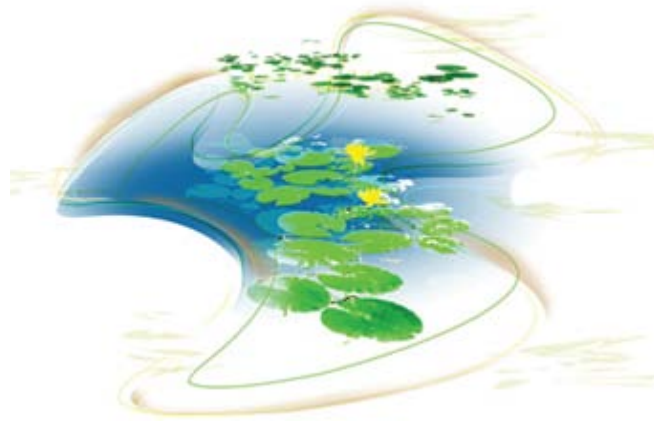


**INDIGENOUS FACILITATION AND MEDIATION PROJECT**

**NATIVE TITLE RESEARCH UNIT**

**AUSTRALIAN INSTITUTE OF ABORIGINAL AND  
TORRES STRAIT ISLANDER STUDIES**



**Native title mediation: issues identified, lessons learnt: proceedings  
and findings of IFaMP workshops with native title mediators  
February and March 2005.**

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**Report No. 5**

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# 1 Executive Summary

1. This report provides an overview of two workshops with native title mediators which were co-ordinated by the Indigenous Facilitation and Mediation Project (IFaMP) in the Native Title Research Unit (NTRU) at the Australian Institute of Aboriginal and Torres Strait Islander Studies (AIATSIS) in Canberra in 2005. Full reports of those workshops are available at <http://ntru.aiatsis.gov.au/ifamp>.
2. This report brings together the major themes discussed during the workshops and includes recommendations from the authors arising from those discussions.
3. The context in which native title mediation occurs should influence the mediation process which is used:
  - mediators need to be aware that, from an Indigenous perspective, the native title legal framework is an artificial one and that the requirement to establish connections to country can create conflict within communities.
  - mediation of native title issues does not occur in isolation. Existing and historical disputes or conflicts may impact on it. The mediator needs to be aware of them and work with the parties to ensure that they are appropriately managed.
  - Indigenous communities have their own, often more holistic, processes for managing decisions and disputes in which ‘peacemakers’, ‘peacekeepers’ and ‘peace builders’ may play critical roles. Indigenous expertise in these areas should be acknowledged and incorporated into mediation processes.
4. Native title mediation is different from mainstream mediation. It places different demands on mediators, raises different challenges to the process, and requires different responses.
5. Native title mediators have a responsibility to ensure the process is fair having regard to inherent power imbalances when one party, the Indigenous party, may have less access to resources and is less experienced and skilled in the legal and mediation processes than other parties such as State and Commonwealth Governments and large corporations.

6. Ensuring the native title mediation process is fair gives rise to significant responsibilities for mediators in:
  - addressing the needs of the participants which include the need for respect, information, thorough preparation, adequate resources and processes which match these needs;
  - thoroughly preparing both themselves and the parties for the mediation;
  - exploring the parties' consent to the mediator and to mediation;
  - ensuring the right people are participating so that outcomes are not undermined because key people do not endorse the process;
  - ensuring the parties' participation is effective so they can make the best use of their involvement;
  - managing the participants' needs for advice so they are well informed;
  - managing the participants' advisers so their participation is constructive and assists the parties;
  - exploring how confidentiality will be managed in the mediation; and
  - making arrangements to resource and implement agreements as part of the agreement-making process.
7. Training in native title mediation needs to go beyond mediation training in order to effectively mediate native title matters. It needs to:
  - specifically address the mediator's responsibilities set out above in the Indigenous native title context;
  - assist the mediator to identify and work with Indigenous peacemakers and peacekeepers in Indigenous communities;
  - explore the mediator's personal attributes and motivations; and
  - develop the mediator's skills in cross-cultural communications and awareness.
8. National standards for native title mediation including a code of ethics could reduce confusion around native title mediations and lead to greater consistency in native title mediations and to the development of clearer complaints processes.
9. Given the range of issues which Indigenous communities are facing, and the long delays which Indigenous parties often experience in progressing native

title matters and in accessing mediation assistance, there is an urgent need for a supported, accredited and skilled national network of Indigenous mediators and facilitators who could provide timely and local services to communities involved in native title mediation.

10. Recommendations emerging from the workshops include:

- more holistic approaches to native title mediation, including co-mediation, which recognise and account for not only the legal context in which native title issues are mediated, but also the Indigenous community and whole-of-government context;
- incorporating Indigenous expertise into native title mediation processes, and supporting its development, particularly in the form of a supported national network of Indigenous process experts;
- developing specific native title national standards and/or a code of ethical conduct which address the roles and responsibilities of all participants in native title including the mediator, parties and their advisers;
- provision by the NNTT and the Federal Court of training and information about native title legislation and processes to trained Indigenous mediators who do not have experience in native title mediation; and
- development by the NNTT of native title training packages which address the specific training needs identified in this report.

## 2 Background to the Report

This report provides an overview of two workshops held by the Indigenous Facilitation and Mediation Project (IFaMP) in the Native Title Research Unit (NTRU) at the Australian Institute of Aboriginal and Torres Strait Islander Studies (AIATSIS) in Canberra. The workshops, with native title mediation practitioners, were funded by the Office of Indigenous Policy Co-ordination (OIPC) in the Department of Families, Community Services and Indigenous Affairs (FACSAIA) and the National Native Title Tribunal (NNTT).

The first workshop of 13 Indigenous mediators was facilitated by Mr Edward Watkin, and held on 17 and 18 February, 2005. The second, involving five Indigenous practitioners from the previous workshops and eleven non-Indigenous practitioners, including NNTT members and Registrars of the Federal Court and consultants, was co-facilitated by Mr Edward Watkin and Ms Fleur Kingham, Deputy President of the Land and Resources Tribunal, Queensland and held on 15 and 16 March, 2005. Separate and detailed reports on the proceedings of each of these workshops have been prepared and are available from the NTRU at AIATSIS.<sup>1</sup>

Discussions in the workshops focussed firstly on identifying best practice in Indigenous decision-making and conflict management processes in native title; and, secondly, on identifying the training issues that arise from best practice. During the workshops, participants engaged in role plays, discussed scenarios and undertook other interactive group work. Agendas and proceedings were planned in conjunction with the facilitators by Ms Toni Bauman, Visiting Research Fellow at IFaMP and Ms Rhiân Williams, IFaMP Consultant Fellow and were informed by findings from IFaMP's survey of native title mediators.<sup>2</sup> The IFaMP team also made a number of presentations.

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<sup>1</sup> Kingham, F. and T. Bauman. 2005. Report on proceedings of Indigenous Native Title Mediation Practitioners Workshop 17-18 February 2005. Indigenous Facilitation and Mediation Project, NTRU, AIATSIS. <http://ntru.aiatsis.gov.au/ifamp>

Kingham, F., T. Bauman and M. Black. 2005. Report on proceedings of Workshop of Native Title Mediators 5-16 March 2005. Indigenous Facilitation and Mediation Project, NTRU, AIATSIS. <http://ntru.aiatsis.gov.au/ifamp>

<sup>2</sup> Williams, R. 2005. *Native Title Mediation Practice: The Commonalities, the Challenges, the Contradictions. A Survey of Native title Mediators*. Indigenous Facilitation and Mediation Project, NTRU, AIATSIS. <http://ntru.aiatsis.gov.au/ifamp>

Prior to the workshops, a number of papers were circulated to participants including a flier outlining the aims of the workshop, a backgrounder, a draft agenda, list of participants, and participant biographies. IFaMP reports on workshops held with Native Title Representative Bodies in 2004<sup>3</sup> and on the results of its survey of native title mediation practitioners were also distributed.

Participants of both workshops expressed gratitude for the rare opportunity to meet as a profession. A number noted that they feel isolated in their work and needed support, a factor which has some bearing on the importance of co-mediation approaches (see 7.3).

As noted, this report provides only an overview of the two native title mediator workshops: readers are referred to the separate reports on each of these workshops for more details.

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<sup>3</sup> Williams and Bauman, 2005. *Report on Native Title Representative Body Workshops: Directions, Priorities and Challenges*. Indigenous Facilitation and Mediation Project, NTRU, AIATSIS. <http://ntru.aiatsis.gov.au/ifamp>



### **3 The Context for Native Title Mediation**

The context in which native title mediation takes place presents challenges to the mediation process and defines the special responsibilities of native title mediators.

#### **3.1 The legal context of native title mediation**

The legal context for native title mediation is established by the *Native Title Act 1993*. Native title mediation is inevitably affected by the views that participants hold about what can or should be delivered by native title and whether the legal regime facilitates this. In determining a native title claim, the Federal Court must be satisfied that the applicants have native title rights and interests. This determines whether they can be involved in land use decision-making and active custodianship of their land.

However, this is not the approach likely to be adopted by Indigenous participants in native title mediation. For them, more fundamental issues loom large. They see native title mediation as providing a community development opportunity: the chance to make substantive improvements in their circumstances and conditions. Realising this opportunity is another matter within the complex legal framework of native title mediation within which it is difficult to work flexibly and which imposes many artificial requirements.

The requirement to establish ‘connection to country’ is itself a cause of conflict and division within Indigenous communities. Anthropologists and lawyers often have difficulty in translating people’s stories to match the legal requirements for establishing native title. The experience of some Indigenous communities with native title has adversely affected the reputation of mediation in those communities and this has important implications for native title mediators.

#### **3.2 The broader Indigenous community context for native title mediation**

Native title issues touch on and are affected by a range of other Indigenous conflicts, relationship dynamics, disputes, and unresolved past issues. If not managed effectively, these could hamper or prevent the resolution of native title matters. Further, if native title mediation is not conducted with an awareness of and sensitivity

towards such conflicts, the mediation can, itself, exacerbate divisions in Indigenous communities.

Even when such conflicts and issues can be identified it can be difficult for the mediator to determine how to approach them. It is unrealistic to expect that all unresolved conflicts can be dealt with through native title mediation. Nevertheless, to mediate effectively, native title mediators need to be aware of the broader issues, to consider the impact they might have on the mediation and to arrive, in negotiation with the parties, at ways of dealing with them.

For example, a key decision-maker in an applicant or broader native title group may choose not to participate in the mediation because of the presence of someone with whom they are in dispute. In some cases, it may be appropriate for the mediator to assist in resolving such a conflict; in others, it may be appropriate to negotiate agreement with the parties to put the dispute aside, or to facilitate its resolution through another process. The mediator may need to manage the non-participation of individuals – through shuttle mediation, for example.

Regardless, the mediator has a responsibility to identify the context for the mediation, and to discuss with the parties the impact that other disputes might have on the mediation and how they might otherwise be dealt with. This is an ongoing responsibility which requires the mediator to monitor and review the approach adopted. Developing this awareness and those skills is a training issue for mediators.

### **3.3 Acknowledging existing Indigenous capacity in decision making and dispute management**

Native title mediators need to be aware of other dispute resolution or management mechanisms at work in an Indigenous community, whether formal or informal. There are individuals in many Indigenous communities who act as ‘dispute managers’ and keep the peace. Indigenous practitioners at the workshops strongly advocated that such people should be identified by the mediator and incorporated into more holistic processes.

### 3.3.1 What is peacemaking?

These more holistic processes were sometimes referred to by Indigenous practitioners as 'peacemaking', 'peacebuilding' and 'peacekeeping'.

Unlike mediation and facilitation, the term, 'peacemaking', needs no explanation for Indigenous people. It is well received and understood, compared to 'mediation' which can hold negative connotations for Indigenous communities and which is perceived as something 'done' to them.

Making peace has strong spiritual and cultural connotations in both Aboriginal cultural practices. The term, 'peacemaking', within Indigenous contexts operates at the 'heart level' and implies wisdom and understanding and a strong focus on relationships. It is also a reference point for a range of interventions that might be required, including governance measures and training.

Indigenous mediators at the IFaMP workshops saw peacemaking, peacebuilding and peacekeeping approaches as:

- critical to building community and group cohesion;
- addressing conflict around native title (which affects the whole community);
- contributing to good governance;
- incorporating training and understanding;
- addressing the breakdown of traditional family structures for sorting out disputes;
- returning roles and responsibilities to Indigenous people;
- helping young people to find their place in communities;
- 'levelling the playing field';
- acknowledging the importance and value of all in the community;
- working to keep peace and strengthen relationships;
- addressing issues between Indigenous people prior to their engagement with external parties;
- building bridges between western and Indigenous processes; and
- based on the principle of living in harmony.

In contrast, native title processes were seen by many of the Indigenous practitioners at the workshops as 'structurally violent', as privileging applicants and those with power

in the community over others, as giving rise to conflict over who the ‘right’ native title holders are and as isolating issues in a way that do not assist their resolution.

### **3.3.2 Who are the peacemakers and what are their issues?**

Not all Indigenous communities will have local ‘peacemakers’. Mediators need to be able to identify local peacemakers to whom others ‘look to make things happen’. They are well respected and widely acknowledged as ‘peacemakers’, and are often, but not always, elders of the community.

A community peacemaker can:

- stay neutral and calm in a situation of conflict;
- bring reason to the disputing parties;
- understand both parties’ reasoning even if they don’t agree with it;
- ‘interpret’ the emotional temperature of a meeting; and
- ‘sit in many different camps’.

There are many reasons for mediators to work with those whose ‘rightful role’ is that of the ‘peacemaker’. The Indigenous participants urged native title mediators to value and acknowledge the peacemakers, and to ensure they are appropriately remunerated and supported, thereby reinforcing their power. Given the problems which Indigenous communities are facing, peacemakers require considerable support to take on formal peacemaking roles at the request of mediators. Without sufficient support, they will be taking on a role that is doomed to fail.

Conflict is a natural thing. How it is managed is the key issue. Mediators need to acknowledge that there will always be disputes and that they cannot ensure that ‘everybody is happy all the time’. The most powerful way of managing conflicts is to assist Indigenous communities in developing and managing their own processes. Hence, mediators should see their roles as assisting the parties to manage the conflict in such a way that the parties continue to coexist and avoid further damaging their relationships. Peacemakers and peacekeepers are the keys to this objective.

### **3.3.3 What is the relationship between mediation and peacemaking and what are the implications for native title mediators?**

‘Peacemaking’ potentially shares many features with facilitation and mediation, depending on how the latter processes are approached. Ideally, they all involve processes that are structured, planned, strategic, and flexible; that clarify issues and involve appropriate people. Indigenous practitioners saw mediation as ‘just one strategy’ in peacemaking that was particularly useful when the community lacks dispute resolution systems.

There is a danger of Indigenous peacemaking processes becoming institutionalised, ‘fetishised’ and appropriated by non-Indigenous people, with the concept written up, ‘put in a box’ and turned into a formula (for example, ‘a 10 step process’) so that it no longer belongs to Indigenous people. Peacemaking is localised and flexible, and dependent upon the presence of ‘peacemaking’ individuals.

Peacemaking processes are seen as different from ‘mainstream’ alternative dispute resolution processes in that they:

- envisage a longer time frame;
- are more flexible;
- employ the holistic approaches which many Indigenous communities seek;
- provide mechanisms to re-engage with ‘traditional’ methods of dispute resolution and thus give back roles and associated responsibilities to Indigenous people;
- build on and tailor processes to existing local decision-making and conflict management processes;
- plan to keep peace and strengthen relationships;
- are linked to sustainability through ‘peacekeeping’ measures;
- identify, acknowledge and accept the causes and reasons for past and present conflicts, and
- identify, emphasise and support strengths in Indigenous communities, deal with the past and allow for expressions of remorse and for apologies, where appropriate.

Indigenous practitioners suggested that, to ensure that external mediation processes work productively with peacemaking initiatives, the mediator should:

- make sure that mediation is consented to and that the parties agree to the mediator;
- identify and work with peacemakers in the community, either involving them as participants or observers;
- build the relationship between the mediator and the parties so that there is real confidence in and commitment to the mediation process;
- employ the terminology of peacemaking and peacekeeping when dealing with Indigenous parties; and
- encourage peaceful behaviour in the mediation and provide opportunities for parties to explore attitudes and options for behavioural change.

Mediators should involve and acknowledge peacemakers by:

- thanking them personally;
- publicly acknowledging them in their communities;
- informing others, including government agencies, who work in the community of the roles that they have played; and
- drawing them in as formal observers to acknowledge their role in the community and to ensure the integrity of the mediation.

Beyond peacemaking, and peacebuilding, there are roles for ‘peacekeepers’ in the implementation and sustainability of agreements in Indigenous communities. These include ensuring that mediation agreements are assessed and reviewed to identify follow up actions, support and resource needs, and the provision of these services.

### **3.4 Is native title mediation different from ‘mainstream’ mediation?**

The legal and Indigenous community contexts in which native title mediation occurs necessarily set different parameters for mediation and demand different responses from the mediator than do other types of mediation.

The native title jurisdiction has its own complex language, terminology and jargon that contribute to a power imbalance between those who understand it and those who do not. Whilst similar imbalances are also to be found in other types of mediations,

the cross-cultural nature of native title mediation compounds the disadvantage for those who are not well versed in the native title regime. This imbalance is exacerbated for Indigenous people by requirements inherent in the native title regime that seek to translate their notions of connection, custodianship and stewardship into a western legal property law framework based on notions of ownership, access and control.

Native title mediation inevitably explores issues of relationships – between individuals, between groups and between them and the land. Conflicts about land and other issues between groups or individuals (who may have chosen to let their disputes lie dormant) can be highlighted, revived and escalated in circumstances where it is necessary to identify who speaks for country. Native title mediation may also involve Indigenous families whose members have had no prior contact with each other because of dispersals of Indigenous people across the country under past Government policies. These families can have difficulty in providing written evidence of their connections to country and can be viewed with suspicion by other parties.

Whilst the nature and strength of connection of people to country could be the subject of a mediation session, it is, usually, a precondition to the mediation commencing. Indigenous parties may be frustrated, insulted or angered about having to prove connection to country. In some States, it may be the case that governments do not provide resources to parties or participate in mediation processes, until persuaded that the ‘right’ people are ‘at the table’. This further entrenches power imbalances as one party to the mediation, the State government, adopts the role of arbiter of the legitimacy of another party’s assertion of connection and questions their rights, even, to participate in the mediation.

Many mediators consider that the consent of the parties is a fundamental principle of mediation. Accordingly, the extent to which participation in native title mediation is involuntary presents a challenge to the mediation process. Indigenous practitioners, in particular, identified the consent of the parties as an issue that mediators should explore with the parties.

Native title mediation timeframes are usually longer than those of other kinds of mediations. Yet there is an inherent contradiction in native title time frames. There may be long delays in starting the process and mediation may drag on for some time.

However, external processes do not wait and the mediation can be overtaken by events which require an urgent resolution of difficult issues.

Whilst resources are often an issue in all mediations, they are particularly controversial in native title mediations. Native Title Representative Bodies, who represent native title holders, are significantly under funded and unrepresented claimants are frequently resourceless. This raises the issue of effective party participation in the mediation. It also exacerbates power imbalances, as those who are in a position to provide resources to native title parties, the Commonwealth, State, and Territory governments, are often also parties themselves and also provide resources to other respondents. The sustainability of any agreement is also threatened if the body best placed to assist with implementation, such an NTRB or other Aboriginal corporation, is not adequately resourced to do so.

Indigenous parties come to native title mediation subject to a significant power imbalance arising from their relative powerlessness in society. Native title mediators have the responsibility to offer a process that is fair to all the parties, sometimes in contexts where they have little scope to meaningfully address the structural power imbalance..

## **4 Mediator Responsibilities**

Because of the fundamental challenges to the integrity of mediation processes in the native title context, strong ethical mediation processes are imperative. The mediator has significant responsibilities in developing and overseeing a fair mediation process.

### **4.1 Addressing the needs of participants**

As is the case for all mediation processes, mediators need to be aware of and attempt to address the needs of all mediation participants in order for native title mediation to be fair. Respect, information, preparation, resources and sound process are necessary to ensure effective participation. Because native title mediation is often cross-cultural, and the mediators are, more often than not, non-Indigenous, it can be easy for the particular needs of Indigenous parties to be overlooked. The following needs of Indigenous parties were identified at the two workshops:



- **Respect:** In native title mediation processes, Indigenous people require confirmation that their knowledge will be valued and taken into account. They need their identities acknowledged and for the roles of elders to be respected and acknowledged. Mediators need to recognise local customs and practices and take into account cultural considerations and protocols.
- **Information:** Indigenous people need to understand the mediation process in order to have confidence in it. They need to know how they can have input into the process, the purpose of any meeting, their role and the likely benefits of their participation.
- **Preparation:** Preparation must take into account timing issues. Time is necessary for building relationships and for taking into account Indigenous cultural, community and personal priorities. Indigenous decision-making and dispute management processes, and working out systems of authority and representation can take some time.
- **Resources:** Adequate resources are necessary for Indigenous parties to participate fully and on an equal footing with other parties in mediations. Indigenous people often need assistance with travel to attend mediations and various kinds of assistance during the mediation (for example, with interpretation).
- **Process:** Indigenous parties need to have confidence and trust in the process. They need the opportunity to have input into the process before the mediation commences, and require flexibility in the mediation process.

#### **4.2 Thoroughly preparing: the mediator and the participants**

Native title mediation demands a greater degree of mediator and party preparation, than a standard commercial mediation. Two critical questions should be asked of the mediator before commencement: ‘Are you ready to mediate?’ and ‘Have you adequately prepared the parties for mediation?’

### **4.2.1 Preparing as mediator**

Whether native title mediators are ready to mediate requires consideration of a number of factors. The scope of the following questions that were identified through the workshops for mediators before they commence demonstrates the importance of thorough preparation. Before beginning the mediation ‘proper’, mediators should ask themselves the following questions.

Do they know:

- enough about the native title process to be able to mediate;
- enough about the groups involved and about their laws and practices;
- enough background information about the land, the people, and the community;
- what the issues are for the parties;
- about previous experiences of the parties with mediation;
- whether the timing is appropriate;
- whether the process of mediation is acceptable to the parties and whether they are acceptable as the mediator;
- whether the appropriate people are involved;
- whether the needs of the parties, which directly bear on their ability to participate, have been met; and
- whether enough time has been taken to build the relationships necessary to mediate effectively?

### **4.2.2 Preparing the participants**

The mediator has the responsibility to focus on the needs of parties, provide information about the process and about requirements of the parties in the process. ‘Pre-mediation’ preparation should not just involve a description of the steps in the process but should also ensure the parties understand the responsibilities of the mediator. A useful technique is to discuss not just what mediators will do, but also what they will not do. Because parties may have had negative experiences of processes described as mediation in the past, it is critical to identify their expectations of the process and to clear up any misunderstandings.

The questions mediators should ask themselves in preparing to mediate (set out above) are also useful questions to canvass with the participants.

### **4.3 Exploring consent to the mediator and to mediation**

Consent is a particularly problematic issue in native title mediation. More often than not, mediation is not voluntary, as it is court referred. This raises important preliminary issues for the mediator.

#### **4.3.1 How important is the parties' consent to mediation and the mediator?**

There was agreement in the workshops that the consent of parties to mediation and their choice of mediator are fundamental principles of mediation. This choice should be fully informed and mutually consensual. The mediator also needs to carefully self-examine for any perceived or real conflicts of interest.

As a first step in consensus building, and in order to address concerns about the phenomenon of 'mediator shopping' – that is, 'shopping' for a mediator who a party believes will be amenable to their preferred outcomes - parties may be asked to agree on a list of mediators, from which one could eventually be chosen.

The manner in which the NNTT allocates native title applications to its Member mediators doesn't usually allow for a choice of mediator. Nevertheless, in making allocations, the President of the NNTT may still be able to take into account the parties' views and allow some choice in the matter. There are also many native title mediation processes which are not allocated by the President of the NNTT where the principle of consent to mediator and mediation can be followed – NTRBs, for example, in their employment of consultants to deal with issues between Indigenous parties.

#### **4.3.2 How can consent to mediation and the choice of mediator be best established, particularly when groups are large and changing?**

The native title mediator should establish the nature of groups and seek a briefing on their composition during preparation. The mediator should discuss with the group whether they consent to the mediation, their willingness to enter into discussions and

the protocols for managing discussions and establishing ground rules, including how consent to the mediator might be established. This preparation should provide the framework for dealing with any questions that may arise later in the mediation concerning the appropriateness of the mediator. The composition of groups in mediations often changes over time, with the size of groups sometimes diminishing once parties are reassured about the process, and feel confident in relying on their representatives. Transparency and flexibility in the process can allow for seamless changes in groups to occur.

### **4.3.3 What are the responsibilities of the mediator if parties are uncertain about consent to the mediator?**

A clear expression of consent from the parties is required and it is the mediator's responsibility to resolve any uncertainty before commencing the mediation. It is also possible that party representatives may consent to the mediator but be unsure about their authority to grant consent on behalf of those they represent. This could require the mediator assisting the group to identify and agree on its decision making process.

Once the parties understand the mediation process and the role of the mediator (as distinct from that of a judge or arbitrator), the focus should shift to assisting representatives to establish how they are going to represent the interests of, and make decisions on behalf of, others in their groups.

## **4.4 Ensuring participation by the right people**

Ensuring the 'right' people are participating in the mediation is a difficult and ongoing issue in native title mediation, and is the mediator's responsibility. 'Intake' and pre-mediation processes are vital for addressing this issue. The application for native title will go some way to defining Indigenous interest groups. However, it is only the starting point, not the end of the process of identifying appropriate participants. Authorised native title applicants are not necessarily the appropriate people to speak for country and may need to defer to elders or others who are not named as claimants.

Whether the 'right' people are involved is an issue which should be revisited during the mediation. There may be situations in which the mediator has to make a decision to defer or terminate mediation if they consider a key person who is considered vital

to an outcome has not been able to participate. Mediators also need to be conscious of those who are being purposely excluded by participants. Ultimately these individuals may have the ability to undermine any agreement reached at mediation if they are not drawn into the process.

There may be cultural or relationship issues which make the participation of particular individuals or groups inappropriate. As with other multi-party mediations, ensuring a flow of information about progress and the rationale of the process from active participants to the wider groups they represent is an issue for the acceptability and, therefore, sustainability of the agreement.

Ensuring the 'right' people are participating is not just an issue concerning Indigenous parties. Government representatives may have limited authority to speak for or commit those who are the ultimate decision-makers. This will have implications for how the mediation is conducted, its effectiveness and time frames. The mediator may decide to ensure that Government parties who do not have authority to make decisions establish ways of communicating about issues to those who do have authority in the course of the mediation.

The use of connection materials to determine who the participants should be in the mediation is an issue of concern. It is often the case that there are fundamental disputes around the identity of native titleholders, which underpin other, more apparent disputes. Parties may dispute the connection information itself. A related issue is state government parties assessing connection materials before they agree to participate. From the state government's perspective, it may not be in the public interest to devote resources to mediation of a claim with little prospect of success. There is also a need to engage respondents who are currently excluded from 'connection processes'. Such exclusions can make these respondents more recalcitrant and they may demand an acceleration of the process.

It may be more appropriate for issues around connection materials to be brought into the mediation process rather than being left with one party – state governments - to determine. In some cases, there may be a dispute around state government requirements that, itself, requires mediation - for example, when a state government requests additional information as a pre-condition to its participation, but the

applicants consider that they already have provided sufficient information which is not challenged by other parties.

#### **4.5 Ensuring effective participation**

There is a range of ways in which parties participate in native title mediation. This can range from attendance at and full involvement in all mediation sessions to being consulted and kept informed during the process. There are also degrees of authorisation by parties of those individuals who are fully participating in the mediation. An individual may not be able to represent a group, speak for another person, group or country, or make commitments on behalf of someone who is absent. The nature of decisions for which a party has been authorised should be carefully explored and identified.

Most importantly, the mediator has a responsibility to ensure parties' needs pertaining to participation have been addressed. These needs relate, as noted, to information, readiness to mediate, resources, process and implementation. Whilst special attention should be given to such needs during pre-mediation processes, the mediator must remain aware of them throughout the mediation. There is a risk that a mediation session may have to be abandoned or postponed if the mediator has not thoroughly assessed whether the parties needs have been met, ultimately making the mediation ineffective, inefficient and costly.

Pre-mediation meetings, between the NNTT, NTRBs and other relevant bodies, are essential for scoping potential issues and identifying the resources which will be required. They also present opportunities to ensure that the NTRB understands and supports the mediation process. At such meetings, the mediator could talk through possible scenarios in anticipation of situations that often arise, and make some precautionary preparations. Special needs such as the need for legal or technical advice should also be identified in such meetings.

In order to address parties' needs relating to effective participation, mediators require flexibility with respect to the timing and the nature of the process of mediation. The mediator may need to move into single party sessions to discuss options for dealing with the problem. If there is a need for information, the mediator may be able to identify potential sources, and to negotiate the sharing of information between the

parties or accessing information from external sources. If it appears that participation in a joint session is difficult for any participant, other options for proceeding (such as working in smaller groups) can be explored. If a session has to be postponed or the mediation abandoned, the mediator should follow up with all parties, and other relevant institutions or groups to leave open the possibility of future recommencement.

#### **4.6 Managing participants' needs for advice**

Relative access to information and to advice is often a significant point of distinction between the parties in native title mediation and a source of power imbalance. Addressing this is an aspect of ensuring effective participation by the parties. There is a general view that mediators can provide advice about process issues but should not provide advice about substantive issues – although there is a range of views about the latter when the advice needed is within an area of a mediator's expertise.

Notwithstanding, mediators have a responsibility to actively address the needs of parties for advice and to explore with them how this advice might be obtained - rather than giving that advice themselves. If an unanticipated need for advice arises during mediation the mediation may have to be deferred so the advice can be obtained. A mediator who has relevant information, such as relevant court decisions, could draw it to the parties' attention, allowing them to assess and apply it to their situation. Alternatively, and with the parties' consent, a mediator could discuss issues with the parties' advisers outside the mediation session – especially if the mediator is concerned whether the advice provided is correct. Even when a party has access to expert advice, the adviser may not communicate that advice clearly. Not all expert views are objective, though experts may provide their views as if they are beyond question.

Mediators should ensure that:

- expert advice is clearly understood by parties;
- expert views are thoroughly explored;
- they do not impose their own assessments of expert advice in the mediation or allow their views to influence their process;
- there is adequate time for parties to question, respond to, discuss and evaluate advice;

- expert issues and experts, themselves, do not dominate the mediation; and
- the expert is properly briefed about the parties' requirements.

Once the mediation has made some progress, joint briefing of experts by parties about discrete issues could be considered as an alternative to experts determining a threshold question at the outset.

#### **4.7 Managing participants' advisers**

The critical roles of lawyers as appointed negotiators and spokespersons for Indigenous parties cannot be overstated, particularly given the structural power imbalances which exist in native title agreement-making and which have already been described in this report. It can be the case that well resourced companies seek to deal directly with applicants without their advisers in order to take advantage of a lack of knowledge and experience of Indigenous parties.

However, the lawyer as advocate presents particular difficulties for native title mediation. The lawyer as adviser is a more constructive and productive role and is more consistent with mediation principles. Mediators should ensure that parties and their advisers understand the adviser's support role and that the adviser fulfils but does not exceed this role. To do this, mediators must establish their authority, prepare advisers for their role, and help the parties to manage their advisers.

Pre-mediation work with parties and their advisers provides an opportunity to explore the adviser's role. It is important to recognise that the capacity of the parties to reach satisfactory outcomes is closely related to the roles their advisers play in the mediation. As the confidence of parties in their advice increases, and as parties better understand technical and legal issues, their ability to manage their advisers and participate in the process improves and their reliance on advisers decreases.

In preparing advisers, the mediator has a responsibility to assist them in understanding appropriate behaviour in mediation. For example, lawyers, used to defining issues in litigation, should be told that they are not the appropriate people to define the issues in mediation. Mediators should also guide advisers about the appropriate timing and manner of participation. Participants should be allowed to speak for themselves if they wish, without advisers intruding or speaking for them. Once the mediation



commences, the mediator should publicly reinforce the advisory role as one of acting as an available source of expertise should participants wish to draw upon it, rather than as a spokesperson.

There is a range of strategies for dealing with adversarial behaviour that has become disruptive, and which often depends on the mediator's style. The 'I'm in charge' mediator may, during pre-mediation, set clear parameters and establish the grounds for dealing with any disruptive behaviour. Other mediators may be less direct. One workshop participant gave an example of a lawyer walking out of a mediation session, and insisting his clients leave with him. Rather than disbanding the mediation, the mediator encouraged the other party to stay and assisted them in developing proposed terms of an agreement to be put to the other party. The mediator then invited the other party and their lawyer to return to the table to discuss the terms, thus avoiding direct conflict with the lawyer and finding a way to bring the lawyer and his clients back into the room.

There may be reasons for adversarial behaviour that mediators need to be aware of and prepared to deal with if they threaten effective mediation. Some lawyers become adversarial when they are under-prepared as a strategy to buy time. Adversarial parties and advisers may also have brought the baggage of past unsatisfactory dealings with the other parties or with their lawyers.

#### **4.8 Exploring confidentiality**

Parties to native title mediation bring a range of perspectives to the issues under discussion, which necessarily affect their view about confidentiality of the mediation. State and Federal Government parties often view native title as an aspect of land and resource management and, therefore, as a matter of public interest. Local governments may view it as a strategic planning process that they have to justify to their community. On the other hand, for many Indigenous parties, their stories, relationships, connections to country, personal and communal rights and responsibilities, are intensely personal and they may not wish their details to be widely disseminated. There are also cultural sensitivities about who has access to Indigenous information.

Dealing with confidentiality in native title mediation involves taking into account and negotiating these different perspectives. Given the range of perspectives of parties, the complexity of the legal situation and the legitimate interests of parties and those who are not actively participating in the mediation, confidentiality provisions cannot be dealt with at the outset by way of general declarations by the mediator that the proceedings are confidential. Such declarations can create false securities and pave the way for disclosures that would not occur if parties had prior understanding of the use to which information may be put. Without adequate discussion of, agreement about and adherence to confidentiality arrangements, parties may be reluctant to provide information in the process. They may also seek external support for their position, talking to people outside the process when this is inappropriate.

Mediators should ensure that issues affecting confidentiality are thoroughly explored. The legal situation regarding confidentiality provisions is not always as straightforward as it is sometimes represented to parties by mediators. Legislation may impose an obligation of confidentiality on the mediator but not directly on the participants. Mediators may have reporting requirements. For example, Federal Court Registrars are required to report back to judges who have referred the matter to mediation and consultant mediators will be required to provide a report to the NTRB that is employing them. Restrictions on the use of information obtained in mediation may only be applicable to court proceedings, and permit the information to be used in other ways and disseminated. Such restrictions may be further qualified, allowing parties in future act matters, for example, to tender information about what happened during mediation to establish or refute allegations of bad faith negotiations.

Members of the NNTT have the power to impose restrictions on information and documents used in the mediation such that if restrictions are breached, criminal sanctions can be imposed. This power has been exercised sparingly to date. However, a consequence of breaches of confidentiality agreements may be that parties begin to demand the power is exercised more frequently.

Parties have particular needs which should be explored in any discussions around confidentiality. Indigenous representatives will have a responsibility to discuss information obtained in mediation with members of the group they are representing or others who are not actively participating in the mediation process. Government representatives may have to discuss information provided to the process with other

government authorities. There will also inevitably be different views about contact with the media.

It is important that the scope and limit of confidentiality provisions and the categories of information they relate to, are discussed in terms of the legitimate needs of parties and those who may not be actively participating in the process. This includes needs relating to communicating with the media. Mediators have a responsibility to make the issue relating to confidentiality explicit in the mediation and to ensure that parties have addressed confidentiality in a serious way before any disclosures occur. It can also be of assistance to the process when sensitive issues are subsequently raised, to remind participants about confidentiality agreements and the limits of legal protection.

Confidentiality provisions and their limits should be discussed and negotiated amongst and with the parties, and include provisions relating to the mediator. Discussions should aim at a shared understanding of: the meaning of the term, 'confidentiality', to whom confidentiality provisions should apply and the categories of information to which they relate, the legal limitations on any provisions, rules relating to media access, options available to enforce confidentiality agreements, how breaches of any agreement will be managed, and what reporting responsibilities the mediator and the participants may have.

#### **4.9 Making, resourcing and implementing agreements**

With the experience of some years of native title agreements, it is useful to reflect on whether sufficient effort is given to designing sustainable agreements and to resourcing their implementation.

Mediators have an obligation to test the sustainability of an agreement through reality testing and the agreement writing. They need to be aware of the difference in cultural approaches to agreements between some Indigenous and non-Indigenous people. A participant at one of the workshops noted that, Indigenous behaviour changes once it is clear that there is an agreement – 'people start behaving like they have an agreement'. Requests for changes to agreements by Indigenous people after mediation has been supposedly 'completed' indicate that the relevant Indigenous interests have not been appropriately taken into account in the process. Agreement-making

processes need to accommodate such changes, recognising that they are essential to the sustainability of the agreement and that it is the mediator who is at fault, not that Indigenous parties 'are always changing their minds'. That is, the process has to be flexible and the mediator has to have a readiness to re-negotiate.

A key difference between many Indigenous and non-Indigenous approaches to agreement-making is the non-Indigenous view that the objective of mediation is a single one-off agreement. For Indigenous people, the objective is a process that extends beyond the making of the agreement, which may be seen as only a milestone in the ongoing relationships between parties. Building relationships over the long term may require a series of interim agreements that demonstrate what has been achieved to date, acknowledges their progress and provides flexibility for the next stage of discussions. As interim arrangements are made and kept, parties can build consensus and develop trust in each other.

Implementing agreements, including resourcing requirements, should be discussed during mediation to test their sustainability. Agreement-making may be the easiest stage of the process, yet it is almost always better resourced and receives more attention than implementation, which often occurs after the mediation concludes.

## **5 Training Issues**

The key training needs for mediators and other participants in mediation identified at the workshops are summarised below. The range of training needs demonstrates the necessity of going well beyond basic mediation skill training in order to effectively 'mediate' in native title matters. Basic mediation training provides the grounding for further skills development but is inadequate in itself for native title mediation.

### **5.1 Native title training needs – beyond basic mediation training**

Training in the scope and limits of native title legislation and processes was identified as a key training need and as a prerequisite to effective native title mediation, given the overdetermination of native title mediation by legislation. This was seen to be the case, not only for mediators who do not have previous native title experience, but also for all parties including applicants and native title holders, and staff of relevant organisations. Training and information sessions about the native title context which

are currently provided by the NNTT are insufficient to meet current need and need to be tailored for specific audiences.

The workshops revealed a need for additional training to be focussed on the specific native title mediator responsibilities as set out in Part 4 and to include:

- identifying and managing underlying disputes in Indigenous communities, discussing these with parties to determine how to deal with them, and keeping them and their impact on the mediation under review;
- thoroughly preparing as mediator and preparing the participants;
- exploring consent to the mediator and to mediation;
- ensuring effective participation by the ‘right’ people;
- identifying the needs of parties and addressing power imbalances amongst the parties;
- developing strategies for dealing with the advice needs of parties;
- developing strategies for dealing with adversarial legal advisers;
- ensuring that advisers understand their roles and incorporating and managing them in the process;
- staying neutral and impartial whilst building relationships with Indigenous parties (‘how not to fall in love with the claim group and fight for them only’);
- developing strategies for negotiating confidentiality provisions in processes;
- ensuring the resourcing and implementation of agreements; and
- equipping mediators with a better understanding of confidentiality issues in native title.

In relation to peacemaking, training was suggested for mediators in:

- identifying and working with ‘peacemakers’ in the community;
- developing peacemaking strategies and their roles in supporting peaceful Indigenous futures; and
- ‘peace speaking’.

Training needs identified for other participants in native title mediation processes were:

- training lawyers to take more productive roles in mediation process; and
- training for applicants and advisers in sustaining Indigenous futures and in community development theory and practice.

## **5.2 The human factor**

The personal attributes and motivations of mediators are important; they must want to understand others and be willing to relate to them personally. They also need to understand themselves. Training designed to develop a greater understanding of human nature, such as self-awareness, personal development, transactional analysis, psychology and group dynamics, can ensure basic mediation skills are enhanced by understanding at a human level. Indigenous mediators referred to this as the “heart” factor. They recommended non-Indigenous mediators spend extended periods of time in Indigenous communities, particularly with ‘peacemakers’.

## **5.3 Cultural awareness**

Mediators, lawyers, anthropologists and other non-Indigenous participants need cultural awareness training and also need to understand cultural protocols. Unfortunately, the quality of training which is currently on offer in these areas is highly variable. Cultural awareness training needs a higher profile and should be given greater priority. Moreover, for anyone to be effective in agreement-making processes and Indigenous decision-making and dispute management processes more broadly, the training which is required should be more than a one-off awareness session.

Native title mediators need to be aware of the culture of the particular community they are working with, as well as the unresolved political and historical issues in which the mediation is taking place. Cultural awareness training should have a specific local component since no one size fits all. Cultural awareness should be an ongoing process of learning and developing methods of relating across cultures.

Indigenous practitioners thought that mediators who work with ‘peacemakers’ in the community have a greater level of awareness and understanding than those who don’t. Native title mediators also need training in the range of processes, perspectives and ways of arguing and resolving conflict in Indigenous communities.

One Indigenous participant gave the example of the importance of ‘witnessing’ in Aboriginal communities where silent witnessing of a conflict or hostile exchange (an attack on the mediator, for example) is not necessarily endorsement of the attack by the group. The group will witness both the attack and the response and at some point decide whether and how to involve themselves in the exchange. A direct appeal to the group to endorse the mediator may be inappropriate because it requires them to take sides. Parties may not want to be drawn in publicly at that moment. Silence in this instance, therefore, should not necessarily be interpreted as support for the challenger’s actions or views. Another purpose of ‘witnessing’ is to ensure that the accuser doesn’t ‘step over the line’ and a reminder of the limits of acceptable actions. The process of ‘witnessing’ has its roots in Aboriginal processes of the past and is a great theatrical event - an opera without music - which must be played out. ‘Witnessing’ authenticates and validates discussion.

Indigenous mediators have a wealth of personal experience they bring to native title mediation. They are already skilled at living, working and communicating in both Indigenous and non-Indigenous worlds which equips them well for cross-cultural mediations. Involving them in training could better prepare non-Indigenous mediators to work with Indigenous communities.

Indigenous mediators who do not have local cultural awareness and knowledge will also need to familiarise themselves with the issues of the community involved in mediation. Whether local or not, all mediators should identify and incorporate local ‘peacemakers’ into their processes.

## **6 Regulating Mediation: National Standards and Codes of Ethical Responsibilities**

Practitioners at both workshops generally supported the development of national standards in native title mediation. One participant noted that: ‘anyone can call themselves a mediator’. Others noted the poor reputation of mediation in some Indigenous communities contributing to a resistance to mediation processes. There also appears to be a need for regulation, given the divergence in practice, ranging from facilitative to directive, which takes place under the rubric of ‘interest based mediation’ in native title practice, and which was revealed in IFaMP’s survey of

native title mediators. The NNTT's description of its process as 'interests based mediation in a rights context' is also subject to interpretation.

National standards could reduce confusion around native title mediation terminology and process, and lead to greater consistency in native title mediations and to the development of clearer complaints processes.

Three issues relating to national standards and codes of ethical responsibilities in native title which were discussed at the workshops were:

- whether national standards for native title mediation should be developed as a discrete set of standards;
- whether there should be national standards for mediation generally, with additional guidelines provided for native title mediation; and
- whether to support national standards through the development of a code of ethical responsibilities which focuses on the mediator's obligations in native title rather than on prescribing a rigid or fixed mediation process.

The second approach may facilitate greater consistency in core mediation practice, while developing specific guidance to deal with native title mediation. The third approach may help to focus attention on the needs of the parties in the mediation, rather than on those of the mediator. All three would allow for the distinctions between commercial disputes and native title matters to be drawn out.

Whilst regulation in some form was supported, there were concerns about the need to maintain the flexibility in native title mediation which is required to adapt processes to local contexts and needs. Any native title code may need to go beyond statements of principle and provide practical guidance on how the principles might be applied in particular situations.

The issues mentioned in this report are by no means exhaustive of those which might be canvassed in discussions about native title mediation standards. Others are raised in the specific reports on each workshop where strategies for dealing with a range of frequently encountered issues were explored in terms of mediator responsibilities and options.



A controversial issue is the responsibility of the mediator to build the capacity of Indigenous and other parties to control the decision-making process, thereby ultimately having greater ownership over any outcomes. There is a range of views about party control of process. One view is that parties should have control over substantive issues whilst the mediator should have control over the process, including defining the process and advising the parties on procedure. Another view is that the mediator has the responsibility to discuss process with the parties and to provide them with guidance, but that process is ultimately a matter for negotiation between the parties. Whether national standards should endorse one view or the other is a matter that requires consideration in developing standards.

Other issues which the participants identified for the formulation of standards in native title mediation appear below.

- Ensuring the process is transparent, respectful, flexible and fair and that the issues are clear.
- Cultural protocols for native title mediation.
- Mediator and party preparation.
- Choosing the appropriate dispute resolution intervention: mediation, facilitation, therapeutic processes etc.
- Developing an understanding of the roles and responsibilities of the mediator and the parties.
- Being neutral and exhibiting lack of bias.
- Managing gender issues.
- Analysing and dealing with power imbalances: resources, information, advice, capacity, numbers.
- Supporting the parties to build their relationships.
- Identifying rights, interests, needs and responsibilities.
- Separating content and process.
- Capacity building of all concerned.
- Generating options (not advising on them).
- Post mediation follow up and implementation and preparing the participants for this.

## **7 Promoting Indigenous Capacity in Decision Making and Dispute Management**

There is a pressing need in native title processes and in Indigenous affairs more broadly, for skilled and supported timely local Indigenous interventions into Indigenous decision-making, dispute management and agreement-making processes. Both workshops broadly supported the proposal for a supported, accredited and skilled national network of Indigenous mediators and facilitators in the light of the range of Indigenous issues which require attention in native title including: the significant amount of conflict about native title, delays in agreement-making processes when mediators are not available, and the longer time frames needed to address a number of Indigenous issues.

As noted, native title mediation often takes place against a backdrop of existing conflicts or issues which are brought to the native title negotiation table, whether explicitly or not. These issues may be peripheral to native title issues, yet divert negotiations or hinder resolution of native title issues. Sometimes they can be addressed during the native title mediation. However, in many cases there will be neither the time nor the resources to achieve this in the legislative framework for native title mediation. Native title mediators could work in conjunction with other regionally based specialised Indigenous mediators to handle such disputes and to ensure coordinated and integrated dispute resolution services.

### **7.1 Why Indigenous mediators?**

Native title mediation often approaches mediation from an institutional rather than a community-based perspective. This can inadvertently undermine Indigenous community capacity in peacekeeping and conflict management, when mediators lack awareness of Indigenous approaches to issues. Participants at the workshops identified a number of reasons for involving skilled and respected Indigenous mediators. Some are mentioned under the discussion of ‘Peacemaking’ in section 3.3 of this report. Others are listed below:

- Non-Indigenous native title mediators can tend to gravitate to non-Indigenous parties where their comfort zone is located.

- Indigenous practitioners may employ more holistic, less formal more appropriate approaches to Indigenous issues.
- Indigenous parties often feel more at ease with Indigenous practitioners.
- Co-mediation approaches, where Indigenous and non-Indigenous practitioners work together, can go some way towards addressing power imbalances in native title mediations involving Indigenous and non-Indigenous parties.
- The use of Indigenous peacemakers who are respected and recognized as honourable people in the community adds authority to a process.
- Native title mediation is neither a simple process, nor simply a mediation process: more fundamental Indigenous social issues are involved to which Indigenous mediators are likely to be more empathetic.
- Indigenous practitioners are constantly moving between a ‘western’ system of legal and administrative culture and an Indigenous world with different cultural priorities: they may be more likely to have the necessary insights, understanding and skills in dealing with ‘cross-cultural’ issues.
- Indigenous parties are more likely to approach Indigenous practitioners to discuss issues because they perceive that they are more likely to be understood.

In matching the appropriate mediator with a dispute, parties should always make an informed choice of mediator or process expert. Given the choice, they may decide to involve a non-Indigenous mediator, but it is often the case that the option of an Indigenous practitioner is not provided.

A regional network of Indigenous mediators and facilitators would be a resource that Indigenous communities, government and other service providers could access for a number of purposes, not just in circumstances of native title conflict. It could assist in negotiations with governments about service requirements and community projects; facilitate government consultation processes; and negotiate the delivery of services to communities whether by government or the private sector. It could also facilitate discussions between government and Indigenous communities regarding whole-of-government approaches to government services, rather than portfolio demarcations, including discussions about concepts of mutual obligation, partnering and shared responsibility.

## **7.2 Issues to be addressed in developing a national network of Indigenous practitioners.**

The proposed national network would require national co-ordination to provide ongoing support and mentoring, and to develop and deliver accredited training which would provide vocational pathways. It could attract work from the full range of government, industry and corporate sectors in providing services in Indigenous communities including from Indigenous organisations (Prescribed Bodies Corporate, for example, or Aboriginal legal aid).

Some issues to be addressed in developing such a network were discussed at the workshop of Indigenous practitioners, though further development work is required. Indigenous practitioners were concerned that resources should be identified, not only for the on-going operation of the network but also for the process of developing the concept and establishing the network.

Such a network needs to have a strong community base. State or regionally maintained networks could be supported by national co-ordination including a national accreditation body. Indigenous coordinating strategy groups could steer the network regionally. The list of existing services and practitioners, already partly developed by IFaMP, could be expanded and refined and existing community mediation networks and processes could be built upon to avoid duplication.

The roles of programs such as the Native Title Studies Centre at James Cook University which has a pilot program to train people in native title mediation and has a joint project with LEADR to offer accreditation in native title mediation, could be explored. Technological options which could provide solutions such as ‘e-solution’ or ‘blind bidding’ could be explored. Non-Indigenous mediators and facilitators could be employed, as appropriate, for example, when using a co-mediation model. Regional recruitment workshops were suggested to identify people with appropriate expertise or potential.

Training could be provided in stages or modules so that mediators can develop specialised knowledge for example, in native title, family, health, housing and education. Arrangements could be made for trainees to sit in on Federal Court native title mediations or case conferences to facilitate mentoring.

### **7.3 Co-mediation**

Co-mediation can provide the opportunity to address issues of culture and gender by having Indigenous and non-Indigenous mediators and/or mediators of both genders working together. It is a practice for which specific training is required: it does not mean one mediator substituting for the other. Each mediator takes well defined and understood roles. There may be possibilities for Indigenous mediators to be employed as cultural advisers or as co-mediators in native title, although legislative restrictions and strict procurement guidelines require consideration. A regularly updated list of Indigenous community mediators could be useful in NNTT selective tender processes or in processes employed by the Federal Court.

## **8 Conclusion and Recommendations**

A range of common best practice themes and training needs have been identified through IFaMP's workshops with native title mediation practitioners. They provide the basis for action which should be considered by the National Native Title Tribunal, the Federal Court of Australia, the Department of Attorney-General and the Office of Indigenous Policy Co-ordination.

Recommendations include:

- more holistic approaches to native title mediation, including co-mediation, which recognise and account for not only the legal context in which native title issues are mediated, but also the Indigenous community and whole-of-government context;
- incorporating Indigenous expertise into native title mediation processes, and supporting its development, particularly in the form of a supported national network of Indigenous process experts;
- developing specific native title national standards and/or a code of ethical conduct which address the roles and responsibilities of all participants in native title including the mediator, parties and their advisers;
- provision by the NNTT and the Federal Court of training and information about native title legislation and processes to trained Indigenous mediators who do not have experience in native title mediation; and

- development by the NNTT of native title training packages which address the specific training needs identified in this report.