Mediating Native Title – in whose interests?

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Abstract

At the Native Title Conference in Townsville on 5-6 June 2012, which marked the 20th anniversary of the Mabo decision, the Commonwealth Attorney-General and Minister for Emergency Management, the Hon Nicola Roxon MP, announced reforms that involved claims mediation moving from the National Native Title Tribunal to the Federal Court. The initiative builds on the Government's 2009 reforms, which gave the Federal Court greater control of native title mediation.

In this paper I will examine the rights and interests in the native title mediation process, and analyse whether there is another approach to native title mediation, under the rubric of alternative dispute resolution, by not being stuck on one way of doing things, per the classic Winnie-the-Pooh scenario, where Christopher Robin drags his bear down the stairs – 'bump, bump, bump, on the back of his head, behind Christopher Robin. It is, as far as he knows, the only way of coming downstairs, but sometimes he feels that there really is another way, if only he could stop bumping for a moment and think of it. And then he thinks that perhaps there isn't'.

Introduction

Is the current native title mediation process the only way to go?[2] Or are there alternative ways to meet all the parties' interests, particularly the Indigenous parties, because there is frustration within the native title mediation process as exemplified by what Lindgren J said below in his introductory summary in *Harrington-Smith v Western Australia (No. 9)*[3]:

> *"The experience of hearing the case and resolving it has exposed me to what I consider to be an unsatisfactory state of affairs in the native title area. Perhaps the heart of the problem is that the legal issue that the Court is called upon to resolve is really only part of a more fundamental political question…Several times during the hearing I encouraged the parties to attempt to find a solution by mediation. I was given to understand that mediation had previously taken place but without success. Apparently mediation continued, even following the hearing… Finally, however, mediation came to nothing and the parties informed me that a decision would be required. I do not know or wish to know why mediation failed. I will only say that it is to my mind sad that the matter has had to be resolved by an imposed solution."*

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2 In this paper when referring to mediation in the native title context, I am referring to mandatory mediation per Part 4 Div 1B of the *Native Title Act 1993* (Cth).

3 (2007) 238 ALR 1

Why is there frustration with the native title mediation process as stated by Lindgren J in *Harrington-Smith v Western Australia (No 9)*[4]; is the problem just a political question as raised by His Honour, or is the problem more do to with the mediation process itself as used in the native title context? Or is the current native title mediation process comparative to the English fairy-tale experience of Winnie-the-Pooh who kept bumping his head as Christopher Robin dragged him downstairs backwards by his heels? "It is, as far as he knows, the only way of coming downstairs, but sometimes he feels that there really is another way, if only he could stop bumping for a moment and think of it. *And then he thinks that perhaps there isn't*".

(a) Major frustration

As part of Lindgren's J 'fundamental political question' quoted above, a major frustration in the native title mediation process has been whether the state (or territory) governments take a positional bargaining approach to mediation by requiring 'proof of connection' to be established as a condition precedent to progression of mediation. Practice varies between governments, particularly in regards to the State of South Australia. This enduring problem has caused considerable frustration in the mediation process between the parties in respect of both the standard and timing of meeting evidentiary requirements.

For example government parties might argue that the fundamental requirement of the Act under s 86A is proof of connection as a condition precedent and the standard of proof required is that of the court at trial. If state/territory policies make the provision of such proof as a condition precedent to mediation, Indigenous claimants are forced up-front to at least show some type of evidentiary proof of connection, which will forearm government with their evidence ahead of possible future litigation. This issue smacks of an adversarial style of dispute resolution.

A. Native title background

Shortly after the High Court's ground-breaking decision in *Mabo v Queensland (No 2)*[5], the Federal Parliament at the time laid the foundations for the statutory recognition of common law native title rights. The preamble to the *Native Title Act 1993* (Cth) ('**the Act**') states:

> *A special procedure needs to be available for the just and proper ascertainment of native title rights and interests which will ensure that, if possible, this is done by conciliation and, if not, in a manner that has due regard to their unique character. Governments should, where suitable, promote negotiation on a regional basis between the parties concerned about:*
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> *(a) claims to land, or aspirations in relation to land, by Aboriginal peoples and Torres Strait Islanders; and*
>
> *(b) proposals for the use of such land for economic purposes.*

4 Ibid.
5 (1992) 175 CLR 1.

As a result, the Act gave the Federal Court of Australia ('**the Court**') and the National Native Title Tribunal ('**the Tribunal**') complementary powers and functions to have native title issues resolved in this less formal way.

B. Recent reforms

On 6 June 2012 the Attorney-General announced that the Australian Government will progress a number of amendments to the Act.

Some of the proposed reforms will:

- clarify the meaning of 'good faith' under the 'right to negotiate' provisions and make associated amendments to the 'right to negotiate' provisions;
- enable parties to agree to disregard historical extinguishment of native title in areas such as parks and reserves; and
- streamline Indigenous Land Use Agreement ('**ILUA**') processes. This will include simplifying the process for minor amendments to ILUAs, improving objection processes for area ILUAs and clarifying the coverage of ILUAs.[6]

As part of the reform package where claims mediation moves from the National Native Title Tribunal to the Federal Court, we need to wait and see if this will introduce a better way of doing things, or whether the proposed statutory requirements for negotiations in good faith will only limit the ability of the parties to negotiate.

In *Cox & Ors v FMG Pilbara Pty Ltd & Ors*[7], the High Court dismissed the native title party's application seeking leave to appeal the Full Federal Court decision in *FMG Pilbara Pty Ltd v Cox*.[8] The application challenged the Full Federal Court decision regarding the interpretation of the good faith negotiation requirements in the right to negotiate provisions of the Act. It has been suggested that the decision could discourage parties to actively engage in negotiations to reach broad and practical agreements. However, it could be submitted per Mansfield J in *Brown v The State of South Australia*[9] that "it would be a breach of any obligation to negotiate in good faith to use the carrot of consent to the determination as leverage to secure agreement on other matters such as a sustainable benefits term".[10]

The issue in telling parties to act in good faith in a mandated native title mediation process, so as to provide the incentives to improve the behaviour and to focus the attention of the parties and their representatives not only on the seriousness of the native title mediation process, is problematic because being told it is in their best interests to do so, will only reify their positions, because of 'Damocles sword' (the reporting process) hanging over their heads, for breaching good faith.

6 See Australian Government, Attorney-General's Department <http://www.ag.gov.au/Indigenouslawandnativetitle/NativeTitle/Pages/Nativetitlereform.aspx> at 2 July 2012.
7 [2009] HCATrans 277 (14 October 2009).
8 [2009] FCAFC 49.
9 [2010] FCA 875.
10 Ibid at 38.

C. Interest-based mediation

The native title mediation process has been touted as 'interest-based', which refers to its process as 'multi-party, cross-cultural mediation in relation to areas of land and water, using a primarily interest-based model in a rights-based context'.[11] There is no statutory definition under the Act what mediation means or entails, other than the recent requirement that the mediation must be conducted in 'good faith'. Section 253 of the Act, for example, defines an 'interest' as 'any other right…' and native title itself is referred to as common law rights and interests and statutory rights and interests: see s 223 of the Act. Section 223(1) goes on to refer 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'. What the Act fails to recognise is the nature and distribution of native title rights and interests, not only across Indigenous and non-Indigenous parties, but also among Indigenous individuals who for example may share membership of the larger native title claimant group. Often there is a 'sum of the whole' approach to Indigenous individual rights and interests, in which the rights and interests of group membership are seen to be homogenous. Where the rights and interests of Indigenous groups are most commonly conceived as against those of non-Indigenous rights and interests. Thus allowing to be unchecked the diverging or conflicting Indigenous rights and interests of individuals to be subsumed into the larger group(s); so the 'sum of the whole' approach does not necessarily mean the sum of its parts.[12]

Though the native title mediation process falls within the facilitative model, because it is interest-based, and has the main objective of trying to avoid positions and negotiate in terms of parties' underlying needs and interests instead of the parties strict legal entitlements, this model does have failings in the native title context; such as not reaching an agreed outcome, being lengthy and requiring uncommon skills from the parties, particularly the Indigenous parties.

Further, the likelihood that parties will engage in mediation that is interest-based will depend on what they see as other alternatives, such as what the Harvard school of mediation would term their BATNA – their 'best alternative to a negotiated agreement'.[13] A BATNA for the mediated reluctant party will involve an assessment of their chances of receiving a favourable outcome from a litigated determination. This is based upon the court making a determination upon the merits of the evidence placed before it, not so much the interests of the parties. It is argued that this weakens dialogue within the mediation process from an agreement outcome that is interest-based to position-based outcome, which isn't really an appropriate method for native title, as native title is about interests and rights, not about positions. For the native title mediation process to work, the parties need to talk and engage. However, the fundamental political question raised by Lindgren J in *Harrington-Smith v Western Australia (No 9)*[14]

11 Neate G, Jones and Clarke G, 'Against all odds: The mediation of native title agreements in Australia', Paper presented to the Second Asia Pacific Mediation Forum Singapore, 19-22 November 2003; see also *Native title agreement-making in Australia: a guide to National Native Title Tribunal practice* (2nd ed, 2005) National Native Title Tribunal, 13 and Chapter 2 for a fuller discussion of principles and theory in native title mediation.

12 See for example *Sebastian v Western Australia* [2008] FCA 926, in which the author gave legal advice to the smaller Indigenous group in the proceedings who were seeking an interlocutory injunction against the larger Indigenous claimant group over the same area of land, thus illustrating the divergence of interests and rights.

13 Fisher and Ury, *Negotiating an Agreement Without Giving In* (2nd ed, 1994).

14 Above n 3.

which challenges the resolution of native title is related to the current burdensome legal and substantive complexities that are resource intensive. The reality is that native title is here to stay, therefore constraining realities means native title needs to be addressed not in forced good faith, but where lasting agreements are based upon clarifying relationships and interests. To work through another way of doing things, an understanding of how things are currently running needs to be explored below, so lessons can be learned and improved on.

Suffice to say that what happens at any mediation will be significantly influenced by the mediator's style and limitations,[15] and it follows that mediators must be effectively trained and mediation practice must be regulated through adoption and maintenance of suitable and sustainable standards and codes of ethics.[16]

The issues surrounding the title of this paper, 'Mediating Native Title – in whose interests?' will be broken down under the following main headings: Mediation – in what context?; What is being mediated?; and What are the interests?

Mediation – in what context?

It can be put that Indigenous people live in two intersecting worlds, western and traditional, with neither fully capable of dealing with disputes involving Indigenous people. Purely western concepts of alternative dispute resolution are often incompatible with the culture of Indigenous people and thus fail to meet many of their interests and needs. Likewise, purely Indigenous concepts of alternative dispute resolution have also been found incompatible for present-day urban Indigenous people, because of European colonisation, thus weakening many traditional ways of resolving disputes between Indigenous people.[17] Professor Larissa Behrendt has also stated that in disputes between Indigenous and non-Indigenous people, the application of western concepts may work against Indigenous needs and perpetuate disadvantage.[18] Therefore it is important that mainstream dispute resolution programs recognise these issues and adjust their practices accordingly, as 'another way' of doing things and, in doing so, promote culturally sensitive interest-based agreements with Indigenous parties participating in the native title mediation process. Suffice to say that in the native title area, the Tribunal and the Federal Court have undertaken initiatives to improve their mediation practices. However, there are limits to the Federal Court being sensitive to Indigenous culture. Because the native title mediation process is governed by statutory requirements requiring parties to use mainstream services, courts or tribunals, and these mainstream services don't just target Indigenous parties. As a result, courts and tribunals do not always meet Indigenous interests, particularly in the native title mediation process.

15 For example, see Cobb S, 'Empowerment and Mediation: A Narrative Perspective', (1993) *Negotiation Journal* 245-55.

16 See Kurien G V, 'Critique myths of mediation' (1995) 6(1) *ADRJ* 43-57; Zilinskas A, 'The Training of Mediators -- is it Necessary?' (1995) ADRJ 58-69.

17 National Alternative Dispute Resolution Advisory Council, *Indigenous Dispute Resolution and Conflict Management*, January 2006, 3.

18 Behrendt L, *Aboriginal Dispute Resolution* (1995).

D. Western Concepts

The National Alternative Dispute Resolution Advisory Committee ('**NADRAC**') has described mediation as follows:

> *'Mediation is a process managed by a dispute resolution practitioner called a mediator. The mediator assists participants to present points of view and facts. They also assist participants to identify the disputed issues, develop options and try to reach an agreement. The mediator does not give advice or make a decision on the facts of the dispute or its outcome. They may give advice on or choose how the process of mediation is conducted. Mediation may be undertaken voluntarily, under a court order, or as part of a requirement in an existing contract.'*[19]

The above description allows diversity in how mediation is practiced, and allows one to analyse how native title mediation is being practiced. Laurence Boulle speaks about four (4) models of mediation, they being *settlement, facilitative, transformative* and *evaluative* models. These models provide a starting point and 'are referred to as paradigm models in that they are not so much discrete forms of mediation practice but rather ways of conceptualising the different tendencies in practice'.[20]

In the native title mediation context, the mediation may for example start out in the *facilitative* model, but later develop into the *settlement* or *evaluative* model, so one can start to understand the issues and features within the native title mediation process.

It should be mentioned for completeness that there are other theories of mediation which do not fall within the four (4) paradigm models as mentioned above. For example the 'narrative' theory which looks at the complex cultural stories through which conflict is constructed by the parties.[21] The focus of this form of mediation is on the contextual nature of the conflict and the way in which meaning is constructed within a social and cultural context, as external influencing factors. The narrative theory focuses on the social context in which conflict occurs and helps the parties to deconstruct their competing conflict stories, by changing the discourse, to create an alternative narrative, which provides a single account of the situation. In this new account of understanding the parties may be able to find shared interests and resolve conflict. Under this theory the mediator is not neutral and is replaced with a mediator as the manager of the story-telling process.[22]

E. Indigenous Concepts

Indigenous communities have used consensual problem solving processes for thousands of years, and were based on the kinship system and recognised network of rights and obligations, with the objective of restoring social harmony in the community.[23]

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19 *National Principles for Resolving Disputes and supporting Guide - Report to the Attorney-General*, National Alternative Dispute Resolution Advisory Council, April 2011.

20 Boulle L, *Mediation: Principles, Process, Practice* (2nd ed, 2005) 43-45.

21 See Winslade J and Monk G, *Narrative Mediation: A New Approach to Conflict Resolution* (2000).

22 Boulle, above n 20, 47.

23 See generally Behrendt L, *Aboriginal Dispute Resolution* (1995); Spencer D, 'Mediating in Aboriginal Communities' (1997) 3 *Commercial Dispute Resolution Journal* 245; Behrendt L and Kelly L, 'Mediation in Aboriginal Communities: familiar dilemmas, fresh developments' (2002) 14 (5) *Indigenous Law Bulletin* 7.

Indigenous concepts of mediation is communally based, as opposed to the generally individualistic approach behind western mediation, in that its about resolving current conflicts and preventing future ones, and empowering the community as opposed to the empowerment of the disputing individuals associated with western mediation.

It's noteworthy what Madeleine Sauve said on Indigenous concepts of mediation, that 'Aboriginal people … seek a change of heart, a transformation, a healing of relationship and spirit – not simply a mutual commitment to honour the terms of an agreement in the future'.[24]

F. Culture and Mediation

As just highlighted, because of the different mediation concepts between Western and Indigenous societies, it would be particularly pertinent to be aware of the cross-cultural issues in the mediation process. Therefore the mediation process should involve problem-solving with an awareness of cultural differences.[25]

In western societies generally, particularly Anglo-Australian culture, mediation is understood mainly in contractual terms, focusing on individual rights and interests leaning towards a heads of agreement. Whereas in traditional societies, mediation is less contractual and more socially-oriented, striving for reconciliation and community harmony between and beyond those directly involved.[26]

While western concepts tend to be rights-focused, individualistic, adversarial and reliant on rational logic and documentation, traditional societies tend to be relational, collective, collaborative and reliant on trust, moral persuasion and social consensus.[27]

The dichotomy in cultural differences is challenging when it comes to communication styles in mediation. Putting aside misunderstandings over meanings, denotations, connotations of words, phrases, colloquialisms and legal terms; misunderstandings can arise over non-verbal communications, such as eye contact, interruptions and silences – in Indigenous Australian culture, non-eye contact, and silence are accepted features of communication, as signs of respect, sacred and privacy, but in Anglo-Australian culture, non-eye contact and silence is a sign of evasiveness, lying and guilt. Likewise the phenomenon of *gratuitous concurrence* exists in traditional societies, where the listener agrees to questions and statements to which they don't understand out of respect to the speaker, whereby in western societies, a lack of understanding is communicated, be it verbally or non-verbally.[28]

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24 Sauve M, 'Mediation: towards an Aboriginal conceptualisation' (1996) 80 *Aboriginal Law Bulletin* 10.

25 See Boulle L, *Mediation Skills and Techniques* (2001) 6-7.

26 Boulle, above n 18, 79; see generally Hofstede G, *Culture's Consequences: Comparing Values, Behaviours, Institutions and Organisations across Nations* (2nd ed, 2001).

27 Lim Lan Yuan, 'Impact of Cultural Differences on Dispute Resolution' (1996) 7 ADRJ 197, 197; It is not the author's intention to over-generalise and stereotype in respect of culture, for example that all Indigenous Australians are relationalists and Anglo-Australians are individualistic, but that cultural differences do influence the mediation process.

28 Pringle K L, 'Aboriginal Mediation: One Step Towards Re-empowerment' (1996) 7 ADRJ 253, 265.

Recognising cultural differences is salient to the skills and techniques of the mediator, because a failure to recognise cultural differences can lead to a breakdown of the whole mediation process itself, all because of a misunderstanding or lack of understanding.[29] Further, power imbalance can be aggravated by communication misunderstandings, in that the dominant culture may prevail, particularly in the native title context, because mediation is mandatory.[30] So, the mediator needs to be culturally literate to the signposts of behaviour, attitudes and communication styles of the parties involved in the mediation process, not meaning to understand every cultural nuance in a comprehensive way, but to promote good dialogue and relations between the mediating parties.[31]

Mediator neutrality in the Indigenous concept, about confidentiality and privatisation plays a less significant role in disputes,[32] because generally the community is aware of the history of the dispute and those involved. For a mediated outcome, the community needs to know the details, so the community can place its moral weight behind its enforcement.[33] These issues are highly relevant in the native title mediation process.[34]

Reflecting on the Winnie-the-Pooh analogy being dragged down the stairs; there may be many ways in which one can come down the stairs. A cynic may say, 'but isn't it the ultimate destination that matters most, that which lays at the base of the stairs'; in our analogy it matters not for Christopher Robin how he gets down the stairs, but it is in Winnie-the-Pooh's interests in how he gets down the stairs. Likewise, with mediation there are differences in form, but it is the process that matters most and in who's interests. So with the current native title mediation process, it needs to be in the interests of Indigenous Australians, not just a matter of being dragged along.

G. Why mediate native title?

The former Justice of the Federal Court, Wilcox J stated that mediation is 'an integral element of the scheme embodied in the Act'.[35] Even the High Court of Australia has endorsed the desirability of mediated agreements on native title issues, where five High Court justices have stated:

> *"If it be practical to resolve an application for determination of native title by negotiation and agreement rather than by the judicial determination of complex issues, the Court and the likely parties to the litigation are saved a great deal in time and resources. Perhaps more importantly, if the persons interested in the determination of those issues negotiate and reach an agreement, they are enabled thereby to establish an amicable relationship between future neighbouring occupiers."*[36]

29 Lim Lan Yuan, above n 27.
30 Young S, 'Cross Cultural Negotiation in Australia: Power, Perspectives and Comparative Lessons' (1998) 9 ADRJ 41.
31 See generally Lederach J P, *Preparing for Peace: Conflict Transformation Across Cultures* (1995).
32 Sauve, above n 24, 11-12.
33 See Young, above n 30, 50.
34 Dodson M, 'Power and cultural difference in native title mediation' (1996) 3 (84) *Aboriginal Law Bulletin* 8.
35 *Wilkes v Western Australia* (2003) FCA 1206 at [17].
36 *North Ganalanja Aboriginal Corporation for and on behalf of the Waanyi people v Queensland* (1996) 185 CLR 595, 617 (Brennan CJ, Dawson, Toohey, Gaudron, Gummow JJ).

Meditation is a key mechanism for resolving native title issues and can be used to reach agreement – that an Indigenous group(s) hold native title and are recognised as such. But before an agreement can be made, preliminary issues need to be settled, such as: whether native title exists and connection has been maintained, and if so in whom title is vested; on the nature and extent of title and any other interests in land or waters; whether native title rights confer exclusive possession, occupation and use; and how title rights relate to other interests over the land and waters in question.[37]

What is being mediated?

A desired outcome of a native title mediation for an Indigenous party would be an agreement that recognises them under Australian law as having rights and interests to lands and waters, because they had those rights and interests before European settlement.[38] For native title to be recognised, Indigenous groups must, among other things show that they have kept their traditional connection to the land and waters.[39]

If there is this recognition, many individuals and groups are affected, such as, traditional owners, pastoralists, conservationists, miners, explorers, fishers, providers of communication and energy infrastructure, and all levels of government.[40]

Therefore because of native title, access to land/sea, and other complex social issues are raised, dealing with factors of law, economics, land management and cross-cultural interaction. So, native title mediation plays a significant part in the needs and rights of the respective parties and developing future strategies.

(a) Power imbalance

Power imbalance in the native title mediation process has been highlighted and characterised as stemming from the structure of the (non-Indigenous) system and the opinions of non-Indigenous participants, and where native title claimants come to the table without recognised rights.[41] Put simply, the biggest single operating cause for this power imbalance is said to be the fact of colonisation and dispossession, because now Indigenous claimants need the recognition of current Australian law. As already stated, native title rights and interests have been hard to legally define, with the onus on the Indigenous claimants to prove, and with the added shackle around contending with non-Indigenous interests.[42]

H. Native title mediation defined

It's interesting to note how NADRAC defined 'native title mediation', in contradistinction to most other forms of mediation, where native title mediation does not necessarily begin because of a dispute but by an application for settling pre-existing rights that may affect the rights and interests of others:

37 See ss 86A and 225 of the Act.
38 See *Mabo v Queensland (No. 2)* (1992) 75 CLR 1; and *Commonwealth v Yarmirr* (2001) 208 CLR 1.
39 *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422.
40 Neate G, 'Reconciliation on the Ground: Meeting the challenges of native title', Asia Pacific Forum Adelaide (2001).
41 See Dodson M, 'Power and Cultural Difference in Native Title Mediation' (1996) 3 (84) *Aboriginal Law Bulletin* 8.
42 See Dolman K, 'Native Title Mediation Is it Fair' (1999) 4(21) ILB 8-9.

> *Native title is essentially a recognition of traditional Indigenous rights in land and waters. In many instances, these rights will co-exist with the rights and interests of others. A claim for native title may be made without any history of past relations or dispute between the claimants and other persons with interests in the area claimed. The mediation process aims at reaching agreement between parties about a number of specific matters. These matters include whether native title exists and, if so, who holds native title; what the native title rights and interests are; and the relationship between those rights and interests and any other interests in relation to an area of land or waters. If agreement cannot be reached, these matters are determined by the Federal Court. The mediation does not necessarily involve the resolution of a particular matter in dispute and may include the consideration of matters of practical workability, for example, how native title rights will be exercised in the future consistently with the rights of others. The involvement of different interests and groups, however, means that native title claims may, and often do, give rise to disputes. The term 'ADR' could therefore be seen as limited to particular aspects of the native title recognition process.*[43]

I. Indigenous cultural context

The non-Indigenous parties and the Federal Court need to recognise the centrality of land to Indigenous claimant groups. The challenge for non-Indigenous parties and for anthropologists, lawyers and courts[44] is to try to understand and describe the nature of Indigenous connection to traditional land under traditional laws and customs to negotiate and potentially agree about any native title rights and interests. The Indigenous cultural context is central to the native title mediation process and its resolution. Otherwise a totally neutral stance in mediation, absent of appreciation of cultural contexts, can promote power imbalance between the parties to the mediation.[45]

J. Historical context

Native title mediation process does not occur in a historical vacuum. All involved in the mediation process need to bear in mind the effect of colonisation and dispossession and its impact on the rights and interests of Indigenous claimants. The watershed of time presents specific challenges to the establishment of native title to be recognised by the Australian governments,[46] judges[47] and others involved in native title mediation process.[48] NADRAC's report on 'Indigenous Dispute Resolution and Conflict Management' recognises traditional Indigenous practices have been weakened over time and

43 National Alternative Dispute Resolution Advisory Council, *ADR terminology: a discussion paper*, June 2002, 10.

44 See for example *Milirrpum v Nabalco Pty Ltd* (1971) 17 FLR 141 (Blackburn J); *The Queen v Toohey; ex parte Meneling Station* (1982) 158 CLR 327 (Brennan J).

45 Kowalski J, 'From the margins to the centre: Cross cultural skills in social issues mediation', 4th National Mediation Conference, 1998, pp 125-7; and Astor H, 'Identity, Diversity and Mediation', Proceedings, 4th National Mediation Conference, 1998, pp 21-8.

46 See the preamble to the Act.

47 See for example *De Rose v South Australia* [2002] FCA 1342 and *Daniel v Western Australia* [2003] FCA 666.

48 See for example Choo C and Hollbach S (eds) (2003) History and Native Title, Studies in Western Australian History No. 23 Centre for Western Australian History, The University of Western Australia, Perth; and Neate G (1997) "Proof of Native Title" in Horrigan B and Young S (eds), Commercial Implications of Native Title, Federation Press, 240-319.

mainstream services are underutilised by, and often ineffective with, Indigenous people.[49]

K. Economic context

Indigenous Australians are for the most part among the poorest people in Australia. Most Indigenous claimants do not, of themselves, have the resources to effectively lodge native title applications, nor engage in intensive native mediation process.[50] As a result governments recognising this fact have legislated for native title representative bodies[51] to assist Indigenous claimants not only with procedural issues but also with financial assistance.[52]

Native title representative bodies play a crucial role in the preparation and progress of the mediation process within their geographic region.

Suffice to say the representative body play a major part on the capacity of the Indigenous claimant groups to meaningfully and positively take part in the mediation process, and by providing a point of reference for other parties to negotiate with them.

L. Social context

Indigenous people need to be involved at the local level in the design and delivery of dispute resolution that takes into account their perspectives on resolution outcomes. So the native title mediation process needs to take into account the Indigenous social context, that includes the diverse rights and interests of the various claimant groups to which the parties belong, and thereby value-add to the process.

M. Political context

The political question raised by Lindgren J in *Harrington-Smith v Western Australia (No 9)* [53] resonates well in the native title mediation process, because it is squarely placed within the political context of the state, territory or region where native title is said to exist. And this is reflected when governments change, as do policies, in relation to native title.

But the political context is not limited to governments, but extends to the politics of Indigenous and non-Indigenous parties and the communities from which they come.

So then, what is being mediated? The answer lies in the melting pot of Indigenous cultural, historical, economic, social and political contexts, the constituents of which flavour the native title mediation process.[54]

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49 National Alternative Dispute Resolution Advisory Council, *Indigenous Dispute Resolution and Conflict Management*, January 2006.

50 See the Preamble to the Act.

51 Ibid ss 201A-203AI.

52 Ibid ss 203B-203BK.

53 (2007) 238 ALR 1.

54 See Neate G, 'Mediating Native Title Agreements: Developing National Native Title Tribunal Practice', Paper presented to the Native Title Conference 2004: Building Relationships.

What are the interests?

N. Relational interests

As already stated, native title mediation process is conducted in a rights-based context, those rights being set out in the Act and other statutes as understood in light of an increasing number of court judgments. For the purpose of resolving native title issues, interest-based mediation should focus on the parties' interests as distinct from their positions or rights and adopt a problem-solving approach to negotiation or to conflict resolution in order to achieve mutually acceptable agreements. It should be noted the 'interest' in interest-based mediation is not restricted to material questions between the parties.

Christopher Moore states that for an agreement to be reached, interest-based processes must develop outcomes that meet, to the parties' acceptability, the substantive, procedural and emotional (psychological) needs of all parties.[55] Then Rhiân Williams and Toni Bauman took these three interests, by subsuming 'rights' under the term 'substantive interests', and in describing 'emotional interests' as 'needs', as follows:

> *"Substantive interests refer to what needs to be negotiated and are often the central focus of negotiations. They include tangible things such as land, rights, and intangible things such as relationships and respect. 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."*[56]

However needs, rights and interests may also be culturally specific, relative, and socially constructed.[57] In Catherine Morris' training of Thai and Cambodians mediators, participants expressed difficulty with the word 'interest' and suggested that it be replaced with the word, 'motivation'. On their translation, 'an 'interest' is anything at all that motivates a negotiator.' However, as Morris points out, replacing the term 'interest' with 'motivation' does not address deeper ethical concerns about the utilitarian moral framework on which many interest-based approaches seem to be founded.[58]

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55 Moore C, *The Mediation Process: Practical Strategies for Resolving Conflict* (3rd Ed, 2003).

56 Bauman T and Williams R, 'The Business of Process: Research Issues in Managing Indigenous Decision-Making and Disputes in Land', Research Discussion Paper (2004) 13, Canberra: Native Title Research Unit, Australian Institute of Aboriginal and Torres Strait Islander Studies.

57 Morris C, 'Interests, Needs, Rights, Morality and Conflict Resolution: A Heretical Perspective' (2003), in Bauman T, 'Whose Benefits? Whose Rights? Negotiating Rights And Interests Amongst Indigenous Native Title Parties', *Native Title Research Unit*, Vol 3, Issues Paper No. 2.

58 Ibid.

As suggested by Toni Bauman, substantive conflict is nested not only in relationships, but also in systems and structures.[59] The native title mediation process can give rise to much conflict amongst Indigenous claimant groups. Therefore it may be fitting to think in a more holistic alternative dispute resolution process which takes into account a range of Indigenous community structures and systems and relationships.

An approach to native title mediation needs to take into account Indigenous cultural and traditional rights and interests, not bundling these rights and interests under just proprietary rights and interests. If native title is approached as 'a bundle of rights' that can be fully or partially extinguished, the relational and, at times, negotiable rights and interests among Indigenous peoples are 'internally disconnected'.[60]

Also there are intra-competing and conflicting rights and interests, which arise among Indigenous peoples in the native title mediation process, which are not easily resolved. As Peter Sutton has outlined, these may include:

> *"Local individual and family rights versus tribal overrights and rights granted through intertribal territory comity, rights versus privileges, primary versus secondary rights, unmediated versus mediated rights, presumptive versus subsidiary rights, actual versus inchoate rights versus potential rights, generic versus specific and core versus contingent."*[61]

The misconceived non-Indigenous notion that Indigenous parties are bounded and homogenous often results in conflict among Indigenous claimant groups. This is a normal human tendency to evaluate another's behaviour with reference to one's terms of understanding, because it has been said that we tend to engage in ethnocentric behaviour in a sub-conscious way.[62]

Power struggles among members of any native title claimant group is unavoidable and individuals may be self-interested in making decisions around group membership, based on, for example, matrilineal or patrilineal descent.

Peter Sutton has intimated that a failure to distinguish rights within native title claimant groups from 'the whole country's owning group members' can lead to conflict 'especially once these relationships become bureaucratised or enter into financial negotiations'.[63]

This where pre-mediation should take place between Indigenous parties so they may state their rights and interests in relation to specific areas of land in the presence of other members of the groups as witnesses. It may be useful at this stage for the mediator to separate rights, interests, needs and for

59 Ibid.

60 Mantziaris C and Martin D, *Native title corporations: A legal and anthropological analysis* (2000); Glaskin K, 'Native title and the 'bundle of rights' model: Implications for the recognition of Aboriginal relations to country' (2003) 12(1) *Anthropological Forum* 67-88.

61 Sutton P, 'Kinds of rights in country: Recognising customary rights as incidents of native title': National Native Title Tribunal Occasional Papers Series No 2 (2001) Perth: National Native Title Tribunal.

62 See Goh B, 'Cross-Cultural Perspectives on Sino-Western Negotiation' (1994) *ADRJ* 268-81.

63 Sutton, above n 61,16.

Indigenous parties to have a dialogue around their meanings – incorporating their duties and responsibilities that certain kinship relationships involve.

Sufficient to say, native title mediation process is relational – subject to other factors. This idea moves away from the reification of closed groups but affirms the full range of rights and interests of Indigenous group members. As Toni Bauman suggests it does not create dichotomies of abstractible rights and interests, by not disconnecting rights and interests from social relations.[64]

Conclusion

Points that need to be remembered about the native title mediation process, is that:

- the mediation is supposedly interests-based in a rights-based context;[65]
- mediation is court directed not because of a *dispute*, but based on an application to the Federal Court of Australia;
- there is no pre-existing relationship to the dispute;
- the parties have different interests in the land/water (i.e. mining, exploration, logging, developers, hunting, fishing, recreationalists, government); and
- there are cultural differences (Indigenous as opposed to non-Indigenous).

The effectiveness of the native title mediation process can be partly gauged according to its ability to assist in changing the attitude of parties who are initially reluctant to engage in mediation. During the mediation process, if reluctant parties begin to communicate their interests with a positive attitude toward a mediated outcome, then the mandatory dimension in the mediation provisions could be said to be effective. However, the likelihood that parties will engage in mediation in good faith is affected by their abilities to move from position base to interest base.

In conclusion, a major issue with the native title mediated process, is its need to conform with the legal boundaries as stipulated by the Act and its associated rules, because when there is a native title dispute between the parties, irrespective of the parties cultural divergence, the legal representatives, meaning the courts, lawyers and court appointed mediators, modify disputes by focusing on those aspects which are legally relevant and re-interpret them into terms and concepts with which the law is familiar.[66] Native title mediation process needs to be relational – connecting rights and interests from social constructs, otherwise Indigenous parties will continue to mimic poor old Winnie-the-Pooh being dragged down the stairs, without really considering their interests.

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