



## **Land, Rights, Laws: *Issues of Native Title***

**Native Title  
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### **Abstract**

*Differing understandings of rights and interests pose a problem in the native title arena that should be addressed to improve native title practice and mitigate often-severe negative impacts upon Indigenous groups. In this paper, Toni Bauman examines issues around the uneasy intersection of competing meanings of individual and collective human rights, rights and interests as they may be interpreted under the Native Title Act 1993 (NTA) and rights and interests as they are approached in native title mediation. The paper suggests that prior to any substantive negotiations taking place, it is necessary for Indigenous parties to negotiate a framework for Indigenous decision-making and conflict management processes in relation to particular local contexts and proposals. It concludes that the exploration of the relational idea of 'fields of intersubjectivities' might provide an appropriate starting point for theorising conflict management and decision-making amongst Indigenous peoples and a basis for developing policy and designing related processes. This is as opposed to a view of rights and interests in terms of a social ontology of groups and individuals in a liberal positivist discourse where rights are seen to be absolute and groups as homogenous*

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### **WHOSE BENEFITS? WHOSE RIGHTS? NEGOTIATING RIGHTS AND INTERESTS AMONGST INDIGENOUS NATIVE TITLE PARTIES**

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## Introduction

Differing interpretations and understandings of rights and interests pose a problem in the native title arena which requires addressing to improve native title practice and mitigate often-severe negative impacts upon Indigenous groups. Under the *Native Title Act 1993 (NTA)* in Australia, a determination of the native title rights and interests of an Indigenous group or individual is made by the Federal Court according to 'rights and interests possessed under the traditional laws acknowledged, and the traditional customs observed' (s223.1(a)). The *NTA* also emphasises agreement-making through non-adversarial processes such as mediation and facilitation which must also account for the rights and interests of parties. The native title rights and interests of Indigenous peoples in Australia are thus located at the uneasy intersection of competing discourses of individual and collective human rights, rights and interests as they may be interpreted under the *NTA* and other State and Territory land rights legislation, and rights and interests as they are approached in native title mediation and facilitation. In their subjection to Australian common law, Indigenous native title rights and interests are also located in fundamental inequalities between Australian law and Indigenous laws, which can give rise to conflicts amongst Indigenous peoples about their identities as they seek recognition of their collective rights and interests in the terms of imposed legislative definitions.

This Paper examines the meanings of Aboriginal 'rights' and 'interests' in the various intersecting and competing discourses around native title, in particular, the relationship between the meaning of rights and interests at law, mediated rights and interests and the extrapolation of Aboriginal meanings amongst themselves in negotiated processes. In the words of eminent anthropologist, W.E.H. Stanner, as quoted by Indigenous leader, Noel Pearson, in his Mabo lecture at the 2003 Native Title Conference in Alice Springs: 'There will be conflicts of interests between Aborigines which may be insoluble unless their own doctrine of what I have termed rights, duties, liabilities and immunities can be developed.'<sup>1</sup> This is a core issue for Native Title Representative Bodies (NTRBs), Services and Land Councils who, under the *NTA*, are charged with dispute resolution and facilitative functions in assisting Indigenous people in dealing with disputes and decision-making and is the focus of this paper.

The paper begins by briefly looking at the ways in which individual and group rights have been approached in human rights paradigms, and then raises issues as to the meanings of the terms, 'rights' and 'interests', as they are employed in 'interest-based' mediations. Questions relating to the negotiation of relational matrices<sup>2</sup> of differentiated and hierarchical Aboriginal native title rights and interests are raised, followed by a discussion of the implications of these issues for Indigenous decision-making and conflict management practices. It is recommended that prior to any substantive negotiations taking place, it is necessary for Indigenous parties to negotiate a framework for Indigenous decision-making and conflict management processes in relation to particular local contexts and proposals. It is suggested that the relational idea of 'fields of inter-subjectivities' might provide an appropriate starting point for theorising conflict management and decision-making amongst Indigenous peoples and a basis for developing policy and designing related processes. This is as opposed to a view of rights and interests in terms of a social ontology of groups and individuals in a liberal positivist discourse where rights are seen to be absolute and groups as homogenous. As Michael Jackson has outlined, fields of inter-subjectivities refer to the co-construction of meaning through 'inter-experience, inter-action, and interlocution'<sup>3</sup> at sites 'of constructive, destructive, and reconstructive interaction'<sup>4</sup> which include 'persons, ancestors, spirits,

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<sup>1</sup> N. Pearson. 2003. Where we've come from and where we're at with the opportunity that is Koiki Mabo's legacy to Australia. Mabo Lecture, the Native Title Conference, "Native Title On The Ground" 3-5 June 2003, Alice Springs, Northern Territory [online]. Available from: <http://www.aiatsis.gov.au/rsrch/ntru/conf2003/papers/pearson.pdf> [Accessed: 13 July 2005]

<sup>2</sup> K. Glaskin. 2003. Native title and the 'bundle of rights' model: Implications for the recognition of Aboriginal relations to country. *Anthropological Forum* 12 (1): pp 67-88.

<sup>3</sup> M. Jackson. 1998. *Minima Ethnographica*. Chicago: University of Chicago Press. p 3.

<sup>4</sup> M. Jackson, see note 4, p8.

collective representations, and material things'.<sup>5</sup> Inter-subjectivities are shaped not only by 'unconscious, habitual, taken-for-granted dispositions', but also by 'conscious intentions and worldviews'.<sup>6</sup>

### **Human rights approaches to individual and group rights**

There is significant potential in the native title regime for the denial of human rights in the distribution of power between Indigenous groups and within them and between Indigenous and non-Indigenous groups. The native title framework itself may be seen to be a fundamental denial of Indigenous rights rather than recognition of these rights. The legal extinguishment of native title, for example, the rights of non-Indigenous people taking precedence over Indigenous rights in the legalities of co-existence, or the inequities in the distribution of resources to deal with native title issues all raise questions of the denial of human rights. Rights to self-determination, to a nationality, or to participate in a cultural group may also be denied in processes involving the exclusion of Indigenous individuals or families from a native title group.

Whilst, traditionally, a major purpose of human rights has been to protect individuals from the power of groups,<sup>7</sup> there are considerable differences in opinion regarding the relationship between individual and collective rights in human rights paradigms. This is an important issue in considering the nature and distribution of native title rights and interests, not only across Indigenous and non-Indigenous groups, but also amongst Indigenous individuals who may share membership of a native title group. There is often a corporate entity approach to group rights in which the rights of groups are seen to be bounded, homogenous, non-negotiable and uni-directional. In this paradigm, the rights of Indigenous peoples are most commonly conceived as against those of non-Indigenous interests in apparently fixed binarisms between 'black' and 'white'. Diverging or conflicting Indigenous rights and interests and their sometimes negotiable quality often remain unaccounted for as may the fact that individuals participate in other 'groups' or relationships across groups.

One 'human rights' approach is to see the enjoyment of a right as devolving directly from groups and to view individual rights within the group as interdependent and mutually interactive rather than in competition. Group rights are seen to protect both the individual and the group. The codification of group rights is aimed at guaranteeing both the rights of the group and the rights of members of the group, rather than at the assertion of the right of the group against its own members. Individual rights are seen as deriving from group rights. Another approach is to see collective rights as individual rights to the benefits of group life. The rights of groups to the preservation of their culture, for example, are derived from the right of all human beings to belong to a culture. Though such rights may be described as collective, they are viewed as located in the individual. However, as Sampford points out, a collective right cannot be enjoyed by others if it is not exercised at all. Whilst collective action may not be the subject of individual choice, the right to participate in collective choice is an individual right.<sup>8</sup>

Neither approach appears to assist us in understanding the allocation of native title rights within and across Indigenous groups, which has a direct bearing on how benefits and decision-making powers might be distributed. A more promising approach is taken by Carol Gould, who considers that groups exist only in and through the individuals related to each other in the group and are not apart from these relations.<sup>9</sup> She points out that it may be an 'ontological error...to consciously or unconsciously reify the conception of a group as something independent of or abstractible from its constitution by individuals, in the specific relations that characterize them as

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<sup>5</sup> M. Jackson, see note 4, p9.

<sup>6</sup> M. Jackson, see note 4, p9.

<sup>7</sup> P. Jones. 1999. Human Rights, Group Rights, and Peoples' Rights. *Human Rights Quarterly* 21(1) pp 80-107.

<sup>8</sup> C. Sampford. 1997. The four dimensions of rights. *Rethinking Human Rights* pp 50-73. (ed.) B. Galligan. and C. Sampford. Sydney: The Federation Press.

<sup>9</sup> C. Gould. 1996-97. Group Rights and Social Ontology. *The Philosophical Forum*. 28(1-2) pp 73-85.

members of that group.’<sup>10</sup> She suggests that such an abstract entity cannot have rights. In turn, group rights are not reducible to the sum of the rights of their constituent members. The right of choice to be a member of, to leave a group, to combine with others or to be members of many groups is critical. If individuals are to have equal rights to the conditions of their self-development, they must have equal rights to the opportunity to participate in a culture and to access the conditions of self-development.<sup>11</sup> Gould suggests a ‘social ontology of individuals-in-relations and constituted social groups’ is needed to understand individual and group rights and the relationships between them.<sup>12</sup> The idea of inter-subjectivity, which is discussed in the conclusion of this paper, supports a notion of group rights that neither reifies the bounded group as rights bearers nor reduces these rights to the distributive rights of individuals. Ultimately, it should be able to accommodate competing native title rights and interests amongst Indigenous people.

### **Rights, interests and needs in conflict management processes**

‘Rights’ issues lie at the roots of many conflicts. Thus, the fields of human rights and conflict management are inextricably interlinked and should be seen as complementary rather than contradictory. Parlevliet suggests that a combination of the prescriptive approach of human rights actors with the facilitative approach of many conflict resolution practitioners should be considered. Whilst recognising that human rights and justice are non-negotiable, the interpretation, application and implementation of rights and justice are negotiable in the context of a negotiated settlement.<sup>13</sup> However, just as there is a need for human rights practitioners to develop a common discourse about the relationship between collective and individual rights, facilitative alternative dispute resolution practitioners need to develop shared understandings of the meanings of rights and interests and how these meanings translate into practice.

Many approaches to facilitative mediation are described as ‘interest-based’, including that of the National Native Title Tribunal 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’<sup>14</sup>. Yet despite wide use of the term, there is considerable divergence in the practice which occurs under its rubric and there are no agreed understandings of the meanings of ‘interests’ and ‘rights’, and how they relate to each other. The terms are often conflated, used interchangeably or in defining each other. Section 253 of the *NTA*, for example, defines an ‘interest’ as ‘any other right...’ and section 223(1) refers to ‘native title rights and interests’ as ‘the communal, group or individual rights and interests of Aboriginal people or Torres Strait Islanders in relation to land or waters’. The terms ‘needs’ and ‘interests’ are also often used interchangeably in discussions of ‘interest-based’ processes.

In questioning whether interest-based approaches can adequately account for the rights and interests and needs of parties, Catherine Morris, a conflict resolution consultant and academic who has been associated with the Institute of Dispute Resolution at the University of Victoria in Canada, notes that ‘interest-based’ approaches have achieved some hegemony.<sup>15</sup> They are usually described as problem-solving processes with the goal of finding mutually satisfactory outcomes for all parties. The literature often identifies three interdependent interests that all parties are said to have – substantive, procedural and emotional (psychological). To reach an agreement, interest-based processes must develop outcomes that meet, to the parties’ acceptability, the substantive,

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<sup>10</sup> C. Gould see note 10, p 76.

<sup>11</sup> C. Gould see note 10, p 77.

<sup>12</sup> C. Gould see note 10, p 78.

<sup>13</sup> M. Parlevliet. 2002. Bridging the divide: Exploring the relationship between human rights and conflict management’. *Track Two: Constructive approaches to community and political conflict*. 11 (1) p 1.

<sup>14</sup> G. Neate, C. Jones and G. Clarke. 2003. 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. Perth: National Native Title Tribunal.

<sup>15</sup> C. Morris. 2003. Interests, Needs, Rights, Morality and Conflict Resolution: A Heretical Perspective [online]. Working Draft. Available from: <http://www.peacemakers.ca/publications/MorrisHereticalPerspective.html> [Accessed 10 February 2004].

procedural and emotional (psychological) needs of all parties.<sup>16</sup> Following Moore, Rhiân Williams and I have explained 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.<sup>17</sup>*

Rights are thus often reframed as interests in interest-based processes and de-emphasized in favour of interest-based consensus building. This appears to be based on the understanding that it is better to appeal to interests that underlie articulated rights than to make demands based on the rights themselves. Morris suggests that in this process, assertions of rights may be ignored as they are seen to be ‘morally judgmental’ and ‘blame orientated’ and the moral content of rights may be lost.<sup>18</sup> Interests may also be seen as superior to rights and rights may be narrowly construed as legal rights determinable in the court, as they may be in Federal Court native title determinations. Needs are also often reframed as interests in interest-based processes and Morris notes a lack of authoritative consensus as to whether needs and interests are of equal importance. She suggests that needs such as security, water, nutrition, identity, freedom, self-expression, and belongingness, some of which are basic citizenship rights, are more than interests.<sup>19</sup> Moreover needs and rights and interests may also be culturally specific, relative, and socially constructed.<sup>20</sup> In Morris’s 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 in which many interest-based approaches seem to be founded.<sup>21</sup>

Morris concludes that rights talk is a fundamentally moral discourse and that our moral philosophies and ideologies lend themselves to any definitions of needs, rights and interests.<sup>22</sup> The interest-based framework, she argues, cannot adequately account for the notion of rights, moral entitlement, duties, responsibilities, competing world views and diverse moral authorities, obligations, global and social inequities, situations where the less powerful are attempting to create change and a range of other factors in which conflict is often framed. Neither, she says, does it account for the character or virtues of the parties, their senses of fairness and inequities, moral entitlements, duties and responsibilities. ‘What if the people really are the problem?’ she asks.<sup>23</sup>

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<sup>16</sup> C. Moore. 2003. *The Mediation Process*. San Francisco: Jossey-Bass

<sup>17</sup> T. Bauman and R. Williams. 2004. *The Business of Process: Research Issues in Managing Indigenous Decision-Making and Disputes in Land. Research Discussion Paper*, 13. Canberra: Native Title Research Unit, Australian Institute of Aboriginal and Torres Strait Islander Studies, p13.

<sup>18</sup> C. Morris, see note 16, p 8.

<sup>19</sup> C. Morris, see note 16, p 4.

<sup>20</sup> C. Morris, see note 16, p 4.

<sup>21</sup> C. Morris, see note 16, p 5.

<sup>22</sup> C. Morris, see note 16, p 8.

<sup>23</sup> C. Morris, see note 16, p 9.

Morris suggests that conflict management processes may be best located in relational frameworks which place ‘just relationships’ as foundational and in which needs, interests, legal and moral entitlements and power are all recognized.<sup>24</sup> However, whilst there is a need to develop a range of approaches to conflict management, which focus on the transformation of political, social or interpersonal relationships, such approaches need to be based on greater understanding of the meanings of relationships. This is not to say that the outcome is not important, but rather that a sustainable outcome must account for the complexity of relationships. Relationships can take many forms. What are ‘just relationships?’ Relationships do not have to be fuzzy and warm hearted; they can be adversarial and complex. They change, becoming static or stable or indifferent. They may themselves be the source of conflict when norms of communication are poorly understood or when, for example, there is a resort to ‘tradition’ as the justification for what others might see as oppressive and cruel behaviour. In Aboriginal communities in Australia, for example, relationships may be based on avoidance where people move camp to escape conflict or where relationships between cross sex siblings or between mothers-in-law and sons-in law, for example, are ‘taboo’.

The challenge is to manage conflict in a constructive way that allows for ‘the expression of discord and legitimate struggle’<sup>25</sup> and fosters *sustained dialogue* where parties do not stop ‘vexing’ one another, but are enabled to do so in ways that allow them to keep talking and listening.<sup>26</sup> Max van der Stoel suggests that effective prevention action includes dialogue, confidence-building, allocation of resources for constructive enterprises and a system of accountability.<sup>27</sup> Even if rights and justice are non-negotiable, there is no single way they should be applied or implemented: one size does not fit all and it is up to the parties themselves to devise and agree upon principles and approaches and thus to own them.

Substantive conflict is nested not only in relationships, but also in systems and structures. In the native title context, native title legislation and processes constitute a system with accompanying structures such as a Prescribed Body Corporate (PBC) which can give rise to much conflict amongst Indigenous people. For Indigenous decision-making and conflict management processes, it may be appropriate to think in terms of more holistic negotiated peacemaking, peacekeeping and peace-building processes which take into account a range of community structures and systems and relationships and the relationships of native title holders to others in Indigenous communities. This is particularly important in new government policy approaches to Indigenous affairs in Australia where the role of native title holders needs to be considered in relation to Shared Responsibility and Regional Participation agreements.

### **Issues in negotiating a relational matrix of differentiated Indigenous native title rights and interests**

Approaches to recognising Indigenous native title rights and interests need to account, not only for their proprietary, but also for their negotiable and networked qualities rather than seeing them as ‘boxed up’ into a package which applies only to members of a bounded native title group. If native title is approached, as has been the case in some recent Federal Court judgements, as ‘a bundle of rights’, rights and interests are compartmentalised as things or objects and the rights of Indigenous individuals and groups can be seen to be fully or partially extinguished. The relational and, at times, negotiable rights and interests amongst Indigenous peoples are ‘internally

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<sup>24</sup> C. Morris, see note 16, p 11.

<sup>25</sup> M. Parleviet, see note 14, p 9.

<sup>26</sup> C. Morris, see note 16, p 15.

<sup>27</sup> M. van der Stoel. 1999. Human Rights, the Prevention of Conflict and the International Protection of Minorities: A Contemporary Paradigm for Contemporary Challenges [online]. Centre for the Study of Human Rights, London School of Economics. [Accessed 18 January 2005]. Available from [http://www.osce.org/documents/hcnm/1999/10/494\\_en.pdf](http://www.osce.org/documents/hcnm/1999/10/494_en.pdf) p 6.

disconnected'.<sup>28</sup> Only a subset of what Katie Glaskin has referred to as the 'relational matrix of rights' which make up the communal rights is recognised.<sup>29</sup>

In his Mabo lecture, Noel Pearson argued that the details and organisation of the traditional laws and customs which 'govern the internal allocation of rights, interests and responsibilities amongst members of the native community', are seen to be 'pendant' or 'parasitic' upon and 'carved out' of the communal title.<sup>30</sup> He argued that they are irrelevant to a determination of native title by the courts that they should not be codified and that they should be left to the Indigenous community. However, there are independent and individual, competing and conflicting, and interdependent rights and interests which arise in their negotiation amongst Indigenous peoples in the native title framework which are not easily reconciled. 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.<sup>31</sup>

The recognition level of the apparently bounded, homogenous and unchanging native title group, often gives rise to conflict amongst Indigenous peoples. Whilst it may be argued that native title is best recognised by the courts at the level of the broader normative society, which is seen to generate and source the relevant laws and customs, rather than at the level of family or clan subgroups,<sup>32</sup> there is always a cut-off point to group membership which disrupts the complex regional relational and networked matrix of rights and interests that are in play. Issues arise as to the appropriate size of a cultural group before is legitimated in its demands for autonomy and recognition. Multiple and layered cultural identifications provide the basis for the splintering and fusion of groups, and groups may seek more exclusive eligibility criteria in search of more specific recognition of their individual rights and greater access to resources.

Denial of native title group membership is a significant cause of hurt and pain for many Indigenous people in Australia. Membership criteria may be over-determined by an ensemble of legal and anthropological and other 'experts' who sometimes act in quasi-judicial roles. Lawyers may advise that the important thing is to 'win' a claim in the courts, arguing for the rights and interests of native titleholders at the least complex level of a group. While it is by no means always the case, those whose claims are considered to be marginal or to not readily support proposed legal arguments can be excluded. NTRBs, Native Title Services, Land Councils and PBCs are left to 'sort it out' after the hearing. But 'sorting it out' is no easy matter and money that sits languishing in Trust accounts because there has been no agreement as to who should benefit from it.

Power is unevenly distributed amongst members of any native title group and individuals may be self-interested in making decisions around group membership. Whilst human rights law might suggest that members of a group have the right to exclude others, what of the rights of those who are excluded and their right to self-identification and participation? As noted, conflict is nested in relationships, systems and structures. Questions arise as to the kinds of processes, institutional structures and power relations which are invoked in such exclusions, whether they facilitate or inhibit transparent decision-making processes, and whether they balance rights and interests when

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<sup>28</sup> Mantziaris, C and D Martin. 2000. *Native title corporations: A legal and anthropological analysis*. Sydney: The Federation Press. K. Glaskin. 2003. Native title and the 'bundle of rights' model: Implications for the recognition of Aboriginal relations to country. *Anthropological Forum*. 12(1) pp 67-88.

<sup>29</sup> K. Glaskin, see note 3, p 80.

<sup>30</sup> N. Pearson, see note 2, p 7.

<sup>31</sup> P. Sutton. 2001. *Kinds of rights in country: Recognising customary rights as incidents of native title*: National Native Title Tribunal Occasional Papers Series, No 2. Perth : National Native Title Tribunal

<sup>32</sup> D. Lavery. 2004. The Recognition Level of the Native Title Claim Group: A Legal and Policy Perspective. *Land, Rights, Laws: Issues of Native Title*, 2 (30) pp 1-11. Canberra: Native Title Research Unit, Australian Institute of Aboriginal and Torres Strait Islander Studies.

they are in competition. The mediation of differential status among native title rights and interests within a group - the relativity of rights which might accrue through patri- and matri-filial inheritance to country, for example, through ritual responsibilities clearly defined through the travels of mythical ancestral heroes, or through being born at particular places and so on - requires considerable skill. Individuals may claim rights which don't enhance the group and may not be committed to the group. Native title rights and interests are no longer spread more or less holistically over the whole of an Australian landscape. Random extinguishment of native title rights and interests under the *NTA* means that there are native titleholders who may not have formal claims to areas to which they are highly attached. Their attention may turn to other areas in which their rights and interests may be 'secondary', but where there is some possibility of recognition and associated benefits.

Criteria for differentiating rights, such as ritual status or particular kinds of relationships to ancestors, have to compete within the group which homogenise rights, as descent from any of four grandparental ancestors is increasingly becoming the defining characteristic of the equal rights to land of all members of a group. This principle gives rise to an infinite array of rights possibilities and often results in decision-making powers being attributed uniformly across all members of the group regardless of their relative attachments to or responsibilities for specific areas of land within a claim.

Who has the power to say what a traditional law and custom is – 'tradition' is not absolute, it is always in a state of flux, it is reproduced unevenly, and is subject to negotiation. What of situations where the 'truth' is contested? Indigenous people have a range of religious, social and political histories and upbringings. Ways of knowing vary even within immediate families. What if the significance of a site is contested and its proponents seen as liars or greedy?

At least some native title rights and interests are differentiated and hierarchical; they are not uniformly distributed across the matrix to which Glaskin refers, they do not fit within neatly bounded apparently homogenous groups and they are specific to locations and a range of associated groupings. Rather than seeing them in binary competition, at least some Indigenous rights and interests should be viewed as contextual and negotiable amongst Indigenous parties themselves.

### **Developing local frameworks of Indigenous decision-making and conflict management**

NTRBs, Native Title Services and Land Councils have to address a complex array of individual and group Indigenous rights and interests in native title agreement-making processes, in presenting claims to the Federal Court, in the establishment of membership rules for Prescribed Bodies Corporate, and in distributing benefits. There is little point, as Noel Pearson commented, in hoping that litigation will provide resolution instead of subjecting all claims to proper research and intra-indigenous consideration and mediation.<sup>33</sup>

At issue is whether the manner in which rights and interests are distinguished amongst Indigenous native title parties can result in their codification, disallowing their negotiable quality and freezing them in time. Also at issue, is whether, as Peter Sutton has asked, such codification 'succeeds in imposing itself on custom'.<sup>34</sup> The codification of the principles of internal differentiation of Indigenous rights and interests in bundles of rights approaches, may, as Katie Glaskin has pointed out, 'contain subsequent litigation by sub-groups or individuals within the claimant group or provide them with a clear legal basis to protect their rights against others in the native title holding group'.<sup>35</sup> Peter Sutton has suggested that a failure to distinguish rights within 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'.<sup>36</sup>

Whatever the recognition level of the native title group, there will always be boundaries to be negotiated and the possibility of codification. Nevertheless, if the first step in agreement-making

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<sup>33</sup> N. Pearson, see note 2, p 7.

<sup>34</sup> P. Sutton, see note 33, p 16.

<sup>35</sup> K. Glaskin, see note 3, p 75.

<sup>36</sup> P. Sutton, see note 33, p 14.



involves the negotiation of transparent and agreed frameworks of decision-making and conflict management in relation to particular locations and issues under discussion, change can be accommodated. The assistance of independent third parties such as facilitators and mediators will be required, and native title holders will benefit from training in negotiation skills. Ideally, negotiations should take place on country – many Indigenous native title holders are ill-informed about the precise locations of the areas and boundaries under discussion, a significant and unnecessary cause of conflict in the first instance. Existing Indigenous decision-making and conflict management processes might be identified to determine their usefulness in the native title context including any roles to be attributed to ‘peacemakers’ in the community regardless of whether they are members of the native title group.

The process should ensure representation of the full range of native title rights and interests. Detailed anthropological work will be needed to record the specifics of the matrix of individual and collective, differentiated, multidirectional and relational rights and interests which form at each site or in a particular area. Parties might be asked to formally 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 to separate out rights, interests, needs, values, responsibilities, duties, etc and for Indigenous parties to have a dialogue around their meanings – the duties and responsibilities that certain kinship relationships involve for example. Should they wish to be heard, the full range of voices should be given expression in an environment of respect for all, including the voices of those who may not be seen to be ‘native title holders’, but who may have interests in the areas and issues under consideration: for example, Community Councils, Housing Associations, youth groups, ‘historical’ people who may not be able to trace connection to ancestors at the first moments of colonisation as is seemingly required by the *NTA*. ‘Witnessing’ is an important and powerful Indigenous cultural practice. It is often the case that Indigenous people have not listened to the stories behind the assertions of rights and interests of others with whom they see themselves in dispute. Places of inter-connection may become clearer if the space is provided for the co-creation of meanings. Parties should be given the opportunity to suggest solutions to circumstances where they may be reluctant to speak in each other’s presence.

A safe environment must be created and it is the responsibility of the mediator or facilitator to ensure that parties perceive they are on a level playing field. An agreement might be brokered as to how final decisions should be made if the parties are unable to negotiate a decision-making and conflict management framework. This might involve arbitration or conciliation by a particular elder, group of elders, or other respected people in the community, or a decision to be made by a working party, NTRB Board, Land Council or the Executive of a Prescribed Body Corporate. Parties may decide that they prefer formal intervention by an external non-Indigenous arbitrator or conciliator and agree to be bound by his or her decision. Avenues for complaint and appeal and provisions for conflicts of interest should be built into any framework.

Other issues to be negotiated might concern the relative decision-making powers of members of the group and the weight of particular subgroup interests relative to all members of any broader group.<sup>37</sup> Should representation be organised according to social groupings such as families or patri-groups, geographically, or according to particular interest groups? What say, if any, should

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<sup>37</sup>In one process of which I am aware, native titleholders are beginning to discuss the distribution of benefits and decision-making powers in relation to a particular area in terms of a scaling of rights and interests in scores out of ten. Family A gets so much out of ten, for example, because they were ‘only born there’ and do not have Dreamings in the area. Family B receives so much because they live in the area but their patrigroup is not associated with the area in question. Family C receives the greatest benefit because of the unique patrifications it has to the area and its primary responsibility for a site and associated Dreaming, which travels through the area. Family D receives ‘x’ because they have sites immediately adjacent to the area and associated Dreamings which are said to enter the area and ‘go back’. Two senior lawmen, who are not members of the broader language group, get ‘y’ in recognition of their regional importance. The Corporation receives so much out of ten in recognition that it is the language group that sources the laws and customs and of the interdependency, shared beliefs and dense kinship relationships which characterises those laws and customs.

spouses have? The manner in which decisions are to be made requires careful consideration. Voting may not be appropriate. If it is, what form should it take and who has the right to vote? A secret ballot? A show of hands? The roles of the NTRBs, Native Title Services, Land Councils and PBCs should be clearly spelt out, in any framework, as should the manner in which anthropological and other research material is to be managed.

An effective rights-based approach requires that just principles are negotiated, defined, broadly accepted and applied. Agreed principles might then be negotiated area by area, site by site, as the need arises, to arrive at the range of configurations and reconfigurations of rights and interests around particular areas and issues. There is no 'one size fits all'. Decision-making or conflict management frameworks should not be static; they should be periodically revisited to ensure their ongoing relevance as conditions change, as key old people pass away, and as competing models of affiliations to land emerge. Transparent frameworks on which Indigenous people can confidently rely which have been negotiated within a broader framework of laws and customs would enable particular disputes to be contextualised, and provide a doctrine of 'fairness'.

There will be a need for relationship building exercises and for the fostering of a context for ongoing pathways for dialogue around native title and other issues. Progress might be marked by engagement around an independent set of criteria of formal and informal standards of justice and fairness, around agreed visions and decision-making processes, and by getting on with the business rather than by apparent 'resolution'. Negotiated agreements must also include provisions for future processes of institution building and transformation, and firmly address the need for resources if effective processes are to occur. Preventative structural solutions might be found that can address issues such as differential access to social resources which are built into any social system. Finally, the framework should be reality checked to ensure that processes are practical, whether the group has access to sufficient resources and a capacity to implement the framework.

Whilst the process involved in negotiating such a framework may be time consuming, it is a long term investment in building the capacity of native title holders to manage their own affairs and should ultimately take pressure off Native Title Representative Bodies, Services and Land Councils. The important point is that native title holders themselves are being assisted in negotiating their own solutions and owning and managing their own outcomes and decision-making and conflict management processes. They have a right to negotiate their native title rights and interests and to participate fully in a dynamic cultural landscape. They have to live with the outcome and each other; solutions lie with them. As long as negotiation, change and review is built into the process, any negative effects of codification should be alleviated.

### **Conclusion: Intersubjectivity**

Conflict is constructed around the full range of relationships between individuals and communities. The idea of property as 'a social relationship, a relation between people in regard to things'<sup>38</sup> sits well with the concept of a social ontology of relationships rather than one of groups and individuals. It also supports the view of native title as a matrix of differentiated, negotiable and hierarchical rights and interests that are derived from relationships between members of the group and their relationships with the group as a whole.

If property is a social relation, then it must also be 'inter-subjective', as is all communication and negotiation. 'Inter-subjectivity' relates to shared meanings constructed by people in their social interactions with each other. In this paradigm, meaning is both shared and personally bound. It is available only through the space created by participating subjects and is created inter-subjectively. It is not, as Jackson has pointed out, a 'synonym for shared experience'. Rather, it embraces 'centripetal and centrifugal forces, and constructive and destructive extremes without prejudice'. 'Compassion and conflict and violence' are 'complimentary poles' of inter-subjectivity, 'the first affirming identity, the second confirming difference'.<sup>39</sup> Inter-subjectivity

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<sup>38</sup> K. Glaskin, see note 3, p 40.

<sup>39</sup> M. Jackson, see note 4, p 41.

occupies the space where the subjective and the objective meet, and where, as I have previously described, 'mutually transforming selves' are located<sup>40</sup> and we constitute each other. Here, the 'subject' refers not only to an 'empirical person endowed with consciousness and will' but also to 'abstract generalities such as society, class, gender, nation, structure, history, culture and tradition that were subjects of our thinking but not themselves possessed of life'.<sup>41</sup>

The concept of inter-subjectivity seems to permit an inter-penetration of meaning and looks to the co-creation of meaning interdependently. This is not only in actual interactions and dialogues between subjects about facts. It also contains the spheres of experience and consciousness as the latter is influenced and conditioned by interaction and its accompanying exchange of signals. It is multi-directional and creates a shared social space out of which distinct subjects co-emerge from a prior matrix or field of relationships. The being of any one subject is thoroughly dependent on the being of all other subjects with which it is in relationship. The concept moves away from the reification of closed groups and affirms the full range of rights or interests or needs of group members. It does not generate dichotomies of abstractible rights and interests. Rather, it sees the co-creation of meaning and the effects on consciousness of the codification of identities.

The challenge is to consider that at least some Indigenous rights, needs and interests may not be absolute, without denying group rights or opening up a discourse which can be seized upon to deny rights generally. We need ways of conceptualising parties to a dispute that do not circumscribe and essentialise their identities, rights and interests and which can inform practice. The kind of processes I have alluded to above would not disconnect rights and interests from social relations; they would recognise and account for them in processes of negotiation.

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<sup>40</sup> T. Bauman. 2001. Shifting Sands: Towards an Anthropological Praxis. *Oceania* 71 pp 202-225.

<sup>41</sup> M. Jackson, see note 4, p 46.

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