Land, Rights, Laws: Issues of Native Title

Native Title Research Unit

Editor: Dr Angela Philp
June 2006

Volume 3
Issue Paper No. 6

Waiting for Mary: Process and Practice Issues in Negotiating Native Title Indigenous Decision-making and Dispute Management Management Frameworks

Toni Bauman

Toni Bauman is an anthropologist, facilitator and mediator and a Visiting Research Fellow in the Indigenous Facilitation and Mediation Project, Native Title Research Unit, Australian Institute of Aboriginal and Torres Strait Islander Studies.

Abstract

This paper follows a previous Issues Paper in which I suggest, that at the outset of any native title agreement-making processes, there is a need for facilitating decision-making and dispute management frameworks in congruence with the matrix of differentiated and relational Indigenous rights and interests, at least some of which are negotiable amongst Indigenous people themselves. Here, I raise some of the practical issues in negotiating such a framework including the need for contingency plans should an agreement not be able to be reached through the accepted primary process in the framework. The paper is woven around a scenario which is based on years of practice and research in a number of locations across Australia and with a range of native title stakeholders. It concludes with some observations about Bernard Mayer's suggestion that the third-party neutral role of the mediator or facilitator should be expanded.

Introduction

This paper follows a previous Issues Paper titled 'Whose benefits? Whose rights? Negotiating native title rights and interests amongst Indigenous native title parties' in which I suggest that, at the outset of any native title agreement-making process, there is a need for the negotiation of an agreed decision-making and dispute management framework amongst the Indigenous parties as a prerequisite to the successful implementation and sustainability of agreements.[1] This framework must account for the regional matrix of differentiated, relational, group and individual Indigenous rights and interests in the relevant area of land, at least some of which are negotiable amongst Indigenous people themselves. It must contain contingency plans should an agreement not be able to be reached amongst the Indigenous parties through the primary process contained in the framework.

While, in some locations throughout Australia, there may be groups of elders and senior law men and women upon whom Indigenous parties can rely to make decisions and manage disputes, who work well together and who are able to reach resolution by negotiations amongst themselves, this is not always the case. There are situations where their opinions are challenged, where they cannot agree, and where those elders with authority and ritual expertise are now deceased. The heavy reliance in the native title arena upon written evidence also raises issues around the veracity of individual and group claims and the nature of traditional laws and customs. There may be no definitive documented evidence, nor any essential anthropological truth to discover. Meanings may be negotiable. To think otherwise, is to suggest a dormant society, unable to reproduce itself, as cultural meanings become irrelevant and are no longer produced out of the conditions in which they are embedded.

Developing the framework which is proposed in this paper is not an easy task and requires a great deal of facilitative skill to ensure comprehensive discussions are held amongst all Indigenous parties to arrive at the free, prior and informed consent which is recommended by the United Nations. Such a framework will need to withstand considerable pressure and agreed alternatives might involve third party intervention. Whatever the case, the process to be invoked in the absence of any agreement should be known, understood and owned by all Indigenous parties from the outset in order that they understand and take responsibility for the consequences of not reaching agreement.

Many questions arise which may require negotiation amongst Indigenous parties. For example, what is the relativity of rights and interests accrued through patr- or matri-affiliation? What is the relative strength of claims made through any one of four grandparental ancestors? How do these match the rights of the language group or tribe when more clan-like interests seem to be predominant? Who is the arbiter of tradition? What status is to be given to place of birth and residential associations? How are the regional community view and ritual responsibilities to be considered?

---

[1] T. Bauman, 2005, 'Whose benefits? Whose rights? Negotiating native title rights and interests amongst Indigenous native title parties', *Land, Rights, Laws: Issues of Native Title*, Native Title Research Unit, Australian Institute of Aboriginal and Torres Strait Islander Studies, Canberra. Various versions of this paper were presented at the Hobart National Mediation Conference and the Darwin Native Title Conference in 2006.

Who are the 'right' native title holders and 'traditional owners' from whom lawyers should take their instructions and ensure prior and informed consent? Which individuals or land owning groups should receive financial benefits and in what proportions? How much should the umbrella Aboriginal Corporation representing the language group or 'tribe' benefit from the agreement relative to more clan-like rights and interests? What weight should be given to documents such as archival records of births, deaths and marriages, and previous anthropological and historical records?

The answers to such questions lie with the native titleholders, through an agreed and negotiated framework of decision-making and dispute management which recognises that rights and interests within the group in relation to a particular area of land are not all the same. It also lies in fearless engagement with conflict rather than avoidance by mediators and facilitators in third party roles and consideration of the kinds of resources and assistance they might offer to the process.[2]

The National Native Title Tribunal (NNTT) has published an excellent pocket guide for agreement-making teams.[3] While it thoroughly lists the activities and issues to take into account in agreement-making processes, it is *how* these things are carried out which will determine success or failure. That is, the micro skills that are employed and the kinds of interactions which occur are paramount.

This paper highlights some of the practical issues that arise in assisting parties to negotiate the recommended framework and around which there can be much conflict. While they are considered in relation to a fictitious scenario, the paper is also based in reality. It draws on the common experiences that I have encountered over years of practice in a number of locations across Australia, and that have been highlighted by mediation, negotiation and facilitation practitioners, native title holders and staff of Native Title Representative Bodies ('NTRBs') during research for the Indigenous Facilitation and Mediation Project. The 'Mary' who is referred to in this paper is not a 'real' person though she will be instantly recognisable to many readers, as will the scenario described below. The paper begins by outlining the scenario and discusses some of the issues that it highlights as the scenario is revisited throughout the paper. It concludes with some observations about Mayer's suggestion that the third-party neutral role of the mediator or facilitator should be expanded.[4]

The Scenario

This scenario involves negotiations of an Indigenous Land Use Agreement ('ILUA') under the *Native Title Act 1993* (*NTA*). It also involves a corporation under the *Aboriginal Councils and Associations Act 1976* which represents the language group or 'tribe'.

---

[2] B. Mayer, 2004, *Beyond Neutrality*, Jossey-Bass, San Francisco, p. 17.

[3] National Native Title Tribunal, 2005, *Pocket guide for agreement-making teams*, Commonwealth of Australia.

[4] B. Mayer, p. xi.

Discussions around the agreement have been taking place over the last ten years and a number of parties including the NTRB presume the agreement to be virtually signed, sealed, and delivered. Nevertheless, there are disputes around the agreement and many Indigenous parties say that they don't fully understand its detail. Over the years, lawyers representing the claimants have changed around six times.

Membership rules of the Corporation state that membership is available to all adult Aboriginals entitled by Aboriginal tradition to the use or occupation of the 'tribe's' or 'language group's' land. However, patrilineal descent and affiliations to discrete patrigroup estates provide the basis for much of the way in which country business is organised. People often speak of a hierarchy of affiliations, where inheritance from father's father is seen as primary, closely followed by mother's father, then mother's mother and finally, father's mother. In contrast, the affiliations of younger generations and of those who have a non-Aboriginal parent, including the Stolen Generations and their descendants, who insist that the 'old rules will have to change', are often asserted through descent from a significant ancestor (male or female) in a series of cognatic affiliations to parents and grandparents. Their argument is reinforced by the fact that a number of patrigroups no longer have patrilineal descendants, and, in some instances, few other members who are descended from the relevant patrilineal apical ancestors.

There is a dispute, concerning the 'right' native title holders, which is linked to whom should benefit from any cash payments for relinquishing the claim. It is not disputed that members of patri-group A, of which Mary is the senior patrilineal descendant, have primary native title rights and interests in much of the area claimed. However, members of Group A are adamant that the whole of the claimed area belongs to them and they do not recognize the interests of five other patri-groups whose countries are said to encroach onto the peripheries of the area. These groups are severely depleted of senior patrilineal members, generally support the Chairman of the Corporation who asserts their interests on their behalf and rely upon him to represent them.

Many senior people, who provided ethnographic information about the claim area some ten years ago, have died. This initial survey revealed only one site of significance which is associated with secret regional ritual and song lines. The significance of the site is well understood regionally and was a matter of written record prior to the survey, as were Group A's affiliations to and ownership of the site. Since then, a number of additional sites of significance have been recorded by the Chairman, who did not participate in the original survey and who says that the original informants did not know the area as well as he does. The sites are located on a continuum of significance, some perhaps best regarded as 'named locations', as they bear the names of the natural features which mark them and implicate the five other patrigroups.

There is only one other knowledgeable senior law woman within the language group who may confirm the Chairman's information. While supporting him and encouraging others to do so, she sometimes succumbs to pressure from Group A to agree that they alone have interests in the area. The meaning of terms such as 'tradition' and 'site of significance' take on great importance, as does the relativity of the range of native title rights and interests. Group A asserts that for a site to be significant, it has to be 'sacred' and celebrated as part of a song line in ceremonies.

Yet, there is an argument to say that named locations also find their meaning according to law and custom. It is commonly agreed that members of the broader language group, as represented by the Corporation have native title rights and interests in the area, and should benefit from the agreement, but it is also acknowledged that Group A and others have greater rights and interests. Past agreement-making discussions in which the Chairman and Coordinator of the Corporation have played central roles have been held with members of the Corporation as a whole rather than with the individual clan or family groups who have such primary interests in the land. Group A disputes whether the Corporation should benefit financially to the proposed degree - 80% of the total amount involved as opposed to 20% to be paid to the relevant patrigroups for giving up the claim. It feels that the Corporation has not represented its interests in the past, is benefiting from the ILUA at their expense and wishes to see greater benefits flow directly to them. The Corporation is under-resourced and does not have the capacity to provide the kinds of assistance Group A expects.

A number of discussions are held as to how decisions should be made and the nature of the traditional decision-making processes. There is general agreement that the senior patrilineal descendants of a patrigroup have the final say in consultation with the children of the women of the group – those whose affiliations to the land are via their mother's father. They may also consult elders from other patrigroups and regional authorities. Where there are no senior patrilineal members of a patrigroup, the senior person in the mother's father's line makes the decision. While this general framework is clearly understood, arriving at a decision is no easy matter. Mary has five sons who live at some distance from where the meetings are taking place. They are particularly forthright and, during the process, influence their mother by telephone, to overturn agreements she has made with the broader group.

There are no easy answers to the issues which are raised here, insufficient space to address them all and no one size that fits all. A range of interventions is required, not all of which are facilitative ones.

Designing the Process

The importance of process design, preparation and planning is undeniable – carried out effectively, they can halve the time and cost of a process and significantly reduce conflict. However, they must ultimately be carried out in negotiation with the parties involved for the outcomes to be owned, sustain able and most importantly, realistic on the ground.

Two preliminary aspects must be settled. Members of the negotiating team must be acceptable to the parties and there should be discussion around potential conflict of interest of all members of the negotiating team and the institutions involved including the NTRB and, in this scenario, the Corporation. Secondly, anthropological mapping which should provide the basis of any process design must be carried out. While the latter may seem self-evident, it does not always occur prior to the commencement of ILUA discussions.

The process facilitator is not an island. Neither are the Aboriginal parties involved, who are situated in dense and complex networks of kin. Effective planning and process design is organisational, heavily dependent upon the skills of all the agreement-making team members regardless of the roles they occupy: not only anthropologists, but also logistical, corporate and administrative support, field officers and liaison officers, lawyers and other researchers.

The constant waiting for Mary, a key decision-maker with many demands on her time, which takes place in this scenario, highlights the central roles which local knowledge and skilled Aboriginal community liaison and communication must play. Mary works part-time and is the Chairman of her community council, continually called to emergency community meetings. Her electricity is cut off and she insists on driving herself to pay the bill in an unreliable car. Her sons are a constant demand and frequently show her disrespect. She is spirited away early one morning to a distant community to attend a bush court in support of a relative who is facing serious charges and is absent for two days of the process. She supports numerous children in court processes and fosters two young children. There are a number of funerals through the process which Mary and others have to attend.

And yet, the process is planned without taking these issues into account and is continually delayed. Field officers, anthropologists and liaison officers who are constantly 'on the ground', can provide important reality checks as to whether aspects of a proposed process are practical. Sometimes required to be soothsayers, they need to seek or predict answers to questions such as: What's Mary up to today? What are her sons thinking? How are the physical needs and medical requirements of parties? When's pension day? What's happening in the courts? Who has appointments to see medical specialists? They are the best sources of information as to the nature of disagreements and underlying disputes. They are also located in disputes themselves around who should attend a meeting. If they leave an essential person behind or bring an inappropriate person, the entire process can be derailed.

Process design must also involve those who provide funding, make budgetary decisions, prepare submissions and administer finances. There is little point in designing a process which responds to changing needs if there are insufficient funds to carry out what is agreed, such as the need for legal representatives or anthropologists to carry out further work. Processes must also be designed around the capacity of parties. The cynical view of Mary absenting herself from meetings is that she is making a statement that agreement cannot be reached without her. But she is also under considerable pressure and wants resolution. She often apologises for keeping others waiting and for changing her mind. A question arises as to whether people like Mary have the capacity to make decisions in the demanding conditions of their daily lives and whether it is ethical to ask them to do so.

There are some simple activities that can assist in designing processes, not all of which I have space for in this paper. Asking participants one by one to publicly say why they are at meetings and the outcomes they expect can yield extraordinary results which have a major bearing on the ongoing process design. In this scenario, after years of consultations, most say they know little if anything about the issues, are there to learn about the country, and that the older people are not teaching them. The process is thus designed to create opportunities for learning about the land and

produces visual materials which explain the complex details of the agreement in straightforward terms around which the ramifications for each of the parties can be explored through simple questions such as 'How do you think that will affect you?'.

Daily team debriefings and careful planning for the following day take place. Aboriginal parties are regularly debriefed at their homes at the end of each day or in private sessions in the mornings before bringing everyone together. Field and liaison officers are kept informed of the issues so they may provide ongoing support and information to the Indigenous parties between the sometimes irregular visits of the mediators/facilitators, lawyers and anthropologists. They monitor disputes and gauge the level of satisfaction with the process in the absence of other members of the team.
In any process design and planning, the emotional/physical, procedural and substantive needs of the parties must be accounted for. Only hard work on the ground, including detailed discussion and effective communication with and between the parties can achieve this.

Negotiating differentiated native title rights and interests: contingency plans

In this scenario, formulas for the relative distribution of benefits based on the presumed differentiated native title rights and interests are agreed and subsequently reneged upon by Mary. She requests a 'second opinion' from regional countrymen and women, who she says have not been consulted. Yet, even after her request is carried out, with exhaustive anthropological inquiry, helicopter surveys and various road trips, there is no consensus or definitive view about meanings in the cultural landscape, and whether the additional five groups have rights and interests. Responses to inquiries about the significance of country and the people associated with it are now often couched in terms which reflect the informants support for Mary or the Chairman and the desire of all six patrigroups to benefit financially.

A final trip is agreed and the group is asked to take responsibility in the event that there is no agreement. It is necessary to save face for the Chairman who has been berated at various stages throughout the process by Mary's sons. In a fit of frustration, the facilitator asks the group, 'What will make you happy then?' One man responds - 'a decision' and the group agrees. Each person is consulted privately about how they think a decision should be made in the event of an agreement not being reached and how they might take responsibility for this. A suggestion that the two elders (the Chairman and the senior woman referred to earlier) should make the decision is rejected by Mary. The Chairman rejects Mary's idea that it should be a group of regional elders on the basis that 'outsiders' should not be involved. A suggestion that the NTRB should make the decision based on all the evidence available is discussed. Should it be made by the Executive? Should it be made by the team who is involved in the negotiations? Should the anthropological material be given to a committee of independent anthropologists who should then make a decision?

These kinds of contingency plans should be made at the very beginning of any process. Saving face for the two elders has become difficult as Mary and her sons refuse to take their advice, and undermine their general authority. Experience also shows that the regional elders who Mary nominates are not always familiar with the country in a fine grained day to day way and bring a range of conflicting broader

perspectives which are influenced by their own life experiences. They seek to impose a regional ritual cloak over the country in which geographical scale is confused and fine topographical detail is unclear.

It has become obvious that the parties need training in negotiation skills. Stand off behaviours 'with backs against the wall' and long histories have become an entrenched way of relating to each other. At the eleventh hour, an agreement is reached that the negotiating team makes the decision based on all available information. Once the decision is made, it is put privately to family groups to ascertain their views and then to the group as a whole. The entire group signs off on the decision, Mary somewhat unwillingly in relation to some groups.

There is now a need to restore the dignity and authority of the two senior elders through relationship-building exercises and through discussions to develop a formula of broader regional approaches to decision-making across the full extent of the language group country. This should have taken place at the outset before discussions of any agreements, and, in the first instance, in private family groups rather than in meetings of the Corporation.

Underlying disputes and the dispute management framework

There will inevitably be a range of underlying disputes which should be identified at the commencement of any process. They are to be ignored at the mediator's peril and not always able to be packaged and removed from any 'mediation space'. In this scenario, disputes between staff of the NTRB about priorities - in particular between anthropologists and lawyers and between central and regional operations - has ensured that the parties have been poorly served. Poor internal NTRB organisational planning and communication between the NTRB and the parties has given rise to conflict over why the ILUA has taken so long, and the large turnover of lawyers has prompted Mary to seek her own legal representation.

There are disputes between the parties and the Corporation which are underpinned by its lack of resources, poor governance structures and procedures and ability to implement any agreement. Several attempts are made to hold an AGM. Changes to the executive of the Corporation, including the position of Chair, could have a major impact on current proposals, since the Corporation stands to benefit significantly and the Chairman and Co-ordinator have been largely responsible for its details. However, the status quo is maintained in the midst of criticisms that the election process is not transparent and the AGM poorly run. The 'real' dispute may be best identified as one between the Corporation and funding bodies and discussions are held and processes put in place for additional funding submissions to be prepared and meetings with them.

There are long running disputes around control over living areas and the expulsion from the Corporation of the Stolen Generations woman, whose assistance Mary seeks. The distributions of funds arising out of agreements to development activities in adjacent countries and from which at least some members of Group A have already benefited through matri-affiliations are also a source of conflict.

It is not being suggested here that the ILUA process can mediate all disputes amongst the parties. However, it is important to seek the advice of parties and have them make conscious decisions as to whether the agreement-making process can continue without their being addressed and suggestions as to how they might be managed. It may be that some issues should be referred to other mediators or facilitators.

Ultimately the aim is to negotiate the principles of a dispute management framework which is integrated with the decision-making one and which also contains contingency plans in the event that a dispute cannot be managed. It may be the case that the two frameworks are identical but this will not always occur. The group may wish local 'peacemakers' to be involved or to seek arbitration or conciliation; there may be traditional ritual ways of resolving disputes, particular relatives whose duty it is to control certain individuals, and regional ways of doing things which could be invoked.

Relationship-building

It may not be apparent that relationship-building should be an integral part of a process involving Indigenous parties who are all interrelated in dense and complex kinship networks. However, Aboriginal relationships take many other forms which intersect with kinship relationships and are built around the full range of daily experiences. It may be unusual for the Aboriginal parties to make decisions in this grouping, least of all decisions involving individual and group financial benefit. Some may not even know each other.

In any event, Aboriginal kinship relationships themselves can be a significant source of conflict when the obligations and responsibilities they involve are not seen to be fulfilled. Some Aboriginal kinship relationships may be characterised by avoidance rules; others by joking interactions; and still others by deference. They are also located on a continuum of 'closeness' and 'distance' that makes it difficult to limit the parties who should participate in any process. The regional neighbours, who the Chairman refers to as 'outsiders', are related to all parties to a greater or lesser degree. Others, including Mary, do not see them as such and want their opinions to be heard.

There are relationship-building measures which can be taken to restore some balance to a group and rebuild fragile relationships. Interaction and communication is the key as is a shift in focus from the monologues of 'experts' on the negotiating team. Parties can be asked to talk about their kinship relationships to others and what that means to them. A range of interactive relationship-building exercises might be designed around these relationships. Country and western music (or other music if requested) can signal the commencement of sessions and lighten atmospheres. Icebreakers wake people up and get them interacting. Discussions can be facilitated that are conducive to the passing on of knowledge on country in circumstances which allow time for relaxation amongst the parties without the pressures of negotiation. Time can be managed to achieve closure at the end of meetings through interactive exercises, where, for example, individual parties might be asked to say how they feel about the process to date and what the outstanding issues are for them. Claimants acknowledging their ancestors and what they think their ancestors might wish of them can focus people on the future of their children and grandchildren.

Free, prior and informed consent

While elements of Mary's behaviour may be seen as strategic sabotage, and others, as unavoidable, one thing is clear - the pressures of her daily life prohibit her from giving free, prior and informed consent.

Native title is a highly complex regime and riddled with legal uncertainty. Obtaining free, prior and informed consent when legal advice is often equivocal is a major ethical issue for those who work in agreement-making. How long will it be before lawyers are taken to court by native title parties for receiving instructions from inappropriate people or acting without informed instructions? We often don't really want people to admit that they don't understand in the time urgent environment. The closed question, 'Do you all understand?' which we frequently hear posed to meetings does not seek an honest response. It prefers raised hands and a chorus of 'yes' as parties leave the meeting, unable to repeat the details of what they have agreed. Open questions – the how, what, when, why's – achieve remarkable results and require conscious effort and practice.

We may lack the communication skills and techniques to explain complicated legal and technical issues and need training in conveying such information in user-friendly English, not only to meetings but also to field and liaison officers. Incorporating clear technical and other expert advice around issues such as tax and indemnity in the process has a direct impact on disputes in this scenario. Information and discussion about the ramifications of taxation and charitable status play a key role in moving Mary away from her fixation on the momentary satisfaction of 'cash langa finger' models of the past to considering more productive long term family investments such as the purchase of land. Discussing how money might be fairly distributed amongst her many family members also makes her see that a fair distribution of her share amongst her family will have little financial impact. Her family stops looking over her shoulder with false expectations of becoming rich.

For the first time, she considers the details of the entire agreement, rather than focussing on the money her family might receive. Not long into the process, she gives permission for the meeting to continue in her absence, saying that she is only interested in the latter and not in the more complex details of how moneys going to the Corporation are to be used. Returning to the meeting after an absence of two days with her regional countrymen to support her, she asks the facilitator to go through yet again the details of the agreement. Those who have repeatedly discussed these details over the last few days vote with their feet. Her sons point out what the Corporation stands to gain relative to her patrigroup and she suddenly takes an interest. She begins to speak of setting up her own corporation to manage the ILUA, a proposal which substantially changes ways of viewing the agreement.

To achieve free, prior and informed consent, there is a need to secure the participation of Mary and her sons in future processes. Signed agreements are obtained that they will be present at future meetings, and punctual. If not, they are to abide by any decisions made in the meeting by Mary's brother. Such agreements are of course not legally binding and contingencies inevitably arise, but they invoke a moral imperative and commitment which go some way towards addressing the issue.

'Big meetings', 'talking heads' and negotiating with and through figureheads in corporations are not always helpful in securing free, prior and informed consent. Nevertheless, there are simple interactive techniques which can make such meetings more effective. At the start of this process, the location, size and cultural significances of the land are not commonly understood. Sheets of butcher's paper and textas are distributed to participants.[5] A base map is drawn on the whiteboard with roads, bores, rivers etc and the boundary of the claimed land for parties to copy. Other features are then added including sites of significance, Dreaming tracks, living areas, and proposed development activities. Care is taken to ensure that all versions of Dreamings and sites and patrigroup countries are recorded and to not privilege one over another. Maps are taken home, passed around, discussed in the evenings and are an important learning tool.

Small group and one-to-one discussions both public and private are imperative. Parties might be asked to turn to the person next to them to discuss specific issues, soon revealing a significant lack of comprehension when the request is met with deadly silence. Those who have an understanding of the issues might be asked to facilitate smaller group discussions or to explain issues to latecomers. While individuals are related to each other, they rarely spend their time sitting around campfires discussing specific details of any agreement. Demands on women like Mary prohibit such considerations and she has not talked about the issues with members of her large family, who rarely all come together and who have a range of opinions. The ILUA negotiations in this scenario provide her with the opportunity to do so, and once having experienced the benefits of small group family discussions, she often asks the facilitator 'to put us in those groups again' – sometimes at inconvenient times when she arrives late and the rest of the parties have just moved from small groups back into the larger meeting! Small group discussions do not only have to be comprised of family members. They can have a number of other permutations and combinations such as youth groups, patrigroups, and groups of Corporation executive members, thus ensuring discussion across families and around particular interests and issues.

Mary and the other parties also look forward to private group and individual sessions outside the meeting, waiting in their camps until late at night for the mediator to arrive, and chastising if this doesn't happen. Narratives change in this private context and are highly revealing as informants can be directly engaged about issues concerning contradictory or changing cultural information. Conflicting parties may face each other away from the witnessing of the group and family members to whom they are beholden and say what they really think, also saving face.

Finally the choice of venues is critical to achieving free, prior and informed consent. Meetings on country are essential for relationship-building and learning about country, but they are not conducive to the level of concentration which is required to make decisions about serious issues. This requires contained discussions in air-conditioned comfort, away from dogs and children and searing heat, with the aid of technology such as Power Point, overheads, and whiteboards.

---

[5] Textas and butcher's paper are also useful for occupying children but better to use pencil than texta if the floor is carpeted!

Engaging with conflict

The tendency of non-Indigenous 'experts' is to avoid conflict. This is in sharp contrast to many Aboriginal cultural approaches where the public expression of conflict is a significant aspect of cultural reproduction, an expression of family and group solidarity, a playing out of kinship relationships and a means of social control. Here, conflict is not to be resolved; but to be witnessed, managed and engaged with on an ongoing basis. This can take the form of the public harangue, a common expression of anger, as people rise to their feet, sometimes shaking and visibly distressed.

Many people like Mary and her sons may initially seem to be difficult, irrational, self-interested and easily dismissed. But their concerns are not to be brushed aside. Their need is to be engaged, taken seriously and listened to. Initially, they provoke the anthropologist into arguing with them over their interpretations of country which seem to be poorly informed. But as they persist with their views, and as Mary's sons better understand the issues and are provided with a space at meetings to express their views, it becomes clear that there is an issue of fairness which is also recognized by the whole group. Group A starts to co-operate. Nevertheless, the meetings are still fraught with conflict.

A central tenet of mediation theory is not to move too quickly from exploring the past into negotiating the present. But this has been breached, in part because of the process facilitator's efforts to avoid conflict. Past issues continue to emerge even as the agreement is being negotiated amidst the ongoing haranguing of the Chairman by Mary's sons, and the similar responses of his wife in his defence. Individual genealogies continue to be challenged, causing significant hurt. Unrealistic, but agreed ground rules about respect and not fighting are repeatedly broken. Ground rules are renegotiated on the basis that conflict may be inevitable; discussions occur around how it might be managed, including identifying the relevant kinsmen and women who might take control should a particular individual become difficult.

Issues come to a head at a closing session when the Stolen Generations woman who had been expelled from the Corporation, walks into the room with Mary. A hush falls over the room and there is expectation of a show down between her and the Chairman. In contrast, she shows respect for him and provides valuable facilitative assistance, reassuring Mary and her family that they will be listened to, that they will not be held to an agreement which Mary has made but with which they no longer wish to comply and that they will be given a second chance. The woman provides an excellent reality check for the group, questioning the capacity of the Corporation to exercise the agreement, and asking about processes to be put in place to secure its implementation. It has been a mistake not to incorporate her into the process, but she is a formidable person and fear of conflict has inhibited the facilitator from doing so. Unfortunately, there is no time for closure, as people drift off to do business on a Friday afternoon and as the negotiating team plans to leave town. Issues are left up in the air and some disputes exacerbate.

The need for locally based Indigenous process experts such as mediators and facilitators as part of a fully supported national network of Indigenous Mediators and Facilitators who can make timely interventions and follow up and provide more flexible services is highlighted.

Conclusion

Many of the difficulties in this scenario arise because of poor process in the past which has led to a sense of unfairness and a proposed clearly unsustainable agreement. They also require significant systemic and structural change. Both involve the overturning of a status quo which, as Mayer points out, consensus-based processes tend to support.[6]

There is little room for negotiation if the limits of the deal are already set when mediation or facilitation begins. The recommended framework of decision-making and dispute management should be negotiated regionally at the outset across the whole of a language group's country in relation to all patrigroups so that there are regionally formulated principles around which negotiations around specific areas might occur. It should be based on detailed anthropological mapping of the matrix of differentiated native title rights and interests contain contingencies in the event that Indigenous parties cannot agree.

Funding is required to do this well in advance of the development of any agreement-making processes which might involve non-claimant parties. The Office of Indigenous Policy Coordination will need to recognise its importance in forward planning and make appropriate budget provisions, as will Native Title Representative Bodies. The capacity of the group to implement agreements also requires significant funding support.

Finally, the scenario reveals the range of interventions and skills which might be required. Indigenous parties need 'consultants, advisors, advocates, teachers, representatives and substantive experts, as well as facilitators, conciliators and mediators', negotiators, organizers, and strategists who are comfortable with the tensions between the 'ideal' and the 'real' as Mayer has pointed out, and participatory community developers and educators.[7] The principles of mediation and facilitation, however, usually insist upon mediator neutrality, a separation of process and content, and that the process expert should only manage and facilitate the process.

One way of ensuring that the kinds of needs that parties have are being met is to co-opt other experts into the process. However, it would be impossible to meet the full range of needs of Indigenous parties in this way in the time frame and with limited resources. The resources that a process facilitator brings to a process are thus highly significant. In the short term, my skills as an anthropologist and mediator/facilitator enable a detailed understanding of the issues which can only enhance the process, though conflict of interest can arise if I offer anthropological opinions such as are required in the scenario discussed.

Ultimately, this scenario requires a long term participatory community development approach which addresses all the relevant issues over time. This would include support for obtaining funding to enable the Corporation to have effective and fair governance measures in order that it can represent its constituents appropriately. It would also involve the co-opting of other assistance as required.

---

[6] B. Mayer, p. 63

[7] B. Mayer, p. 31 and p. 216.

Part of the problem, as Mayer points out, is the stress we place people under in striving for consensus[8] in the face of 'deep structural issues, underlying social inequities and systemic problems'.[9] In invoking simple communication and interactive techniques, we can make a significant difference which might enable healthy and open competition amongst parties which does not shirk conflict but seeks to engage and explore and manage it in moving forward towards an outcome.

[8] B. Mayer, p. 54.

[9] B. Mayer, p. 47.

ISBN 0 85575 537 7
ISBN 978 0 85575 537 9

Native Title Research Unit
Australian Institute of Aboriginal and Torres Strait Islander Studies
GPO Box 553
Canberra ACT 2601
Telephone: 02 6246 1161
Facsimile: 02 6249 7714
Email: ntru@aiatsis.gov.au
Website: www.aiatsis.gov.au