INDIGENOUS FACILITATION AND MEDIATION PROJECT

AUSTRALIAN INSTITUTE OF ABORIGINAL AND TORRES STRAIT ISLANDER STUDIES

Report on Native Title Representative Body Workshops:

Directions, Priorities and Challenges

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Indigenous Facilitation and Mediation Project Report on Native Title Representative Body Workshops: Directions, Priorities and Challenges

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ABBREVIATIONS USED

ACT	Australian Capital Territory
ADR	Alternative Dispute Resolution
AIATSIS	Australian Institute of Aboriginal and Torres Strait Islander Studies
ALO	Aboriginal Liaison Officer
ARC	Australian Research Council
ATSIS	Aboriginal and Torres Strait Islander Services
CEO	Chief Executive Officer
CJC	Community Justice Centre
COAG	Council of Australian Governments
DEST	Department of Education, Science and Training
IFaMP	Indigenous Facilitation and Mediation Project
ILUA	Indigenous Land Use Agreement
NADRAC	National Alternative Dispute Resolution Advisory Council
NGO	Non-Government Organisation
NNTT	National Native Title Tribunal
NTA	*Native Title Act 1993*
NTRB	Native Title Representative Body
NTRU	Native Title Research Unit
OIPC	Office of Indigenous Policy Co-ordination
ORAC	Office of the Registrar of Aboriginal Corporations
PBC	Prescribed Bodies Corporate
SWALSC	South West Aboriginal Land and Sea Council
The Project	Indigenous Facilitation and Mediation Project

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Finally, we wish to thank Members of the Project Reference Group who commented on an earlier version of this report.

EXECUTIVE SUMMARY

In 2004, the Indigenous Facilitation and Mediation Project undertook a series of workshops with Native Title Representative Bodies to identify their issues in relation to dispute management and decision-making. This report summarises the issues that emerged from those workshops including priority areas and recommendations for further research and future action.

ISSUES EMERGING FROM THE WORKSHOPS

- A fundamental source of difficulties in the native title process is the tension between Aboriginal and Torres Strait Islander customary law and non-Indigenous common law. The native title system places an unfair burden of proof on Indigenous peoples and often requires them to conduct their business in non-Indigenous ways. These difficulties are further exacerbated by the inadequate level of resources allocated to support the informed decision-making of Indigenous peoples and groups. These issues have critical ramifications for the procedural fairness of the decision-making and dispute management processes in which Indigenous peoples are required to participate.

- There are many sources of conflict within the native title system. These include the complex legal environment, the role and use of connection material, the claim re-registration process, the consent determination process, the role of governments and government negotiators and relationships between families and individuals. Each of these issues is compounded by the time pressures of many of the native title processes. They also effect both Indigenous and non-Indigenous groups within the native title process.

- The processes adopted by NTRBs in managing the decision making of Indigenous communities and groups can themselves give rise to uncertainty and conflict within communities particularly if there is uneven access to information. Where these processes involve extensive reliance on technical experts or 'big meetings', this can further compound the difficulties of creating inclusive, responsive, transparent and accountable decision-making and dispute management processes.

- The ability of NTRBs and others such as the NNTT, to provide information about native title in easily understood formats varies considerably both in the quality of information and the competence of organisations in delivering this information.

- The differences between the range of agreement making processes such as mediation, facilitation, negotiation, conciliation and arbitration, which are utilised in native title, are often poorly understood and communicated. There is often a lack of coordination amongst the managers of these processes leading to confusion and unnecessary duplication.

- The absence of national standards or any regulating body for dispute management professionals such as mediators and facilitators has led to considerable diversity in practice. There is also a need to detail the ethical and professional obligations of native title mediators. This would assist NTRBs and others in choosing appropriately qualified dispute management practitioners.

- Mediation processes are seen to offer considerable potential for the joint identification of issues, concerns and outcomes; however, there is also a lack of confidence in and uncertainty about the fairness and quality of mediation practices.

- There are clear expectations that:
  - mediation should be an act of choice

  - mediators should be clear as to their role and responsibilities
  - mediators should have no conflict of interest either real or perceived
  - mediators should be able to assist disputing parties to understand each other's points of view and have the ability to control the process fairly and effectively for all involved.

- Concerns about mediation centre on the following issues:
  - mediator neutrality
  - confidentiality of the mediation process
  - mediator approaches including the lack of appropriate preparation
  - cultural sensitivity of the mediator
  - lack of mediation follow-up.

- The lack of local capacity in mediation and facilitation, including the ability to access Indigenous dispute management practitioners, often results in considerable delays in dealing with disputes quickly and effectively. Delays can lead to escalation of disputes making them more difficult to manage than if they had been "nipped in the bud".

- There is a need to review the role of Indigenous mediators and facilitators and their employment by organisations such as the NNTT and the Federal Court.

PRIORITIES

- Developing and enhancing the procedural expertise of NTRBs in managing the processes of how people negotiate is a key priority.

- Procedural agreements as to the processes by which connection materials are exchanged and managed amongst the applicant group are crucial to minimising disputes and are central to the effective management of any native title process. A lack of agreement between the different professional groups, such as lawyers and researchers on how to manage and use connection materials is a source of considerable conflict within the native title process.

- There is a need to ensure that dispute management processes are integrated with other services and approaches in the community, including existing ways of dealing with decision making and conflict. This would allow for co-ordinated approaches and ensure the implementation of strategies at a cross-agency level that complement and support one another. It would also optimise the use of limited resources.

- Dispute management and decision-making processes need to reflect localised ideas of how authority should be organised and how decisions should be made. They need to build on existing Indigenous capacity and to include Indigenous laws and values. They also need to avoid simplistic, quick fix solutions at the expense of long term community relationships and sustainability.

- Applicants need the capacity and resources to independently coordinate and implement their own strategies for managing information and decision making. This would enable them to be more effective and to carry out their responsibilities in a more timely manner. It would also enable them to move from extensive reliance on the NTRBs to greater independence and partnership arrangements.

- There is a range of priority research areas in relation to mediation including elements of appropriate mediator preparation, the reason for the break-down of agreements, strategies for managing third parties and technical experts in dispute management processes and evaluating the experiences of parties in relation to mediation.

- High levels of staff turnover and the fact that many of those engaged by NTRBs are new to their professions means there is a need for a standardised induction process including issues relating to decision-making and conflict management. Such induction training also needs to include local cultural issues and perspectives.

- NTRBs have a range of interconnected training needs. In particular, there is a need for all staff of NTRBs to have a thorough understanding of general native title processes and procedures as well as of specific issues relating to local native title applications.

- Twenty priority training areas emerged in relation to decision making and dispute management. These focused on communication skills, and managing conflict and include issues such as presentations skills, negotiation skills, dealing with difficult people and behaviours, managing technical experts and third parties in mediation and facilitation, group dynamics and cross-cultural communication.

- All training undertaken by NTRBs and their staff needs to be thoroughly and independently evaluated to assess its relevance and usefulness.

- Any training undertaken by NTRBs should open up pathways to vocational and academic qualifications particularly for Aboriginal Liaison Officers (ALOs) and other Indigenous staff employed by NTRBs.

CONCLUSIONS

The life of the Indigenous Facilitation and Mediation Project is limited. The complex business of facilitating decision making and dispute management will remain core business, not only for NTRBs but also for Indigenous peoples and groups. It is important to plan now for the ongoing implementation and development of initiatives, which will support the work undertaken by the project, including the roles of the newly established Indigenous Co-ordinating Centres.

Consideration needs to be given to the establishment of a national coordinating unit which would have a range of functions including:
- supporting the development of national standards in the Indigenous context;
- supporting and co-ordinating regional panels of Indigenous mediators and facilitators;
- co-ordinating long term research to inform the development of new approaches and;
- developing and providing relevant training for NTRBs and others.

RECOMMENDATIONS

1. Existing native title education and information packages and kits need review and assessment in relation to their ease of use, ability to be easily and quickly updated and their appropriateness for a variety of Indigenous audiences.

2. The level of resources required by NTRBs and applicants to update, develop and deliver native title education and information packages should be identified and allocated by those responsible including NNTT, NTRBs, OIPC and others.

3. Opportunities for developing joint strategies for claim management, including better co-ordination of the range of processes, could be explored further by NTRBs, the NNTT and others in order to minimise duplication and enhance the efficient use of resources.

4. NNTT should give consideration to sponsoring a workshop to develop best practice approaches to dealing with overlapping claims.

5. There is a need to review the processes by which NTRBs collect, exchange, and allow access to connection materials in order to develop best practice guidelines and policies.

6. As part of this review process, IFaMP should identify strategies to co-ordinate a workshop to review and agreed upon joint approaches between lawyers and researchers and the range of agencies involved for the use of connection materials.

7. IFaMP should explore the possibilities of piloting the creation of a dedicated staff position of process manager in NTRBs in collaboration with interested NTRBs.

8. The NNTT should give consideration to holding a series of workshops for applicants to discuss applicant roles and responsibilities. This would require liaison between NTRBs and those presenting information to ensure that information presented is congruent with NTRB approaches.

9. IFaMP recommends that OIPC identify ways it can assist and support neighbouring NTRBs to meet and explore further ways of sharing resources and working together strategically. This would also support co-ordinated approaches to claim management.

10. There is a need for regular and separate state-based forums for researchers and lawyers to learn from each others' expertise and experience and to carry out strategic planning. This needs to also happen for NTRB field/project officer staff to allow and encourage them to share information and practical strategies including approaches to decision-making and conflict management.

11. A code of conduct and terms of reference must be developed which detail the ethical and professional obligations of native title mediators.

12. The training of regionally based Indigenous mediators and facilitators, both male and female, is an urgent priority.

13. OIPC and IFaMP, as a matter of priority, should identify strategies to secure resources for a consultant who could identify approaches including funding opportunities to support the achievement of vocational qualifications for ALOs.

14. IFaMP recommends that OIPC identify the resources required for:
- the development of a standard induction process;
- the development of localised cross-cultural training; and
- the trialling and evaluation of pilots in these training programs.

15. IFaMP recommends that OIPC identify the resources required for developing strategies and providing pilot training and evaluation in the 20 priority training modules identified in this report.

16. IFaMP should continue to identify potential training providers and pilot training activities in the areas identified in this report.

17. IFaMP should develop an evaluation framework which can be used to evaluate training activities.

18. IFaMP should continue to progress discussions for a coordinated national approach to the issues identified in this report including the development of regional panels of Indigenous mediators and facilitators.

BACKGROUND

The Indigenous Facilitation and Mediation Project (IFaMP) of the Australian Institute of Aboriginal and Torres Strait Islander Studies (AIATSIS) commenced in July 2003 with initial core funding from the Native Title and Land Rights Branch in the Aboriginal and Torres Strait Islander Services (ATSIS). The Project is based in the Native Title Research Unit (NTRU) of AIATSIS. It aims to identify the range of Indigenous decision-making and dispute management processes and, best practice approaches to facilitation and mediation in native title. IFaMP also aims to review and evaluate the training necessary to support and enhance these processes.

In the first year of the project, IFaMP focused on Indigenous disputes and decision-making as an aspect of Native Title Representative Bodies (NTRBs) responsibility under the *Native Title Act 1993* (Cth) ('NTA'). CEOs and Chairs of NTRBs at the Aboriginal and Torres Strait Islander Leaders Forum in March 2004 agreed to a series of workshops, to be held with NTRBs, to further investigate and define these issues. Throughout May and June 2004, project staff, with funding from the National Native Title Tribunal (NNTT), facilitated three two-day workshops with a range of staff and Board members of NTRBs and, a fourth one-day workshop with CEOs of NTRBs.

Workshops were held with 14 staff from Gurang and Central Queensland Aboriginal Land Councils in Bundaberg, 13 staff from North Queensland Land Council and the Torres Strait Regional Authority in Cairns and, 13 staff from Yamatji Marlpa Barna Baba Maaja Aboriginal Corporation in Perth. A fourth workshop, scheduled to be held with the Goldfields Land Council at Kalgoorlie was postponed owing to a death in the community. A final one-day workshop with CEOs or their proxies was held on Tuesday 1 June 2004, prior to the annual NTRU AIATSIS Native Title Conference in Adelaide.

The workshops were structured to explore the following elements:

- NTRB decision-making and dispute management practices;
- the sources of conflict and, most particularly, the points within the native title process when conflicts are most likely to arise;
- the resource issues facing NTRBs in effectively managing decision-making and dispute management;
- the types of training NTRBs see would best enhance their capacity in dispute management and decision-making processes; and
- the skills and qualities of effective dispute management professionals such as mediators and facilitators, particularly those working in the native title context.

The goal of IFaMP in collecting this information was to map a sample of NTRB experiences in relation to their decision-making and dispute management responsibilities and, to determine whether the sample was representative of issues faced by all NTRBs. This was to ensure that the IFaMP research agenda and any pilot training closely matched the needs of the NTRBs, as articulated by the NTRBs themselves.

The last 30 years of Indigenous affairs in Australia highlights that under policies of 'self-determination', Indigenous peoples have often had 'bright ideas' imposed upon them by bureaucracies and well-meaning people with few positive outcomes and little sustainability. IFaMP is concerned that its work is not another example of these impositions, and that NTRBs have a sense of ownership of the Project. The support of NTRB CEOs for the proposal to hold these workshops was critical. Their ongoing support to staff in dealing with issues which were raised in the workshop, and in implementing the range of training identified in the workshops as priority needs, is also required.

INTRODUCTION

Much of the daily business of NTRBs is centred around meetings, decision-making processes and dispute management. The emphasis of the amended *Native Title Act* 1993 *('NTA'*) on maximising 'outcomes', and agreement-making through non-adversarial and collaborative dispute resolution approaches, has seen facilitation and mediation processes and their management become core business functions for many NTRBs.

There has been little analysis as to what constitutes a 'best practice' dispute management approach in Indigenous contexts. The absence of appropriate qualifications and professional regulation means that it is difficult for NTRBs to make informed assessments as to the suitability of dispute management professionals. Most of those engaged as dispute management professionals are not Indigenous. This dearth of Indigenous voices is reflected in an absence of Indigenous perspectives in the design and implementation of dispute management processes and reinforces the perception that native title is an imposed 'white fella' way of doing business. It can give rise to dissatisfaction within NTRBs and Indigenous groups as to the role and responsibilities of mediators and facilitators. It also leads NTRBs to insist that more Indigenous people should be receiving training in mediation and facilitation.

Indigenous peoples are not just another 'stakeholder' in the native title process; they have unique rights and interests in land as the 'first' peoples of Australia. The recognition of these rights and interests in native title processes are as much a challenge for NTRBs in relation to the Indigenous peoples they represent, as they are in the broader context of non-Indigenous stakeholders. NTRBs are asked to address these rights and interests in what is essentially a non-Indigenous framework. This is not to deny that they are entirely without influence in the process. However, the challenge is to develop appropriate decision-making and dispute management processes that are owned and managed by Indigenous peoples, including applicant groups themselves. These processes need to recognise the range of rights and interests which are involved, and reflect this in appropriate structures and sustainable processes. This will have a considerable effect in alleviating the conflicts which arise amongst Indigenous people in native title processes.

Participants valued the opportunity presented by the workshops to come together with a range of staff from across their organisations and, with whom they might not often interact. They noted that the opportunity to compare processes and approaches with those of other NTRBs was also important. A number of the issues raised in this report have been identified in reports from previous consultation processes, including those conducted by the NNTT. Many participants in the workshops stressed the importance of realising substantive outcomes from their discussions and that recommendations in this report need to be followed up. They did not wish to see their contributions being lost in 'just another report'.

The purpose of this Report is to outline the issues and concerns currently confronting NTRBs in order that future research directions and priorities of the Project match NTRB needs. It discusses challenges, areas of commonalties and priorities as articulated by NTRB staff themselves and the recommendations which emerge from these. The report is divided into two sections. The first section deals with:

- the operational and systemic environment;
- sources of conflict in the native title process;
- facilitation and mediation practice; and
- the types of training that would support and enhance NTRB capacity in decision-making and dispute management.

The second section outlines:

- recommendations for further action regarding issues identified in this report;
- areas for further research; and
- suggestions for future national and regional approaches.

SECTION 1 – ISSUES IDENTIFIED FROM NTRB WORKSHOPS

1. NATIVE TITLE: THE BIG PICTURE

The goal of IFaMP in undertaking the NTRB workshops was to identify issues affecting the capacity of NTRBs to implement effective decision-making and dispute management processes. A key theme, which emerged repeatedly from each of the workshops, was the need to give consideration to the environment in which NTRBs operate. This includes recognition of the 'big picture' systemic issues, such as sovereignty and the relationship between Indigenous and non-Indigenous laws and processes, and the practical realities of resourcing and capacity issues of both NTRBs and applicant groups.

1.1 The Status of Indigenous Laws and Ways of Doing Business

Many workshop participants emphasised that there is an overarching dispute between Aboriginal customary laws and non-Indigenous common law which contributes to the difficult operating environment of NTRBs, and to disputes amongst Indigenous peoples. The native title regime is structured in such a way that non-Indigenous interests take precedence over Indigenous native title rights and interests. This is evidenced, for example, in the 1998 amendments to the *NTA*, which focussed on providing greater certainty to non-Indigenous stakeholders.

The unfairness of such a system is signalled by agreements, which may require Indigenous parties to forego their rights in relation to compensation for activities undertaken by non-Indigenous parties without proper regard to the impact on native title. Native title holders may be asked to forgive past acts without the knowledge as to what those acts and their consequences may have been. This becomes a process of legitimising past actions that may have been dishonourable and even illegal - for example, where developments have taken place without appropriate clearances. In circumstances where the benefit also accrues primarily to non-Indigenous stakeholders, this led to the conclusion in a number of workshops that the native title regime has become "Terra Nullius Mark Two".

In light of the recent Yorta Yorta decision, which has raised the bar of 'proof' of native title, it was felt that Indigenous peoples have little option but to enter into negotiations about native title. However, they do so with little bargaining power because native title has become significantly more difficult to achieve through the court system and because, in many instances, native title interests are only recognised if they do not conflict with non-Indigenous interests. This has created an environment in which there may be little incentive for non-Indigenous parties to participate in any meaningful way in mediation and facilitation processes.

A further example of the overarching dispute is the principle of extinguishment. This is a core component of the *NTA*, and contradicts the principle of Aboriginal sovereignty, which participants noted should be located at the heart of the *NTA*. The workshops identified that sovereignty is derived from the recognition of Indigenous laws and customs. Yet the *NTA*, by requiring that Indigenous laws and customs meet benchmarks as determined by common law, was seen to be denying the sovereignty of Indigenous laws and customs. Given that the *NTA* has allowed native title to be extinguished over many areas in Australia, land over which native title has not been extinguished has become the focus for Indigenous peoples. This has created Indigenous classes of 'haves' and 'have nots' in relation to their ability to enter into native title processes. It has also given rise to conflicts amongst Indigenous

peoples over areas of land that may not necessarily have been of primary significance to them but which now remain the only areas over which there is the possibility of securing and exercising native title rights and interests.

The *NTA* also requires Indigenous peoples to do business in non-Indigenous ways. This may satisfy the needs of non-Indigenous parties for representation, inclusion, accountability and substantive outcomes but may run counter to the needs of Indigenous people and to the principles of Indigenous models of governance. For example, these processes may incorporate decision-making models, such as majority rules voting procedures, which do not always match Indigenous approaches to governance. Indigenous ways of doing business may appear to be inefficient to non-Indigenous observers, as they can involve large groups as active decision makers who may take significant time to achieve outcomes. If these processes are permitted, they can be inherently more sustainable because they are directly relevant and responsive to the Indigenous community's needs and requirements for representation and inclusion and owned by the Indigenous community.

1.2 Resource Issues

In each of the NTRB workshops, a strong and repeated focus of concern was the lack of resources for NTRBs and applicants. The disparity in resources available to Indigenous and many non-Indigenous stakeholders creates a significant power imbalance that is detrimental to the rights and interests of native title holders, and can cause disputes. Evidence of disparities can be seen in that:

- limitations on NTRB resources means that they have to prioritise amongst claims;
- resources dedicated to claims have to be prioritised around advancing the claim in the legal arena;
- there are very few resources available to keep applicants' representatives up to date on the native title regime and developments in their own application; and
- there are few resources for applicants to keep those they represent fully informed or to get information from them.

Such factors impact on the ability of applicants to effectively brief their legal representatives, and contribute to a climate of uncertainty, and a lack of informed and authorised decision-making. There are also few, if any, resources to inform the broader Indigenous community, who may not be directly involved in an application but who may be affected by it. This may become a source of conflict as people seek to insert themselves into processes in order to remain informed, and to make assessments as to whether they should be involved.

Much of the responsibility for communicating issues to native title holders is placed on the shoulders of the individual applicants. This poses a personal and financial burden on individuals who are often financially disadvantaged. Applicants and/or those they represent may lack access to basic communication aids, such as phones or faxes, let alone computers, internet or e-mail access. It is often impossible for complicated native title information to be quickly disseminated to those who need it.

Difficulties in the gathering and disseminating of information are further complicated when coupled with extremely tight timeframes. These are often imposed by the Federal Court or in Future Act processes, and lead to Indigenous peoples and NTRBs being unable to conduct

effective processes and continue to reinforce patterns of historical disadvantage and dispossession. This in turn is exacerbated by those state or federal governments, who may see the interests and rights of traditional owners as being an impediment to economic development rather than as on a par with, and deserving of, the same respect as those of non-Indigenous stakeholders.

1.3 The Relevance of the Status of Indigenous Law and Resource Issues to the Practice of Mediation and Facilitation

The relevance of the status of Indigenous law and resource issues to the practice of mediation and facilitation is two-fold.

Firstly, there is an urgent need to clarify the responsibility of organisations who provide mediation and facilitation, such as the NNTT, the Federal Court and others, such as consultant mediators and facilitators, in identifying and implementing culturally inclusive processes and approaches. Secondly, there is a question as to the responsibility of mediation providers in raising awareness of the inequities of the native title regime. Clarifying the responsibility of mediators to raise systemic issues, that impact on the fairness or appropriateness of their processes, may assist in creating a procedural level playing field and assist all stakeholders, both Indigenous and non-Indigenous, to participate effectively in the mediation process.

Improving the practice of mediation and facilitation and developing 'best practice' approaches is an important goal. However, mediation or facilitation may not always be what is required. In the first instance, the factors and requirements that mean mediation or facilitation is the fair and appropriate choice must be determined and agreed by dispute management providers. Whilst the native title context continues to see all matters referred to mediation, it will still be important to implement and develop best practice approaches to mediation.

2. SOURCES OF CONFLICT WITHIN THE NATIVE TITLE PROCESS

The native title context is fertile for disputes. There are disputes between native title holders regarding boundaries of country, areas of overlap and the connections of applicants. Co-existence requires negotiation between and within both Indigenous and non-Indigenous groups, who are not always accustomed to acting as decision-making groups. The focus on outcomes in the native title context has meant that those participating have often felt pressured to resolve issues without a thorough understanding of the range of matters involved. Indigenous and non-Indigenous parties, themselves, have also sometimes insisted on resolving issues without the necessary understanding of the views of others involved.

As noted above, negotiations and mediation processes often take place in time pressured environments, particularly given the pressures to facilitate development or economic expansion. This was repeatedly highlighted during the NTRB workshops as a source of conflict and, as significantly exacerbating other sources of conflict within the native title process. Time-lines were often seen to meet non-Indigenous agendas, and to be imposed by the Federal Court to expedite matters. This was seen to compound the difficulties of communicating complex legal issues and principles to Indigenous stakeholders and to obtain appropriate prior and informed consent from applicants and others.

These and other sources of conflict as identified in the workshops are discussed below.

2.1 Complex Legal Environment

The complexity of the native title legal environment is, in part, a function of the very large number of state and Federal laws and processes, which impact on native title negotiations. It is challenging for NTRB lawyers to stay informed. However, the expectation is that native title holders and applicants will also be and remain fully informed. The difficulty of doing so is intensified by the continually changing elements of native title law.

The example given in the workshops was that of the recent High Court Yorta Yorta decision which has led to a situation where it has become increasingly difficult for native title holders to achieve legal recognition of their rights and interests. The level of proof now required will affect all the claims currently in the native title process. Even for those applicants participating in agreement-making processes such as ILUAs or consent determinations, the bar has been set much higher by the Yorta Yorta decision. The role of communicating changes in legal requirements is given to NTRBs. This can be a source of conflict because native title applicants may believe that it is the NTRBs who are changing the goal posts, or who have failed to properly provide the relevant and correct information.

Applicants may be involved in a range of different agreement-making processes simultaneously. Some groups may be involved in arbitrated processes where decisions are imposed on them, while, at the same time, being involved in facilitative processes where they are directly negotiating and determining outcomes. These might include consent determinations, right to negotiate and Future Act processes, Indigenous Land Use Agreements (ILUAs) and mediations. These processes may involve different Indigenous groups or individuals, yet concern the same areas of land, giving rise to considerable confusion amongst those involved. The critical need is to communicate the differences between these processes, including what can be expected of these processes. There is also a need to ensure better co-ordination amongst the managers of these processes to minimise unnecessary duplication and burdens on those participating.

The complexity of native title processes is not just an issue for Indigenous parties. Non-Indigenous stakeholders also experience difficulties and uncertainties in coming to terms with native title processes, and this can just as equally be a source of conflict for them. Participants in the workshops saw, however, that most non-Indigenous stakeholders are more likely to understand the principles of what is fundamentally a ‘western cultural construct’ than are Indigenous peoples. They also emphasised that issues which impact on Indigenous parties will be likely to have ramifications for non-Indigenous parties and it is in the interest of all involved, that processes are streamlined and those involved fully understand what is required of them.

2.1.1 Connection material

Processes around establishing connection to country can place extraordinary pressures on communities. The process of connection involves researchers who are employed to document information related to the authenticity of the connections of individuals to particular areas of land. This includes the nature of traditional laws and customs, their continuity to the present day and the genealogical connections of individuals to ancestors who were on the land at the time of colonisation. Connection reports refer to issues of individual identity and cultural meaning and therefore can be emotionally charged. Control

over and access to cultural knowledge is a sensitive and highly regulated issue in many Indigenous communities and connection materials require careful management.

The ways in which connection materials are collected and collated can also have an impact on their acceptability to and useability for the applicant group. The question of who has the authority to decide the authenticity of individual claims in relation to connection can be a vexed one. In many instances, government agencies adopt a range of approaches to the use of connection materials, which involve them acting in quasi-judicial roles in determining the authenticity of peoples' connections. This can become a source of conflict, particularly as perceptions of inconsistency and questions of social justice may arise. Requirements for dealing with connection materials vary from state to state, and consequently there has been a lack of any coordinated approach and policy development in this area. This has resulted in inconsistencies in how connection materials are dealt with amongst the states, which has particular implications for native title applicants whose interests straddle state borders.

NTRBs and their researchers also employ a range of processes around connection materials. These vary from complete transparency, where applicants are given copies of all materials, to policies of total restriction. Native title holders whose connections to country are documented in connection reports may not be given the opportunity to comment on the information which directly concerns them. When this material is used to determine the authenticity of individual connections, questions of procedural fairness and natural justice arise, as do questions as to who has the appropriate authority to make such decisions.

Workshops identified that the relationship between the *NTA* and cultural heritage legislation, particularly as it relates to the gathering of connection information in cultural heritage clearances, is also a source of conflict. Although NTRBs generally do not deal with cultural heritage issues, there is often considerable overlap between business carried out on cultural heritage issues, and on native title applications. The lack of a coordinated approach to research imposes an unnecessary burden on Indigenous communities and can ultimately prove disadvantageous to applicants, where there are inconsistencies in connection information. It also sees Indigenous groups endlessly recycling through processes of consultation and information gathering around the same issues and areas of land.

2.1.2 The re-registration process

The 1998 amendments to the *NTA* led to the requirements that all claims pass through a re-registration process. A number of claims, which were lodged prior to the 1998 amendments, were not always representative. Some of these claims however, passed the re-registration test, often without NTRB certification. Although NNTT registration guidelines are available on the web, workshop participants identified that there is considerable uncertainty and perceived inconsistencies surrounding them.

Workshops noted that the registration of unrepresentative applications has given rise to overlapping and competing native title applications, as Indigenous people see this as the only way of securing their native title rights and interests. This process was described in the workshops as 'domino claiming'. It was also identified that some applicants, whose claims have not been re-registered, continue to be involved in negotiations giving 'de-registered claims' a momentum and legitimacy which NTRBs find difficult to challenge, and around which conflict compounds.

There was recognition that a number of problematic applications were originally lodged without the necessary anthropological and historical research to support them. These claims often overlap with both new and existing claims, leading to significant levels of conflict. Although such claims may not have been lodged through the relevant NTRB, they may now be seeking or have acquired NTRB representation. Such representation may have been secured before NTRBs had guidelines for assistance in place, and, in some instances, the claims would be unlikely to meet those guidelines now. Applicants in such claims may also be requesting that NTRBs take responsibility for their legal costs, including those incurred prior to any NTRB involvement. Inconsistencies in approach can become a source of conflict for the NTRB in its dealings with other native title applicants, particularly given the need to prioritise claims in a climate of scarce resources.

2.1.3 Consent determinations

The consent determination process is one that seeks to expedite the process of recognising native title holders. Central to this is the use of connection material. Some states require that they sign off on connection material before any substantive negotiations take place. This can lead to repeated requests for additional connection information resulting in long delays, well in excess of twelve months. Such delays can exacerbate or incite conflicts, as issues and players change.

Workshops saw that consent determination processes can result in non-Indigenous stakeholders or competing native title groups going 'expert shopping' for anthropologists and other researchers who will take positions contrary to those which may be set out in any connection reports. Non-Indigenous parties, who want to see the connection report, may simply be on 'fishing expeditions' for information that may help them oppose native title in the courts.

The timing of the involvement of other parties such as non-Indigenous stakeholders in the consent determination process can be a source of conflict. When other parties become involved, claimants may have already invested significant time and resources into negotiating the consent determination process with the state. Negotiations may collapse because the authenticity of connection material already agreed upon by the state, is not accepted by other parties. The importance of agreeing to a procedural approach for negotiating consent determinations, including the timing of the involvement of other parties is critical.

2.2 The Role of Governments

Participants in each workshop identified that their relationships with state and Federal Governments and their representatives have a critical impact on the effectiveness of negotiation processes, and the levels of conflict experienced. The approaches of Commonwealth and state governments are greatly influenced by their individual policy makers and representatives. The personalities and politics of these key people can fundamentally shape the directions and the nature of negotiating processes. Highly adversarial individuals bring with them a combativeness that makes mutually collaborative negotiation processes difficult. Individuals, who are perceived as open to Indigenous issues and perspectives and who seek to foster collaboration in their approaches, are likely to foster goodwill and cooperative approaches.

Perceptions of bad-faith negotiations on the part of some governments, including a lack of integrity in previous negotiations, establish the climate for subsequent negotiations. Native title holders may have experienced numerous government consultation and decision-making processes, from which very little real benefit to them has emerged. These processes may have created conflict or difficulties both within the community and between applicants and NTRBs. The legacy of previous dealings including a lack of trust may continue to shape and affect the issues that applicants seek to bring to the negotiating table. It may also cause conflict if governments seek to excise past dealings from negotiations and place pressure on applicants to focus on an agenda that seems arbitrary. This can serve to provide to applicants a further example of bad faith or unfair dealings on the part of governments.

The workshops identified that government approaches to overlapping claims can reflect a lack of understanding of the cultural dimensions involved. Indigenous understandings of boundaries may be far more fluid than the requirements of the Federal Court or, more broadly, the native title regime allow. Boundaries can be the subject of continual negotiation and re-negotiation. Yet there is a perception that overlaps signify a lack of clarity on the part of native title holders as to where their boundaries lie and this is seen to speak to the authenticity of their connection and identity. The workshops identified that overlapping claims are not always reflections of conflict, and may be an indication of shared interests in country. They emphasised that forcing applicants into negotiating boundaries that do not clearly reflect their cultural context can cause unnecessary conflict between and within groups.

2.3 Indigenous Family and Community Issues

Native title processes require communities to prioritise 'traditional' connections over 'historical' and residential connections, and may leave many long-term residents feeling without rights. They also normally require that native title matters be excised from other issues and disputes in a community. This ignores the reality that Indigenous peoples do not, solely define their relationships in terms of native title. There are complicated, multi-layered relationships and connections amongst those involved including long standing grievances and feuds. Native title is simply a new dimension to the already complicated landscape occupied by Indigenous peoples.

Individual representatives within native title applicant groups may see that their role is to represent and inform their families, rather than any larger group. This shapes the information flow within applicant groups and between them and other members of native title groups. If NTRBs operate on the assumption that individual representatives are ensuring that all who require the information are receiving it, and this is not what is occurring on the ground, this will have consequences for the reliability of decision-making. How issues are reported back to NTRBs, and from NTRBs to the community can influence the way these groups operate and interact. The communication dynamics between and within these groups can themselves become a source of grievance and conflict if it is perceived that applicants and NTRBs are not fulfilling their representative responsibilities in ensuring that members of the native title group are kept informed. Suspicions and distrust can arise when information is not evenly and appropriately distributed.

Applicants may not necessarily fulfil their responsibilities, such as replying to correspondence, communicating with each other and making collective decisions for a range of other reasons. There is often a lack of clarity about the roles and responsibilities of applicants, which results from a lack of education and awareness. In each of the NTRB

workshops it was repeatedly emphasised that, in most instances, applicants 'would do the right thing, if they knew what the right thing was', and had the resources to do so. Whatever the reason for applicants failing to meet their responsibilities, participants saw that this intensified existing difficulties and conflicts within communities.

2.4 NTRB Practices and Approaches

NTRBs operate in a complex cross-cultural environment. Cross-cultural awareness and sensitivity on the part of all staff are central to their effectiveness, particularly in the quality of service delivered to applicants. The workshops identified that the high turnover of NTRB staff, and that many of those employed are often new to their professions or to working in Indigenous organisations, means that there is a need to continually implement cross-cultural awareness programs. It was emphasised that this training needed to be centred on local nuances and issues particularly given that staff, whose behaviour is not culturally appropriate, can often inadvertently create difficulties and conflicts in working with applicants.

The relationship between native title holders and their lawyers was also identified in the workshops as holding the potential for much conflict. They may have conflicting goals and priorities and little understanding of each other's perspectives and responsibilities and appear to 'talk past' each other. Lawyers may insist upon a strict native title legal agenda, whilst applicants may refer to apparently unrelated historical issues, that cannot be framed into the current legal agenda. Participants emphasised that lawyers need to ask the native title holders what their goals are rather than assuming what those goals should be. This was seen as critical to minimising confusion and conflict and to ensuring that applicants remain in control of the processes that they are involved in.

Another significant source of difficulties within NTRBs, identified in each of the workshops is the difference in perceptions between research and legal staff about the role and use of connection materials. Legal practitioners often see that connection materials should provide a high degree of certainty, whereas many researchers see that such certainty is not possible due to the fluid nature of Aboriginal societies. These professional differences can exacerbate the levels of confusion and concern amongst applicant groups leading to disputes.

Workshop participants highlighted that there is often a reliance on formal presentations by the range of agencies and staff involved to convey complex information to applicants. These presentations can be highly technical and rely on the use of legal jargon, which is often poorly understood. The absence of appropriate visual aids to support the clarification of such information can result in considerable confusion as groups argue over poorly understood information. Workshops identified the importance of communicating this information in simple and easily comprehended ways. The use of new geo-spatial technology, which allows the over-layering of maps to build up a picture of what is under discussion, was seen as offering considerable potential in the management of native title information and in dealing with overlapping claims.

Payment of travel and other allowances to applicants to attend meetings was seen as a perennial source of conflict. The level of burden on applicants to continually attend meetings is significant. When NTRB staff and consultants are paid to attend meetings, many applicants believe that it is unfair that they are not. A lack of appreciation on the part of consultants and staff about this issue, particularly where it is raised repeatedly, has become a source of frustration and conflict, both in negotiations between applicants and NTRBs, and

with others. Even where NTRBs support the payment of allowances to applicants to attend meetings, negotiating this with other stakeholders such as state governments, can create difficulties that subsequently effect those meetings.

3. THE ROLES AND RESPONSES OF NTRBs IN MANAGING DECISIONS AND DISPUTES

Under Section 203BF of the *NTA,* NTRBs have a range of dispute resolution functions with respect to Indigenous peoples. They also have responsibilities to facilitate decision-making amongst applicants and those they represent. These responsibilities and functions have seen meetings and the management of meetings, become daily business for NTRBs. NTRBs are required to support applicants to participate in a number of processes such as arbitration, conciliation, mediation, facilitation and negotiation simultaneously. In order to be effective, they need strategic and coordinated approaches. This requires the review of operational practices to ensure that the climate and conditions necessary to support such approaches are in place.

The boundaries that define the areas to be covered by NTRBs do not always follow 'traditional' boundaries. This can be a source of conflict as the jurisdictions of NTRBs may overlap. Members of native title groups can be subject to a barrage of staff from neighbouring NTRBs, all of whom require the same information. Inconsistencies in information can be queried, particularly by government agencies and hold the potential to jeopardise native title claims. As information becomes contested it can create disputes between native title holders. This in turn can lead to circumstances where NTRBs become located in disputes as applicants seek to pit them against one another.

The workshops identified that applicant communities are highly dependent upon NTRBs. In particular, their reliance on NTRBs to resource and run applicant meetings has created a dependency that works *against* building capacity to manage their own business. NTRB staff often find themselves having the conflicting responsibilities of facilitating or chairing meetings while, at the same time providing technical or legal advice. These conflicting roles place competing demands on staff, making it difficult for them to remain neutral. Even where staff achieve this balancing act, they may be perceived by applicants as biased towards certain groups or individuals and this can lead to conflict.

3.1 The 'Big Meeting'

It was identified in the workshops that the calling of 'big meetings' has become the accepted practice whenever there are issues to discuss, decisions to be made and/or conflicts to be resolved. Some individuals or groups may simply be attending these meetings to remain informed, rather than to participate in any formal decision making processes. People can often leave these 'big meetings' with little understanding of the issues that have been discussed or the decisions that have been made. 'Big meetings' are often ineffective because of the limited opportunities for discussion. Those involved at 'big meetings' have a range of interests which can not be fully expressed and explored in such forums. In particular, issues of representation which involve extended family groups are often poorly managed in larger forums.

Workshop participants identified that building agreement-making processes from the ground up requires working with clusters of families and individuals, and preparing them to negotiate agreements amongst and between them. The resources required in doing this are

not insignificant. However, many resources are currently expended on big meetings where outcomes subsequently break down because the necessary preparation of those involved has not taken place.

4. MEDIATION PRACTICE

In each of the workshops, participants were asked to identify their experiences of mediation and the elements of effective and fair mediation.

Overall, participants identified:

- mediation should be an **act** of **real** choice;
- mediation must produce an outcome satisfactory to all parties and allow all parties to express their views;
- a strong preference for Indigenous mediators, provided they have sufficient training and expertise;
- a strong preference for the co-mediation approach, as long as parties have a choice as to co- or sole mediation;
- where co-mediation is used, mediators working together should be trained in the same approach;
- that NTRBs and parties should have a choice of mediators, but a lack of resources means that only the NNTT mediators can be called upon;
- that a mediator must be impartial and suitably qualified and experienced regardless of whether they are Indigenous or non-Indigenous;
- that Indigenous mediators must not have interests in the area, that is, must not have a conflict of interest, whether real or perceived;
- there should be national regulation of and standards for mediators in the native title context, particularly as this would assist NTRBs in choosing appropriately qualified dispute management practitioners;
- that the NNTT and Federal Court should have more specialised Indigenous mediators, particularly for use in inter-Indigenous disputes;
- qualifications and experience in mediation should be essential for NNTT members;
- there is a need to develop the capacity of native title holders to manage their own disputes;
- that processes should incorporate Indigenous protocols, laws and approaches;
- that a lack of resources should not prevent NTRBs or others from choosing independent mediators; and
- mediation should take place between the parties, not between lawyers.

There was general agreement that mediation could be an effective tool that brought people together and facilitated communication. While some participants were able to identify positive experiences of mediation, there was also considerable scepticism around the fairness and quality of some mediation practice. These concerns were also shared by participants at the New South Wales Community Justice Centre Workshop at the Adelaide Native Title Conference in June 2004.

4.1 Expectations of Mediation

There was a clear expectation that mediators:

- be clear as to their role and responsibilities;
- be neutral and impartial;
- understand and maintain confidentiality;
- have no conflict of interest real or perceived;
- be open and fair minded;
- have integrity;
- be patient;
- have wisdom and empathy;
- have knowledge of the points of view and issues of concern both/all parties;
- have the ability to control the process fairly and effectively;
- assist disputing parties to understand each other's points of view;
- enable and encourage the participation of all parties;
- achieve an outcome agreed by all parties;
- respect Indigenous people and be culturally aware; and
- continually assess the suitability and appropriateness of mediation, including whether common ground can be reached.

4.2 Concerns Relating to Mediation

Significant concerns about the practice of mediation emerged during the workshops. Those concerns centred on deficiencies in the following key areas:

- mediator neutrality;
- mediator competence;
- mediator confidentiality;
- mediator interventions;
- mediator preparation;
- party preparation;
- cultural sensitivity on the part of mediators;
- mediator focus; and
- mediation follow-up.

4.2.1 Mediator neutrality

The concept of mediator neutrality was seen as essential to the role and responsibility of a mediator. Mediation was seen as ineffective when the mediator was punitive, biased and unsupportive of all of the parties in the process or, where the mediator was seen to have a conflict of interest.

Some participants in the workshops identified that they had experienced mediators who were intimidating and allowed intimidation by other parties, particularly towards native title applicants. This led to a perception that mediators were not remaining neutral, and were actively demonstrating partiality and support for other parties in the process. It was also identified that in certain situations, mediators have been removed from the process at the request of parties because of perceptions that the mediators are biased. This has led to situations where mediators with whom Indigenous parties felt comfortable, were removed.

4.2.2 Mediator competence

A number of workshop participants identified that they had experienced mediation where the mediator either continually interrupted parties, or lost control of the process. They had also experienced mediators who failed to identify the real issues and expectations of the parties, including underlying issues and concerns, or did not provide any explanation of their process, including the rationale behind the procedural approaches. Such actions contributed to a sense that the mediator did not understand his or her role and, was not able to perform effectively. Others commented that they had experienced mediation processes where the mediator did not participate in the process and allowed others, particularly lawyers, to run the mediation process. For some, the lack of mediator competence was demonstrated by mediators who allowed parties to be inconsistent in their positions and, did not require those parties to explain those inconsistencies.

Still others had experienced mediation where the mediator was unable to effectively communicate the purpose of mediation, and explain how the role of the mediator differed from that of a judge or a lawyer. This was further compounded by mediators who did not include opportunities that supported the integration of legal advice into the mediation process, so that applicants and others could be advised as to the appropriateness of the agreements under consideration. Workshop participants were clear that it was not the role of the mediator to provide this advice, but that it was the role of the mediator to ensure that this advice, if needed and required, was able to be provided. Finally, mediators did not always pay attention to the logistics necessary to meet the comfort and safety requirements of all parties. This was seen as critical to supporting the participation of all parties.

4.2.3 Mediator confidentiality

A key mediator competence concerns the maintenance of the confidentiality of information and proceedings. Some participants had experienced mediation where the mediator had breached confidentiality, including broadcasting confidential outcomes which then became the source of further disputation. Clarifying disputing parties' expectations of confidentiality is important. It was identified that there is a tendency to impose confidentiality clauses on parties, without clarifying with them who they need to communicate with outside of the mediation process. Unless this is done, it sets up unrealistic expectations that can become the source of future conflict and tensions between parties.

4.2.4 Mediator interventions

The role of the mediator was seen as critical to the effectiveness of the mediation process. However, a number of workshop participants identified that they had experienced mediation processes where, the mediators positioned themselves as the most important person in the process and pushed to set agenda, which were at odds with the parties' wishes. Often the mediator did not seem to fully understand the issues and concerns of the parties. They pushed for the dispute to be settled in a way, which seemed to be acceptable to the mediator, but did not genuinely engage in the needs and interests of the parties.

Some workshop participants had experienced mediators who made comments that fuelled the existing conflict. This included instances where the mediator lacked understanding of the issues, or where they took sides with one party or the other. The effect was to make the process of dispute resolution and dispute management more difficult for all of the parties.

4.2.5 Mediator preparation

A number of participants had experienced mediators who were under-prepared, had insufficient knowledge of the group, and the background to the dispute which led to the mediation process being completely ineffective. Much of the effectiveness of the native title mediation process is dependent on the ability of the mediator to identify potential stumbling blocks. To do this, the mediator needs to meet with the parties and obtain a thorough understanding of their issues and take the time necessary to genuinely engage with communities. It was perceived that preparation time frames were often focussed around mediator needs, rather than around the needs of the parties.

4.2.6 Party preparation

In each of the workshops, the point was made that Indigenous parties' ability to participate in native title mediation processes is largely dependent upon the effectiveness of the preparation that they receive. The failure to grasp the consequences of this lack of preparation was seen as a significant problem in mediation processes and was seen to be a function of the time urgent environment, in which most native title mediations are conducted.

To carry out such preparation effectively, particularly with stakeholder groups who are often geographically dispersed, live in isolated locations, and lack access to communication infrastructure, requires significant investments in both time and resources. However, time frames are often imposed that do not account for these difficulties and therefore, do not allow appropriate preparation to occur.

4.2.7 Cultural sensitivity on the part of mediators

Lack of respect for Indigenous people, and cultural insensitivity on the part of mediators was seen as a major reason why mediation processes were unsuccessful. All workshop participants emphasised the importance of mediators understanding the issues in dispute, a significant component of which is having an insight into the issues from the point of view of the parties themselves. Inherent in this was the importance of an understanding of cultural values and priorities that shaped the parties' perceptions, including historical and relational issues.

The predominance of non-Indigenous male mediators was seen to have consequences, in relation to the participation of women and, to the management of gender restricted information. Mediator approaches, which emphasise quick and individualised decision-making processes, were seen to disadvantage Indigenous peoples. This was because they do not allow for Indigenous protocols and processes and, do not account for the needs of Indigenous group decision-making processes.

4.2.8 Mediator focus

Native title mediation processes are frequently called agreement-making processes, and their focus is often on achieving substantive outcomes. The legitimacy of these outcomes is often seen as depending on their discreteness, measurability and practicality. It is therefore not surprising, that mediators and others measure the effectiveness of the mediation process in terms of whether or not an agreement has been reached.

The practice of mediators who are obsessive about achieving outcomes, whether or not those outcomes are suitable to the needs of parties themselves, emerged as a pivotal problem and concern in relation to mediation. Mediators were sometimes seen to place pressure on parties to reach settlement. Getting parties to agree too quickly, where agreements do not genuinely reflect their needs, often means the subsequent breakdown of agreements.

4.2.9 Mediation follow-up

At present, mediators are seen as not 'owning' the outcomes of mediation processes or as having a responsibility for monitoring or following up agreements. Once the mediation is finished, they leave, and there is no independent monitoring as to whether agreements are implemented or working, and whether there is any need for their re-negotiation.

This lack of follow-up is a source of considerable dissatisfaction. There is a need to clearly identify in any agreement-making process, who has the responsibility to ensure implementation, what resources they will require, and what is to happen in circumstances where agreements break down or need re-negotiation.

4.3 Indigenous Mediators and Local Indigenous Capacity

At present, the majority of native title mediators are non-Indigenous and male and this has a range of consequences. There was a strong perception that Indigenous mediators would put Indigenous parties more at ease, thus enabling more effective communication within the mediation process. In one of the workshops, Indigenous mediators were seen to understand 'culture', and to have the potential to exercise greater control and authority over a meeting. This was as opposed to non-Indigenous mediators who, may not understand Aboriginal cultures, may misinterpret what they hear, may not understand local Indigenous ways of speaking or, whose authority may not be accepted by the group. Nevertheless, overall, cultural understanding' rather than 'skin colour' was emphasised as making the difference in good mediation practice and it was also noted that there may be circumstances were non-Indigenous mediators are preferred.

There was recognition of the fact that Indigenous mediators with local connections might be perceived in some instances as not being neutral and impartial, making it necessary to draw on Indigenous mediators from outside the local area. There was also appreciation that non-Indigenous parties may have concerns if only an Indigenous mediator is utilised. It was seen

that this could be managed by the use of co-mediation approaches utilising both Indigenous and non-Indigenous mediators, and allowing for the opportunity to have both male and female mediators. Workshop participants believed that this would also demonstrate equity and balance in the procedural approach.

The lack of local Indigenous capacity in mediation practices was seen to result in significant delays, as a result of waiting for interstate mediators to be available. Such delays can often exacerbate and escalate tensions making it even more challenging to deal with disputes. High profile Indigenous people may be sought from outside the area because of a perception of their ability to resolve disputes. This fosters a reliance on external practitioners, rather than encouraging the development and extension of local capacity to manage disputes. Where local people are used, they are often high profile persons, such as Elders, who have the appropriate authority, but who may lack the necessary skills to complement that authority. The extensive use of third parties to resolve disputes does not encourage people to undertake their own direct negotiating and problem solving activities. This is not to say that third parties such as mediators are not useful or helpful, but rather that they are not the be-all and end-all of dispute management.

4.4 Complaints Processes

The level of concern raised in the workshops about the practice of mediation highlighted the need for complaints processes. At the CEO workshop in Adelaide, it was requested that the Project investigate the role of the Commonwealth Ombudsman in handling complaints about native title mediation processes. Below is an initial outline of the issues and approaches which are the subject of ongoing research.

If an NTRB employs an independent mediator, there appear to be few complaint mechanisms. The Commonwealth Ombudsmen cannot receive complaints about mediators in private practice. If a mediator is also a legal practitioner based in New South Wales or Victoria, there appears to be recourse to the legal ombudsman in those states. Lawyer mediators in all states and territories are also accountable to professional bodies such as law councils, law societies and legal practitioner boards. Mediators registered in the Australian Capital Territory (ACT) as approved mediation agencies, pursuant to the *Mediation Act 1997*, are required to have complaint processes.

Complaints about members of the NNTT can be made directly to the President of the NNTT. Complaints about staff of the NNTT, including the Registrar, can be made to the Commonwealth Ombudsman. It seems that the Commonwealth Ombudsman cannot receive complaints about NNTT Member mediators because they are statutory appointments and are therefore, not public servants.

It appears that there is currently no independent agency who can receive complaints about any and/all mediators in the native title area. The liability of independent mediators and NTRBs in relation to agreements also requires further investigation.

4.5 Mediator Code of Conduct and Contractual Terms of Reference

The lack of national standards for mediators means that NTRBs have no independent benchmarks to assist them in assessing the qualifications and competence of practitioners. Standards would also assist NTRBs in assessing the range of services available and, the suitability of particular mediators for particular disputes. A further consequence of the lack

of standards was an absence of an agreed 'Code of Conduct', which might establish ethical and professional obligations and responsibilities for mediators.

CEOs suggested that a 'Code of Conduct' could be attached to contracts with mediators engaged by NTRBs. CEOs also requested that the Project develop draft terms of reference for the engagement of mediators, including cultural awareness requirements. The need to clarify the range of conflicts of interest, both potential and real, that affect the suitability and appropriateness of people to act as mediators or facilitators emerged as a critical issue from the workshops.

4.6 Training Opportunities in Mediation

NTRB staff may not always be the most appropriate people to mediate in disputes, because their role is to actively advocate for and support native title applicants. Consequently, in situations where there are disputes between applicants, it is inappropriate for them to manage the dispute management process. Nonetheless, an understanding of mediation practices and principles would assist them in supporting, managing, evaluating and participating in these processes.

There are however currently no mediation training courses available that have been developed specifically for the native title context. CEOs at the workshop in Adelaide requested that IFaMP investigate the range of training in mediation, which might be available to NTRBs including the training currently being piloted by the NNTT for its staff and members. There is a range of other mediation training providers, both private and corporate which require investigation. The identification of providers is subject to ongoing research.

5. TRAINING ISSUES

In each of the workshops, participants were asked to consider the range of NTRB training needs in decision-making and conflict management. A key issue which emerged was the need for the staff of NTRBs to have a thorough understanding of general native title processes and procedures, as well as of issues associated with specific native title applications and their progress. Both are essential to support the provision of appropriate and relevant information to applicants. The need for NTRB staff to understand each others' roles in order to minimise misunderstandings, was also stressed as a way of relieving conflict, including conflict amongst the applicants.

Workshop participants saw their responsibility as one of reflecting the needs of NTRB staff and applicants in general, rather than specifically identifying the needs of any particular individual or organisation. Participants in all workshops found it difficult, if not impossible, to divorce training needs relating to decision-making and dispute management, from the range of other training needs, which they saw as integrated. Although the relevance of some of the training needs they identified to decision-making and conflict management may not be immediately apparent, it was felt that training in all areas was necessary to provide the building blocks to good decision-making and conflict management.

Participants identified that the core training needs set out below applied across NTRB staff, and would also be helpful for applicants and those they represent.

5.1 Core Training Needs

The core elements of training were seen to include the following:

- staff induction training, including cross-cultural induction and cultural maps of local areas and how to read and understand and interpret these maps;
- cross-cultural training, including:
  - management in the context of an Indigenous corporation
  - understanding Indigenous decision-making including local processes and issues;
- teamwork and team-building skills, including;
  - team dynamics
  - networking opportunities within professional groups and relevant to the native title context
  - team time-management, which involves the need to understand and appreciate the role and workloads of all members of the team
  - setting-up processes to deal with office disputes;
- presentation skills and public speaking including preparation and use of appropriate visual aids;
- communication skills, including;
  - conflict management, dealing with difficult people and de-escalating difficult situations
  - mediation and dispute resolution
  - meeting skills and procedures
  - how to choose the appropriate dispute resolution process
  - negotiation skills
  - facilitation skills
  - relationship building techniques;
- leadership training;
- mentoring skills;
- stress management;
- resource management (fiscal and human resources); and
- debriefing and feedback skills.

Engaging with the broader community in relation to native title issues can help de-escalate and defuse many potential conflict situations. An important aspect of this is the need for key personnel such as CEOs, members of governing bodies, and applicants, to have training in media management.

5.2 Particular Training Needs for Staff, Applicants and Board Members

Outlined below are additional training needs as identified specifically for staff, board members, and applicants. As noted, some of these areas fall outside the Project's brief: however, they are critical in building overall capacity to make informed decisions and alleviate Indigenous conflicts.

5.2.1 Applicants and Negotiating Teams

The development of the capacity of applicants and negotiating teams is central to the effectiveness of native title negotiations and, to minimising levels of conflict. The issue of

educating applicants and negotiating teams emerged as a source of significant difficulty in effectively carrying out the work of NTRBs.

The information required by applicants includes:

- knowledge of native title legislation and processes 'from start to finish', including the roles and responsibilities of NTRBs, the NNTT, the Federal Court and other relevant bodies and organisations;
- knowledge of the Indigenous Land Corporation and other organisations, and what they can deliver; and
- understanding their roles and responsibilities, including how to act legally and in a culturally appropriate way, and the consequences of not performing their responsibilities.

Core training areas for applicants and negotiating teams included the following:

- how to effectively present information to and represent the members of the applicant group, and conduct applicant meetings;
- strategies for managing the communication needs of others who are affected by the native title application;
- managing cultural knowledge and its inclusion in legal process;
- knowing how to report back to NTRBs, including how to clarify specific family representation lines and responsibilities;
- negotiation skills, including;
  - recognising the 'tricks' of other negotiating parties
  - awareness of strategic thinking and elements of a 'good deal' that benefit all
- developing agreed protocols and getting them adhered to by other stakeholders such as mining companies;
- how to get best outcome from the research and how to use connection material;
- basic business courses, particularly in preparation for establishment of PBC and other incorporated bodies; and
- governance and leadership training.

Workshops also commented that applicants need to be systematically informed of training opportunities, in order that they may take advantage of them.

5.2.2 Board Members and Council Executive

NTRBs have a range of governing structures including boards, councils and regional authorities. Staff in the workshop did not feel that they should be determining directions for the members of their governing bodies. They did emphasise however, that the role of the Board in supporting the implementation of effective decision-making and dispute management processes, can greatly enhance the likelihood that those processes will be successful.

5.2.3 Chief Executive Officers

The role of the CEO as liaison between staff, the applicant community and the broader non-native title community, including non-Indigenous stakeholders, is an important one. The CEO sets the tone, both within the organisation and in the organisation's interactions with others. CEOs need access to high quality training in communication skills, personnel management, strategic planning and policy development skills.

It is also helpful if CEOs have access to mediation training. This is not to suggest that they would necessarily be required to act as mediators. Their role would be to support the implementation and management of mediation and dispute management processes within the NTRB, to support the NTRB in managing those processes within the applicant community, and in engagement with non-Indigenous stakeholders.

5.2.4 Legal practitioners

The workshops recognised that legal practitioners normally understand native title law and the native title context, but that there is a need to maintain the currency of their knowledge base. It was identified that legal practitioners would benefit from information which assisted them in better understanding the groups they represent. The need was for greater opportunities for them to meet these groups, and to participate in induction conducted by Indigenous staff, to support them in working with the groups. In order to negotiate appropriately with different types of industries, including the minerals and pastoral industries, legal practitioners must also have a clear understanding of the commercial and economic matters relevant to those industries.

A basic requirement is that they are able to write effectively and to provide technical information in a range of forms for different audiences. Legal staff also need to understand how to vary their verbal communication and consultation styles, and to avoid jargon; in order to match the local needs of the community with whom they are working. They are responsible for negotiating and asserting the rights of their clients. Fundamental to this is their ability to provide clear information and recommendations that help applicants to make informed decisions for themselves.

The lack of understanding of anthropology, both in a general sense and as it relates to the particulars of an applicant group, can be a source of significant conflict within NTRBs. Legal practitioners need an understanding of anthropological principles and practices to be able to carry out effective teamwork on applications. An understanding of the specific anthropological issues which might give rise to conflict in applications, could also assist in identifying early warning signs of conflict that would allow pre-emptive strategies to be implemented.

5.2.5 Researchers

It was identified in each of the workshops that researchers face a number of challenging responsibilities within the native title environment. They need to understand how to produce terms of reference for a range of consultants and, how to facilitate engagement between Indigenous parties, as well as between those parties and the NTRBs. They need a clear awareness of the range of legal requirements that they may experience as expert witnesses, as well as how to produce documents that fulfil those legal requirements and can also be easily understood by applicants.

It is essential for all research staff to have an understanding of both their professional and legal obligations and responsibilities. They need to have the ability to negotiate those responsibilities, particularly with legal staff within NTRBs. Much conflict can be avoided if there is clarity about those roles and responsibilities.

It is also important for researchers to have interview skills, particularly for the purposes of working sensitively and appropriately with Indigenous people. This will require a clear understanding of confidentiality provisions, as well as the best ways to support the negotiating requirements of applicants within the native title process.

5.2.6 Indigenous Liaison Staff

Indigenous liaison staff come under a number of titles in NTRBs including Aboriginal Liaison, Project and Field Officers. In each of the workshops, the roles of the Indigenous liaison staff was repeatedly recognised as central to the success of native title processes. Workshops emphasised the need to support and develop these staff and, to secure a career path for them within NTRBs. It was seen to be necessary that training be targeted to assist in developing and enhancing skills in line with this pathway. Workshops also identified the importance of vocational pathways for Indigenous liaison staff that enables them to achieve formal qualifications. The point was made that Indigenous liaison officers are in many cases the leaders of the future, and building their capacity will build the capacity of their communities.

The workshops highlighted that Indigenous liaison staff are a key point of contact between the Indigenous communities and the NTRB. They act as interpreters in a two-way interpretation process between Indigenous communities and NTRBs. It was felt that supporting and enhancing their status would lead to an increase in the effectiveness of this interpretation process, particularly if it resulted in their greater involvement in planning processes.

SECTION 2 – RECOMMENDATIONS AND EMERGING ISSUES

1. NATIVE TITLE EDUCATION AND AWARENESS

The ability of NTRBs and others such as the NNTT to provide information about native title in easily understood formats emerged as a significant issue within the workshops. This includes the ability to provide information in the relevant local languages. There is also considerable variation in the quality of technical information and the competence of organisations in delivering such information. Assessing and enhancing the technical ability and competence of organisations in delivering native title information in user-friendly ways for Indigenous audiences is a key priority area.

Additional resources may be required to assist both NTRB and applicant groups to remain abreast of developing issues in native title. In particular, the base line level of resources required by applicants to keep those they represent informed and involved needs to be identified. Any gap in resources will mean that NTRBs and applicants will be unable to provide the necessary information to those who require it. This information also impacts on the applicants' understanding of their own roles and responsibilities.

The non-applicant Indigenous community is also affected by native title negotiations, and as identified in this report, these groups can seek to insert themselves into processes in order to remain informed. There is a lack of resources and any consistent education campaign to inform these groups of native title issues and matters. This is a significant source of conflict in communities and if there were resources available to support regular and ongoing native title information and education strategies for these groups, this would assist in minimising levels of concern, fear and frustration within the broader Indigenous community.

Recommendation 1: Existing native title education and information packages and kits need review and assessment in relation to their ease of use, ability to be easily and quickly updated and their appropriateness for a variety of Indigenous audiences.

Recommendation 2: The level of resources required by NTRBs and applicants to update, develop and deliver native title education and information packages should be identified and allocated by those responsible including NNTT, NTRBs, OIPC and others.

2. MANAGING NATIVE TITLE PROCESSES

The Federal Court practices in relation to time-lines that are set for matters, impacts on the procedural fairness for those involved, particularly for Indigenous stakeholders. The difference between the range of agreement-making processes, such as facilitation, conciliation, negotiation, arbitration and mediation is often poorly understood by those involved. There is a need to develop information packages, which clarify these differences. There is also a need for the development of strategies to support communication amongst the managers of these processes, to ensure better co-ordination and to minimise unnecessary duplication. It is important to note that these issues have been recognised and are the subject of consideration by the Federal Court Users Group. However, further partnerships between the Federal Court, the NNTT, NTRBs and others are required to deal more extensively and more effectively with these issues. This also includes circumstances where the Federal Court refers matters to the NNTT for mediation without regard to the processes that NTRBs may already have in place to deal with disputes.

There is also a need to review claim registration practices and identify joint strategies for managing claims that are particularly problematic. Given the critical role of the NNTT in liaising with Indigenous stakeholders, consideration could also be given to extending the role of the Tribunal's Indigenous staff to act as regionally-based liaison officers, who can act as a point of contact between the NNTT and local Indigenous communities.

Recommendation 3: Opportunities for developing joint strategies for claim management, including better co-ordination of the range of processes, could be explored further by NTRBs, the NNTT and others in order to minimise duplication and enhance the efficient use of resources.

Recommendation 4: NNTT should give consideration to sponsoring the workshop to develop best practice approaches to dealing with overlapping claims.

3. MANAGING CONNECTION MATERIALS

Opportunities to gather connection information from native title applicants in a communal manner enables meanings, and their range of possible interpretations, to be negotiated amongst applicant groups. These negotiated and agreed meanings are more likely to remain consistent for groups than those individually documented by researchers, which are not subject to group clarification and confirmation. Ideally, the processes by which connection materials are exchanged and managed amongst the applicant group would also be negotiated amongst them *prior* to applicants entering into negotiation processes with others. Applicants also need to agree how they will use connection material in negotiations with other parties, and this use needs to be negotiated and agreed with those parties themselves. These procedural steps and agreements are crucial to avoiding disputes and are central to the effective management of any native title processes.

As outlined in this report, the collection and use of connection materials is highly fraught. The lack of best practice guidelines in how to deal with connection materials also underpins many of the differences in how the states deal with connection materials.

Recommendation 5: There is a need to review the processes by which NTRBs collect, exchange, and allow access to connection materials in order to develop best practice guidelines and policies.

Recommendation 6: As part of this review process, IFaMP should identify strategies to co-ordinate a workshop to review and agreed upon joint approaches between lawyers and researchers and the range of agencies involved for the use of connection materials.

4. ENHANCING NTRB PROCEDURAL EXPERTISE

Given the desire of all involved in native title to minimise and prevent unnecessary escalation of conflicts and disputes, the ability to be proactive in managing disputes is vital for both applicant communities and NTRBs. A thorough understanding of process and the requirements of parties in dispute management processes would assist in the implementation of processes that have the understanding and commitment of those involved. NTRBs in particular, would be assisted in effectively intervening and developing management strategies by the employment of process experts, such as those with facilitation and mediation skills.

At the Adelaide Native Title Conference, NTRB staff who attended the New South Wales Community Justice Centre's (CJC's) workshop noted the appropriateness of the CJC's mediation model for some native title disputes. They felt that this was the case because the approach deals with the kinds of family and community disputes, which underlie native title disputes.

Procedural knowledge and expertise have not been seen as necessary skills in NTRBs. The lack of training tailored to the native title context has compounded the challenges in developing this expertise. Creating the position of 'process expert' alongside those of administrative, legal, research and Indigenous liaison positions that are currently recognised as essential would consolidate the importance of procedural expertise. It would also secure resources for a critical component of NTRB governance and function. Staff employed in such positions could support applicant communities in developing and maintaining their own procedural expertise. While perceptions of conflicts of interest may mean that NTRB staff may not be appropriate to intervene as mediators or facilitators in disputes, they would serve a vital role in designing and overseeing such processes.

4.1 Separating Procedural and Substantive Expertise Within NTRBs

NTRB staff often find themselves in the difficult position of having conflicting responsibilities of facilitating or chairing meetings while, at the same time, providing technical or legal advice. It is important to separate the procedural responsibilities of managing meetings from the substantive responsibilities of advising the meetings. Mixing responsibilities makes it difficult for someone, who is advising a meeting, to be perceived as neutral and impartial if there is dissent in relation to that advice. It can also be very difficult for technical experts to identify misunderstandings of the information they are conveying. It is often more productive if there is one person whose sole responsibility is to manage the meeting process by which people talk to one another, rather than to also advise people. This person remains alert to miscommunications, monitors how to manage them and acts as a 'circuit-breaker' without being seen as a stakeholder in particular solutions or outcomes.

Recommendation 7: IFaMP should explore the possibilities of piloting the creation of a dedicated staff position of process manager in NTRBs in collaboration with interested NTRBs.

5. ENHANCING THE CAPACITY OF APPLICANT GROUPS TO MANAGE DISPUTES

Applicants need to independently co-ordinate and implement their own strategies for managing information, and decision-making processes. This would assist them in effectively carrying out their responsibilities in a more timely manner. It would build the capacity of communities to manage their own business, and enable them to work in partnerships with NTRBs rather than being reliant upon them. Securing resources that enable NTRBs to assist communities in acquiring this expertise as quickly and effectively as possible is a key capacity area. This is particularly the case given the need to build the capacity of proposed Prescribed Bodies Corporate (PBC) and other incorporated Bodies and Trusts.

Some NTRBs currently negotiate service agreements, which include resources for capacity-building positions in NTRBs. Opportunities to benchmark these approaches with other NTRBs would offer invaluable insights into successful negotiation strategies. Any strategies

negotiated between NTRBs and the NNTT for the joint management of claims could also include capacity building strategies for applicants and the native title group.

Recommendation 8: The NNTT should give consideration to holding a series of workshops for applicants to discuss applicant roles and responsibilities. This would require liaison between NTRBs and those presenting information to ensure that information presented is congruent with NTRB approaches.

6. DEVELOPING CO-ORDINATED APPROACHES TO NATIVE TITLE CLAIMS

There is a requirement for a co-ordinated and consistent strategy for each native title claim. The 'network' involved is considerable and includes the NTRB and others including other NTRBs, applicants and those they represent, other stakeholders, bodies such as the Federal Court and the NNTT and the broader Indigenous and non-Indigenous communities. Communication amongst NTRB staff groups about claim related matters is pivotal to the success of any broader management strategy. However, a lack of appreciation of each others' roles and, opportunities to meet when coupled with the time pressured environment, often results in a lack of staff communication.

To develop an integrated approach to managing a claim, the information of each staff member working on the claim must be incorporated into the management strategy. Legal staff have information about the legal issues that impact on particular claims. Researchers have important information about the connections of applicants. Field officers often have information about potential sources of disputes among the applicant group, including the early warning signs of conflict. All of this information is necessary to developing strategic approaches and a coherent picture of the claim.

Recommendation 9: IFaMP recommends that OIPC identify ways it can assist and support neighbouring NTRBs to meet and explore further ways of sharing resources and working together strategically. This would also support co-ordinated approaches to claim management.

Recommendation 10: There is a need for regular and separate state-based forums for researchers and lawyers to learn from each others' expertise and experience and to carry out strategic planning. This needs to also happen for NTRB field/project officer staff to allow and encourage them to share information and practical strategies including approaches to decision-making and conflict management.

7. TOWARDS HOLISTIC DISPUTE MANAGEMENT DESIGN APPROACHES

In native title processes, Aboriginal and Torres Strait Islander people are asked to prioritise native title disputes over all other concerns, including other disputes. As one participant in a workshop at the Native Title Conference in Adelaide in June 2004 explained, "… you are asked to leave your differences at the door … but you can't. You just can't". These are distinctions between what is and isn't part of a native title dispute, and are often seen as arbitrary and artificial by Aboriginal and Torres Strait Islander people. Native title disputes are important to resolve and deal with, but they are part of a complicated web of relationships, connections and interpersonal communication dynamics. Each of the workshops stressed the need to develop new and innovative processes in mediation, decision-making and conflict management which work on the ground, which take into

account Indigenous law and other cultural priorities, and which allow for an integrated approach to the management of disputes in the community.

There are many 'formal' models of mediation, which are discussed in the literature, such as 'evaluative', 'transformative', 'narrative', and 'interest based' approaches. It is likely that elements of all of these approaches could inform any new developments. Most workshop participants were unaware of the 'technicalities' and debates around various mediation models. It also appears, that many practitioners and academics writing in the field, lack an understanding of the realities on the ground of Indigenous people's experience of dispute management processes.

In the development of new approaches, it is important to ensure that dispute management processes are integrated with other services and approaches in the community, including existing ways of dealing with decision-making and conflict. This allows for a co-ordinated approach, and the implementation of strategies at cross-agency levels that complement and support one another. It also avoids duplication and the waste of limited resources. Processes to deal with a native title dispute might consider a range of community support services and interest groups, in order that the full dimension of the dispute, its sources and ramifications are reflected in the solutions and agreements achieved. It is also critical that processes are subject to thorough and ongoing evaluation in order to ensure improvement in the process and to allow benchmarking.

There is a need to create an environment in which dispute management processes are appropriate. Given the history of Indigenous peoples, healing initiatives may be required as an integral part of both preparing for dispute management and participating in dispute management processes. There is also a requirement to address fundamental inequities in relation to:

- educational, cultural and social programs and opportunities;
- the capacity of those participating including levels of confidence and self-belief;
- long standing hurt, trauma and sense of past injustices;
- the value placed on cultural understandings and senses of belonging and identity; and
- perceptions of the root causes of conflict including preparedness to discuss and resolve any differences.

Furthermore, there is a need to ensure that, in designing dispute management processes, thinking is informed by:

- collective and individual Indigenous rights to self-determination and individual rights, needs, and interests;
- the fluidity and plurality of individual and group identities;
- existing 'peacemakers' and 'peace-builders in the community';
- long term community relationships and sustainability rather than simplistic 'quick fix' solutions; and
- the interests and needs of those who may be excluded from the process.

Where dispute management processes are required, there is a need to support localised, flexible and integrated decision-making approaches which:

- are negotiated from the 'bottom up' in the first instance;
- clearly map the elements of and parties to the conflict;
- are supported by comprehensive relevant and timely education and awareness programs and communication strategies;
- embody Indigenous values and Indigenous law;
- reflect localised ideas of how authority should be organised and how decisions should be made;
- take into account the range of differentiations and commonalities between and across groups and focus on relationships;
- recognise the complexity of dispute dynamics, including underlying issues and local and regional dimensions;
- build on Indigenous capacity including existing decision-making and conflict management processes; and
- integrate dispute management approaches with other relevant community services.

These processes must:

- ensure prior and informed consent of those participating;
- satisfy the procedural, emotional and substantive needs of all parties;
- account for power imbalances, including relative access to resources and other factors affecting capacity to participate, including resources, the quality of representation, and knowledge of the system and processes;
- build the commitment and willingness of those involved to participate;
- foster open dialogue amongst all involved;
- involve pragmatic peace-building with the extended family at the base;
- assess the type of dispute and match it with the most appropriate dispute management interventions rather than a 'one size fits all' approach;
- have strategies for managing third parties, such as lawyers, researchers and other technical experts, including the management of written materials and advice;
- employ accredited practitioners including Indigenous practitioners as required;
- implement appropriate co-mediation models as negotiated;
- ensure that resources are secured and allocated for the implementation of agreements;
- include provisions for the review and revisiting of outcomes and solutions, in recognition of evolving needs and circumstances; and
- must recognise the right of participants to say 'no'.

7.1 Mediation Practice

The arbitrary time frames set for mediation and the impact of resourcing levels, particularly for NTRBs and applicant groups raises issues as to the procedural fairness of mediation processes. There is a need for a debate as to the role of the NNTT and other agencies who are acting as mediators, in identifying and raising the impact of these issues of procedural fairness. This includes the need to identify when and where mediation is the most

appropriate intervention and what is required to support it without disadvantaging any of the parties participating.

There is a need to develop national standards, which detail the ethical and professional obligations of native title mediators. These responsibilities could be articulated in a Code of Conduct, which would also assist NTRBs and others in more clearly understanding the role of mediators. There is also a need to review the requirement for an independent complaint authority for native title mediations. Such an authority could review issues of practice and act as a co-ordination point for the implementation and monitoring of national standards.

There is a need to review the need for specialised mediators for disputes amongst Indigenous peoples. This includes the need to review in collaboration with various mediation providers, approaches to co-mediation and the possible employment of Indigenous mediators. Where co-mediation is employed by organisations it is vital that co-mediators are trained in the same approach and have the necessary time to negotiate a joint strategy. Given the limited numbers of Indigenous mediators, the training of regionally based Indigenous mediators, both male and female is an urgent priority. These panels of mediators would allow NTRBs and others greater choice of mediators and could support the prompter delivery of service. There is also a need to develop processes and responsibilities for the independent monitoring and follow-up of agreements reached in native title processes.

Recommendation 11: A code of conduct and terms of reference must be developed which detail the ethical and professional obligations of native title mediators.

Recommendation 12: The training of regionally based Indigenous mediators and facilitators, both male and female, is an urgent priority.

7.2 Mediation Research

Further research needs to be conducted into:

- the voluntariness of parties' participation and the impact of this for the mediation process;
- the confidentiality needs of those participating in mediation and how to manage and negotiate this with parties;
- the elements of appropriate mediator preparation;
- the elements of appropriate party preparation;
- reasons for the breakdown of agreements;
- strategies for managing third parties and technical experts in dispute management processes;
- the experiences of parties who have received co-mediation and their evaluations of it;
- the experiences of those parties who have received mediation with both Indigenous and non-Indigenous mediators and their evaluations of this; and
- processes, which take into account Indigenous law, and which incorporate culturally sensitive mediation practice.

In line with recommendations from the CEO workshop, IFaMP will also continue to investigate issues around mediation and facilitation particularly fresh approaches, in collaboration with Mr Graeme Neate, the President of the NNTT and others.

8. TRAINING PRIORITIES AND ISSUES

NTRBs have a range of overlapping and highly important training needs. This report has identified some of those however there is a need to further map these issues to identify and allocate the resources necessary to deliver and meet the training needs in as timely a manner as possible.

Training is an ongoing organisational need and responsibility. It includes the need to train and develop new staff and to provide ongoing professional development to experienced staff. There is a critical need to ensure that training is tailored to the native title context and that all trainers and presenters are themselves trained and competent in adult education principles, including practical strategies for engaging effectively with Indigenous participants. All training conducted for NTRBs or applicants needs to be independently evaluated in order to assess its usefulness and effectiveness. Any approach to training needs to be integrated in such a way as to ensure that it builds both individual and corporate knowledge and expertise. There is also a need to ensure that any training opens up pathways to vocational and academic qualifications particularly for Aboriginal Liaison Officers (ALOs).

Two priority areas clearly emerged from the workshops: the first being cross-cultural training and the second, induction training. These two areas were seen to be fundamental to NTRBs being able to operate effectively and efficiently. Given rates of staff turnover and that many of those engaged by NTRBs are new to their professions there is a need for the development of a sophisticated, standard induction process which can be rolled out in all NTRBs. This should include induction for native title lawyers, anthropologists and other staff within NTRBs and provision for local content.

Recommendation 13: OIPC and IFaMP, as a matter of priority, should identify strategies to secure resources for a consultant who could identify approaches including funding opportunities to support the achievement of vocational qualifications for ALOs.

Recommendation 14: IFaMP recommends that OIPC identify the resources required for:
- **the development of a standard induction process;**
- **the development of localised cross-cultural training; and**
- **the trialling and evaluation of pilots in these training programs.**

8.1 Suggested Training Modules arising out of the NTRB Workshops

The following training areas, which arose out of the workshops and with direct relevance to the Project, are suggested as possible pilot training activities.

1. Communication skills – introduction to effective communication
2. Mapping conflict including underlying disputes, early warning signs, the range of Alternative Dispute Resolution (ADR) interventions and when they might be required
3. Mapping Indigenous decision-making processes
4. Assertiveness and self-esteem
5. Cross-cultural communication
6. Organisational communication
7. Facilitation
8. Managing meetings

9. Presentation skills and public speaking
10. Mediation
11. Dispute management design approaches
12. Negotiation skills
13. Managing technical experts and third parties in mediation and facilitation
14. Group dynamics
15. Dealing with difficult people and behaviours
16. Presenting technical information to non-technical audiences
17. Team work and team-building skills
18. Relationship-building exercises
19. Feedback and debriefing skills
20. Train the trainer

Many of these modules and courses already exist. The Project sees its role as one of developing an evaluation protocol to evaluate the relevance and usefulness of these training programs to NTRBs. Where these courses do not exist or are not appropriate to the needs of NTRBs, the Project sees its role as one of developing, in collaboration with appropriate training providers, pilot programs that can be evaluated and rolled out once their suitability and appropriateness has been confirmed. The Project also sees a role in negotiating strategies with other relevant bodies, to develop and implement an integrated approach to NTRB training in these areas.

Recommendation 15: IFaMP recommends that OIPC identify the resources required for developing strategies and providing pilot training and evaluation in the 20 priority training modules identified in this report.

Recommendation 16: IFaMP should continue to identify potential training providers and pilot training activities in the areas identified in this report.

Recommendation 17: IFaMP should develop an evaluation framework which can be used to evaluate training activities.

9. TOWARDS A SUSTAINABLE AND NATIONAL APPROACH FOR MANAGING DECISION-MAKING AND DISPUTE-MANAGEMENT

The complex business of facilitating decision-making and managing disputes will be core business not only for NTRBs, but also for all Indigenous Australian peoples, for many years to come and beyond the life of IFaMP. There is a need to plan now for the ongoing implementation and development of the initiatives which are identified in this Report and which the Project will be not be able to deliver in their entirety. The planning of the necessary infrastructure to support and manage such initiatives in an ongoing and integrated way, beyond the life of the Project must commence. It is this lack of succession planning that has often seen the failure of a number of significant Indigenous programs, despite promising beginnings.

Consideration needs to be given to the development of a national approach in Indigenous decision-making and conflict management, including the possible establishment of and appropriate location for a national co-ordinating unit, which would:

- support the development of national standards, ethics and codes of practice particularly in the Indigenous native title context,

- continue to implement long term training evaluation protocols in native title;
- support and co-ordinate trained regionally based panels of Indigenous facilitators and mediators;
- provide support and mentoring to trainees and existing trained mediators and facilitators;
- co-ordinate future training and continue to develop and refine training programs for NTRBs;
- investigate accreditation for the range of training and ensure vocational pathways for trainees;
- co-ordinate long term research, and in particular case studies and comparative research;
- raise awareness of the need for independent procedural experts in the community; and
- develop ongoing criteria of assessment and investigate issues associated with establishing a register of Indigenous facilitators and mediators for NTRBs.

The need for a Whole-of-Government integrated approach to service delivery has long been on the agenda in Australia as noted in the 2004 Report, 'Many Ways Forward: The Report of The Inquiry into Capacity-Building and Service Delivery in Indigenous Communities'. The Council of Australian Governments (COAG) has been trialling this approach to service delivery and partnership, in a number of Indigenous communities and regions around Australia. The Federal Government now plans to expand these trials. Native title does not appear to be a core element in these trials. Decision-making and dispute management processes and training of Indigenous people in these areas should also be their core business. NTRB staff at the New South Wales Community Justice workshop in Adelaide recommended that the Project explore linkages with the COAG trials.

9.1 Identifying Indigenous Dispute Management Practitioners in Native Title

In the current absence of any national approach, it is difficult to identify and locate Indigenous dispute management practitioners. This has led to requests for the development of a register of Indigenous practitioners. Identification of these practitioners would assist the NNTT and the Federal Court in meeting the demand to employ Indigenous mediators, particularly in Indigenous disputes, and to implement greater use of co-mediation approaches. While questions exist concerning how such a register would be used, and who would be responsible for maintaining it, the requirement for such a register is an expression of the unmet need to quickly identify appropriate Indigenous practitioners. There is a need to develop criteria to assess both the suitability of practitioners for inclusion on any register, and to ascertain that those on the register are maintaining their currency in relation to ongoing and emerging issues of professional development. The role of a national body in maintaining and managing a register would need to be clarified.

Recommendation 18: IFaMP should continue to progress discussions for a co-ordinated national approach to the issues identified in this report including the development of regional panels of Indigenous mediators and facilitators.

10. CONCLUSION

Those parties affected by disputes, and who need to make decisions, have a stake in improving the processes whereby disputes are managed and decisions are made. This is a core aspect of good governance. Effective partnerships between agencies such as the OIPC, NTRBs, the NNTT and the Federal Court and applicants are fundamental to the success of this. The new regionally based Indigenous Co-ordinating Centres are in a key position to support the panels of regional Indigenous facilitators and mediators as recommended in this report.

Information gathered, and issues raised at the NTRB workshops, have provided a valuable database for ongoing research in terms of identifying best practice and training needs in the facilitation of Indigenous decision-making and, the management of disputes in native title. It is clear that there are many challenges, opportunities and priorities, especially ensuring applicants have a thorough and clear information base to make decisions and the necessary time to do so.

Above all, serious consideration needs to be given to a national approach to the issues and needs identified in this report to carry out the necessary long-term tasks and, to ensure sustainability. The life of the Project is limited; however, the issues are here for the long-term.

REFERENCES

House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs. 2004. *Many Ways Forward Report of the Inquiry into Capacity-Building and Service Delivery in Indigenous Communities*. Parliament of the Commonwealth of Australia, Canberra.

APPENDIX 1

This Appendix contains the recommendations emerging from the CEO Workshop, held in Adelaide on 1 June 2004, and the "Community Justice Mediation Models and Native Title" Workshop at the Native Title Conference, Adelaide, 2 June 2004.

Some of these recommendations have already been acted upon and are included in the body of this report.

1. Recommendations of CEO Workshop Adelaide 1st June 2004

The following recommendations were made after the CEOs were presented with an Executive Summary of discussions of the three Native Title Representative Body (NTRB) workshops.

1. As a result of NTRB workshops a number of training areas and priorities were identified. Those training areas and priorities including Native Title information provision and others dealing with conflict and facilitation, should be reviewed and further analysed with a view to developing recommendations that should be referred to the AIATSIS Indigenous Facilitation and Mediation Project (IFaMP) Reference Group.

   The issue of training for managing meetings should be looked at separately and recommendations developed. The Project Reference Group should action in consultation with the CEOs of NTRBs, after the final electronic review by CEOs.

2. IFaMP should formalise a request to the National Native Title Tribunal (NNTT) to pilot their mediation training with NTRBs and to have it formally evaluated by IFaMP. NTRBs to be involved include the Aboriginal Legal Rights Movement (ALRM), Cape York Land Council (CYLC), and Native Title Services Victoria (NTSV).

3. IFaMP should investigate community justice mediation programs and other training opportunities for evaluation and possible implementation within the NTRB context.

4. CEOs endorse in principle the concept of a pilot facilitation training of Indigenous people based on the core elements identified in IFaMP recommendations. The endorsement is to be referred to the IFaMP Project Reference Group for implementation and supervision.

5. The CEOs present at the IFaMP forum on 1 June 2004 recommend that the NTRB workshop process as outlined in the flyer is concluded. Based on the IFaMP recommendation, the Project will move into a new phase. Any further NTRB workshops will be based on the ongoing identification of new issues by IFaMP and ratified by the Project Reference Group.

2. Recommendations from "Community Justice Mediation Models and Native Title" Workshop, held at Native Title Conference, Adelaide, 2 June 2004

The following recommendations were made at the New South Wales Community Justice Workshop on mediation models and native title in Adelaide on 2 June 2004 as part of the annual Native Title Conference, which is run by the Native Title Research Unit (NTRU) at the Australian Institute of Aboriginal and Torres Strait Islander Studies (AIATSIS). The workshop was held for staff of NTRBs and has been the subject of a separate report which appears on the IFaMP web site. The recommendations were presented to a plenary session at the Native Title Conference on Friday 4 June 2004.

The Community Justice Mediation Models and Native Title workshop recognized the need for fair, inclusive and transparent decision-making processes, on which Indigenous people can confidently rely and which build on local skills in decision and conflict management processes.

It also recognised that many of the disputes between native title groups were 'community' disputes often between individuals, and that they could benefit from the kinds of mediation practices employed in the Community Justice sector.

The Workshop recommended that AIATSIS looks at:

- establishing regional panels of nationally accredited Aboriginal and Torres Strait Islander facilitators and mediators under a national network, with the aim of dealing with community issues, which would have an immediate impact on native title outcomes;
- examining funding options for independent mediation and facilitation services for Aboriginal and Torres Strait Islander communities, for example pilot projects and 'whole of government' approaches; and
- assisting in setting up and convening a working group of NTRB representatives to follow up, promote and develop facilitation and mediation services.

The Workshop also recommended that:

The National Native Title Tribunal (NNTT) and the Federal Court need to employ Aboriginal and Torres Strait Islander mediators and facilitators. This will make a significant difference in addressing what is seen to be a power imbalance created by Indigenous people having to deal with imposed 'whitefella' processes, which are highly complex and place Indigenous people at a significant disadvantage.

APPENDIX 2 – METHODOLOGY

Prior to the NTRB workshops which form the basis of this report, a flier containing information about the research aims of, and background to, the workshops was sent to participating NTRBs.

Each workshop was two days in duration, and a range of exercises was incorporated to explore the above elements. Workshop sessions included discussions of case examples of decision-making and dispute management within NTRBs. Interactive activities which explored communication dynamics within organisational structures and processes, assisted participants to identify and explore the key elements of effective decision-making and dispute management processes. Participants identified the range and types of interventions, which are necessary to manage the different needs within decision-making and dispute management processes**.**

An executive summary of key issues and concerns raised at the three NTRB workshops was presented to the CEOs (or proxies) at the one day workshop in June 2004 in Adelaide. CEOs were asked to review this information in order to identify future directions and priorities for the Project. Recommendations from the CEO workshop are attached in Appendix 1 and are incorporated into the body of this report. Confidential reports on each of the workshops were provided to the relevant NTRBs.

This General Report details the priorities, challenges and outcomes arising from both the NTRB and CEO workshops. It does not identify specific NTRB responses. It accounts for issues that emerged from the "Community Justice Mediation Models and Native Title" Workshop held with staff and Board members from NTRBs at the Native Title Conference in Adelaide, 3-4 June 2004. It also incorporates information from a two day pilot training workshop held with staff of the South West Land and Sea Council in September 2003, and a follow-up session held in May 2004.

In line with a recommendation that emerged from the CEO workshops this report was discussed and reviewed at the September 2004 meeting of the IFaM Project Reference Group.

The Indigenous Facilitation and Mediation Project (IFaMP) is located within the Native Title Research Unit at the Australian Institute of Aboriginal and Torres Strait Islander Studies.

Broad aims of the Project include:

- the identification of best practice in facilitating Indigenous decision making and managing disputes in native title which builds on existing Indigenous processes, practices and skills;
- raising awareness of the need for procedural expertise and skills and long term relationship building; and
- promoting the development of panels of regionally-based Indigenous facilitators and mediators who are supported and mentored appropriately, and who are effective in native title.

For further information contact www.aiatsis.gov.au\ifamp.htm

This Report is Number 2 in a series of IFaMP discussion papers and reports on workshops which were funded by the National Native Title Tribunal and the Office of Indigenous Policy Co-ordination. In May and June 2004, IFaMP held three workshops with staff of Native Title Representative Bodies (NTRBs) in Cairns, Bundaberg and Perth and a follow up workshop with Chief Executive Officers of NTRBs. This report discusses issues relating to decision-making and conflict management which arose at the workshops, and outlines the training needs which NTRB staff identified. The Report also makes a number of recommendations.

A full web version of this report is available at: http://www.aiatsis.gov.au/ifamp.htm