Indigenous Facilitation and Mediation Project

Native Title Research Unit

The Australian Institute of Aboriginal and Torres Strait Islander Studies

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IFaMP overarching principles

- Decision-making and dispute management processes are core business for all who work with Indigenous people
- Decisions and processes must be fully informed and owned for outcomes to be sustainable - prior and informed consent
- Processes must build on and develop existing Indigenous human capital and ways of doing things in an environment of mutual respect
- How business is done holds the key: a history of poor decision-making and dispute management processes has caused many problems over the last 30 years
- Capacity of governments and their employees is critical
- Conflict is natural; how it’s managed is the issue
Three year program (workshops, reports, publications, practice papers, awareness raising)

- 2003-04 Pilot Facilitation Training Workshop South West Land and Sea Council and follow-up evaluation, Native Title Representative Bodies, Native Title Services and Land Councils workshops, CJCs, CDOs and Governance conference, Jabiru.

- 2004-05 AIATSIS seminar series, Indigenous and non-Indigenous mediation and facilitation practitioners workshops, evaluation workshop

Pilot Facilitation Training Workshop
South West Land and Sea Council
and follow-up evaluation
Perth, September 2003 and May 2004
Asia Pacific Mediation Forum
Singapore, 2003
Minerals Council of Australia
Native Title Representative Bodies (NTRBs) have a legislative responsibility under the *NTA*.

- Mediation and facilitation services provided by:
  - External consultants
  - National Native Title Tribunal members
  - NTRB staff (core business)

**NTRB Workshops to identify issues and training needs**
CEO workshop Adelaide Native Title Conference, 2004
NSW Community Justice Workshop
NTRB Day
Native Title Conference
Adelaide, 2004
ISSUES ARISING FROM NTRB WORKSHOPS AND SOURCES OF CONFLICT

- Overarching dispute between two laws and the unfairness of an imposed legal system
- Time pressures (good and bad)
- Long standing hurt, trauma and sense of past injustices
- Native title as a platform
• Complexity of legal environment and misunderstandings

• Distribution of resources is unfair
  – information dissemination (keeping applicant representatives up to date)
  – prioritising claims around legal priorities
  – applicants keeping the native title group up to date

• Capacity of parties to enter into mediation (education, resources, representation) and ethical issues

• Negotiations in bad faith and fishing expeditions

• Cultural heritage
- talking to the right people
- real and perceived conflict of interest
- disputed connection materials and overlapping claims
- inadequate follow up and implementation
- adversarial lawyers; managing third parties - lawyers taking instructions from the wrong people and not listening to instructions
- staff planning and co-operation (pilot training)
- need for Indigenous local expertise for timely interventions (national network)

- difficulties in reconciling the role of elders into the process

- the need to avoid quick fix solutions at expense of long term resolution

- the right to say no

- lack of understanding of differences in range of processes and what to expect

- absence of national standards (complaint processes, CEOs)
Recommendations (NTRB report)

- urgent need for locally based Indigenous mediators and facilitators to make timely interventions

- education packages and processes; communication skills (lawyers etc)

- policy guidelines

- process expert (real or perceived conflict of interest)

- applicant rules and responsibilities

- localised cross cultural training

- pilot induction processes

- nationally accredited training - vocational pathways
Community mediation centres and NTRBs workshop
AIATSIS, October 2004
Some Implications for mediation and facilitation practice

- voluntariness and choice of mediator and facilitator
- conflict of interest real or perceived
- cultural sensitivity of the mediator and local knowledge
- co-mediation
- confidentiality
- mediator responsibilities
- conflict of interest
- meaning of consensus
- identify underlying issues, parties and stakeholders, positions, and interests
- account for differentiation and relationships within and across groups and for individual and collective, rights, interests, needs and responsibilities
- employ a range of mediations eg. family
- incorporate ways of ensuring that information is understood
AIATSIS seminar series, Semester 1, 2005

- Aboriginal Law and Native Title Mediation: the Spear Creek, Port Augusta Example (Parry Agius)

- Leading New Ways of Doing Business (Kerrie Tim)

- Indigenous panel – decision-making, conflict management and representation in native title (Mick Dodson and Valerie Cooms)

- Decision-making, Conflict Management and Representation in Native Title: A case study of the Kelabit Dispute Resolution in Sarawak, Malaysia (Assoc. Prof. Ramy Bulan, Co-ordinator of the Centre For Legal Pluralism and Indigenous Law, Faculty of Law, University of Malaya)
Native Title Mediation Practice: The Commonalities, the Challenges, the Contradictions A Survey of Native Title Mediators (Williams, 2005)

- Range of processes under interest-based mediation and discrepancies in how people described it
- Misunderstandings about co-mediation
- Mediator responsibilities
  - Implementation
  - Preparation of parties
  - Mediator providing advice
  - Incorporation of experts into processes
Indigenous and non-Indigenous native title mediator and facilitator workshops
Canberra, 2005

Feeding in results from survey and NTRB workshops
Non-Indigenous and Indigenous native title mediator and facilitator workshop
Canberra, AIATSIS, March 2005
3. Do you see that Indigenous mediators are being extremely important in the resolution of native title cases, and, if so, would you support and lobby for the development of this?

4. How are you able to assist all parties to come to an agreement in the best interests of all, without breaching neutrality?

5. Do you think you have the ability to mediate effectively with Indigenous people? Skills, knowledge, experience, openness to learn?

6. What is your solution/strategy for making the legal and other Indigenous adaptations in the native title context?
Peace-making, peace-keeping and peace-building

• defining the approach (mediation can hold negative connotations as ‘done’ to people; don’t box it - written word becomes the truth)

• mediation is only one strategy

• identify, build on and tailor processes to existing local decision-making and conflict management processes

• reinforce power of local peacemakers, recognise and support

• holistic approach involving all sectors of the community and longer time frame

• deal with the past and allow for expressions of remorse and apologies

• living in harmony (sort out troubles between selves first before external engagement)
Third Party Involvement in Agreement-Making and Participatory Community Development Workshop, AIATSIS, Canberra, 2005
National approach Indigenous facilitators and mediators workshop
Canberra, AIATSIS, October 2005
• National network of Indigenous Facilitators and mediators
  (existing email network and issues paper)
• support and co-ordinate trained, mentored, accredited and specialised regionally based networks of Indigenous facilitators, mediators and negotiators
• long term evaluation protocols and standards
• vocational pathways and nationally accredited training (eg cjc’s)
• non-Indigenous practitioners (co-mediation model)
Need for Case Studies

- Food and Agricultural Organisation Conflict Management survey
- IFaMP survey of mediators in native title
- Federal Court/NADRAC scoping study
Negotiating Indigenous rights and interests amongst Indigenous native title holders, 2005

• regional matrix of differentiated Indigenous rights and interests through detailed anthropological mapping

• negotiate decision-making and conflict management processes up front - no negotiation if the limits of the deal are already set - assumption that the status quo will be preserved.
  • across the whole of a ‘tribal’ group’s country so that there is a regional formula.
  • vested interests prohibit the principled negotiation of such a framework to which all must adhere if attempts made along the way
  • may be no arbiter of tradition.
IFaMP participatory pilot facilitation/mediation case study, 2006

Methodological issues

- mediator/facilitator
- anthropologist
- researcher
- community member/friend
- local knowledge
- perceived or real conflict of interest
Sample Techniques

• mapping on butcher’s paper

• small group work

• closed questions
Case Study pilot findings (cont’d)

- collective and individual Indigenous rights

- contingencies where Indigenous parties cannot agree amongst themselves - may decide to involve the interventions of third party/ies

- ignore and trivialise difficult people at your peril

- focus on relationship building

- interests and needs of those who may feel excluded from the process

- capacity of the group to implement agreements depends on its governance structures
Additional IFaMP best practice research findings and Principles

- no one size fits all and no quick fix solutions
- skills lie in tailoring processes to reflect local ideas, decision-making processes and incorporate local expertise
- need for arms length process experts (co-mediation)
- agreement-making to be built up to ensuring commitment and willingness
- negotiate processes from the bottom up
- Support with timely education and awareness programs
- Build on existing capacity (Government and Indigenous)
- Integrate with other relevant community services and needs
- Avoid simplistic, quick fix solutions at the expense of long term relationships and sustainability
- Provisions for implementation and the review of outcomes and solutions, in recognition of evolving needs and circumstances
- clearly map the elements of and parties to the conflict
- ensure prior and informed consent of those participating
- account for emotional, substantive and procedural needs (planning)
- account for relative access to resources
- prepare for negotiations and negotiation training
- strategies for managing third parties
1. Evaluation workshop, Canberra, AIATSIS, October 2004

2. Evaluation Toolkit: training and service delivery in decision-making and dispute management processes in native title workshop, Canberra, AIATSIS, May, 2005
Evaluation Toolkit: Training and Service Delivery in Decision-Making and Dispute Management Processes in Native Title

- funding from the National Native Title Tribunal
- required expertise
- consulting firm Social Compass
- built around NTRB needs and native title but relevant to all agreement-making and decision-making processes
- stand alone services (consultants and NNTT), NTRB staff
- 3 parts: indicators and measures, tools and how to
- workshop participants: National Native Title Tribunal, Federal Court of Australia, Native Title Representative Bodies (Queensland South Native Title Services and Yamatji Land and Sea Council)
- trialing
Other Major Research Resources

- Web site

- Bibliography: Culture, Conflict Management and Native Title
Major implementation requirements

- Nationally accredited training - range of pilots - core skills and different contexts - VET sector
- Whole of government pilots including all native title stakeholders
- Ongoing research including international examples and case studies
- NTRBs and applicants roles and responsibilities
- Development of national network of fully accredited, supported and mentored Indigenous facilitators, mediators and negotiators – expansion and consolidation of email network and matching
- Continued raising of awareness
- Clearing house – best practice
- National standards and common evaluation procedures in the Indigenous context
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