia)
- if the claims have been referred to the Tribunal for mediation,⁵⁴ having the Tribunal mediate between the groups
- asking the Tribunal to conduct a native title application inquiry,⁵⁵ or a review of materials to see whether a native title claim group holds native title rights and interests in relation to the overlap area,⁵⁶ to assist in the mediation of the dispute
- asking the Tribunal to refer the issue to the Federal Court for determination.⁵⁷

⁵² *Native Title Act 1993* s 203BF.

⁵³ *Native Title Act 1993* s 303BK(3).

⁵⁴ Including referral for the purpose of mediating the resolution of the overlaps, see *Native Title Act 1993* s 86B(5).

⁵⁵ *Native Title Act 1993* ss 138A-138G.

⁵⁶ *Native Title Act 1993* ss 136GC-136GE.

⁵⁷ *Native Title Act 1993* ss 136D, 86D(1).

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

Role of the Tribunal

Procedural Direction: Procedural Direction No. 9 of 2007 provides, in relation to claimant applications on the Regional list or the Substantive list, that where a claimant application is overlapped by the whole or a part of the claim area of another claimant application, the relevant Tribunal Member must develop with the relevant parties a program for attempting to resolve the overlap.⁵⁸

Such a program could be prepared in light of, or include, a range of interdisciplinary products and procedures, many of which the Tribunal can provide.

The program should include, where appropriate, work to be done by specialist employees of the Tribunal such as:

- the preparation of a tenure map for the claim area
- the preparation of a preliminary tenure analysis for the claim area
- historical, anthropological, linguistic or other research in relation to the claim area or the native title claim group.

When preparing a program for attempting to resolve the overlap, the relevant Member should consider whether to recommend that the Tribunal conduct:

- a review of the issue of whether a native title claim group who is a party to the proceeding holds native title rights in relation to the claim area, or
- a native title application inquiry.

Reducing the number of respondent parties to a proceeding

As a general rule, before there can be a consent determination of native title, every party to the proceeding must agree to it.⁵⁹ In some cases (particularly where there are scores, if not hundreds, of respondent parties) it can be difficult to obtain the consent of all parties and the requisite documentation of that agreement. For logistical as well as substantive reasons it is important to ensure that only those people with a relevant interest become, or remain, parties to the proceeding. Given the many years that often elapse between the notification of a claimant application and its resolution, it is possible that some parties will not retain relevant interests in the claimed area. This may be, for example, because they have sold their interest or because the claim area is reduced in such a way that their interests are no longer affected. If people who should not be parties retain that status, a consent determination might be delayed or even denied.

The Act was amended in 2007 to:

- limit the range of persons who may become a party to claimant application proceedings
- empower the Tribunal to refer to the Federal Court the question of whether a party should cease to be a party to a proceeding.

⁵⁸ Paragraphs 36-40.

⁵⁹ *Munn v Queensland* (2001) 115 FCR 109.

New limitations on who can become a party: Although much of the previous scheme concerning parties remains, section 84 of the Act has been ‘tightened up’ to make it more difficult to ‘automatically’ become a party to proceedings. Some persons who previously could become parties by giving notice to the Court will now only become parties if they have an ‘interest, in relation to land or waters’ that may be affected by a determination in the proceedings.⁶⁰

Further, the power of the Court at any time to join a person as a party has been amended so that being joined as a party requires not only that the person’s interests may be affected by a determination but also that ‘it is in the interests of justice’ that the person be so joined.⁶¹

These provisions apply only to applications lodged on or after the ‘commencing day’ of the relevant amendments.⁶²

Role of the Tribunal

Procedural Direction: Procedural Direction No. 9 of 2007 requires the relevant Tribunal Member:

- to consider whether any party to the proceeding lacks a relevant interest in relation to the land or waters in the claim area
- if the Member considers that a party does not have a relevant interest in the proceeding, to invite the party to withdraw as a party to the proceedings
- if the party does not withdraw, to consider referring the matter to the Court or reporting the matter to the Court.⁶³

Remaining a party—referral of a question about whether a party should cease to be a party: If the Tribunal Member presiding at a mediation conference considers that a party does not have a relevant interest in the proceeding, the Member may refer to the Federal Court the question of whether a party should cease to be a party to the proceeding.⁶⁴ A ‘relevant interest’ for this purpose is an interest that may be affected by a determination in the proceeding.⁶⁵ If such a question has been referred to the Federal Court, the presiding Member may continue the mediation if he or she considers that it is appropriate.⁶⁶

The Tribunal might, for example, refer such a question to the Federal Court where a claimant application has been amended to remove certain areas or categories of land from the claim area and, as a consequence, some parties’ interests are no longer affected by the claim. Analysis of current tenures in the claim area or the tenure history of the area might also disclose that some parties do not have interests that could be affected. Such analysis can be, and often is, conducted by the Tribunal’s geospatial specialist staff under the Act.⁶⁷

⁶⁰ *Native Title Act 1993* s 84(3)(a)(iii). The phrase ‘interest, in relation to land or waters’ is defined in s 253.

⁶¹ *Native Title Act 1993* s 84(5).

⁶² *Native Title Amendment Act 2007*, Item 78.

⁶³ Paragraphs 25-28.

⁶⁴ *Native Title Act 1993* s 136DA(1).

⁶⁵ *Native Title Act 1993* s 136DA(6).

⁶⁶ *Native Title Act 1993* s 136DA(5).

⁶⁷ *Native Title Act 1993* ss 78(2)(b), 108(3)(a).

Amendments to the Federal Court Rules that commenced to operate on 4 January 2008⁶⁸ and Procedural Direction No 5 of 2007 set out the process by which the Tribunal refers to the Court questions about whether a party should cease to be a party.

Other Federal Court orders: It should be noted that this is not the only process available for the removal of a party. The Federal Court may at any time order that a person, other than the applicant, cease to be a party to the proceedings.⁶⁹ The Court has issued self-executing orders in relation to parties who appear not to have relevant interests in the area claimed and who do not provide (by a specified date) a statement as to why they should remain a party.⁷⁰ One way of achieving that result is for the Tribunal to include in a mediation progress report to the Court a statement about the apparent lack of relevant interest by one or more of the parties.

Partial determinations

In some cases it might be in the interests of parties to negotiate a consent determination over part of a claimed area.

The Act has been amended to make it easier to obtain such a consent determination. Subject to it being within power and appropriate, the Court may make a determination of native title in relation to the area in the terms sought by the persons specified in section 87A. This means that a consent determination may be made without the consent of a party to the proceedings where that party does not hold a specified type of interest in the determination area and who is not otherwise listed. That includes:

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

Those parties may object to the Court making a determination in the terms sought. In deciding whether to make the consent determination the Court must take into account any objections from those parties.⁷¹

When a consent determination is made under this scheme, the application will be deemed to be amended to reduce the area covered by the application to what is left.⁷² The registration test will not be applied to these 'amended applications', and if the application is registered, the entry in the Register of Native Title Claims must be amended to reflect the change in the area covered by the application.⁷³

⁶⁸ Order 78 Rules 20A-20C.

⁶⁹ *Native Title Act 1993* s 84(8).

⁷⁰ For example, at a regional directions hearing on 11 December 2007, Spender ACJ, in response to notices of motion filed by the North Queensland Land Council Aboriginal Corporation, made self-executing orders in relation to seven claimant applications involving 19 respondents.

⁷¹ *Native Title Act 1993* s 87A(5).

⁷² *Native Title Act 1993* s 64(1B), (1C).

⁷³ *Native Title Act 1993* ss 190(3)(a), 190A(1A).

Resources constraints

Issues for claim groups and their representatives

Historically, the debate about the adequacy of resourcing native title claim groups has focused on the amount of public funding provided to native title representative bodies and the ways in which native title representative bodies have applied those moneys to assisting in the resolution of claims and to the performance of their other statutory functions. The debate has proceeded on the basis that:

- Indigenous groups lack the resources to prepare and prosecute claims in the way and to the standard required by the law
- it is appropriate, as a matter of public policy and social justice, to assist groups in that endeavour.

Consequently, groups who are represented by native title representative bodies have relied on those organisations to provide the relevant assistance.⁷⁴ Properly functioning native title representative bodies are not just important to the people they represent. The Tribunal and parties to various native title proceedings and negotiations also benefit from them providing an efficient and effective service.

If the native title representative body lacks resources to assist some claimants, or if the priority given to their claim is such that the resources will not be provided for some years, then the claimants (and the other parties and institutions, such as the Tribunal and the Court) have to wait.

Many native title claimants and their representatives experience difficulty in juggling mediation with complying with Court orders, responding to future act notices (particularly those asserting the expedited procedure), negotiating ILUAs, engaging in bilateral negotiations, dealing with related issues (e.g. cultural heritage), and dealing with the myriad of issues/problems that constantly arise within claim groups.

Unrepresented claimants: Native title claim groups who are not represented by native title representative bodies have to seek assistance elsewhere, often from professionals acting pro bono.

Issues for governments

State and territory governments are the first respondents to native title proceedings. Some have expert staff, and engage consultants for native title work. However, some governments lack the resources or tenure recording systems to undertake detailed tenure research or assess connection reports in a timely manner, or to substantively mediate numerous claims concurrently.

Issues for respondent parties

There can be scores, and occasionally hundreds, of non-government respondent parties to native title proceedings. Some parties have very limited interests (both legally and spatially) that might

⁷⁴ See *Native Title Act 1993* ss 203B-203BK for the functions and powers of representative bodies.

be affected by a determination of native title. Where some respondents have interests in common with others they may obtain joint representation, e.g. through an industry organisation or lawyer.

Respondent parties need to decide the extent to which they want or need to be involved at various stages in the proceedings, e.g. whether they need to be independently satisfied of all aspects of the claim group's connection, or whether they should simply seek to negotiate a suitable agreement with the applicants and ensure that the respondents' interests are recognised in any determination of native title.

In a recent judgment discussing the role of a State respondent in native title proceedings, Justice North referred to the way in which native title jurisprudence has developed and stated:

In broad terms the learning relating to extinguishment has shown that successful applications will not interfere significantly with the rights and interests of respondent parties. To the extent that native title rights and interests are inconsistent with the rights of respondents, those latter rights will prevail.⁷⁵

The related issue for respondents is how many resources they need to apply to native title proceedings and whether the Commonwealth will provide them with at least some resources.

The *Guidelines on the provision of financial assistance by the Attorney-General under s 183 of the Native Title Act 1993* are meant to encourage the resolution of native title matters through agreement-making, rather than litigation, wherever possible.

The Guidelines relate to financial assistance that the Attorney-General may make to respondent parties in relation to native title inquiries, mediations or proceedings, or persons entering into an ILUA or an agreement about rights under subsection 44B(1) of the Act (rights of access for traditional activities), who are not members of the native title claim group concerned.⁷⁶

The Guidelines specify:

- the scope of assistance that can be applied for under section 183 eligibility criteria
- the form and requirements of making applications for assistance
- the type of assistance that can be authorised under section 183
- the conditions applicable to any assistance that is authorised and rights of review on decisions in relation to applications for assistance.

⁷⁵ *Hayes on behalf of the Thalanyji People v Western Australia* [2008] FCA 148 at [22] citing *Western Australia v Ward* (2002) 213 CLR 1.

⁷⁶ Section 183 of the *Native Title Act 1993* prohibits the Attorney-General from providing assistance to government Ministers, native title holders or claimants and claimants for compensation in relation to native title. Their funding is dealt with under Div 4, Pt 11 of the Act.

Issues for the Tribunal

On occasions, critics have complained that the Tribunal is over-resourced relative to some other participants in the native title system, particularly native title representative bodies.

It is a matter of public record that, in recent years by prudent management of its resources, the Tribunal has not spent all of its annual appropriation.⁷⁷

The focus for other participants should not be on whether the Tribunal is relatively well resourced but on how those resources can be used to ensure that progress is made across the system. Resources of other participants should not be wasted by unnecessary duplication of activities that appropriately can be undertaken by the Tribunal. A range of parties can be assisted by:

- research reports
- geospatial products (such as maps, aerial photography, three dimensional imaging)
- preliminary tenure analysis
- enhanced research tools that combine data from literature searches and geospatial products prepared and paid for by the Tribunal.

At least some of these products will be prepared so that Members and employees can comply with various directions in Procedural Direction No. 9. Parties should seek to use them strategically.

Issues for the Federal Court

Although the Federal Court recognises that limits on financial and human resources and a range of other factors affect the progress of individual claims or clusters of claims,⁷⁸ the Court is anxious to ensure that steps are being actively taken to advance the resolution of claims whether in mediation or trial.⁷⁹ Lack of resources may not be sufficient for the Court to treat the claim as, in effect, in abeyance. Judges may request reports showing that some steps, however small, have been taken between each directions hearing in relation to each application in a state, territory or region.

Integrated nature of the native title system

It is essential to bear in mind that the native title system is an integrated whole, with the major participants being:

- native title representative bodies or native title service providers (native title representative bodies)
- native title parties (most of whom are represented by or via native title representative bodies)
- state and territory governments (as first respondents to native title applications)
- the Commonwealth Minister (currently the Attorney-General)
- other respondent parties

⁷⁷ See the Annual Reports of the National Native Title Tribunal.

⁷⁸ See e.g. *Frazer v Western Australia* (2003) 128 FCR 458, 198 ALR 303.

⁷⁹ See *Harrington-Smith v Western Australia (No 6)* [2003] FCA 663.

- the Federal Court
- the Tribunal
- the Commonwealth funding agencies – the Attorney-General’s Department (which, among other things, administers respondent party funding) and the Department of Families, Housing, Community Services and Indigenous Affairs.

The performance of the *system* depends on the performance of the participants, most of whom are funded by the Commonwealth.

The performance of each *participant* is contingent to a greater or lesser extent on the performance of other participants. Each participant only has capacity to perform their functions and exercise their powers if they have, or have access to, appropriate levels of funding, professional employees or consultants, and the skills and knowledge required to engage in a positive and productive way with others. Consequently, neither the Court nor the Tribunal can perform their functions adequately, or produce appropriate outcomes, if the parties or their representatives lack the capacity to engage effectively and in a timely way with each other and with the Court or Tribunal.

The Commonwealth funds many of the participants in the native title system including native title representative bodies, some respondent parties, the Federal Court and the Tribunal. For the system to work, the Commonwealth must ensure that sufficient resources are provided to the system and that those resources are distributed appropriately between the participants. Funding is determined on a four year cycle. The final year of the present cycle is 2008-09.

The Attorney-General’s Department has coordinated a comprehensive review of Commonwealth native title funding for the next cycle. The review was completed in July 2008.

Meeting the challenges: an interest-based approach

Interest-based approach: an overview

From its inception, the Tribunal has attempted to conduct interest-based mediation. The Tribunal’s internal guide to mediation, for example, states that the Tribunal ‘conducts multi-party, cross-cultural mediation in relation to areas of land or waters, and seeks to use a primarily interest-based model in a rights-based context.’⁸⁰

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

⁸⁰ National Native Title Tribunal, *Native title agreement-making in Australia: a guide to National Native Title Tribunal practice*, 2nd edn, 2005, p 15, para 2.4.1.

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

- As to *process*, he suggested that, rather than start by considering connection, the starting point could be the consideration of tenure. Early consideration of tenure may identify where native title may continue to exist and where it may have been extinguished. It may assist in resolving overlapping claims and provide parties with an opportunity to consider possible outcomes. A connection process could run in parallel with discussions about a range of outcomes.⁸¹
- As to *outcomes*, the Attorney-General suggested that they could be native title (such as determination of native title) or non-native title outcomes, or a combination of the two. If native title is the desired outcome, then connection evidence will be required to determine the claim. If connection is not made out, the parties can consider whether alternative agreements can be reached.⁸²

Five years before the Attorney-General's speech, a Full Federal Court stated: 'Not all agreements include a determination of native title, but nonetheless they may involve recognition of the historic association of the claimants with the relevant land.'⁸³ 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.⁸⁴ The wide variety of options that have been agreed or considered as, or as part of, the settlement of claimant applications is illustrated earlier in this paper.

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

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

The Attorney-General stated:

By sitting down at the start and discussing what interests they have and what outcomes they are seeking, parties may be more readily able to identify opportunities for the timely and satisfactory resolution of the claim.⁸⁵

⁸¹ R McClelland, Negotiating Native Title Forum, 29 February 2008, paras 38, 43 and 44.

⁸² R McClelland, Negotiating Native Title Forum, 29 February 2008, paras 38-42, 45-46.

⁸³ *Attorney-General (NT) v Ward* (2003) 134 FCR 16, introductory statement of the Court, per Wilcox, North and Weinberg JJ.

⁸⁴ See *Fraser v Western Australia* (2003) 128 FCR 458 at [24].

⁸⁵ R McClelland, Negotiating Native Title Forum, 29 February 2008, para 39.

He continued:

Much can be achieved if parties are up front about what they really want and open-minded about finding creative solutions⁸⁶...Through parties focussing on their interest in claims, and how these might be met in practice, it should be possible for parties to negotiate more timely and satisfactory outcomes.⁸⁷

As noted earlier, although the Tribunal seeks to use a primarily interest-based model, native title mediation takes place in a rights-based context. Mediation occurs within a legal framework whereby parties may seek a judicial determination of their respective rights and interests at law. Because such native title outcomes are limited by what the law allows, negotiations are not at large so far as those outcomes are concerned.⁸⁸

However, parties can negotiate a wide range of outcomes beyond native title determinations (and irrespective of whether there is a determination under the Act) that satisfy their shared or separate interests.

Deciding what will each party settle for – an interest-based approach

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

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

The reason for asking the question and why different answers might be given can be summarised briefly.

Most claims have been in the system for many years. As noted earlier, approximately 21% were lodged before the substantial amendments were made to the Act in 1998, and a further 55% were lodged before the High Court's landmark judgments in the *Ward*⁸⁹ and *Yorta Yorta*⁹⁰ cases.⁹¹ In other words, more than three quarters of current claims were lodged before claimant groups could have understood, or been advised comprehensively about, such matters as:

- the high evidentiary standard necessary to prove that they have native title
- the legal concept of native title being a 'bundle of rights' and the limited content (from the standpoint of traditional laws and customs) of the native title rights and interests that the law will recognise

⁸⁶ R McClelland, Negotiating Native Title Forum, 29 February 2008, para 49.

⁸⁷ R McClelland, Negotiating Native Title Forum, 29 February 2008, para 64.

⁸⁸ National Native Title Tribunal, *Native title agreement-making in Australia: a guide to National Native Title Tribunal practice*, 2nd edn, 2005, p 16, para 2.4.1.

⁸⁹ *Western Australia v Ward* (2002) 213 CLR 1.

⁹⁰ *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422.

⁹¹ Other significant judgments were not delivered by the High Court until late 2001 (*Commonwealth v Yarmirr* (2001) 208 CLR 1) or 2002 (*Wilson v Anderson* (2002) 213 CLR 401).

- the nature and extent of extinguishment from the grants of past and present land tenures that has resulted in any prospect of recognition of their native title rights being removed, or in such recognition being confined to very limited native title rights and interests
- the consequent loss of exclusivity in relation to native title over most of the land mass of Australia (and the implications of that for possible compensation claims)
- the vulnerability of native title to extinguishment and the ways in which native title may be extinguished after a determination of native title, e.g. by acquisition like any tenure.

For many groups, the most they could obtain is a determination that is limited to:

- a small proportion of their traditional country (perhaps a few parcels of land separated by significant distances)
- a few non-exclusive native title rights and interests.

To obtain even that limited result:

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

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

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

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

The aspiration might include:

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

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

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

Native title claim groups who want to explore alternative settlements (including or instead of a determination that native title exists) should be specific about what they want to achieve and how they want to achieve it. They should not wait to see what others might offer. For example, are the claimants seeking a role in the management of specific areas, title to other areas, assistance with capital works, or financial assistance for ongoing management of their interests or other specific outcomes?

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

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

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

In the course of delivering a consent determination that native title exists over part of the area covered by the *Wik* claim, Justice Drummond said that he accepted, 'at least for the moment, that an agreed resolution' of the balance of the Wik peoples' claim was preferable to 'a Court-imposed result' because such an outcome was 'more likely to provide a more useful framework than a court decision limited to specific issues'.⁹² But he urged the parties to 'engage in the process of compromising, by giving up part of what each considers to be their full legal rights, that is essential if there is to be an agreed rather than a Court-imposed result'.⁹³ He cautioned:

It is worthy of note that litigation rarely results in the complete vindication of the position of any one party. Much more commonly the Court, after having the opportunity to hear and consider all the evidence from all the parties, comes to the conclusion that there is at least some merit in the arguments put forward by each party. Few litigants win 100 per cent of their cases. I do not expect native title litigation to be any different in this respect.⁹⁴

⁹² *Wik Peoples v Queensland* [2000] FCA 1443 at [5].

⁹³ *Wik Peoples v Queensland* [2000] FCA 1443 at [7], see also [8].

⁹⁴ *Wik Peoples v Queensland* [2000] FCA 1443 at [9].

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

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

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

Agreements on resolution of a claim always require readiness to compromise. That is often difficult to achieve.⁹⁵

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

[P]rompt parties to other native title disputes to increase their endeavours to reach compromises. Those endeavours will necessarily involve give and take on the part of all parties. Native title litigation, like other litigation, need not be conducted on an 'all or nothing' basis.⁹⁶

He referred to the risk to Indigenous communities of failure in a native title claim, a risk which 'is far from hypothetical' and which 'can have devastating consequences for the claimant community'. But if claimant communities and state parties can achieve a mediated outcome 'they can ensure that a broad spectrum of mutual benefits can follow the resolution of native title claims'.⁹⁷ He continued:

[I]f compromises are able to be achieved, the cause of reconciliation between Australia's past and present will be greatly advanced and the economic, social and educational benefits available to all Australians may be better able to be accessed by members of claimant communities.⁹⁸

Other judges have expressed the view that courts are unsuitable forums for native title issues to be resolved.⁹⁹ In any case, it is up to the parties to work out the on-the-ground practicalities of any determination that native title exists.¹⁰⁰

⁹⁵ *Attorney-General of the Northern Territory v Ward* (2003) 134 FCR 16, introductory statement of the Court (Wilcox, North and Weinberg JJ).

⁹⁶ *Rubibi Community v Western Australia (No 7)* [2006] FCA 459 at [166].

⁹⁷ *Rubibi Community v Western Australia (No 7)* [2006] FCA 459 at [167].

⁹⁸ *Rubibi Community v Western Australia (No 7)* [2006] FCA 459 at [168].

⁹⁹ See e.g. *Members of the Yorta Yorta Aboriginal Community v Victoria* [1998] FCA 1606 at [130], *De Rose v South Australia* [2002] FCA 1342 at [89], [144].

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

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

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

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

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

The options which native title claim groups might consider seriously could be influenced by the attitude of, and approach taken by, the main respondents (particularly governments) to connection requirements and options for alternative settlements. Having made a native title claim which, in part at least, is an assertion of group identity and rights, native title claim groups are unlikely to withdraw or vary their claims significantly unless meaningful offers are made which meet their reasonable aspirations for themselves and their descendants.

The cumulative effect of such informed decisions in relation to hundreds of current claimant applications could be significant to the rate of progress of the claims that are pursued and the cost of delivering just and enduring outcomes for the parties.

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

Although legal certainty is desirable, it has not always been necessary for the settlement of claims. In 2001, before the *Ward* judgment of the High Court, parties to two claims in Western Australia secured consent determinations from the Federal Court. In his reasons for decision in one case, Justice Carr noted that parties to the application had incorporated into their agreement clauses which provided a mechanism to enable a variation to be made to the determination if the High

¹⁰⁰ See e.g. *Ward v Western Australia* (1998) 159 ALR 483 at 639, *Smith v Western Australia* (2000) 104 FCR 494 at 500 [27].

Court were to overturn or set aside the Federal Court's decision in the *Ward* matter. His Honour had examined these clauses and was satisfied that they were an entirely appropriate way of reserving the rights of the parties pending the High Court's decision.¹⁰¹ In similar circumstances, Justice French said that he was satisfied that it is appropriate that there should be scope for a variation of the form of the determination in light of the High Court's judgment which was yet to be delivered.¹⁰²

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

As in all areas of the law, there are, and will continue to be, outstanding questions in native title. However, fifteen years of experience with the native title system should enable parties to accept that an outcome does not have to be legally perfect to work in a practical sense. In particular, it is clear that in this area, there will sometimes not be clear cut legal answers or the court's decision will not be entirely predictable. So unless participants want to risk an all or nothing legal throw of the dice, there must be a will on both sides to devise workable solutions.¹⁰³

Settlements involving or comprising components other than determinations of native title

Options for alternative settlements: Options that might be included in an alternative settlement include:

Recognition of traditional land, without native title rights, for example:

- recognition under state or territory legislation or by other means of statutory protection
- recognition of traditional boundaries and traditional owner entities on state land title systems
- signage in appropriate locations and publications
- place naming rights and provision of 'welcome to country' on official occasions

Grants of land or interests in land or water, for example:

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

Roles in managing what happens on land, for example:

¹⁰¹ *Ngalpil v Western Australia* [2001] FCA 1140 at [30].

¹⁰² *Brown v Western Australia* [2001] FCA 1462 at [12].

¹⁰³ R McClelland, Negotiating Native Title Forum, 29 February 2008, para 63.

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

Employment and economic opportunities, for example:

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

Financial payments or grants to the group, for example:

- for capital works on the land (e.g. for commercial or cultural development)
- to administer the land (such as funding of a traditional owner group)
- enterprise development.

There are various examples of settlement 'packages' negotiated in different parts of Australia. It should be stressed that:

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

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

Alternative settlements can be negotiated through agreements:

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

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

Issues for governments

The process by which native title applications are resolved by agreement requires the active and positive involvement of governments (particularly state and territory governments). Many of the options for settlement are exclusively in the control of governments.

Governments need to decide what they want to achieve in relation to native title claims. Although it is common for governments to say they want to negotiate rather than litigate, the question is what they want to negotiate about? Do they want to start by testing each claim to ascertain whether it might support a determination of native title or are they willing to consider, from an early stage in the process, a broader range of options from which to fashion a settlement of each claim? Do they consider claims to be primarily legal proceedings in relation to which they are the first respondent, or do they want to use native title claim proceedings as an opportunity to deal with a range of related issues?

The trend seems to be toward the broader objective. At the conclusion of their meeting on 18 July 2008, the Commonwealth, State and Territory Native Title Ministers issued a communiqué in which they recorded their agreement that 'a flexible and less technical approach to native title was needed throughout Australia'. They 'committed their Governments to taking a more flexible view of the ways to achieve the broad range of practical outcomes possible from native title processes – achieving real outcomes for Indigenous people and providing certainty for other land users'.

Ministers 'recognised that resolution of native title issues may or may not involve native title determinations; and that land justice and social justice outcomes can meet the needs and aspirations of this and future generations of Indigenous people.'¹⁰⁴

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

- When might negotiations of alternative settlements begin?
- How long should be allowed for other options to be delivered?
- What arrangements about native title claims will provide sufficient certainty
- The basis and threshold requirements for negotiating an alternative agreement

Issues for the Federal Court

Viewing native title claims in a broader context than conventional litigation: Native title determination applications are particular forms of proceeding that are commenced in the Federal Court that seek specific relief, in the form of a determination of native title.

¹⁰⁴ Communiqué, Native Title Ministers' meeting 18 July 2008.

For the Federal Court, each application is a proceeding that needs to be managed towards resolution by determination or dismissal, strike-out or discontinuance. The Court brings to the case management of each application its experience and practices in relation to other litigation, adapted to take into account some of the unusual features of native title litigation.

For the Tribunal, each application referred to it is an opportunity to assist the parties to reach agreement on the matters specified in section 86A of the Act or¹⁰⁵ some other form of agreement that satisfies the needs, aspirations and other interests of the parties. The Tribunal's primary objective is complete resolution if possible, not just reducing the number of issues that go to trial or the number of litigants.¹⁰⁶

For the reasons outlined earlier in this paper, many parties (not just native title claim groups) see the proceedings as an opportunity to negotiate outcomes that may, but need not, include a determination of native title. The Act clearly contemplates that possibility, and provides for the Court to adjourn proceedings to allow for negotiations that might result in an application being withdrawn or amended, the parties to a proceeding being varied or some other thing being done in relation to the application, and an agreement may involve matters other than native title.¹⁰⁷

For the purpose of this part of the paper, the issue to be considered is whether such approaches to resolving native title claims will affect case management practices of the Court or whether case management by the Court will affect the degree of flexibility (and amount of time) available to parties to negotiate settlement packages.

Whether or not individual judges think of claimant applications in this broader context and administer their lists accordingly, parties need to recognise that the Court is case managing native title proceedings that have been filed in Court. Consequently, whatever motivated the commencement, amendment or continuation of the claimant application, and whatever negotiations are taking place other than in relation to a possible determination of native title, parties must adapt their behaviour so that the proceedings remain in mediation and are not dismissed or listed for hearing before the Court.

Assuming that the applications are not voluntarily withdrawn (e.g. because native title claim groups, particularly those with registered claims, want to retain some leverage with other parties), the challenge for them will be to demonstrate to the Court that real progress is being made toward a negotiated outcome of the claim. Where appropriate, they may apply for an adjournment of the proceedings under subsection 86F(3) of the Act to allow time for the negotiations.

Parties should not assume that alternative or even related agreement-making will be accepted by the Court as legitimate reason for delaying the resolution of the claim.

¹⁰⁵ Particularly where s 86F of the *Native Title Act 1993* is invoked.

¹⁰⁶ Where the Federal Court refers part of a proceeding to the Tribunal, the mediation may be about reducing the issues: see *Native Title Act 1993* ss 86B(5), 87(1), 136G(4).

¹⁰⁷ See *Native Title Act 1993* s 86F.

The challenge for judges of the Court will be to manage claims in their lists in a way that optimises the prospects of settlement while preserving the proper role of the Court in case management, remembering always that 'case management is not an end in itself' and that 'the ultimate aim of a court is the attainment of justice and no principle of case management can be allowed to supplant that aim'.¹⁰⁸

Conclusion

The native title scheme expressly favours resolution of claimant applications (and other native title issues) by agreement. The process by which native title applications are resolved by agreement requires the active and positive involvement of applicants and governments. It also requires other respondent parties to have an incentive to consider and, where appropriate, negotiate options for settlement rather than proceed as if native title claims are necessarily headed for trial.

All participants must work to find ways to reach outcomes in a timely and more efficient manner for the hundreds of current native title applications and those that are to come. The history of long and expensive litigation informs the need for a more rigorous agreement-making regime.

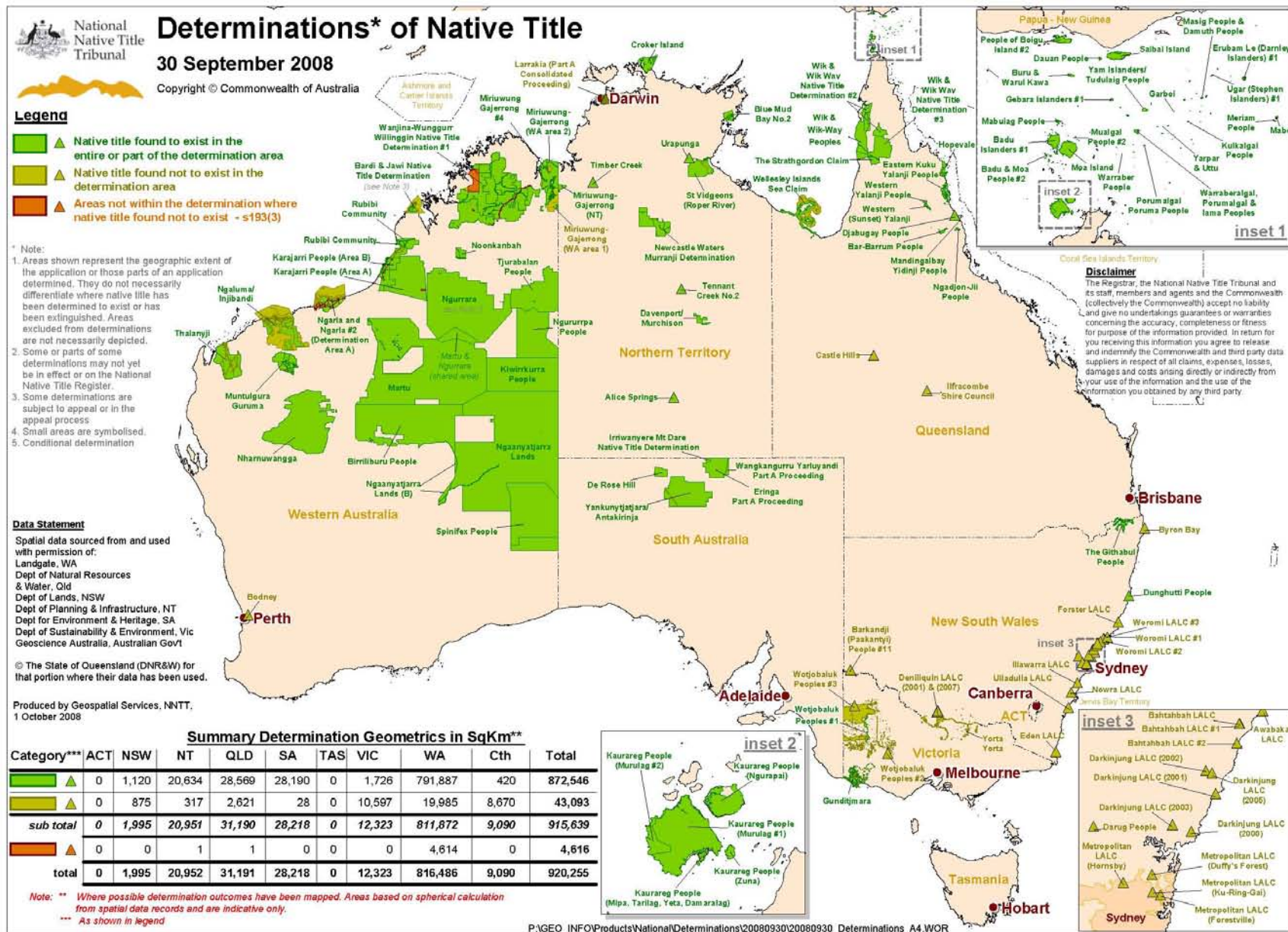
In summary, the changes to practice or approach could include:

- all parties taking an interest-based approach to the negotiations
- native title claim groups making informed and early decisions about the option they want to pursue and the basis on which they will settle (e.g. a determination of native title and/or some other form of agreed outcome)
- disputed and overlapping claims being resolved or made the subject of separate proceedings
- negotiations being conducted with tenure and connection materials informing the process, rather than the provision of connection reports being a precondition to negotiations
- governments actively and creatively exploring options for settlement, including alternatives to native title outcomes
- other respondent parties deciding whether, and to what extent, they need to be involved in the process, and then withdrawing or participating only to the extent necessary to protect their interests (e.g. by negotiating ILUAs).

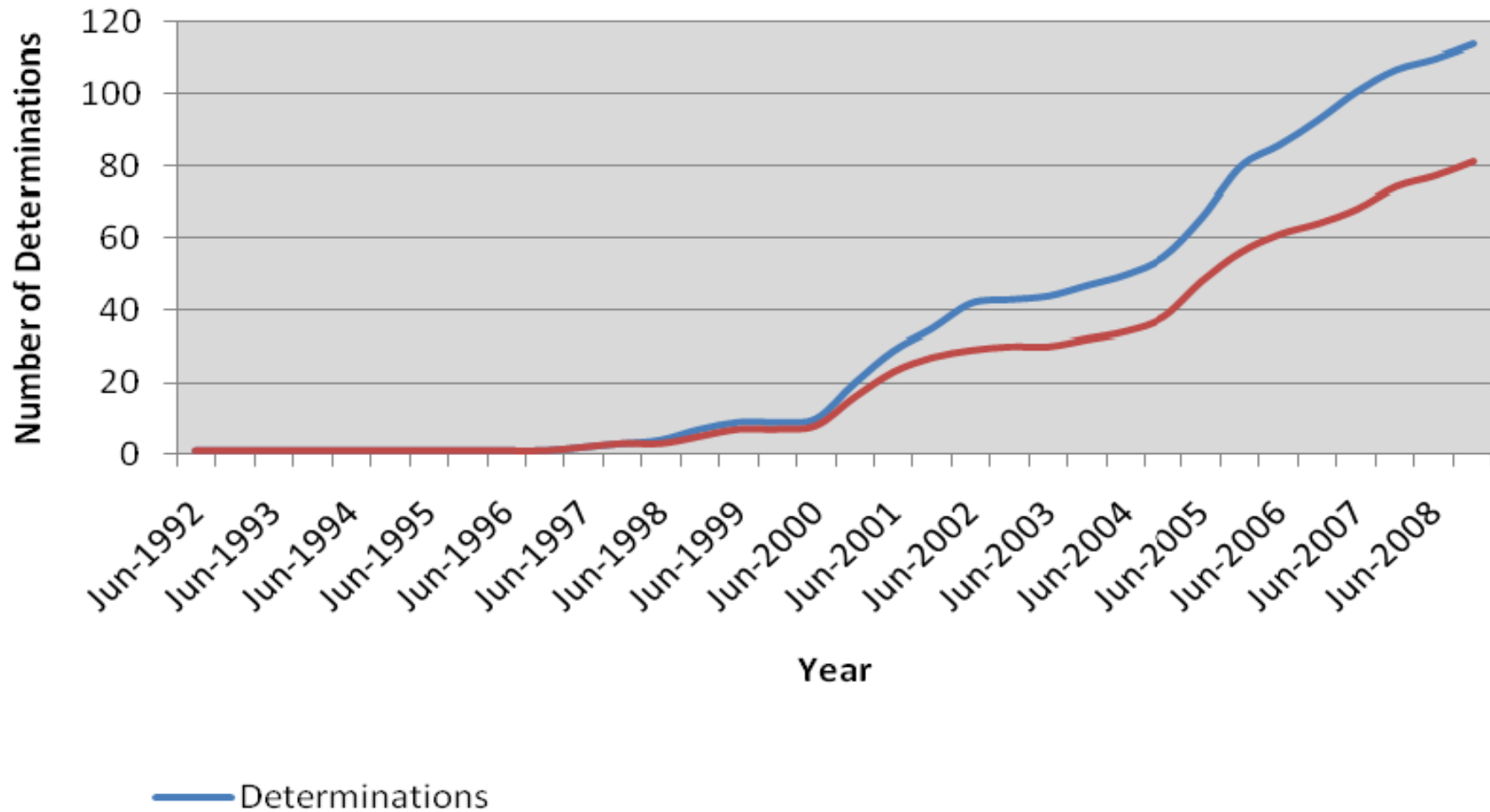
The challenges are many. Effective responses to them require innovation, leadership and commitment to achieving results across the native title system.

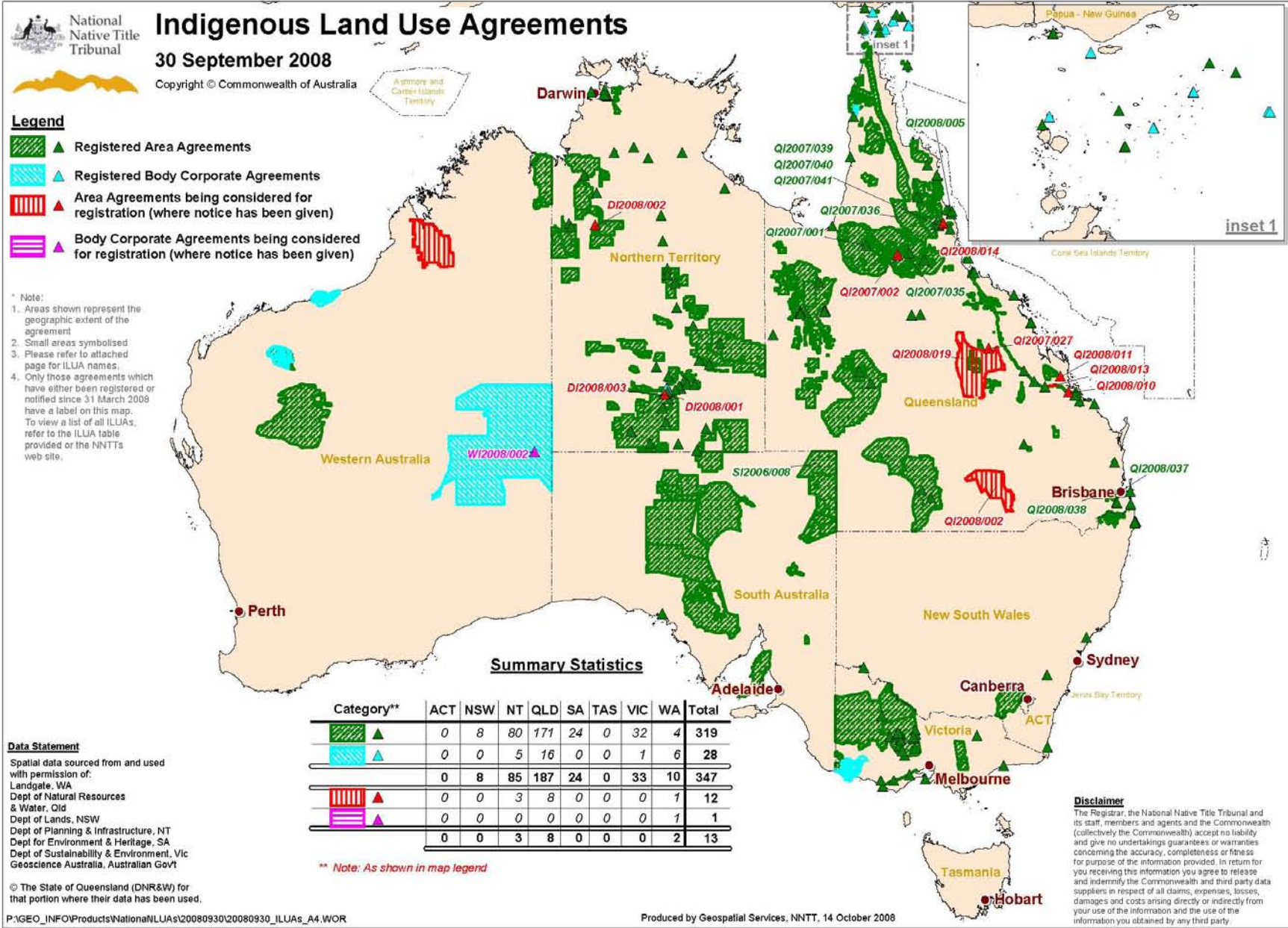
The Tribunal stands ready, willing and able to help you achieve just and enduring outcomes.

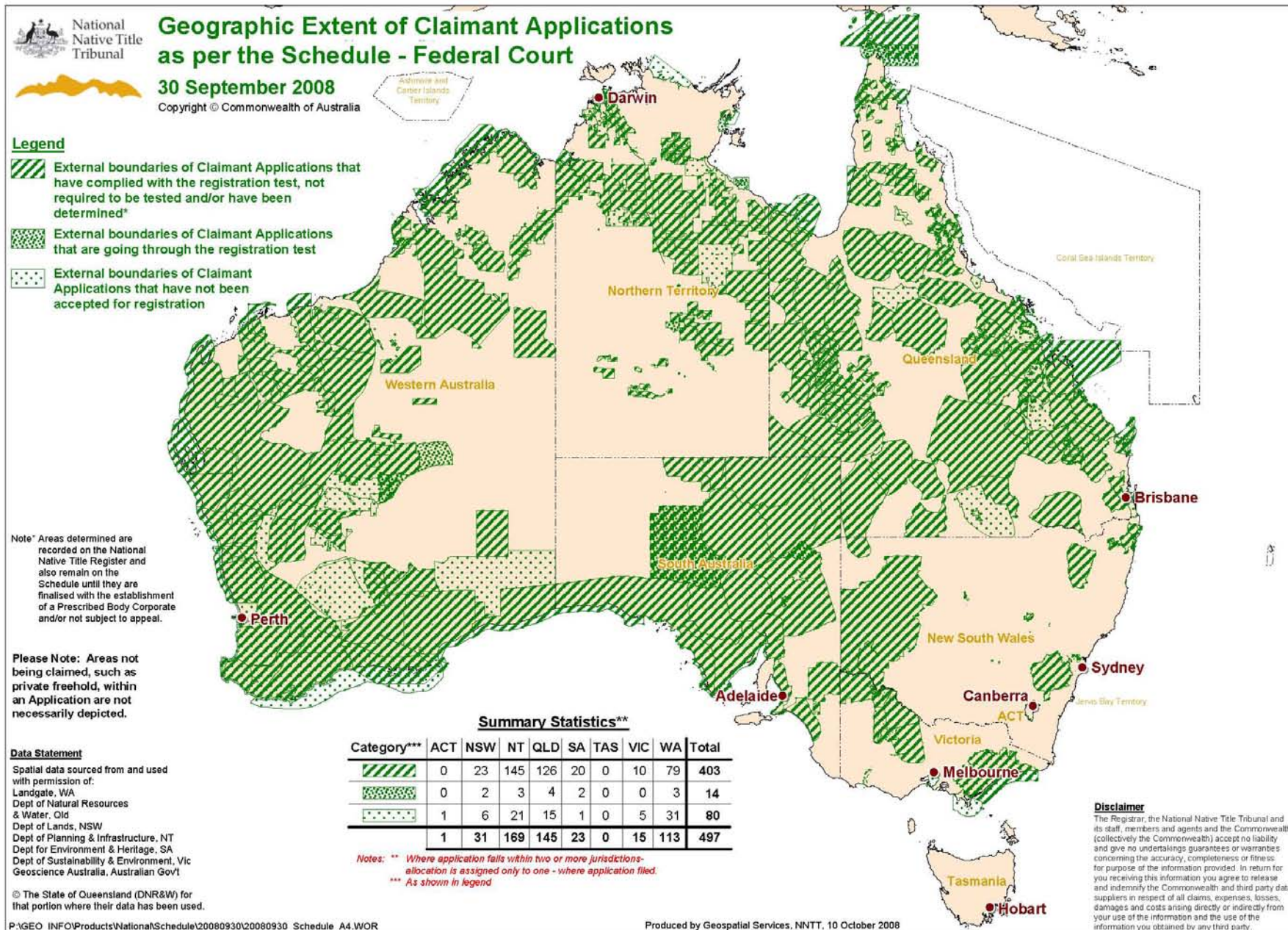
¹⁰⁸ *Queensland v JL Holding Pty Ltd* (1997) 189 CLR 146 at 154-5, 141 ALR 353 at 359 per Dawson, Gaudron and McHugh JJ.



Cumulative determinations of native title to 30 September 2008







National Native Title Tribunal
 30 September 2008
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Geographic Extent of Claimant Applications as per the Schedule - Federal Court

Legend

- External boundaries of Claimant Applications that have complied with the registration test, not required to be tested and/or have been determined*
- External boundaries of Claimant Applications that are going through the registration test
- External boundaries of Claimant Applications that have not been accepted for registration

Note* Areas determined are recorded on the National Native Title Register and also remain on the Schedule until they are finalised with the establishment of a Prescribed Body Corporate and/or not subject to appeal.

Please Note: Areas not being claimed, such as private freehold, within an Application are not necessarily depicted.

Summary Statistics**

Category***	ACT	NSW	NT	QLD	SA	TAS	VIC	WA	Total
	0	23	145	126	20	0	10	79	403
	0	2	3	4	2	0	0	3	14
	1	6	21	15	1	0	5	31	80
	1	31	169	145	23	0	15	113	497

Notes: ** Where application falls within two or more jurisdictions - allocation is assigned only to one - where application filed.
 *** As shown in legend

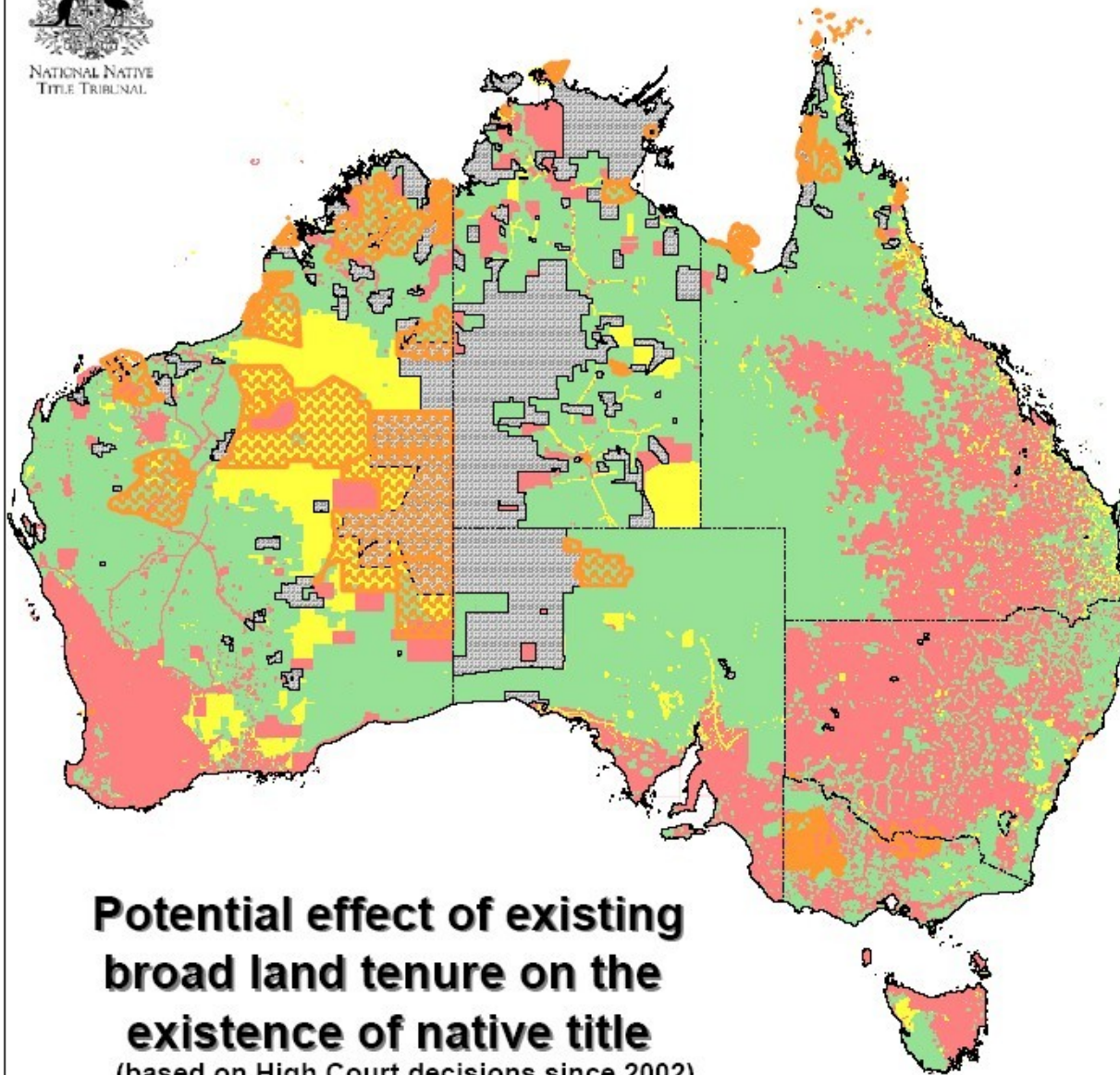
Data Statement

Spatial data sourced from and used with permission of:
 Landgate, WA
 Dept of Natural Resources & Water, Old
 Dept of Lands, NSW
 Dept of Planning & Infrastructure, NT
 Dept for Environment & Heritage, SA
 Dept of Sustainability & Environment, Vic
 Geoscience Australia, Australian Gov't

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





**Potential effect of existing
broad land tenure on the
existence of native title
(based on High Court decisions since 2002)**

Produced by National Native Title Tribunal, 5 February 2007

Legend

Broad Tenure Class

-  Consists mainly of freehold land, scheduled interests, exclusive pastoral leases and certain vested reserves.
-  Consists mainly of non-exclusive pastoral leases and some reserves.
-  Consists of vacant or unallocated Crown or State land.
-  Indigenous lands granted under State/Territory/ Federal statutes.
-  Determinations as at 31 December 2006

Native Title Status

- * Extinguished
- * Partially extinguished and may co-exist with other interests.
- * May exist as exclusive or non-exclusive rights and interests.
- * May or may not exist. If subject to s47A, extinguishment by grant of a prior interest must be disregarded.

* Note that the status ascribed here is not necessarily conclusive and does not necessarily represent the findings of any court as to the status of any particular area. It is based on current data and is indicative only of the potential effect of various dealings. In particular, it does not generally include any historical tenure information which, once obtained, may affect the status shown. The final determination of the status of any particular area is a matter for the courts. Note also that the application of the non-extinguishment principal, including as a result of the application of ss. 47, 47A and 47B of the NTA, has not been taken into account in preparing this information product. Note also that this depiction also relies upon the application of a presumption of validity.

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Overlap Activity Map as at 30 September 2008



Legend

- Area* only covered by a single application
- Area* covered by two applications
- Area* covered by three applications
- Area* covered by four applications
- Area* covered by five applications
- Area* not covered by an application
- Area* covered by determinations

This map depicts areas of overlap and non overlap of native title claimant applications and determinations as defined by the geographic extent of their external boundaries

Note *

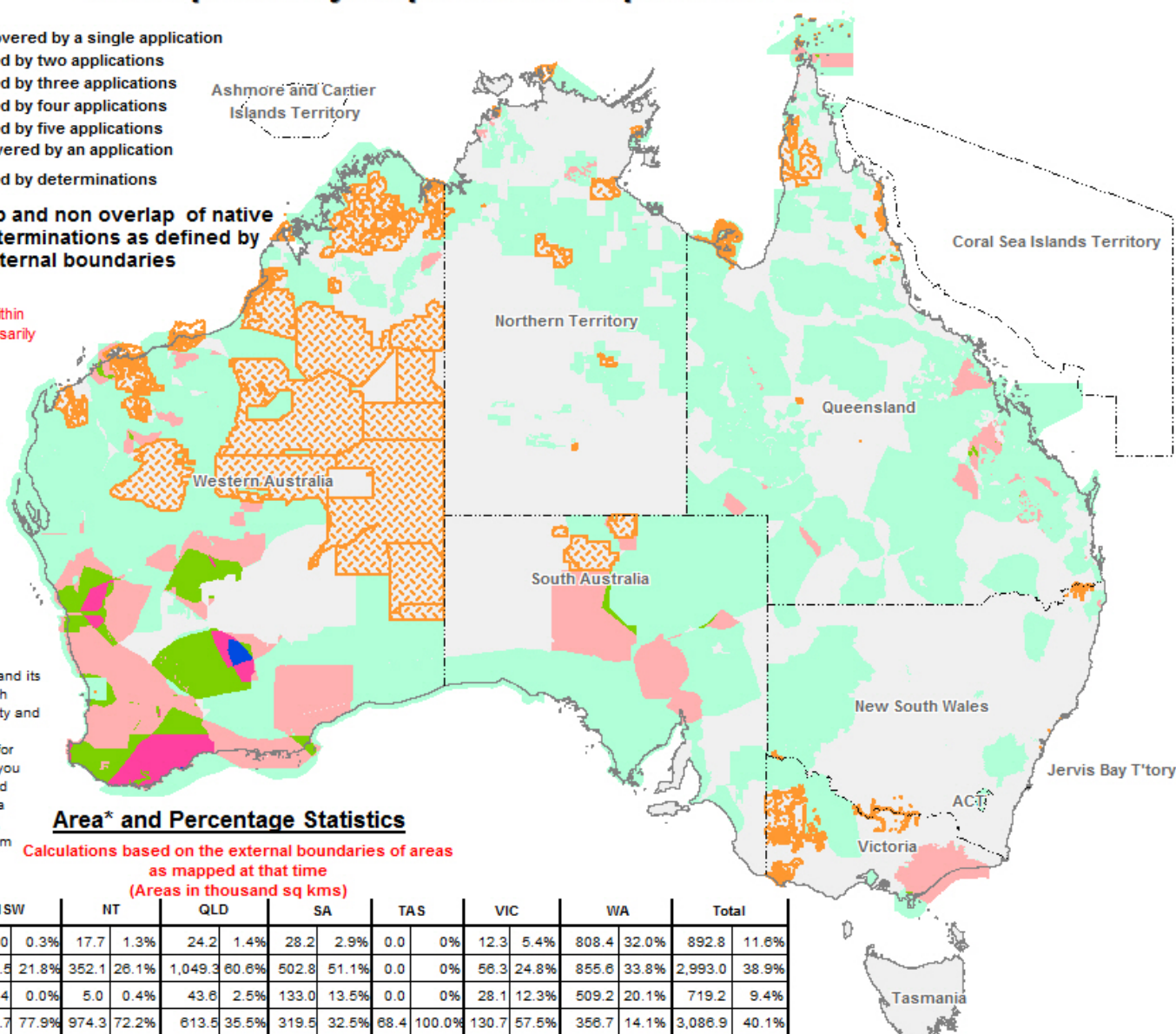
1. Areas excluded, such as private freehold, within an Application or determination are not necessarily depicted.
2. Determinations have been included for completeness
3. Areas seaward beyond the High Water Mark have not been included in the statistics.
4. Areas based on spherical calculation from spatial data records and are indicative only.

Data Statement

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Area* and Percentage Statistics

Calculations based on the external boundaries of areas as mapped at that time (Areas in thousand sq kms)

Area* of Land Covered	ACT	NSW	NT	QLD	SA	TAS	VIC	WA	Total									
by determinations	0.0	0%	2.0	0.3%	17.7	1.3%	24.2	1.4%	28.2	2.9%	0.0	0%	12.3	5.4%	808.4	32.0%	892.8	11.6%
by a single application	2.4	100.0%	174.5	21.8%	352.1	28.1%	1,049.3	60.6%	502.8	51.1%	0.0	0%	56.3	24.8%	855.6	33.8%	2,993.0	38.9%
by more than 1 application	0.0	0%	0.4	0.0%	5.0	0.4%	43.8	2.5%	133.0	13.5%	0.0	0%	28.1	12.3%	509.2	20.1%	719.2	9.4%
not covered	0.0	0%	623.7	77.9%	974.3	72.2%	613.5	35.5%	319.5	32.5%	68.4	100.0%	130.7	57.5%	356.7	14.1%	3,086.9	40.1%