

A large, vertical, decorative pattern on the left side of the cover, featuring intricate geometric and organic shapes in black, red, and white, reminiscent of traditional Indigenous art.

# RESEARCH DISCUSSION PAPER

**Scoping Process Issues in Negotiating  
Native Title Agreements**

**Delwyn Everard**

NUMBER 23

AN AIATSIS RESEARCH DISCUSSION PAPER

Scoping Process Issues in Negotiating Native Title agreements

Delwyn Everard

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## Table of Contents

About the Author.....	5
Acknowledgements .....	6
Disclaimer .....	6
List of Abbreviations and Acronyms .....	7
Introduction .....	8
Background .....	9
Introduction to key negotiation concepts .....	10
Preliminary Issues .....	12
Distinguishing between Process and Content.....	12
Stakeholders .....	13
<i>Who can speak for country?</i> .....	13
<i>Overlapping Claims</i> .....	15
<i>The role of the broader local Indigenous community</i> .....	15
<i>Other parties at the table</i> .....	16
<i>Other relevant stakeholders</i> .....	16
Interests .....	16
How to focus on Interests .....	17
A strategic vision for the future.....	18
The interests of the other parties .....	19
Are there any shared interests?.....	20
Relationship.....	22
Dealing with Indigenous group dynamics .....	22
Know your opponent .....	25
Let your opponent get to know you.....	25

Communication .....	26
The negotiating team – Who will speak for country? .....	26
Keeping the traditional owners informed .....	28
Managing Third Party Information .....	29
Different Cultural Patterns of Communication .....	30
Options .....	31
Where do good options come from? .....	32
Using a staged process.....	32
The role of working parties in generating options.....	33
Standards .....	34
Previous agreements as benchmarks .....	34
“Bargaining in the shadow of the law” .....	35
Alternatives .....	36
Understanding what the courts can deliver.....	36
Looking beyond the native title system.....	37
Commitment.....	38
Securing all parties’ agreement to the same process – negotiation protocols .....	38
Procedural commitment by the claimant group.....	38
Resourcing the process.....	39
Substantive commitment - implementation and governance.....	40
Conclusions and Reflections .....	41
Bibliography .....	43

## **About the Author**

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## **Disclaimer**

The views expressed in this paper are those of the author unless otherwise indicated.

## List of Abbreviations and Acronyms

AIATSIS	Australian Institute of Aboriginal and Torres Strait Islander Studies
BATNA	Best Alternative to a Negotiated Agreement
ILUA	Indigenous Land Use Agreement
RTN	Right to Negotiate
NTA	<i>Native Title Act 1993</i> (Cth)
NTRB	Native Title Representative Body
NTRU	Native Title Research Unit
NTSP	Native Title Service Provider
SIA	Statutory Environment Impact Assessment report
YMAC	Yamatji Marlpa Aboriginal Corporation

## Introduction

It is widely acknowledged that native title agreements have the capacity to generate significant positive social, economic, environmental and cultural benefits for Indigenous communities. If this is so, why are such outcomes the exception and not the rule? Why is it that the obvious passion and commitment driving many negotiators representing native title claimants routinely fails to deliver such outcomes. Indeed, outcomes from agreements often fall far below traditional owners' expectations.

It is not controversial that agreements with outcomes relating to employment and training and business development, together with financial payments, can be instrumental in securing sustainable economic benefits for Indigenous communities. Studies on the social impact of negotiated agreements in the resource sector show that dealing with environmental management and cultural heritage issues is crucial in minimising negative cultural and social impacts and protecting Indigenous cultural integrity and social vitality.<sup>1</sup>

The aim of this paper is to focus broadly on the process issues faced by claimant groups and their negotiating teams throughout the varied phases of a native title negotiation. It is hoped that the scoping of such issues may assist in the design of future training for native title negotiators and that this, in turn, will assist native title groups to mobilise and engage their available negotiating power.

Native title negotiations are characterised by the complexity of the subject matter and the fact that there are usually multiple parties. The Indigenous claimant group is seldom homogenous and its diversity reflects a tapestry of needs. Furthermore, the negotiations often occur over a long period of time – sometimes years. It is not uncommon for native title determinations and ancillary Indigenous Land Use Agreements (ILUAs) to be negotiated in parallel. Attention to process design and a strategic approach to process choice can play a fundamental role in securing the participants' confidence in, and commitment to, the negotiation process as well as in achieving successful native title outcomes.

The discussion in this paper and the accompanying lists of 'Things to Think About' are based on a number of interviews with individuals with experience across a broad cross section of native title negotiations including large mining negotiations, statewide framework agreements, ILUAs, consent determinations of native title, both assisted and unassisted negotiations, agreements reached both outside the *Native Title Act 1993* (Cth) (NTA) and those driven by it. Interviewees were asked to describe their negotiation experiences and to reflect on the obstacles to agreement, the strategies adopted and the relationship of those strategies to the outcomes achieved.

The spectrum of perspectives provided by the interviewees was the basis for an early draft of this paper which formed the basis of a one-day AIATSIS Native Title Research Unit negotiation workshop held in Sydney on 19 March 2009. The workshop involved a hypothetical negotiation put to a panel of eight participants representing traditional owners, government, mining companies, native title representative bodies (NTRBs) and consultants. Further issues were raised

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<sup>1</sup> C O'Faircheallaigh, 'Evaluating Negotiated Agreements in Aboriginal Australia', paper presented at the Workshop on Policy Evaluation & Policy Learning: Beyond Program Evaluation and Performance Audit at the ANU Conference on Governing By Looking Back: How History Matters in Society, Politics and Government, Canberra, 12 - 14 December 2007, p.10.

in ‘taster’ training sessions that followed. The workshop demonstrated the utility of the hypothetical format as a powerful teaching tool of negotiation microprocesses and skills. Negotiation issues are approached in this paper using the ‘7 Element’ analytical framework developed by the Harvard Negotiation Project.<sup>2</sup> The 7 Elements are Relationship, Communication, Interests, Options, Standards, Alternatives and Commitment. They are facets of almost every negotiation whether articulated or not and whether consciously pursued or not.

By looking at each of the Elements in turn, and illustrating their importance in native title negotiations with examples provided by the interviewees and through the workshop, process issues in native title negotiations are highlighted. Some issues are explored here in the context of one Element but could also be viewed through the prism of another. It is an approach that can be replicated by traditional owners, NTRBs and others involved in negotiating native title disputes and which could assist them in the identification of process issues. Usually, given the complexity and lengthy time periods common to native title negotiations, each negotiation will involve a team of individuals with different responsibilities at different stages. The NTRB field worker who engages with the claimant group is not the person who faces the resource company at the negotiation table. Each plays a critical role. Each is likely to employ a range of different skills and engage in a range of different processes. All members of the negotiating team can develop an awareness of various process issues and acquire skills to manage those issues with the overall aim of improving outcomes from agreements.

## Background

Native title negotiations present a range of scenarios. Under the *Native Title Act 1993* (Cth) (NTA), a negotiation may relate to compensation for the Federal or State government’s validation of past or intermediate period acts,<sup>3</sup> the entry into an ILUA<sup>4</sup> or a future act negotiation. The negotiation may arise after court proceedings for the determination of native title have been commenced, or in order to avoid starting them at all. The parties may include government departments, multinational corporations, councils, local businesses or farmers. Negotiations may cover huge tracts of land or a few hectares. The negotiation may arise because the proposed use of the land will have significant long term environmental, economic and cultural impacts on country or not. Issues for negotiation may be limited or parties, particularly claimants, may see negotiations as providing opportunities to address a wide range of social and cultural issues which might not be seen by other stakeholders as relevant to negotiations.

Negotiations also arise as a consequence of the operation of legislation of the States and Territories.<sup>5</sup> For example, negotiations may occur under the *Aboriginal Land Rights (NT) Act 1976* (Cth) between Aboriginal traditional owners and an applicant for a exploration licence or concern the obtaining of title to unalienated Crown land in New South Wales under the *Aboriginal Land Rights Act 1983* (NSW).

In many cases, the negotiation will have to be conducted within a procedural framework set down in legislation. For example, future act negotiations with mining companies are subject to a six

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<sup>2</sup> The 7 Elements are traditionally associated with the interest based model of negotiation but can be applied to any negotiation.

<sup>3</sup> Sections 17, 22D, 22G, 22L and 23J *Native Title Act 1993* (Cth).

<sup>4</sup> Division 3, subdivisions B to E *Native Title Act 1993* (Cth).

<sup>5</sup> *Aboriginal Land Rights (NT) Act 1976* (Cth); *Mineral Resources Act 1989* (Qld); *Aboriginal Land Rights Act 1983* (NSW).

month timeframe as specified in Subdivision P of the NTA, after which either party may refer the dispute to arbitration.<sup>6</sup>

Native title negotiations also occur outside the legislative framework as parties pursue a process developed and constructed entirely by themselves, although the legislation generally creates both the opportunity and the incentive that brings the parties to the negotiation table.

For the purposes of the discussion in this paper, it is assumed that negotiators already have a basic understanding of the unique cultural and legal context in which native title operates, including the particular legislative requirements which may impact on negotiated agreements<sup>7</sup>.

## Introduction to key negotiation concepts

Negotiation is the process of interaction between parties seeking to reach an agreement. Negotiation theory recognises several different strategies:<sup>8</sup>

- In **‘rights-based’ negotiation**, the parties focus on determining the scope and strength of their respective legal rights in order to agree how outcomes should be allocated. In native title, for example, negotiations often concentrate on whether the Indigenous party’s ‘connection’ evidence would satisfy a court and the likely legal remedies under the NTA. The State may refuse to engage in discussions with, or consider the interests of, any group other than the native title claimants. This is classic rights-based negotiation.
- In **‘power-based’ negotiation**, the outcome is determined by the party with the upper hand – whether through possessing greater resources, more information, stronger legal rights, more media influence or another source of superior power. The power balance can shift during a negotiation. Examples of parties seeking to negotiate through use of power are the union that threatens to strike if its demands are not met or the State government which threatens compulsory acquisition of country if resource companies and traditional owners fail to agree by a deadline.<sup>9</sup>
- **‘Positional’ negotiation** is a bargaining process in which each party states its demands or positions and then engages in a series of trade-offs where each reacts to the demands of the other parties with a rejection and counteroffer of its own amended position. The most common example is a negotiation that is only about money where the parties haggle to an agreed price.
- In an **interest-based negotiation**, the parties seek to articulate the interests or concerns that are their motivators for seeking a specific outcome, and then work to generate options for agreement which meet their own needs and concerns in a way which least undermines or diminishes the needs and concerns of the other parties.

All these strategies are used in native title negotiations, sometimes in combination. Where interest-based negotiation can be used, it is likely to lead to optimum sustainable outcomes, because ‘in general, reconciling interests costs less and yields more satisfactory results than

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<sup>6</sup> Section 35 *Native Title Act 1993* (Cth).

<sup>7</sup> For example, section 24CG *Native Title Act 1993* (Cth).

<sup>8</sup> See for a general discussion of the alternative processes, Chapter 1, W Ury, J Brett & S Goldberg *Getting Disputes Resolved*, Jossey-Bass Publishers, San Francisco 1988.

<sup>9</sup> See J Hawley, ‘Pipe Dream’, *Sydney Morning Herald*, Good Weekend, 7 March 2009, p.20.

determining who is right, which in turn costs less and satisfies more than determining who is more powerful'.<sup>10</sup> However, interest-based negotiation may be neither practical nor possible in many situations. Sometimes, power-based negotiation may be the most effective approach for a party (but will tend only to benefit that party and is not often a strategy utilised or available to claimant groups). The strategy to be adopted depends on the circumstances, not least of which is whether the other parties make the same process choices. However, if the claimant negotiating team can recognise what type of process is occurring or is able to make conscious choices to influence the process, then its negotiating position is likely to be strengthened.

In an **'assisted' negotiation**, an external facilitator controls the process and thereby assists all parties in talking to, and negotiating with, each other. This could be the National Native Title Tribunal or another independent mediator, or even someone aligned with one of the parties. The parties might even have a rotating nominee responsible for managing the negotiation process.

In an **'unassisted' negotiation**, the parties negotiate directly with one another without any facilitator. They may do so face-to-face or through representatives. In native title negotiations, where the claimant group often comprises a substantial number, it is unusual for the whole group to engage directly with the other parties. A small group of Elders or traditional owners may represent the wider claimant group or negotiations may be undertaken on their behalf by a NTRB, external lawyer or professional negotiator.<sup>11</sup> In the latter instances, while the claimant group is clearly receiving 'assistance', the negotiation process as a whole is still considered to be unassisted.

**Mediation** is a model of assisted interest-based negotiation in which the parties enlist the assistance of a neutral person or persons to help them systematically isolate issues between them in order to generate options, consider alternatives and reach a consensual settlement that accommodates their respective needs.<sup>12</sup>

Mediation is acknowledged as a useful strategy where the parties will have an ongoing relationship after the negotiation. This is often the case with native title. It is also helpful where specific outcomes are unlikely to be achieved unless the parties can work through the issues underlying their relationship: for example, where hurt experienced by the Stolen Generations must be addressed and redressed.

It is useful to reflect further on mediation at this point given it is a cornerstone strategy embraced by the NTA and the National Native Title Tribunal. Many of those interviewed felt mediation had failed to meet claimant groups' expectations as it is a consensual process requiring the commitment of all parties and is unlikely to be effective if one party's agenda is to secure a rights based resolution at minimum cost. Mediation styles involving tightly structured communication channels were also experienced by Indigenous parties as placing distance between them and the other parties, in a way that prevented them directly speaking to the other side 'from the heart'. However, a skilled mediator should facilitate rather than hinder communication and this may be a

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<sup>10</sup> Ury, above note 8, p.3.

<sup>11</sup> In a native title determination application under the NTA, the native title claim group will authorise a particular member or particular members of the group to undertake the role of the Applicant. The NTA rests specific authority in the Applicant as representing the group. In this situation, the 'Applicant' may be the individual or individuals appropriately authorised by the group to make decisions and to represent it in negotiations. Alternatively, the Applicant may authorise negotiating team to represent the group.

<sup>12</sup> J Folberg & A Taylor, *Mediation: A comprehensive Guide to Resolving Conflict Without Litigation*, Jossey-Bass, San Francisco, 1984.

reflection on the mediator not the process. What is clear from these comments is that the skills and attributes of a mediator can impact on the participants' confidence in the mediation process and, ultimately, also on the results achieved.

*Gunditjmara traditional owner Denise Lovett recalls: the Gunditjmara Claim wasn't moving until it got into the Federal Court directed mediation. The mediation process began to be more active once the Federal Court set the timetable. I remember being frustrated with the mediation process but now I believe I was frustrated with the issues that we were dealing with. If we hadn't had the mediation process, which provided time to consider issues, gather cultural knowledge, get specialist advice and create the opportunity for members not present to have input, I don't think the outcome would have been as good. The mediation process provided the cooling off time to let emotions settle so everyone could come back again to talk.*<sup>13</sup>

If a skilled mediator is critical to a successful mediation, the question arises as to what is meant by successful? Is it that the process was accepted by all parties and assisted them to come to an agreement with which they could live? Or is it that the parties had confidence that the mediator was across the substantive issues and the process was designed to explore and take into account all of the content? In selecting a mediator, it may be that expertise in negotiation process is far more important than an understanding of native title. Even so, given the complexities of native title, a mediator will require some knowledge of native title and Indigenous issues to be effective.<sup>14</sup>

Conversely, there were several examples of successful unassisted negotiations. Those negotiations were generally well resourced and characterised by agreed negotiation protocols (whether formal or informal) and robust and inclusive internal communication and decision making processes within the claimant group. The claimant group generally had access to external consultants and advisers who played a substantial role on their negotiating team.<sup>15</sup>

Claimant groups and their negotiating team will find that strong process management skills are helpful whether the negotiation is assisted (in which case the mediator or facilitator also brings such skills to the process) or unassisted.

## **Preliminary Issues**

### **Distinguishing between Process and Content**

At a threshold level, negotiators need to understand the difference between process and content. The subject matter or 'content' of the negotiation is what the negotiation is about, what expertise is required to understand and deal with that subject matter, and the outcomes that are being sought.

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<sup>13</sup> Delwyn Everard, Interview with Denise Lovett, traditional owner and CEO of the Gunditj Mirring Prescribed Body Corporate (22 February 2009).

<sup>14</sup> The NTA contains specific legislative requirements for registering native title agreements and achieving consent determinations so that some knowledge of its operation is essential to the design and management of a successful mediation. See, for example, section 62A *Native Title Act 1993* (Cth).

<sup>15</sup> For example, the role of Philip Hunter in the YMAC/Rio Tinto negotiations and that of Pat Dodson in the Miriwung Gajerrong Ord negotiations.

The ‘process’ of the negotiation is concerned with managing the way the parties interact while seeking agreement on the subject matter and covers issues such as transparency, how each topic is best approached, what strategies of engagement will maximise outcomes, the role of the broader stakeholder group in the dialogue between the parties, and what mechanisms are needed to ensure that any agreement reflects consensus within each stakeholder group.

One of the challenges for the negotiator is to maintain an awareness of the process questions. This is difficult given that the content questions usually appear more pressing and immediate. Ideally, in each negotiation, someone will be responsible for process. In an assisted negotiation, that is the role of the mediator or facilitator.<sup>16</sup> In theory, in an unassisted negotiation, one member of each negotiating team could take on that role. That person may be a legal adviser, an NTRB or Native Title Service Provider (NTSP), a professional negotiator, or any of the key people in the negotiation. In practice, given the limited resources of claimant groups, it will seldom be feasible to have one person concerned exclusively with process. Process issues will be a separate but critical responsibility for the negotiating team, requiring as much attention as the content issues and a different set of skills.

## **Stakeholders**

Critical to each negotiation is the identification of the relevant stakeholders. Having the wrong people at the negotiation table, or leaving someone out, can be fatal to deal making. Where the negotiation occurs in the context of native title proceedings before the Federal Court, the stakeholders are the various parties to those proceedings.

The negotiator’s first involvement can often post-date the initial characterisation of the dispute and the parties to it. Nevertheless, the experienced negotiator can perform a threshold analysis of the content parameters of the negotiation to ensure that all relevant stakeholders are identified and consideration given to what role they should or should not play. This is done by asking questions such as: What stage have we reached in this negotiation? Whose interests are at stake? Whose commitment is required for any agreement on options to be legitimate and durable? Which relationships and channels of communication need to be facilitated?

### ***Who can speak for country?***

Early in the negotiation, the native title negotiator must consider these questions within the context of the group claiming rights under the NTA as the traditional owners of country. At the initial stages, there may be people with native title rights who are unaware of them or of the local models of land tenure by which connection is understood. They may be members of the ‘Stolen Generation’ who were removed from country or the descendants of Stolen Generations who have grown up without a sense of cultural identity. The implications of including or excluding particular groups or individuals in the claimant group will be thoroughly considered. Ignoring such issues or leaving them unresolved will merely defer them to surface later as disputes within negotiations with non-claimant parties at the most inconvenient times. This can be divisive, create uncertainty and undermine the negotiation, often critically. Defining the claimant group in a transparent and inclusive way builds confidence within, and strengthens, the group.

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<sup>16</sup> In mediations with the National Native Title Tribunal, the Tribunal members perform that role – having expertise both in content and process.

*In one claim, the Land Council relied on the strong connections to country and knowledge of a handful of senior men to identify those with native title rights and interests. When the application was lodged, many traditional owners including one of the named applicants had not been spoken to.*

The negotiator may be assisting the Indigenous community to frame and authorise a native title claim to be made, clarifying the community's aspirations and expectations after a claim has been lodged, or helping it to devise strategies of engagement with those seeking access following a consent determination. Understanding how all those with rights to country have been identified and included in the claimant group, and understanding the nature of their connection to country provides critical context for subsequent process choices and affects each aspect of the 7 Element analysis.

Knowledgeable members of the Indigenous community and third party experts (such as anthropologists) can also provide valuable assistance in this enquiry. Another obvious source of useful evidence available to the claimant group's negotiating team is likely to be connection information, whether prepared formally in relation to a native title claim or gathered informally as part of the preparation for negotiation. In rights-based disputes to determine native title, a formal 'connection report' is generally used to define who should be included within the claimant group. This is usually prepared at substantial cost by a third party anthropologist and is designed to meet the static legislative requirements of section 223 of the NTA and evidentiary hurdles developed out of the associated case law rather than to ensure that all those who have rights to country are identified and can participate. In this paper, 'connection' is used to describe a relational matrix far more layered and complex than the NTA legal standard.

It is to be expected that claimant groups may resent being compelled to demonstrate the validity of their age-old connection to country to non Indigenous interlopers. The unfairness of placing the onus on the dispossessed is a political and philosophical debate that needs to be heard. Nevertheless, the current legal reality is that the burden of showing connection falls on the traditional owners. The challenge for the native title negotiator is to resist approaching 'connection' exclusively in a reactive legalistic way but rather to use it positively to empower the claimant group and strengthen the negotiation process.

While the claimant group's negotiating team must be mindful that connection information often contains much that is culturally sensitive and that may not be appropriately shared with other parties, such information can provide a valuable ongoing resource in a variety of negotiations beyond just that which results in the determination of title. Understanding and using connection information effectively can assist in process design and management. It often operates to identify sites of significance including sites of special or sacred importance and the people associated with such places. It can be a foundation for determining how interests should be represented at the negotiating table and how outcomes might be allocated. Selective use of material that describes the nature and depth of the connection of country may be useful to help build relationships of respect between claimants and non-claimant parties.

## ***Overlapping Claims***

In many cases, there may be more than one Indigenous group with claims to certain country. This could be due to a number of reasons: genuinely layered rights of traditional ownership; political rivalries between Indigenous groups; claims lodged in haste to procure procedural rights in relation to future acts or cultural heritage; or claims based on inadequate research or legal advice. In situations where competing claimant groups are in conflict, it is unsurprising that non-Indigenous parties may seek to play such groups off against one another – the so-called ‘divide and conquer’ approach. The negotiating team faced with a competing claim needs to evaluate this early and help the claimant group make strategic decisions.

*Seven groups of traditional owners with competing tiered interests in country reached agreement whereby two groups identified as having the ‘primary’ connection would have a greater say in decision making and a larger share of benefits with the remaining five groups participating both in decision making and benefits but in a ‘secondary’ way. The need to negotiate with a powerful adversary created growing cohesion within the group.*

There are substantive and procedural options to be explored. It may be that there is clear evidence to support competing claims and it is constructive for the groups to cooperate through coexistence and to pool resources to create an effective joint negotiating strategy. It may be necessary to address and resolve the basis for the respective claims before moving forward in any negotiation with non-claimant parties. A preliminary substantive negotiation among the various claimant groups preceding the principal negotiation may be required.

*Two separate groups of traditional owners - the Miriuwung Gajerrong people and the Balangarra people - showed connection to country on Lacrosse Island (Boorroonoong). Rather than competing with each other, they agreed to pursue native title rights as joint owners.<sup>17</sup>*

The complexities of dealing with overlapping claims are highlighted in the experience of traditional owner groups in South Queensland as described by McAvoy and Cooms.<sup>18</sup>

## ***The role of the broader local Indigenous community***

In many native title negotiations, regional and broader local Indigenous communities which are *not* traditional owners have a legitimate interest in negotiations affecting the country where they live (just as the non Indigenous resident community has). Whilst this may seem superficially at odds with the NTA and its rights based approach, the philosophical construct of a negotiated rather than a litigated solution is that negotiation operates in the real world and is not limited to an artificial legal reality (which, for example, views the dispossessed as having ‘abandoned’ their land). In the real world, community members who may have lived in the area under consideration

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<sup>17</sup> Delwyn Everard, Interview with Des Hill, traditional owner and Ord Final Agreement Project Implementation Officer for Yawoorroong Miriuwung Gajerrong Yirrgeg Noong Dawang Aboriginal Corporation, (23 February 2009).

<sup>18</sup> T McAvoy and V Cooms, *Even as the Crow Flies, It is Still a Long Way: Implementation of the Queensland South Native Title Services Ltd Legal services Strategic Plan*, Native Title Research Monograph 2/2008, Native Title Research Unit, Australian Institute of Aboriginal and Torres Strait Islander Studies, Canberra, 2008.

for long periods of time, but who are not regarded as native title holders, are stakeholders with real concerns which may need to be addressed in any comprehensive land use settlement. While such groups may not be represented at the negotiating table (or might be given a limited voice by the parties), their concerns may be relevant to the sustainability of outcomes and the negotiator needs to be conscious of them and consider how process choices are impacted.

### ***Other parties at the table***

The same analysis can be undertaken with each other party to the negotiation, whether a resource company or government party. For example, is it enough that the State Parks and Wildlife Service and the Department of Mines are present? Are there other relevant ministries and government agencies whose approval or consent is needed? Should they be included now? If not, could their absence derail or hinder agreement in the future?

### ***Other relevant stakeholders***

Consideration also needs to be given to other public and private stakeholder groups which may not be regarded as an essential party to the substantive negotiation (at least not yet) but who have an acknowledged interest. What about lobby groups such as the environmental movement? The media? How should these stakeholder groups be managed? These are critical threshold issues and the negotiator needs skills to evaluate and consider whether and how to engage these people and who to involve.

*Grassroots environmental group ‘Save the Kimberley’, joined by major and minor environmental organisations, eco- and marine- tourism operators and celebrity entertainers is conducting a carefully orchestrated media campaign to influence the outcome of native title negotiations in the Kimberley. The Land Council’s process strategy recognises and plans for this.*<sup>19</sup>

### **Things to Think About**

1.	Consider what speaking for country means - What are the traditional connections to this country and how are the traditional owners identified?
2.	What connection information is available? How can that be used to assist the negotiator and the claimant group in making process choices? If a formal connection report is to be prepared, consider its application beyond merely conforming with the NTA’s requirements.
3.	How will you define the native title group to the other parties when they ask?
4.	How are the other stakeholder groups defined? Who speaks for them? How do they make decisions? What is their concern with country?

### **Interests**

*‘The needs, goals, hopes and concerns that motivate the parties – the real reasons behind the things that parties say they want.’*

Understanding the interests of the claimant group is necessary for the negotiating team to frame a sustainable agreement that meets the genuine needs and interests of the traditional owner group.

<sup>19</sup> See Hawley, above note 9.

This means taking an integrated holistic approach to outcomes rather than passive acceptance of the legal framework delimited by the NTA.<sup>20</sup>

*In one native title negotiation with a department of national parks and wildlife, the claimant group demanded an Indigenous employment milestone of 10% of the government workforce on country. The jobs were located some distance from the community. When asked “How will people move up there for those jobs?” the answer was that people would not, and could not be made to move! The negotiating team was not properly informed as the real interests of the traditional owners. It appeared to have wasted energy bargaining for something of no real value and which could not be delivered. Alternatively, the ‘real interest’ of the claimant group may well have been to secure the jobs, but the wrong questions were being asked to understand those interests. It may have been better to ask ‘why’ people did not want to move at the moment. Under what conditions might they move?*

Evaluating the group’s underlying interests also equips the negotiator to construct transparent and accountable internal decision making processes which feed into the negotiation, identify the most appropriate group representatives to engage in dialogue with the other parties and participate in the negotiation, deal with intra-group tensions and dynamics, and secure group consensus and ownership of the negotiation process.

## **How to focus on Interests**

Information about the claimant group’s needs and concerns involves a far more sophisticated analysis than simply deciding on a ‘walk away’ financial component. This means a clear understanding of the relationship to country and the responsibilities and concerns for country held by those stakeholders, as well as a detailed knowledge of their social, political, cultural and economic circumstances and familiarity with their visions for their community and future generations. This is likely to encompass a spectrum of issues from respect and acknowledgement to health, education, employment, law and justice, housing and community management.

Often the interests that are most easily accessed are those that are tangible such as financial compensation. Less tangible interests are more difficult to quantify and articulate. These can include needs such as recognition, an acknowledgement of connection to country, respect for traditional processes and other qualitative desires. Interests and/or needs may also present as fears or pain: fears of political push back, pain from past injustices and other tangible or intangible dynamic and unspoken matters. It is important to allow such issues to be articulated and explored. Fear and pain can otherwise manifest itself later as hostility or operate to block a party from consideration of options for agreement. Unpacking such information requires awareness, skills and training.

Focusing on future interests and goals often cannot commence until the historically grounded interests of acknowledgement and recognition of traditional owners as owners of country has been considered. The structure of the NTA is such that, in some cases, historical concerns may have been dealt with in an earlier consent determination of native title which then provides the

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<sup>20</sup> See the discussion in K Guest, *Cultural Appropriateness with Teeth – the Promise of Comprehensive Native Title Settlements: the Ngarluma Yindjibarndi-Burrup, Miriuwung and Gajerrong-Ord and Wotjobaluk agreements*, Native Title Research Discussion Paper, Native Title Research Unit, Australian Institute of Aboriginal and Torres Strait Islander Studies, Canberra, (forthcoming).

rights framework for further negotiations around more forward looking interests. In other cases, both past and future interests are identified within the same dialogue.

On-country meetings can provide the negotiator with a starting point for looking at the needs and interests of the traditional owner group. Available connection information may be helpful in delineating the complicated matrix of differentiated rights and interests within the traditional owner group. Using connection information in a meaningful way might involve an exploration of questions about the relativity of rights acquired in different ways, for example through part- or matri-affiliation or through one of four grandparental ancestors, or through language group or more clan-like associations.<sup>21</sup>

The negotiator must set up a process for discussing and prioritising interests within the claimant group. One way is for the negotiator to map and record interests graphically. This can be done using any visual tracking tool from the simplicity of butcher's paper to more sophisticated techniques such as mind mapping or talking paper.<sup>22</sup> The advantage of a tangible 'map' of interests is that it can be used during the negotiation as a reference tool to analyse proposals to see how they fit with the group's needs.

To create such a map, it is often useful to work backwards. Groups are often ready to tell the negotiator their 'demands' and positions - the 'we want' is easier to articulate than the driver. The art of the skilled negotiator is to assist the group to unpack this and prioritise it. This is best done as a separate exercise during planning. Ideally, it is done in a way that includes the key advisers so that they are privy to the dialogue that surrounds what will become a more linear list.

The negotiator may meet resistance to the process of mapping interests as its relevance to agreement-making may not always be apparent to the claimant group. The mapping process can also uncover tensions and painful associations. It is useful to be transparent and to ensure the process is coupled with an explanation as to how the mapped interests will be used and how they feed into the larger community vision. Over time as the usefulness of this exercise starts to be demonstrated, experience indicates that initial resistance will dissipate.

## **A strategic vision for the future**

Claim groups must establish their own vision for the future. Otherwise they will end up relying on the other parties to articulate it for them and it is then unlikely to accurately reflect their interests and expectations. A dialogue about a community vision or strategic plan has more traction and is a more positive engagement than a dialogue over a sum of money with no plan as to how it will benefit the community.

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<sup>21</sup> These questions require negotiation and resolution by the Indigenous claimant group through an agreed and negotiated framework of decision-making and dispute management. T Bauman, 'Waiting for Mary: Process and Practice Issues in Negotiating Native Title Indigenous Decision-Making and Dispute Management Frameworks', *Land, Rights, Laws: Issues of Native Title*, vol. 3, no.6, June 2006, p.2

<sup>22</sup> Mind-mapping is a non-linear graphic technique for organizing information and demonstrating the relationships between ideas developed by Tony Buzan. Talking Paper is a type of facilitation stationery used to enhance dialogue, planning, participative learning and decision-making in groups.

*In their preparation for negotiations, the Puutu Kurnti Kurrami Pinikura traditional owners identified aged housing around Onslow as an issue. Their NTRB Yamatji Marlpa Aboriginal Corporation (YMAC) helped them develop a strategic plan around that issue which they took into the negotiations. When presented with the strategic plan, the other parties were willing to engage on that issue. They saw it as a good idea and a good investment and one they could see value in being associated with. The preparation of the strategic plan also led to the development of governance structures within the claimant group itself and created confidence and pride in the group which strengthened their negotiating position.*<sup>23</sup>

One interviewee remarked on the number of claimants coming before the National Native Title Tribunal or into mediation who not only did not know what they wanted but ‘had no concept of what they are able to want’ or had ‘absurdly low expectations’. In his experience as a mediator, there was often ‘a wider menu’ than the one the claimant group worked from. He commented that NTRBs should, as a general policy, focus more energy and resources in creating and informing realistic expectations.

Information as to the nature of economic benefits and opportunities available from a native title negotiation enables the claimant group to approach the other parties with a clear and coherent understanding as to the range of possible outcomes around which dialogue can occur. Possession of that information enables them to generate practical options for discussion, evaluate proposals critically, identify difficulties in implementation and negotiate structures and processes to facilitate and protect outcomes.

### **The interests of the other parties**

Looking at the interests and perspectives of the other parties present at the negotiating table can help the claimant group to frame its proposals in a complementary way, paving the way for constructive negotiation.

From a process perspective, this provides an interesting challenge for the negotiator. How are the other parties’ interests to be identified and explored? One way is to make each party’s interests explicit by identifying and discussing them. In the majority of situations, identifying areas of mutual interest is a strong foundation for sustainable outcomes. There are examples where this has been done; however, while theoretically sound, this approach is impossible unless the other parties are not only open to such an approach but have the capacity to recognise and articulate their own drivers.

*In the Argyle Diamond Mines’ negotiation with the Miriuwung Gajerrong people, native title had been extinguished over the relevant area and the company had licences and leases to mine. Its relationship to the local community was important to it. The company resourced the Miriuwung Gajerrong people to engage with it and an agreement was reached involving limited restoration of native title and an agreed platform for social and economic development for the Indigenous traditional owners.*

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<sup>23</sup> Delwyn Everard, Interview with Simon Hawkins, CEO of Yamatji Marlpa Aboriginal Corporation, (15 December 2008).

More usually, counterparties are reluctant or unable to articulate their own interests. The ability to identify the unspoken interests or needs that lie at the base of demands and offers made by other stakeholders in negotiation is a critical skill and one that needs to be developed within the negotiating team. The skilled negotiator will ‘unpack’ the other parties’ demands or suggestions by peeling them back down to the level of the underlying interests. One technique is to reverse engineer the other parties’ interests by fine-tuning the offer that is on the table. This is not easy and can get bogged down if the other party gets stuck in position or does not have the requisite authority to make a shift. Another strategy is to engage a third party process: a mediator or trusted adviser who can facilitate an interests dialogue. A third party process can operate as a circuit breaker to shift the focus from positions to interests. For example, each side’s experts may be asked to work jointly to identify propositions or agreed standards that can move the parties forward.

*A turning point in one lengthy native title mediation was the third party experts’ ‘hot tub’ directed by the Federal Court. This resulted in identification of 36 agreed propositions relating to connection. This proved to be the catalyst and shortly thereafter, an agreement was reached with the State which was also accepted by the Commonwealth and which was then the basis for a consent determination.*

### **Are there any shared interests?**

Deeply understanding the needs of the other parties enables the negotiator to shape a deal that can be agreed to by those other parties. A useful way to conceptualise this is as an analysis of the other parties’ proposals to identify whether they exhibit any degree of shared visions.

There is an emerging trend for governments to view the native title system, particularly as it impacts resource development, as a tool for achieving economic and social policy goals. The NTA’s Right To Negotiate (RTN) process provides an opportunity for native title negotiations to be about more than country. Where this is the case, this creates a fertile ground of possibilities for mutual interests to be satisfied. Indigenous groups seeking to utilise the native title process as a means of achieving long term improvement in their socioeconomic position may find that such outcomes also serve government’s political interests. Both are stakeholders in a region and have a vested interest in its future. In negotiating with government, an appreciation of its policy options and the processes involved for it to develop new policy is essential.

*In the late 1990s, the South Australian government initiated discussions with the Aboriginal Legal Rights Movement about negotiating a statewide framework land use agreement that integrated land issues with broader Indigenous socio-economic considerations. It encouraged the SA Farmers Federation and the SA Chamber of Mines and Commerce to participate on the foundation principle that negotiated agreements would involve recognition, not extinguishment, of native title and that ‘everything’ was up for discussion.<sup>24</sup>*

An example of shared interests occurs where resource companies and other non Indigenous stakeholders have broader agendas than just access at a minimum cost. For example, demonstrating ‘corporate social responsibility’ credentials to the community at large may provide

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<sup>24</sup> P Agius, J Davies, R Howitt & L Johns, ‘Negotiating Comprehensive Settlement of Native Title Issues: Building a New Scale of Justice in South Australia’, *Land, Rights, Laws: Issues of Native Title*, vol.2, no. 20, December 2002.

the impetus for a mining company to agree to a cultural heritage regime which protects the Indigenous Cultural Intellectual Property of the traditional owners in particular sacred sites.<sup>25</sup>

Interestingly, the preamble to the NTA states in part:

*Governments should, where appropriate, facilitate negotiation on a regional basis between the parties concerned in relation to:*

*(a) claims to land, or aspirations in relation to land, by Aboriginal peoples and Torres Strait Islanders; and*

*(b) proposals for the use of such land for economic purposes.*

While this preamble seems to have been largely ignored for some time, these words would seem to invite the Commonwealth and the States and Territories to take an interest based rather than rights based approach in their negotiations.

### Things to Think About

1.	It is easier to work with core needs and fears than positions. What are the circumstances, expectations and interests of the claimant community? What is its vision for the future? Is there a strategic plan for achieving that vision?
2.	What is known about the social, political, cultural and economic circumstances of the claimant group? Is its vision realistic?
3.	Have the interests been visually mapped and has the group prioritized those interests?
4.	Is there a process to identify how those interests may evolve over time?
5.	What is known about the interests of the other parties? Have they been articulated as distinct from positions and demands? If not, how can we learn about their interests? Can they be unpacked from their statements on other matters?
6.	How will we engage with the parties in a dialogue on interests?
7.	Is a dialogue on interests appropriate? If other means of negotiation are more appropriate, use the mapped interests to evaluate and test proposals.

<sup>25</sup> C O’Faircheallaigh, ‘Negotiating Cultural Heritage? Aboriginal-Mining Agreements in Australia’, *Development and Change*, vol.39, no.1, 2008, pp.34-35

## Relationship

*The goal is to build a relationship between the parties that underpins their capacity to deal with their differences and get to an effective outcome.*

Native title negotiations are characterised by a multifaceted and intricate series of relationships not only between Indigenous claimants and the multiple other parties but also within the Indigenous claimant group. It is helpful to analyse the relationship issues in native title negotiations from each of these perspectives.

## Dealing with Indigenous group dynamics

Within any traditional owner group lie complex relational matrices and dynamics. The way in which the negotiator identifies, accommodates and builds these relationships can be a source of strength or weakness in the negotiation.

Maintaining a united front in negotiations with mining companies increases the prospects for achieving a favourable outcome.<sup>26</sup> This is likely to be the case whether the non Indigenous party is a mining company, government body, local council or group of pastoralists. A fractured claimant group divided by conflict is easily exploited by the parties with whom it is negotiating.

*The main reason attributed to the success of a negotiating process which resulted in agreements being reached by a large resource developer with several groups of traditional owners was the fact that most of the groups had chosen to be represented by a single representative body so that their interests were coherently and consistently articulated. They also benefited from the experience of the NTRB in other negotiations and were seen as more pragmatic than groups which were represented separately.*

So, the negotiator needs to work with the claimant group to manage internal group relationships before approaching the negotiating table. The objective is less to resolve such conflicts and differences than to establish a communication, decision making and conflict management process. This has two purposes: first, to address any potentially disruptive underlying and ongoing issues within the group so that the substantive negotiation with non-claimant parties is not undermined; and second, to secure effective and consensual cooperation and engagement between the members of the group to enable their participation in the negotiation process. Sometimes the former may require an intervention, for example, a mediation process within the group may be appropriate to resolve how the group members can work together for the negotiation period. The negotiator might use ‘witnessing’ to enable dialogue around conflicts as to entitlement to country within the group. Allowing people space to state their stories in the presence of others as witnesses is ‘an important and powerful cultural practice’.<sup>27</sup>

The Final Report of AIATSIS’ Indigenous Facilitation and Mediation Project highlights the possibility of involving those recognised within their communities as ‘peacemakers’ or

<sup>26</sup> O’Faircheallaigh, above note 1, p.5

<sup>27</sup> T Bauman, ‘Whose Benefits? Whose Rights? Negotiating Rights and Interests Amongst Indigenous Native Title Parties’, *Land, Rights, Laws: Issues of Native Title*, vol.3, no.2, 2005, p.7.

'peacekeepers' in any decision making and conflict management processes.<sup>28</sup> Such individuals are respected, skilled in staying neutral and calm during conflict and can provide a voice of reason to which disputing parties will listen. They can be pivotal in building cohesive internal relationships within the group.

At the outset, the process by which the traditional owners' relationship to country is mapped can also map underlying disputes, tensions and conflicts within the group, whether cultural, social or political. Native title negotiators are well aware that rights-based legal analyses as to the identification of traditional owners will not necessarily be coextensive with the nature of representation and decision making within the group. Bauman describes native title as 'a matrix of differentiated, negotiable and hierarchical rights and interests that are derived from relationships between members of the group and their relationships with the group as a whole'.<sup>29</sup> It is this matrix that the negotiator needs to be aware of within the context of the negotiation and assist the group to manage, in particular, away from the substantive negotiation. This can unify the claimant group prior to engagement or, at least, allow for the structuring of the process so that thorny issues are not destructive of the process.

The negotiator will generally facilitate the adoption by the claimant group of an agreed decision making and communication processes for use during the substantive negotiation.<sup>30</sup> Again, the negotiator can use connection information to map the relationships and traditional decision making processes within the native title group which can then provide the framework for the processes to be employed in the negotiation.<sup>31</sup>

Decision making based on the western democratic principles of one vote one value might not be culturally appropriate. Interrelated issues of kinship, gender, tribal politics, cultural custodianship and seniority may generate a more collective but nevertheless representative and consensual process.

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<sup>28</sup> T Bauman, 'Final Report of the Indigenous Facilitation and Mediation Project July 2003 – June 2006: research findings, recommendations and implementation', Native Title Research Report, Native Title Research Unit, Australian Institute of Aboriginal and Torres Strait Islander Studies, Canberra, 2006, p.19.

<sup>29</sup> Bauman, above note 28, p.19.

<sup>30</sup> The *Native Title Act's* requirements may also need to be considered at this point highlighting the importance of the negotiating team having access to a sound understanding of its operation. For example, if the agreement is to be registered as an Indigenous Land Use Agreement, information about the decision making process needs to be provided. See sections 24CG and 251A.

<sup>31</sup> 'Providing time and funding for culturally appropriate decision making processes ensures traditional owners have the best opportunity to 'own' negotiated outcomes by developing the skills to understand, implement and manage the agreement in the long term.' Guest, above note 20, p.19.

*The Gunditjmara traditional owners' negotiating team initially comprised its legal representatives in conjunction with the heads of the families within the claimant group. The claimant group developed a new decision making and negotiating structure based on the principle that native title affected everyone as individuals as well as collectively and that everyone should be entitled to participate. A practice developed of holding monthly meetings on country to which all the traditional owners (numbering over 180) were invited, even those living in other States. All issues were discussed and agreed at those meetings by those that attended and the outcome reported back to all those who could not.*

*Denise Lovett describes it as a forum which kept everyone informed and involved and was a means of passing on knowledge and learning about country from one generation to the next. When the State wished to meet during the negotiation, they were invited to attend the monthly meeting and engage with the entire group. This was initially resisted by the State, the NTRB and their own legal advisors but proved so effective that the meetings have continued even after agreements have been reached, and form an integral part of the governance structures of the prescribed body corporate which oversees implementation.<sup>32</sup>*

The process of determining the group's decision making and communication strategies contributes to the cohesion of intra-group relationships. This leads to the question of transparency: to what extent should the claimant group's internal decision making structure be made transparent or played out in front of the other parties? Almost inevitably, hierarchical lines of decision making and associated processes and structures will become obvious in negotiations even if concealed for a period.

Determining to what extent and how the claimant group's process needs can be part of a process to which all parties are committed requires an assessment of the non-claimant parties' drivers and how transparency and timetabling issues are likely to affect relationships with them. Some non-claimant organisations may embrace the core of the Indigenous decision making methodology if it is seen to enhance processes that they already are comfortable with and they understand its rationale.

The interviewees identified examples where the accepted wisdom of some bureaucratic organisations appeared to be that 'good negotiation' involved keeping one's cards close to one's chest. For those entities, transparency was perceived as counter cultural and threatening rather than an example of sophisticated consensus building in action. The skilled negotiator must assess how transparency will affect the relationships between the parties and plan accordingly.

These types of iterative decision making processes can also involve more time. The negotiator needs to be mindful of this and build time and related issues into the process. To what extent will the other parties have the patience to allow the Indigenous stakeholders that time and to what extent do time and commercial deal making pressures require a more flexible approach? What process choices are available to secure enough time? How can other process parameters be adjusted to achieve consensus?

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<sup>32</sup> Delwyn Everard, Interview with Denise Lovett (22 February 2009).

## **Know your opponent**

Understanding the other party's interests and needs is a strong basis for building respect and a sustainable future relationship. Information about the culture of the other parties, the market within which they operate, their historical and political background, their relationship to local Indigenous and non Indigenous community, and their track record elsewhere can assist the negotiating team to build a relationship, to plan its strategy for engaging that party, to identify opportunities for joint participation and to generate options for discussion. In many native title negotiations, parties will be involved in ongoing relationships after the negotiation is finalised.

An agreement which governs how the parties will deal with each other into the future creates the legal or contractual infrastructure for the future relationship between the parties. If the relationship developed during negotiations is based on respect and understanding, this not only creates a fertile ground for mutually beneficial outcomes but also provides the basis for a long term sustainable future partnership.

*The 2006 Atlas Iron Agreement gives Ngarla people a compensation package which includes shares in Atlas Iron Limited and opportunities to tender for business connected with the new mining operation and receive preferential consideration. It is intended to provide many Ngarla people with the chance to enter the workforce and to establish new businesses, thereby, increasing their economic independence and providing the community with more control and certainty about its future financial situation. 'Having shares in the company means that our ties with Atlas will stay strong and will last much longer than hand shakes and signing paper' explains Charlie Coppin, Ngarla traditional owner.*

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Governments and resource developers are often concerned about the wider community beyond the claimant group and are interested in integrating native title solutions into broader policy objectives for the community at large. While relationships with the broader local community may seem irrelevant in a negotiation structured around the NTA's rights-based approach to native title, the negotiator understands the dynamics of those relationships and considers their impact on the negotiations. If such relationships are genuine drivers underpinning the interests of those parties, then ignoring them may hamper the negotiation and limit the spectrum of outcomes. The negotiator needs to be able think of strategies to manage those interests.

NTRBs and NTSPs usually deal with Government and business in multiple situations and are well placed to advise traditional owners on the kind of expectations that non-Indigenous stakeholders are likely to have on a range of issues. The negotiator can use this information to build the negotiating relationship and in other tactical process decisions.

## **Let your opponent get to know you**

Agreements work where the non Indigenous parties are familiar with the native title group and understand its dynamics. The greater their understanding of the dynamic matrix of cultural, social and economic needs and interests of the traditional owners and the nature of the relationships to

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<sup>33</sup> "Ground Breaking Economic Opportunities With New Mining Agreement", Media Release, Yamatji Marlpa Barna Baba Maaja Aboriginal Corporation, June 12, 2006

country, the better equipped they are to generate sustainable and workable options for discussion within the negotiation and to form a relationship of mutual respect.

The negotiator's relationship building skills and strategies will address potential issues and build mutual understandings. Meetings on country are a powerful means of relationship building and communication. So too is including traditional owners in the negotiating team.

### **Things to Think About**

1.	Look beyond the parties to the negotiation and identify all the different relationships and interrelationships both among the parties, intra-parties and externally. Consider how each relationship may affect the negotiation.
2.	Have the relationships and dynamics within the traditional owner group been mapped?
3.	Explain the mapping process and its relationship to the negotiation to the stakeholder group. Discuss how the intra group relationships can be reconciled so that the group can negotiate in a coordinated and unified way?
4.	What is known about the other parties? What are they seeking to achieve?
5.	Can meetings on country be arranged to create understanding between the parties?
6.	Is there respect on each side of each relationship? If not, what steps can be taken to build that. Respect can coexist with differences in views on issues.
7.	To what extent is engagement with the local community or external parties helpful in building the relationship with the other parties to the negotiation? To what extent is it an obstacle?

### **Communication**

*' the transfer of messages designed to ensure that what is intended is what is heard'*

In most negotiations, the consideration of communication issues is directed at the way in which the parties to the negotiation engage with each other, how well they understand each other, and the strategies they adopt to articulate their interests.

### **The negotiating team – Who will speak for country?**

The relationship between the traditional owners and the negotiating team is a cornerstone of an inclusive process and starts with the process for deciding who will communicate with the other parties. All of those interviewed identified the critical importance of having members of the traditional owner group present at the negotiation table. There were numerous reasons for this. Having traditional owners sit across the table from the other parties able to say "I speak for this country" is very powerful. It adds credibility and legitimacy to the claimant team, both from the perspective of the other parties and for the Indigenous stakeholders. It assists in relationship building between the parties, can demonstrate transparency; and is one means of ensuring that the claimant group is fully informed about, understands and is committed to, the process of the negotiation.

*Traditional owner Des Hill describes how the Miriuwung Gajerrong people wanted the Court to come on to country and listen to people give their stories there. It was easier for the old people to give connection evidence that way rather than in a courtroom. They took Justice Lee on a boat and pointed through the water to show where their special places had been over 30 years previously.<sup>34</sup>*

The process of unpacking connection information and identifying interests will identify which members of the claimant group legitimately or necessarily can take on roles speaking for the group, in both intra-group dealings and its dealings with the non-claimant parties. An effective negotiator will facilitate a process whereby the claimant group itself determines the way it will be represented in the negotiation.

*During native title mediation, the lawyers for the traditional owners set up a highly structured process which did not permit any free interaction between the claimants and the other parties. This was, to a significant extent, designed to protect the traditional owners from making prejudicial concessions likely to be exploited by their more sophisticated and highly resourced opponents. While the legal advisors had correctly identified a substantial power imbalance, their strategy for dealing with it put them at odds with their own clients who felt that the process undermined their rights and dignity.*

The question of who from within the claimant group should participate in the face to face negotiation with the other parties is complex. Within some Indigenous political cultures, there is a strong emphasis on individuality and local autonomy that can manifest itself in a resistance to allowing one person to speak on behalf of another.

In other groups, there may be greater flexibility for the traditional owners to consider a range of factors in appointing members to representative roles. Relevant factors may include fluency in English, willingness to sit through long meetings, technical expertise and particular knowledge on relevant issues (sacred sites, education, governance) alongside consideration of traditional and tribal patterns of seniority and respect vesting authority in Elders. There may be a variety of representative roles which need to be discussed and decided by the group with the assistance of the negotiator. These may include a speaking or non-speaking presence at the face-to-face negotiations, membership of working groups instructing the negotiating team, mediation of internal group issues, chairing of group meetings and so on.

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<sup>34</sup> Delwyn Everard, Interview with Des Hill, traditional owner and Ord Final Agreement Project Implementation Officer for Yawoorroong Miriuwung Gajerrong Yirrgeg Noong Dawang Aboriginal Corporation, (23 February 2009).

*Each claimant group is asked by the NTRB to appoint a specific number of negotiators, and the groups use their own decision making protocols to select their representatives. The legal advisers play little or no role in these selection processes. The teams so formed typically include members with a wide range of skills and experience. The chosen representatives do not necessarily all have outstanding skills for negotiating directly with the other parties. However many contribute in important ways, such as helping the team to plan for negotiation meetings, staying calm during conflict, exercising quiet authority within the group, and communicating effectively with their community between negotiation meetings. These Indigenous negotiating teams generally do not have a single spokesperson: anyone can speak at any time on any issue, but no express commitments can be made unless agreed beforehand. Legal advisers contribute but do not dominate.*

In a number of negotiations, Elders were consulted and closely involved on issues of connection. In others, responsibility was given to members of the younger generation who were more articulate and versed in western ways of communication.

Negotiators should be prepared to articulate the process of choosing representatives to the other parties. They should also ask questions of their counterparts to establish lines of decision making and representation within the non-claimant parties. How the negotiator answers such questions and the level of transparency that is provided around issues of representation and internal decision making can assist in building relationships and trust between the parties.

The negotiating team must not only be properly invested with authority but also experienced and realistic. If there are not existing human resources within the claimant group, training may be needed or third party assistance obtained. This often means that an external facilitator or lead negotiator from outside the group should be engaged. In many cases, this may be capable of being resourced through NTRBs or NTSPs. The experience of the interviewees indicated that the most effective model was where members of the traditional owner group were chosen to represent or 'speak for' the claimant group, either alongside an expert external negotiator or working closely with advisors. Some level of external assistance was a pivotal element in the successful negotiating process in all of the examples examined.

### **Keeping the traditional owners informed**

The benefits of open and effective communication between the parties to a negotiation are obvious. In practice, in multiparty negotiations between large groups all of whom cannot sit at the negotiating table throughout the parties' dialogue, this means that the communication channel between the negotiating team and the stakeholder group it represents is vital. All stakeholders need the opportunity to evaluate and reflect upon the issues that emerge during negotiation, how proposals meet their interests, and practical issues of implementation. This takes time, and requires processes to be designed that create space during the negotiation for each negotiating team to report back to, and consult with, its stakeholders before proceeding. Indigenous decision making is a continuous social process expecting change and requiring frequent affirmation through the ongoing canvassing of views.<sup>35</sup>

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<sup>35</sup> T Bauman & R Williams, 'The Business of Process: Research Issues in Managing Indigenous Decision-Making and Disputes in Land. Report No. 1.' Indigenous Facilitation and Mediation Project, Native Title Research Unit, Australian Institute of Aboriginal and Torres Strait Islander Studies, Canberra, 2005, p.6

*'We wanted a negotiation process that is about empowerment and that provides rich knowledge to claimants. We wanted the claimants to own the decisions that they made. We wanted them to feel proud and powerful in these negotiations, and to come away with outcomes that they, not their experts, are responsible for.'*<sup>36</sup>

These communication issues require the negotiator to draw upon specific skills and strategies that are different from the skills employed in other aspects of the negotiation. The negotiator must be experienced in the art of asking open questions seeking responses that clarify how, why and who. Rather than asking "Do you understand?" the question might be "What will you tell your family about this?" Accepting a majority show of hands saying 'yes' or 'no' in a meeting does not indicate that the claimant group understands a proposal and its implications. Small or breakout groups may be effective so different family or kinship groups can consider proposals together and in the context of their own issues rather than in the forum of a single meeting. Representatives of each breakout group can then report back to the meeting to explain its views.

*In negotiations with Rio Tinto in Western Australia involving several claimant groups represented by YMAC, each family group within each claimant group nominated one or two family members to be part of a working group. That working group comprising between 12 and 16 people met regularly. A representative from each claimant group then attended regular meetings with the negotiating team and Rio. Immediately prior to each of those meetings, a meeting was held to which all traditional owners were invited to attend to discuss the issues and determine instructions and strategy. Sometimes, rather than two meetings, Rio was invited to attend the traditional owners' meeting to present options and issues for discussion. The BHP team will be asked to leave the room while proposals are discussed.*<sup>37</sup>

The use of translators or interpreters is important but may not always be feasible for reasons of time and cost. The use of visual rather than written representations of information such as drawings and diagrams is an effective means of assisting claimant groups to understand complex procedural and substantive issues. Given the strong cultural traditions of Indigenous storytelling, metaphors and stories can also be useful tools to explain concepts and issues, particularly where English language skills are poor. For example, one way of explaining why it might be useful to include not only the Elders but other younger members of the traditional owner group in the negotiating team might be as follows: When you want to catch fish, you take that Elder because he knows the country and how that fish thinks and where he might be. But he's old now and not as strong so you might also need a young man to paddle the boat and throw the spears. Asking the negotiating team to summarise its understanding and using that format to provide feedback to the claimants for their approval is another effective communication tool.

## **Managing Third Party Information**

Uncertainty and lack of clarity surrounding the meaning and significance of information prepared by third party consultants for NTRBs and claimant groups can lie less in the information itself than in the failure of processes to communicate it. Technical experts may not be equipped to

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<sup>36</sup> Agius, above note 24.

<sup>37</sup> Delwyn Everard, Interview with Simon Hawkins, CEO of Yamatji Marlpa Aboriginal Corporation, (15 December 2008).

manage the process by which information is delivered and sometimes lack the expertise to identify when information is not understood by their Indigenous clients. Bauman recommends separation of substantive and procedural responsibility for transmitting information to claimant groups: 'The procedural expert remains alert to miscommunications, monitors how to manage them and acts as a circuit breaker without being seen as a stakeholder'.<sup>38</sup>

So it may be preferable for members of the negotiating team to communicate third party information to the stakeholder group rather than those responsible for compiling such information. Conversely, there may be valid reasons for the negotiating team to distance themselves from the delivery of certain information and to require the proponent to present it to the claimant group.<sup>39</sup> This may be necessary in order to create space for the claimant group to react negatively without compromising their relationship with the negotiating team. Issues of clarity and understanding can still be addressed by, for example, having a communication specialist repeat the information back to the third party proponent in a form that will be comprehensible to all Indigenous participants. This has the added advantage of getting the proponents to confirm their message.

Before the negotiator can facilitate the communication and evaluation of relevant information by the claimant group, the process needs to provide for the acquisition of that information. Yet another challenge lies in designing consultative processes which achieve that. Ideally, Indigenous claimant groups will have access to information assembled by government, corporate and other third parties throughout the continuum of negotiation and implementation. This facilitates the Indigenous parties' understanding of the proposals affecting country and the impact on country and community. It enables the claimant group to recognise, evaluate and monitor the impact of proposals throughout the negotiation, particularly adverse impacts.

Unfortunately, in many instances, information is available but not provided to traditional owners either at all or within time frames that allow such information to support the process of negotiation. For example, O'Faircheallaigh identifies the social impact assessments usually undertaken as part of the statutory Environment Impact Assessment report (SIA) as valuable information which has historically tended to flow to government authorities and project proponents on the basis of milestones dictated by the project approval process but which is not integrated into the native title negotiation process. He recommends that Negotiation Protocols and Memoranda of Understanding require SIAs be used to capture additional relevant information (such as impacts arising from the agreement making process) and be made available to the negotiation parties within timeframes related to the negotiation.<sup>40</sup>

## **Different Cultural Patterns of Communication**

The negotiating dialogue in many typical legal disputes is that of lawyers expressed within a legal framework using formal written and verbal forms. However, native title is a cross cultural negotiation where the parties often use differing patterns of communication. Requiring Indigenous stakeholders to be restricted to essentially 'Western' forms of dialogue can disadvantage them and can inhibit genuine communication and relationship building.

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<sup>38</sup> Bauman, above note 28, p.9.

<sup>39</sup> For example, this information may turn out to be suspect, causing traditional owners to question the integrity of the people who communicated it. Where information is communicated by the nominated negotiating team, it can become difficult for traditional owners to react. They may 'pull their punches' out of respect for their own negotiators or in order not to show disunity to the other side.

<sup>40</sup> O'Faircheallaigh, above note 1, p.8

It is logical that many Indigenous people will be more comfortable in their own language just as mining company representatives may prefer English. It is unsurprising that Indigenous people will conceptualise their connection to country and thus their native title ‘claim’ in a non legal way and may communicate it more effectively through stories or drawings or on country. This needs to be allowed to happen and can be powerfully compelling.

Non Indigenous lawyers and corporate representatives are comfortable working within tight timeframes and put a premium on attacking lists of issues systematically and efficiently in face to face sessions. When the allotted time is up, they defer further consideration until next time and may be frustrated if the parties fail to get through the agenda. Indigenous processes are often less preoccupied with time limits and efficiency and are also frustrated when meetings are terminated to catch planes. There can be resistance to being managed in a way which is perceived as preventing a story or issue from being fully articulated. Each party needs to consider the pressures and drivers on the other party and be conscious of the concessions each has made to facilitate the process.

### Things to Think About

1.	How will the traditional owners choose their representatives?
2.	What skills do representatives need to participate in the negotiation? To communicate effectively with the stakeholder group?
3.	How will you ensure that the stakeholder group is informed and consents to the process? To the decisions made in negotiation? At what point are Stakeholders included in the dialogue and in what capacity?
4.	Once the stakeholder group is identified, how will the group decide amongst themselves how to operate?
5.	Is it helpful if the other parties understand the group’s processes? Will their understanding contribute positively to the process? Will it help to build relationships?
6.	Is enough time allowed for communication, reflection and evaluation throughout the process?
7.	How does the other party communicate and make decisions? A good negotiator is conscious of different patterns and strategies of communication used by other parties.

### Options

*Options are ideas about the ways in which the parties can meet their respective interests through agreement.*

The 7 Elements analysis as applied to ‘interests-based’ negotiation examines the processes by which negotiators generate and explore options, rather than simply haggle to the lowest value common denominator.

In an interest-based negotiation, option generating is often a joint exercise based on a mutual recognition of joint or coextensive interests. Once interests and concerns are articulated, areas of common ground can be identified and used as a platform to generate options for discussion. However the process of option generating can also be a valuable analytical tool where the parties’ relationship is less cooperative. Option generating is a way for the native title negotiator to identify and leverage opportunities within the negotiation, whether interest-based or not. Armed with an understanding of the claimant group’s interests, the skilled negotiator analyses the

interests of the other parties to develop proposals for discussion which are likely to resonate with those other parties because they do not impact negatively on the spoken or unspoken interests of the other parties.

### **Where do good options come from?**

Ideally, preparation for negotiation will involve consideration of the widest possible range of options to meet the interests of the parties (as best they can be understood). Without a well developed list of options, the negotiating team can feel 'on the back foot' from the beginning or can make unrealistic demands that then provoke equally negative responses and set the stage for unnecessarily protracted and adversarial negotiations.

Claimants and NTRBs can draw on a number of external sources to facilitate their thinking about possible options. One source of new ideas is external consultants with knowledge and skills beyond the scope of claimants, their lawyers and other NTRB staff. Another source of ideas is agreements reached by other groups in the past.<sup>41</sup> At least two interviewees suggested that further work to catalogue a wide range of the ideas and options considered during native title negotiations, as well as the text of agreements actually reached, would be extremely valuable.

### **Using a staged process**

The process by which the parties engage in dialogue around options once they have been identified is also important. The conventional 'textbook' advice teaches 'separating inventing from deciding', that is, exploring multiple options without immediately locking into commitments.<sup>42</sup>

However, many native title agreements involve a deliberate staging, focusing on specific issues one at a time and seeking agreement or 'in principle' commitments on each one before moving on.<sup>43</sup> This leaves open the possibility of adjusting the options on the earlier issues in light of the options emerging for later issues. In some instances, difficulties in reaching agreement on direct financial benefits have been eased by reopening earlier 'in principle' agreements on employment opportunities and cultural heritage protection mechanisms. The parties can see progress being made and in some cases, partial implementation can commence before the entire negotiation is complete.<sup>44</sup>

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<sup>41</sup> See discussion in 'Standards' below.

<sup>42</sup> R Fisher, W Ury & B Patton, *Getting To Yes: Negotiating an Agreement Without Giving In*, Random House (2<sup>nd</sup> ed) 1999.

<sup>43</sup> The legal framework of the NTA presumes that a formal resolution on title will be reached first, paving the way for negotiation around differing access needs at a later stage.

<sup>44</sup> S Hawkins, presentation to the Negotiating Native Title Conference, October 2008. The presentation described native title negotiations as involving a combination of mutual goals and separate or divergent interests and believes that the process adopted in the negotiation should differ depending on whether the issue under consideration involves a shared or a separate goal.

*The 2006 Protocol agreed between YMAC and Rio Tinto has a carefully structured staging of issues with outcomes associated with each stage. The first stage deals with financial benefits and agreements have already been signed between Rio Tinto and ten native title groups. The second stage builds on the agreements already reached focusing on seven clearly articulated areas of mutual interest including employment and training, and environmental protection. 45*

## **The role of working parties in generating options**

Many native title negotiations have made use of working parties – subgroups of the overall negotiating teams that meet in between the main meetings. This has proven to be an efficient way of developing new options, or developing the detail as to how the broad options previously identified might work in practice. The use of working groups is also common in other complex multiparty negotiations (such as international diplomatic and trade negotiations).

### **Things to Think About**

1.	Use interests to develop a broad list of possible options. Widen the pie to craft creative solutions. How will the stakeholder group participate in this process?
2.	Consider how third party advisers and consultants may be able to assist the process of option generating?
3.	Can information about other similar agreements be accessed? Consider whether those solutions might have traction in our situation.
4.	Think about options as part of preparation for engagement. Can options be generated jointly or should this be done separately – consider the nature of the relationship between the parties.
5.	Can a broader spectrum of options be created by referring to interests and standards rather than the narrow legal framework?
6.	Focus on discussing and exploring each of those options with the other parties in depth before making commitments. Ensure the negotiating team has clear instructions as to its role and authority during this part of the negotiation process.
7.	Can options be divided up in a way that is specific to certain issues in the negotiation? If so, can the parties agree on the prioritization of those issues? Is staged discussion of options appropriate or useful?
8.	Are some options and issues specific to only some parties? Should separate discussions be held?

<sup>45</sup> Delwyn Everard, Interview with Simon Hawkins, CEO of Yamatji Marlpa Aboriginal Corporation, (15 December 2008).

## Standards

*Standards are criteria used to benchmark a party's substantive or procedural proposals.*

Standards are used by negotiators both to support the legitimacy of their own proposals and to evaluate whether other parties' proposals are fair. How can the claimant group benchmark its subjective expectations of 'fairness' against an objective standard so as to give its proposals persuasive legitimacy? This involves the process of evaluating substantive content as opposed to the actual measurement of outcomes. That is, the issue is not so much 'is this a good outcome' but 'how do we assess if this is a good outcome?' There are a number of possible approaches, two of which are discussed in more detail below.<sup>46</sup>

## Previous agreements as benchmarks

One example of a process 'standard' is by reference to other agreements. The practical difficulty with drawing on past agreements as standards is that they are frequently confidential, at least in the detail. Some agreements are available through the Agreements Treaties and Negotiated Settlements website ([www.atns.net.au](http://www.atns.net.au)).<sup>47</sup> One procedural option might be to seek access for an independent third party chosen by all the parties who can review such information and articulate how the proposals before them correspond. The complexity of native title agreements and their unique cultural context is such that such comparisons can often be distinguished.

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<sup>46</sup> There is a third approach, which is to define indigenous interests on key issues dealt with in agreements, and develop explicit (and, if possible, quantitative) criteria for gauging how well agreements perform on these criteria. Professor O'Faircheallaigh has developed such criteria for eight key issues in his chapter, C O'Faircheallaigh, 'Evaluating Agreements between Indigenous Peoples and Resource Developers' in M Langton, M Tehan, L Palmer & K Shainet al (eds), *Honour Among Nations? Treaties and Agreements with Indigenous People*, Melbourne University Publishing, Melbourne, 2004.

<sup>47</sup> Similarly, commercial and historical information about the implementation of earlier agreements reached in native title negotiations, including analyses of the ways in which they failed or benefited the communities they were designed to protect, would be a rich resource for the current generation of Indigenous claimants and their advisers. In C O'Faircheallaigh, 'Native Title and Agreement Making in the Mining Industry: Focusing on Outcomes for Indigenous Peoples', *Land, Rights, Laws: Issues of Native Title*, vol.2, no.25, 2004. Professor O'Faircheallaigh observes at page 7 that the 'overwhelming picture' from his analysis of 73 resource development agreements entered into with native title owners between 1978 and 2003 is one of great variability which reflects neither project scale nor developers' ability to pay. He concludes that the financial outcomes achieved under the RTN provisions of the NTA are generally more modest than those obtained under other legislative regime. While further research is still required, one explanation is that the stronger agreements are the outcome of stronger, better prepared and more strategic Indigenous negotiating teams and the weaker agreements reflect the inequality between the Indigenous parties and their well resourced and informed opponents.

*An infrastructure company proposed to pay financial compensation to the traditional owners based on a formula. The formula was “exactly the same as what we pay any other landowner” – a seemingly objective standard. But it became clear that this formula was based on compensation for the dollar value of stock feed lost during the period of construction and rehabilitation. The claimants argued that their relationship to the land was different from that of the non-Indigenous farmers and that any agreement should reflect their culture of sharing: we’re sharing the land with you, and we ask that you share the proceeds of your endeavour with us. While the final agreement didn’t include royalty payments as such, it did include a range of benefits that the claimants felt reflected something of this ‘sharing’ standard rather than a pure compensation-for-economic-loss standard.*

### **“Bargaining in the shadow of the law”**

Native title negotiations occur, for the most part, because a legal regime requires this of them. In this context, legal standards are frequently used (you must agree to this because this is what the law would do) particularly by non-Indigenous parties. For example, we will only consent to a determination of title if you demonstrate you meet the relevant legal tests. This may be resisted by claimant groups whose starting point is that while the law may have provided the catalyst for the negotiation, for a variety of historical and cultural reasons they do not regard it as setting an objectively fair standard.

Whether motivated by their own ideology (standards) or political pressures (interests), there are examples where State governments, resource companies and other non-Indigenous parties have not measured outcomes with a strict legal yardstick. In such cases, more creative outcomes may be achievable.

*In the Future Act negotiations for the Eastern Gas Pipeline (1997), the pipeline route from East Gippsland in Victoria to the outskirts of Sydney passed through land claimed by seven claimant groups. The groups had not fully resolved as between themselves who spoke for which country, but agreed to negotiate collectively with the EGP company and resolve these and other issues between themselves at a later date. The non-Indigenous parties were acting under a commercial imperative to secure access and did not insist on strict demonstration of “connection”. The negotiation was based on the mutually accepted principle ‘We understand that you, collectively, speak for this country’. This approach was consistent with the Native Title Act, which gave each of the claimant groups the ‘right to negotiate’, as well as being consistent with an accepted approach among Aboriginal people for dealing with non-Indigenous parties independently of their dealings with each other.<sup>48</sup>*

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<sup>48</sup> Delwyn Everard, Interview with Shawn Whelan (12 February 2009).

## Things to Think About

1.	How does the agreement measure up against other similar agreements? How do we explain any discrepancies?
2.	How is financial compensation calculated? Do the parties agree on the principles of that calculation?
3.	What does the agreement say about connection to country? How does it acknowledge that connection?

## Alternatives

*Analysis of 'alternatives' involves a realistic appreciation of might be produced by seeking to resolve the issues using a strategy other than negotiation.*

In order to place a value on the benefits of negotiation, the negotiator must guide the claimant group through a BATNA analysis – what is our *Best Alternative To a Negotiated Agreement*? What do we do if we can't reach agreement? Where do we walk to? Is it better or worse than what is possible in this negotiation? This enables the parties to have relative confidence in what they achieve through negotiation. A poor negotiated outcome might still be a success if the alternatives were likely to result in complete defeat. Such an analysis requires the investigation of available legal and political avenues, and an assessment of the merits of each in the context of the country in question and the affected group of traditional owners.

## Understanding what the courts can deliver

The mismatch between Indigenous expectations of what the native title legislation and courts can deliver and the politico-legal reality was a commonly identified deficiency in a number of the native title negotiations discussed by the interviewees.

In early native title negotiations, a lack of precedent and legal clarity about the operation of the NTA may have been unavoidable. Today, Indigenous parties are entitled to expect clear and coherent advice from their legal advisers about the strengths and weaknesses of their case. A limited understanding of the threshold legal issues and unrealistic expectations (for example, that land will be returned when the best that can be achieved is a form of coexistence) will inevitably lead to disappointment. A claimant group may reject an option for a negotiated outcome or feel let down by such an outcome because their expectations are unrealistically bolstered by a false BATNA. Several interviewees remarked on the dangers of overly positive and superficial legal advice and one on the unrealistic assessments given by some anthropologists keen to deliver good news.

*Between 1994 and 1995, the Yorta Yorta peoples engaged in a multi party mediation of their native title claims with, among others, two state governments and six shire councils. On legal advice, they rejected proposals for comanagement and some limited land transfers which did not include formal recognition of traditional ownership rights. But by 2003, their claims for native title had been rejected by the Federal Court, the Full Federal Court and the High Court and it had become the longest-running native title case in Australia's history. In 2004 with their claim to country unambiguously rejected at every level of the Australian legal system, they reopened negotiations with the Victorian government and signed an agreement that formally acknowledged land management rights over 50,000 hectares of Crown land in the state's north.*

*Had the Yorta Yorta understood the weaknesses of their legal case under the NTA, would they have approached the mediation differently? Would they have achieved stronger outcomes negotiating from a position of some doubt about their claims rather than a position of comprehensive judicial rejection? As Monica Morgan, a Yorta Yorta woman, observed while waiting on the decision of the High Court, 'Now in reflection we might say that maybe if there was a better structure in place for mediation, maybe if there was more resources, it may have been different'.<sup>49</sup>*

## **Looking beyond the native title system**

The process of preparing, lodging, pursuing and negotiating native title claims is so overwhelming that it is possible to lose sight of other available strategies for meeting Indigenous needs. As traditional owners consider the whole range of their interests – their vision for their country and their people, and their concerns about their current situation - they should think creatively not only about the options for agreement *within* the scope of native title negotiations but also their alternatives *outside* them. Some of the best agreements in Australia have been achieved because traditional owners refused to accept that their legal position defined that the limits of what could be achieved in negotiations.

Alternative strategies include other legal avenues, such as heritage protection legislation, administrative law remedies, land rights legislation, and common law claims. They include political strategies, ranging from direct action on specific issues to lobbying for funding to negotiating state wide framework agreements on the joint management of national parks. And they include strategies of independent action, such as developing new cooperatives, Aboriginal corporations and business enterprises, not to mention individual and family efforts to promote health and education. All of these are well known to Aboriginal communities, including the limitations of each. But as the legal limits of native title become clearer, other strategies for meeting the interests that have motivated native title negotiations are worth another look – whether in place of, or to complement to, those negotiations.

### **Things to Think About**

1.	What are the strengths and weaknesses to a claim by this group under the NTA? What exactly does a court determination of native title mean?
2.	What financial, economic, social and cultural benefits and opportunities are available from an agreement with these parties?

<sup>49</sup> Monica Morgan, 'The Yorta Yorta Experience', paper presented at the National Native Title Conference 2002, Geraldton, Western Australia, 3-5 September 2002

3.	How can political strategies be used to bolster legal position?
4.	What steps might the other parties take if no agreement is reached? How would that affect us?
5.	What other legislation or options might provide us with opportunities to access rights and benefits? What are the prospects of accessing those rights and benefits successfully? How long would it take? What resources would be needed?
6.	What technical information is needed to understand our position and does the claimant group fully understand it?

## Commitment

*“ensure that all commitments are clear and workable”*

Much of the discussion in this paper has already touched on commitment – the final element of the seven elements of negotiations as developed by the Harvard Negotiation Project. Successful negotiation requires commitments by the parties – both to the process (such as agenda, timeframe, and communication processes) and the substantive outcomes. Reality checking is a significant aspect of negotiation in order to ensure that commitments being made are practical feasible. While this seems self evident, it requires conscious attention.

### Securing all parties’ agreement to the same process – negotiation protocols

It is increasingly common for a procedural negotiation to precede the substantive native title negotiation. Memoranda of understanding or negotiation protocols contain ‘rules of engagement’ covering matters such as resourcing, representation, and timeframes. They may contain joint media policies, address issues such as transparency, and define roles and responsibilities and communication channels within and between respective negotiating teams.

This means that the ‘process’ is often the first negotiation. This can be a significant opportunity to ensure that the process is realistic, inclusive and constructive, and to establish commitment to the process on the part of all parties. It can also provide opportunities for relationship building.

It is during this preliminary negotiation that the parties may identify and agree to a particular model for the negotiation. For some negotiation models, agreement by both parties to the process is essential for the process to function effectively. Most of the interviewees with a theoretical background in dispute resolution identified a ‘principled’ or ‘interest based’ negotiation model as the preferred approach. Invariably, however, this was followed by the rider that such an approach was seldom effective unless all the parties committed to the same approach. If the parties are unfamiliar with the negotiation approaches discussed, it is also useful to discuss training options at this stage.

### Procedural commitment by the claimant group

While the mere fact of reaching agreement on substantive issues superficially signals consent, a critical factor in securing sustainable outcomes requires that the group take ownership of, and feel empowered by, the process which culminates in agreement.

One means of securing commitment to the process is by incorporating Indigenous ways of understanding and processing information and Indigenous decision making structures into the

selection of representatives to participate in the negotiating team and the strategies used to communicate and evaluate proposals generated during the negotiation process.

## **Resourcing the process**

Securing commitment, like establishing strong communication processes and procuring necessary third party advice, takes time and costs money. Resourcing is considered here but underpins all aspects of negotiation and is a significant issue for native title negotiators who are often chronically under resourced.

Well before the substantive negotiation commences, resources are needed to identify comprehensively the traditional owners for the country in question, to prepare thorough evidence of connection and to develop constituent participation processes based on the traditional decision making structures and customs of the group. In other words, resources are needed to provide not only for the negotiation process but the design and preparation of that process including negotiation training.

*In one negotiation, a three day meeting held in region to evaluate overlapping land claims made by several different Indigenous groups who travelled long distances to attend, cost approximately \$500,000.*

Whatever the budget, the process must enable appropriately constituted groups to be authorised and capable of informed decisions. This threshold requirement is critical to ownership and acceptance of the negotiated outcome by the Indigenous groups involved. In seeking funding, the fact that resources will enable all relevant traditional owners to be identified and consulted has demonstrable long term benefits to the parties on the other side who want to ensure that any agreement resolves all possible issues.

Claimant groups need to be pragmatic about resourcing possibilities. There is little value in a process if there are insufficient funds to carry it out. The process needs to be designed within the context of realistic assessments of available funding. As the recent era of exponential growth and deep pockets in the resources sector passes, claimant groups will have to provide increasing justification and detail in funding applications and develop processes which are budgeted, cost effective and targeted.

The implications of not being able to undertake certain aspects of proposed process need to be considered. Choices need to be made and priorities determined in consultation with the claimant group. Should the process be redesigned to fit the available budget or should the process be staged with funds applied to the first stage then a hiatus until funds are available for stage two? If a staged approach is adopted, will momentum be lost, or knowledge and capacity diluted?

Finally, the strongest agreements allocate some resources to the implementation of the agreement, the periodic review of implementation and the establishment of Indigenous governance structures to oversee proper implementation. Those resources may need to be allocated from the funds to support the process or may form one of the negotiated outcomes.<sup>50</sup>

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<sup>50</sup> Half of the resource development agreements considered by Professor O’Faircheallaigh contained no provisions for review of implementation or identified what information needed to be provided to support

*The South Australian Government funded the Aboriginal Legal Rights Movement (ALRM) to engage in a process of negotiation with it, the South Australian Farmers Federation and the SA Chamber of Mines and Energy for a statewide framework ILUA. The funding was applied to a series of meetings between August and December 2000 enabling Native Title Management Committees to discuss issues, hear from experts and agree to a process for ongoing participation. The meetings resulted in the establishment of a representative organisation – the Congress. The budget contemplated funding to facilitate training, organisational and political development to build capacity in all NTMCs. This has not happened. Limited funding has led to a decision to apply the available funds to enable negotiations to continue on a pilot scale limited to three NTMCs.<sup>51</sup>*

## **Substantive commitment - implementation and governance**

Sustainable agreements contain terms which the parties can deliver and measure. This means reality checking proposals to confirm they meet the parties' genuine interests and that resources and capacity are in place to ensure effective implementation.<sup>52</sup> In the focus on reaching agreement, the native title negotiator can sometimes overlook the importance of focussing on the period beyond execution.

*“The apparent absence of interest in agreement implementation appears illogical given the level of resources, both financial and human, that go into establishing agreements.”<sup>53</sup>*

Procedural mechanisms can also be built into agreements to support future implementation, for example, by agreeing review time frames and evaluation processes in negotiation protocols which survive the execution of the substantive agreement, setting aside specific negotiation times to discuss implementation, and establishing a sub-committee with specific responsibility for implementation issues.

One fundamental issue is the lack of continuity in human resources. It is often the case that many of the individuals involved in the negotiation for the Indigenous parties withdraw – NTRB personnel and lawyers to the next job and weary community Elders handing over to a younger generation who have no background to the negotiation. Governance structures developed for the negotiation fall into disuse leaving a vacuum.

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such a review. He recommends that a focus on implementation be incorporated into every negotiation process from its inception. O’Faircheallaigh, above note 47, p.10.

<sup>51</sup> Agius, above note 24.

<sup>52</sup> As Mick Dodson and Dianne Smith observe, ‘It is only when effective governance and holistic development strategies are in place that economic and other development projects have a chance of becoming sustainable’: W Bergmann, ‘A New Way of Doing Business: Economic Empowerment for Aboriginal People to Ensure Responsible Resource Development in the Kimberley’, speech at the National Press Club, Canberra, 30 April 2008.

<sup>53</sup> Simon Hawkins, presentation at the Negotiating Native Title Conference, October 2008, citing M AllBrook and M Jebb, *Implementation and resourcing of native title*, report to the National Native Title Tribunal, 2004.

The development of strong governance structures after agreement is essential not only for enforcement and implementation of those agreements but to protect rights of native title from erosion.

*The Gunditjmarra Corporation receives about five notices a month advising of future works proposed by the State which will extinguish native title if some accommodation is not reached. Sometimes, they relate to tiny parcels of land – 30 by 40 meters. However as CEO Denise Lovett notes, ‘if we let all these go, over a generation they will add up to a lot and then we have fought for nothing. Now, we need to look after this country for the next generation’.*<sup>54</sup>

### Things to Think About

1.	Does the claimant group understand and agree with the process to be followed? Is it inclusive and representative?
2.	Who is responsible for keeping the parties to the process? How is that done?
3.	How do the parties evaluate the process as they go forward? How do they test that the process working and make it more effective?
4.	Are there systems and structures in place to monitor and evaluate the parties’ commitment to implementing their agreement?
5.	What issues have not been addressed? What process is there to deal with those issues in the future?
6.	Is there a detailed budget which covers process design as well as process?
7.	What resources are available? Can you pool resources with other claimant groups? What are our training needs? How do we build capacity?
8.	Does the agreement contain evaluation processes?
9.	How will we maintain our relationship with the other parties to ensure they keep their side of our agreement?
10.	What processes can we continue to use after agreement to build our capacity to implement the agreement?
11.	What resources are available to support implementation? What will happen if they prove inadequate?

## Conclusions and Reflections

In conclusion, a strong negotiation process will be inclusive, flexible and robust, based on the informed consent of the Indigenous stakeholders. It will reflect local needs and decision making structures and will be adequately resourced. All parties will be committed to it.

The negotiation process will have a major bearing on the nature of outcomes – not all of which can be measured quantitatively. A good negotiator requires a range of skills which require experience and training and which are not usually benchmarked in the evaluation of agreements. The author is hopeful that this paper may go some way towards highlighting process issues in a holistic way.

Whether the model for negotiation is positional bargaining, rights based, power based or, as is hoped, more often interest-based, the native title negotiator can employ the 7 Elements to hone his or her analytical and tactical skills. By using those tools to understand the real hopes,

<sup>54</sup> Delwyn Everard, Interview with Denise Lovett, traditional owner and CEO of the Gunditj Mirring Prescribed Body Corporate (22 February 2009).

concerns and interests of the claimant group, to build relationships and communication channels, and to generate options based on joint interests which are reality checked against objective standards, the negotiator creates the greatest opportunity for long term sustainable social, cultural and economic benefits for traditional owner stakeholders.

Finally, of course, while attention to process is important, even the best process cannot achieve good outcomes in the absence of good policy frameworks, adequate resourcing and legislative options that align with traditional owner aspirations. Limits to what can be achieved by a negotiation process and negotiated outcomes are likely to remain as long as claimant groups lack capacity. Negotiators need to be attuned to opportunities to assist claimant groups in capacity building. Developing process skills is but one of many steps along that pathway.

## Bibliography

Agius P, Davies J, Howitt R & Johns L, 'Negotiating Comprehensive Settlement of Native Title Issues: Building a New Scale of Justice in South Australia', *Land, Rights, Laws: Issues of Native Title*, vol.2, no. 20, December 2002.

AllBrook M & Jebb M, *Implementation and resourcing of native title*, report to the National Native Title Tribunal, 2004.

Bauman T & Williams R, 'The Business of Process: Research Issues in Managing Indigenous Decision-Making and Disputes in Land. Report No. 1.' Indigenous Facilitation and Mediation Project, Native Title Research Unit, Australian Institute of Aboriginal and Torres Strait Islander Studies, Canberra, 2005, p.6

Bauman T, 'Final Report of the Indigenous Facilitation and Mediation Project July 2003 – June 2006: research findings, recommendations and implementation', Native Title Research Report, Native Title Research Unit, Australian Institute of Aboriginal and Torres Strait Islander Studies, Canberra, 2006, p.19.

Bauman T, 'Waiting for Mary: Process and Practice Issues in Negotiating Native Title Indigenous Decision-Making and Dispute Management Frameworks', *Land, Rights, Laws: Issues of Native Title*, vol. 3, no.6, June 2006, p.2

Bauman T, 'Whose Benefits? Whose Rights? Negotiating Rights and Interests Amongst Indigenous Native Title Parties', *Land, Rights, Laws: Issues of Native Title*, vol.3, no.2, 2005, p.7.

Bergmann W, 'A New Way of Doing Business: Economic Empowerment for Aboriginal People to Ensure Responsible Resource Development in the Kimberley', speech at the National Press Club, Canberra, 30 April 2008.

Everard D, Interview with Denise Lovett, traditional owner and CEO of the Gunditj Mirring Prescribed Body Corporate (22 February 2009).

Everard D, Interview with Des Hill, traditional owner and Ord Final Agreement Project Implementation Officer for Yawoorroong Miriuwung Gajerrong Yirrgeg Noong Dawang Aboriginal Corporation, (23 February 2009).

Everard D, Interview with Simon Hawkins, CEO of Yamatji Marlpa Aboriginal Corporation, (15 December 2008).

Fisher R, Ury W & Patton B, *Getting To Yes: Negotiating an Agreement Without Giving In*, Random House (2<sup>nd</sup> ed) 1999.

Folberg J & Taylor A, *Mediation: A comprehensive Guide to Resolving Conflict Without Litigation*, Jossey-Bass, San Francisco, 1984.

Guest K, *Cultural Appropriateness with Teeth – the Promise of Comprehensive Native Title Settlements: the Ngarluma Yindjibarndi-Burrup, Miriuwung and Gajerrong-Ord and Wotjobaluk agreements*, Native Title Research Discussion Paper, Native Title Research Unit, Australian Institute of Aboriginal and Torres Strait Islander Studies, Canberra, (forthcoming).

Hawley J, 'Pipe Dream', Sydney Morning Herald, Good Weekend, 7 March 2009, p.20.

McAvoy T & Cooms V, *Even as the Crow Flies, It is Still a Long Way: Implementation of the Queensland South Native Title Services Ltd Legal services Strategic Plan*, Native Title Research Monograph 2/2008, Native Title Research Unit, Australian Institute of Aboriginal and Torres Strait Islander Studies, Canberra, 2008.

Morgan M, 'The Yorta Yorta Experience', paper presented at the National Native Title Conference 2002, Geraldton, Western Australia, 3-5 September 2002

O'Faircheallaigh C, 'Evaluating Agreements between Indigenous Peoples and Resource Developers' in M Langton, M Tehan, L Palmer & K Shain (eds), *Honour Among Nations? Treaties and Agreements with Indigenous People*, Melbourne University Publishing, Melbourne, 2004.

O'Faircheallaigh C, 'Evaluating Negotiated Agreements in Aboriginal Australia', paper delivered at the ANU Conference Governing by Looking Back: How History Matters in Society, Politics and Government, 12-14 December 2007, p.5

O'Faircheallaigh C, 'Native Title and Agreement Making in the Mining Industry: Focusing on Outcomes for Indigenous Peoples', *Land, Rights, Laws: Issues of Native Title*, vol.2, no.25, 2004.

O'Faircheallaigh C, 'Negotiating Cultural Heritage? Aboriginal-Mining Agreements in Australia', *Development and Change*, vol.39, no.1, 2008, pp.34-35

Ury W, Brett J & Goldberg S, *Getting Disputes Resolved*, Jossey-Bass Publishers, San Francisco 1988.

## **Legislation**

*Aboriginal Land Rights Act 1983* (NSW).

*Aboriginal Land Rights (NT) Act 1976* (Cth)

*Mineral Resources Act 1989* (Qld)

*Native Title Act 1993* (Cth)