

Federal Court National Native Title User Group, 9 July 2008  
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In July 2007 I attended the Connection workshop convened by AIATSIS and the National Native Title Tribunal. In the course of the discussions I asked the members of my working group – experienced native title lawyers, anthropologists and others – why was it that some claims advanced quickly and with good outcomes, while others did not. I asked, rhetorically, that surely the answer was not simply that it was due to serendipity. After consideration, the group advised that in their view it was just due to serendipity. The reason some claims get progressed more quickly, with better outcomes, is just a matter of luck.

There are a wide range of factors at play in whether claims can be progressed quickly, with good outcomes, a number of which have already been touched upon by other speakers this morning:

- Native title is legally and factually complex
- Claim processes can be impacted by the change of seasons, let alone by cultural factors
- The poor quality of some claims – which hampers the ability of parties to engage early with the claimants – and, in the case of non-government respondents, can as a result hamper their disengagement from the claim
- Some claimants are unrepresented
- The conflicting priorities of parties – and potentially of the Federal Court
- The capacity of NTRBs to advance claims – particularly where they have a high volume of future acts competing for attention
- The manner in which some claims are prepared and run
- The availability of suitable anthropologists
- The authorisation of claims, and the stage at which authorisation issues are dealt with if raised (an issue potentially addressed in the 2007 amendments to the Native Title Act, by giving the Court the ability to proceed notwithstanding a defect in authorisation, if the Court chooses to make use of this power)
- Expectations of claimants may not match the reality of what a determination of native title can provide
- Overlaps, and intra-Indigenous conflict generally
- Perverse incentives: for example procedural rights that may be stronger than a determination would achieve, in the case of a weak claim; or linkages to cultural heritage regimes that inadvertently encourage lodgement of claims but not their resolution

- The complexity of connection – and the manner in which it is often approached, by both governments and claimants: for example delays at different steps, or a lack of feedback and engagement during the process. From a Commonwealth perspective, we have recently experienced a situation where we asked for a small amount of information to be provided by the claimants to assist the Commonwealth to consider an aspect of the claim where no information had been provided: the response of the claimants’ representatives was to propose that they engaged an anthropologist to come from overseas to carry out an extensive 6 month mapping process. They seemed to have difficulty conceiving of doing something much smaller and more flexibly, and this is a challenge for all practitioners – not just doing things the way we have done them before.
- The lack of transparency of connection processes and outcomes. The Commonwealth experience here is that if State and Territory governments, as the primary respondents, expose both the process and their thinking on a proposed outcome to other respondent parties along the way, this can help bring those other parties to the same outcome, more quickly, and also build trust that pays dividends in subsequent matters, where the parties are respondent peak bodies involved in a number of claims.
- The extent of involvement of non-government respondents: anecdotally this is less of a concern now, and the 2007 changes to the Respondent Funding Guidelines seem to have had an impact; noting also that the 2007 amendments did provide a number of ways to address the interests of non-government respondents, such as splitting claims to enable partial determinations if a single respondent party is the only impediment to a consent determination.
- Inconsistent approaches within the Court and Tribunal: for example on connection, on the one hand one judge has said in several matters that there doesn’t need to be a formal connection process but that the Court can instead prepare a draft consent determination and just deal with connection to the extent that specific issues are then disputed by the parties – which certainly assists to ensure that processes are focussed on what is actually required – while on the other hand another judge has declined to make a consent determination sought by all parties and instead called for further evidence on connection and genealogy. Without commenting on the specific cases, I simply note that if there is inconsistency it makes it harder for parties to know what they need to do to obtain an outcome.
- The challenge of joint management of claims by 2 separate, independent statutory institutions – the Court and the Tribunal – in my view a challenge that both bodies are still grappling with.
- A lack of flexibility on the part of practitioners and parties: for example, governments having set processes that require dealing with connection before entering into negotiation; claimants who won’t negotiate because they are preparing for trial – and in some cases who want to litigate first and then negotiate, although the room for negotiation may be considerably reduced once evidence has been heard and findings made

- And, of course, the comment often heard that the “simple” claims have now largely been dealt with.

This is quite a list.

At the same time, however:

- The 554 current claims represent around 30% of all claims ever lodged, and large numbers of them are also future act-related claims that may never proceed in their current form.
- There is continued growth in the number of outcomes reached by agreement.
- Over the years, we have seen a number of creative, flexible approaches to processes – for example:
  - Conferences of experts, even occurring before a claim is lodged, to assist in having a high quality claim lodged that can readily be engaged with
  - Making anthropologists available for informal question and answer sessions by the other parties
  - The Northern Territory handover and leaseback of national parks, in return for the withdrawal of claims over those parks
  - The Wet Tropics settlement, with extensive side agreements including for co-management
  - The South Australian ILUA process and the potential it holds for settlement of claims, if it is able to deliver
  - The alternative process currently being developed in Victoria
  - In some claims, more Government willingness to engage on connection proactively, not just leaving it to the claimants to make the case.
- We have also seen some broad approaches to agreement-making – which can both achieve better outcomes and counter the perverse incentives – for example:
  - The Wimmera and Gunditjmara settlements – where determinations were only one part of the settlement, the rest being provided through numbers of ancillary agreements
  - The Miriuwung-Gajerrong Stage 2 settlement
  - The possibility of regional settlement approaches, which are currently being explored in several locations.

Having seen that these creative, flexible and broad approaches can be utilised, the challenge is to make creative and flexible approaches the standard.

The 2007 amendments have resulted in better information flows between the Tribunal and the Court, which lessens the risk of parties playing them off against each other – although I'm not sure the extent to which the information flows are being used in making orders to assist the progression of matters, for example the Court making orders to assist the Tribunal to progress a matter.

Regional prioritisation can assist and is occurring.

A wide spectrum of processes are available for parties to use, such as early evidence; referrals of questions of law to the Court (noting the matter can potentially then go back to mediation after the question is answered); as noted earlier, conferences of experts; trials on limited questions. No one approach is necessarily right for each case, and the needs of each case should be actively considered by the parties and by the Court and Tribunal.

Commencing with interest-based discussions, rather than with the technical requirements of the Native Title Act, has the potential to build relationships and to identify the major native title matters that might actually need to be addressed given those interests. This can enable scoping of the process required for the negotiations and the approach required to connection.

Interest-based discussions can be assisted by the use of Tribunal mapping products, to help all parties understand what is in fact subject to the claim.

Early production and use of current, and where possible historic, tenure material may also help at early stages with scoping of both connection and negotiations – so, again, all parties can understand what land is actually currently available for and subject to the claim.

Although overlaps are often cited as a significant problem, they are not a reason to automatically park a claim. We can distinguish between substantive overlaps (a claim wholly or largely overlapped), marginal overlaps (where overlaps are only at the edges) and vexatious overlaps (those clearly lacking a strong foundation), and apply different processes in each case to seek to progress the claim. Measures such as land summits, agreements to share rights, splitting claims to hive off contested areas, and applications to strike out claims that are obviously lacking merit can all have a role to play, and all parties and institutions have a role to play. Overlaps are not just a matter we should expect NTRBs to resolve on their own, and parking overlapped claims may just reward intransigence on the part of overlapping groups.

In the same way, splitting claims can also help to remove oxygen from intransigent non-Government respondents, although anecdotally the actions of non-Government respondents seem now to be seen as less of an impediment to claim resolution than previously, perhaps in part reflecting the impact of the 2007 amendments to the Native Title Act to facilitate the removal of parties and to tighten the interest test for becoming a party, as well as the 2007 amendments to the Commonwealth's respondent funding guidelines.

The Commonwealth Attorney-General spoke in February 2008 of his desire to see a move away from purist approaches. Native title rights are rights in rem, and must be recognised on a suitable basis, but there is room for flexibility. Part of the basis for flexibility is acceptance that there can legitimately be a divergence of views on the proper interpretation of the Native Title Act. By way of example, the Commonwealth has announced that it has changed its position on native title rights in the sea, moving from recognition only to 3 nautical miles – based on a pure and technical interpretation about the territorial sea at the time of sovereignty – to a readiness to accept that native title rights can potentially be recognised to the limits of the modern territorial sea, namely 12 nautical miles.

A key issue is the behaviour of the parties – all parties – and of their representatives. Will we creatively, flexibly and broadly approach the opportunities native title presents, or will we be bound narrowly by the processes we have previously followed and, when asked why some matters are resolved more quickly and with better outcomes, simply continue to answer ‘serendipity’?