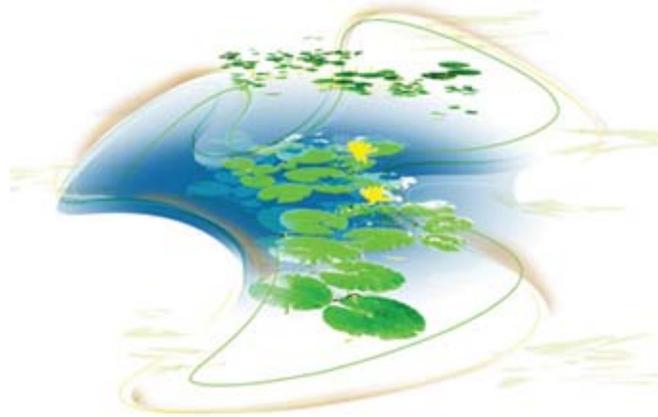


INDIGENOUS FACILITATION AND MEDIATION PROJECT

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



The Business of Process
Research Issues in Managing Indigenous
Decision-Making and Disputes in Land

Report No. 1



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The Business of Process
Research issues in Managing Indigenous Decision-Making and Disputes in Land

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Abstract

The Indigenous Facilitation and Mediation Project at the Australian Institute of Aboriginal and Torres Strait Islander Studies is aimed at researching best practice Indigenous decision-making and dispute management systems and building on Indigenous skills and approaches in these areas to develop training for Indigenous peoples.

In developing Indigenous governance approaches, including decision-making and dispute management processes in Indigenous communities, there has been a tendency to transplant processes from the non-Indigenous context. This paper argues that developing localised approaches to decision-making and dispute management that are responsive to the needs of Indigenous communities is essential, particularly as the approaches which are adopted can escalate or exacerbate fundamental pressures and tensions within Indigenous groups. The ongoing evaluation of the effectiveness and consequences of the range of processes which are implemented is also critical. This is particularly the case, given that the emphasis of the amended Native Title Act 1993 is on agreement-making and maximising ‘outcomes’ through non-adversarial and collaborative alternative dispute resolution mechanisms such as mediation and facilitation.

This paper emphasises that in order to get ‘outcomes’, the first thing is to get the process right. This includes ensuring that appropriately authorised locally based Indigenous decision-making and representative processes are core components of effective and sustainable collaborative and co-operative efforts.

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Introduction

The relationships between and within groups and individuals are the fundamental building blocks of a functioning society. They require maintenance and ongoing negotiation and re-negotiation. The nature of any negotiation, decision-making, dispute management and agreement-making processes applied, will have consequences for relationships and the social fabric as well as for the sustainability of outcomes. Disputes are a normal part of relationships and decision-making processes. All societies and individuals experience conflict and disputes and Indigenous societies are no exception. All societies have a range of mechanisms for managing and dealing with disputes, and for bringing to account those whose disputes impact on the social cohesion and structure of the group or society as a whole. Adversarial approaches will often achieve outcomes at the expense of relationships and sustainability whereas collaborative and cooperative decision-making approaches seek to position relationships at the heart of inclusive and sustainable outcomes.

For Indigenous peoples, and indeed many other stakeholders, it may be that a primary goal of any dispute management and decision-making process is one of maintaining relationships rather than a single-minded focus on finalising or producing discrete outcomes. This does not mean that Indigenous stakeholders do not wish to achieve substantive outcomes, but it does mean that the process may require considerable time and must evolve from, or have a sense of being owned by the group themselves. Achieving a match between the range of Indigenous needs and expectations and models of decision-making and dispute management is important. Critical to these processes is the recognition that informed decisions are important but not easily achieved and that all decisions will have repercussions, both for those directly involved and for others, including future generations.

The Indigenous Facilitation and Mediation Project (the Project) at the Australian Institute of Aboriginal and Torres Strait Islander Studies is researching Indigenous decision-making and 'dispute' management systems in native title. It aims to identify the underlying principles of relevant and responsive approaches and is primarily concerned with developing capacity in decision making and managing land related disputes within Indigenous communities in collaboration with Native Title Representative Bodies ('NTRB').¹ Project research outcomes will be framed appropriately for users, providers, researchers of and trainers in facilitation and mediation.

Although recent Indigenous governance initiatives have recognised the importance of integrated 'whole-of-family', 'whole-of-community' and 'whole of government' approaches, they are often based on assumptions that decision-making processes will be representative and inclusive in line with the democratic principle of one vote, one value. This can be a source of conflict for Indigenous peoples who may find themselves caught between democratic imperatives which often appeal directly to individuals and 'traditional' forms of decision-making which may be more collectively orientated and aimed at reinforcing cultural identities and practices. This is not to say that there are no commonalities between the two processes or that Indigenous decision-making does not allow for individual interests. However, exploring tensions between the individual and the collective is a vital element in developing Indigenous decision-making processes that are flexible and responsive to the range of rights and interests and needs that must be accommodated. The nexus between good governance and just and sustainable outcomes for Indigenous peoples is to be found in the skilled facilitation of effective Indigenous dispute management systems including decision-making processes, which are agreed and accepted by those whose interests are affected by the process.

This paper positions the Project research and outlines a broad range of research issues and parameters. The research is underpinned by a recognition that approaches to Indigenous decision-making and dispute management systems must be integrated with other Indigenous governance initiatives. It aims to produce a theoretical framework for thinking about culture and conflict in which theory and practice are mutually informing.

We do not uncritically accept ‘mediation’ or ‘facilitation’ as providing answers to all Indigenous disputes or to developing appropriately representative decision-making processes. We do, however, suggest that negative views of ‘mediation’ and ‘facilitation’ may well arise from experiences of processes that lack a consistent procedural logic, or where practitioners have blurred the boundaries between procedural and substantive issues. In order to develop positive cultures of procedural expertise, it is necessary to move beyond quasi-judicial or authoritarian approaches. Achieving just and sustainable ‘outcomes’ requires an awareness of the importance of specific procedural expertise and of the need for durable relationship building beyond the more common and current emphasis on substantive outcomes and content. This focus on process and long term relationship building is not necessarily mutually exclusive to the delivery of speedy outcomes; it may very well be the only way that an outcome is ensured.

Why is this Research Required?

In 2000, the *Manila Declaration of the International Conference on Conflict Resolution, Peace Building, Sustainable Development and Indigenous Peoples* commented on the ‘universalizing’ of forms of conflict resolution within ‘western legal paradigms’.² It highlighted the need to build on Indigenous institutions to strengthen Indigenous capacity and skills, as well as the significant contribution that Indigenous women might make in the area of conflict resolution. It called for an ‘Independent International Commission of Indigenous Peoples for Mediation and Conflict Resolution’ to promote and defend Indigenous rights and an ‘Indigenous Peoples Global Network for Research’ to support and strengthen Indigenous capacities, to undertake research and documentation, and to disseminate information.

There is a growing body of international research which points to the need for research in Indigenous decision-making and conflict management approaches, and for the need to identify and develop standards and best practice. Recent research by the Harvard Project on American Indian Economic Development and amongst Canadian First Nations suggests that fair and reliable dispute resolution mechanisms and appeal processes are core principles of good governance.³ A United Nations study on land and natural resources conflict management, carried out by the Food and Agriculture Organisation in 2002, noted that there are a range of interventions, processes and communication models, as well as a spectrum of conflict resolution approaches. It identified that terms such as ‘mediation’, ‘consensus building’ and ‘assisted negotiation’ were used interchangeably and commented on the lack of shared understanding about the concepts and processes employed amongst the myriad of models applied to resolving conflict. It identified, as a matter of particular concern, that there is a lack of rigour in standard setting and training, and noted the need for greater analysis, including case studies, of the effectiveness of the match between dispute resolution models and the range of disputes.⁴

This is also the case in Australia where the emphasis of the amended *Native Title Act 1993* ('NTA') is on agreement making, maximising 'outcomes' through non-adversarial and collaborative alternative dispute resolution mechanisms such as facilitation and mediation.⁵ Native title disputes can encompass an extraordinarily complex set of circumstances and require consistent and coherent 'best practice' approaches from the dispute management professionals involved, Indigenous or otherwise. The broad practice of mediation, including that arising under the NTA, has been characterised by great diversity in approach and outcome. There is little agreement between practitioners as to what constitutes a 'best practice' approach and how such approaches are affected and shaped in Indigenous contexts. Under the rubric of 'mediation' and 'facilitation', Indigenous peoples have been subjected to a variety of dispute management and decision-making processes ranging from highly structured adjudications through to unstructured casual conversations.

Stakeholders and service providers do not seem to have a set of shared understandings and expectations of mediation and facilitation processes and, what they can and should deliver. The difference between the range of processes and their consequences are often not clear either to those managing proceedings, or to others involved in and affected by the proceedings. It is also important to recognise that, on the whole, dispute management and facilitation professionals have not been Indigenous peoples and this has procedural ramifications for Indigenous parties. Indigenous peoples have not been passive in these processes, and, in many instances, their agency has transformed the processes as they have asserted their rights to be active players in the management of their own decision-making and disputes. However, those implementing the processes have often been frustrated by such independent action, seeing it as a negative force which impedes progress, rather than recognising it as legitimate and influenced by Indigenous values and imperatives.

It is not surprising that complex, contradictory and unworkable processes that impact on and exacerbate conditions of poor governance and fundamental pressures and tensions within Indigenous groups are sometimes implemented. These processes often ignore the power relations that exist within and between Indigenous groups and with broader 'non-Indigenous' communities. The consequent de-stabilisation of existing structures, including Indigenous decision-making and dispute management mechanisms, is a cost borne by Indigenous peoples. The failure of processes often results in the problematising of Indigenous peoples and Indigenous practices. It can lead to the perception that Indigenous peoples are 'always fighting', rather than to the recognition that it is inappropriate processes that are the source of difficulties. It also encourages the idea that disputes between Indigenous peoples are the principal obstacle to achieving native title outcomes and agreements. This ignores the fact that there are disputes within and between other stakeholder groups, including Governments, NTRBs, the National Native Title Tribunal ('NNTT'), mining companies, local farmers and pastoralists and others, which also impede agreements.

While disputes are more likely to arise when due process has not been followed,⁶ 'due process' in the uncertain native title environment is often ill defined. Time pressures often mean 'undue' haste and key actors in decision-making processes may be overlooked. There are a range of research reports, including Connection Reports, which require careful management. They may be perceived to favour the merits of particular applicants' assertions of claim. This then becomes the focus of debate and argument around membership of the native title group and whose name should be on the list. Rather than an over reliance upon research reports prepared by anthropologists, librarians, historians and archaeologists for the NNTT, NTRBs or the Federal Court, it would be more appropriate to consider the merits of facilitating the decision-making of those Indigenous peoples whose needs, rights and interests are involved.

Legal and bureaucratic priorities have increasingly come to dominate Indigenous lives. A culture of often ineffective meetings has, in some areas, become endemic as Indigenous peoples are required to attend an increasing number of forums to which considerable funds are often committed. It can be the case that the effort expended in the logistics of meetings – in travel, accommodation and food – exceeds the energy which is invested in the facilitation of decision-making, ensuring appropriate representative structures and clearing up misunderstandings about legislative requirements.

Indigenous communities and NTRBs do not live and operate in an environment of constant disputation. However, under s. 203BF(1) of the *NTA*, they do have dispute resolution functions, including facilitative functions under s.203BB. These relate to ‘the conduct of consultations, mediations, negotiations or proceedings about native title applications, future acts, indigenous land use agreements, rights of access conferred under this Act or otherwise or about any other matter relating to native title or the operation of the Act...’.⁷ NTRBs also have certification functions under s.203BE. Applicants must be authorised by all the persons in a native title group via a process of decision-making according to ‘traditional laws and customs’ or via other ‘agreed’ processes (s.251B). Another area for dispute concerns the role of NTRBs in establishing Prescribed Bodies Corporate, the names of which and ‘the groups they conjure’ becoming the ‘focus of conflict’ for many native title groups.⁸

NTRBs have a wide range of responsibilities and work in a challenging environment. This research is aimed at enhancing their capacity to perform their functions; any enhancement of NTRB capacity can only serve to enhance broader Indigenous capacity.

What is this Thing Called Alternative Dispute Resolution (‘ADR’)?

In Australia, as noted earlier, the emphasis of the amended *NTA* is on agreement making and maximising ‘outcomes’ through non-adversarial and collaborative alternative dispute resolution mechanisms such as mediation and facilitation. ‘Facilitation’, ‘mediation’, ‘conciliation’, ‘negotiation’ and ‘arbitration’ are all terms which are mentioned, though not clarified, in the *NTA* and which are used interchangeably by native title stakeholders and some practitioners in describing their procedural approaches. All practices are included under the rubric of ‘Alternative Dispute Resolution’ or ‘ADR’. The National Alternative Dispute Resolution Advisory Council (‘NADRAC’), whose role it is to advise the Commonwealth Attorney-General on ADR, categorises ADR as a way of resolving a dispute without the need for a judicial decision and which may be facilitative, advisory or determinative in nature.⁹

In our research, we emphasise the *management* rather than the *resolution* of disputes in the understanding that not all disputes may be resolved in the sense of a final determination or agreement. Indigenous communities may need to make decisions and continue doing business whilst effectively managing their disputes. It is important to recognise that many Indigenous groups already put their disputes temporarily aside to work towards a common goal.

A focus of this research will be to produce a set of definitions for ADR processes in the Indigenous context, as well as to explore terminology such as ‘intra-Indigenous disputes’, ‘representation’, ‘consensus’ and ‘informed consent’. The research focuses on mediation and facilitation as the primary dispute management mechanisms currently implemented in relation to disputes involving Indigenous peoples. The key difference between these terms is that mediation is an intervention into a dispute whereas facilitation does not presuppose a dispute. Facilitation is a process that can be used for the purposes of problem identification, planning, education and learning, as well as dispute management.

NADRAC definitions, which draw extensively on the work of Alison Taylor, Chris Moore and Jay Folberg, are generally accepted by mediation practitioners. They define the role of the mediator or facilitator as a procedural one.¹⁰ That is, the mediator is not there to advise, make decisions or suggestions in relation to the substantive issues of the dispute. The content of the dispute is to remain at all times the sole purview of the disputants. Broad agreement amongst mediation and facilitation practitioners about definitions has not translated into an agreed approach or into any binding national standards for mediation or facilitation. There is also considerable variation between what practitioners say and what they do.

The issue of standards has been subject to considerable scrutiny by NADRAC, which has identified that where ADR is mandatory, as is the case with mediation under the *NTA*, there is a greater need for standards.¹¹ However, in seeking to develop a framework for ADR standards, NADRAC has suggested that the diverse context in which ADR is practised leads to a 'diffusion of responsibility for standards development' and means that a 'single set of standards' across all ADR sectors is 'unlikely'.¹² This lack of standards poses many problems, not the least of which is the absence of guidelines by which NTRBs and Indigenous communities might choose appropriately qualified and competent mediators and facilitators. It also leads to a set of circumstances where, under the *NTA*, dispute resolution qualifications and experience are optional for members of the NNTT. It is in this context that statutory regulation of mediation practice needs to be further considered.

A core component of ADR mechanisms is the purported preferencing by practitioners of interest-based approaches. In his book, *The Mediation Process*, Moore outlines the two main procedural approaches to dispute management as either positional or interest based. He identifies positional approaches as involving the successive taking and then giving up a sequence of positions, with the tendency to lock into positions with little interest in meeting the underlying concerns of other parties. By contrast, he argues, an interest-based approach is a problem-solving process, with the goal of finding mutually satisfactory outcomes for all parties. For Moore, interest-based approaches identify three interdependent interests that all parties are seen to have: substantive, procedural and emotional (psychological) which he defines in the following ways:

Substantive interests refer to what needs to be negotiated and are often the central focus of negotiations. They include tangible things such as rights and land, and intangible things, such as relationships and respect.¹³

Procedural interests refer to how the process of negotiation is conducted. They relate to matters such as having a fair say and to negotiations occurring in an orderly, timely and balanced manner. They also mean that the process focuses on meeting some of the mutual interests of all the parties, rather than forcing a party to agree to a predetermined position advocated by another.

Emotional (psychological) interests refer to the emotional and relationship needs of parties both during and as a result of negotiations. They relate to issues of self-esteem and to being treated with respect by their opponents. Where relationships are to continue in the future, it may be important that parties have an ongoing positive regard for each other.

To reach an agreement, interest-based processes must develop outcomes that meet, to the parties' acceptability, the substantive, procedural and emotional (psychological) needs of all parties.¹⁴ In interest-based processes, it is the role of the mediator to assist the parties in exploring and explaining how they define their interests. It is not the role of the mediator to define the interests of the parties, or to enforce one constitution of interests as the only option.

The mediator does not police what interests can be brought into the mediation. The role of the mediator is to facilitate the parties' decision-making about how they will manage the full range of issues that constitute and impact the dispute. However, some mediators and facilitators do seek to determine interests and, in some cases, to exclude them from the mediation process. This does not seem congruent with the role of mediators as neutral process managers in interest-based approaches.

It is hoped that our research will identify how Indigenous peoples constitute their native title interests and the consequences when others, such as mediators, seek to limit the ways in which they do this. Artificial exclusions or third party determinations of what constitutes appropriate issues for mediation are part of a positional approach requiring some parties (most notably Indigenous parties) to ignore the full range of their substantive, procedural, and emotional (psychological) interests in order to achieve an 'outcome' or 'agreement'.

The project aims to develop a clear theoretical framework for the relationship between decision making, representation, conflict and culture in the design of best practice dispute management systems involving Indigenous peoples. We are not seeking to articulate the perfect dispute management mechanism, as this will vary from place to place and context to context. We are aiming to identify processes that assist Indigenous individuals and groups in developing their own appropriate and mutually agreed decision-making and dispute management processes, including where matters involve non-Indigenous stakeholders.

Locating Indigenous Decision-making and Dispute Management in the Literature

Understanding Indigenous decision making processes and allowing space and time for them to occur is a key factor in achieving positive native title outcomes for all. In 1972, H.C. Coombs urged researchers to study Indigenous decision-making processes in order that they might better inform policy makers.¹⁵

During the life of the research project, close attention will be paid to Indigenous decision-making and dispute management processes in the literature.¹⁶ These processes will, as noted, vary from place to place, but some broad common principles can be identified. For example, a number of anthropologists have emphasized the importance of process to Indigenous peoples, but, as anthropologist Emeritus Professor W.E.H. Stanner pointed out, the need is to study particular processes rather than making assumptions about the 'process-in-general'.¹⁷ Things are never 'finished' in Indigenous communities. Whilst processes will vary from place to place, decision-making in most, if not all, Indigenous societies is a continuous social process which has an expectation of change, and a need for frequent affirmations of contracts and decisions.¹⁸ Decisions are not static moments. They may need to be revisited as circumstances change, and as future generations are bound by decisions which may no longer be relevant to their needs. Professor Stanner also noted that understanding the issues is critical, that choice and decisions are difficult, that Indigenous people need time to consider new ideas and alternatives, and to strike a balance between winners and losers.¹⁹

The importance of achieving 'consensus' in Indigenous Australian societies through the ongoing canvassing of all relevant views is well recorded though the meaning of 'consensus' requires careful consideration. Nancy Williams has pointed out in relation to the Yolngu in Arnhem Land, that, consensus 'should refer to the existence of general agreement in the absence of any overt disagreement'²⁰ and that '[r]eaching and forming a consensus requires work and management on the part of leaders and all people who are interested in contributing to a decision that is to be made'.²¹

Thinking and making decisions as a collective, in an extended kinship structure, entails obligation and is a 'dynamic interactive process which constitutes the corporate life of the group'.²² Kenneth Liberman has described a 'congenial fellowship' of 'verbally formulating and acknowledging – and thereby *making publicly available* – the developing account of the state of affairs which is emerging anonymously as a collaborative production'.²³

Many accounts of Indigenous dispute management processes in the literature describe explicit sometimes ritualised controlled processes in which webs of kinship relations and gender are fundamental organizing principles.²⁴ There is an emphasis on maintaining relations, on reciprocity and on retribution.²⁵ Underlying issues may not always be obvious and saving face is essential.²⁶ More recent accounts of urban Aboriginal Australia, such as Marcia Langton's, note that fighting, which may involve anger, aggression, swearing, and violence, may be based in 'traditional' values and cultural norms. In this context, some anthropologists have suggested that fighting can be a positive socio-cultural reproductive force providing a means of demonstrating 'belonging' to a 'community', and a range of relationships and needs as well as reinforcing social norms and order.²⁷

Nevertheless, fighting, where it involves violence, is perceived as a problem by many members of Indigenous communities. Violence is illegal in many cases, it may be random, alcohol-related, and not part of any clearly defined 'community' processes of control. From the point of view of this research, we would look to the need for the facilitation of 'community' engagement in a process of evaluation and decision-making as to how the community wishes to deal with community interactions including those involving 'fighting'.

In order to explore decision-making and dispute management in Indigenous contexts, the Project aims to research and consider the cultural meanings of 'disputes', 'fighting' and 'consensus' and the relationship between culture, conflict, native title and identity.

Native Title, Identity, Decision Making and Disputes

A number of disputes in native title, and in land issues more broadly, revolve around issues of Indigenous self-identification. In the first instance, they almost inevitably arise out of the overarching dispute between native title holders and those who oppose their claims and who refuse to recognise the rights of native title holders to make such claims. They often concern the acceptance of Indigenous individuals as members of claimant groups which are seen as categorically defined, bounded and non-negotiable and the relative merits of overlapping and competing claims. Indigenous 'laws', 'customs' and 'tradition' are a resource in this dynamic. The meanings of the terms are contested by all stakeholders in a legislative regime which seeks their authentication and to determine levels of groupings.

The need to define groups categorically does not account for differentiation within and across groups. It creates a fertile climate for disputes concerning who has the greater claim or authority over the country and the appropriate grouping to which native title should be attributed. Tradition is invoked in establishing land-based authority²⁸ as part of a rhetoric of Indigenous 'representativeness'.²⁹ Native title provides many claimants with the first opportunity to assert ownership of land and may be the only opportunity for them to express the deep hurt they have embodied as a result of colonisation. It is often seen as the only vehicle for achieving recognition and respect, and any insistence upon extinguishment of native title denies this urgent need.

There may also be a mismatch between Indigenous expectations of what native title can deliver and what is possible under the *NTA*, as well as a considerable lack of clarity surrounding the legislation. This creates a climate of local uncertainty which can also provide grounds for disputes, especially if individual grievances are played out through the native title dispute.

In native title, Indigenous peoples are left to compete over the scraps of a landscape once entirely theirs in search of individual and group recognition within a complex legal, social and commercial environment. They often bring their whole beings to the native title processes including old but still seeping wounds, historical arguments, inter-generational trauma, internalised pain, and the effects of community violence and alcoholism.³⁰ Intricate, multi-layered and multi-directional interpersonal, family, and ‘community’ dynamics are overlaid by, and interwoven with, complex and sometimes substantially financially rewarding commercial negotiations. Private tensions may be publicly aired in mediations and in court processes. If not appropriately managed, ‘low-key rivalries and unspoken grievances’ may be transformed into ‘serious dispute “business”’.³¹ Indigenous peoples may appear to be ‘invoking elements of disputes’ as part of a ‘specific practical, oppositional positioning’ which seems to be historically unrelated to the native title dispute but which may be critical to the understanding of its dynamics.³² In interest-based ADR processes, it is important to remember that the entirety of how a disputant constitutes his or her interests, including apparently unrelated elements, must be included in the dispute management processes.

Native title processes are often responsible for introducing or exacerbating uneven regimes of recognition of Indigenous relationships by the dominant legal system. Under the *NTA*, ‘native title holders’ must be able to trace ongoing connections to country through ancestors who were on the land at the time of the first non-Indigenous contacts and to demonstrate that they ‘own’ the land according to ‘traditional’ laws and customs. However, a history of dislocation and dispersal under government policies has meant that many Indigenous peoples across Australia, including members of the ‘Stolen Generations’, have been removed from their ancestral countries. Relocated to missions, government settlements and other institutions, significant numbers of these people are uncertain of their original ancestral connections, and unable to meet legislative requirements. People may not always find it easy to return to the areas from which they were removed, and they may not be readily accepted into the groups who live there. In a number of instances, they have formed closer ‘historical’ ties to the regions to which they were relocated, rather than ‘traditional’ connections to their ancestral country as required by the *NTA*.³³ In native title processes, ‘native title holders’ are often seen to constitute the appropriate agreement-making group to the exclusion of ‘historical’ people with whom they may have close family ties, or have lived for many years.

The challenge for all involved including NTRBs is to secure appropriately constituted groups who are authorised and able to make informed decisions within budgetary constraints. The manner in which native title rights and interests are defined, and groups are constituted can also sow the ‘seeds of conflict’, as Peter Sutton has noted.³⁴ As an example, broadly defined regional native title systems can overlook specific localised and individualised rights and interests as representatives of the broader group are seen to have an equal say in making decisions about matters which may not be their primary concern.

A number of writers have argued that native title ‘provide[s] new settings for the playing out of old tensions’.³⁵ Whilst this is certainly the case, native title also creates new tensions as the geographical dimensions of Aboriginal sociality have considerably broadened and as applicants are asked to consider unprecedented development projects.³⁶ Decision-making often takes place in highly legalised and bureaucratic processes which are increasingly difficult for Indigenous peoples to influence. The time constrained, multi-agenda driven meetings whi

many Indigenous peoples experience today and in which they are required to make decisions are significantly different from the conditions which Liberman describes above.

A lack of clarity, including on the part of legal practitioners, about the parameters, responsibilities and likely determinations of the *NTA*, creates a climate of uncertainty, which may exacerbate disputes. There are often no procedural precedents for Indigenous peoples in negotiating and making decisions about projects which involve large amounts of money, considerable infrastructure and complex commercial negotiations, the consequences of which can be impossible to predict. Although there is evidence that large regional groups of Indigenous peoples have made collective decisions in the past, the members of native title holder groups required to make decisions today may find collective decision-making challenging. They may be unfamiliar with each other; some may be meeting for the first time, and the groups may not be characterised by the close regional social and cultural kin ties that constituted regional decision-making groups in the past.

Unless there is appropriate facilitation of decision-making processes, there can be considerable distress which, at times, can harden into animosity and group feuds. Individuals may perceive that they are excluded by inappropriate structures and processes and experience these as direct attacks on their identity. This can be a cause for shame, the effects of which often ripple across wide-ranging Indigenous networks.³⁷ Native title places demands on Indigenous peoples to frame their identities in particular ways and this can be a source of significant conflict.

In order to be effective in managing native title issues, there is a need for a far better understanding of the meaning of conflict in Indigenous communities. In our research, we emphasise the need for theory and practice to be mutually informing, and aim to engage both native title practitioners and researchers in a dialogue with the goal of achieving practical and meaningful outcomes. For this to occur, we need to develop a theoretical cultural framework, which sees 'culture' not only in terms of 'Indigenous' and 'non-Indigenous' differences, but also in terms of the range of differentiations within and between Indigenous groups. Achieving accepted definitions and theoretical frameworks for culture is extraordinarily complex, and is the subject of much debate amongst cultural theorists. It is far easier to say what culture is not than to say what it is. Nevertheless, it is important to develop a theoretical approach which can inform the practice of mediation and facilitation.

The Consideration of 'Culture' in Frameworks for Negotiating Process

'Culture' is forever in a state of 'becoming', embedded in an interplay of power and identity construction and emerging out of the conditions in which it finds itself.³⁸ Culture is not a list of 'things' or behaviours or ideas that can be ticked off lists and scored out of ten. The individual is a complex site of cultural, social, economic, environmental, temporal and historical production. Attempts to theorise Indigenous relations and difference tend to emphasize the primacy of 'culture'. In so doing, they often employ binary oppositions or approaches, including domain theory. These approaches imply bounded and discrete cultural groups, and give rise to problematic terms such as 'intra-Indigenous', as if the Indigenous world is untouched by any 'outside' forces including those emerging from the *NTA*. Problems also arise when cultural issues are discussed in the mediation literature where references to 'cross-cultural', 'bi-cultural' or 'inter-cultural', also mostly imply bounded and discrete 'sides' along with a concomitant sense of certainty.³⁹ The view that mediation occurs between homogeneous groups (whether 'black' and 'white', or between different families or clans and so on) does not account for the many inter-relationships and interconnections between people, or for the range of differentiations within the group.

Nevertheless, bounded 'cultural' groups are fundamental to legislative frameworks such as the *NTA* and are often imposed upon Indigenous peoples, even when this is not how they would necessarily constitute themselves. This creates particular problems for the Indigenous individual who is located in dense and complex networks of kin and connection, often extending to non-Indigenous Australians, and where there is an almost universal tension between autonomy and relatedness. It also creates problems for the mediator in ensuring that all interests within and beyond 'the group' are accounted for and challenges the notion of discrete 'parties' to a dispute.

We believe that it is important not to fetishise or mystify cultural difference. There are a number of problems with commonly used but poorly comprehended expressions such as 'culturally appropriate' and 'culturally relevant'. Recently, the Harvard Project on American Indian Development has also introduced the term 'cultural match'.⁴⁰ In employing these terms, we need to avoid the compartmentalisation of culture from other factors which shape Indigenous lives and which also include class, economic and educational status, gender, age, personality, preferred lifestyles and locality. In addition, terms such as 'culturally appropriate' and 'culturally relevant', imply a check list of typified cultural practices and encourage a view which privileges a static concept of 'culture' over the dynamic inter-relationships and factors that shape individuals and which need to be negotiated by them.

We are not seeking to discard the concept of culture. Rather, we see culture as one of a number of factors that impacts on the development and implementation of relevant and responsive decision-making and dispute management systems. Difference does play a role, but it is not absolute or determined at fixed points in time and it is not solely about culture. Individuals and groups constitute their identities in multifaceted ways and do not necessarily consciously identify or articulate these as difference.

The critical need is to have a process of mapping the 'match' between models of decision-making and dispute management and their needs including the 'rights' and 'interests' of participants within such processes, including appropriate ways of organising and exercising authority.⁴¹ The focus should be on processes which are not piecemeal. They should evolve organically from the 'community' affected by the dispute, be driven by that 'community' and be relevant and responsive to their needs which will vary considerably from context to context, and over time. This stands in marked contrast to processes which are not driven locally and which continue to rely upon repeated external interventions by 'experts'. In some cases, those affected by a dispute may determine that external intervention is the most appropriate. It will remain vital however that any experts engaged negotiate agreed processes with the parties to the dispute. Concepts of social cohesion, self-determination, Indigenous capacity and the recognition of Indigenous law are fundamental to negotiating an agreed process with Indigenous parties.

Perspectives on Designing Dispute Management in Indigenous Communities

There has been little research carried out in Australia as to as to the critical elements of responsive dispute management systems in Indigenous contexts. Of particular note, however, is the book titled *Aboriginal Dispute Resolution*, by Indigenous Professor and lawyer, Larissa Behrendt,⁴² and the use of the works of Edward T Hall⁴³ by mediation practitioners in Australia.⁴⁴ Both Behrendt and Hall rely upon binary oppositions, which, as noted previously, is problematic. However their work is included here as it informs mediation practice in Australia.

Behrendt's book, which has become a standard text, has been drawn on by a number of organisations in their thinking about dispute system design, including the NNTT. In parallel to a schema developed by Hall, she suggests that it is important to consider 'differences' between the 'traditional' values of Aboriginal people and those of non-Aboriginal Australians. Hall argues that all cultures encode and decode information and communication in a variety of different ways. He ascribes a range of values to different cultural contexts such that Indigenous peoples with 'collective' cultures conform to 'high context' values, and non-Indigenous peoples with 'individualistic' values to low context ones. Many of Behrendt's 'traditional Aboriginal values' correspond to Hall's 'high context' values and his 'low context' values correspond to her 'non-Aboriginal values'.⁴⁵

Australian mediators such as Rhiân Williams, have used Hall's work to argue that a fundamental tension exists between the 'low context' value of 'time dominating', and the 'high context' value of 'focus on relationships'.⁴⁶ She argues that designing mediation and facilitation processes under extreme time constraints may significantly disadvantage the needs and interests of Indigenous disputants. This is particularly the case, since such time limited processes have usually been framed to exclude historical contexts and concerns and to instead emphasise future agreements and outcomes.

As outlined earlier, in interest-based processes, procedural needs are interwoven and interdependent with substantive and emotional needs. Anything that impacts on procedural acceptability will have a concomitant impact on the parties' perception of how their substantive and emotional needs and issues are being dealt with. What is fair, respectful, or inclusive for one group may not be the case for another. So how then do mediators and facilitators design processes that accommodate the range of needs, including cultural needs, that parties bring to the negotiating table? The starting point is to recognise that the process itself is the first site of negotiation and that there are differences which will impact on the process.

In order to be effective in 'intercultural' settings it has been suggested that mediators and facilitators need to have a high degree of comfort with ambiguity as well as the ability to create an inclusive communicative framework to enable the fullest participation of all parties.⁴⁷ A genuinely inclusive process demands the recognition that process design cannot be assumed to be culturally neutral, and that preferencing a particular procedural approach may significantly advantage the needs and interests of one group over another. It is also critical that mediators and facilitators recognise that they, themselves, are the product of many forces including cultural ones, and that this has consequences for the imperatives that shape the design of their dispute management process. Mediators and facilitators need a self-reflexive approach which works to make explicit the logic of their procedural approaches so that all stakeholder groups can engage in the negotiation of a mutually acceptable, relevant and responsive process.

Developing a Coherent Logic for Process Design

Although dispute management practitioners use a common language of process, the logic underpinning their process design seems to vary enormously. Laurie Nathan from the Centre for Conflict Resolution, at the University of Cape Town, in South Africa, writes on the use of mediation in African civil wars. He identifies that mediators very often deviate from 'the logic of mediation' and make procedural errors. In doing so they '[f]requently heighten the suspicions, fear and anger of the beleaguered disputants and are consequently ineffective if not counter-productive'.⁴⁸ Nathan's 'logic of mediation' is built around '[s]ix strategic principles: mediators must not be partisan; the parties must consent to mediation and the appointment of the mediator; conflict can not be resolved quickly and easily; the parties must own the settlement; mediators must be flexible; and mediators must not apply punitive measures'.⁴⁹

Central to Nathan's argument is the premise that conflicts cannot be resolved quickly and easily. The extreme time constraints of many dispute management processes is often justified on the grounds that parties are busy, it is expensive to bring people together and it is important to move quickly to reach agreement so as to not hold up economic development, government or industry schedules. Such processes, however, do not allow time for parties to explore the full spectrum of their issues. If agreements are achieved they frequently break down because they are not reflective of the full range of realities confronting the disputing parties. When agreements break down, those involved lose face and power and are problematised as agents of authority. They often blame each other instead of analysing the process that led to the breakdown. Furthermore, any breakdown and loss of face becomes part of the relationship between the parties that needs to be resolved.

In native title disputes, where the history is often one of colonisation and dispossession, certain groups may feel more strongly than others about the historical relationship. Processes that exclude historical contexts, and instead emphasise future agreements and outcomes are prioritising one party's interests over another. Whilst it can be argued legitimately that mediation is about reaching agreements about what *will* be done, it must also be acknowledged that, for many stakeholders, there is a need to explain and seek acknowledgment of what has gone before. Unless there is an opportunity to do this, there may be vital elements missing from any agreement or settlement. As Nathan identifies, this push for settlement often becomes a manifestation of '[q]uick fix' strategies that reflect little appreciation of the difficulty of achieving reconciliation and little familiarity with the intricacies of local dynamics and culture.⁵⁰

Nathan sees conflicts as complex things that may involve '[a]pparently irreconcilable interests and values, exacerbated by intense mistrust and by competition over scarce resources, and which defy simple solutions.'⁵¹ He also notes that 'the degree of complexity (of disputes) rises considerably where the conflict has a national character, the adversaries believe that their physical or cultural survival is at stake, there are multiple disputants and divisions within their ranks, large scale violence has already occurred and the principal causes of the conflict are structural.'⁵²

Whilst Nathan is referring to conflict on the scale of civil war, much of what he argues is also relevant when considering native title disputes. Nathan sees the resolution of conflict as an exercise of power. The mechanisms used for resolution are themselves reflective of the power of and within the groups involved, as are the issues that make it to the mediation table. The mediator can also exercise significant power, both legitimately and illegitimately. Nathan argues that, in the African context, the United Nations has blurred its enforcement and mediating roles. This results in mediation processes becoming an exercise of power by the UN over participants rather than the participants being assisted to resolve their disputes by a non-partisan and non-authoritative body.⁵³

A number of writers have questioned whether mediation is appropriate when there are significant power imbalances between the parties or where one party is significantly advantaged by the application of a mediation process. In Australia, the *NTA* structurally positions mediating bodies such as the *NNTT* and *NTRBs* to exercise power over stakeholders through control over time and resources.⁵⁴ It locates Indigenous law as something which has to be proven within the common law and whose existence has to be embraced by non-Indigenous stakeholders in order for it to be legitimate, whereas the legitimacy of the non-Indigenous law is at all times taken for granted. The *NTA* also determines what is considered appropriate for the mediation process. However, this does not necessarily match the manner in which

Indigenous peoples constitute their native title interests, including the full range of their substantive, procedural and emotional interests. It is also arguable that the notion of distinct 'parties' required by mediation may be inappropriate in Indigenous contexts where a range of kin and other social and cultural relationships intersect the dispute.

Fairly and appropriately balancing the needs and ways in which native title stakeholders construct their interests is an extraordinarily challenging responsibility for mediators. It requires recognition of the 'time urgent' environment in which all parties are operating, and of the fundamental importance of assisting parties to re-negotiate and manage ongoing relationships. It also requires recognition of the power relations between parties. Nathan's six principles as described above provide an integrative theoretical framework for evaluating dispute management processes and for uncovering hidden procedural biases. They also provide a useful reference point for Indigenous communities in considering the design of localised dispute management approaches. His principles also pose considerable challenges when considering the design and implementation of mediation in the native title context where, for example, mediation is not a voluntary process.

Issues in Mediation Practice

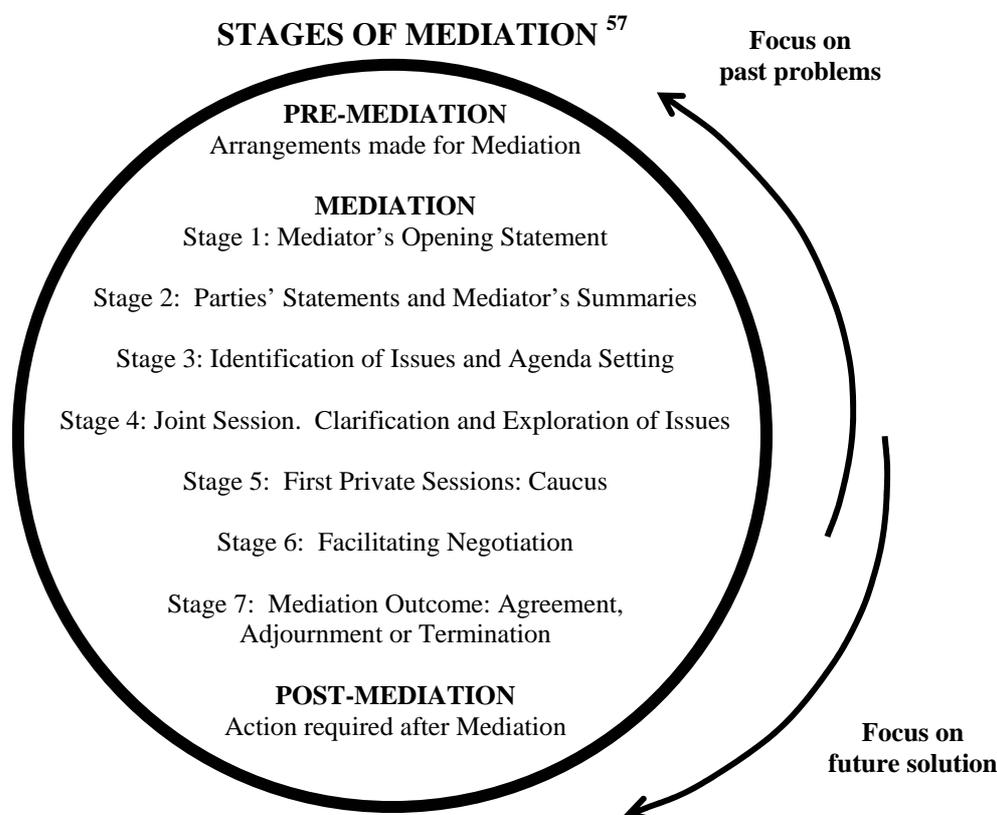
Nathan sees mediation as specialist expertise which can assist disputing parties to deal with the 'pathology of memory' and achieve meaningful and lasting agreements.⁵⁵ With its emphasis on flexibility and on encouraging ongoing relationships, mediation would appear to be well suited to Indigenous communities. The former Director of the Queensland Dispute Settlement Centres, Margaret O'Donnell, notes that 'Aboriginal people have responded enthusiastically to a procedure which resembles more, in its origins, traditional dispute resolution processes within Aboriginal society, than western legal traditions.'⁵⁶

Broadly described, the process of mediation is usually described in terms of three distinct phases which are shown in the Figure below.

Phase One is pre-mediation preparation, often referred to as 'intake'. This involves either the mediator/s or a separate intake worker assessing with each party, separately, the suitability of the matter for mediation, and making appropriate arrangements for any mediation.

Phase Two is the mediation process proper. Mediation steps usually involve mediators and parties meeting jointly. After an introductory step where the process is explained, and any procedural ground rules are established, the parties are asked to outline their issues and concerns. These are then summarised and condensed to an agreed agenda of issues which are discussed in turn by the parties. Mediators often use caucusing or private sessions when the exploration of issues has reached a point where a focus on future resolution seems appropriate. Following on from caucus, mediators usually facilitate negotiation between the parties about ways of resolving the dispute. Resolutions or agreements may be in either a written or verbal form.

Phase Three, the post mediation follow-up phase, is highly variable and may not be employed by all mediators. Where it does occur, it involves post-mediation evaluation of the effectiveness and durability of agreements, and ongoing monitoring and assistance where agreements have broken down.



There is considerable variety in the models of mediation employed amongst practitioners. Academics writing on dispute resolution, such as Hilary Astor and Christine Chinkin, have argued that 'the practice of mediation does not mean simply learning and applying a procedural template to all disputes'⁵⁸ and that 'any attempt to suggest a rigid prescriptive definition is undesirable'.⁵⁹ However, some mediation agencies, such as the New South Wales Community Justice Centres and the Victorian and Queensland Dispute Settlement Centres, see a clearly defined and articulated 12-step process of mediation as central to their effectiveness as mediation providers.

Very little analysis exists as to the specific effects of each stage and phase of the mediation process. There is even less research in relation to the effects on and the requirements of Indigenous disputants. Preparation for mediation is often much more challenging in matters involving Indigenous disputants because of the critical need to ensure that appropriate decision-making and representational processes are in place. This can be time consuming and expensive, and it can be difficult for the mediator to assess whether it has been achieved. The mediation proper also poses challenges for the mediator, not the least of which may be the perception that many of the issues raised are not relevant to the matters that need to be resolved. There can be an intense pressure on mediators to achieve settlement and to exclude parties and interests in order to achieve that settlement. Finally, there may be very few resources available to support mediators or others in following up matters from a mediation. Indeed, it is likely that follow-up only occurs when an agreement breaks down, rather than as a pro-active, preventive measure.

Identifying and articulating the key principles underpinning the stages and steps in models of mediation and their relevance to Indigenous peoples will be a focus of this research. In considering how the practice of dispute management, and in particular mediation, is appropriate to the cultural and social dynamics of Indigenous groups, a number of writers have identified five main areas of possible concern. These include the concepts of mediator neutrality, the confidentiality and voluntariness of the mediation process, the potential for mediation to undermine the authority of Indigenous peoples and traditional dispute resolution mechanisms, and the nexus between violence and disputes and the difficulties this poses for mediators.

Mediator Neutrality

Whilst the concept of neutrality is central to most definitions of mediation, it is also recognised as inherently problematic. Debates have primarily centred around whether it is possible for Indigenous peoples to be neutral and impartial rather than on what impacts on the neutrality of both Indigenous and non-Indigenous mediators.⁶⁰ Of greater concern, as Indigenous mediator and facilitator, Kurt Noble identifies, is the expressed need of Indigenous communities that mediators be neutral.⁶¹ Our research will explore how to establish appropriate procedures by which impartial, fair and mutually acceptable mediators - Indigenous or otherwise - are chosen. We will also investigate Indigenous concepts of impartiality and neutrality and how such concepts impact on both Indigenous and non-Indigenous practitioners.

Confidentiality

There seems to be some uncertainty in the mediation setting as to whom confidentiality provisions apply and how they are to be applied in Indigenous contexts.⁶² The issue is a point of divergence amongst mediation practitioners. Some see confidentiality as applying only to the mediators; others see it as applying to both parties and the mediators. In mandated mediation processes such as under the *NTA*, confidentiality may or may not apply to parties and does not apply to mediators as a result of their reporting responsibilities.

Our research will explore to whom confidentiality provisions should apply and the consequences, particularly for Indigenous peoples, of treating confidentiality as a procedural parameter either for negotiation between the parties or for *a priori* imposition by the mediator.

Voluntary Nature of Mediation

The voluntary nature of mediation is also a point of divergence amongst mediation practitioners. Nathan sees that 'the voluntary and consensual nature of mediation is so widely endorsed at the level of discourse and prescription that it can be regarded as a defining feature of the process'.⁶³ Others argue that '[i]t is simplistic to define mediation in terms of a rigid, voluntary/involuntary distinction and that in practice only the outcome of mediation is voluntary'.⁶⁴

It is sometimes pointed out that Indigenous disputants are required, pressured or directed by family members and by respected authoritative members of the 'community' such as 'Elders' to attend mediation. However, this pressure is not unique to Indigenous Australians.⁶⁵

Our research will identify who, if anyone, should have the power to compel parties to attend mediation. The consequences of any elements of compulsion, and whether there are differences when the mediation process is proposed for disputes among Indigenous peoples or as a process of dispute management between Indigenous and non-Indigenous parties will also be considered.

Maintaining the Authority of Indigenous Peoples in Dispute Management Processes

The importance of ‘preserving the prerogatives of Aboriginal authority’ including Indigenous law cannot be over-emphasised.⁶⁶ Authority within Indigenous communities is contextual, derived in various ways, and is not solely vested in ‘Elders’. Many writers have, however, identified the importance of maintaining the role of ‘Elders’ and of not undermining existing Indigenous dispute resolution mechanisms.⁶⁷ Critics such as Scott Beattie, also question whether ‘[i]n training Aboriginal mediators, we may be destroying what remains of traditional wisdom in the area of conflict resolution.’⁶⁸

A core component of our research will be to identify the range of dispute management processes currently utilised by Indigenous peoples, the ways in which those mechanisms support and complement the authority and role of appropriately authorised decision-makers, including ‘Elders’, how external bodies and individuals interact with those existing structures, and the impact of those interactions.

Violence

The nexus between violence and dispute poses many difficulties for mediators. The NADRAC discussion paper, *Fairness and Justice in Alternative Dispute Resolution*, comments that ‘it has been said that the most common problem in Indigenous communities is conflicts within families and extended families, and that they will often involve some degree of ... violence.’⁶⁹ Writing on the use of mediation in post-colonial contexts, Nathan notes that many people may not see any option to violence as a means of dealing with a dispute. For Nathan, violence is an inherent component of many disputes and cannot be artificially excised from them. He is not arguing that violence is a legitimate means of dealing with a dispute, but rather, that, in dealing with a dispute where violence is involved, violence is a substantive matter that needs to be managed within the mediation process.⁷⁰

Non-Indigenous approaches to violence tend to emphasise individual responsibility and are at odds with communal decision-making and responsibilities and obligations to complex networks of kin. The critical point here is not that mediation is to be used as a response to acts of individual violence. Rather, the issue is whether mediation can be a means through which individuals, as part of complex networks, can discuss the consequences of that violence for the broader society as well as ways of reducing, minimising or eliminating violence. This recognises that the effects of individual acts of violence are not just restricted to the individuals involved and that there is a greater ‘dispute’ which concerns the effects of violence on the broader ‘communities of interests’ to which those individuals belong.

In this context, mediation can be seen as complementing legal approaches, not standing as an alternative to them, and appropriately modified and developed dispute management processes can be useful in facilitating discussion around and formulating ‘whole of community’ and ‘whole of family’ approaches to violence issues.

In addition to these five main issues, we hope to explore the differences between models of sole and co-mediation, including how determinations are made as to the appropriateness of mediators, as well as the parties' perceptions of the mediation process. Other research issues concern the impact on the process of the mediator's gender, whether he or she is Indigenous, and/or 'local', and/or of Torres Strait Islander or Aboriginal descent. A further research priority is to identify the impact of third parties such as lawyers, experts and representatives who speak on behalf of those whose interests and rights are being negotiated, and strategies for managing them effectively within the mediation process.

Conclusion: Indigenous Capacity in Managing Decision-Making and Disputes

Swedish academic and writer on dispute resolution, Nils Christie, has argued that disputes are the property of those in dispute and should not be stolen by the state or by other external bodies or individuals.⁷¹ Indigenous peoples have been managing their own disputes and making their own decisions for thousands of years and have the right to continue to do so.

Indigenous organisations operate in an extraordinarily demanding environment, in which much of their daily business is about meetings and decision making processes. NTRBs in particular, have a range of dispute management responsibilities which include disputes between native title holders, or between native title holders and other organisations. They also extend to disputes amongst staff members, or within and between sections of their organisations (between professionals such as lawyers and anthropologists and field staff for example, or between Indigenous and non-Indigenous staff). In some circumstances, the NTRB itself, or individual staff members, may be parties to disputes involving native title holders and other Indigenous organisations. It is vital that partnerships and collaborations are negotiated between and within Indigenous peoples and their representative organisations. Similarly, these matters need negotiation between Indigenous peoples and those engaged to work on their behalf including a range of experts such as researchers and lawyers. This is critical to achieving meaningful and durable outcomes.

The complex environment in which NTRBs operate requires collaborative, effective and fair processes in the development of policy, processes and strategic thinking at all levels. It is an environment that is ripe for disputes. De-escalating disputes is made more difficult when adversarial approaches are advocated by key organisational players, or when inappropriately resourced and trained staff are tasked with dealing with complex matters. Dispute management 'experts' may be engaged in a crisis management strategy, and, yet, NTRBs often have no objective criteria by which to measure their credentials. Alternatively, problems may be ignored in the hope that they will go away when often they simply fester and go underground, only to resurface some time later.

Indigenous participation in processes that are not appropriate and responsive to their needs will continue to see the significant disadvantaging of Indigenous interests. The challenge is for Indigenous organisations such as NTRBs, to review and further develop their own procedural capacities and skills in managing disputes and facilitating decision-making. This will assist their Indigenous constituencies to build on already existing skills in localised and dependable approaches in which they may voice their concerns and have them addressed.

This Project is not aimed at promoting a continued reliance on external providers of mediation and facilitation processes. Neither do we seek merely to transfer or impose mainstream programs of mediation, facilitation, arbitration or negotiation onto Indigenous peoples, an imposition against which Behrendt has also cautioned.⁷² Rather, our work is directed towards assisting Indigenous peoples and organisations to engage strategically with native title

processes in determining their own procedural agendas, and in arriving at processes which are clearly linked with other local governance approaches.

Where third parties such as mediators or facilitators are to be engaged, it is hoped that the research will provide objective criteria for measuring their credentials and the relevance of their procedural approaches. A core focus for the project will be to ensure that project learnings and outcomes are incorporated into the training of mediators who work with Indigenous peoples. The Project also aims to provide staff of NTRBs and other Indigenous peoples with the analytical tools to identify the key points at which dispute management interventions might be required, and the informed capacity to decide upon the qualities of the most appropriate practitioners.

The design and implementation of responsive, reliable and sustainable systems requires skills and training. Given that mediators and facilitators have primarily been non-Indigenous, this Project will explore the consequences of this, and the need for Indigenous facilitators and mediators who could act as trainers and mentors to other Indigenous peoples in developing their own group processes. We also aim to raise awareness of the need to resource appropriate infrastructure including vocational pathways and organisational supports for Indigenous practitioners. We would strongly recommend that this should focus on developing a national coordinated approach.

The business of process is important business. Achieving outcomes is vital. However, just as vital, if perhaps not more important, is the process that gets to those outcomes. Processes that engage individuals and communities and give them confidence in their authority are essential. Needs and solutions change but how we do business with each other always remains fundamental.

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- Williams, R. 2002. 'Negotiating process: Talking the 'how' before the 'what'', paper presented to the Transforming Land Tenure Conflict Symposium, University of the South Pacific, 10-12 April 2002.

¹ The Project is for three years and receives its core funding from the Aboriginal and Torres Strait Islander Services ('ATSIS'). The National Native Title Tribunal ('NNTT') has agreed to fund five workshops with Native Title Representative Bodies to discuss issues and assess the needs around this important public policy issue. The AIATSIS Project will complement the work of the NNTT Agreement-Making Strategy Group (AMSG) which has been investigating mediation approaches with the aim of developing a structured 'best practice' internal mediation training program. Over the life of the Project, there will be a number of opportunities for stakeholders to participate including via a Seminar Series, workshops and case studies. Feedback is gratefully appreciated and sought, in the first instance, via a Project Reference Group comprising a number of Indigenous people, and including representatives of NTRBs, funding agencies, mediation professionals and researchers, and via the Project pages on the AIATSIS Native Title Research Unit web site.

² Sahabat Alam Malaysia 2000, 'Manila Declaration of the International Conference on Conflict Resolution, Peace Building, Sustainable Development and Indigenous Peoples'.

³ S. Cornell and J. Kalt 1995, *Successful Economic Development*; S. Cornell 2002, What is Institutional Capacity?; N. Sterritt 2001, *First Nations Governance Handbook*; N. Sterritt 2002, Defining Indigenous Governance; D. E. Smith 2003, *Building Effective Indigenous Governance*.

⁴ Food and Agricultural Organisation of the United Nations (FAO) 2002, Land and Natural Resources Conflict Management Survey.

⁵ See for examples of agreements, M. Langton and L. Palmer, 2003 'Modern Agreement Making and Indigenous People in Australia: Issues and Trends'. See also Parliamentary Joint Committee on Native Title and the Aboriginal and Torres Strait Islander Land Fund 2003 *Effectiveness of the National Native Title Tribunal in fulfilment of the Committee's duties pursuant to subparagraph 206(d)(i) of the Native Title Act 1993*.

⁶ J. Munster 1997, *Dispute Management Strategies: Suggestions from the Central Land Council*, p.193. In discussing disputes and NTRBs, Munster has pointed out that Indigenous disputes are more likely to arise when 'due process has not been followed'.

⁷ Section 203BF(1)(a)(ii) *Native Title Act 1993 (Cth)*

⁸ P. Sutton 2003, *Native Title in Australia*, p. 57. See also C. Mantziaris and D. Martin. 2000. *Native title Corporations: A Legal and Anthropological Analysis*.

⁹ NADRAC 2001, *A Framework for ADR Standards*, p.114.

¹⁰ C. Moore 2003, *The Mediation Process*; p.75. J. Folberg and A. Taylor 1984, *Mediation: A Comprehensive Guide to Resolving Conflict without Litigation*, cited in ACT Competency Standards, 1995. Moore defines mediation as 'the intervention into a dispute or negotiation by an acceptable, impartial and neutral third party with no authoritative decision-making power to assist disputing parties in voluntarily reaching their own mutually acceptable settlement of issues in dispute' (p. 75). Folberg and Taylor state that 'mediation has been described as process by which the participants, together with the assistance of a neutral person or persons, systematically isolate dispute issues in order to develop options, consider alternatives, and reach a consensual settlement that will accommodate their needs' (p.1).

¹¹ NADRAC 2001, *A Framework for ADR Standards*. pp. 78-79.

¹² NADRAC 2001, *A Framework for ADR Standards*, p. 16 It is important to note, however, that the mediator's role as a procedural one with concomitant specific procedural expertise is clearly recognised by and in the ACT Competency Standards for Mediators. Whilst there are competency standards which have been developed within the requirements of the Australian National Training Authority, the ACT Competency Standards were the first standards to be developed in Australia and have been extensively incorporated into subsequent standards. They form the basis of the only legislation in Australia to regulate the practice of mediators on a jurisdiction-wide basis without regard to areas of substantive specialisation. The ACT Standards specifically state that 'while mediators may be drawn from many different sources, the core requirements to effectively conduct mediation are the same.' The standards recognise that disputes which are highly specialised, technical or complex or involving multi parties will require additional procedural skill sets such as '[m]anage the role of technical experts or advisors'. However, they do 'define the core competencies required of mediators in a wide range of settings and contexts.'

¹³ The NNTT refers to its approach to mediation as an 'interest-based approach' in a 'rights-based context'. The terminology of 'rights' and 'interests' is located in a number of competing and conflicting discourses which makes it difficult to arrive at shared definitions in the native title regime. The meanings of the terms are the subject of much debate both within and across the following three discourses. Firstly, the terms have developing legal meaning under Section 223 (1) of the *Native Title Act* which refers to 'native title rights and interests' as 'the communal, group or individual rights and interests of Aboriginal people or Torres Strait Islanders in relation to land or waters'. Secondly, there are a number of approaches to the meaning of 'rights' as they are defined at international law including that they may not be definable, that they are never identical for any one person and that they are in a constant state of flux. Thirdly, there are the meanings of the terms, 'interests' and 'rights' (and 'needs') as they are discussed within ADR mechanisms where there is recognition of two main procedural approaches: *positional* and *interest-based*.

¹⁴ C. Moore 2003, *The Mediation Process*.

¹⁵ H.C. Coombs 1972, *Decisions by Aborigines*.

¹⁶ National Native Title Tribunal (NNTT) 1996. *Mediation Review and Implementation of Recommendations*. The *Review* recommends research into the principles and features of traditional dispute resolution and how they might be used in native title disputes, p. 96.

¹⁷ Professor W.E.H. Stanner referenced in N. M. Williams 1985, 'On Aboriginal Decision Making' p.241.

¹⁸ N. M. Williams 1985, 'On Aboriginal Decision Making', p.242.

¹⁹ Stanner in N. M. Williams 1985, *On Aboriginal Decision Making*, p.240. We would make the point that there are many similarities and overlaps between these Indigenous needs and the needs of other disputants.

²⁰ N. M. Williams 1985, 'On Aboriginal Decision Making', p.243.

²¹ N. M. Williams, 1994, *Aboriginal Decision Making and Native Title* p. 111.

²² K. Liberman 1985, *Understanding Interaction in Central Australia*, p.15.

²³ K. Liberman 1985, *Understanding Interaction in Central Australia*, p.20.

²⁴ For a detailed discussion of the literature see P. Blackwood and P. Memmott 2003, *Quandamooka Decision-Making: A Report Prepared for the Federal Court*.

²⁵ See for example, L. Hiatt 1965, *Kinship and Conflict*; L. Warner 1958, *A Black Civilisation*; W.E.H. Stanner 1968, *The Boyer Lectures 1968: After the Dreaming*; M. Meggitt 1962, *Desert People*.

²⁶ N. M. Williams 1987, *Two Laws Managing Disputes in a Contemporary Aboriginal Community*, p.69.

²⁷ See M. Langton 1988, 'Medicine Square'; G. Macdonald 1988, A Wiradjuri Fight Story; Gaynor Macdonald 1990, 'Where Words Harms and Blows Heal'; M. Brigg 2003, 'Mediation, Power and Cultural Difference'.

²⁸ Finlayson, J. 1997; 'Aboriginal Tradition and Native Title Representative Bodies'. Merlan, 1996, 'Fighting over Country: four commonplaces'.

²⁹ Smith, D. 1997 From humbug to good faith? The politics of negotiating the right to negotiate' p. 105.

³⁰ P. Agius 1995, 'Dispute Resolution Prior to Application: Role of Representative Bodies'. Parry Agius has identified that an alternative dispute resolution process needs to take into account elements such as 'the social matrix system, personal relationships, community dynamics, local Aboriginal history, the history of Government intervention, Aboriginal social structures, current Aboriginal political issues, regional Aboriginal issues and peak bodies and other Aboriginal players'. He also identifies the need for crisis intervention and prevention. In identifying these elements, he reinforces our point that Indigenous people bring their 'total beings' to the negotiating table (p31).

³¹ Smith and Finlayson 1997, *Fighting over Country: Anthropological Perspectives*, p.viii.

³² F. Merlan, 1997, Fighting over Country: four commonplaces' p.12.

³³ D. Martin, 1996, 'The incorporation of 'traditional' and 'historical' interests in Native Title Representative Bodies'.

³⁴ P. Sutton, 2003. *Native Title in Australia*, p. 13.

³⁵ D.E. Smith and J. Finlayson 1997, *Fighting over Country: Anthropological Perspectives*, p.viii.

³⁶ M. Edmunds, 1997, 'Do not shoot. I am a British Object': Anthropology, the law, and native title'. p.39. Mary Edmunds has suggested that 'the material and symbolic stakes have been raised' with native title and that this has led to an increase in Indigenous conflicts over land.

³⁷ T. Bauman 2002, 'Test 'im blood': Subsections and Shame in Katherine.

³⁸ T. Bauman 2002, 'Test 'im Blood': Subsections and Shame in Katherine'.

³⁹ Eg. J. Kalowski 1996, 'In a Manner of Speaking'; C. Jones 2002, *Aboriginal Boundaries*.

⁴⁰ S. Cornell 2002, 'What is Institutional Capacity?'. D. E. Smith, 2003 'Building Effective Indigenous Governance'.

⁴¹ cf D. E. Smith 2003, Building Effective Indigenous Governance, p.7.

⁴² L. Behrendt 1995, *Aboriginal Dispute Resolution*.

⁴³ E. T. Hall 1981, *Beyond Culture*.

⁴⁴ See J. Kalowski 1996, 'In a Manner of Speaking'; R. Williams 2002, 'Negotiating Process'.

⁴⁵ Table 1 *High Context and Low Context Communication Values* (E.T. Hall 1981, *Beyond Culture*)

LOW CONTEXT (INDIVIDUALISTIC)	HIGH CONTEXT (COLLECTIVE)
Mastery over Nature	Harmony with Nature
Personal Control over the Environment	Fate
Doing	Being
Future Orientation	Past or Present Orientation
Change	Tradition
Time Dominates	Focus on Relationships
Human Equality	Hierarchy/Rank/Status
Youth	Elders
Self-Help	Birthright Inheritance
Individualism/Privacy	Group Welfare
Competition	Co-operation
Informality	Formality
Directness/Openness/Honesty	Indirectness/Ritual/"Face"
Practicality/Efficiency	Idealism/Theory
Materialism	Spiritualism/Detachment

Table 2. *Cultural Differences Between Aboriginal and Non-Aboriginal Australians* (Larissa Behrendt 1995, *Aboriginal Dispute Resolution*, p.18)

TRADITIONAL ABORIGINAL VALUES	NON-ABORIGINAL VALUES
Belief in custodianship of land	Land viewed in proprietary way
Equality with all other creatures	Superiority to all other creatures
Oral culture	Written tradition
Taught by example	Harsh disciplinarians
Reluctance to change	Openness to change
Communal	Individual
Egalitarian	Hierarchical
Co-operation	Competition
Respect for Elders	Youth oriented
Consensus	Authoritarian

⁴⁶ R. Williams 2002, 'Negotiating Process'.

⁴⁷ J. Kalowski, Personal Communication 2002. Comfort with and tolerance of ambiguity has also been a key selection criteria for Community Mediation Services such as the Alternative Dispute Resolution Division, Queensland Department of Justice, since 1990.

⁴⁸ L. Nathan 1998, 'A Case of Undue Pressure: International Mediation in African Civil Wars', p. 1.

⁴⁹ L. Nathan 1998, 'A Case of Undue Pressure: International Mediation in African Civil Wars', p.1.

⁵⁰ L. Nathan 1998, 'A Case of Undue Pressure: International Mediation in African Civil Wars', p.5.

⁵¹ L. Nathan 1998, 'A Case of Undue Pressure: International Mediation in African Civil Wars', p.4.

⁵² L. Nathan 1998, 'A Case of Undue Pressure: International Mediation in African Civil Wars', p.4.

⁵³ L. Nathan 1998, 'A Case of Undue Pressure: International Mediation in African Civil Wars', p.4.

⁵⁴ See for example M. Dodson 1996, 'Power and Cultural Difference in Native Title Mediation'. See also K. Dolman, 1999 'Mediation in Native Title: Is it Fair?'

⁵⁵ L. Nathan 1998, 'A Case of Undue Pressure: International Mediation in African Civil Wars', p.6.

⁵⁶ M. O'Donnell 1995, 'Mediation within Aboriginal Communities', p.97.

⁵⁷ R. Charlton and M. Dwedney 1995, *The Mediator's Handbook*, p.7.

⁵⁸ H. Astor and C. Chinkin 2002, *Dispute Resolution in Australia*, p.139.

⁵⁹ H. Astor and C. Chinkin 2002, *Dispute Resolution in Australia*, p.135.

⁶⁰ For a range of views see for example A. Ackfun 1993, 'Aboriginal Mediation'; K. Noble 1995, 'Mediation with Aboriginal Families'; M. O'Donnell 1995, 'Mediation within Aboriginal Communities'; C. Jones 2001, *Aboriginal Boundaries: The Mediation and Settlement of Aboriginal Boundary Disputes in a Native Title Context*.

⁶¹ K. Noble 1995, 'Mediation with Aboriginal Families'.

⁶² See for example L. Kelly 2002, 'Mediation in Aboriginal Communities'; A. Ackfun 1993, *Aboriginal Mediation*. See also M. Edmunds and D. E. Smith 2000, *Guide to Mediation and Agreement-Making under the Native Title Act*.

⁶³ L. Nathan 1998, 'A Case of Undue Pressure: International Mediation in African Civil Wars', Centre for Conflict Resolution, p.4.

⁶⁴ L. Kelly 2002, 'Mediation in Aboriginal Communities', p.7.

⁶⁵ C. Moore 2003, *The Mediation Process*, p.20.

⁶⁶ N. M. Williams 1985, *On Aboriginal Decision Making*, p.264.

⁶⁷ See M. O'Donnell 1995, 'Mediation within Aboriginal Communities'; K. Noble 1995 'Mediation with Aboriginal Families'; S. Beattie 1997, 'Is Mediation a Real Alternative to Law? Pitfalls for Aboriginal Participants'; L. Behrendt 1995, *Aboriginal Dispute Resolution*.

⁶⁸ S. Beattie 1997, 'Is Mediation a Real Alternative to Law? Pitfalls for Aboriginal Participants', p.66.

⁶⁹ NADRAC 1997, *Issues of Fairness and Justice in Alternative Dispute Resolution*, p.85.

⁷⁰ NADRAC 1997, *Issues of Fairness and Justice in Alternative Dispute Resolution*, pp.4-6.

⁷¹ Nils Christie 1977, 'Conflicts as Property'.

⁷² L. Behrendt 1995, *Aboriginal Dispute Resolution*, p.6.