SENATE STANDING COMMITTEE ON LEGAL AND CONSTITUTIONAL AFFAIRS
NATIONAL NATIVE TITLE TRIBUNAL

**Question No. 148**

**Senator Siewert asked the following question at the hearing on 13 February 2007:**

a) Do the Tribunal's mediation practises differ across its different jurisdictions?
b) Your annual report gives a simple summary of mediation activities; can you provide details on the breakdown of activities occurring in each state?
c) How do you evaluate the success of the different mediating approaches and activities across jurisdictions? Is there a process to transfer successful practices and skills?
d) Can you outline on what information gathering activities the $15,000 payment to Mark Dignam & Assoc was spent?
e) Can you provide a copy of the May 2006 report into agreement making practices developed from the information gathered by Mark Dignam & Assoc? If not – why not?

**The answer to the honourable senator's question is as follows:**

a) The National Native Title Tribunal's mediation practice in relation to native title claimant applications is based on the multi-party interest-based mediation model. While this model is capable of general application, its use must be tailored to the circumstances of individual native title applications.

Native title claimant applications have various unusual characteristics, including:

- the geographic nature and extent of applications ;
- the number of parties (sometimes scores or hundreds);
- the variety of interests of the parties;
- the land or waters subject to the application (e.g. desert country in some instances compared to claims over urban settlements);
- disputes between neighbouring Aboriginal groups in relation to some of the land or waters claimed;
- the different history of occupation and land tenure from state to state (affecting the extent to which native title has been extinguished and the nature of native title rights and interests that might be recognised); and
- the different negotiating positions of governments and other key parties.

As a consequence, the Tribunal's mediation practice needs to be flexible enough to accommodate the features of individual claims or clusters of claims. Bearing such factors in mind, the Tribunal has sought to articulate and apply a consistent approach to its mediation practice. At the conceptual level, the Tribunal has undertaken a thorough analysis of the various phases of native title mediation and has developed detailed written guidelines for its members to use or adapt for each phase. Common research tools such as regional background studies have been developed to assist parties. Geospatial information is used within the mediation process. Enhanced research and geospatial tools are being developed in some cases for possible broader application.

Although local circumstances affect the pace of progress and the range of possible outcomes from native title mediation, the Tribunal does not adopt a different approach in principle to mediation in each jurisdiction.

b) A table providing details of mediation outputs occurring in each state and territory in 2005-2006 is set out below.

Number of agreements by state or territory

| Type of agreement | ACT | NSW | NT | QLD | SA | TAS | VIC | WA | Total |
|---|---|---|---|---|---|---|---|---|---|
| 2.2a Agreements that fully resolve native title determination applications | 0 | 1 | 0 | 2 | 0 | 0 | 3 | 3 | 9 |
| 2.2b Agreements on issues, leading towards the resolution of native title determination applications | 0 | 3 | 19 | 106 | 16 | 0 | 7 | 25 | 176 |
| 2.2c Process/framework agreements | 0 | 5 | 11 | 100 | 43 | 0 | 6 | 71 | 236 |
| Total | 0 | 9 | 30 | 208 | 59 | 0 | 16 | 99 | 421 |

In respect of activities relating to these outputs, see the Tribunal's Annual Report 2005-2006 at pages 50-64.

c) The Tribunal evaluates the success of its mediation practice and activities across jurisdictions by several means. Members working within a state or territory meet regularly to compare progress in matters and to discuss the success or otherwise of methods that are being used. Members also participate in a bi-annual Members' Meeting during which discussions occur about practice. The Members' Meeting includes sessions designed specifically to improve practice development within the Tribunal. Other initiatives within the Tribunal for transferring knowledge of successful practices and skills include:

- member and case managers' forums to discuss mediation approaches and practice issues
- a practitioners' forum established on the Tribunal's intranet to collect and disseminate information among members and case managers, and
- research and discussion papers produced by, for example, the Tribunal's research and legal sections, dealing with legal and practice issues.

In addition, the Tribunal commissions independent research into qualitative aspects of its mediation performance consistent with its performance indicators listed in the Portfolio Budget Statement and also commissions biennial client satisfaction research. The outcomes of this research are noted in the Tribunal's Annual Reports.

d) The report undertaken by Mark Dignam and Associates was a qualitative measure of the National Native Title Tribunal's Outputs for 2005-2006.

e) The report is at Attachment A.

**ATTACHMENT A**


# Mark *Dignam*

**& Associates Pty Ltd**
**44 Walton Street Blakehurst 2221**
**Ph 02 9546.5791 dignam@mt.net.au**


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# NNTT Agreement Making Research Project, 2006

**A report from qualitative research with applicants, respondents, legal representatives and government organisations, to investigate attitudes to Agreement Making processes and outcomes**

Prepared for:

**National Native Title Tribunal**

Principal Registry – Perth
1 Victoria Avenue
PERTH WA 6848

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|---|---|
| Client Contacts: | **Shelley Kissing**<br>**Tim Evans** |
| MD&A Contact: | **Mark Dignam** |

Ref: CMD.359 August, 2006

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# 1. Executive Summary and Conclusions

## 1.1 Summary of Main Findings

This report summarises the findings from interviews with 32 parties who had recently been involved in agreement making processes with the NNTT, including native Title Agreements, Indigenous Land Usage Agreements (ILUAs) and Future Acts, the latter often being mining companies seeking access to land that is already subject to native title or land use agreements.

Interviews were conducted during June, July and August 2006. Respondents comprised a range of interest groups, such as indigenous applicants and their representative bodies, respondent parties and their representatives, government departments and agencies at Commonwealth, state and local level, plus mining and other commercial interests. In most cases, respondents were lawyers, either in-house or external.

The following is a summary of the main findings from the research.

### *A. Overall satisfaction with processes was high*

- Only two respondents (of 33) rated overall satisfaction with processes as below expectations, both being in relation to ILUAs
- The NNTT was seen as performing well in relation to information provision and process fairness. There were however a handful of criticisms of the conduct and objectivity of the mediator, which included concerns about a lack of consistency across mediators, no standardised methods, siding with one party, and conducting negotiations between some parties only to the exclusion of others
- Fairness was typically defined in terms of procedural fairness and natural justice, for example, the right of all parties to have a say, equal weight placed on their views, etc. The NNTT was typically seen as going a good job in this case, noting the caveat applied above
- Some respondents had output based definitions of fairness, and this complicates the issue. At a simplistic level, a few thought a "fair" result was getting what they wanted, yet others thought of fairness as taking into consideration "commercial realities" or being "flexible".

Diverse expectations and aspirations underpin some views of fairness, which manifests the need for communication about the processes of mediation and the roles and responsibilities of the NNTT at the outset.

### B. Time and cost efficiency was sometimes a source of dissatisfaction

- Around one third of ratings across all efficiency attributes (time, cost, effort, etc) were below acceptable levels. Dissatisfaction was equivalent across agreements, ILUAs and Future Acts
- Main reasons came down to long delays in a handful of cases, some taking over a decade (Wotjabuluk and Saltwater for example). However, even with shorter cases, there are sometimes high expectations of quick resolution
- Whilst the mediators were more favourably viewed in terms of efficiency (only three below expectations ratings) there were again some divergent views; some wanted mediators to "push along" the process, others wanted the opposite. A few felt that mediators should assist the parties (advice, information) others disagreed. However, a more rational position was that mediators can contribute to inefficiency by poor co-ordination and long delays between meetings, and in some cases, accepting that the parties do not abide by previously agreed action.

Given that more recent cases are shorter and that precedents and experience is obviously greater, satisfaction can be expected to improve in future, though divergent expectations and interests, as well as inconsistent mediation approaches, may continue to be a source of dissatisfaction.

### C. The NNTT was seen as trying hard to empower parties

- Firstly, empowerment arose as being more important in relation to Future Acts than either agreement and ILUAs
- Satisfaction was quite high, more so with ILUAs, though there were still areas of dissatisfaction. Some wanted the NNTT and the mediator to be more active in advising parties on agreement making, and two respondents did not feel that they were made to feel like an important part of the process
- Note that as many parties had been involved in multiple cases, the need for education and information was seen as less pressing, and it was also notable that most respondents were lawyers (in-house, government or external) who were in less need of help. As such, education and information needs targeting
- Despite the above, there is a need for new participants (including lawyers) and for mediators to elaborate on processes, responsibilities and rights at the outset, though the relative need for this does vary based on the experiences of the parties
- Even minor parties to cases wanted to feel involved, and there was occasional concern about mediators focusing more on the needs and interests of one party rather than all equally.

Overall, it is a **fine balancing act** keeping all parties happy, and this needs to take into consideration the experience and interests of the parties.

## D. Agreements of all types generally work, despite some conflict and dissatisfaction

- For the most part, respondents were satisfied that the outcomes were fair and reasonable, and that the interests of all parties were considered in reaching the agreement, as well as communication and information about the outcome and the reasons for it
- Four respondents were not satisfied with the attempts by the mediator to seek a resolution, again, largely due to the mediator perceived to be siding with one party, or pushing too hard. In such cases, parties can feel that their interests are being ignored
- In relation to **durability,** it was evident that there is a high level of satisfaction with the agreements, with a few dissenters. Most involve formal processes for review, joint management or dispute resolution, though only in a small number had any form of disputation taken place, one being a challenge to the Saltwater case. Note that having a joint management committee and dispute resolution process was sometimes felt to improve durability
- Some causes of instability are beyond the actual agreement, for example, disunity among groups represented by a Land Council, or changes to other organisations that are not controllable by the NNTT.

## E. Relationships are generally satisfactory, and the NNTT helps build them

- Ratings on relationship attributes were high across all agreement types, particularly ILUAs, and relationships were also rated particularly highly for them
- Most existing relationships were working reasonably well, though a number do appear to be rather perfunctory, particularly Future Act, a few parties commenting that relationships are less important and that the mediator's role is not as central in relationship building
- Mediators were nearly always seen as treating the parties with respect and helping to build relationships, a few exceptions where when the mediator is seen as favouring the point of view of one party, or "demeaning" one party by pushing too hard to reach agreement
- Most do learn from the process of mediation and the agreement making process, though many were quick to point out that they do vary considerably, thus new situations will arise in future.

## F. Litigation was rarely seen as an acceptable alternative

- With one exception, agreement making by negotiation and mediation was seen as a better alternative to litigation, that dissenting voice being a Land Council
- For most, Courts are a second line of defence, such as when mediation is not successful
- Even if the mediation is unsuccessful, it may highlight the substantive issues in the case, thus making the court processes more efficient

- Some also pointed out that whilst the court could organise mediation or arbitration, it is better for these processes to be run independently, and ideally before courts become involved.

### G. Numerous suggestions for change were identified

Whilst there was little real agreement, a number of suggestions were made by respondents. Main suggestions were as follows:

- Communication and information about agreement making for those new to the process, including better explanations by the mediator
- More standardised processes and protocols to be applied by mediators, the point being that variations were sometimes seen as common across mediators, which may affect outcomes
- Avoid "bi-lateral" or "closed door" negotiations as they lead to the perception of bias and may thwart the agreement making process
- Work with state governments to develop standardised approaches and ideally, to avoid political pressure
- Benchmarks for compensation for mining companies to ensure comparability, and some control over other costs, such as funding by miners of the conditions of joint management agreements
- Seek to better understand the agendas of Land Councils and develop better relationships with them
- Updating of the NNTT register, as out of date information can create problems for signing of agreements and registering amendments
- Sensitivity to the logistical problems faced by indigenous groups and their representative bodies, which may affect their ability to get agreement from their people. However, this would appear to be balanced by the desire by commercial parties to complete them quickly, thus considering commercial issues as well.

## 1.2 Conclusions and Recommendations

The research highlights the competing interests and ideologies of parties to agreements, ILUAs and Future Act determinations, and the need for a fine balance by the NNTT and mediators in agreement making processes. As a result, much of the dissatisfaction arises from a combination of:

- Poor understanding of the roles and responsibilities of the NNTT, and underlying legislation, and sometime the view that the entire "system" is unfair or biased
- Failure of the parties to develop their own positions, typically in cases that involve state governments, and where Land Councils or other representative bodies act for a number of families who may also have different interests and objectives
- Logistical problems, such as when a Land Council has geographically dispersed members who are not contactable by phone or even mail
- Competing interests, particularly mining companies wanting quick resolution, though indigenous parties wanting time to meet and consider the issue
- The perception that the NNTT helps one side more than another. For example, providing advice and assistance to an indigenous group on how to negotiate and how to maximise their position.

A good example was the common view of mining company representatives that the NNTT and mediators need to push the processes along, though the other parties wanted time to discuss the issues involved. Thus one argues that the mediator is wasting time, the other than the mediator is pushing too hard. Another example is that unrepresented or poorly represented indigenous groups are assisted or advised by the mediator, leading to a perception of unfairness by the other parties.

Accepting that competing interests will always arise, and that not all parties are ever going to be satisfied, there are a series of suggestions that we have relating to processes and mediation.

### A. Communication with new and experienced parties

Most respondents we interviewed were quite experienced in relation to agreement making processes, and need relatively little help in understanding the processes and in developing relationships with the other parties. Yet there were numerous inexperienced people who wanted more help and guidance.

Given that mediation is typically conducted between lawyers, the solution is to vary the processes and communication based on the needs and experience of the individuals.
In relation to the **mediator**, paying particular attention to new participants, particularly those with no legal knowledge, would be useful, helping both to inform and also empower the party.

## B. Process consistency

The more experienced persons interviewed, such as legal representatives with experience of numerous cases, sometimes felt that there is too much inconsistency in the approach of different mediators. This was occasionally seen as being variable enough to affect outcomes.

At the same time, an entirely standardised approach is not suggested, with the common view being that all cases are different. However, an agreed, more predictable approach was asked for, rather than all processes being left up to the individual.

The above suggests that it is now time for the NNTT and its members to develop protocols that will lead to more consistency in terms of processes and outcomes.

It may also be worth analysing outcomes from cases, such as compensation for mining tenements and the terms and conditions of joint management committees, to enable advice to the parties in future cases on what is a "normal" or "typical" approach.

Further, there were some concerns about "bi-lateral" negotiations, which exclude some parties, and whilst we recognise that they may make sense, some care is needed as it can result in other parties not co-operating and challenging decisions that may otherwise have been acceptable. Ideally, such negotiations should be conducted with the agreement of the minor parties.

In summary, we suggest that guidelines or at least boundaries would be appropriate for the following:

- The acceptability of bi-lateral negotiations in cases where there are numerous other parties
- The role of the mediator in identifying the substantive issues and seeking to reach agreement. For example, if the mediator should identify differences of opinion and work toward compromises. Note that some asserted that the mediator should do this, yet others felt that it is up to the parties to reach agreement
- Whether the mediator should advise claimants of the likely success of a claim, such as when the mediator sees little or no hope of it being successful
- The extent to which minor parties to a claim are grouped or excluded
- The relative importance of competing interests such as when one party wants to speed up the process, others want time to discuss it with the people they represent.

## C. Pressing hard or softly

Applicants and respondents often had differing priorities, and this was manifest in relation to how hard or softly the mediator should push for agreement, including trying to reduce the time frame, and in guiding the discussion. There is clearly no easy solution to this other than discussing the pros and cons at the outset, such as ensuring that logistical issues are understood by both parties, as well as their preferred method of moving forward. For

example, if there are likely to be communication problems with indigenous land holders on the one hand, and if there are pressing commercial needs on the other.

The above positions the mediator as something of a broker, who negotiates the progress of the case, not just agreements. This may not be considered to be a relevant role, yet the focus on time costs by the parties interviewed suggests that it is important to understand the time and cost pressures facing each party, logistical issues and commercial needs.

# 2. Introduction and Method

## 2.1 Background

This report summarises the findings from 32 interviews with parties involved with the NNTT and its mediators in relation to Native Title Agreements, ILUAs and Future Act determinations. This project follows our completion last year of a major client satisfaction research (CSR) program last year, which found that:

- Stakeholders were sometimes more critical of NNTT members, particularly in areas such as fairness, suggesting that **expectations** are problematic. In most cases however, stakeholders were satisfied with the effort made by members
- **Agreement making** was the main area of dissatisfaction, with 29% to 38% being dissatisfied with the cost, fairness and timeliness of the process. Members were sometimes seen as responsible for the dissatisfaction felt by clients
- Some negativity was evident both in relation to the **processes** involved in agreement making and claims, and also the **outcomes.**

It was also clear that there were some stakeholder groups who were significantly less satisfied, viz:

- Unrepresented claimants
- Indigenous representative bodies
- (some) peak bodies
- Legal representatives (more related to processes).

At the same time, industry stakeholders and local government were also sometimes over-represented as dissatisfied parties.

This project focused on **agreement making**, with effectiveness being based on six Tribunal criteria, viz:

| Criteria | Measure |
|---|---|
| Process | Satisfaction with mediator's conduct and their experience of the process and its fairness |
| Efficiency | Cost and time effective, value from the outcome |
| Empowerment | Education of parties about the processes, and problem solving, and equips them to deal with disputes in the future |
| Effectiveness | Extent to which a settled outcome will be achieved |
| Durability | Extent to which the outcome endures over time |
| Relationship | Extent to which the mediation process increases understanding and improves the relationship between the parties. |

The above criteria formed the objectives of the study. This included both qualitative views of the NNTT and its members, as well as satisfaction ratings on a series of parameters, along with relative importance ratings of various parameters.

Respondents include:

- Claimants (individuals and organisations)
- Respondents (individuals and organisations)
- Claimant representatives (eg, lawyers)
- Respondent representatives (as above).

Around 40 substantive agreements are made per year, and this research mainly focuses on recent agreements, which include:

- Native Title Agreements (N=9)
- Indigenous Land Usage Agreeements (ILUAs) (N=12)
- Future Act agreements.(N=11).

The three agreement types above have been separately reported, noting that there is realistically some degree of overlap, and many respondents had been involved in a number of agreement types over the years. Only a minority were persons who had no experience prior to the most recent agreement. As a result, respondents sometimes generalised their comments, and particularly those involved in many cases over the years.

## 2.2 Research Method

A complete listing of recent agreements was provided by the NNTT, including contact details for each respondent. The NNTT had previously written to all respondents advising them of the process, and some changes were made to the list.

We attempted to contact all parties on the sample frame. Several attempts were made to contact every respondent, though there were several reasons for not giving an interview:

- Respondent no longer worked at the organisation
- Limited contact with the NNTT, thus reluctant to comment
- Phone number no longer in use, and the organisation was not contactable (the case with some indigenous elders and their representatives)
- Could not be contacted and no response to voice mail
- Refusal due to present workload.

The interviews were all personally conducted by Mark Dignam by telephone. Appointments were made and respondents were re-contacted at set times.

The interviews were quite long, averaging 45 minutes, the range being from 30 to 65 minutes. In a handful of cases, more than one person was interviewed at the time, there being four in the case of one government agency.

The research covered all parties involved in Agreements, ILUAs and Future Act, though it worth noting the following:

- Unrepresented parties were very uncommon. Most respondents were legal representatives of Land Councils or other claimants, government agencies or respondent parties such as mining companies or other land users. In the mining industry, some were company executives, and whilst not legally qualified, it was apparent that they had researched the issue of native title
- Whilst a few agreements involved family groups without representation, the respondents were in most cases Land Council legal or other professional staff
- The sample frame divided respondents into three groups, companies, individuals and government. This turned out to be a somewhat arbitrary segmentation. Many of the company respondents were land council legal officers, law firms or government personnel. Some parties defined as government were Aboriginal development corporations, land councils or elders, and the individuals were typically land councils or elders groups.

In summary, the agreement making process including Future Act and ILUAs has apparently moved from having indigenous people or their representative bodies stake claims, with land users as respondents, to a process that is now built around legal processes, involving solicitors on all sides, including claimants, respondents and government. Further, many of the cases investigated for this project were ILUAs and Future Act, rather than initial native title claims.

The implication of the above is that some of the roles of the NNTT are changing, and with precedents in case law now being argued by solicitors, there may be less need to educate most (though not all) parties on the processes involved, and to provide them with tools and knowledge that can be used again.

# 3. Agreement Making

## 3.1 Background

The parties to Agreements included Land Councils, state and local government, legal practitioners representing pastoralists, miners and other land users, and legal practitioners representing the indigenous claimants.

Two of these agreements took a number of years to finalise, including Wotjobuluk, which can be described both as an Agreement and ILUA, based on the data provided. As was also the case with ILUAs, these long standing cases dampen the overall level of satisfaction. Yet respondents did allow for the fact that few precedents had been established, and in some cases, one or more of the parties involved were seen to have held up the process, despite the best efforts of the mediator.

## 3.2 Processes

All the parties interviewed had over the years been involved in at least one other matter (including ILUA and Future Act), which involved the NNTT, with one exception only. However, given the time frame for the two main cases, it was apparent that some parties came into the process part of the way through. For example, two legal representatives were involved for only the last 2 years of a case, one other for three years.

In relation to what they **knew and wanted to know** at the time, we make the following points:

- Those entering the process at the outset typically knew little, though most were involved in previous cases, including some who were involved in very long cases from the outset
- Those entering part of the way through a case (common in long Agreements) were varied in that some relied on internal knowledge, such as advice from others staff, though others had little idea and found it difficult to catch up with a case that had already been running for several years or more
- The incidence of direct contact with the NNTT varied widely, from “hundreds” to only a few times, due not only to the time spent, but also their role
- Few had any real concerns about the processes, and in any case, some saw it as a positive experience at the outset, being new and different. Others felt that it was just something that they had to do
- Most felt that the NNTT well informed them about the processes and steps of native title negotiations, though those entering the process later were not so positive, taking some time to get up to speed

- At the outset of major cases, there were few who had a clear understanding of the **processes and role of the NNTT**, but the NNTT was seen as doing a good job explaining its role and few found it difficult to follow
- Some would have liked to have been better informed about the processes at the start, including what they would be expected to contribute, and sometimes the positions of each party involved in the Agreement, including government agencies. One also pointed to the need to elaborate on the separation of the NNTT as a tribunal from the Court
- Most felt that the **mediator** did a good job following processes, though in long Agreements, there was some frustration expressed, though mainly at state governments, who were seen as having no policies at the start, and their representative stalled cases. There was the occasional view expressed that the mediator could have pushed it along faster
- Two respondents expressed concern that there was too much **private negotiation** between the state government and the applicants, to the detriment of respondent parties. For example, bi-lateral negotiations rather than multi-lateral negotiations, which then seek to "sell" an approach to other parties. This was sometimes seen as unfair, and it was implicit that the mediator can then side with one party
- A few lawyers also raised the question of the varying approaches applied by mediators. The point was that there are no **standardised practice directions**, leading to an ad-hoc approach with no real underpinning strategy. One urged the NNTT President to take more control in having standardised protocols (accepting that some customisation is always necessary) on the basis that outcomes are affected by the style of the individual.

Overall, the degree of private negotiation and the lack of standardisation of approaches is relevant, as they were both seen as undermining the integrity of outcomes and did not always reflect well on the NNTT.

Ratings of the performance of processes were as follows. Note that the scale is expectations based, viz:

- **Exceeds** your expectations (where some aspects of service or assistance were better than expected)
- **Meets** your expectations (nothing particularly good or bad stood out, a fair, reasonable level of service)
- **Below** your expectations (your normal expectations are not met – some aspects of service were below what you see as a reasonable standard).

## Figure 1 – Processes Attributes

| Service attribute | Rating | | | | Importance | | |
|---|---|---|---|---|---|---|---|
| | Exceed | Meets | Below | DK/NA | Very | Quite | Not |
| Information provided regarding processes | 2 | 7 | | | 5 | 3 | |
| Fairness of the processes | 2 | 6 | 1 | | 8 | 1 | |
| Conduct of the mediator | 4 | 4 | 1 | | 7 | 2 | |
| Objectivity of the mediator | 4 | 3 | 2 | | 7 | 2 | |
| Overall satisfaction with the processes | 2 | 7 | | | | | |

***Note**: One respondent did not complete the rating scales*

We make the following comments:

- Most attributes were considered to be very important, information somewhat less so, but still important
- One commented that the mediator responds more to those who *"shout the loudest"*. That respondent recognised that everyone is entitled to have a say, but the respondent felt that the indigenous party was listened to more
- One other party pointed to a lack of procedural fairness in that information was shared between a native title applicant and the state government, not with other parties, suggesting back-room deals. This was repeated by another respondent, who called them "bi-lateral" negotiations
- Another felt that the process of Agreement making favoured the applicant, though this was not specifically an issue for the mediator. That is, the claims process is about *"favouring the applicant…the focus is on giving them native title…"*

In summary, views were **generally positive**, though differing expectations and positions were partly the cause of dissatisfaction.

The issue of **fairness** was further explored, with some having trouble defining its meaning, viz:

- At a simple level, legal representatives pointed to **procedural justice**; the right to have a say, equal opportunity to express opinions, all parties having equal standing, negotiation in good faith and all parties being provided with information and assistance
- Most felt that the NNTT does demonstrate fairness by not taking a position, giving the parties a fair say, and involving the parties in the process

- Consistency was also raised as a key issue by a handful people, and on that basis, there was a perception across respondents to claims that the protocols used are not really "unfair" but that the mediator can advise a party on what they need to do, or conduct separate discussions with parties outside of the mediation process
- One mining company representative suggested that the mediation process is "unfair" in that minor parties are not treated as having equal standing in the case
- One lawyer felt that fairness can also be defined in terms of achieving an outcome that is durable, which was seen as being underpinned by the perception of fairness, not just fairness from a legal standpoint.

## 3.3 Efficiency

At the start of longer Agreements, few had any real expectations, though those entering later were surprised at the difficulties involved, and the time and effort to get things moving. Looking back, there was some criticism of the time and costs involved, though also acceptance that there were few precedents, thus everyone was learning along the way.

More recent Agreements still took a few years, though in considering the efficiency of the processes, there was recognition that the NNTT and mediator often had little control, for example, where state governments were slow to move, or where applicants took some time to gather the historical evidence needed. The latter was seen by lawyers as a common cause of delay. That is, the case is not well prepared, and considerable time can be spent researching the case, getting relevant information etc.

Commercial parties and their representatives did however feel that some cases were not run on any rational commercial basis. Whilst they accepted that delays were not directly caused by the NNTT, some questioned the role of the NNTT and mediator; why didn't they push the parties, set and stick to deadlines?

Yet the opposite point of view was also raised, being that it is unrealistic for the mediator to "push it along", and such behaviour can end with agreements that are at least partly made under duress, and may not be durable.

Costs were said to "*blow out*" by some parties simply due to time, to others, they were reasonable, particularly as some parties were funded. Yet the costs were more an issue to respondents to the claim, than either applicants or government. One government respondent further said that even minor parties can get legal aid, thus it should not be a major issue.

Ratings on efficiency attributes were as follows:

**Figure 2 – Efficiency Attributes**

| Service attribute | Rating | | | | Importance | | |
|---|---|---|---|---|---|---|---|
| | Exceeds | Meets | Below | DK/NA | Very | Quite | Not |
| Time effectiveness of the mediation process | | 7 | 2 | | 6 | 3 | |
| Cost effectiveness of the process | | 7 | 2 | | 5 | 3 | 1 |
| Effort required on your part | | 6 | 3 | | 7 | 2 | |
| Efficiency of the NNTT in agreement making | 1 | 5 | 2 | 1 | 7 | 2 | |
| Efficiency of the mediator | 2 | 7 | | | 7 | 2 | |

We make the following points:

- The **mediators** were generally well regarded; the inefficiency pointed was largely seen as a process problem (particularly having few set processes early on) or else due to delays by some of the parties, and state government received a few negative comments
- Poor co-ordination of cases and long delays between meetings (as opposed to delays getting started, usually seen as being caused by applicants) were occasionally cited as reasons for dissatisfaction
- Costs and effort were seen as too high by some commercial respondents to Agreements. Two felt that the NNTT *"dragged its feet"* for years, and that the NNTT need to *"take more control"* of such processes to avoid the Agreement going on for a decade or more. Another view was that the Agreement making process can get bogged down by *"nitpicking"*
- Yet some others, talking about the precise same Agreements, felt that the matters were effectively handled by mediators, who *"sped up"* the processes
- One party said that the case was initially badly handled but that the efficiency improved over time.

## 3.4 Empowerment

The NNTT was generally seen as going a good job in informing people who will be involved in Agreement making, noting that in some cases, the parties were grouped for communication purposes.

Mediation reports were typically provided quickly, and most felt well informed. Further, most believed that they learned a lot, though that is tempered with experience, in that all cases are different, and that as the process becomes more standardised, the protocols used in the past may not apply.

A few parties who were new to the process did find it hard to follow. They suggested that for such persons, the NNTT needs to provide a *"starter kit"* or similar, and in long standing cases, have historical summaries of the case available.

**Figure 3 – Empowerment Attributes**

| Service attribute | Rating | | | | Importance | | |
|---|---|---|---|---|---|---|---|
| | Exceeds | Meets | Below | DK/NA | Very | Quite | Not |
| Efforts of the NNTT to help you learn how agreements are made | 2 | 5 | 2 | | 2 | 5 | 2 |
| Effort made by the mediator to help you understand Agreement making | 2 | 6 | 1 | | 1 | 5 | 3 |
| Extent to which the NNTT made you feel an important part of the process | 3 | 3 | 2 | 1 | 2 | 5 | 2 |
| Your ability to easily deal with any future native title negotiations or agreements | 1 | 8 | | | 2 | 3 | 4 |

We make the following comments:

- Empowerment was **less important** than efficiency and processes, largely as most parties interviewed had some knowledge of the process, and often did not fell that the NNTT really needs to engage them. Newer parties and shorter Agreements however led to different results
- Two recent entrants to long standing processes felt that the NNTT could be more *"proactive"* in advising what has happened and where the mediation process is going
- In relation to feeling like an important part of the process, two took issue with not being seen as having equal standing. One pointed to information not being shared with all parties (the individual represented minor parties), the other thought that there were side agreements that were being made without the involvement of all parties, and that the mediator was providing too much help to another party
- Note that views of the mediator were quite varied; some were very positive, others not so, and individual needs and expectations appeared to play a role here.

## 3.5 Effectiveness

All parties interviewed were at least reasonably happy with the outcome of the Agreement, some saying *"absolutely"*. That was despite the long time frame of the Agreement making processes in some cases. The more experienced respondents, when considering all agreements, sometimes said that the "vast majority" are effective.

There were mixed views of the role played by the **mediator** in driving a successful outcome, partly due to the time taken with some cases, but also as some felt that the parties, not the mediator, sought to maximise the outcomes. Overall, most were happy with the action of the mediator, accepting the caveat of the time taken in a few Agreements. As noted earlier, a few respondents were critical of the mediator trying to champion the views of one side.

In relation to explaining **outcomes**, most felt that the mediator and NNTT did a good job on explaining outcomes on an ongoing basis, and that summaries provided a *"very helpful"*, or that *"the details of all determinations were provided*". A contrary point of view was that the mediators are sometimes inconsistent in terms of explanations.

A few parties also pointed out that the NNTT **case managers** did a good job in relation to information provision.

There were few suggestions for making the process more efficient. A few comments were as follows:

- Continue to provide information on an ongoing basis, when Agreements drag on. That is, if there are delays, advise the parties and keep them "in the loop"
- Take a more proactive role in bringing the parties together quicker, yet one other party said that this is **not** a good idea, that the people involved don't want to be pressured into a fast settlement
- Focus on the substantive issues, and place less emphasis on minor aspects.

Overall, all parties interviewed thought that the negotiation process was **worthwhile**; it does end up reaching a satisfactory outcome, it just sometimes takes a lot of time to get there.

Figure 4 overleaf summarises the satisfaction ratings regarding effectiveness.

Overall, all parties we interviewed were either very or quite satisfied with the final outcome, which suggests that the process is valuable, and that it augurs well for the durability of the Agreements struck.

**Figure 4 – Effectiveness Attributes**

| Service attribute | Rating | | | | Importance | | |
|---|---|---|---|---|---|---|---|
| | Exceeds | Meets | Below | DK/NA | Very | Quite | Not |
| Extent to which the outcome was fair and reasonable | 3 | 6 | | | 9 | | |
| Extent to which the interests of all parties were considered in the agreement | 3 | 5 | 1 | | 7 | 2 | |
| Action of the mediator in seeking a resolution | 2 | 6 | 1 | | 7 | 2 | |
| Communication and information about the outcome and the reasons for it | 3 | 6 | | | 2 | 7 | |

**Notes:**

- The **outcome** was all rated as very important, and to a slightly lesser extent, the interests of the parties, and action of the mediator. The two saying that the action of the mediator is not as important was due to the action of the parties more than the mediator
- Communication was typically seen as **less** important, as the involved parties sometimes felt that they would already know the outcomes and reasons
- Only one party gave below expectations ratings, and that person felt that the interests of all parties, including minor parties, may not always be considered, and that agreements can be *"pushed through"* so that the NNTT could demonstrate that it has reached an agreement. That is, *"A culture of agreement at any cost"*
- Other said that the job *was "very well handled*" by the mediator, or that it was *"at the end"*

## 3.6 Durability

Few problems or issues were reported, other than in one Agreement, where one of the parties was appealing the decision. One other respondent, being a state government lawyer, questioned the "deal making" of some mediators, in terms of producing agreements that may not be durable. For example, the state and the applicants agreeing privately, then selling that outcome to others.

In most cases, the view was that there is some level of satisfaction with the decisions made, and that the parties were reasonably committed to making it work, having freely entered into them.

The **steps required** to implement the Agreement varied depending on their role in the process. Some just had to abide by it, others such as government often had to set up facilities

and management committees or "body corporates" to oversee the Agreement. The legal representatives had relatively simple roles in this respect; once the Agreement was signed, they really only had to handle some paperwork.

Of the Agreements covered, the major cases nearly always had:

- Review Clauses
- A management committee, sometimes called a body corporate or a monitoring and/or liaison committee
- Dispute resolution processes built in, including mediation or arbitration if disputes arise.

The above did not always apply in minor Agreements, though all had at least a resolution process built into the Agreement, in case disputes arose. Note that a few respondents were negative about review clauses, as it implied that if the agreement was amended, then a new agreement may need to be prepared and registered.

## 3.7 Relationships

This section concerns the quality of relationships and the role played by the NNTT in building relationships with and between the parties. We found the following:

- The process of agreement making **does** help bring most of the parties together, though to differing degrees, partly as some of the people we spoke to have little or no need for ongoing relationships, such as where the Agreement involved crown land, thus commercial parties had no need for more involvement
- Some indicated that there was a deal of goodwill, there being only one report of a relatively *"hostile"* relationship in respect of one Agreement
- Most agreed that the negotiation and agreement making process helped give them a better understanding of the view and interests of the other parties involved, though some felt that this is hardly a priority, as the process is now *"really negotiation by lawyers…some parties don't get involved*"
- All parties felt that they could communicate well with the mediator, some elaborating on this point, in relation to a high degree of respect shown, or the experience of the mediator in dealing with disparate parties.

Ratings on relationship attributes were as follows:

**Figure 5 – Relationship Attributes**

| Service attribute | Rating | | | | Importance | | |
|---|---|---|---|---|---|---|---|
| | Exceeds | Meets | Below | DK/NA | Very | Quite | Not |
| Ease of communication with the moderator | 3 | 6 | | | 3 | 6 | |
| Efforts by the moderator to ensure all parties had a say | 3 | 4 | 1 | | 5 | 3 | 1 |
| Respect shown by the mediator for the different views and rights of the parties involved | 2 | 6 | 1 | | 4 | 4 | 1 |
| Effort made by the mediator to build relationships between you and others | | 7 | | 2 | | 6 | 3 |

**Notes:**

- The mediators and NNTT per se were generally rated well, there being two comments received that the mediator gave different weight to various parties, or else sought to drive the position of one party, and that solutions were too often accepted and espoused by the mediator, to the detriment of other parties. That is, almost selling the solution or idea put up by another party
- In relation to the **importance** of these aspects, views were quite mixed, the effort of the mediator to build relationships, as mentioned earlier, being relatively less important
- At the time of interview, most had good relationships with the other parties, or as good as they reasonably could be in a few cases. Some simply said that they were "okay".

We asked all parties interviewed if the agreement making process is better than the alternative, which is **litigation**. We found the following:

- Only one party agreed that the court process would be a better route, that comment being due to the faster action that a court can take, and its ability to generate legally enforceable outcomes. That person was pointed to the long delays with some Agreements
- The remainder did not agree, some commenting that it is *"always better"* to seek mediation, or that court action is "adversarial" or "very costly" from the start
- Even if court action eventuates, the agreement making process can identify the substantive issues in the case, thus making the court process more efficient
- Some recognised that the process of agreement making does bring people together, gets them talking, and enables a negotiation process, which becomes more difficult with litigation.

When asked if there was **anything else** they had to say, most largely repeated the comments already made or inferred. For example:

- One party said that there needs to be more **mediating fairness**, not bias in favour of the major parties or one party
- One said that there needs to be more public **communication** on Agreements and other NNTT activities, to avoid the long delays and the vacuum of knowledge at the start of native title applications. The individual also said the NNTT needs to build its image in the mining community
- One said that there needs to be a process to determine who can sign an Agreement; this arose as an issue with numerous native title applicants dealing with a large Land Council
- Given the number of parties to some claims, one individual said that the parties should all have to show **why** they have an interest in the claim at the outset. In the case of indigenous applicants, there would need to be some basic prima facie evidence before a claim can be accepted, not after
- Two respondents asked for more **open and transparent** processes, that individual pointing to closed door negotiations between the applicant and the state government, which did not involve respondent parties. One person also commented that the process is too politicised at state government level (for example, the Minister wants to show they have looked after particular interests, or to show they can drive a deal through leading up to an election)
- Further, one respondent pointed out that the above issues were common for some members only; there is variation in practices and procedures, and the respondent vehemently argued for more standardisation
- A few also pointed to the roles of state government in both delaying Agreements and failing to develop any policy. Their view was that such delays create too much uncertainty and block activity on the land, and time frames for reasonable behaviour are needed.

# 4. Indigenous Land Usage Agreements

Parties interviewed were local government executives, senior management and legal representatives from mining companies, the Australian Government solicitor, and legal representatives for a number of indigenous parties, both internal counsel and external solicitors.

## 4.1 Processes

In relation to past experience, we found the following:

- Three of the twelve persons had **no prior experience** with the NNTT prior to the individual ILUA they were involved in
- Two main ILUAs covered were Saltwater and Coolgaree (Palm Island), which involved numerous parties
- The level of **knowledge** prior to their involvement at the outset varied considerably. Several had been involved *in "several"* or *"dozens"* of Agreements of all types previously, thus some had a clear picture of processes, others had relatively little knowledge base
- One had relevant experience prior to the NNTT's formation with the Aboriginal Land Rights Act, before becoming involved in a major Land Council. One other had similar experience, though now represented industry
- A few raised concerns about the **negotiation processes** at the outset, based on having heard that they are *"quite difficult"* or that it takes a long time. One referred to various impasses based on the lack of clear legal processes at the outset, another mining company representative was concerned about the behaviour of Land Councils such as delays and a lack of resources, based on prior experiences
- When asked if the **steps and processes were explained** at the start, responses varied, some saying *"totally"* or that the NNTT did a very good job in explaining the steps, though a few stated that there was *"limited"* explanation, and they would have liked to have known more. Overall, most were quite positive, and some also relied on state or other government agencies (e.g., DOIR in WA) for information and advice
- The **roles and responsibilities** of the NNTT appeared to be made clear to nearly all, some saying that the NNTT *"explained it very well"* or that they were *"very clear"* in regard to consultation and mediation processes
- A few suggested that they would have liked to better understand the **time** involved, the processes, the roles and position of various parties (e.g., the Lands Department), and the nature of the claimants

- Most were positive regarding the processes followed by the **mediator**, some pointing to a lack of goodwill on behalf of the parties on occasions
- Two parties pointed out that the mediator helped identify the best agreement making process, thus providing a road map for resolution, which may have been difficult otherwise. Others said that the mediator did a very good job in bringing the sides together. However, two did question the fairness of the mediator.

**Satisfaction with process attributes** were as follows. Note that the scale is expectations based, viz:

- **Exceeds** your expectations (where some aspects of service or assistance were better than expected)
- **Meets** your expectations (nothing particularly good or bad stood out, a fair, reasonable level of service)
- **Below** your expectations (your normal expectations are not met – some aspects of service were below what you see as a reasonable standard)

## Figure 1 – Processes Attributes

| Service attribute | Rating | | | | Importance | | |
|---|---|---|---|---|---|---|---|
| | Exceed | Meets | Below | DK/NA | Very | Quite | Not |
| Information provided regarding processes | 2 | 9 | | | 7 | 3 | 1 |
| Fairness of the processes | 3 | 6 | 2 | | 8 | 3 | |
| Conduct of the mediator | 5 | 5 | 1 | | 10 | 1 | |
| Objectivity of the mediator | 5 | 6 | | | 10 | 1 | |
| Overall satisfaction with the processes | 3 | 6 | 2 | | | | |

***Note**: Not all respondents completed the scales above.*

We make the following comments:

- Most rated all of these attributes as being **very or quite important**, particularly the conduct of the mediator and their objectivity. The one person who said information is not important had been involved in several ILUAs before, thus knew the processes well
- Those expressing some concern about the processes pointed to the mediator not always being on top of all the details and issues involved in the ILUA, or that the processes are too focused on reaching a result, leading to agreements that are pushed through by mediators

- One Land Council representative said that the underlying process of ILUAs is flawed as it gives control over the economic resources to others, there being no control by the indigenous land owners, the other pointed to the need for processes to reflect the logistical problems faced by Land Councils, such as distance and communication issues
- Having said the above, many were very satisfied with the processes and the role of the mediator, with some respondents sometimes explaining to us all the things the mediator had done to help reach agreement.

The issue of **fairness** was further explored, with the following meanings:

- There were consistent comments that **fairness** is related to everyone having a say, being given equal opportunity to express views, and that all processes are objective. In short, procedural fairness. One Land Council also added that fairness encompasses a lack of pressure to reach agreement
- An exception was a focus on **outcomes**. That is, it is about achieving an acceptable outcome, that considers the interests of both parties
- Most felt that the NNTT does a **good job** of this, one comment being that not all information is always shared, another that the recognition of all parties needs to be related more to their real interest in the Agreement
- A few commercial respondents recognised that the mediators do seek to placate all parties, though they felt that more latitude is given to indigenous parties and their representatives, and also to government, compared to commercial interests. That is, delays and failure to complete agreed activities was more often accepted
- Similarly, two others said that whilst the NNTT and the mediators do seek to be fair to all parties, it may in fact try *"too"* hard. The point here was that one individual said that those with no interest in the land were afforded status, though they should be knocked out at the start, rather than involving too many parties, yet the other complained that there is a lack of understanding of how Land Councils operate and of the difficulties faced in communicating with the people
- One felt that fairness is more about providing **assistance to the parties** (including funding) and implied that *"fair"* effectively means finding a way for indigenous people to gain control over the land.

There were positive comments about the efforts of the NNTT to be fair to all parties, there being the occasional comment that it may in fact try *"too"* hard, or be more flexible with one party than others.

## 4.2 Efficiency

Views of the efficiency of the processes were mixed, and this partly relates to the time frame for the ILUA, viz:

- Those involved in long term cases had few expectations at the start, some admitting that they did not know how long it would go for, or how complex it would be
- Those involved in numerous cases had a more defined set of expectations, noting that some had been involved in several ILUAs, and recent cases were seen as relatively *"straight forward*", a positive comment in that protocols appear to be more defined. One was surprised how easy it has become, after having experienced longer cases previously
- When asked how long an ILUA **should** take, it is worth noting that very long cases were seen as being delayed for numerous reasons, often beyond the control of the NNTT, and with no precedents. Yet now, cases that took 18 months were thought to be manageable in 6 months, longer cases in no more than twice the time
- Consistent with the above, most respondents found it difficult to say what is a "reasonable" time frame, particularly for the major agreements. However, there was some blame for delays laid at the feet of government agencies and also indigenous organisations, for example, Land Councils that served numerous indigenous families or groups, where there were divergent views across them
- **Costs** were sometimes above expectations, though herein lies a trade-off between efficiency and inclusion. For example, the Coolaree (Palm Island) ILUA was said to have involved many meetings, site inspections, marine biology experts etc. People were also being transported to Palm Island from the mainland in an attempt to resolve deep-seated differences. In other cases, such as Saltwater, the case took a long time to resolve, and costs started to increase. Yet some argued that costs are minimal, and particularly for minor parties
- There was however the perception that costs can get out of hand when there is a lack of progress. Mining company respondents pointed to under-resourcing on the part of applicants as a problem, as well as similar under-resourcing by state government authorities, which can lead to time and then cost blowouts
- One respondent felt that a cause of delays and cost blow-outs is the frequent focus on aspects of cases that are not substantive issues. That is, very minor aspects can be afforded too much importance
- In general, costs arose as being related to the time frame of the case, and respondent parties in particular were critical of the *"tardiness"* of the agreement making processes, changes to the parties involved, and the sheer volume of parties and their disparate views.

In summary, it was apparent that the long standing cases lead to dissatisfaction with the time, costs and effort required, though there was reasonable satisfaction with more recent ILUAs, with processes being more settled and costs and effort being less problematic. Again, much of the blame for delays in the past was levelled at other parties, and also the lack of

precedents at law, and experience among the parties. Ratings of efficiency attributes were as follows:

**Figure 2 – Efficiency Attributes**

| Service attribute | Rating | | | | Importance | | |
|---|---|---|---|---|---|---|---|
| | Exceeds | Meets | Below | DK/NA | Very | Quite | Not |
| Time effectiveness of the mediation process | 1 | 7 | 3 | | 5 | 3 | 2 |
| Cost effectiveness of the process | | 8 | 3 | | 6 | 3 | 1 |
| Effort required on your part | 1 | 8 | 2 | | 5 | 5 | |
| Efficiency of the NNTT in agreement making | 2 | 5 | 3 | | 6 | 4 | |
| Efficiency of the mediator | 2 | 9 | | | 6 | 4 | |

***Note**: Not all respondents completed the scales above.*

We make the following points:

- Overall ratings on efficiency attributes were **mixed**, which were consistent with the comments about time, cost and effort previously. Note however that the **mediators** were all rated as above or in line with expectations
- Most of these attributes were considered to be important, those rating them less important were representatives for indigenous parties who bore few costs
- Low ratings on the efficiency of the NNTT was put down to the following:
    - Not a lot of input provided in some cases, and there were numerous changes to the right to negotiate, the claim *"going round in circles"*
    - The time frame of some agreements led to below expectations ratings in other cases, there being extensive delays even with mediation. One said that there was really *"no clear way forward"*, their view being that the NNTT needed processes to move it along
    - Longer cases were also said to be tied up with legal issues; one said that there were *"too many lawyers*" arguing with each other about matters of no substance. One other pointed to minor issues (rather than substantive matters) taking up far too much time.

Given the time taken in some ILUAs, the concerns raised above are not surprising, though some were positively commented on, the NNTT for example being able to define a simple process in some cases, with an ILUA being recommended.

## 4.3 Empowerment

Most parties were well aware from the outset who the other parties would be in any ILUA. A few said they did not, though in such cases, they had entered the process part of the way through, without a historical knowledge of the case.

The NNTT was seen as doing a **good job** advising the parties, one saying that they need to keep up to date on changes to the parties as the ILUA process continues, another stating that representative bodies are known, not the claimant groups, thus both need to be known. As a general rule, the notification process appears to work well. One mining company representative however was not as complimentary in relation to the Federal Court.

Whilst their was some agreement that their experiences had led to **skills acquisition**, some felt that all agreements are complex and difficult, and the whilst past knowledge can be applied, only partial application is generally possible. Further, a few respondents pointed out that disputes between the parties can arise that are little to do with processes, and cannot easily be learned.

Those involved in recent, shorter cases, particularly if they had been involved in several, felt that the processes are now "*getting easier*", and some key learnings had been developed, despite acceptance that *"they are all different"*.

Ratings on these attributes were as follows:

**Figure 3 – Empowerment Attributes**

| Service attribute | Rating | | | | Importance | | |
|---|---|---|---|---|---|---|---|
| | Exceeds | Meets | Below | DK/NA | Very | Quite | Not |
| Efforts of the NNTT to help you learn how agreements are made | 5 | 5 | 1 | | 1 | 9 | 1 |
| Effort made by the mediator to help you understand Agreement making | 3 | 7 | 1 | | 1 | 10 | |
| Extent to which the NNTT made you feel an important part of the process | 6 | 5 | | | 2 | 8 | 1 |
| Your ability to easily deal with any future native title negotiations or agreements | 1 | 10 | | | | 10 | 1 |

***Note**: Not all respondents completed the scales above.*

We make the following comments:

- As with Agreements, empowerment attributes were generally of moderate rather than high importance
- The NNTT was very well rated in terms of engaging and empowering people, and overall, this is a **strong point** in relation to ILUAs
- The only negative ratings above were on one occasion from a government legal representative, who felt that the mediators do not always explain the processes well, and one indigenous legal representative, who felt that indigenous parties needed more information on the purposes and processes involved. That representative pointed to misunderstandings on behalf of native title holders about the underlying objectives of ILUAs.

The final point above raises the issue of who is the party that requires information and education. For the most part, lawyers and other informed groups were well versed in processes and protocols, and did not regard more education as being particularly important. Yet some indigenous groups, even those represented, were not as well informed, suggesting the need for targeted information.

## 4.4 Effectiveness

The effectiveness of the process was seen as being positive; the **outcomes** were seen as fair and reasonable despite one possibly being subject to challenge (Saltwater). At the same time, a few lawyers commented that fair outcomes are usually based on precedents, and that the earlier cases had little historical basis, thus it is hard to categorically say if any outcome is "reasonable". For that reason, there seemed to be more emphasis on satisfaction rather than precedent.

There were a few unhappy parties in relation to financial arrangements. Whilst some were happy that the ILUA was eventually settled, one mining company and their legal representative were dissatisfied with the amount of compensation. As the company needed a relatively quick settlement, they were "held over a barrel", and the compensation level was said to be beyond precedent.

On the other hand, a Land Council representative argued the other case, that the indigenous people do not have control over the economic resources, and that the percentages paid were very low (typically 1%).

In relation to the **effectiveness** of the mediation process, the following arose:

- Views of the mediator were generally very positive, some pointing out that the mediator *"breaks down suspicions", "leads to better outcomes*", and helped *"all get on board"*
- The mediator, backed by the NNTT, also helped some with maps and other tools to resolve the matter
- Most were happy with the explanation of outcomes, some noting that there was a relatively limited role for the NNTT and the mediator. Others said the NNTT did an *"excellent job"* in this respect
- Given the time frame of some processes, a few did suggest that the mediator could have pushed harder for an agreement, particularly in respect of government parties and when the indigenous parties have internal disputes. Yet the opposite point of view was also raised, that there is too much pressure to agree.

In summary, most said that the process is **effective and worthwhile**, though some felt that the process could have been more quickly sorted out or "moved on", and that a fairer result in one case was argued for, and less pressure to agree in another. Yet most were positive about the processes and the mediator.

Figure 4 overleaf summarises the ratings given.

**Figure 4 – Effectiveness Attributes**

| Service attribute | Rating | | | | Importance | | |
|---|---|---|---|---|---|---|---|
| | Exceeds | Meets | Below | DK/NA | Very | Quite | Not |
| Extent to which the outcome was fair and reasonable | 2 | 8 | 1 | | 7 | 3 | 1 |
| Extent to which the interests of all parties were considered in the agreement | 4 | 6 | 1 | | 6 | 4 | 1 |
| Action of the mediator in seeking a resolution | 5 | 6 | | | 6 | 4 | 1 |
| Communication and information about the outcome and the reasons for it | 2 | 7 | | 1 | | 10 | 1 |

**Notes:**

- Effectiveness was generally considered to be very or quite important, and the "not important" ratings come mainly for one party, who argued that the NNTT had limited involvement in the ILUA, the parties involved sorting it out themselves. That is not a typical situation however

- The outcomes were seen as fair and reasonable, with two dissenters, being in relation to the percentage amount of compensation, and in another case, the mediator was seen as too accepting of delays and disputes on the other side. In relation to compensation, the miner felt that the mediator should point out to the indigenous party what commonly accepted, in the other case (Gundich Mara) the critical respondent argued that the mediator needed to take more control

Overall, the mediators were well regarded, half rating their action as being above expectations, and none assigning low ratings, despite the issues raised earlier about efficiency.

## 4.5 Durability

The parties interviewed were generally positive in relation to the durability of these ILUAs, with a few exceptions:

- One (Saltwater) was being challenged by one party who apparently had little to do with the original case
- In two other cases (both in WA) there was evidence of disunity among the indigenous parties. In both cases, there was some concern that the parties represented by a Land Council did not agree with each other. These issues may lead to ongoing disputes, one being over land access, the other the application of royalties
- One Land Council noted that internal disputes with the families represented can at times lead to difficulties with the durability of ILUAs.

Mining agreements were being put in place by the companies involved, including organisation of management committees and organisation of relevant paperwork, including government approvals.

All ILUAs had some form of management or co-operative committee, and all but two had a review clause. In one case however, the management committee had not been properly formed due to disagreements within a Land Council.

In the case of mining companies, reviews were seen as necessary as exploration was established initially, the production stage would lead to a review and often separate agreement. It was also apparent that mining companies would provide ongoing information to the indigenous parties regarding exploration outcomes.

All ILUAs appeared to have a forum or process for dispute resolution, such as third party mediation or negotiation, some may involve NNTT case managers or mediators in the event of a dispute. Note that one mining company representative pointed out that such a forum would not solve disputes between indigenous parties.

## 4.6 Relationships

This section concerns the quality of relationships and the role played by the NNTT in building relationships with and between the parties. We found the following:

- Most agreed that the process of the ILUA led to better working relationships with the parties, and in one case (Coolgaree) all the parties involved celebrated together after completion. However, that does not imply that there are good personal relationships. Rather, relationships appeared to be more businesslike
- The relationships at the start of some processes were said to be *"very bad"* and again in the case of Coolgaree, some intimated that the case may not have been resolved with the help of the mediator. On the other hand, a few felt that the mediator played a minor role in this, the process helping resolve matters
- Similarly, most did learn to understand the points of view of the other parties, though that does not always imply that they agreed with them. Even in the least amicable case, the party interviewed conceded that they were now *"less suspicious"* of each other
- No problems were reported in communicating with the mediator, some saying that the mediator "did and excellent job" and *"broke the deadlock"*, or that they *had "admiration for their skills"*
- At the same time, a few people interviewed said that the relationships are more up to the individuals, not the mediator, and that the mediation process may have limited impact on relationships.

Ratings were as follows:

**Figure 5 – Relationship Attributes**

| Service attribute | Rating | | | | Importance | | |
|---|---|---|---|---|---|---|---|
| | Exceeds | Meets | Below | DK/NA | Very | Quite | Not |
| Ease of communication with the moderator | 5 | 6 | | | 5 | 5 | |
| Efforts by the moderator to ensure all parties had a say | 6 | 5 | | | 6 | 4 | |
| Respect shown by the mediator for the different views and rights of the parties involved | 7 | 4 | | | 6 | 4 | |
| Effort made by the mediator to build relationships between you and others | 2 | 7 | 2 | | 5 | 5 | |

**Notes:**

- All these aspects were considered to the very or quite important, and to a greater extent than with Agreements as per the previous section of the report

- The mediators clearly perform well in relation to the respect shown to all sides, and their efforts to give all sides a say, and communication was also a strong point
- The only points of difference came from Land Councils. In one case, the respondent said that most attempts to build relationships did not work well. Even then, the respondent felt that the deadlock was due to stubborn individuals, not necessarily the efforts of the mediator. The other person interviewed stated that the mediator needed to take a more active involvement in building relationships.

Current relationships were generally good, with the obvious issue of one ILUA (Saltwater) where one party, considered to be a minor player, was threatening to challenge it. In the case of Coolgaree, some recognised that relationships had improved, though they may not be perfect at the current time.

In one other case, the respondent (from mining company) argued that the emphasis needs to be on the improving relationships between the parties.

We asked all parties interviewed if the mediation and negotiation process is better than the alternative, which **is litigation**. We found the following:

- All but one party agreed that mediation is a better option, and some praised the ILUA process as it lead to a compromise that gives everyone a win
- One recognised that some issues are difficult, and that Court action may still be needed due to a range of legal problems and there being a lack of clear legal parameters for ILUAs
- Most however were clear that the Courts should be the *"last resort"* and that mediation and negotiation is *"always cheaper"*. Some asserted that litigation would be a "*disaster"* or that *"there is no point"* in it
- A few respondents claimed that mediation should be independent from the courts. One elaborated on this point, asserting that Court based mediation is unsatisfactory as the registrars are often not skilled mediators, and that it creates a conflict of interest for the court.

When asked if there was **anything else** they had to say, we received the following comments:

- One pointed to the important role of NNTT case managers as well as the mediator in doing much of the work
- The same person also expressed some dissatisfaction with state government approaches to ILUAs, with no clear policies and a lack of interest to move them forward, and that view was repeated by others
- A few hoped that the law underpinning ILUAs will be more *"mature"* in future, after long standing cases
- Mining companies want commercial benchmarks for compensation, arguing that such matters should be part of the mediation process, and that past levels suggest precedents

- Two people said that there are too many parties involved, and these should be filtered out at the start to make the process more manageable, and to ensure that the real parties involved can negotiate. Further, one said that issues such as overlapping claims by indigenous applicants need sorting out at the start, rather than this being a part of the mediation process
- One Land council advised that the NNTT could build better relationships with them, based on seeking to understand the interests and agenda of the Land Council, rather than developing its own agenda and seeking to impose that agenda on them.

In summary, ILUAs were seen as generally working well, despite a few issues with appeals and disgruntled commercial parties over compensation, delays and disputes between indigenous parties. Note that there was strong support for ILUAs as a concept, being more likely to give the parties a win-win outcome.

# 5. Future Acts

Parties interviewed were a range of legal representatives of mining companies, mining company directors and legal staff, indigenous Land Councils and their legal representatives, plus state and territory legal representatives and departmental personnel.

## 5.1 Processes

The parties interviewed appeared to be divided into two groups based on experience with Future Act:

- Several said that they had been involved in *"hundreds"*, *"dozens"* or *"lots"* of cases, largely legal representatives and one mining company executive
- Similarly, the experience of the parties varied based on time; the least was 1-2 years, several being over 5 years
- Cases mainly centered around exploration and production leases, some being involved more on heritage matters.

Concerns at the outset of the most recent cases were relatively limited compared to Agreements and Future Act. However, persons with no prior experience, or little experience, had sometimes heard that it is a difficult and time consuming process, or pointed to the lack of history in case law.

Sources of information on Future Act were a combination of:

- Other staff
- Case law
- The NNTT.

The NNTT was seen as helpful to most in terms of both information about the steps and processes involved and in explaining its role and responsibilities, viz:

- The NNTT was typically seen as helpful in relation to processes, some saying that the Tribunal provides good information, others that it helps with training of staff (in this case, of government agencies)
- One said that the NNTT provided a mediation protocol a few weeks earlier, which was seen as being very helpful
- A few had attended workshops at the NNTT
- When asked what else they would have liked to know at the start, a few newcomers felt that they would like to know the rules and processes better, though they accepted that some help was available from the NNTT.

When asked, all but one were positive about the processes followed by the **mediator**, a few describing the role played in some detail. One suggested that the mediator took a *"back seat"* role, one other that he laid the foundations, being the mediation protocol, and the parties largely argued it out from there.

There were two points of dissention to the above, viz:

- One lawyer representing the applicant said that the mediator sometimes "got the law wrong" and thus "steered the negotiation in the wrong direction". The respondent then elaborated that there was a misunderstanding on the part of the mediator regarding the status of the land
- Another legal representative asserted that the mediator pushed too hard in one case only to achieve an outcome, that was not really satisfactory to their client. However, the respondent did point out that this was not always the case, and in fact gave two ratings for different recent cases (this person had been involved in many).

Ratings of the performance of processes were as follows:

## Figure 1 – Processes Attributes

| Service attribute | Rating | | | | Importance | | |
|---|---|---|---|---|---|---|---|
| | Exceed | Meets | Below | DK/NA | Very | Quite | Not |
| Information provided regarding processes | 6 | 3 | | 1 | 2 | 7 | 1 |
| Fairness of the processes | 3 | 7 | | | 8 | 2 | |
| Conduct of the mediator | 3 | 6 | 1 | | 7 | 3 | |
| Objectivity of the mediator | 4 | 4 | 2 | | 9 | 1 | |
| Overall satisfaction with the processes | 4 | 6 | | | | | |

Clearly, fairness and related aspects are very important, and with the two exceptions noted above, ratings were very high. Those giving "below expectation" ratings pointed to the following:

- Legal errors on the part of the mediator
- Pushing the position of the applicant, rather than taking a balanced perspective
- Trying too hard to achieve an outcome, rather than one that was satisfactory to all parties.

The issue of how hard the mediator should push is a **fine balancing act**. We noted in some earlier Agreements and ILUAs, that there was frustration over the time taken and delays

involved, yet here, there was concern that a mediator pushed too hard to move the process along. The issue of pushing the position of one party may also be a misunderstanding of Future Acts in the first place.

A few government representatives felt that the mediation process for Future Acts was relatively easy compared to Agreements and ILUAs, though even then, views differed in relation to aspects such as:

- The extent to which a mediator should advise a party on the status of their case or position (for example, saying that the case has little merit)
- Whether they should "sit on the fence" or seek to reach agreement by identifying all points of difference, working to focus the discussion on them, and trying to resolve such points, such as by compromise
- Provision of advice to one side (e.g., if an indigenous group is unrepresented or poorly represented).

When asked what **"fairness**" means, comments were consistently related to procedural fairness as follows:

- Objectivity and impartial mediation – not taking a position, understanding and recognising the points of view of the parties
- Consistency over time and over different cases
- Equal treatment, all allowed to be heard and put their case forward, including equal access to the mediator
- Right of reply.

Yet at this point, some quite divergent views started to emerge. If the above attributes are considered, then the NNTT was clearly seen as going a good job, including action by the mediators. However, there are other issues at play:

- Government parties felt that the interests of the parties needs to be more balanced, including the ability of all parties to request delays, not providing assistance or advice to one side only
- A few mining company representatives felt that *"commercial fairness"* needs to be considered as well, and that necessarily involves a focus on time, costs and effort, not just the outcomes. They also emphasised consistency of outcomes
- On the other hand, two indigenous representatives argued the opposite. One said that it means to *"look after the traditional people"*. The other said that sometimes the mediator provides too much assistance to the mining companies on what they need to do to settle the case

- One legal representative said that claimants can have unrealistic expectations, and a way of demonstrating fairness is to focus on what can reasonably be achieved and thus seek to dampen unrealistic aspirations.

Again, the competing interests involved mean that it is difficult to satisfy everyone. There were few questions however over the procedural fairness of the processes, but differing expectations and aspirations also play a role here.

## 2.2 Efficiency

Most had previous experience with native title matters, and the Future Act matters that were discussed took less time to resolve in most cases than did Agreements and ILUAs. There was an expectation that Future Act matters are less complex and quicker to resolve.

A few parties interviewed asserted that whilst most matters can be fairly quickly expedited, there are some cases that are too *"meeting orientated*", and this can waste time. Further, a mining company representative complained that one case took seven years to resolve. Whilst others took 3 months, this one case was protracted as the parties were hard to find, distance was an issue, and communication was poor. One other mining company had a case that took 2 years, though they pointed out that the WA government was largely to blame for the delay.

Persons who had been involved in native title matters for a long time however felt that there are numerous reasons why cases can take time to resolve, and that it is not like a "commercial negotiation" process. The limited resources of the parties, inexperienced people, complexity of some issues and internal disagreement (e.g., in a Land Council), and "ground breaking" cases were all cited, the point being that 2 years could be a relatively efficient settlement under some circumstances.

In relation to **costs** in terms of time and money, views were polarised based on whether the individual was the applicant, respondent or government. We make the following points:

- The Land Councils and other indigenous parties were less concerned about time and cost, some saying is was *"not a problem…funded by the Commonwealth"*
- Similarly, government agencies were not overly concerned about it, though on NT government party said that it "went a bit overboard" in that there were too many lawyers and parties involved
- One mining company representative complained about the travel costs, in that the site was a long way away from their offices, and the indigenous owners insisted on meeting on site, despite the time and costs involved
- A lawyer representing miners pointed to unnecessary delays on the part of the land holders, their failure to turn up to meetings and follow up on what is agreed in prior meetings
- One mining company representative was annoyed that they had to fund an anthropologist, and three of the indigenous people as well on daily rates and expenses. Much of this was

seen as unnecessary and little more than income redistribution. Further, the respondent felt that this arrangement meant that the indigenous parties had a good reason not to agree, thus dragging it out unnecessarily

- A third mining company said that the design of the processes are *"namby pamby"* and not commercial. Too many meetings, too much time and money is wasted. The individual expressed frustration that the NNTT had no power to drive the process, only to seek an agreement.

Again, different parties had quite distinct agendas, and there are competing interests and expectations. Ratings of efficiency attributes were as follows:

**Figure 2 – Efficiency Attributes**

| Service attribute | Rating | | | | Importance | | |
|---|---|---|---|---|---|---|---|
| | Exceeds | Meets | Below | DK/NA | Very | Quite | Not |
| Time effectiveness of the mediation process | 2 | 6 | 3 | | 7 | 3 | 1 |
| Cost effectiveness of the process | 1 | 5 | 4 | 1 | 6 | 4 | 1 |
| Effort required on your part | 3 | 7 | 1 | | 8 | 3 | |
| Efficiency of the NNTT in agreement making | 2 | 7 | 2 | | 8 | 3 | |
| Efficiency of the mediator | 2 | 6 | 3 | | 9 | 2 | |

We make the following points:

- Views were more polarised based on the position of the party than they were for Agreements and ILUAs. However, note that most rated efficiency attributes highly, and the commercial sector almost invariably rated all aspects to be very important
- For the reasons mentioned above, the **cost and time** effectiveness of the processes were criticised by some, mainly the miners, who sometimes expressed exasperation at the costs, including paying the other side, and the ability of the indigenous parties to "drag it out" whilst collecting money from it
- The mediators were sometimes said to "push too softly" and let the native title holders "drag their feet", such as not following up parties that have not done what was agreed. One government respondent felt that some mediators don't "focus" the parties, that is, allow too much discussion without clarifying the nature of the issues, points of disagreement and roadblocks, and what
- At this point, one Land Council representative mentioned that their view is that the whole process should be Court driven, and opposed the existence of the NNTT.

## 3.3 Empowerment

Of the eleven respondents, all but two mining company representatives knew who the other parties involved were, and they did ask for the NNTT be better advise them. Further, a few wanted to know at the outset the roles and interests of parties, and what the meetings are like.

Most believed that they had **learned a lot** during the agreement making process, arguably more than was the case with Agreements and ILUAs, and a couple of parties believed that they learned good negotiation skills along the way. One posited that the learnings involved in Future Act cases are more applicable to other cases than in other native title matters, as the processes and protocols were more standardised.

Ratings on these attributes were as follows:

**Figure 3 – Empowerment Attributes**

| Service attribute | Rating | | | | Importance | | |
|---|---|---|---|---|---|---|---|
| | Exceeds | Meets | Below | DK/NA | Very | Quite | Not |
| Efforts of the NNTT to help you learn how agreements are made | 2 | 6 | 2 | 1 | 6 | 3 | 2 |
| Effort made by the mediator to help you understand Agreement making | 3 | 7 | | 1 | 3 | 2 | 2 |
| Extent to which the NNTT made you feel an important part of the process | 6 | 5 | | | 4 | 4 | 3 |
| Your ability to easily deal with any future native title negotiations or agreements | 1 | 10 | | | 2 | 5 | 4 |

We make the following comments:

- Importance ratings varied somewhat, some thinking that these attributes are relatively unimportant. Miners in particular rated efficiency highly, empowerment much lower. A few government parties also felt that these attributes are not important to them
- Satisfaction ratings were **high**, there only two who rated any the first attribute as being below expectations. The two parties suggested that:
    - The NNTT talk to parties up front more, and explain the processes better. Note that this person did have a motive, being that the process should "*shake out*" some of the parties from the process
    - The NNTT should do a better job of informing mining companies and commercial interests on the processes of agreement making
- The NNTT was very well rated in respect of making the parties feel that they are important. Clearly, the parties are made to feel involved and valued.

## 3.4 Effectiveness

The parties were all quite or very satisfied with the outcome, though two of the mining company representatives again pointed to the costs involved, including the royalties payable as part of the Future Act agreement. Note that the mediator's role was sometimes believed to be relatively simple in Future Act compared to other cases. Comments about the mediator were as follows:

- There was broad acceptance that all parties are considered, and that the mediator does listen to all players, and does seek to explain the steps well
- Further, most were in agreement that the mediator does try to meet the needs of all parties, asking for their input and comment
- There were three parties (of eleven) who were less positive, each pointing to the role of the mediator in driving agreement, and one government party felt that the interests of the state needed to be more fully taken into consideration. The same respondent also asked that all mediators should avail themselves of all facts in the case. Miners sometimes felt that mediator can be leading or not strong enough in seeking agreement
- In relation to explaining outcomes, this was rarely seen as a problem, with some being very positive: *"good simple documentation"; "yes, well handled…"; "good communication about processes and outcomes"; "we get written acknowledgements…"*. Some however pointed to variation between mediators and some being in a too much of a hurry to move on without explaining outcomes
- Few had any suggestions for more action by the mediator, though the commercial organisations wanted more focus on the "*commercial reality and precedents*". Note that one Land Council and one other indigenous party representative argued the opposite, being that there is sometimes too much emphasis on speed, rather than following the processes well. Again, this is a double-edged sword, given the disparate interests of the parties.

One party, being a Land Council, argued that the mediation process does not lead to good outcomes and that it would be better handled by Courts, a point addressed later.

Figure 4 summarises the ratings given.

**Figure 4 – Effectiveness Attributes**

| Service attribute | Rating | | | | Importance | | |
|---|---|---|---|---|---|---|---|
| | Exceeds | Meets | Below | DK/NA | Very | Quite | Not |
| Extent to which the outcome was fair and reasonable | 4 | 6 | | 1 | 10 | | 1 |
| Extent to which the interests of all parties were considered in the agreement | 3 | 6 | 1 | 1 | 7 | 3 | 1 |
| Action of the mediator in seeking a resolution | 3 | 4 | 3 | 1 | 7 | 1 | 2 |
| Communication and information about the outcome and the reasons for it | 3 | 5 | 1 | 2 | 3 | 7 | 1 |

**Notes:**

- These attributes were generally considered to be important, though particularly fairness, the one dissenting voice being the party who opposed the NNTT's involvement per se
- Communication and information about the outcomes was of lesser importance, a few noting that the outcomes would be pretty well known anyway
- As we noted earlier, there were a few concerns about the resolution process on behalf of the mining companies, and one indigenous party felt that the concerns of the land holders were pushed aside at times in favour of the needs of the mining company. Miners sometimes wanted more feedback on outcomes on a progressive basis, and for the mediator to "take more control" in pursuing an outcome. Again, these issues are a fine balancing act.

## 3.5 Durability

Most parties agreed that these Future Act determinations were working well, though we did note a few words of concern:

- A few mining companies expressed some concern that the agreements are not strictly enforceable, or that the agreement struck only addresses the first stage (exploration) and thus the permit holder has to go through it again later, assuming the area is eventually mined

- Similarly, one mining company lawyer felt that there can be a lack of commitment on the part of state governments in particular. That person also suggested that some mining companies don't comply either, such as not paying royalties or abiding by agreements
- Not a lot of work appeared to be necessary in relation to the implementation of these agreements, with some financial obligations on the part of miners, including employment of local people, provision of information on the tenement, or in several cases, the establishment of a co-ordinating committee
- A few government respondents stated that whilst government roles and responsibilities for Future Act are largely legal processes, though the detail of Future Act matters can be complex and subject to further negotiation.

Most agreements had some for on monitoring and review committee, though they were less formalised than for Agreements and ILUAs, and some were said to not require such a committee, being "*simple agreements*". It was apparent that in most case (nine of eleven) that the processes for monitoring and/or reviewing progress were formalised, though one did question if agreements are effectively reviewed and monitored. One government lawyer pointed out that agreements of all type tend to work better when there is a joint management committee.

The parties were all either very or quite satisfied (split evenly, one did not know) with the final outcome, being a good result.

## 5.6 Relationships

This section concerns the quality of relationships and the role played by the NNTT in building relationships with and between the parties. We found the following:

- Firstly, the need for relationships was a mater of debate. Some said they were not important; all that happened was the mining company explored one tenement, though at the other end, relationships were taken seriously
- Most agreed that the mediator worked well to improve relationships, a few felt that the mediator played a minor role in that regard, the relationships being between the parties involved, or that the nature of Future Act agreements means that there is less need for them
- Views of ease of communication with the mediator were positive, and most felt that they now had a better understanding of the processes, noting that the range of experience did vary considerably. Some commented that they do bring a sense of balance to the process, seek ways of resolving the issue, and try and show areas of similarity in positions, not just dissimilarity
- One mining company representative was less positive regarding communication with the mediator, though in that case, their argument was that the indigenous party too often blocked the mining company in negotiations, and the mediator did not press them to honour their obligations under previously agreed matter. They also said that the mediator did not follow up requests for information.

When asked if the processes helped to **improve relationships** or if the mediator worked to achieve them, most were accepting of both, though there was a nonchalance about some comments, for example, they are "*okay"* or "*working as well as they need to*". In short, Future Act cases seem to have less developed relationships, and some are strained by the financial obligations on the miners, including the imposition of a monitoring body.

Realistically, to some mining companies, the Future Act process is about getting access to a tenement. Everything else, such as negotiation and relationships, is simply a pathway to get there, but in themselves, they are not particularly important. For example, one said: *"there are no real relationships, just commercial reality. The mediator does allow all parties time…but it's a procedural matter"*

In summary, the relationships work largely as they **have to**. Government representatives placed more emphasis on the fairness and inclusion in the processes, as did Land Councils to a degree, but note that one Land Council representative saw little or no role for the NNTT.

Ratings were as follows:

**Figure 5 – Relationship Attributes**

| Service attribute | Rating | | | | Importance | | |
|---|---|---|---|---|---|---|---|
| | Exceeds | Meets | Below | DK/NA | Very | Quite | Not |
| Ease of communication with the moderator | 5 | 6 | | | 3 | 6 | 2 |
| Efforts by the moderator to ensure all parties had a say | 6 | 5 | | | 6 | 4 | 1 |
| Respect shown by the mediator for the different views and rights of the parties involved | 4 | 7 | | | 5 | 4 | 1 |
| Effort made by the mediator to build relationships between you and others | 4 | 5 | 1 | 1 | 5 | 4 | 1 |

**Notes:**

- Most of these attributes were equally rated in terms of importance, with a mix of responses. Overall, there generally are seen as important, somewhat less so to miners
- Ratings were **high** in relation to all attributes. There was only one dissenting voice, being a mining company executive who suggested that the mediator needed to do more to inform them and communicate with them, including being easier to get a hold of
- Mediators are clearly working hard to give all parties a say, and often when the parties really do not want to hear the perspective of the other side.

We asked all parties interviewed if the mediation and negotiation process is better than the alternative, which **is litigation**. We found the following:

- For most, litigation is not wanted, and note that many Future Act agreements are resolved relatively quickly (say, within 3 months). Some asserted that litigation would be a *"disaster"*. A few even commented that the option of litigation is less relevant for Future Act than for other agreement types
- There were a few who had different views. One mining company executive felt that litigation is a *"realistic alternative*", and one Land Council said it would be *"better under Court processes"*
- Others simply did not want litigation is it can be avoided. That is, *"mediation is better"*
- The intermediary position, which was held by a handful of the people interviewed, is that Courts are an alternative, but that mediation should be seen as the **starting place**, not litigation. Thus Court action is for resolution of disputes only.

When asked if there was **anything else** they had to say, we received the following comments:

- One commented how friendly and polite are the NNTT staff
- Three mining company personnel asked for more focus on cost containment, one used the word *"rorting"* in relation to taking advantage of the conditions of the joint management arrangements
- The miners also reiterated their desire for more formal processes to move the agreements along, though as noted earlier, that was not acceptable to indigenous parties
- One mining company lawyer asked for more consistent protocols and methods by mediators, feeling that there are too many differences between them. The same person said some also take more control than others.
- One government representative asked for less jargon and more plain English
- One asked for the NNTT register to be updated to make it more accurate, as a listing of a claims group can include deceased parties. This was particularly seen as being problematic for registration tests for amendments. Further, the same person said to change who can sign an agreement, as it can make it virtually impossible to get them signed.

In summary, there were **competing interests** in relation to Future Act, and this creates a potential dilemma for mediators. The evidence suggests that mediators are generally doing a good job keeping the parties together, and in being fair and reasonable to all. This clearly involves a balancing act, though expectations do appear to be an issue. Some effort may be needed to more fully explain the processes and issues involved to miners and in some cases, other parties as well.
There may also be a need for more definitive information at the outset on protocols and methods, ensuing not only understanding, but also dealing with varying expectations of the parties.

**CMD359** **May 2006**

# NNTT Agreement Making Project
## Screener

Agreement details:

_____

Details of applicant and respondents:

---

**Q.1 Status of person/organisation responding to survey:**

| | | |
|---|---|---|
| Indigenous applicant – representative body | 1 | |
| Indigenous applicant – un-represented | | 2 |
| Indigenous applicant – represented by other person/organisation | 3 | |
| Legal practitioner representing applicant | | 4 |
| Legal practitioner representing respondent | 5 | |
| State or Territory Government Native Title Units | 6 | |
| Commonwealth Departments | 7 | |
| Local government organisations (Councils) | 8 | |
| Peak body/organisation as an applicant or respondent | | 9 |
| Peak body/organisation assisting an applicant or respondent | 10 | |
| Individual parties (pastoralists, mining companies, utilities, etc) | 11 | |
| Other | | 12 |

---

**On contact with organisation:**

S.1 Good Morning/Afternoon, may I speak to (...name of targeted person from sample frame…)?

| | | |
|---|---|---|
| Yes – available | 1 | (continue to S.2) |
| No – unavailable | 2 | Make time for callback – ask when they will return |

**S.2 On contact with targeted person:**

Good (…morning/afternoon…) I'm (…name…) from Mark Dignam & Associates, a social research company. We are conducting for the National Native Title Tribunal on Agreement Making. You should have been sent a standard letter by the Tribunal in the last week or two advising that we would be calling. Your responses are confidential and no personal data will be provided to the Tribunal.

IF THEY DON'T RECALL, FAX/EMAIL STANDARD LETTER, OFFER TO RE-SEND IT

S.3 IF SEEKING A PERSONAL INTERVIEW
We are personally interviewing parties involved in recent Agreement Making processes. Can you give us a time on (dates) that you would be available? The interview should take around 30 minutes.

S.4 IF SEEKING PHONE INTERVIEW
I'd like to make a time with you to interview you on the phone. The interview is likely to take 25-30 minutes. What would be the best time for you?

IF AGREED – NOTE TIME/ DATE BELOW:

Date: ____/____/2006

Time: _____

Name: _____

Title: _____

Organisation: _____

Address: _____

CMD359 February 2006

# NNTT Agreement Making Project
## Questionnaire

### *Section A. Processes*

Q.1 Was the (…specific agreement…) the first time that you had been involved in a fully concluded agreement?

| | | |
|---|---|---|
| Yes | 1 | (go to Q.4) |
| No | 2 | (continue) |

Q.2 How many other agreements or other matters (e.g., ILUA's, Future Act etc) have you dealt with the NNTT?

Number: _____

Q.3 And what type of matter/s were they?

| |
|---|
| |
| |
| |

Q.4 For how long have you been involved in a role that brings you into contact with the National Native Title Tribunal? *(Aid if Necessary)*

| | |
|---|---|
| Less than 6 months | 1 |
| 6 to 12 months | 2 |
| Over 12 to 24 months | 3 |
| Over 2 years to 5 years | 4 |
| Over 5 years | 5 |

Q.5 I'd now like you to think about the (..specific agreement..).
On how many separate occasions did you have contact with the NNTT during the negotiation and Agreement making process?
*Probe if Necessary – get an estimate*

Write in number of times: |____|____|____|

Q.6 When the Agreement making process initially began, how much did you know about the processes involved?

| |
|---|
| |
| |

Q.7 What concerns did you have about the negotiation processes at the start?

Q.8 Were the steps and processes involved in native title negotiations explained at the start? (Probe: by whom, how)

Q.9 What (else) would you have liked to have known at the outset?

Q.10 At the outset, were the roles and responsibilities of the NNTT clear to you? (Please describe any issues or problems)

Q.11 What would you have liked to know at the time?

Q.12 What did you think of the processes followed by the mediator? What issues of problems arose? What did you expect?

Q.13 As I read out a few attributes, can you please rate the NNTT in relation to processes using the following scale:

- **Exceeds** your expectations (where some aspects of service or assistance were better than expected)
- **Meets** your expectations (nothing particularly good or bad stood out, a fair, reasonable level of service)
- **Below** your expectations (your normal expectations are not met – some aspects of service were below what you see as a reasonable standard)

And for **each attribute**, would you say that it is…. *Read out*

- Very Important
- Quite important
- Not very or not important

| Service attribute | Rating | | | | Importance | | |
|---|---|---|---|---|---|---|---|
| | Exceeds | Meets | Below | DK/NA | Very | Quite | Not |
| Information provided regarding processes | 1 | 2 | 3 | 4 | 1 | 2 | 3 |
| Fairness of the processes | 1 | 2 | 3 | 4 | 1 | 2 | 3 |
| Conduct of the mediator | 1 | 2 | 3 | 4 | 1 | 2 | 3 |
| Objectivity of the mediator | 1 | 2 | 3 | 4 | 1 | 2 | 3 |
| Overall satisfaction with the processes | 1 | 2 | 3 | 4 | | | |

Q.14 FOR EACH BELOW EXPECTATIONS RATING
Please explain your reasons for rating (…attribute...) below expectations.

| | |
|---|---|
| Information provided regarding processes | |
| Fairness of the processes | |
| Conduct of the mediator | |
| Objectivity of the mediator | |
| Overall satisfaction with the outcome | |

Q.15 Can you please tell me what "fairness" means in relation to agreement making?

What did the NNTT do to demonstrate fairness?

| |
|---|
| |
| |
| |

Q.16 And what could the NNTT do to demonstrate a commitment to fairness?

| |
|---|
| |
| |
| |

### *B. Efficiency*

Q.17 What expectations (if any) did you have at the start of the negotiations in relation to how long it would take, the effort required, and the costs involved?

| |
|---|
| |
| |
| |
| |

Q.18 For how long were you involved in the negotiation and agreement making process? *Write in*

_____

_

Q.19 How long do you think is a reasonable time frame for an agreement?

_____

_

Q.20 Were costs in terms of time and money reasonable? If not, describe.

| |
|---|
| |
| |
| |

Q.21 As I read out a few attributes, can you please rate the NNTT in relation to processes using the following scale:

- **Exceeds** your expectations (where some aspects of service or assistance were better than expected)
- **Meets** your expectations (nothing particularly good or bad stood out, a fair, reasonable level of service)
- **Below** your expectations (your normal expectations are not met – some aspects of service were below what you see as a reasonable standard)

And for each attribute, would you say that it is…. *Read out*

- Very Important
- Quite important
- Not very or not important

| Service attribute | Rating | | | | Importance | | |
|---|---|---|---|---|---|---|---|
| | Exceeds | Meets | Below | DK/NA | Very | Quite | Not |
| Time effectiveness of the mediation process | 1 | 2 | 3 | 4 | 1 | 2 | 3 |
| Cost effectiveness of the process | 1 | 2 | 3 | 4 | 1 | 2 | 3 |
| Effort required on your part | 1 | 2 | 3 | 4 | 1 | 2 | 3 |
| Efficiency of the NNTT in agreement making | 1 | 2 | 3 | 4 | 1 | 2 | 3 |
| Efficiency of the mediator | 1 | 2 | 3 | 4 | 1 | 2 | 3 |

Q.22 FOR EACH BELOW EXPECTAITONS RATING
Please explain your reasons for rating (…attribute...) below expectations.

| | |
|---|---|
| Time taken to reach agreement | |
| Costs involved | |
| Effort required on your part | |
| Efficiency of the NNTT in agreement making | |
| Efficiency of the mediator | |

**C. Empowerment**

Q.23 At the outset, were you aware what other parties would be involved in the Agreement Making process? Discuss *(Skip to Q.25 if NO)*

| |
|---|
| |

Q.24 Were you informed by the NNTT of who would be involved?
(Check if this is important to them)

| |
|---|
| |

Q.25 What (if anything) could the NNTT do to better communicate the range of stakeholders involved?

| |
|---|
| |
| |

Q.26 To what extent have your Agreement Making experiences helped you to develop skills that would be useful in resoluiton of any future disputes? Discuss

| |
|---|
| |
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Q.27 As I read out a few attributes, can you please rate the NNTT in relation to processes using the following scale:

- **Exceeds** your expectations (where some aspects of service or assistance were better than expected)
- **Meets** your expectations (nothing particularly good or bad stood out, a fair, reasonable level of service)
- **Below** your expectations (your normal expectations are not met – some aspects of service were below what you see as a reasonable standard)

And for each attribute, would you say that it is…. Read out

- Very Important
- Quite important
- Not very or not important

| Service attribute | Rating | | | | Importance | | |
|---|---|---|---|---|---|---|---|
| | Exceeds | Meets | Below | DK/NA | Very | Quite | Not |
| Efforts of the NNTT to help you learn how agreements are made | 1 | 2 | 3 | 4 | 1 | 2 | 3 |
| Effort made by the mediator to help you understand Agreement making | 1 | 2 | 3 | 4 | 1 | 2 | 3 |
| Extent to which the NNTT made you feel an important part of the process | 1 | 2 | 3 | 4 | 1 | 2 | 3 |
| Your ability to easily deal with any future native title negotiations or agreements | 1 | 2 | 3 | 4 | 1 | 2 | 3 |

Q.28 FOR EACH BELOW EXPECTAITONS RATING
Please explain your reasons for rating (…attribute...) below expectations.

| | |
|---|---|
| Efforts of the NNTT to help you learn how agreements are made | |
| Effort made by the mediator to help you understand Agreement making | |
| Extent to which the NNTT made you feel empowered, or in control | |
| Your ability to easily deal with any future Agreements | |

**D. Effectiveness**

Q29a Did you find the agreement outcome to be fair and reasonable, considering what was legally achievable and taking account of the views and positions of all parties into consideration? *(If not, discuss why what could the NNTT have done to make it fairer?)*

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Q29b Did you find the mediator to be effective in seeking and considering the views and positions of all parties into consideration?

Q.30 To what extent was the mediation successful in maximising the outcomes for you? *Discuss*

Q31a Did the NNTT (or the mediator) explain why the outcome/s were reached during each stage of the process? Were you satisfied with the explanation?

Q31b Overall, how satisfied were you with the processes and steps involved in reacing the Agreement? *Discuss*

Q.32 What could the mediator have done to make the process more effective?

Q.33 Given the outcomes of the agreement, were you satisfied that the negotiation process was effective and worthwhile?

Q.34 As I read out a few attributes, can you please rate the NNTT in relation to processes using the following scale:

- **Exceeds** your expectations (where some aspects of service or assistance were better than expected)
- **Meets** your expectations (nothing particularly good or bad stood out, a fair, reasonable level of service)
- **Below** your expectations (your normal expectations are not met – some aspects of service were below what you see as a reasonable standard)

And for each attribute, would you say that it is…. Read out

- Very Important
- Quite important
- Not very or not important

| Service attribute | Rating | | | | Importance | | |
|---|---|---|---|---|---|---|---|
| | Exceeds | Meets | Below | DK | Very | Quite | Not |
| Extent to which the outcome was fair and reasonable | 1 | 2 | 3 | 4 | 1 | 2 | 3 |
| Extent to which the interests of all parties were considered in the agreement | 1 | 2 | 3 | 4 | 1 | 2 | 3 |
| Action of the mediator in seeking a resolution | 1 | 2 | 3 | 4 | 1 | 2 | 3 |
| Communication and information about the outcome and the reasons for it | 1 | 2 | 3 | 4 | 1 | 2 | 3 |

Q.35 FOR EACH BELOW EXPECTAITONS RATING
Please explain your reasons for rating (…attribute...) below expectations.

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|---|---|
| Extent to which the outcome was fair and reasonable | |
| Extent to which the interests of all parties were considered in the agreement | |
| Action of the mediator in seeking a resolution | |
| Communication and information about the outcome and the reasons for it | |

**E. Durability**

Q.36 Is the agreement working well at the present time? Have any problems arisen? If yes, what are they?

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Q.37 What is the commitment level of the parties to implement the agreement?

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Q.38 What are you doing to implement the agreement?

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Q.39 Is there a review clause in the agreement?

Yes 1 (explain)

_____

No 2

_____

Q40. Is there any provision for a joint management committee or similar body to review and monitor the agreement?

Yes 1 (explain)

_____

No 2

_____

Q41. Is there a forum to discuss issues prior to dispute resolution?

Yes 1 (explain)

_____

No 2

_____

Q.42 Overall, how satisfied were you with the final outcome?

Would that be… *read out*

| | | | |
|---|---|---|---|
| Very satisfied | 1 | Not at all satisfied | 4 |
| Quite satisfied | 2 | (Don't know) | 5 |
| Not very satisfied | 3 | | |

If *not very* or *not at all* satisfied, discuss below.

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## *F. Relationships*

Q.43 Did the native title negotiation process help you achieve better working relationships with the parties involved? If not, ow could it have been handled better?

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Q.44 Was the mediator active in helping to develop these relationships?

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Q.45 As a result of the negotiation and agreement making process, do you have a better understanding of the points of view and interests of others?

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Q.46 Did you feel that you could easily communicate with the mediator?

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Q.47 As I read out a few attributes, can you please rate the NNTT in relation to processes using the following scale:

- **Exceeds** your expectations (where some aspects of service or assistance were better than expected)
- **Meets** your expectations (nothing particularly good or bad stood out, a fair, reasonable level of service)
- **Below** your expectations (your normal expectations are not met – some aspects of service were below what you see as a reasonable standard)

And for each attribute, would you say that it is…. *Read out*
- Very Important
- Quite important
- Not very or not important

| Service attribute | Rating | | | | Importance | | |
|---|---|---|---|---|---|---|---|
| | Exceeds | Meets | Below | DK/NA | Very | Quite | Not |
| Ease of communication with the moderator | 1 | 2 | 3 | 4 | 1 | 2 | 3 |
| Efforts by the moderator to ensure all parties had a say | 1 | 2 | 3 | 4 | 1 | 2 | 3 |
| Respect shown by the mediator for the different views and rights of the parties involved | 1 | 2 | 3 | 4 | 1 | 2 | 3 |
| Effort made by the mediator to build relationships between you and others | 1 | 2 | 3 | 4 | 1 | 2 | 3 |

Q.48 FOR EACH BELOW EXPECTAITONS RATING
Please explain your reasons for rating (…attribute...) below expectations.

| | |
|---|---|
| Ease of communication with the moderator | |
| Efforts by the moderator to ensure all parties had a say | |
| Respect shown by the mediator for the different views and rights of the parties involved | |
| Effort made by the mediator to build relationships between you and others | |

Q49 To what extent did the process hellp you to understand the needs and interests of the other parties involved in the Agreement making process?

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Q50 Has it improved your relationship with the other parties? Discuss.

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Q51 How would you describe the relationship you have with the other parties at this time?

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Q.52 Do you think the agreement making process is better than the alternative, which is litigation?

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Q.51 Are there any other comments you would like to make?

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Name: _____

(Attach the screener to record personal details)