TOWARDS A COMMON PRACTICE: INVESTIGATING AUSTRALIAN INDIGENOUS DISPUTE MANAGEMENT NEEDS IN LAND ISSUES.

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ABSTRACT

The Australian Institute of Aboriginal and Torres Strait Islander Studies is undertaking a three year mediation and facilitation project with core funding from the Aboriginal and Torres Strait Islander Commission and funding over twelve months for workshops from the National Native Title Tribunal. The project is aimed at developing best practice models of dispute management in land use issues with a particular focus on native title. The project will culminate in the establishment and training of regional panels of Indigenous facilitators and mediators. The authors, Rhian Williams and Toni Bauman head the project team.

A key aim of the project is to develop and promote shared understandings and sets of standards for mediation and facilitation processes amongst all native title stakeholders. Currently, a range of formal and informal activities has taken place under the rubric of 'mediation'. Some have been good whilst others have been detrimental to the communities involved. The need for developing agreed definitions of mediation and facilitation is highlighted in the Land and Natural Resources Conflict Management Survey carried out in June and July 2002 by the Food and Agricultural Organization of the United Nations. In particular, a lack of specific training is highlighted as an international concern.

Our paper will focus on the Project's approach to developing shared definitions and understandings and agreed training strategies. We will conclude by identifying that the development of positive cultures of mediation and facilitation requires creating awareness of the importance of and developing skills in procedural expertise beyond a more common emphasis on substantive outcomes.

The Indigenous Facilitation and Mediation Project at the Australian Institute of Aboriginal and Torres Strait Islander Studies is researching best practice Indigenous decision-making and ‘dispute’ management processes in land issues. It aims to identify the underlying principles of relevant and responsive approaches and to assist in enabling Indigenous community and Native Title Representative Body capacity in these areas.

The relationships between non-Indigenous and Indigenous Australian were fundamentally changed by a series of land mark court decisions which recognised Indigenous rights and interests in relation to land. As a result, in 1993, the Australian Government passed the *Native Title Act 1993* (NTA) to create structures for the consequent negotiations of the co-existence of Indigenous and non-Indigenous interests.

The *Native Title Act 1993* places an extraordinary range of responsibilities on both Indigenous claimants, their representatives, the Native Title Representative Bodies (NTRBs) and non-Indigenous stakeholders. Agreement making, which is a core principle underlying the *Native Title Act 1993* (NTA) regime, aims to maximise ‘outcomes’ and ‘outputs’ through non-adversarial and collaborative alternative dispute resolution mechanisms such as mediation and facilitation. Despite this emphasis, stakeholders and service providers do not seem to have a set of shared understandings and expectations of mediation and facilitation and what they can and should deliver.

There is also a critical link between governance, decision-making and dispute management. The nexus between good governance and just and sustainable outcomes for Indigenous communities is to be found in the skilled facilitation of effective Indigenous integrated dispute management systems. Inclusive and representative decision-making processes, which are transparent and fair and upon which Indigenous people can confidently rely are inherent best practice components of such systems. Individual communities must be driving forces in designing and tailoring dispute management systems to their own particular needs. Achieving a match between institutions and communities is a localised process which is central to positive outcomes. Inherent to such processes are the concepts of self-determination and community capacity and the recognition of Indigenous Law rather than a continued reliance on external interventions by ‘experts’.

Disputes over land constitute a highly complex set of circumstances, which require consistent and coherent ‘best practice’ approaches from the dispute management professionals involved. There has been a tendency to transplant dispute management processes from the non-Indigenous context with the assumption that, whilst they may not be culturally neutral, they will do the job. The consequent de-stabilisation of existing structures of governance, including Indigenous decision-making and dispute management mechanisms is a cost borne by the Indigenous community. The failure of such external mechanisms results in the problematising of Indigenous people and Indigenous behaviour. This can lead to perceptions that Indigenous people are ‘always fighting’, rather than to the recognition that it is the imposition of processes that are non-responsive to the needs of Indigenous communities that causes problems.

A number of anthropologists have emphasized the importance of process to Indigenous people. The need, however, is to study particular processes rather than making assumptions about ‘process-in-general’. Whilst processes will vary from place to place, decision-making in most, if not all, Aboriginal societies is a continuous social process which has an expectation of change and a need for frequent revisiting and reaffirmation of decisions. Decisions are not necessarily permanent and fixed, they may need to be revisited as circumstances change, and as future generations become bound by decisions which may no longer be relevant to their needs. There is generally a poor understanding of the meanings of ‘disputes’ in Indigenous communities. As is the case in all societies, disputes are a normal part of Indigenous life. They may have a positive reproductive force not always obvious at first glance, and may be one of the few ways in which Indigenous people can subvert processes which are imposed upon them or decisions with which they disagree.

Native Title often provides the only platform for the playing out of a varied range of disputes within Indigenous communities. It can also create new tensions as Indigenous people fight over the scraps of a once holistic landscape in competition for scarce resources and in a search for recognition. It provides many claimants with the first opportunity to assert ownership of land and is often seen as the vehicle for

achieving recognition and respect for Indigenous people. However, the manner in which native title processes emphasise ‘traditional owners’ over other Indigenous people in the community can introduce an uneven regime of recognition, creating unprecedented social divisions and leading to disputes. Community specific, dispute management processes may no longer be practised as those with expertise may have passed away prematurely or as the community processes have been replaced by external procedures.

There are often no Indigenous procedural precedents for negotiating over and making decisions about the kinds of large scale development projects which Indigenous people are asked to consider today. A lack of clarity, including on the part of legal practitioners, of the parameters and responsibilities and likely determinations of the *NTA*, creates a climate of uncertainty, which may exacerbate disputes. The size of the Indigenous groups involved in negotiations may preclude the easy resolution of conflict. This may be especially the case when groups consist of people who have only have been brought together for the purposes of the negotiations and who do not normally form a decision making group.

Newly evolved procedures for enabling Indigenous decision-making and dispute management are necessary to respond to such changed circumstances. Indigenous people have been subjected to a range of formal and informal dispute management and decision-making processes ranging from highly structured adjudications, mediations and facilitations through to unstructured casual conversations. The differences between these processes and their consequences or intended outcomes have often not been made clear to those attending. ‘Facilitation’, ‘mediation’, ‘conciliation’, ‘negotiation’ and ‘arbitration’ are all terms used by practitioners in describing their procedural approaches. All these approaches are also mentioned though not clarified, in the *NTA*. These terms are also used interchangeably by community people – both Indigenous and non-Indigenous.

Contradictory and unworkable processes have been imposed on Indigenous communities, often escalating or exacerbating fundamental pressures or tensions. Ineffective and expensive meetings, often lacking in procedural rigour in which little attention has been paid to appropriate decision-making and representational structures, have become endemic. Disputes between Indigenous people are frequently identified as the principal obstacle to achieving native title outcomes and agreements. This is despite the fact that there are similar disputes within other stakeholder groups including Governments, Native Title Representative Bodies, mining companies, pastoralists and others, which similarly impede agreements.

There is no homogenous approach to dispute management and decision-making practices and there are no agreed standards for mediation or facilitation. This lack of standards poses many problems not least of which is how do NTRBs and Indigenous communities choose appropriately qualified and competent mediators and facilitators. It also leads to a set of circumstances whereby the *NTA* sees dispute resolution qualifications as optional for members of the National Native Title Tribunal.

Laurie Nathan from the Centre for Conflict Resolution, at the University of Cape Town, in South Africa, writing on the use of mediation in African civil wars, identifies that mediators often deviate from the logic of mediation and make procedural errors. In doing so, they ‘...frequently heighten the suspicions, fear and anger of the beleaguered disputants and are consequently ineffective if not counter productive.’(Nathan, 1998:1). For Nathan, a primary reason for this deviation is the lack of training received by mediators which is due in part to the lack of recognition of mediation as a specialist expertise.

Nathan argues that there are “… six strategic principles of mediation: 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” (Nathan, 1988:1).

Much of what Nathan outlines is relevant when considering native title. Most importantly, as he identifies, conflicts are complex things and cannot be resolved quickly and easily. He states that they may involve “… apparently irreconcilable interests and values, exacerbated by intense mistrust and by competition over scarce resources, and defy simple solutions.” He continues, commenting that “The degree of complexity 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." (Ibid).

Of particular note, is his premise, that the resolution of conflict is an exercise of power. In Australia, the *NTA* structurally positions mediating bodies such as the NNTT and NTRBs to exercise considerable power over stakeholders through control over time, resources and what is considered appropriate for the mediation process. It also locates Indigenous Law as inferior to non-Indigenous Law, which is taken for granted. That is, Indigenous Law has to be proven within the common law and accepted as such by the non-Indigenous stakeholders.

For Nathan, the degree of complexity is related to the historical relationships and contexts from which conflicts have emerged. He argues that history and relationships cannot be artificially excised from the dispute management process. Mediators who frame processes that exclude historical contexts and instead emphasise future agreements and outcomes are prioritising one party's interests over another and, in so doing, are exercising their power over parties. As Nathan identifies, this approach which pushes for settlement is a manifestation of "… 'quick fix' strategies that reflect little appreciation of the difficulty of achieving reconciliation and little familiarity with the intricacies of local dynamics and culture." (Ibid).

Balancing the need to focus on relationships with the recognition of the time urgent environments within which all parties are operating, is an extraordinarily challenging responsibility for mediators. Mediation processes that do not allow time for the building of genuine understanding and for cooperation between the parties, will produce unsustainable outcomes and can only serve, as observed earlier by Nathan, to '… heighten the suspicion, fear and anger of beleaguered disputants' (Ibid).

It is important for communities to be in control of determining their own procedural agendas and skilled in associated processes. It is also important to recognise that the building blocks of such processes are already present in the community. This may lead to a heightened focus on relationship building and a reinforcing of community authority rather than on 'quick fix' approaches. Processes of facilitation and mediation which are flexible and owned by the community can considerably contribute to the capacity of communities to be self determining.

In identifying best practice approaches to Indigenous decision-making and dispute management, which are clearly linked with other local governance procedures, including the development of appropriately skilled and resourced Indigenous practitioners, it is hoped that this research will engage both substantive and procedural experts in the debate and move towards a national strategic approach.

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 giving them the confidence to exercise their authority are absolutely essential. Needs and solutions change but how you do business with one another, always remains fundamental.

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