

INDIGENOUS FACILITATION AND MEDIATION PROJECT

NATIVE TITLE RESEARCH UNIT

**AUSTRALIAN INSTITUTE OF ABORIGINAL AND
TORRES STRAIT ISLANDER STUDIES**



Report on Proceedings of

**Workshop of Native Title Mediators
15 and 16 March 2005**

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AIATSIS

Australian Institute of Aboriginal
and Torres Strait Islander Studies

Introduction

On 15 and 16 March, 2005, a workshop of 16 native title mediation practitioners, including 5 Indigenous practitioners, was held in the Mabo Room at the Australian Institute of Aboriginal and Torres Strait Islander Studies (AIATSIS). Discussions focused on issues relating to best practice in decision-making and conflict management in native title. The workshop was convened by the Indigenous Facilitation and Mediation Project (IFaMP), in the Native Title Research Unit at AIATSIS, staff of whom are funded by the Office of Indigenous Policy Co-ordination. Funding for travel and other specific workshop related expenses was provided by the National Native Title Tribunal.

The workshop was co-facilitated by Mr Edward Watkin and Ms Fleur Kingham, the Deputy President of the Land and Resources Tribunal, Queensland. Records of proceedings were made by Matt Black, a research officer of the Land and Resources Tribunal. The agenda and proceedings were planned by Ms Toni Bauman, Visiting Research Fellow at IFaMP and Ms Rhiân Williams, IFaMP Consultant Fellow in conjunction with the facilitators. The IFaMP team also made a number of presentations.

Prior to the workshops, a number of papers were circulated to participants including a flier outlining the aims of the workshop, a backgrounder, a draft agenda, list of participants (Annexure 1), and participant biographies. IFaMP reports on workshops held with Native Title Representative Bodies in 2004 and on its Survey of Native Title Mediation Practitioners were also distributed.

Prior to this workshop, a native title workshop of Indigenous mediators was held at AIATSIS on 17 and 18 February, 2005. The proceedings of this workshop are contained in a separate report.

A third and final report will discuss and comment on issues which arose in both of the workshops and contain recommendations.

Proceedings of the Workshop of Native Title Mediators (15-16 May 2005)

DAY ONE

15 March 2005

SESSION 1. Setting the scene.

1.1 Welcome and Introductions

Mick Dodson, the Chair of AIATSIS, and also a native title mediation practitioner, welcomed participants to the workshop. Toni Bauman, IFaMP's Project Manager and AIATSIS Visiting Research Fellow, introduced the facilitation team.

1.1.1 Broad Aims of the Workshop

Toni Bauman broadly outlined the aims of the IFaMP project and discussed the role the workshop would play in the Project. She also set the context of the workshop in terms of its relationship to previous workshops held with Native Title Representative Bodies and a survey of native title mediation practitioners which was conducted by Ms Rhiân Williams for IFaMP.

1.1.2 Participant introductions.

Participants paired off and introduced each other. They included Registrars from the Federal Court, members and former case managers from the National Native Title Tribunal (NNTT), and lawyers, mediators and negotiators working in private practice. They represented a broad range of experiences with Indigenous issues and, more specifically, with native title issues. Three of the Indigenous participants had attended the native title workshop for Indigenous mediators in the previous month.

1.2 The big picture.

Participants were asked to identify the one thing they would change about native title mediation, if they had the power to do so. The responses, summarised below, reflect some key concerns that were returned to during other sessions of the workshop.

- The *Native Title Act* 1993 is flawed; it has established an often unworkable framework and imposes too many artificial requirements.
- Native title should be realised on the ground as a way forward for Indigenous people and communities and strengthening families rather than creating divisions in Indigenous communities because underlying issues such as unresolved family disputes are often not addressed.
- The native title regime often does not allow sufficient time and resources to adequately address issues through appropriate processes, particularly family disputes.
- Co-mediation is very important.

- The involvement of lawyers in mediation can ‘muddy the waters’ and provide another layer of issues that parties have to work through.
- Native title should be about looking after country.
- A number of native title agreements have been reached but parties should be better prepared for mediation.
- Native title issues belong to broader questions of sovereignty and a treaty between Indigenous Australians and the government.
- A ‘whole of government’ approach should be a reality, not just a catch phrase.
- There should be more trained Indigenous mediators.
- Future Act processes can force Indigenous people into ill conceived claims.

1.3 Questions from the Indigenous mediators’ workshop.

At the conclusion of the Indigenous mediator’s workshop in February 2005, Indigenous participants posed a number of questions to be asked of the participants in this workshop. The facilitators introduced the questions and placed them on butcher’s paper around the walls. Participants were asked to provide their responses on post-it notes on the butcher’s paper over the course of the workshop.

The questions appear below. Annexure 2 sets out the questions and responses.

Question 1. Do you feel that mediation is a heartfelt skill?

Question 2. How do they see native title mediation relating to traditional community methods of dispute resolution?

Question 3. Do you see indigenous mediators as being extremely important in the resolution of native title issues, and, if so, would you support and lobby for the development of this?

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

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

Question 6. What is your solution/approach/formula for reducing the high level of intra- and inter- Indigenous disputation in the native title context?

Question 1 invoked some discussion and two Indigenous practitioners who attended the previous workshop for Indigenous mediators, contextualized the questions for the workshop. One noted that successful processes have to account for the collective nature of Indigenous sociality and the sense of responsibility which Indigenous individuals feel to their communities or mobs. For mediators to be successful in dealing with Indigenous issues, they must be respected and recognised as honourable people in the community. He commented that Indigenous people live in ‘two worlds’ - in the legal/western system and in a ‘traditional’ Indigenous one. Indigenous people are constantly switching from one to the other and ‘ways of being’ in the two worlds don’t always match. He noted that, whilst the questions might seem strange or inappropriate to non-Indigenous people, they arise directly from the experience of being an Indigenous person.

The other participant reinforced these comments, noting that native title issues are fundamentally Indigenous community, human and social issues. The mediator needs to be empathetic to this and understand that native title mediation processes need to be more than standard or regular mediation processes.

1.4 The Native Title Representatives Body Workshops.

Toni Bauman gave a brief report on the series of workshops which were held by IFaMP with NTRBs in May and June 2004. Some key issues identified by IFaMP through these workshops included:

- a divergence in practice under the rubric of mediation and, as a result, uncertainties about what to expect from the mediation process;
- uneven distribution of resources seen to create an uneven playing field;
- time pressures;
- inadequate follow up and implementation, adversely affecting agreement sustainability;
- too much focus on the legal agenda;
- too little opportunity for applicants to speak together;
- difficulties in assessing parties' capacity for negotiation;
- difficulties in reconciling the role of elders into the process; and
- the need to avoid quick fix solutions at expense of long term resolution.

1.5 IFaMP Survey of Native Title Mediation Practitioners.

Rhiân Williams gave a brief report on the IFaMP survey of the practices of native title mediators. A fundamental finding from the survey is that practitioners describe a range of different processes under terms such as 'interest-based mediation'. Rhiân noted that a similar finding had emerged from a survey conducted by the United Nations Food and Agriculture Organisation of mediators involved in land tenure conflict management.

The Executive Summary of *Native Title Mediation Practice: The Commonalities, the Challenges, the Contradictions A Survey of Native Title Mediators* (Williams, 2005) was distributed to participants prior to the workshop. It outlines the objectives and findings of the survey. Some of the issues explored in the survey concerned:

- discrepancies in the way in which mediators described the type of mediation they practiced;
- preparation strategies;
- the range of attitudes to and conflicting definitions of 'co-mediation' (serial mediation versus working side by side);
- ways of managing power imbalances;
- ethical obligations of mediators in relation to neutrality, voluntariness, confidentiality, provision of advice, relationships with parties, ensuring appropriate decision-making structures and processes and influencing decisions;

- aspects of working cross-culturally such as managing the role of elders, men's and women's business and connection reports;
- training or mentoring received and its usefulness; and
- attitudes towards national standards for native title mediation.

1.6 Implementing Agreements

There was no time during the workshop to focus on the topic of implementing agreements – though related issues were discussed a number of times during the workshop in various contexts. Participants were asked to place their responses to the following two questions on post-it notes on butcher's paper on the wall.

- What are the mediator's responsibilities to ensure that parties have the capacity to implement agreements?
- In your opinion, as a mediator, what is the key reason for agreements that don't work?

Responses are contained in Annexure 3.

SESSION 2. Ensuring the participation of appropriately authorised Indigenous people.

Two issues were explored in this session: the mediator's responsibility in ensuring the participation of appropriately authorized Indigenous people and the management of connections materials in this process.

The facilitators noted that that 97.3% of respondents to the survey identified ways in which they ensure the participation of appropriately authorised people. Some saw that responsibility for this rested with organisations other than the mediator such as Native Title Representative Bodies. Others saw it as the responsibility of the mediator.

Views expressed in the survey about the incorporation of historical and anthropological research into the mediation process also varied. Some considered that using such materials in a mediation process can cause further conflict; others considered that they could be incorporated into the process in ways that assisted in resolving conflict. Some mediators used connection materials as 'evidence' of appropriate people with whom to work in the mediation, while others incorporated negotiations around the use of connection materials as part of the mediation process.

Discussions took place in small groups and issues were summarised in a plenary session as outlined below around the following two questions.

- What are the mediator's responsibilities to ensure the participation of appropriately authorised Indigenous people?
- How do they do this?

2.1 Issues relating to ensuring participation of the appropriate people

There is a range of issues to which the mediator should pay attention in ascertaining the appropriateness of parties to participate in any mediation. It may be that the participation of apparently excluded parties is essential to the implementation and sustainability of any agreement. There may be a cultural or relationship issue that makes participation by an individual or group inappropriate. Mediating in a cross-cultural environment requires great sensitivity to such issues which are not always obvious.

There is also more than one way to participate in a mediation and parties do not always have to be physically present. They may be consulted about what is taking place and/or contribute their views through an intermediary or by telephone.

2.1.1 Status of ‘authorised’ applicant in decision-making processes

The native title application is the beginning, not the end, of the process of identifying who needs to participate in mediation and other associated processes. Whilst the legislative framework set some parameters for litigation, participants did not consider it should limit the scope of participation in native title mediation. Whether the ‘authorised’ applicant/s are the ‘right people’ to speak for country is also often a central dispute between one or all applicants and those they represent as well as between the native title group and respondents to the claim.

Participants identified that the term ‘authorised’ had a particular meaning in the *NTA* relating to the application and associated responsibilities. Whilst individuals may be ‘authorised’ to act in the legal formalities of the claim process, this does not mean they can act unilaterally in all matters and there will almost always be other members of the native title group and other key Indigenous people who need to be present at any mediation. Decisions must be made by the group/s they represent. Even when there is no apparent dispute about the general representativeness of applicant/s, native title group/s may not wish to rely solely on them for the purposes of mediation. For example, there may be members of a larger steering committee, elders or other influential or skilled people who the group wishes to have involved and who may need to be consulted at every step of the mediation.

Applicants, themselves, will often insist that they have to consult the ‘group’ prior to making a decision or defer to elders and others who are not named as applicants on the application. Alternatively, some representatives may see deferring to others as a sign of weakness and lack of authority. External reference, steering or working groups or committees, who are not present at the table, can also become suspicious of the mediation and perceive that the parties are getting too ‘cozy’ if they are not kept properly informed.

Representation can take a number of forms. An individual may be able to speak only for him or herself, for a family, or for a particular group or country. Representatives may not always have the authority to bind a person who is not present. Some participants noted that parties may send a representative to the mediation who cannot bind them as a deliberate strategy to allow the group some breathing space to reflect on proposals that have been discussed at mediation. This need not impact negatively

on the mediation providing the mediator is aware of the strategy and the process for obtaining agreement is clear to all involved. Nevertheless, where an individual does not have immediate decision-making power, they must have some level of authority to ultimately bring their group with them, and the processes associated with this should be clearly identified and understood in the mediation.

2.2 Mediator's responsibilities in ensuring the participation of appropriately authorized Indigenous people.

The extent of mediator responsibility should form part of a set of process design principles.

Participants agreed that the mediator has a responsibility to consider issues that could affect the progress of the mediation and, ultimately, the sustainability of an agreement. This necessarily involved considering who should be at the table. Whilst most participants thought they should 'take their cues' on who should be at the table from those who are actively participating in mediation, others considered that there might be occasions when the mediator had to express an opinion as to who should participate. There will be circumstances where the mediator might be assured by parties that 'we are the representatives; there's no one else'. The mediator may be told 'we don't need him/her – we'll explain it to him/her'. Such statements need to be carefully tested with all involved and not taken at 'face value'. Each group will also have preferred ways of doing business.

2.2.1 Extent of mediator intervention

There were differing views as to the extent the mediator should intervene in ensuring participation by a key individual or group. It was suggested that, if a mediator identified such a person, as key to the success of the mediation, the mediator should consider approaching that person directly to secure their participation. Others thought that this was not the role of the mediator, but rather something that needed to be negotiated between all parties as part of the mediation. A direct approach to an individual early in a mediation might be ill-informed and have unintended consequences, possibly exacerbating reasons for their non-participation which might simply be related to their 'witnessing' of the process before joining it. The individual may also be deliberately not participating. Direct approaches might place the individual in a situation where they feel obliged to join the mediation when there are sensitive cultural reasons for not doing so. Such issues – whether involving only Indigenous people, or both Indigenous and non-Indigenous parties, may need to be addressed indirectly by the mediator and negotiated amongst people themselves outside the mediation. Over time, it may then be possible for the mediator to make more direct approaches to the relevant people.

Should the mediator be uncertain as to whether appropriately people are participating, he/she may decide to defer or terminate a mediation. This is particularly the case when the mediator knows or suspects that a party who could be central to the success of the mediation is not involved.

2.2.2 Inadequate resources

The nature of the native title process often means the privileging of applicants over the other native title holders they represent and resources may only be available for applicants to participate in any mediation process.

The mediator may need to be creative in finding ways to enable their participation and to ensuring that appropriate resources are located. Where a representative individual needs to consult a group before any agreement can be reached, the mediator has a responsibility to ensure that the representative has the resources by which to do so and that appropriate processes are in place.

2.2.3 Nature of representation and authorization

The mediator needs to clearly identify the nature and extent of an individual's representation and authorization and this should be discussed and understood by all parties. Issues such as who the parties are authorized to represent and for what purposes should be clearly canvassed. One participant related the experience of an 'open' mediation where a small number at the table but the entire community was invited to observe the discussions. The mediator should discuss with each representative how consultation with the group/s they represent can be achieved and factor in time to allow this to happen. The mediator should take care that the process does not create a distance between the parties and the groups they represent. At the same time, the mediator should be aware that delays in a mediation can create distance between parties 'at the table' and those they represent.

The participants discussed whether the mediator should assist a delegate in their discussions with their group. There were mixed views about whether this was appropriate, one participant noting that this could undermine the representative authority of the individual with the group they are representing.

2.2.4 Information flow from the mediation

Ensuring that there is a flow of information about progress and developing issues is essential for the sustainability of any multi-party mediations including native title. The roles of those 'outside the room' including other members of the native title group, staff of NTRBs and Land Councils, and others the group may wish to have involved in implementation of the agreement need to be clearly established. Each needs to be aware of the direction being taken in any mediation in order that requirements for its implementation are practical and that the agreement can become a reality. The mediator needs to set aside time to bring them up to date and to obtain appropriate responses.

2.2.5 When to address issues ensuring appropriate participation in the mediation

It was repeatedly emphasized through the workshop that the quality of pre-mediation or intake processes has a direct bearing on the success of the mediation. One participant noted that the mediation can be like an 'event' or 'theatre' if these processes have been effective, where the mediation simply confirms what has already been established in them.

There was strong endorsement that issues relating to ensuring the participation of appropriately authorized people should be directly addressed in pre-mediation and intake processes. However there is also a need for the mediator to continually revisit these issues in the course of the mediation.

The mediator should check with the applicants and their group in pre-mediation and intake processes to ensure everybody who needs to be there, is there. Participants considered that during this period, the mediator should also examine reasons for assertions that particular individuals or groups should be excluded from participating in a mediation process. For example, whilst parties may consider that excluding a 'trouble-maker' will assist the mediation, those excluded may subsequently cause an agreement to collapse. One participant said that she had once spent four days negotiating who would participate in a one-day mediation. The negotiations included who could attend and how and when they might speak.

Native title mediations often take place over an extended period of time and it is necessary to revisit the appropriateness of representative parties and participants in the process. There may be changes in community dynamics and in the parties who choose to or who are available to involve themselves in the mediation process. Legal representatives, anthropological and field staff from Native Title Representative Bodies and Land Councils who may be involved in the process also change over time.

Further, as the mediation progresses and issues are explored, new issues may be raised which involve people who have not been previously engaged in the process. As observers gain confidence in the process, additional parties or groups may choose to join the process. It is not uncommon for the joining of new parties to a mediation to impact negatively on proceedings. As they join, the dynamics of the group can be altered and there is a need for the mediator to play 'catch up', updating them on relevant information and what has transpired to date. When this occurs, the challenge is to keep existing parties fully engaged in the process without losing their momentum and energy.

The mediator needs to actively manage the fluidity of the process and any suggestions of additional parties joining the mediation should be attended to as soon as possible. The earlier new entrants are incorporated into the process, the better. Updating of newly joined parties may be best carried out in private sessions so as not to lose the attention of other parties.

2.2.6 Ensuring the participation of appropriate non-Indigenous parties

A number of participants stressed that getting the 'right' non-Indigenous parties to mediation is also a major issue. For example, if the States' representatives at the table do not have decision-making powers, it may be impossible to close an agreement reached at the mediation itself. A number of examples were given where arrangements discussed or agreements reached at mediation, were rejected by that representative's manager when taken back to the office. Those sitting outside the mediation may only see negative aspects of the process in terms of what they've 'given up'.

The mediator needs to be aware of such an issue and discuss it with the representative. One participant gave an example of how she had dealt with such an issue involving a government minister who sent a public servant to the mediation, without final authority to bind the minister. The minister agreed to be available by phone so that his/her representative could keep him/her informed during the mediation and seek advice as to how to proceed.

2.3 Use of connection materials.

This session aimed to consider the role of connection materials in mediation and the mediators' responsibilities in dealing with connection materials.

Toni Bauman broadly outlined processes associated with connection materials, and asked how mediators can be certain that they are dealing with the appropriate parties. She raised issues regarding the limitations of connection materials in the mediation and noted that the connections of people to country may well be at the core of any dispute with some accusing others of fabrication.

She noted that NTRBs have limited funding for the production of connection reports and that there are questions around how such materials are interpreted. They should not be accepted at face value. Many people had also been removed from the country to which they were required to prove connection and this could be a source of conflict between those living on the land and those who had been removed. There are also many, sometimes competing views, of the meanings of country and those who are connected to it. Information can be obtained in a range of ways and there may not be a single absolute truth in the ways in which legal processes appear to search for it. A single anthropologist or other researcher cannot possibly obtain all views at any one time.

Anthropologists and other researchers can be pitted against each other and accused of having made mistakes in recording information or of having spoken to the 'wrong people' or of having only told part of the story. Whilst biological descent – 'bloodline'- has become a major marker of eligibility, genealogies are living constructions. All kinds of information have become jealously protected including information which is publicly available such as birth and death records.

The Yorta Yorta decision which suggests that the tide of history has washed away the laws and customs of the Yorta Yorta has set the bar high in terms of proving connection through laws and customs. And laws and customs are often perceived as unchanging and non-negotiable. This has caused native title groups to have to represent themselves in ways which match such views but which may not truly reflect their realities on the ground and the 'real' and ongoing manifestations of laws and customs. This is all set in the context of a positivist view that culture is unchanging and in which conflict is almost assured.

Responses to the survey revealed that some mediators use connection materials to determine who can participate in the mediation. Yet who can make decisions about who are the 'right' people for country? Given the issues with connection materials, some of which are outlined above, the research team has concerns about the use of

such materials in mediation. Similar issues may arise around the use of expert reports in mediations in other fields.

Breakout groups were asked to consider the following questions:

- How might historical and anthropological materials be incorporated into the mediation including assisting in determining the participation of appropriately authorised Indigenous people?
- What are the mediator's responsibilities if there are challenges to the connection materials?

Those who did not have experience in dealing with connection materials were asked to:

- Identify another evidence-based process in which there was a dispute over evidence and discuss how they handled it as a mediator

Below we summarise issues which were raised in the reports back from the small group discussions.

Above all, it was noted that the mediator should avoid being placed in the position of arbitrator rather than mediator and keep away from making assessments as to connection materials in determining the 'right' people to speak to. This is a high risk activity since connection materials are often at the very heart of many of the disputes and the mediator's responsibility is to remain impartial. Notwithstanding, one participant noted that issues, not connection materials should be the focus of the mediation.

2.3.1 Connection materials in mediations before NNTT Members and Federal Court Registrars.

Connection materials do not appear to be referred to in mediations before NNTT Members and Federal Court Registrars. The Federal court involvement in native title mediation has been relatively recent, and mostly has involved overlapping claims. Although Federal Court mediations may necessarily involve different views of connection, use of the connection materials to determine who was authorised to speak for country would involve the very question the court would be asked to decide if the mediation was not successful and would be inappropriate.

NTRBs have prime responsibility for dealing with overlapping claims. NNTT Members may be requested to assist in dealing with these from time to time or give other assistance to help with resolution of overlaps.

One participant did suggest that connection materials could be sued as a tool for resolving overlapping claims.

2.3.2 Role of the states and territories in dealing with connection material

Applicants prepare a connection report, mostly through their Native Title Representative Bodies or Land Councils, and provide it to the State government. The State Government will not participate in or devote resources to mediation until they have accepted the connection evidence.

The State sees native title as a land management and resourcing issue. It requires that it is satisfied with the connection of parties as a precondition to mediation in which they also almost always participate as a party. The State takes the position that it represents the public interest in land management and that it is not in the public interest to devote resources to mediation of a claim with little prospects of success. Such anomalies have never been seriously challenged by parties.

Some participants considered that processes dealing with the creation and use of connection materials should be a matter of negotiation in the mediation rather than being the province of one party, the State, to determine. One participant noted that parties need to negotiate amongst themselves as to who should be in the group, rather than external experts being asked to adjudicate.

One participant had encountered situations where he considered that mediation involving the state as a party was required in the first instance because of the state's refusal to accept connection materials and its repeated requests for additional information that the applicants considered they had already provided. Another related an experience where all parties other than the State were in agreement that the connection materials should be accepted but the State continued to withhold its acceptance.

Ultimately, the ability of native title parties to challenge the State is often affected by a lack of resources, for which they or the NTRBs who represent them may be dependent upon the Office of Indigenous Policy Co-ordination to provide. Decisions to litigate have to be made in the light of competition between NTRBs for funding and priorities which are set by others.

2.3.3 NTRBs, connection materials and overlapping claims

The use of connection materials in mediation is an issue for Native Title Representative Bodies particularly in relation to overlapping claims.

In the absence of NTRB representatives at the workshop, participants were unwilling to explore this issue further.

However, strong concern was expressed about the difficulties NTRBs experience in obtaining funding to take court action and other areas of operation. It was also noted that NTRBs have a crucial role in processing the details of consent determinations which might be agreed through mediation.

2.3.4 Expert evidence in mediations other than native title

The group dealing with expert evidence in other types of mediation emphasized that expert evidence had to be carefully handled in any mediation. A number of points were made as follows.

- Pre-mediation or intake is vital in identifying the need for expert evidence.
- The mediator should be aware of any assessments they may themselves have made of the expert evidence (whether consciously or otherwise) and be careful not to impose that assessment in the mediation or allow it to influence their process.
- The mediator should not let the expert impose his or her view ‘from a pedestal’ as if the view is indisputable. Not all expert views are objective.
- The mediator may bring an expert to the mediation to address a discrete issue as needed or leave expert involvement to the end of the mediation (the NTA seems to place experts ‘up front’).
- The mediator should ensure that issues relating to expert evidence and the experts themselves do not dominate the mediation.
- The mediator should ensure the expert is properly briefed.
- The mediator should explore the processes by which expert opinion has been obtained including when the opinion was obtained, by whom and the nature of the specific request for expert opinion that was made.
- Experts should be jointly and discretely briefed about issues after the mediation has made some progress, rather than be used to determine a threshold question at the outset.

2.4 Session summary.

The facilitators summarised the key messages from this session on the whiteboard as follows:

- Question goes beyond ‘authorisation’ under NTA.
- Issue for non-Indigenous parties as well.
- Issue for preparation.
- Different levels of authority and types of participation
- Connection materials not used in Federal Court and NNTT mediations.
- Issue for NTRBs and state pre-mediation – an issue that could be further explored with them.

SESSION 3. Mediator responsibility, managing the need for advice and managing advisors

There were two themes to Session 3: Managing the need for advice and managing advisors. Participants were also asked to discuss the mediator's responsibilities in relation to these two issues, how they may have handled situations in the past and what they thought a mediator should do in situations where these issues arise.

3.1 Managing the need for advice.

Parties need a range of advice in order to participate effectively in native title mediation. Examples of this include information about the *Native Title Act 1993*, the practicalities and economic feasibility of options under discussion, technical advice, and advice concerning legal and procedural options. The NTRB workshops raised questions about how to integrate legal advice into the mediation process to ensure that the appropriateness of agreements under consideration can be adequately discussed, without lawyers dominating the mediation. Whilst participants in those workshops considered it was not the mediator's role to give such advice, they did consider it was the mediator's role to ensure that parties had access to advice when needed. They also linked access to advice during mediation to the sustainability of agreements.

To prepare participants for the small group discussions, one participant related his experience with a mediation involving a dispute between two organisations with different roles regarding the same parcel of Aboriginal land. One group was established as result of land rights legislation; the other was incorporated under the *Aboriginal Councils and Associations Act*. Both parties had agreed that there should be no advisers in the mediation sessions. During the mediation, it was evident to the mediator that neither group understood the powers of the group operating under the land rights legislation.

Whilst the participant considered that it was inappropriate to give the parties legal advice, he believed that he had a responsibility to ensure proper advice was obtained. He suggested to the parties that they should each obtain legal advice regarding the matter. He also obtained the permissions of each of the parties for him to speak, independently, to their lawyers. Lawyers for both parties agreed on the appropriate legal interpretation, the misunderstanding was cleared up and the mediation proceeded.

The participant thought that he would have also proceeded in this way if only one of the parties appeared to misunderstand the legal situation. However, in doing so, he would have checked with the other party that this was appropriate

Participants who were interested in further exploring the topic of 'the need for advice' broke into small groups to discuss the following questions:

- What are the mediator's responsibilities for ensuring the parties are adequately advised?
- What are the mediator's responsibilities where they believe parties are poorly or not advised?

- What advice should a mediator provide? What advice should a mediator not provide?

3.1.1 What are the mediator's responsibilities for ensuring the parties are adequately advised?

- The groups agreed the mediator does bear some responsibility for ensuring the parties are adequately advised.
- The participants referred to the power imbalances that can exist if all parties do not have equal access to appropriate advice and agreed that the mediator bears some responsibility in ensuring such an imbalance is addressed.
- If one party has an adviser present and the other does not, the mediator's responsibility may extend to finding some way of getting an adviser for the unrepresented party. One participant had identified funding for an adviser in such a situation.
- It is not the mediator's responsibility to advise parties on a proposed outcome or to express a view of the adequacy of such an outcome.
- If parties seek advice, they should be referred to appropriate sources. In some cases, the mediation will have to be suspended to allow for advice to be obtained.

3.1.2 What are the mediator's responsibilities where they believe parties are poorly or not advised?

Participants considered that thorough preparation before the mediation session should reveal the needs of parties in relation to required advice. However, if an unanticipated need for advice arises, participants identified a range of options set out below.

- The mediator could call a halt to the mediation to allow a party to get further advice. However, this option may not be practical if the mediation session has been some time in the making and people have come from long distances to participate.
- If appropriate, the mediator could suggest that the issues around which advice is needed are put to one side to be dealt with later, proceed to deal with other issues in the mediation in relation and return subsequently to deferred issues. However, this option would not be feasible if the mediator considered that the issue around which advice was needed, was related to other issues which might be discussed. This could ultimately affect whether the agreement was valid and enforceable.
- The mediator might assist in identifying the issue, offer their own understanding of a particular issue and suggest the parties get advice on that point. This would not be detailed advice from the mediator, but more by way of the mediator flagging an issue about which they might seek advice.
- Another option is provide relevant information, by drawing the attention of the parties to a relevant court decision, for example. Some thought, however, that the only information or advice a mediator should provide is about process.

- The mediator might ‘tell a story’ about or describe another mediation or agreement with which he or she had been involved that illustrates the point under discussion. It is important that parties then draw their own conclusions from information provided.
- If the parties agree, the mediator could talk to the parties’ advisers outside of the mediation. Parties may have access to expert advice, but sometimes the adviser has not been able to communicate that advice clearly, and the mediator may have to play a role to ensure that the advice has been clearly conveyed.
- It is not just relating advice that is important. Mediators also need to ensure that there is adequate time for parties to question, respond to, discuss and evaluate advice. The adviser should not simply ‘fly in’ and ‘fly out’ of a mediation session without ensuring appropriate discussions and understanding of the advice provided.
- One participant described a mediation where the parties needed legal advice and a senior lawyer was flown in to the mediation. The mediator was confident that the advice the lawyer provided to the parties was incorrect. She confronted the lawyer during a break and he agreed. The lawyer subsequently informed the parties of this, and provided them with the correct advice.
- An issue of particular concern to claimant groups is how to deal with the influence of the views and advice of younger members, when the group has made the choice that the elders should make the decision. It may be appropriate for elders to make decisions without others. The mediator may need to discuss this issue with the relevant claimant group.
- Parties may need advice concerning the likely success of their claim. This may particularly be the case when claims have been poorly conceived or prepared in the first instance. This may involve the mediator seeking outside advice for parties as to the need to withdraw claims in order to reframe them and to allow time for comprehensive anthropological research.

3.1.3 What advice should a mediator provide? What advice should a mediator not provide?

Rhiân Williams reported that a significant number of respondents to the survey of native title mediators drew a distinction between procedural advice and content advice. Most considered it acceptable to provide advice about procedural issues, and about processes which might follow if parties are unable to agree in mediation. A smaller number of respondents however, thought that giving advice about content issues was appropriate if the parties requested it.

Many respondents emphasised that a mediator should never give substantive advice. The mediator might not have sufficient skill or knowledge to provide the necessary advice and provide incorrect advice.

Some participants thought that the mediator’s role in reality testing the consequences of proposals may be seen as ‘giving advice’. They thought that the kinds of questions the mediator might pose in performing this role signaled

to the parties the issues which the mediator considered to be important and prompted parties to consider those issues rather than others.

After small group discussion, the participants at this workshop reported that they considered it was appropriate for the mediator to give advice about:

- the process;
- where to get advice; and
- topics about which parties might need to get advice.

There was general agreement that it was not appropriate for the mediator to give advice about substantive outcomes or their merits.

3.2 Managing the advisers.

Parties often bring advisers with them to mediation sessions, most frequently lawyers. The roles these advisers play can impede the mediation. Drawing from the survey results, Rhiân Williams noted that 55.5% of practitioners surveyed reported a highly adversarial stance taken by lawyers as one of the top three negative impacts for their process. 22.2% saw this as the primary negative impact. The NTRB workshops also noted that mediation should take place between the parties not the lawyers.

Participants who chose this topic for small group discussion were asked to consider the two questions below.

- What are the most effective ways of managing adversarial advisers, of shifting them from an adversarial stance to a problem solving one and controlling the impact of an adversarial stance?
- How can this issue be addressed at a more systemic or strategic level?

The following is a summary of the responses from these groups.

3.2.1 What are the most effective ways of managing adversarial advisers, of shifting them from an adversarial stance to a problem solving one and controlling the impact of an adversarial stance?

Although the discussion of this question revolved around lawyers in mediation, it is noted that there are other advisers who can also be adversarial. Participants identified pre-mediation work with both the parties and their lawyers as critical in establishing a shared understanding amongst all the parties as to the adviser's role in the mediation. This time presents the opportunity to explore the role of advisers with the adviser, and with the party they are advising. A joint brief for all parties to the mediation might then be circulated.

Participants thought advisers should be guided along the following lines:

- parties need to have the option of speaking in their own language;
- information should be presented in simple English;
- advisers should not intrude or comment upon people's emotional needs; and

- there should be agreement before mediation about when and how advisers are to speak, for example, during private sessions.

Once mediation commences, participants consider the mediator should:

- speak to advisers when the parties are present;
- negotiate the need for speaking to the parties directly, without their lawyers present if required;
- ask the lawyers to provide advice to the party they represent in the presence of the mediator;
- use the advisers as a resource in the mediation;
- incorporate advisers into the process as advisers and ensure they do not act as advocates within the mediation;
- time the interventions of advisers carefully; and
- ensure that advice is explained clearly to parties.

The mediator's style will often determine the kinds of strategies a mediator might employ in dealing with legal advisers. Some adopt an 'I'm in charge', often adversarial and disruptive approach. Others are less forceful and may not assert a controlling role in the process.

Where the legal adviser appears to be trying to control the process, it was suggested that the mediator should set clear parameters during pre-mediation processes. This would then establish the basis for taking the disruptive adviser aside to speak to them about their behaviour. This would, however, require a degree of assertiveness with which the mediator may not always feel comfortable. One participant gave an example of an alternative strategy which he/she employed when a lawyer walked out of the mediation and took his clients with him. The mediator encouraged the other party to stay and assisted them as they developed proposed terms of agreement to put to the other party. The mediator then invited the other party and their lawyer to return to the table to discuss those terms. In doing so, the mediator avoided direct conflict with the lawyer and found a way to bring the lawyer and his clients back into the room.

Participants discussed reasons for adversarial behaviour. One participant considered that some individuals (whether lawyers or not) may become adversarial when they are under-prepared in order to stall for time. This can set up a dynamic where parties become adversarial with each other, 'sparking off' each other as it was described in the workshop. Lawyers can bring to mediation the baggage of past Future Act dealings and there can be a need to mediate between the lawyers! Parties may also have poor relationships with their own lawyers or the lawyers for other parties. These are dynamics the mediator needs to be aware of, and be prepared to monitor and deal with, particularly as changes in attitudes also occur throughout the process, which, in the case of native title, can be over a sometimes unnecessarily long period of time.

It was understood that lawyers are essential to the native title process, and native title mediations, particularly in the documenting and drafting of agreements which may be reached in the mediation. The mediator was considered to have a role in the drafting of agreements reached in mediation to ensure that they truly reflect the nature of the mediated agreement.

3.2.2 How can this issue be addressed at a more systemic or strategic level?

Issues relating to the shifting from adversarial stance to a problem solving one need to be approached systemically and strategically. Participants made the following suggestions or comments in relation to this issue.

- Capacity building for parties themselves is necessary to improve their ability to actively participate in mediation processes, and reduce their reliance on advisers.
- Any capacity building work should also assist parties in developing their own skills in managing their advisers, in understanding the roles of lawyers in mediation, and in seeking useful advice from lawyers. Participants agreed that parties may not receive the advice they need because they do not know the appropriate questions to ask of lawyers. Mediators may also assist parties in formulating suitable questions.
- Advisers need to be made aware of their responsibilities in providing advice and feedback to their clients and of their roles in mediation.
- The use of Indigenous mediators may help in reducing adversarial approaches.
- Whilst the complexity of native title mediation makes national standards difficult to develop, there could be a set of underlying and unifying principles accepted by mediators who undertake native title work.
- Mediators need training in how to manage adversarial advisers – experiential role plays would be useful.
- Lawyers need to be educated about their roles in mediation: that they are advisers not advocates; that people can speak for themselves; and that time out can be taken to get advice on the technical issues. Training and standards could assist in developing a culture around native title mediation that ‘ownership’ of the mediation rests with the parties not with the lawyers. Whilst lawyers are accustomed to defining the issues in litigation, they should not do so in mediation. (The Federal Court Registrars have observed a cultural change in how lawyers have approached mediation of general federal court matters since it was first introduced. There appears to be a growing awareness by lawyers that it is the parties who need to speak.)
- A number of participants supported the idea of a workshop for native title lawyers to explore issues and reflect upon legal practice in mediation. Some thought the workshop might involve mediators; others supported a workshop comprising only lawyers.
- Some participants considered Indigenous communities have to be given more opportunity to take responsibility for managing their own disputes. Relegating advisers to a support position, rather than to a leadership/advocate role, could facilitate this. One Indigenous participant commented that it seemed that Indigenous communities had been ‘brainwashed’ into believing that they can’t manage their own disputes.
- Lawyers and mediators should jointly craft agreements at the table.

3.3 Session summary.

In summarising this session, the facilitators noted that the participants had:

- agreed that it is the mediator's responsibility to manage the needs of parties for advice as well as to manage the roles of advisers;
- identified strategies for dealing with a lack of poorly conceived or even incorrect advice;
- distinguished between types of advice a mediator could be asked to give;
- agreed that adversarial behaviour on the part of lawyers in mediation is highly problematic and that the role of the lawyer should be as adviser; and
- identified the responsibilities of the mediator as including: preparing the lawyers in their advisory roles; preparing and assisting parties in managing their advisers; establishing the role of the mediator as process manager including the management of advisers.

SESSION 4. Interest based mediation in a rights context.

The facilitators introduced the session by noting that, in the survey of native title mediators, 66% of respondents described their process as 'interest-based'. However, there were significant differences between respondents in their description of what the term, 'interest-based' mediation meant to them.

The objective of this session was to explore the concept of an 'interest based' mediation processes in the context of 'rights and interests' as they appear in the NTA.

Workshop participants were asked to develop their own definition of interest-based mediation in this rights context: that is by reference back to the framework of the *Native Title Act* and the processes that are imposed. They then formed small groups to consider a number of questions and undertake the following task.

Compare and contrast your definitions.

- What are the commonalities?
- What are the differences?
- What are the surprises?
- What do you see as the difference between interests and rights in the native title context?

A number of participants expressed some discomfort with the task set in this session. Some considered it an esoteric exercise detached from the reality of their practice. Others were not sure what was being asked of them. Some participants were unclear as to whether they should approach the questions from within the legal framework of the NTA, from mediation theory, or from a practical perspective of developing solutions to issues.

Contributions arising from the report-back from small group discussions included the following:

- Group 1 focused on the need to take parties beyond their legal ‘positions’ and to allow them to tell their stories of past wrongs. Psychological and emotional needs have to be addressed and parties have to be given the opportunity to focus on such ‘interests’. Parties are more likely to be satisfied with agreements or resolutions which are reached which consider such ‘interests’ and which are mutually beneficial.
- Group 2 questioned whether the definition was important, drawing a distinction between mediation theory and practical issues on the ground. They noted that native title rights and interests have specific legal definitions. They also noted that parties might bring other interests to the table, only some of which are court recognised. Ultimately, native title mediation is about how these competing or different interests can be worked out on the ground. This group endorsed flexibility and the need to incorporate a range of mediation approaches.
- Group 3 considered the diversity of interests which can arise during mediation, seeing the role of the mediator as one of helping parties to prioritise their issues and to identify those that may be better dealt with in another forum. The mediator may assist parties in identifying the appropriate forum in which such issues might be addressed and should ask parties, whether the mediation can continue in such an event. Other issues may be deferred for later. This group also noted that the style of mediation may depend upon the personalities involved and the contexts of a mediation.
- Group 4 agreed that interests relate to the wants and needs of parties, and that rights are those things that are defined by law. They considered a mediation that focuses on wants and needs, and seeks to develop shared understandings of parties, is an interest based process. There was disagreement in this group about the ethical limits of an interest-based approach in which native title rights might be traded, for example, in exchange for satisfying interests which might be better viewed as the responsibility of governments. The group gave the example of the extinguishment of native title rights in exchange for a kidney dialysis machine.

Whilst it was noted that parties should be permitted to determine their interests, some members of this group queried whether the native title process itself might be so fundamentally disempowering in respect of certain interests and rights, that an interest-based process is not appropriate. Some thought that no party should leave a mediation feeling ‘worse off’, in respect to their rights, than they did when they entered the mediation. Others asked whether rights should be traded off for interests.

What appears to be a significant imbalance between the rights and interests of Indigenous and non-Indigenous parties presents challenges to the ethics of the mediator. For example, what is the mediator’s role if he/she considers that parties are forging an agreement that is unfair to one of the parties. One view was that it is not the mediator’s role to judge an outcome, but rather to ensure that the parties are fully informed. Others considered that the mediator might be interventionist in ensuring fairness of agreements. Issues, such as the consequences for parties if they don’t agree, or the capacity or power of a party to resist an agreement, need to be considered. There is a need to explore the ambiguities and ethical nuances further in

relation to mediation and native title rights and interests. Agreements will break down if they are not seen to be fair.

DAY 2

16 March 2005

SESSION 5. Sharing experiences – challenging scenarios.

The facilitators introduced the aims of this session as exploring options for mediators in dealing with challenging situations through the development of a number of scenarios to allow participants to learn from each other and to share their experiences.

Working in small groups, some participants were asked to develop scenarios involving difficult or challenging situations and others were asked to describe examples of innovative practice in mediation, both of which would be discussed in the plenary session. To demonstrate the task in relation to a challenging scenario, Rhiân Williams outlined a scenario involving confidentiality issues, which was followed by general discussion.

A brief outline of each scenario and the key points made during the plenary are provided below.

5.1 Scenario 1 – Confidentiality – What does it mean – consequences for breaching it?

The ‘confidentiality’ scenario outlined by Rhiân Williams unfolded gradually during plenary discussion.

Scenario: You are the mediator of a multi-party mediation involving 16 parties. You are in the preparation stage at a meeting of one party, which is comprised of about 70 people. It is unlikely that they will all attend. One person asks ‘Is this a confidential process?’ What is your response?

Plenary:

- Tell them it’s confidential to the parties to the mediation, not just the participants, so they can discuss what happens with their group.
- Negotiate a ground rule that there is no talking to media about the process without the whole group agreeing. Take this to a meeting of all parties.
- Table a mediation protocol outlining how the mediation is to be conducted, including confidentiality. Have this confirmed at a meeting of all parties.
- This may involve a range of procedural negotiations including establishing to whom confidentiality provisions apply and how they will be managed if breached.
- Refer to the provisions of the NTA and state that it is as confidential as the law allows.

- Check with parties how confidential they think the process needs to be. How many people do they have to communicate with?

Scenario: So are people saying that mediation is confidential?

Plenary:

- Federal Court Registrars are required to report-back to the judge. This needs to be explained to the parties; as do the provisions in the NTA concerning the use of materials and information arising from a mediation.
- Members of the NNTT have power under the NTA to impose restrictions on information and documents used in the mediation. If that power is used and restrictions are breached, there are criminal sanctions. Whilst it is a power that is exercised sparingly, when confidentiality provisions are breached, it can mean that parties seek the exercise of the Members' power more frequently.
- There are significant differences between the powers and protections of an NNTT Member and those of consultant mediators and there is an issue around the calling off mediators to give evidence.
- Confidentiality and without prejudice go hand in hand. Once people start discussing (outside the mediation) what happened in a mediation, they lose without prejudice status and people begin to take positions. The objective of confidentiality is to provide parties with the opportunity to speak without prejudice and to float ideas they couldn't or wouldn't discuss in a public forum.

Scenario: The mediation continues and one party submits important information on assurances that they were given that the mediation is confidential. Later, that information is leaked to media. What do you say to the party who submitted that information when they ask what can be done?

Plenary:

Some participants said that negotiations around breaches of confidentiality, their consequences and how they might be handled should occur at the commencement of the mediation so there was an understanding of this before any breach occurred.

In pre-mediation processes, the mediator should have explained that there is little that can be done through legal means, though it's possible the parties could take legal action against each other. One way of tying parties into confidentiality provisions is to establish ground rules that should a party breach confidentiality provisions agreed in the mediation, then that party will be excluded from the mediation process.

Issues around confidentiality might also be revisited and highlighted in the course of mediation as sensitive issues and documented materials arise.

It was suggested that a crisis can be productive. The venting which can accompany a breach of confidentiality or other improper behaviour, can present an opportunity for exploring relationships between the parties. One participant had experienced the leaking of information from mediation to Parliament. This was followed by a 'torrid'

meeting of the parties which involved considerable discussion about good faith and what confidentiality meant to this group. On this occasion, the breach did 'clear the air' in some respects as well as revealing a range of underlying issues which had not been dealt with.

The mediator is not an 'arms controller' and cannot guarantee confidentiality, but such a breach of a mediation process which should take place with the good faith of all the parties, lays bare relationship issues and issues of trust.

There was a discussion around whether native title mediation involves public interest issues and whether confidentiality can be maintained where the public interest is concerned. Public interest can be a matter of perspective. Local government, for example, may view an issue as part of a strategic planning process about which they need to consult the public. The State Government may see the same issue as a matter of land dealings. Traditional owners may see it in the context of their dealings with one another and in relation to their individual and group rights. Dealing with confidentiality involves taking into account and negotiating these different perspectives. This may often be required around specific information rather than the setting of broad rules which may not necessarily be applicable to specific circumstances.

To say that the mediation process is confidential as a blanket statement may be simplistic. Whilst confidentiality provisions may be binding on the mediator, there can be a number of issues involved which may make it impossible for confidentiality provisions to be binding on the parties.

Discussions need to occur in the mediation around a range of confidentiality issues at the outset and revisited throughout the mediation. These should include conversations between levels of government and traditional owners about what confidentiality means. They should include conversations amongst all parties and the mediator about confidentiality provisions in relation to reporting requirements and responsibilities, and about how to manage a breach. The mediator's responsibility in relation to confidentiality provisions and reporting requirements needs to be clearly identified. It may be the case that NNTT or Court mediators are backed by legal provisions that can lend weight to confidentiality provisions.

One participant noted that there is a need for specific training of mediators around managing issues of confidentiality including issues around the use of electronically produced documents. Electronic documents can be easily sourced and one participant noted that in his experience, confidential electronically produced documents had been used in subsequent mediations. Another called for legislation to protect consultant mediators who are more vulnerable than court or NNTT mediators.

5.2 Scenario 2 – Hostile challenge to mediator at meeting after agreement reached – witnessing in Indigenous communities.

Scenario: There are negotiations between two neighboring Indigenous groups about a disputed area of country. The mediation takes place on country with the two groups. They develop a process for sorting out the issue. There are 20-30 representatives from each group, and each group has separate legal representation. At the end of a day long meeting, an agreement is written down and appended to a map of the disputed area. The handwritten agreement is signed by all relevant people. Some weeks later, the mediator meets with one of the groups to discuss the implementation of the agreement. The mediator is confronted by an angry member of the group who was not present at meeting and who accuses the mediator of misleading the elders. He says that the people who signed the agreement thought they were signing an attendance sheet. His anger is vented in front of a large group. He expresses offence on behalf of elderly members of the group. He personally abuses the mediator, accusing the mediator of inexperience in dealings with Indigenous people. What does the mediator do?

Plenary:

Most participants considered that the mediator has to find a way to get beyond the abuse and deal with the underlying issue. To do this, the mediator needs to be aware of how he/she is responding emotionally to the attack, to not take it personally, and to deal with the situation objectively.

Different views were expressed about whether it was appropriate to offer an apology or not either to the group or to the individual expressing anger. Some felt very strongly that since there was nothing to apologise for, if they did apologise, they would be undermining their integrity as a mediator, and acknowledging the validity of the attack. Others saw an apology as a way of acknowledging the feelings of the individual and of moving the discussion on to solving the problem even if the mediator did not consider him/herself at fault. Such an apology might not been seen as an admission of fault on the part of the mediator, but rather in terms of the mediator expressing something like: 'I'm sorry that you feel that way about this agreement; let's talk about what the problem is.'

A number of participants felt strongly that the mediator should defend his/her integrity by expressing surprise at the challenge, reiterating their understanding that the parties have reached an agreement and that they have endorsed it by signing the documentation. This might then be followed by discussions with all parties concerning possible problems with the agreement. If the group has shifted, there may be a need to renegotiate without giving the individual dissenting voice too much weight. Remember that 'yes' can mean 'maybe'.

One participant related an experience where he had responded 'in kind' to this type of situation: eventually shouting at the person to 'shut up and sit down'. The group to which the person belonged approved this action. However, participants agreed that such a response was only successful because the mediator had done a significant amount of preparatory work and was familiar with the parties. He had identified the

Indigenous ‘diplomats’ amongst the parties and made close connections with them, and was able to rely on their strengths from time to time for support.

This led to a discussion about the role and importance of ‘diplomats’ and ‘peacemakers’ in Indigenous communities, an issue which also arose in the workshop for Indigenous mediators. ‘Indigenous ‘diplomats’ and ‘peacemakers’, or ‘interpreters’ as one participant referred to them, are not necessarily the oldest, nor the friendliest, nor the most educated people in the community. They are those who stay calm in situations that involve conflict and who are relied upon by others to make things happen. They can read the emotional temperature of the meeting for the mediator.

The strategic use of morning tea breaks was identified as a way of enabling proceedings to move on to the next stage. It presents a chance to check informally with others how they feel about what’s occurred and to gauge whether there is a significant issue that needs to be dealt with.

This scenario led to a discussion about differences in the ways in which Indigenous and non-Indigenous people see themselves as having arrived at an agreement. One participant said that the behavior of parties changes when they consider they have an agreement. If parties are suggesting changes, the agreement needs to be further negotiated in order to account for the full range of interests of the parties.

Another participant said that non-Indigenous mediators appear to be seeking a finite agreement as a one-off event and ‘as if that is the end of story’. Indigenous people, however, often see agreements as processes that extend beyond the making of the agreement and as ‘milestones in the relationship’. One way to build the relationships between parties is to develop a series of interim agreements that demonstrate to parties where they have reached at particular points in the mediation, acknowledges their progress around specific issues, and leaves flexibility for developing the next stage of their discussions.

Some participants stressed that it is important for the mediator to establish boundaries as to the kind of attack described in the scenario. For example, a mediator should never allow criticism of his/her staff.

5.2.1 Indigenous Witnessing and cross cultural issues

There was a discussion about the need for non-Indigenous mediators to have training in the different processes, perspectives and ways of arguing and resolving conflict in Indigenous communities. Some of the Indigenous practitioners highlighted the important role of witnessing in Aboriginal communities and the need for understanding the meaning of Indigenous actions in mediation in cultural terms. They explained that, by silently witnessing the kind of exchange which took place in the scenario, the group was not necessarily endorsing the attack on the mediator. Members of such a group may witness both the attack and the mediator’s response before deciding how they will act themselves and whether to enter into the exchange.

A direct appeal to the group to endorse the mediator may be inappropriate. Such an appeal might well be seen as a request for the group to take sides against the

individual who is angry. For a range of reasons, they may not wish to be drawn into the argument – they may be closely related to the individual concerned, for example, and be required under Indigenous cultural protocols to support the person whether they believe his actions to be appropriate or not. They may want more information before being drawn into the issue publicly.

The silence of other group members when such an attack takes place should not necessarily be interpreted as support for the challenger's views. Another purpose of witnessing by Indigenous people is to ensure that the accuser doesn't 'step over the line'. Both accused and accuser are being witnessed, and silence can also signal the group's disapproval to the accuser and that there are limits to what the group will tolerate. The mediator may consider seeking advice from an Aboriginal case manager if one is available who can observe body language and other signs amongst group reactions.

The process of Indigenous witnessing has often been documented as integral to Indigenous dispute management processes. One Indigenous participant described Indigenous disputes as 'operas without music'. The witnesses are not necessarily in agreement with the accuser, but the drama must be played out. Another participant said it was like a 'sword fight' in which the mediator's response had to be 'authentic'.

5.3 Scenario 3 – Requests to attend and the adversarial lawyer

Scenario -- objection to participation of a representative body: There are competing claims for a disputed area of land. Group A is the group of registered claimants. Group B forms part of a competing claim group. Group B wants to strike out Group A's claim. The Federal Court Judge refers it to mediation. Group A has private legal representation and all members of Group A are invited to attend the mediation. The Native Title Representative Body for the area hears of the mediation and advises the Court that they would like to attend as an observer, but not as a party. Group A's solicitor is advised of this. Group A's barrister attends. On the day of the mediation, Group A's barrister objects to the presence of the representative body. What does the mediator do?

Plenary:

A number of participants raised the importance of negotiating with parties as to who should attend the mediation in pre-mediation processes. Some said that they do not rely on letters to the parties, even if they are legally represented, as was the case in this scenario. One said that their preparation strategy is based on the principle that no parties will have read anything prior to mediation. If there is no identified legal requirement for the representative body to attend and a party objects to their presence, then the representative body should not be permitted to observe. It might be useful to have them available outside the mediation in the event that the parties wish to refer an issue to them.

Scenario – accusation mediator is giving advice: The mediation has been progressing for some time. The mediator is now in private session with group A. Group A's barrister is particularly adversarial. During reality testing by the mediator with Group A, the barrister interrupts the mediator and demands that the mediator

stops advising his client. Whenever the mediator tries to speak, the barrister demands that the mediator stops and that he speaks to the mediator privately. What does the mediator do?

Plenary:

There were different views about whether the mediator should talk to the barrister privately or not. Some participants thought that this would provide an opportunity for the mediator to explain to the barrister that his actions weren't helping his clients. Others thought that for the mediator to give in to the demands of the barrister would give him too much power in the mediation. One participant suggested that, before taking the barrister outside, the mediator might pause and clarify the purpose of the private session that the barrister is proposing in the presence of his client. Another suggested that, if the mediator agrees to speak to the barrister privately, the mediator should also then speak privately with the barrister's client about the matter.

In terms of the substantive complaint, that the mediator is giving advice, the mediator might refer the barrister back to the guidelines and protocols established in pre-mediation about the roles of advisers and of the mediator.

Scenario – barrister tries to lead his clients to walk out of the mediation: The barrister is still dissatisfied with the mediator's response and stands up to lead his clients out of the mediation session. What does the mediator do?

Plenary:

At the start of the mediation, the mediator should make clear to all parties what the role of the lawyer is and that the lawyer is there to take instructions from those they represent. If this has occurred, the mediator can refer back to the rules and check with the parties as to what they wish to do. Thee parties should be given the power to make an independent decision.

A number of participants had experienced this kind of behaviour and considered that the parties needed to be made aware of the consequences of walking out of a mediation before doing so. Most thought that the attention of the mediator should be on the parties in this instance and not the barrister. The mediator might address the party represented by the barrister directly, suggesting a conversation *before* they decide to leave. The mediator might point out to them, for example, that it may take a significant period of time before another meeting could be arranged in the future. Some thought that focussing on the consequences in this way, might make it difficult for the party to save face. Rather, they suggested, the mediator should focus on the rules of engagement.

It was also noted that once a discussion had taken place between the mediator and those considering leaving the mediation, the latter would need time to consider what they want to do. They might be provided with the opportunity to talk further before they make final decisions.

An alternative suggestion was that the mediator might identify issues which are not controversial and, with the agreement of all parties, continue to work on these issues

in the mediation or at least identify issues which are in agreement and obtain some 'sign-off' on these.

One participant noted that the Queensland Law Society has professional conduct rules for lawyers.

Scenario – barrister walks out with half his client group and the rest stays: After the mediator responds, the barrister leads a walk out, but only half of Group A go with him. What does the mediator do with those who remain?

Plenary:

Different views were expressed about whether the mediator should continue with the private session. Some thought the session should stop there in the interests of the long term viability of any outcome. However, there was concern, as above, that this would give the barrister undue power. Others thought that termination of the mediation would depend upon whether key people in the group remained. Still others thought that the issue was one of voluntariness of the process. That is, it is the right of the parties to choose to leave, as it is for the remaining parties to choose to continue in their absence. One participant noted the importance of the mediator informing the members of Group B that half of Group A had left so that they could consider whether they were willing to continue with the mediation. That is, it is an issue for all the remaining parties to decide.

Above all, the process needs to be transparent and if parties decide to stay, the mediator will need to check carefully as to the implications for any outcomes. Issues may still be discussed in the understanding that they will have to be revisited.

5.4 Scenario 4 – the recalcitrant party.

Scenario: There is a claim group in an area where there is significant future activity and associated moneys. There is a division within the group. One faction is keen to negotiate with the developers to deliver benefits to community. Another smaller faction is led by a vocal recalcitrant who will do everything he can to disrupt the process. For example, he will give tacit approval to negotiations but will refuse to be in the same room as members of the other faction. As a result, the developer is faced with the prospect of two separate negotiations. The 'spoiler' is prepared to 'torpedo' the mediation rather than allowing the other group to get anything. You, the mediator, suspects that there are underlying issues that might explain the recalcitrant behaviour, such as an unresolved historical hurt of some description. What does the mediator do?

Plenary:

Recalcitrance was seen as a serious issue with the recalcitrant often having a significant minority power base.

Some participants saw the recalcitrant person's behaviour as a sign of powerlessness, perhaps over a past unresolved issue. The mediator might engage in a private session to seek clarification - the cause may be outside the scope of native title mediation.

Sexual abuse may be involved, and the party may require assistance, such as counseling or therapy or family mediation. Issues of aboriginal Law may be involved. The mediator needs to identify whether the issue needs to be resolved before the native title mediation can proceed. Alternatively, the parties may agree that the issue is outside of the scope of the native title mediation, and should be kept separate from the mediation. There are times when 'negotiation' confused with 'mediation'. Some thought that it was a clear design decision on the part of the mediator as to whether an issue belonged to the 'native title space'. Some issues might be better dealt with outside the mediation and there is a need to set clear boundaries as to the agenda in the mediation.

Options identified involved trying to manage the behaviour, addressing the cause of the behavior, or attempting to achieve both. It was noted that it will not always be possible to address the cause of concern; indeed it may not be logistically feasible to do so. There are times when issues around the capacity of parties to negotiate become evident only when the mediation is well under way. If so, the mediator needs to pause and discuss the issues with the parties and what, can realistically, be done to address them. The mediator won't necessarily be in a position to solve these issues, but has a responsibility to see that they are discussed. Private checking with parties is essential as to the readiness of all parties to proceed.

One participant talked about the danger of giving a recalcitrant false hope that their issues will be solved by mediation. The scope of the process needs to be made clear. Parties should not be given false hopes that their issues will be addressed if the native title mediation is not the appropriate forum.

There was a discussion about dealing with a recalcitrant if they are a named applicant in a native title claim. A named applicant has legal status and power in that the signature of all applicants is required on many agreements. Although, it is intended that applicants represent the native title group, an applicant may withhold his/her signature even when the rest of the group is willing to close an agreement. Ultimately, there is a legal process for removing a named applicant if the group so requests, but the process can be highly divisive and unpleasant. In reality testing with a troublesome applicant, who is out of step with the group, the mediator might discuss and explore this process and its consequences. If the process is not working, the mediator should check with the parties and possibly close the mediation.

There was a discussion about the native title claim registration test and the extent to which that defines a group. One aspect of that test is whether or not a group is properly described. Any other Indigenous people who believe they have an interest or who dispute the claim of the group may join the proceedings as respondents. There may subsequently be an 'overlap' mediation in which the interests of such respondents are accommodated by the claim group. There are examples, where Indigenous parties, already covered by an application, seek to join as respondents because they do not trust the named applicants. They are included in the group but assert a separate status, often because of a lack of trust of other applicants.

There was discussion around the tensions between smaller 'subgroups' and larger community or language based groups which might lay claim to specific areas. Claims by broader based groups can lead to assumptions that native title rights and interests

are spread uniformly across land. One participant noted a process with which she is currently involved, where parties are beginning to discuss a scale of rights and interests which would provide the basis for decision-making powers and for the distribution of any moneys associated with the project. The aim is to establish a matrix of differentiated rights and interests which takes into account the full range involved and which are based on the specific associations of individuals or groups with specific areas - for example, places of birth, burial, ritual places, Dreaming tracks and so on.

Participants considered dealing with groups and group dynamics is a training need for mediators, as is information about how and where to direct parties for assistance outside the mediation. This session noted the critical need for non-Indigenous mediators to learn from Indigenous mediators.

SESSION 6. Sharing experiences – successful and innovative practice.

Participants who were allocated the task of describing innovative and successful practice were asked to provide their examples. These are summarized broadly below.

6.1 Balancing opportunities to contribute in the face of dominating personalities.

One participant had facilitated a meeting of 25 to 30 people. Whilst the mediator encouraged contributions from everyone, only a few of the young people present did all the speaking. The mediator did not want to put other group members on the spot by directly asking their opinion, but read clues from their body language that some of them did not really agree with what was being proposed. The mediator used informal discussions during a break to offer people the opportunity either to raise something themselves, or to ask the mediator to do that for them.

6.1.1 Using humour.

During a mediation comprising two groups, some members of opposing groups became involved in a drunken fight at the 'pub' in the evening. The next day, none of those involved wanted to attend the mediation. The mediator said to them: 'You buggers, I'm supposed to be mediator and you tried to settle it yourselves last night!'. This use of humour broke the tension and allowed talks to continue. However, participants also discussed inherent dangers in using humour, the need to ensure it was appropriate and, preferably, self-deprecating, rather than being directed at any one person or group in the mediation.

6.1.2 Taking time for stories.

Native title mediation has to have considerable flexibility and allow especially Indigenous parties a degree of leeway. Many people, including non-Indigenous people want to tell their stories and need the time to do so. Some Indigenous stories,

often concerning the removal of parties from their parents and families under past government policies of assimilation, are heartrending and often relate to an inability to prove connection. Whilst the telling of such stories can take considerable time, participants felt strongly that the mediator should not interrupt, even when the story does not appear to relate directly to native title.

Whilst this might lengthen the mediation, it will strengthen the bonds between the mediator and the claim group and, more importantly, between claimants themselves, and any other parties who are present?

6.1.3 The power of country.

‘Country’ can be used in mediation to help settle issues between Indigenous people in a number of ways. Physically meeting on country can have a powerful and positive affect in determining how people approach issues. References to the laws of country and how people feel about country can also be used in mediations off country to focus discussions.

6.1.4 Think about safety: working with groups of people who cannot be brought together.

Thorough preparation requires the mediator to be as aware as possible of issues which might arise. In particular, participants identified that the mediator should be aware of any possibility of violence since parties should not be put at risk. One participant noted that there was considerable disquiet in a meeting upon the arrival of a particular woman, who she subsequently discovered was the subject of a Domestic Violence Order. It is important to ask: Is it feasible to bring members of these groups together? What are the potential risks? How can they best be managed?

There will be situations where the members of groups should not be brought together, at least in the first instance. In one example, the mediator kept the groups separate and shuttled between them. The mediator then organized the members of each group into working clusters in which less volatile calmer personalities worked together with those who were perceived as more difficult. Eventually, calmer heads prevailed and the mediator was able to bring the two large groups together.

6.1.5 Using the telephone.

One participant used the telephone to conduct a form of shuttle mediation, in order to deal with a party unwilling to meet face to face with other parties. The telephone can also be useful when resources are lacking for travel. An example was given where two parties who negotiated an agreement about the burial of ancestral bones, confirmed the agreement jointly by telephone with a senior person who was not able to be present.

SESSION 7. Building local and regional Indigenous capacity.

The purpose of this session was to explore the concept of a national network of Indigenous facilitators and mediators, to gauge support for the proposal and, to identify the issues that need to be addressed in developing and implementing the proposal.

Following an IFaMP introduction to the issue, participants worked in groups to discuss the following questions:

- How do we progress the concept?
- What role could you or your organisation play?

7. 1 IFaMP introduction to issues associated with national network of Indigenous facilitators and mediators.

Toni Bauman noted that in many IFaMP discussions with a range of stakeholders, including workshops with Indigenous mediators, NTRBs and community justice centres, requests have been made for IFaMP to work towards the establishment of a supported national network of regionally based accredited and specialised Indigenous facilitators and mediators. Toni saw the proposal as being entirely consistent with the Federal government's stated whole-of-government approaches to issues in Indigenous communities including new policies such as Shared Responsibility and Regional Participation Agreements.

She outlined a number of associated issues including (among others):

- the strong preference for co-mediation which was expressed at the Indigenous practitioners' workshop and the NTRB workshops;
- national standards, codes and ethics;
- accreditation allowing Indigenous mediators to work anywhere in Australia, and not just in native title or Indigenous issues;
- building on existing substantial regional expertise through community justice centres where they exist, including their networks;
- supporting Indigenous trainees through mentoring, access to work; placement opportunities ongoing professional development;
- developing a range of ongoing training approaches and train the trainer;
- debriefing services - especially if a mediator has worked in the single mediation model, there is a need to debrief with a colleague or mentor;
- career paths;
- lists of Indigenous facilitators and mediators;
- provision of community education (native title); and
- dispute management design.

7.2 Possible contributions and considerations

One group examined the role the National Native Title Tribunal might be able to play. Another group focused on the role the Federal Court. A third group considered issues which might need to be addressed.

7.2.1 National Native Title Tribunal

In summary:

- The NNTT could provide information and training in the processes of native title to existing and new mediators. This is already done internally. Packages developed for NNNT internal use could be adapted for this purpose.
- It is unlikely the NNTT would engage consultant mediators, although there may be some scope to engage consultant mediators as co-mediators in native title matters. One impediment is the increasingly strict procurement guidelines. It may assist the NNTT if there was a list of Indigenous community mediators, regularly updated, that could be used in a selective tender process against verifiable lists.
- The NNTT could encourage its staff to extend use of their knowledge in working closely with NTRBs. They may be able to work with NTRBs to identify and work through issues before they are finally referred to the NNTT for mediation, including possible engagement of Indigenous mediators to address underlying community or group issues.

7.2.2 Federal Court

In summary:

- The Court could be active in raising the profile of Indigenous mediators and encouraging parties to engage them.
- The Court could raise the issue of native title funding at forums that it is involved in including the Attorney Generals/OIPC/Federal Court/NNTT forum.
- It could provide information and training, particularly about the role of the court in native title.
- It may be possible for trainees to sit in on Court mediations or case conferences to facilitate mentoring of Indigenous mediators.
- There may be possibilities for Indigenous mediators to be employed as cultural advisers or co-mediators, although there may be some restrictions in the NTA and the Federal Court Act that would have to be considered.

7.2.3 Other considerations

- The creation of a register of existing services and practitioners and investigation of whether there are existing networks or training that can be used as models (for example, the Native title Studies Centre at James Cook

University has a pilot program to train people in native title mediation and has a joint project with LEADR to offer accreditation in native title mediation).

- The establishment of a set of national standards, including a code of ethics.
- The establishment of an accreditation system.
- The creation of training programs which include environmental issues, cross-cultural aspects, governance and awareness of rights.
- The establishment of a group of independent mediators willing to de-brief others.

7.3 Possible strategies in establishing a national network of Indigenous practitioners

- The raising of support for the proposal through forums such as the national mediation conference.
- The engagement of the Office of Indigenous Policy Co-ordination in support for this initiative.
- The engagement of the Federal Attorney-General and the Council of Attorneys-General.

7.4 Workshop recommendation

At the end of the group reports, the following recommendations from the Indigenous Native Title Mediation Practitioners' workshop were discussed:

That IFaMP should seek funding to:

- (a) Develop the concept of a formal network of regionally based Indigenous mediators, facilitators and negotiators dealing with Indigenous matters in a whole of government approach and the roles of non-Indigenous practitioners in this network.
- (b) Explore best practice in the provision of Indigenous mediation services.

The workshop unanimously supported the principle of IFaMP seeking funding to pursue workshops on the above issues.

SESSION 8. Peacemaking and training.

8.1 What is peacemaking?

One of the participants who also attended the native title workshop of Indigenous mediators, talked about the concept of peacemaking, which had been raised frequently during that workshop and had also arisen in the course of this workshop. He noted that, prior to colonisation; Indigenous peoples governed the country and managed their own conflicts in 'fantastic' peacemaking processes. Whilst it might not have been seen in such terms, their people were skilled in their own processes of dispute

resolution. This has always been a part of Indigenous culture – peacemaking has been a necessary part of living. Human beings will always fight; it’s a natural part of life.

Many Indigenous people are uncomfortable with the way native title mediation is practiced. As a mediator, he has tried to modify the process where he can to make it more appropriate. He was uncomfortable with the way he was trained and is always pushing the boundaries and trying to make his practices more culturally appropriate.

He said that you can visit any Indigenous community, whether in the city or in remote areas, and you will find people who stay calm and stand back from disputes, try to bring reason to the disputing parties, seek to understand each party even if they don’t agree with them, try to keep people from hurting one another, try to mend fences and repair damage, and to keep the peace. Whilst that is true in any culture, it has particular validity for the Indigenous community because it is a group based society. People bear a responsibility to the group not just to the individual. These peacemakers are usually well respected, often, but not necessarily, older people who are ‘able to sit in many different camps’.

He noted that he has given a lot of thought to how these people can be used. Mediators need to be able to identify them, utilise their skills and knowledge and acknowledge that in the community. They are the ones who remain after the mediator flies out and are left doing the ongoing work. If this were recognized and respected, this would do much to enhance their role and effectiveness and to bring together western and Indigenous processes.

Another participant spoke of the work of Bruce Barnes at the University of Hawaii where he had recorded Hawaiian terms for parts of peacemaking processes (eg. conciliation or peacemaker) which relate to well-defined roles in the processes. Support for these roles is shown as others address those in the roles by the terms who were also protected by such naming. He saw an advantage in a clear definition of the peacemaking role, and in the naming of that role. In particular it provided the respect and acknowledgement of the role that such a person plays. It wraps a formal institutional structure around the role. When a dispute arises, the peacekeeper is actually called by that name, is protected, and people understand the role the peacemaker must play.

However, the Indigenous speaker expressed caution about formalizing the process and about non-Indigenous people discussing ‘peacemaking’ and ‘taking it over’. He said that he didn’t want ‘peacemaking’ to be studied or defined because ‘the written word becomes the truth’. What he wanted to see was guidance to those engaged in other processes, like native title mediation, to be aware of these people, to identify them, to acknowledge them and to work with them. At the moment, other mediation processes ‘cut across’ local processes and undermine the work of ‘peacemakers’ or ‘diplomats’ in Indigenous communities.

A question was asked as to how to identify ‘peacemakers’ in the community and make contact with them. The speaker noted that direct approaches to apparent ‘interpreters’ or ‘peacemakers’ in the community may not be the most appropriate approaches to make. ‘It’s a subtle process’. He advised the workshop that ‘the more talk that happens before mediation, the more likely you are to identify the

peacemakers. You will find their name keeps coming up in conversation'. Other people who work with the community, such as police or health workers, 'white' advisers or rangers, are also likely to be able to identify them. The mediator should sit down with people in the community and make themselves known and establish connections: 'Blackfella want to know who you are as a person'.

As an example of the need to support peacemakers, another participant raised the tragic suicide of a peacemaker in a remote Cape York community. During a night of violence between groups in his community, the 'peacemaker' tried to intervene, unsuccessfully. Shortly afterwards he took his own life. The toll that extreme unresolved conflict places on such people is enormous and they have little support systems for the work that they do.

The following were suggestions as to ways of involving and acknowledging Indigenous peacemakers:

- thank them personally;
- acknowledge, honour, respect them in the community and give them recognition;
- let other government agencies who work in the community know of the role they played; and
- in acknowledgement of their role in the community, draw them in as a formal observer to ensure the integrity of the mediation.

It was suggested that there should be regional forums for local peacemakers to enable them to have their own discussions about issues from the 'ground up'. One participant said that work should also be done within communities to determine how 'peacemakers' or 'interpreters' can be supported.

There was some discussion about the recent Mawul Rom ceremony where instead of adapting non-Indigenous mediation practices to Indigenous needs, the issue was how to adapt an Indigenous 'peacemaking' ceremony to meet the needs of non-Indigenous people for 'reconciliation'.

8.2 Summary of peacemaker discussion.

In summary, the key points that emerged during the discussion were:

- In every Indigenous community there are people who play the role of peacemaker in their community.
- A mediator who is aware of the peacemakers can positively engage with them for a more effective mediation.
- Peacemakers can build a bridge between western and Indigenous processes.
- Peacemakers play a vital role in mediation and have little support for the work they do.
- Whilst there are differences of opinion about whether that role should be formalised or institutionalised, mediators working with Indigenous

communities need to look for them and engage with them during their mediation preparation.

- There are a number of ways mediators can acknowledge and involve peacemakers and enhance their role in their communities.

8.3 Native title mediator training needs

At the commencement of the workshop, participants were asked to note their training needs in native title mediation as they arose in each session in response to the question, ‘What are the training needs of Mediators?’ Participants’ responses to this question are set out below.

A number of additional training needs arose in the course of particular sessions and are noted throughout the report. There was some discussion around cross cultural awareness training which appears below. Training in group dynamics and how to think procedurally about group management processes was also emphasised at times during the workshop. Most models do not emphasize the impact of group dynamics on process.

8.3.1 Native title mediator training needs

- Managing adversarial advisers.
- Facilitating negotiations between parties about confidentiality and other procedural parameters.
- Electronic tips and traps (including inadvertent breaches of confidentiality through document properties).
- Cross-cultural understanding.
- Mediation training of non-indigenous by indigenous practitioners.
- Training indigenous people: career paths in mediation; providing support and pathways for indigenous students; encouraging involvement in mediation.
- Dealing with difficult or recalcitrant parties.
- Mediation training for indigenous experts.
- Cross-cultural techniques and practices (do they differ from mainstream mediation practices and techniques?)
- Training of advisers about the mediation process and their roles in it.
- Dealing with groups.
- Dynamics of Aboriginal groups including witnessing.
- Handling abuse of the mediator.
- Understanding why people take adversarial stances.
- Exchanges of information and practices between Indigenous and non-Indigenous mediators
- Utilizing participants in mediation as a resource in mediation.

8.3.2 Cultural awareness training

A brief discussion of the responses to Question 2 from the Indigenous practitioner's workshop, 'How do they see native title mediation relating to traditional community methods of dispute resolution?', led to a discussion of cross-cultural training needs for native title mediators. As noted, participants were requested at the beginning of the workshop, to write their responses to these questions on post-it notes and add them to the butcher's paper on the wall. The facilitator noted that the words, 'traditional community methods of dispute resolution' had often been interpreted by participants at this workshop to mean 'alternative dispute resolution' methods rather than, as was intended by the Indigenous practitioners, 'peacemaking'. That is, the Indigenous practitioners had meant 'methods traditional to Indigenous communities' such as the roles which peacemakers might perform as discussed above. Such differences in interpretation demonstrate the ease with which misunderstandings can occur.

Native title was seen to be an urgent site for cross-cultural training. One participant noted that 'it's like hell, like a war zone'. Another noted that the best kind of cultural awareness training for native title mediators would be experiential learning in working side by side with Indigenous mediators.

The NNTT does cultural training regularly, but opportunistically, rather than systematically. One participant said people generally spoke about cultural awareness training in 'one off' terms that suggested it was like an immunization. However, such training needs to be regular and should be seen as an ongoing process of learning about another culture and how to relate across the cultures. Indigenous practitioners at the previous workshop had said that they saw little value in most cultural awareness training and that it had brought about little change. One participant at that workshop had raised the concept of cultural relativity training. It seemed that he was drawing a distinction between awareness and interrelation; and that the latter would assist people in learning how to relate with people from other cultures rather than just teaching them typified so-called 'facts' about that culture.

It was noted that a good example of cross-cultural training is a program that Mary Graham, one of the Indigenous participants in this workshop, regularly runs for developers and government agencies dealing with Indigenous people. Mary Graham uses the powerful analogy of a glass brick wall between black and white Australia. They can see each other and make each other out through the wall. They can hear a little of what they are each saying, but it is muffled and they can't really have a dialogue.

There was some discussion around why cross cultural training is needed. The discussion is summarised below.

- **Higher Indigenous profile and standing:** It is broadly accepted that, as Australia seeks to develop closer links with Asia, Australians should learn about Asian languages, culture and history. There is not the same focus in Australia on learning about Australia's Indigenous people.
- **Learn how Indigenous people relate with each other:** One participant spoke of Indigenous people not being direct and telling people what to

- do. A traditional method of providing guidance is to tell a story and leave it to the listener to work out their own path from that story.
- **Learn to use different methods of dialogue:** One participant said that he encouraged developers to tell Indigenous people the story of their project: how they came to choose it; what issues they have to consider; what they will have to do to make it work.
- **Make it local and specific:** There is no standard set of rules – cultural awareness must relate to the community you are working with.

SESSION 9. Workshop conclusion.

In closing, participants were asked to reflect on the two days of the workshop and to state briefly what they valued about the workshop. The following is a summary of the responses:

- **Reflecting on personal practice**
Participants talked of the benefit of being able to take the time out to reflect on their practice. A number felt they would take back what they had learned during the workshop and improve their practice as mediators. Others said they needed to ‘digest’ what had been said in the last two days.
- **Exchanging views**
Participants valued the opportunity to hear the views of other practitioners. Many expressed the view that they had been privileged to spend time with people with such a depth and breadth of experience. One participant expressed gratitude for the other participants’ willingness to be so open about their experiences and their opinions.
- **Enhancing understanding**
Some participants spoke of the personal benefit of enhancing their own and contributing to enhancing other’s understanding of issues from Indigenous and non-Indigenous perspectives.
- **Developing a positive vision for the future**
A number of participants talked with enthusiasm about potential developments for the future: both for the practice of native title mediation and, more generally, for relations between black and white Australia. Support was expressed for ongoing funding for the research project to take the proposals discussed to the next stage of development.

Toni Bauman closed the workshop and thanked the facilitation team and the participants.

Annexure 1

List of Participants

NATIVE TITLE MEDIATION PRACTITIONERS WORKSHOP 15-16 MARCH 2005 PARTICIPANTS

State	Name	Organisation
Indigenous Facilitation and Mediation Project		
ACT	Toni Bauman Rhiân Williams Jess Clements Sally Brockwell	Native Title Research Unit, AIATSIS
QLD	Fleur Kingham	Land and Resources Tribunal
QLD	Matt Black	Land and Resources Tribunal
QLD	Eddie Watkin	Learn to Lead
National Native Title Tribunal		
QLD	Graeme Neate	National Native Title Tribunal
QLD	Graham Fletcher	National Native Title Tribunal
VIC	Gaye Sculthorpe	National Native Title Tribunal
Federal Court		
SA	Cathy Cashen	Federal Court
NSW	Stephanie Kavallaris	Federal Court
QLD	David Robson	Federal Court
Others by State		
ACT	Tim Chadwick	Tim Chadwick: Mediator-Facilitator-Lawyer
ACT	Mick Dodson	National Centre for Indigenous Studies, ANU
ACT	Joanna Lunzer	Office of Indigenous Policy Coordination
NSW	Jillian Comber	Comber Consultants
NSW	Tina Spiegel	Spiegel and Associates
NSW	Aub Cora	Community Justice Centres
QLD	Jonathan Fulcher	Minter Ellison Lawyers
QLD	Mary Graham	Kumarra: Stronger Indigenous Families
QLD	Craig Jones	Native Title Studies Centre, JCU
QLD	Marg O'Donnell	Consultant
QLD	Charlie Watson	Consultant

Annexure 2

Questions from the Indigenous practitioners' workshop and responses from this workshop

At the native title workshop for Indigenous mediators in February 2005, a number of questions were formulated to be put to this 'general' workshop for native title mediators workshop for consideration. The questions and the responses to them are set out below:

Question 1. Do you feel that mediation is a heartfelt skill?

This question invoked some discussion during the first session. Responses from those who agreed with the proposition included:

- Yes most definitely and it should be approached as such.
- Yes – impossible to do it otherwise, especially in indigenous matters.
- Yes if you mean by “heartfelt” that mediators should have prior knowledge and understanding of indigenous values, history, identity, culture and world view.
- Heartfelt is the essence.
- Yes, a heartfelt yes, because if passion and commitment is not involved in the application of skill, the process will feel very frustrating and enervating.
- Yes – but it must be supported or based on ability and experience as grounded within a competent process.

Responses from those who did not endorse the proposition included:

- The skills in conducting mediation are to provide the specific effective process in which all interests may be raised and explored fully by the parties, and on which the parties can then reach their own outcome. Whether it is a heartfelt process by the mediator is not necessary.
- I think the mediator needs to be dispassionate in the performance of the duties. But the skills/attitudes of patience, persistence, listening are essential to being effective.

Question 2. How do they see native title mediation relating to traditional community methods of dispute resolution?

(A number of respondents interpreted 'traditional community methods of dispute resolution' to mean Alternative Dispute Resolution as compared with native title mediation. The question was intended to refer to traditional methods used in Indigenous communities, often referred to by Indigenous mediators as 'peacemaking'.)

- Native title mediation is broader than traditional ADR (it comprises country, law, lore, cultural heritage, social relationships and finding common ground).
- Workshop the two systems: there are many differences.
- Native title is too legalistic compared with traditional mediation.
- Native title mediation is multi-party and cross cultural.
- There needs to be good process design to accommodate relevant bits of both.

Question 3. Do you see indigenous mediators as being extremely important in the resolution of native title issues, and, if so, would you support and lobby for the development of this?

Strong support was expressed for indigenous mediators. Suggestions included:

- Some experts and advisers need to step aside and make room for indigenous mediators.
- They are very important in intra-indigenous mediation.
- They are essential to the legitimacy of the process.
- They are imperative.
- They could mediate alone or co-mediate.
- Co-mediation including an indigenous mediator should become the standard for cross-cultural mediation.
- But you need to consider the impact of traditional loyalties on indigenous practitioners.
- They should be used in a structured process to achieve a practical outcome.
- They bring the community to come to their own resolution.
- Train indigenous mediators to train others – continuity.

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

- Keep an eye on the main game.
- Bury your ego.
- Focus on the parties – it is their mediation, not yours (ie the mediator's).
- Process design and rules.
- Process design – the parties define the interests, the mediator manages the process.
- Mediation principles.
- Transparency.
- Good time frame – time to speak and to listen.
- Aboriginal protocols.
- Self awareness – of own position and attitude.
- Interest based in context of adequate resources and advisers.

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

There was a mixed response. Some thought they did, some thought they did not, but nearly all expressed an openness to learn more and a desire to increase their experience and skill base. One respondent noted that the best outcome was for communities themselves to resolve their own issues with their own people.

Question 6. What is your solution/approach/formula for reducing the high level of intra- and inter- Indigenous disputation in the native title context?

- Aboriginal protocols.
- Greater respect for traditional dispute resolution processes and for elders.
- Indigenous mediators.
- Good time frame.
- Co-mediation.

- Inclusive.
- Community based solutions focusing on development.
- Practically and technically sound advice about process and outcomes before the claim is lodged.
- More user friendly process to amend or withdraw claims.
- Separate out indigenous law issues and native title issues.
- Proper authorization.
- More resources.

Annexure 3

Implementing Agreements

There was no time during the workshop to focus on the topic of implementing agreements. However, participants placed their responses on post-it notes on butcher's paper to two related questions. The questions and responses are set out below.

What are the mediator's responsibilities to ensure that parties have the capacity to implement agreements?

- Yes, depends.
- Resourcing; planning, shuttle diplomacy and intake.
- A number of responses stressed the need to raise the issues with implementation during negotiations, including the resources needed to implement the agreement.
- Mediators should be retained to confirm terms of agreement and to mediate disputes that may arise in implementation.
- Mediators should reality check agreements, ensure realistic agreements are prepared and that parties have authority to enter into the agreements.

In your opinion, as a mediator, what is the key reason for agreements that don't work?

- Negotiators move on to other negotiations and hand over implementation for others.
- Lack of commitment to outcome.
- Lack of capacity to implement outcome (resources).
- Mediators need to follow through with implementation phase.
- Too many and varied to put in a nutshell.
- The parties not having the ability to follow through due to lack of resources.
- Lack of full and proper exploration of all issues, concerns etc by the parties (through facilitation by the mediator) in the first joint session.
- Ego.
- Legalism.
- Adversarial approach.
- Positional bargaining.
- Not enough importance placed on putting energy and resources into implementation and management of agreements.