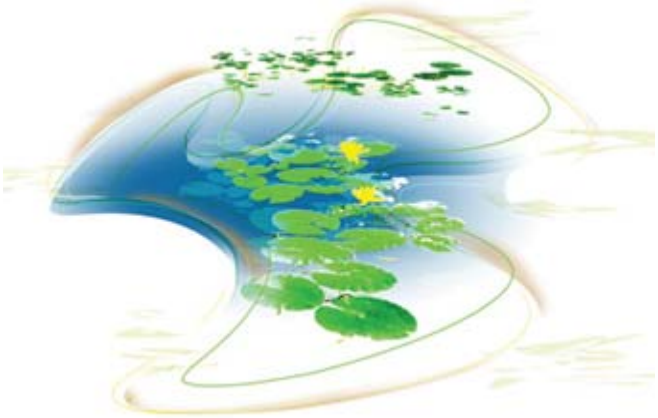
INDIGENOUS FACILITATION AND MEDIATION PROJECT

AUSTRALIAN INSTITUTE OF ABORIGINAL AND TORRES STRAIT ISLANDER STUDIES



Final Report of the Indigenous Facilitation and Mediation Project July 2003-June 2006: research findings, recommendations and implementation

Toni Bauman

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AIATSIS
Australian Institute of Aboriginal and Torres Strait Islander Studies

Final report of the Indigenous Facilitation and Mediation Project July 2003-June 2006 : research findings, recommendations and implementation.

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This report incorporates some information and ideas provided by Rhiân Williams under contract to IFaMP.

Abbreviations

ADR	Alternative Dispute Resolution
AIATSIS	Australian Institute of Aboriginal and Torres Strait Islander Studies
ATSIS	Aboriginal and Torres Strait Islander Services
CEO	Chief Executive Officer
DEST	Department of Education, Science and Training
FCA	Federal Court of Australia
IFaMP	Indigenous Facilitation and Mediation Project
ILUA	Indigenous Land Use Agreement
NADRAC	National Alternative Dispute Resolution Advisory Council
NGO	Non-Government Organisation
NNTT	National Native Title Tribunal
NMAS	National Mediation Accreditation Standards
NTA	*Native Title Act 1993*
NTRB	Native Title Representative Body
NTRU	Native Title Research Unit
OIPC	Office of Indigenous Policy Co-ordination
ORAC	Office of the Registrar of Aboriginal Corporations
PBC	Prescribed Bodies Corporate
SRA	Shared Responsibility Agreement
RPA	Regional Partnership Agreement
SWALSC	South West Aboriginal Land and Sea Council
The Project	Indigenous Facilitation and Mediation Project

Executive Summary

Project Background

1. The Indigenous Facilitation and Mediation Project (IFaMP) in the Native Title Research Unit at the Australian Institute of Aboriginal and Torres Strait Islander Studies (AIATSIS) completed its third and final year on 30 June 2006.

2. The Project supported best practice approaches to Indigenous decision-making and dispute management, particularly in relation to the *Native Title Act 1993* which emphasises agreement-making through non-adversarial approaches, such as mediation, facilitation and negotiation.

3. IFaMP carried out research, consultations and workshops with a variety of stakeholders, published various papers and workshop reports, conducted a pilot participatory decision-making and dispute management case study and pilot training with Native Title Representative Bodies (NTRBs), made numerous presentations to conferences and specialised audiences and developed wide ranging networks. A significant body of work has arisen from these activities including IFaMP's web pages (http://ntru.aiatsis.gov.au/ifamp/index.html).

4. Whilst the project has arisen out of the native title context, Indigenous decision-making and dispute management processes are core business for all who work in Indigenous affairs and are central to Indigenous governance. An absence of free, prior and informed consent in Indigenous decision-making processes has often contributed significantly to failures in Indigenous affairs.

5. IFaMP's findings thus apply to the full range of Indigenous engagement with both government and commercial sectors. This includes not only native title Indigenous Land Use Agreements (ILUAs), but also the Shared Responsibility Agreements (SRA) and Regional Partnership Agreements (RPA) which lie at the core of the Government's new arrangements in Indigenous Affairs, which, in any event, are often implicated in native title agreements, and to many other programs.

Project Findings

6. IFaMP has identified the urgent need for procedural experts who could assist government, other stakeholders and Indigenous communities in:

   - ensuring informed decision-making processes and greater co-ordination of a whole-of-government approach including native title agreement-making;
   - negotiating ways in which Indigenous people prefer to do business that match their local needs and in which they can secure equal partnerships with government representatives and other parties; and
   - ensuring that parties have what is required to enable them to negotiate effectively.

7. The range of associated initiatives in Indigenous decision-making and dispute management and which will ultimately be cost effective include:

a) skilled, transparent and inclusive Indigenous decision-making and dispute management facilitative processes to ensure that decisions are owned by communities, and are therefore sustainable and bring about real change;

b) 'arms length' third party facilitation in order that agreements contribute to strategic pathways for Indigenous community cohesion, are fair, and that the interests of all parties are represented;

c) provision of the missing piece of infrastructure in Indigenous agreement-making processes in the form of a national fully supported and accredited network of Indigenous facilitators, mediators, and negotiators to provide prompt and timely local assistance;

d) common standards and evaluation procedures which look at the details of micro processes in achieving agreement outcomes and nationally accredited training; and

e) building the capacity not only of Indigenous communities but of others who are involved including government employees and staff of Indigenous organisations and those who are employed in the industry and corporate sectors, in designing and managing processes and communicating effectively with Indigenous people.

In particular, there is a need to foster Indigenous capacity in the following areas:

- identifying and exploring the causes and potential solutions to problems;
- responding in meaningful and sustainable ways to changing government requirements and agendas;
- developing appropriate strategies and capacities to engage, manage and utilise relevant technical expertise;
- ensuring decision-making and dispute management processes are embedded in good governance structures and match their needs;
- planning and implementing workable community strategies and solutions including the identification of:
    - the appropriate group to be involved in decision-making;
    - how decisions should be made about particular issues; and
    - strategies for managing conflict; and
- monitoring, renegotiating, modifying or adapting, strategies and solutions as required.

Project Outcomes

8. IFaMP has laid the foundations for meeting these needs, with a number of outputs, which are discussed in this report including:

- various strategic documents, reports and consultations regarding the development of the proposed national network of Indigenous facilitators and mediators;

- a groundbreaking research base in the area of Indigenous decision-making and dispute management, a range of publications, an extensive and comprehensive web site, and detailed bibliography;
- a best practice framework;
- a pilot participatory case study;
- introductory pilot training with NTRB staff;
- email networks of Indigenous and non-Indigenous mediators, facilitators, and negotiators, and a paper which explores issues associated with the establishment, maintenance and distribution of such lists;
- a training resource guide – *Finding Training Solutions in Indigenous Decision-Making and Dispute Management* – which sets out existing training pathways in the Vocational and Education Training sector and provides details of around 80 training providers, many of whom can customise training to requirements;
- an *Evaluation Toolkit: Training and Service Delivery in Decision-Making and Dispute Management Processes in Native Title* – which is relevant to all agreement-making and decision-making processes;
- a briefing paper, *Making a Complaint About Native Title Mediation*;
- a flier, *Negotiating Native Title* setting out user-friendly definitions of a range of interventions such as arbitration, conciliation, mediation, facilitation and negotiation;
- *Guidelines for Developing Decision Making and Dispute Management Policies for Native Title Representative Bodies*, which are transferable to other contexts;
- extensive stakeholder networks; and
- raised awareness of the importance of process.

Implementation of IFaMP's findings

9. A range of initiatives are required to implement IFaMP's findings, which also reflect the findings of the National Alternative Dispute Resolution Advisory Council's (NADRAC's) national consultations regarding Indigenous dispute resolution and conflict management. Not all of these initiatives would necessarily be undertaken by a single agency, though, ideally, they would be managed by a national program or secretariat whose activities should involve:

- co-ordinating a fully supported and accredited national network of Indigenous facilitators and mediators at state and territory levels and establishing appropriate processes and structures;
- building on existing networks including the community mediation centres in Queensland, Victoria, New South Wales and the Northern Territory which are well placed to co-ordinate activities at a local and regional level, the Australian Indigenous Leadership Centre, OIPC's Indigenous Women's Development Program and OIPC's Expert Panels and Multi-Use List for Community Facilitators/Coordinators;

- providing for a clearing house to ensure that Indigenous best practice issues are communicated effectively and efficiently;
- developing a national training curriculum and piloting and delivering relevant training in Indigenous engagement, decision-making and dispute management processes which includes ways of approaching Indigenous local capacity;
- mentoring of Indigenous trainees;
- developing common standards, monitoring and evaluation procedures in the Indigenous context;
- establishing complaints processes;
- carrying out a range of service delivery and training pilots;
- conducting and managing ongoing research including:
    - pilot whole-of-government case studies; and
    - comparative Indigenous international research;
- co-ordinating 'internships' for staff of NTRBs, business, government, community and other leaders;
- establishing ways of matching of process expertise with community needs and tendering processes; and
- ongoing raising of awareness of the importance of process in achieving sustainable outcomes.

10. In the absence of a body specifically committed to promoting Indigenous procedural expertise, there is a risk that the valuable foundations which have been built by IFaMP will be lost.

Recommendations

11. It is recommended:

(a) That funding is provided from the relevant sections of Commonwealth and State Governments within a whole-of-government framework for a national secretariat to ensure the implementation of the range of IFaMP's findings concerning Indigenous agreement-making, decision-making and dispute management processes.

(b) That funding is provided for the missing piece of infrastructure in Indigenous agreement-making processes in the form of a supported and accredited national network of Indigenous process experts including mediators, facilitators and negotiators, who can make timely local interventions and who will ultimately be cost effective.

(c) That the National Native Title Tribunal (NNTT), the Federal Court of Australia, the Office of Indigenous Policy Co-ordination (OIPC) and the Attorney-General's Department jointly act on the native title related recommendations which have arisen from IFaMP workshops and which are set out in Appendix VII, where this has not already occurred.

INTRODUCTION

The Indigenous Facilitation and Mediation Project ('IFaMP' or 'the Project'), located in the Native Title Research Unit at the Australian Institute of Aboriginal and Torres Strait Islander Studies, commenced in July 2003 and completed its third and final year in June 2006. The Project supported best practice approaches to Indigenous decision-making and conflict management, particularly in relation to the *Native Title Act 1993*, which emphasises agreement-making through non-adversarial approaches, such as mediation, facilitation and negotiation.

Funding for the Project in Year 1 was provided to support Native Title Representative Bodies and Native Title Services (NTRBs) by the Land and Native Title Section of the previous Aboriginal and Torres Strait Islander Services (ATSIS) and by the National Native Title Tribunal (NNTT). In Years 2 and 3, the Project was funded by the Land Service Development Section of the Land and Resources Group in the Office of Indigenous Policy Co-ordination (OIPC).

IFaMP was staffed by a Visiting Research Fellow, Toni Bauman, who is an anthropologist, mediator and facilitator, and a research assistant whose position was occupied by various full time and part time employees. The Project was under the management of Dr Lisa Strelein of the Native Title Research Unit. The Project contracted the assistance of consultant mediator, Rhiân Williams, Capital Careers, a Registered Training Organisation and Social Compass who work in evaluation.

IFaMP carried out research, consultations and workshops with a variety of stakeholders, published various papers and workshop reports, conducted a pilot participatory decision-making and dispute management case study, made numerous presentations to conferences and specialised audiences and developed wide ranging networks. A significant body of work has arisen from these activities including IFaMP's web pages (http://ntru.aiatsis.gov.au/ifamp/index.html) which are a considerable resource with an efficient search engine.

(i) Application and relevance of the Indigenous Facilitation and Mediation Project

Indigenous decision-making and dispute management processes are core business for all who work in Indigenous affairs. Decisions and agreements must be owned by Indigenous people themselves to ensure that responsibility is taken for their implementation and that they are sustainable. The absence of free, prior and informed consent in Indigenous decision-making processes has contributed significantly to failures in Indigenous affairs.

Research indicates that effective decision-making and dispute resolution processes are key indicators of successful Indigenous governance which, in turn, are central to the efficient implementation and sustainability of any agreements.[1] There is also a critical need in Indigenous decision-making and dispute management processes to build the

[1] *Celebrating Indigenous Governance. Success stories of the Indigenous Governance Awards.* Reconciliation Australia, 2006.

capacity of all involved – Indigenous and non-Indigenous alike - in responding in meaningful and sustainable ways to changing government requirements and agendas.

Agreement-making processes often require 'arms length' third party interventions in order that they are fair, that the interests of all parties are represented, and that they contribute to strategic pathways for Indigenous community cohesion. Whilst the Project is titled 'The Indigenous Facilitation and Mediation Project', a range of approaches and training is required in developing successful Indigenous decision and agreement-making and dispute management processes – not simply 'mediation' and 'facilitation'. The core skills lie in identifying local needs, interests, and ways of approaching decision-making and dispute management. It is then necessary to tailor and design processes to match them in negotiation with the parties involved. Processes may also need to accommodate the fact that some disputes may not be amenable to resolution. Reasons for this should be identified and working relationships built between parties that account for the dynamics of disputes, whilst at the same time, enabling parties to move forward constructively.

While the project has arisen out of the native title context, the lessons learned apply more broadly to the full range of Indigenous engagement with Commonwealth and State/Territory government and non-government organisations, industry and corporate sectors. They also apply to the engagement of Indigenous people with each other in any number of community initiatives. Examples include not only Indigenous Land Use Agreements under the *Native Title Act 1993*, but also the Shared Responsibility and Regional Partnership Agreements which lie at the core of the Government's new arrangements in Indigenous Affairs. The landscape of negotiated agreements also includes a wide range of other Indigenous programs and responsibilities in areas such as:

- natural resource management;
- health;
- housing;
- education;
- substance abuse;
- consumer advocacy;
- business;
- governance;
- employment;
- family and community cohesion;
- youth health and well being;
- welfare reforms;
- criminal and restorative justice;
- family relationship centres;
- repatriation of remains and other cultural materials; and
- reconciliation.

IFaMP has been identified by the Aboriginal & Torres Strait Islander Social Justice Commissioner, Tom Calma, in his *Social Justice Report 2005*, as a program that 'highlight[s] key issues relating to the capacity of Indigenous communities to be able to participate on an informed and equal basis in the new arrangements.' He noted his particular interest in IFaMP's research findings concerning the importance of 'arms

length' process experts to support Indigenous communities to achieve sustainable outcomes.[2]

(ii) Implementation of IFaMP's findings

IFaMP's activities and consultations have identified some key needs and laid some valuable foundations on which to build. Of particular note is the repeatedly expressed need for a national fully supported and accredited network of Indigenous facilitators, mediators and negotiators who are able to provide timely local interventions to support Indigenous decision-making and conflict management processes over longer time frames.

In the absence of a body specifically committed to promoting Indigenous procedural expertise, there is a risk that the valuable foundations which have been built by IFaMP will be lost. There is an urgent need to act on IFaMP's research findings and recommendations which are set out in this report. The implementation of these recommendations will result in the building, not only of Indigenous capacity in decision-making and conflict management and the sustainability of agreements, but also that of NTRBs, government agencies, their employees and the many others involved in the range of agreement-making processes.

[2] Aboriginal and Torres Strait Islander Social Justice Commissioner. 2005. *Social Justice Report* p.8, http://www.humanrights.gov.au/social_justice/sjreport05/chap1.html). Human Rights and Equal Opportunity Commission, Commonwealth of Australia, Canberra.

1. Project Aims

IFaMP aimed to:

- identify and support best practice in Indigenous decision making and conflict management in the NTRB native title context in providing the basis for the design and implementation of flexible, responsive, reliable and sustainable decision-making and dispute management systems;
- provide a previously non-existent evidence base for Indigenous decision-making and dispute management processes particularly in native title;
- identify training needs of NTRBs and those they represent and develop a training framework for the native title context; and
- raise awareness of the need for procedural expertise and skills and long term relationship building in dealing with Indigenous decision-making process and dispute management processes beyond a more common emphasis on substantive outcomes.

2. Project methodology

IFaMP's methodology was based on the principle that theory and practice should be mutually informing. A range of approaches were adopted. IFaMP carried out numerous consultations and held a range of workshops (see Appendix I). The workshops were thoroughly prepared and designed to consider relevant research issues and incorporate information from previous workshops, research and surveys, often through interactive exercises, role plays and scenarios. Workshops were reported on in detail to capture the research issues; a number of issues and discussions papers were published; and practical briefing papers, manuals and guides were prepared (see Appendix II). IFaMP conducted pilot training, a participatory case study, and a survey of native title mediators, participated in and held seminars, and gave presentations to a range of organisations Government Departments and conferences (see Appendix III).

IFaMP developed extensive stakeholder networks within OIPC, the Attorney-General's Department, the Federal Court of Australia, the National Alternative Dispute Resolution Advisory Council, staff and members of the National Native Title Tribunal, NTRBs, community mediation services, the First Nations Governance Institute, Reconciliation Australia, the Minerals Council of Australia, Office of the Registrar of Aboriginal Corporations, the National Indigenous Council, a range of other Government and non-Government organisations and departments and corporate and industry stakeholders.

IFaMP papers and other relevant information were regularly and widely distributed to a range of stakeholders through the Native Title Research Unit and through IFaMP's email networks and web pages. The web pages were regularly updated throughout the life of the Project, and also provided opportunities for critical feedback (see also Appendix V for other Project feedback). The Project received many comments regarding the usefulness of the web site. Feedback from workshops was provided to participating NTRBs sometimes in the form of confidential workshop reports.

2.1. Major IFaMP Activities

Major IFaMP activities are listed below by year. Papers, reports publications and presentations which arose out of them are listed in the Appendices.

2.1.1 Year 1 (2003 -2004)

Year 1 (2003-04) focussed on NTRBs in a number of workshops which were funded by the NNTT to identify best practice issues and training needs around Indigenous decision-making and dispute management.

- *NTRB Workshops*

Workshops were held with:

- Yamatji Marlpa Barna Baba Maaja Land and Sea Council, Perth.
- Central Queensland Land Council and Gurang Land Council, Bundaberg.
- North Queensland Land Council and the Torres Strait Regional Authority, Cairns;
- Chief Executive Officers of NTRBs, Adelaide Native Title conference, May 2004, where findings from the above three workshops were discussed;
- NTRB staff, Adelaide Native Title conference, May 2004 (facilitated by the Indigenous section of the Community Justice Centre of New South Wales); and
- NTRBs and community mediation centres (New South Wales, Victoria, and Queensland) to discuss ways in which the centres might assist NTRBs in providing services and training, in Canberra.

- *NTRB Pilot Introductory Facilitation Training*

A two day introductory facilitation training session, was held with staff of the South West Land and Sea Council and a return visit was made to discuss implementation and evaluation issues.

2.1.2. Year Two (2004 – 2005)

Year Two focussed on mediators and facilitators and other providers of process expertise to NTRBs in identifying best practice and evaluation issues and training needs around Indigenous and non-Indigenous decision-making and dispute management in native title and in broadening the research base.

- *Survey of native title mediation practitioners*

Mediation consultant, Rhiân Williams conducted a survey of native title mediators around best practice and training issues, the findings of which provided the basis for developing workshop programs for process practitioners.

➢ *Practitioner Workshops*

Workshops were held with:

- Indigenous mediators and facilitators, at AIATSIS, Canberra;
- Indigenous and non-Indigenous native title mediators, facilitators and negotiators including NNTT members and Federal Court Registrars, at AIATSIS, Canberra; and
- evaluation specialists, at AIATSIS, Canberra.

➢ *AIATSIS seminar series*

IFaMP co-ordinated and presented papers in the AIATSIS seminar series on native title, Indigenous decision-making and conflict management issues (see Appendix IV for the list of speakers and titles).

➢ *National Alternative Dispute Resolution Advisory Council* (NADRAC) *Indigenous Consultative Committee*

Visiting Research Fellow, Toni Bauman, was a member of NADRAC's Indigenous consultative committee for its national consultations concerning Indigenous issues in alternative dispute resolution which provided the basis of a report by NADRAC to the Commonwealth Attorney-General.

➢ *Federal Court NADRAC Steering Committee: Best practice case study scoping project*

Visiting Research Fellow, Toni Bauman, was a member of a Steering Committee for a consultancy, funded by the Federal Court in partnership with NADRAC, to carry out a scoping study to identify the range of specific case studies which would assist in identifying best practice issues and identify training needs in Indigenous alternative dispute resolution processes. The Project extended into Year 3. [3]

2.1.3. Year 3 (2005-2006)

Year 3 focussed on consolidating findings from Years 1 and 2. Further pilot training was undertaken with NTRBs, a number of practice documents were produced including a training resource guide, an evaluation toolkit and policy guidelines for NTRBs, and recommendations for the establishment of a fully supported accredited network of Indigenous facilitators and mediators were further explored (see 3. IFaMP Outputs below and Appendix II).

[3] The need for case studies of decision-making and dispute management processes involving Indigenous people, which provide detailed fine grained ethnographic descriptions and analysis of techniques and initiatives particularly in the balancing of power relationships, has been identified on numerous occasions. See *Land and Natural Resources Conflict Management Survey, Final Report*, Food and Agricultural Organization of the United Nations (FAO) Rome Italy (2002), the *Manila Declaration of the International Conference on Conflict Resolution, Peace Building, Sustainable Development and Indigenous Peoples* (2000) and IFaMP's survey of native title mediators (Williams, 2005) for example.

➢ *Workshops*

Workshops were held with:

- NNTT members, Registrars of the Federal court, and NTRBs to develop an evaluation toolkit; and
- Indigenous Mediators and Facilitators and OIPC's Partnership and Shared Responsibility Group concerning a proposal for the development of a skilled and supported national network of Indigenous mediators and facilitators and best practice.

➢ *NTRB pilot dispute management training*

Two two-day introductory pilot dispute management training sessions were held with:

- Native Title Services, Victoria; and
- Central Land Council, Alice Springs

➢ *Pilot participatory case study, Northern Territory*

Visiting Research Fellow, Toni Bauman, was involved as a facilitator in a participatory pilot case study on an Indigenous Land Use Agreement and a land claim under the *Aboriginal Land Rights NT 1976 Act*, issues from which were published in a Native Title Research Unit Issues Paper.

3. Major IFaMP outputs

IFaMP outputs include:

- raised awareness of the importance of Indigenous decision-making and dispute management processes and influencing of changes to practice, particularly in native title;
- a groundbreaking research base in the area of Indigenous decision-making and dispute management including a range of publications, research papers, an extensive bibliography, a survey of native title mediators, workshop reports and power point presentations (see Appendices II and III);
- an extensive and comprehensive web site;
- a best practice framework in Indigenous decision-making and dispute management;
- a training resource guide – *Finding Training Solutions in Indigenous Decision-Making and Dispute Management: A Resource for Native Title Representative Bodies* (with Capital Careers).
- an *Evaluation Toolkit: Training and Service Delivery in Decision-Making and Dispute Management Processes in Native Title* (with Social Compass);
- a flier called *Making a Complaint about Native Title Mediation*;
- a flier, *Negotiating Native Title* setting out a range of interventions such as arbitration, conciliation, mediation, facilitation and negotiation;
- extensive email networks of Indigenous and non-Indigenous mediators and facilitators, and a paper which explores issues associated with the establishment, maintenance and distribution of the names on these networks; and
- guidelines for developing decision making and dispute management policies for Native Title Representative Bodies.

4. Why is procedural expertise required?

The ability to implement and manage processes – the business of process – is the key to the business of Indigenous decision and agreement-making, dispute management and problem solving processes more broadly. An inappropriate process can result in increasing tensions and hostilities between and amongst Indigenous families and individuals. It can also mean that the implications of decisions are not understood, that the decisions are not owned and that agreements are consequently not sustainable.

Typically, over many years, Indigenous communities have experienced pressure to accept solutions or ideas, often suggested to them by non-Indigenous agencies, without having the opportunity to understand the details or implications of their decisions, or to consider other solutions. In many instances, meetings where closed questions are put to the floor, such as 'Do you understand?' and 'Everyone agree?' have become the *modus operandi*. Indigenous people often leave such meetings unable to explain what they have agreed to and the agreements break down.

Good negotiation processes incorporate a range of design elements, which all work to ensure robust, equitable, inclusive and appropriate processes that best enable parties to do business with one another successfully. This means the greater likelihood, not only that agreements will be reached, but that those agreements will hold, be implemented and sustained. The role of the process expert is to facilitate discussion and negotiation, and assist communities and government and other stakeholders, not only in doing business with one another, but **how** that business will be done. In order for this to be the case, processes need to account for the emotional, procedural and substantive needs and issues of parties and build working relationships between parties to enable them to move forward.[4] The procedural expert frees those who are negotiating either on their own behalf or on behalf of someone else to focus upon these issues and needs.

IFaMP's research demonstrates that good process requires awareness of the importance of distinguishing between the **procedural** responsibilities of managing negotiations and the **substantive** interests of the negotiator. Mixing, or blurring the two, can make it difficult for all participants, particularly a government or organisational representative who seeks to both negotiate with a group and manage the process around which negotiation takes place. Technical experts, such as environmental experts, town planners, economic advisers, anthropologists, community advisers, lawyers and so on, may be unable to identify when information is not understood if they are also attempting to manage the process in which that information is conveyed. They may also have a particular view, which they unconsciously or otherwise impose upon parties, but which should be objectively explored. The procedural expert remains alert to miscommunications, monitors how to manage them and acts as a 'circuit-breaker' without being seen as a stakeholder in particular solutions or outcomes.

The whole-of-government and agreement-making arrangements which now characterise Indigenous policy will require high-level interpersonal and analytical skills amongst Public Service employees, including the ability to:

[4] 'Working relationships' mean exploring ways of doing things which take into account the kinds of relationships which exist between parties, including the dynamics of conflicts which may not be amenable to resolution.

- identify the widest possible range of views and represent those views fairly to government for decision-making;
- communicate and consult with the public skilfully for informed decision-making and effective program delivery; and
- interact effectively with local communities in order to guarantee coordinated community service delivery.[5]

These skills are clearly required, within the broader Indigenous governance sector, as they are in the native title arena. However, there is also a need to recognise a 'third arm' where those who are engaged in negotiations are not also managing the processes. Issues of fairness, objectivity and conflict of interest arise in agreement-making processes. This is particularly so in agreements which are being negotiated by Government agencies on behalf of the Government. Priority setting and agreement-making with Indigenous communities within a whole-of-government framework has created an urgent need for highly skilled independent, regionally based Indigenous (and non-Indigenous as appropriate) process experts. They could support, assist and manage processes of engagement between and within communities and government in a fair and ongoing manner. Timely interventions by skilled practitioners may also mean that disputes do not exacerbate.

This is not to suggest a new Indigenous dependency on third party experts. A clear finding of IFaMP's research is that processes need to build on local capacity, realities and needs and ensure that Indigenous parties and organisations are ultimately able to manage their own decision-making and dispute management processes and agreements along pathways of community cohesion. Responsibility will only be shared if negotiated from positions of adequate capabilities of all parties.

Procedural experts could also assist government and Indigenous communities in:

- ensuring informed decision-making processes and greater co-ordination of a whole-of-government approach including native title agreement-making;
- negotiating ways in which Indigenous people prefer to do business that match their local needs and in which they can secure equal partnerships with government representatives and other parties; and
- ensuring that parties have what is required to enable them to negotiate effectively.

The issues raised in this section around best practice decision-making and dispute management not only lie at the core of successful Indigenous governance, but also determine the success of the full range of agreement and decision-making processes and Indigenous engagement. Procedural expertise lies in tailoring processes to Indigenous, Government and other stakeholder needs.

[5] *Connecting Government Whole of Government Responses to Australia's Priority Challenges. Summary of Findings*. 2004. Pages 8-9.

5. Complexities of the agreement and decision-making process environment

Native title and other agreement and decision-making processes are diverse and complex, particularly in moving from single issue approaches to more comprehensive regional ones. Numerous process issues arise in incorporating Indigenous priorities and requirements and a range of interventions might be required.

5.1. The NTRB context

Native title processes emphasize agreement-making through non-adversarial and collaborative processes such as mediation, facilitation and negotiation. Under Sections 203BF and 203BD of the *Native Title Act 1993* (Cth) (NTA), NTRBs have a range of dispute resolution functions and are required to support the decision making processes of their constituents.

Constituents on whose behalf an NTRB acts, include native title applicants and the native title holders they represent, and persons who may hold native title. NTRB decision-making and dispute management processes also involve a range of representative groups such as Prescribed Bodies Corporate, working parties, committees and corporations under the *Aboriginal Councils and Associations 1976 Act*.

Constituents may be involved in a number of simultaneous native title processes including Future Act matters, Section 31 (3), Section 29 Notices, Section 86B referrals and S86F matters, consent determinations, litigation, and a range of alternative settlements, including Indigenous Land Use Agreements.

Various kinds of native title and other land related decision-making and dispute management services are provided to native title holders by external consultants, National Native Title Tribunal (NNTT) members, NTRB staff, Federal Court Registrars, community mediation centres and State government tribunals.

Native title has given rise to much conflict amongst Indigenous communities. Issues of group cohesion require addressing prior to entering into negotiations with respondents to any native title application in what is a complicated and imposed legal regime.

NTRB workshops in Year 1 identified that:

- there is a overarching conflict between Indigenous and non-Indigenous ways of doing business;
- the distribution of resources is unfair - neither NTRBs nor applicants have sufficient resources to fulfil their roles and responsibilities;
- native title provides a platform for the airing of a range of Indigenous community issues and the history of previous dealings with non-Indigenous people and systems, making it impossible to divorce native title from other issues in the community;
- the complexity of the native title legal environment leads to misunderstandings, false expectations and conflict;

- underlying disputes and potential sources of conflict including long standing hurts, trauma and senses of past injustice should be mapped at the outset of any process;
- excluding issues arbitrarily or without authorisation from those participating may send messages that processes are biased, not inclusive or thorough, and lack respect and integrity;
- parties should be given the opportunity to assess the impact on any agreement-making process if issues are not addressed and whether and how they might be dealt with outside the process;
- lawyers acting adversarially are a major obstacle to successful agreement-making;
- lawyers often don't listen to their clients, take instructions from the wrong people and misinterpret instructions;
- there is often inadequate follow up to agreements and implementation issues are rarely thoroughly explored in agreement-making processes; and
- there is a need to develop robust and transparent innovative decision-making and conflict management processes which are agreed to by the parties.

Recommendations from the NTRB workshops are set out in Appendix VII. Achieving the kinds of processes which are required when NTRBs are located at the centre of complex relationships and often work with limited resources under imposed and urgent time frames is a challenge. It requires strategic, co-ordinated approaches and operational practices which arise out of well developed policies. It also requires a balancing act between the ideal and the real.

5.2. Whole-of-government and whole-of-community

Native title agreements are not islands unto themselves. Many parties in native title agreement processes are Aboriginal corporations or members of Aboriginal corporations who may also be negotiating, making decisions about or managing disputes around Shared Responsibility or Regional Partnership Agreements in a whole-of-government framework. There is also a need, if many native title agreements are to be successful, for building the capacity of Corporations, or other Indigenous groups and individuals. SRAs or RPAs are often the only potential source of funding for doing this.

A whole-of-government approach necessarily involves government agencies working across portfolio boundaries with Indigenous communities as equal partners in an integrated government and Indigenous response. Yet, there is a plethora of government departments which aim to implement strategies to achieve social change in Indigenous communities at national, state, regional and local levels. There is also a wide range of Indigenous family and community organisations as well as non-Indigenous interest groups (industry and local government, for example) that may need to be included in any agreement-brokering processes. Each of the agencies, departments, or organisations often has different ways of doing business. There may be little if any co-ordination between them and a concomitant expectation that their agenda takes precedence over all others. Many have overlapping responsibilities and are often providing multiple services in a single community.

It is often the case that a number of Indigenous decision-making and dispute management processes which are attempting to address the same or similar issues are taking place concurrently. Given the confusion that arises out of the multiple and overlapping interventions which characterise Indigenous affairs, there is an urgent need for 'whole-of-community' approaches to Indigenous agreement-making which integrate the range of community services, approaches and interest groups and which take into account the full dimensions of Indigenous decision-making and its ramifications. Ideally, processes should consider all the ways in which a community functions, and its systems of relationships, interconnections and governance structures in a co-ordinated approach, in which cross-agency strategies complement and support one another and avoid duplication and the waste of limited resources.

5.3. Complexities of Indigenous decision-making and dispute management processes

The complexities and inter-relatedness of Indigenous societies means that issues are multi-levelled, multi-directional and multi-layered. The consequences of decisions often ripple across the community and beyond, along extensive Indigenous social and cultural networks. Outcomes invariably affect Indigenous people who may not be directly involved in making the decisions and issues under consideration are often influenced by, and not to be seen as separate from, other issues in the community.

Indigenous governance structures are a complex mix of formal and informal structures and processes. Extended Indigenous families have many levels of inclusiveness. There are local institutions informed by long held Indigenous laws and cultural priorities, local government councils, incorporations of native title holders and traditional owners, and a range of other Aboriginal resource and interests groups.

The kinds of agreements that are made, and the nature of the group with whom they are made, can exacerbate sometimes already vexed relationships between and within groups. The process by which the appropriate group or individual participation in decision-making is identified is a critical negotiation and requires significant procedural expertise. Facilitative processes are also required in decision-making processes about appropriate leadership and representation of specific areas of interest.

5.4. Understanding local Indigenous capacity

As noted, identifying local Indigenous capacity needs and building capacity is a core factor influencing the sustainability of agreements. Effective processes build and ensure the 'readiness' of parties to engage, including that of non-Indigenous parties and government agencies who are often ill-prepared, and who may have little experience in working with Indigenous communities and knowledge of agreement-making processes.

Focussing prematurely on what needs to be done to resolve matters without building the capacity of the parties to negotiate, including their understandings of the implications of any agreement, may mean that vital elements are missing from any agreement or solution. When agreements break down, those involved invariably blame each other, further undermining Indigenous capacity and relationships, not only with each other but also with those with whom they are negotiating.

Indigenous communities face a raft of pressing problems in areas such as health, employment, education, law and justice and community management. Proceeding with agreements without considering the full range of needs to ensure their successful implementation and sustainability is an ethical issue.

Indigenous capacity relates to:

- personal self belief and confidence of individual applicants and native title holders;
- Indigenous laws and practices;
- financial, technical, legal and other levels of knowledge;
- ability of representative organisations to carry out functions and implement agreements;
- group cohesion; and
- the capacity to:
    - consent;
    - participate;
    - continue to participate;
    - implement outcomes and agreements;
    - manage one's own disputes and decision-making processes;
    - represent and lead; and
    - manage those who provide legal and/or technical advice.

There is a need to foster Indigenous capacity in the following areas:

- identifying and exploring the causes and potential solutions to problems;
- responding in meaningful and sustainable ways to changing government requirements and agendas;
- developing appropriate strategies and capacities to engage, manage and utilise relevant technical expertise;
- ensuring decision-making and dispute management processes are embedded in good governance structures;
- planning and implementing workable community strategies and solutions including the identification of:
    - the appropriate group to be involved in decision-making;
    - how decisions should be made about particular issues; and
    - strategies for managing conflict; and
- monitoring, renegotiating, modifying or adapting, strategies and solutions as required.

The capacity of those involved in implementing or managing any agreement, decision-making and dispute management process is also relevant including:

- the skills and knowledge of the process manager;
- the ability of Indigenous organisations and government departments to carry out their functions;
- the ability of government employees in agreement-making processes; and
- the ability of technical advisers in providing clear advice that is understood.

6. The maze of current process interventions

Currently, Indigenous people may be participating in parallel processes or in single processes where a range of interventions or aspects of them are employed, including in the native title arena. This can give rise to confusion and often exacerbates conflict amongst parties. The processes may involve informal discussions, formal negotiations, mediation, facilitation, negotiation, conciliation, arbitration or participatory community development, for example, or be a combination of any or all of these. Some of these processes involve 'arms length' third party interventions such as facilitation and mediation. Others involve conciliators giving a range of options and advice, or arbitrators acting as a judge and making decisions on the basis of facts which are binding on all parties. Terms, such as 'solution broker' and 'enabler', also appear to have gained currency particularly in the SRA and RPA context, though it is often unclear what is meant by them.

IFaMP's survey of native title mediators identified that there is a wide divergence in practice, qualifications and training of practitioners, and a range of practices taking place under the rubric of 'interest-based mediation'.[6] This is also the case for the other interventions mentioned above, each lacking common standards by which their effectiveness can be measured. The need for regulation, monitoring and evaluation which was identified in IFaMP's native title survey, and for the appropriate matching of interventions with the needs and circumstances of Indigenous communities, applies also to OIPC's Expert Panels and Multi-Use List for Community Facilitators/Coordinators, for which Expressions of Interest have been advertised.

The nature of a process is rarely adequately explained to the Indigenous people upon whom it is about to be inflicted. Parties in agreement, decision-making and conflict management processes are often not aware of the range and usefulness of processes available to them and the relationships of processes to each other. Without common standards and agreed definitions, it is difficult to see how this could be done. IFaMP's native title survey revealed significant differences in the approaches of mediators as to the degree of responsibility they should accept for the preparation of parties, the implementation of agreements and identifying which parties should be involved in mediations. There were also significant differences in the manner is which the process, 'co-mediation', is understood. Employed appropriately, co-mediation can have significant benefits in Indigenous agreement-making and dispute management processes. It is a process in which co-mediators (male/female; Indigenous/non-Indigenous, for example) play well-defined and agreed complimentary roles including providing checks, balances and support for each other, effective debriefing and planning, and avoids a focus by parties on a sole expert. Some survey respondents, however, thought that co-mediation meant mediators acting as substitutes in each other's absence or as having complimentary skills.

[6] Williams, R. 2005. *Native Title Mediation Practice: The Commonalities, the Challenges, the Contradictions: A Survey of Native Title Mediators. Indigenous* Facilitation and Mediation Project, Native Title Research Unit, Australian Institute of Aboriginal and Torres Strait Islander Studies, Canberra.

6.1. Matching interventions with party needs: beyond mediation

Identifying the appropriate process assistance which matches the needs and circumstances of parties, requires skill and knowledge. No one size fits all. All processes should be carefully designed, structured, planned, strategic and flexible. The key is to design processes which reflect the procedural, substantive and emotional needs of parties and to negotiate their acceptability with them. Parties need to make informed decisions about the processes in which they wish to be involved with an understanding of the level of burden that they may place on them. Processes which are poorly matched against the needs of parties will inevitably be unworkable, impractical and inappropriate. Given the choice, parties may choose not to be involved.

The term, 'mediation' is often employed as a panacea for all problems, when 'mediation' may not be the intervention which is required. Its apparent emphasis in the title of the IFaMP project and in the *Native Title Act 1993* is misleading. The term presumes a dispute but, under native title legislation, applications have been referred by the Federal Court to the NNTT for mediation whether there is a dispute or not. Some of the fundamental principles of mediation, such as that it should be voluntary and that parties should have a choice of mediator may not be amenable to native title processes. Neither may the well-defined steps which are commonly seen to constitute mediation. In some instances, native title 'mediation' may more closely resemble arbitration or conciliation.

It may be the case that, rather than 'mediation', parties require conflict management strategies or training in negotiating skills, for example. They may request arbitration or conciliation as best meeting their needs if the processes are adequately explained. There may also be a range of other priority interventions which are required such as assistance with governance issues or the preparation of funding submissions, advocacy, education, community development, and capacity building. For Indigenous practitioners at one of IFaMP's workshops, mainstream mediation training could be like 'speaking another language'. Nevertheless, mediation skills and processes can be of considerable value in agreement-making processes including the identification of underlying disputes and the needs and interests of parties, communication skills, facilitation and negotiation techniques and agenda setting.

The way a process is named can play a significant role in the level of comfort which parties experience around it. The term, 'mediation', does not always have a good reputation amongst Indigenous communities. Terms such as 'community facilitation' may be more appropriate in that they invoke the facilitation of the provision of a range of required interventions, not only mediation or facilitation, but also other measures such as building governance capacity. Notwithstanding, 'mediation' will be the appropriate intervention in a number of instances and the term has the advantage of 'calling it as it is: a dispute as a dispute'. The issue is the identification of the appropriate intervention by parties themselves and their consent to it.

6.2. Peacemaking approaches

IFaMP's research and consultations, including workshops involving Indigenous mediators and facilitators in Years Two and Three, have consistently revealed the need for the involvement of local Indigenous expertise in decision-making and dispute management processes (see Section 11 below). Approaches which might be taken, were often given the labels, 'peacemaking', 'peacebuilding' or 'peacekeeping'. These terms were seen as being more meaningful to Indigenous communities, a range of Indigenous 'peacemaking' rituals having been described by early ethnographers and the terms having strong Christian spiritual implications. There was concern that the terms not be seen as synonymous with 'mediation' which was recognised as only one strategy of peacemaking, and that they do not become 'boxed up', 'fetishised' and 'turned into a written formula'. The terms were seen as having 'different meanings to different groups in different contexts'.

It was noted that a number of Indigenous people are recognised in their communities as 'peacemakers', that they should be identified, supported and incorporated into any decision-making and dispute management processes and that their services should be recognised, valued, and appropriately remunerated. Peacemaker attributes were described as bringing reason to disputing parties, staying neutral and calm in conflict, being respected in the community, and able to 'sit in many camps'. A number of Indigenous people who have been undertaking leadership training through OIPC's Indigenous Women's Leadership Program and the Australian Indigenous Leadership Centre may well be suited to such work.

Peacemaking, peacebuilding and peacekeeping approaches were seen by the Indigenous practitioners at the IFaMP workshop in Year 2 as:

- critical to the building of community and group cohesion;
- addressing conflict around native title which effects the whole community;
- contributing to good governance;
- incorporating training and understanding;
- addressing the breakdown of traditional family structures for sorting out disputes and returning roles and responsibilities to Indigenous people;
- helping young people find their place in communities;
- building bridges between western and Indigenous processes; and
- based on the principle of living in harmony and addressing issues between Indigenous people prior to their engagement with external parties.

They were seen as different from more 'mainstream' alternative dispute resolution processes in that they:

- envisage a longer time frame;
- are more flexible;
- employ the holistic approaches which many Indigenous communities seek;
- involve the building on and tailoring of processes to existing local decision-making and conflict management processes;
- plan to keep peace and strengthen relationships;
- are linked to sustainability through 'peacekeeping' measures; and
- deal with the past and allow for expressions of remorse and apologies.

7. Theoretical Complexities

Identifying a theoretical approach, which addresses the complexities in Indigenous decision-making and dispute management, involves the consideration of range of theoretical approaches. These relate to: governance, subjectification, intersubjectivity, identification, property, the meaning of consensus, ways of approaching rights, interest, needs, aspirations, and goals in mediation and human rights theory and legislation, codification, relationships, conflict and many others.

In the first instance, conflict must be understood as natural, constructed around the full range of multidirectional and contextual relationships between individuals and communities, and as nested in systems and structures. Managing it may sometimes require an upheaval of the status quo, which, as Mayer points out, consensus based processes tend to support.[7] At least some parties, however, may not be amenable to such deep change, particularly when they have vested interests in things staying as they are.

Managing conflict and agreement-making processes may also require an approach which is based in a social ontology of relationships seen as 'fields of inter-subjectivities' as opposed to a liberal positivist view of the rights and interests of groups and individuals as absolute and groups as homogenous. In this view, parties in processes are not to be approached as distinct from each other. They are mutually transformed as meaning is co-created by participating subjects inter-subjectively and interdependently in their social interactions with each other. Distinct subjects co-emerge from a prior matrix or field of relationships, the being of any one subject thoroughly dependent on the being of all other subjects with which it is in relationship.

The concept of intersubjectivity thus moves away from the reification of closed groups and affirms the full range of rights or interests or needs of group members. It does not generate dichotomies of abstractible rights and interests. Rather, it sees the co-creation of meaning and the effects on consciousness of the codification of identities. The idea of property as 'a social relationship, a relation between people in regard to things'[8] sits well with this concept and supports a view of native title as a matrix of differentiated, negotiable and hierarchical rights and interests that are derived from relationships between members of the group and their relationships with the group as a whole. If property is a social relation, then it must also be 'inter-subjective', as is all communication and negotiation.

The challenge is to consider that at least some Indigenous rights, needs and interests may not be absolute, without denying group rights or opening up a discourse which can be seized upon to deny rights generally. We need ways of conceptualising parties to a dispute that do not circumscribe and essentialise their identities, rights and interests and which can inform practice. Part of the problem, as Mayer points out, is the stress we

[7] Mayer, B. 2004. *Beyond Neutrality*. Jossey-Bass, San Francisco.
[8] K. Glaskin, 2003. Native title and the 'bundle of rights' model: Implications for the recognition of Aboriginal relations to country. *Anthropological Forum* 12(1) see note 3, p 40.

place people under in striving for consensus[11] in the face of 'deep structural issues, underlying social inequities and systemic problems'.[12]

This is a daunting task in the complex field of relationships and legal requirements which constitute native title and whole-of-government agreement making processes.

In the meantime, there are best practice approaches which will enable parties to move forward: employing communication and interactive techniques and involving parties in carefully designed relationship building exercises, for example. The aim is to foster open competition amongst parties which does not shirk conflict but seeks to engage, explore and manage it in achieving a positive outcome.

11 B. Mayer, p. 54.

12 B. Mayer, p. 47.

8. Training Issues

Rather than delivering training across NTRBs in the short period of time available, and given the significant NTRB staff turnover, IFaMP's approach has been to:

- identify the training needs of NTRBs;
- carry out pilot training in introductory facilitation and dispute management;
- audit existing training and produce a training resource guide; and
- address issues which relate to the delivery of appropriate training in the Indigenous context in the long term.

8.1. What kind of training is needed?

Experts in managing Indigenous decision-making and dispute management processes are not made overnight. There is no 'quick fix' in a two or three day training program. As is the case with all training, there is a natural progression which is required as introductory skills are developed and consolidated through practice and new skills are acquired through additional training. Approaches to engagement, problem solving, relationship building, dispute management and decision-making are also constantly evolving including, for example, ways of fostering positive dialogue, relationship building, developing mutual understanding and approaching reconciliation. Innovative interactive and other facilitative techniques emerge regularly such as Talking Paper. Those who are proficient in and committed to process expertise continue to undertake professional development training throughout their working lives.

Training in a vacuum is of little use: if skills are not employed soon after training, trainees will often lose them. They require mentoring to develop confidence, to observe or work alongside more experienced practitioners as co-mediators or facilitators where relevant and to be supported and valued in organisational governance practices. Staff training is also often the first resort when organisations do not appear to be achieving expected outcomes when it may be that problems are being caused by poor organisational communication and governance.

Ultimately, training is only as good as the trainer and native title applicants, NTRB staff and other potential trainees need to be engaged around their preferred ways of receiving training. Trainers can be asked to customise training, and a trainer's knowledge of the Indigenous context in which trainees are working will add considerable value to any training. IFaMP's research has identified a critical need for trainers to be skilled in communicating with Indigenous people, understand the context of their work and make the training relevant to the work place. A number of Indigenous NTRB staff noted that they had walked out of training because of the inability of the trainer to communicate effectively.

A range of training needs at various levels which was identified by IFaMP through workshops with NTRBs and mediation and facilitation practitioners is discussed below. These training areas need to be formally developed into a curriculum in an 'Engaging with Indigenous people' training package in the Vocational Education and Training (VET) sector. This might involve a range of qualifications from Certificates to Diplomas and, ultimately, University degrees. A set of core training areas could be identified with electives addressing particular contextual needs such as native title and Shared Responsibility Agreements.

8.1.1. Training needs in Indigenous decision-making and dispute management processes identified by NTRBs

NTRBs recognised the importance of including introductory training in decision-making and dispute management processes in induction processes. IFaMP's report on the NTRB workshops which were held in Year 1 contains a section on the specific training needs of a range of staff positions including lawyers, anthropologists, CEOs and field officers as well as of native title applicants and negotiating teams.[9] Twenty key modules were identified as applying to all staff across NTRBs as follows:

1. Communication skills – introduction to effective communication
2. Mapping conflict including underlying disputes, early warning signs, the range of Alternative Dispute Resolution (ADR) interventions and when they might be required
3. Mapping Indigenous decision-making processes
4. Assertiveness and self-esteem
5. Cross-cultural communication
6. Organisational communication
7. Facilitation
8. Managing meetings
9. Presentation skills and public speaking
10. Mediation
11. Dispute management design approaches
12. Negotiation skills
13. Managing technical experts and third parties in mediation and facilitation
14. Group dynamics
15. Dealing with difficult people and behaviours
16. Presenting technical information to non-technical audiences
17. Team work and team-building skills
18. Relationship-building exercises
19. Feedback and debriefing skills
20. Train the trainer

Training in 'cross-cultural communication' and 'cross-cultural awareness' does not only refer to perceived differences between Indigenous and non-Indigenous people. There is a range of cultures within any organisation which need consideration in determining appropriate training including: corporate, administrative, professional, legal, anthropological, and liaison staff. Each has its own requirements and cultural priorities which intersect and overlap with any Indigenous-non-Indigenous perceived or real differences. There is also a need to distinguish between 'cultural awareness' and 'cultural engagement': being aware of issues which impact on Indigenous people does

[9] Williams, R. and T. Bauman, 2005. *Report on Native title Representative Body Workshops: Directions, Priorities and Challenges*. Pp:18-22 and 30-31. Indigenous Facilitation and Mediation Project, Native Title Research Unit, Australian Institute of Aboriginal and Torres Strait Islander Studies.

not necessarily indicate skills in engaging and communicating with them in particular ways to achieve sustainable outcomes.

IFaMP's pilot training with NTRBs in Year 3 also revealed the importance of staff receiving training in the early warning signs of, or potential triggers for, conflict and of training in project management and organisational planning. In exploring scenarios, participants were often surprised to find how inadequate organisational work practices and communication contribute to the escalation of conflict amongst their Indigenous constituents. This included a lack of preparation and planning, not approaching issues regionally, combative relationships amongst staff, and a lack of clarity about staff roles and responsibilities. This highlights the fact that Indigenous decision-making and dispute management processes must be embedded in good governance structures to be successful.

IFaMP's case study revealed that negotiation training for Indigenous parties is an urgent need. These parties often lack strategies in negotiating with each other, particularly when entrenched relationships of sometimes irrational disagreement can mean unsatisfactory outcomes for all.

8.1.2. Training needs identified through practitioner workshops

IFaMP's workshops with Indigenous and non-Indigenous practitioners in Year 2 identified the following responsibilities for mediators of native title issues and the need for specific native title related training in these areas:

- addressing the needs of the participants: respect, information, preparation, resources and process;
- thoroughly preparing both themselves and the parties for the mediation;
- exploring the parties' consent to the mediator and to mediation;
- ensuring the right people are participating so outcomes are not undermined because key people do not endorse the process;
- ensuring the parties' participation is effective so they can make the best use of their involvement;
- managing the participants' needs for advice so they are well informed;
- managing the participants' advisers so their participation is constructive and assists the parties;
- exploring how confidentiality will be managed in the mediation; and
- making arrangements to resource and implement agreements as part of the agreement-making process.

They suggested that training might also involve:

- facilitating negotiations between parties about confidentiality and other procedural parameters;
- managing adversarial advisers;
- electronic 'tips and traps' (including inadvertent breaches of confidentiality through document properties);

- conflict management;
- conflict coaching;
- participatory community development theory and practice;
- facilitating more effective group functioning;
- cross-cultural techniques and practices to be employed in mainstream mediation practice;
- training of technical and legal advisers in their roles in the mediation process;
- the dynamics of Aboriginal groups including witnessing;
- handling abuse of self as mediator;
- reasons for people take adversarial stances; and
- using the skills and knowledge of participants as a resource in mediation.

A number of practitioners already trained as mediators, but not having worked in native title, identified that, in order to be effective, they needed additional training in:

- native title legislative requirements and processes;
- skills in identifying Aboriginal and Torres Strait Islander people who should be incorporated as a useful resource in mediation; and
- local understandings of Indigenous tribes, groups, languages, affiliations to country and land tenure.

Indigenous practitioners noted the need for training which approaches culture in relational terms where differences are respected and worked with rather than in terms of 'cultural awareness' and which focuses on giving the process expert a greater understanding of human nature. This included training in:

- personal development and self awareness;
- transactional analysis;
- psychology;
- conflict resolution theory;
- 'peace speaking' involving positive reframing for a purpose;
- multi-party facilitation and mediation; and
- understanding culture and western ways of defining Aboriginality.

They strongly recommended immersion in Indigenous community life and mentoring by a respected Indigenous person for those who had not worked in Indigenous communities and suggested that non-Indigenous mediators might benefit from training delivered by Indigenous mediators. They also identified the following as useful training they had received in mediating native title agreements:

- their life experiences as Indigenous people for peacemaking in Indigenous communities;
- observations of other mediators and counsellors;

- leadership training;
- experience as board members; and
- experience in managing relationships between staff and executives.

Some training needs for applicants and native title holders were identified through the practitioner workshops in addition to those which are set out by IFaMP in its report on NTRB workshops. These included training in:

- managing lawyers;
- understanding the mediation process;
- conflict management;
- conflict coaching;
- peacemaking;
- understanding the limits of native title; and
- sustaining Indigenous futures.

OIPC's Indigenous Women's Leadership Program also identifies a range of training which could be helpful for Indigenous parties including:

- harnessing feelings for action;
- managing support groups;
- identifying values;
- vision and goal setting;
- wellbeing
- developing a community activity;
- community consultation; and
- appreciating ourselves and others.[10]

As can be seen from the training needs outlined in 8.1.1 and 8.1.2 above, there is a need to package them in a formal curriculum around engagement with Indigenous communities. Recommendations from the practitioner workshops are contained in Appendix VII. They include recommendations for:

- the provision by the NNTT and the Federal Court of training and information about native title legislation and processes to trained Indigenous mediators who do not have experience in native title of training; and
- the development by the NNTT of native title training packages which address the specific native title training needs which are identified in this report.

[10] Leadership Resource Book Indigenous Women's Leadership Program Office of Indigenous Policy Co-ordination 2005

8.2. IFaMP's Training Resource Guide

IFaMP has received numerous inquiries seeking advice and recommendations as to appropriate training in Indigenous decision-making and dispute management processes. While development of a curriculum would be an ideal approach to addressing identified training needs, in the interim, there are existing training providers that can meet some of the needs if you know where to find them.

IFaMP's Training Resource Guide - *Finding Training Solutions in Indigenous Decision-Making and Conflict Management: A Resource Guide for Native Title Representative Bodies* was developed around the NTRB workshops in Year 1 and focuses on the twenty key areas listed in 10.1 above. The Guide is also relevant to other organisations and Government Departments working in Indigenous affairs.

The Guide sets out existing training pathways in the Vocational and Education Training sector where national accreditation is available for either full qualifications or individual units. It also provides details of around 80 training providers, many of whom can customise training to requirements. Research for this guide revealed many gaps in the availability of nationally accredited training relating to the twenty key modules and other key training areas outlined above.

Part One includes information on:

- nationally accredited training and the Australian Qualifications Framework;
- organisations to contact to obtain advice about training;
- possible sources of funding for training programs;
- the Commonwealth Government's New Apprenticeship (traineeship) program; and
- nationally accredited qualifications that best fit with the twenty priority training areas relating to Indigenous decision-making and dispute management processes.

Part Two contains information on:

- the names of Registered Training Organisations which deliver nationally accredited qualifications containing units relevant to Indigenous decision-making and dispute management processes; and
- details and contacts of a range of training providers who may offer training related to the twenty key training priority areas identified by IFaMP and who could possibly partner with an RTO to offer full qualifications.

The Guide is available at: http://ntru.aiatsis.gov.au/ifamp/Latest_Updates.htm
and http://ntru.aiatsis.gov.au/ifamp/research/research_frameset.html

8.3. Accreditation and standards

NTRB staff, and particularly Indigenous staff who participated in the IFaMP workshops in Year 1, identified a need for nationally accredited training and vocational pathways in the area of engagement with Indigenous communities including decision-making and dispute management processes.

Whilst it may appear that there are many training providers, the quality and relevance of training which is being delivered is highly variable. The length of mediation courses, for example, can vary between 3 and 10 days, and participants often identify, that whilst the short courses provide a good introduction to mediation, they do not equip them to mediate effectively. A number of training providers issue their own accreditation certificates, but there are no common national standards in either training or service delivery of Indigenous decision-making and dispute management processes.

It is also often difficult to assess whether training has been effective – particularly in Indigenous areas where outcomes may only become apparent over the long term. There is a need to identify and monitor over time:

- participant and organisational levels of skill prior to training against which to measure any improvement;
- whether those being trained are being equipped with relevant skills;
- how trainees are using and applying their new skills and knowledge; and
- the experience of the training and what people undergoing the training say about it.

The 2006 National Mediation Conference adopted a scheme for National Accreditation Standards for Mediators. The NMAS initiative involves core competencies that will have to be met across the country by all mediators belonging to the system with organisations applying to be a Recognised Mediator Accreditation Body (RMAB). It provides for additional competencies to be developed for Indigenous and other sectors which would supplement the core NMAS ones. Implementation committees will address issues around training, the development of a national code of conduct for mediators, national accreditation and establishing a register of mediators among others.

Similar work is required for other interventions such as conciliation and work is required to tailor any national scheme to the range of Indigenous contexts. Recommendations from IFaMP's practitioner workshops include a recommendation for the development of specific native title national standards and/or a code of ethical conduct which addresses the roles and responsibilities of all participants in native title including the mediator, parties and their advisers.

9. Best practice framework in Indigenous decision-making and dispute management processes

It is important that NGOs, Government Departments, industry and corporate sectors and others engaging with Indigenous people develop policies relating to Indigenous decision-making and dispute management and agreement-making processes and ensure that constituents are aware of them. These policies need to reflect a set of principles which can be implemented on the ground. No one size fits all and there will be local circumstances and needs to be reflected in any policies and practices. Policies and their implications need to be reality tested with a range of constituents whose ideas might also be sought about alternatives.[11] This section sets out the principles of a best practice framework and provides guidelines for best practice. A separate IFaMP document provides guidelines specifically relating to NTRBs and native title.[12]

9.1. Ten best practice principles in Indigenous decision-making, agreement-making and dispute management processes

1. Conflict is natural and can have positive outcomes when managed appropriately.
2. Indigenous people have the right to:
    - free, prior and informed consent to processes and agreement outcomes;
    - say no to any processes or agreements; and
    - manage and own their decisions and disputes.
3. Indigenous decision making and dispute management processes are complex and should not be rushed.
4. Processes should do no harm.
5. How agreements are negotiated will have a major bearing on their sustainability: decisions must be owned by Indigenous parties to be sustainable.
6. 'Quick fix' solutions are to be avoided at the expense of long term resolution.
7. No one size fits all - processes should:
    - reflect, support and be tailored to local needs and ideas of how authority should be organized and decisions should be made;
    - embody Indigenous values and Indigenous law;
    - recognise that some Indigenous disputes may not be amenable to resolution and that their dynamics should be managed and accounted for in solutions; and
    - build on and support local capacity.

[11] Visiting Research Fellow, Toni Bauman has published a Native title Research Unit Issues paper which sets out some of the process issues, practical implications and techniques arising out of IFAMP's case study. See T.Bauman. 2006. Waiting for Mary: Process and Practice Issues in Negotiating Native Title Indigenous Decision-making and Dispute management Frameworks. Vol. 3, Issues Paper No. 6. *Land, Rights, Laws: Issues of Native Title*. Native Title Research Unit, Australian Institute of Aboriginal and Torres Strait Islander Studies, Canberra.

[12] Indigenous Facilitation and Mediation Project, 2006. *Guidelines for Developing Decision-Making and Dispute Management Policies for Native title Representative Bodies*. Native Title Research Unit, AIATSIS, Canberra.

8. Early intervention and prompt responses can de-escalate conflict.
9. Agreement-making processes and negotiations require arms length facilitation.
10. Indigenous decision-making, agreement-making and dispute management processes should be integrated with other processes and services in Indigenous communities in whole-of-government and whole-of-community approaches.

9.2. Best practice guidelines in Indigenous decision-making, agreement-making and dispute management processes

➢ Resourcing processes adequately

Decisions about the prioritisation of resources for aspects of Indigenous decision-making and dispute management processes impact on the full range of relationships that individuals and organisations have to manage. They can be a significant source of conflict and grievance. Adequate resources should be allocated to processes and considered in initial planning stages and process designs.

Resource considerations include:

- the impacts of not funding aspects of a well designed, integrated process on the range of stakeholders including the impacts on relationships and the potential escalation of conflict;
- the complexities of the issues and the necessary time frame to address them;
- appropriate levels of resourcing to support constituent participation in processes; and
- the nature of capacity building assistance which will need to be provided.

➢ Strategic planning, preparation, design and time frames

The importance of planning in ensuring successful processes and sustainable outcomes cannot be underestimated. Effective planning should:

- ensure a clearly defined and structured program and process design through which a particular issue will be addressed and take place well in advance of any process;
- identify team members for the duration of the process;
- include strategies for managing third parties, such as lawyers, researchers and other technical experts, including the management of written materials and advice;
- account for the emotional, procedural and substantive needs and interests of parties; and
- incorporate evaluation processes.

The time frames for native title and other decision-making and dispute management processes place Indigenous organisations and parties under considerable pressure. Time frames should be realistic and account for the range of impacting factors.

Time frames should allow time for:

- preparation;
- obtaining consent to the process;
- identifying who the representatives are and what their responsibilities will be;
- briefing representatives;
- representatives to consider and evaluate their own position and requirements, including the need for technical and or legal advice;
- confirming consent of those the representatives are said to represent;
- consideration and evaluation of how processes are proceeding away from the processes themselves;
- reflection upon and evaluation of emerging issues, potential solutions and details of agreements;
- regular debriefings of both team members and Indigenous parties; and
- managing applicant issues and dealing with external pressures from respondents, governments.

➢ **Team Cohesion**

Many negotiating processes fail because of a lack of team cohesion. Team cohesion requires:

- all members of the team working as a team including corporate, field/liaison officers, anthropologists, lawyers, and government agents;
- clearly defined roles, responsibilities and limitations of team members and recognition of the value of each team member;
- clear communication pathways between team members for specific issues;
- regular debriefings; and
- processes for keeping all team members informed of evolving legal and technical issues and agreement details.

There is often conflict within organisations and teams between those focused on process and those who are focussed on outcomes. Team members need to develop understandings in:

- the importance of process in achieving sustainable agreements and their particular roles in doing so (corporate staff, for example, often need education as to why certain things are not appropriate in the Indigenous context and be given examples of where things have gone wrong, why and their socio-cultural and financial ramifications); and
- how to weigh up the implications of compromising process against the practical reality of doing the best in the circumstances.

➢ Consent to process

To arrive at mutually acceptable and fair procedures, parties should consent to the process.

- Parties should make informed decisions and choices about:
  - the process they wish to be involved in;
  - whether it meets their needs; and
  - the process expert they wish to be involved.
- The process whereby peoples' consent is established to a process may need to be separated from their actual participation in the process.
- The consequences of participating or not participating must be clearly articulated and explored with potential participants.
- Answers to the following questions might be explored:
  - What are the differences between the range of possible interventions?
  - What are the reasons for their appropriateness or otherwise?
  - Are their potential implications clearly understood?
  - How can they satisfy the procedural, emotional and substantive interests and needs of all parties?
  - How is consent to a process to be established?
  - What is the fit between the process and the preferred way of doing business?

➢ Meeting the needs of those outside the process

Those who observe decision-making, dispute management and agreement-making processes may need to be managed and kept informed even if they are not the immediate focus of any processes.

- The full range of stakeholders should be mapped in any process design.
- The nature of groups to be consulted and the implications of not involving them should be thoroughly explored.

➢ Capacity to participate

Those involved in implementing or managing agreement, decision-making and dispute management process, have a responsibility to work with Indigenous parties to:

- assess and address capacity to participate issues prior to the commencement of any agreement-making processes;
- build commitment, willingness and readiness to participate;
- account for power imbalances, between and amongst all parties including relative access to resources, the quality of representation, and knowledge of the system and processes;

- build on existing Indigenous capacity in an environment of mutual respect;
- monitor and address capacity issues that arise during the course of any process; and
- monitor and address capacity issues that may impact on any agreements arising out of the process.

Those involved in implementing or managing any agreement, decision-making and dispute management process, also have a responsibility to:

- genuinely assess whether they have the skills and training to meet Indigenous requirements;
- remove themselves from processes where they know they are inadequate and unable to provide the necessary service;
- ensure appropriate services are provided by someone else where required; and
- seek training and other capacity building as needed.

➢ **Dialogue, relationship building and interactive techniques**

Effective agreement-making processes:

- foster open dialogue amongst all involved;
- build practical working relationships amongst the parties;
- ensure issues are understood;
- incorporate local interpreters or other skilled Indigenous communicators as required; and
- provide information, ensure discussion, and check levels of understanding:
    - through interactive and participatory sessions such as small group and one-on-one discussions;
    - in non-technical user-friendly English with the aid of audio and visual aids including maps, diagrams, and GPS.

➢ **Community Education**

Processes should be supported by comprehensive relevant and timely education and awareness programs and communication strategies including information about:

- the range of possible processes to be invoked;
- time constraints of the agreement;
- dates and times of meetings well in advance;
- the process which is taking place;
- the limitations of any potential agreement; and
- the legal and technical complexities of any agreement.

➢ Mapping underlying issues and disputes

Situations need to be assessed to identify existing, underlying or potential disputes and issues, in order to match them with the most appropriate dispute management interventions.

There is a need to clearly map:

- the range of differentiations and commonalities between and across groups;
- the complexity of dispute dynamics, including the elements of underlying issues and local and regional dimensions; and
- the parties to any conflict or negotiation.

➢ An integrated approach

Indigenous decision-making and dispute management processes should:

- be integrated with other services in the community to allow for coordinated approaches, the implementation of strategies at a cross-agency level that complement and support one another, and optimisation of limited resources; and
- identify and incorporate local 'peacemakers', 'peacebuilders' and 'peacekeepers' as appropriate.

➢ Negotiating local decision-making and dispute management frameworks

The mapping of native title rights and interests, or other interests of parties, should have priority in agreement-making processes. If this occurs concurrently with negotiations, it can mean that the mapping of cultural information is influenced by vested interests in the potential outcomes of any agreements.

- Indigenous decision-making and dispute management frameworks should be negotiated in detail between parties, with the assistance of a process expert as required, prior to any decisions being made or engagement with external parties.
- In land related matters, and in other situations, this may involve:
    - the mapping of a detailed regional matrix of relational and differentiated native title and other rights and interests;
    - the communication of its results to constituents;
    - the matching and negotiation of land or other interests with a decision-making and dispute management framework – preferably a regional one if this is practical to guard against inequities in future agreement-making processes in the region;
    - agreement to a contingency in the event that consensus is not reached to ensure that parties are aware of the risks of not reaching agreement and take responsibility for the consequences, including an investigation of the following options:

- mediation;
- conciliation;
- arbitration by an external arbitrator;
- arbitration by the NTRB or the negotiating team;
- arbitration by regional Indigenous authorities;
- involvement of local Indigenous peacemakers and peace builders;
- that only a certain number of representatives need to agree;
- provisions for the removal of decision-making powers of representatives under certain conditions including for example, their lack of participation in discussions, inappropriate participation, violent behaviour, conflict of interest, and negative effect on group processes; and
- others as negotiated amongst the parties.

➢ **Effective group representation, roles and responsibilities**

Representatives cannot genuinely consent to and participate in processes unless they know what is required of them and believe that they have the capacity to carry out these requirements. Ways of electing representatives should be carefully considered and explored in relation to particular contexts. Calls for expressions of interest from suitably skilled people with a range of expertise for designated positions - professional development, legal, education, and mediators, for example - and from the range of interest groups in the community – land owners, youth, men, and women, the local Council for example – might ensure that representatives are better able to fulfil their functions.

The following questions might be discussed and answered by parties.

- How are representatives to be determined?
- When can representatives consider they have the authority to sign documents?
- What processes are required before this point can be reached?
- What is the fiduciary duty of representatives?
- Which members of the broader community do they represent?
- What issues or interests do they represent?
- How might representatives communicate issues to and discuss them with the group?
- What assistance is available in representatives carrying out their roles and responsibilities?

➢ Conflict of Interest

Conflict of interest can be real or perceived, and can derail any process. Accusations of conflict of interest should be taken seriously.

Agreement-making processes should include consideration of:

- whether Indigenous organisations who are managing processes on behalf of others are, themselves, located in a dispute;
- the need to consider alternative funding sources and management for particular issues where this is a core problem;
- how staff of organisations who are also members of claimant groups or other interest groups should address conflict of interest issues;
- the histories of relationships of process experts and lawyers with individuals or groups (sometimes not widely known);
- the possible vested interests of parties who are members of other steering groups, Boards, Corporations, and Prescribed Bodies Corporate;
- parties who may stand to benefit privately from any proposed agreement;
- anthropologists seen as favouring one group or individual over others;
- previous involvement of lawyers in other related agreements; and
- government employees seen as favouring one interest, group or individual over another.

➢ Implementation

Agreement-making processes should:

- ensure that resources are secured and allocated for the implementation of agreements; and
- include provisions for the review and revisiting of outcomes and solutions, in recognition of evolving needs and circumstances.

➢ Complaints processes

Effective decision-making and dispute management processes should include fair complaints processes and avenues of appeal, compliance and non-compliance procedures.

➢ Employment of process experts and codes of conduct

Those involved in decision-making and dispute management processes should have appropriate training.

- Contract considerations for third party process consultants include:
    - contracts to be accompanied by signed Codes of Conduct;
    - staged contracts including:
        - Terms of Reference in the first stage, requiring that, in negotiation with parties, the consultant clearly identify the range and nature of

disputes and issues, the process they recommend, the steps it involves, their time frame and agreement of the parties to the process;

- a second stage contract for the type of intervention he/she is recommending; and
- a third stage relating to implementation;

- stipulation in contracts of the need for:
  - interactive interventions; and
  - ensuring that information is understood; and
- the use of Indigenous process experts including local ‘peacemakers’ who can make early interventions.

10. Evaluation

IFaMP has been concerned to support a culture of evaluation in the native title context. There has been little, if any, thorough and independent evaluation of process training or service delivery which addresses the relationship between the detail of micro processes and techniques and agreement-making outcomes. Ensuring appropriate training and delivery of facilitation and mediation services will have a flow on effect in improving Indigenous capacity to manage and own their business, decisions and conflicts.

All organisations that provide decision making and dispute management services need to take time to monitor, reflect on and evaluate their processes, practices and services to identify whether they are effective, relevant and responsive. Thorough and ongoing internal and independent evaluations which measure the effectiveness and sustainability of processes for native title applicants and others enable greater accountability. They also assist in ensuring that the necessary improvements can be made.

Ideally, policy should insist on evaluation being integrated into any initial design and program strategic planning. The aims and objectives of any process and the kinds of indicators, measures and benchmarks which can be used in measuring success over the short, medium and long term, should be clearly set out.

IFaMP has developed an Evaluation Toolkit in decision-making and dispute management for NTRBs which is located on its web site at http://ntru.aiatsis.gov.au\ifamp. The toolkit, written for those with little or no experience in evaluation aims to enable NTRBs and others to:

- conduct their own evaluations;
- build the knowledge and skills of staff in evaluation processes, and
- know when to employ external evaluators.

The toolkit was developed to provide evidence-based answers to the following two key questions which were developed at the two-day native title workshop of representatives of the FCA, NNTT, NTRBs, and NTRU in Year 3:

1. *To what degree did the decision-making and dispute management training strengthen your organisation's capacity to provide a more efficient and effective service?*
2. *To what extent, if any, has the service or process benefited native title holders, and the broader Aboriginal community?*

The kit is written in three parts: Part A sets the Native Title Representative Body evaluation context, identifies its major stakeholders, and suggests the indicators and measures to be employed in the evaluation of native title decision-making and dispute management training and processes. Part B outlines the steps in conducting an evaluation. Part C provides a number of worksheets and practical tools to assist in an evaluation.

The toolkit represents only a first step in developing effective evaluation processes in Indigenous decision-making and dispute management processes and training. More research is required to develop an evaluation framework which matches the nationally accredited training which is recommended above.

11. A national approach to best practice Indigenous decision-making and dispute management processes

IFaMP's research shows the importance of dealing with issues as they emerge within Indigenous groups or communities. Currently, Indigenous people are reliant upon and have to wait for the assistance of, process practitioners who may be located at some distance from their communities, and who may have little insight into their needs. Delays in dealing with issues – in native title Court adjournments or in the availability of NNTT members, for example - lead to increased opportunities for the escalation of disputes. Such delays ultimately make it harder to deal with any initial agreement-making matters and further eroding local capacity to deal with them. They also mean that agreement-making processes are slowed down considerably, that scarce resources are wasted, that the bases of previous negotiations may have changed, and that compelling issues which emerge as the negotiating team is about to leave are not addressed.

11.1. The need for skilled local Indigenous intervention

Locally and regionally based process services are required for Indigenous communities to respond promptly and effectively to issues and will be cost effective. IFaMP's research shows that Indigenous communities prefer that these services are provided by Indigenous practitioners, with the proviso that the latter are skilled, respected and acceptable to the groups involved. Indigenous practitioners may also wish to involve non-Indigenous practitioners as the need arises, particularly in co-mediation approaches. Native title mediation and other government program approaches are often made from from an institutional rather than a community-based perspective and can inadvertently undermine Indigenous community capacity in decision-making and conflict management.

Recommendations from IFaMP's practitioner workshops include:

- the development of more holistic approaches to native title mediation, including co-mediation, which recognise and account for not only the legal context in which native title issues are mediated, but also the Indigenous community and whole-of-government context; and
- the incorporation of Indigenous expertise into native title mediation processes, and support for the development of Indigenous expertise, particularly in the form of a supported national network of Indigenous process experts.

The involvement of skilled and respected Indigenous mediators is crucial for a range of reasons, a number of which are listed below and which emerged from IFaMP's workshops in relation to native title mediation.

- Non-Indigenous native title mediators may tend to gravitate to non-Indigenous parties where their comfort zone is located.
- Indigenous practitioners often employ more holistic, less formal more appropriate approaches to Indigenous issues.
- Indigenous parties may feel more at ease with Indigenous practitioners.

- Co-mediation approaches where Indigenous and non-Indigenous practitioners work together can go some way towards addressing power imbalances in native title mediations involving Indigenous and non-Indigenous parties.
- The use of Indigenous peacemakers who are respected and recognised as honourable people in the community adds authority to a process.
- Native title mediation is neither a simple process, nor, simply, a mediation process: more fundamental Indigenous social issues are involved to which Indigenous mediators are likely to be more empathetic.
- Indigenous mediators are constantly moving between a 'western' system of legal and administrative cultures and an Indigenous world with often contrasting cultural priorities: they may be more likely to have the necessary insights, understanding and skills in dealing with 'cross-cultural' issues.
- Indigenous parties are more likely to approach Indigenous practitioners to discuss issues because they perceive that they are more likely to be understood.

The need for a national network of Indigenous mediators and facilitators was first raised at a workshop of NTRB staff and native titleholders, facilitated by Indigenous mediators from the New South Wales Community Justice Centre, on the NTRB day of the Native Title Conference in Adelaide in 2004. Since then, it has been repeatedly brought to IFaMP's attention at numerous forums. It is the missing piece of infrastructure in Indigenous agreement-making processes.

Similar suggestions were made to NADRAC in its Indigenous forums held around the country to identify issues around alternative dispute resolution**.** Recommendation 4 of its report to the Australian Attorney-General suggests that governments:

- evaluate the proposal for a national network of Indigenous dispute resolution practitioners being developed by the Indigenous Facilitation and Mediation Project at the Australian Institute of Aboriginal and Torres Strait Islander Studies, and, if satisfied that it will be of practical benefit, examine ways in which it can be implemented (4.1);
- consider, as part of a consultative network, how to involve the national network into relevant service areas such as the proposed Family Relationship Centres, the provision of Indigenous legal aid services, Family Violence Prevention Legal Services, native title, service delivery agreements, community development programs and restorative justice programs (4.2); and
- encourage the involvement of this network in their relevant service delivery areas (4.3). [13]

The NADRAC report also refers to IFaMP in the context of the identified need to promote information sharing between Indigenous dispute resolution practitioners, between Indigenous and non Indigenous practitioners, between Indigenous-specific and mainstream services and between those involved in different dispute resolution and conflict management practice and program areas.

The need for timely, skilled and local Indigenous intervention will not be met by OIPC's Expert Panels or Enabler Networks. Although there is nothing to stop

[13] NADRAC. 2006. *Indigenous Dispute Resolution and Conflict Management*. Commonwealth of Australia.

Indigenous practitioners responding to OIPC's calls for expressions of interest in being on its Expert Panels and Enabler networks, these calls are unlikely to attract the full range of Indigenous practitioners, given their administrative and bureaucratic requirements. Neither do OIPC's networks currently appear to be accompanied by the appropriate professional development, mentoring, standards, training, capacity building, and support which is necessary for the effective local Indigenous interventions which will make all the difference in agreement-making processes.

The proposed Indigenous network needs to be community based whilst also having national and state co-ordination, have a strong a community focus and build on existing community capacity. Its skills are required in many areas, a number of which were identified by Indigenous mediators and facilitators at an IFaMP workshop, sponsored by OIPC's partnerships and shared responsibility branch in October 2005 and are listed in Appendix VI. Carried out effectively with appropriate support, it will achieve a multiplying effect.

11.2. Facilitator and mediator email lists

IFaMP has established an email list of some 75 Indigenous and 112 non-Indigenous mediators and facilitators and other process experts. The number of Indigenous mediators and facilitators is much higher when it is taken into account that the community mediation centres act as a clearing house for information sent to their Indigenous practitioners who are not generally listed individually on IFaMP's lists. The New South Wales Community Justice Centre alone has 75 trained Indigenous mediators.

Regular inquiries have been received from NTRBs and a range of other stakeholders seeking the services of facilitators and mediators, particularly Indigenous practitioners. During the life of the Project, IFaMP provided a valuable service in distributing Expressions of Interest notices from those making the inquiries on its email networks, to which a number of responses were received. IFaMP has prepared a discussion paper covering issues around the establishment, maintenance, operation and ownership of such lists.

A number of community mediation centres which are funded through Departments of Attorneys-General, have noted that the national approach which is being advocated here could provide their trained mediators, who are currently employed on a casual and piecemeal basis, with more substantial employment and vocational pathways.

11.3. Implementing IFaMP's Findings

There is a range of recommended implementation requirements, that have been identified from IFaMP's research, not all of which would necessarily be provided by a single agency. A whole-of-government approach is required which considers the roles of relevant commonwealth, state and territory government departments and authorities in carrying out these activities.

Ideally, these implementation activities would be managed and organised by a national program or secretariat whose activities might involve:

- co-ordinating a fully supported and accredited national network of Indigenous facilitators and mediators at state and territory levels and establishing appropriate processes and structures;

- building on existing networks including the community mediation centres in Queensland, Victoria, New South Wales and the Northern Territory which are well placed to co-ordinate activities at a local and regional level, the Australian Indigenous Leadership Centre, OIPC's Indigenous Women's Development Program and OIPC's Expert Panels and Multi-Use List for Community Facilitators/Coordinators;
- providing for a clearing house to ensure that Indigenous best practice issues are communicated effectively and efficiently;
- developing a national training curriculum and delivering relevant training in Indigenous engagement, decision-making and dispute management processes which includes ways of approaching Indigenous local capacity;
- mentoring of Indigenous trainees;
- developing common standards, monitoring and evaluation procedures in the Indigenous context;
- establishing complaints processes;
- carrying out a range of service delivery and training pilots;
- conducting and managing ongoing research including:
    - case studies; and
    - comparative Indigenous international research;
- co-ordinating 'internships' for staff of NTRBs, business, government, community and other leaders;
- establishing ways of matching of process expertise with community needs and tendering processes; and
- ongoing raising of awareness of the importance of process in achieving sustainable outcomes.

Meetings of Commonwealth, State and Territory-based relevant stakeholders are required in a whole-of-government framework to advance the implementation of IFaMP's research findings. These might involve departments of Attorneys-General, Families, Community Services and Indigenous Affairs and Justice, Health, Housing, Education, and OIPC and many others. Discussions should also involve the National Indigenous Council and the Human Rights and Equal Opportunity, as well as Indigenous Coordination Centres, community justice and mediation centres, Native Title Representative Bodies and other Indigenous organisations, networks and communities.

12. Conclusion

In the absence of a body specifically committed to promoting Indigenous procedural expertise, there is a risk that many of the issues identified by IFaMP's research will not be addressed. This is a critical time in Indigenous affairs and there is an urgent need to pay attention to Indigenous decision-making and dispute management processes to not only get them right for future Indigenous generations, but also to alleviate what might be seen as a broader burden on Australian society.

13. Recommendations

(a) That funding is provided from the relevant sections of Commonwealth and State Governments within a whole-of-government framework for a national secretariat to ensure the implementation of the range of IFaMP's findings concerning Indigenous agreement-making, decision-making and dispute management processes.

(d) That funding is provided for the missing piece of infrastructure in Indigenous agreement-making processes in the form of a supported and accredited national network of Indigenous process experts including mediators, facilitators and negotiators, who can make timely local interventions and who will ultimately be cost effective.

(e) That, where this has not already occurred, the National Native Title Tribunal, the Federal Court of Australia, the Office of Indigenous Policy Co-ordination and the Attorney-General's Department jointly act on the recommendations specifically related to native title which have arisen from IFaMP workshops and which are detailed in separate IFaMP reports as set out in Appendix VII.

Appendix I: List of IFaMP workshops facilitated and/or convened

1. Facilitation Training Workshop for South West Land and Sea Council, Perth, 2-3 September 2003 (R. Williams and T. Bauman facilitators).

2. Introduction to Managing Decision-making and Conflict Workshop for Community Development Officers, Northern Territory Government, Darwin, 3 November 2003 (T. Bauman facilitator).

3. Facilitating Indigenous Decision Making and Managing Disputes Workshop, Building Effective Indigenous Governance Conference, Jabiru, Northern Territory, 6 November 2003. Held on behalf of the Department of Community Development, Sport and Cultural Affairs with assistance from the Department of the Chief Minister, Office of Indigenous Policy (T. Bauman facilitator).

4. Native Title Representative Body Workshops (T. Bauman and R. Williams facilitators):
    a. Workshop on Decision-Making and Dispute Management, North Queensland Land Council and the Torres Strait Regional Authority, Cairns, 13-14 May 2004
    b. Workshop on Decision-Making and Dispute Management, Gurang Land Council Aboriginal Corporation and Central Queensland Land Council Aboriginal Corporation, Bundaberg, 10-11 May 2004
    c. Workshop on Decision-Making and Dispute Management, Yamatji Marlpa Barna Baba Maaja Aboriginal Corporation, Perth, 24-25 May 2004
    d. NTRB CEO Workshop on Decision Making and Conflict Management, Adelaide, 1 June 2004
    e. Community Justice Mediation Models and Native Title Workshop, Native Title Conference, Adelaide, 3-4 June 2004.

5. Pilot Facilitation Training Workshop, South West Land and Sea Council, Perth, September 2003 (T. Bauman and R. Williams facilitators).

6. Follow-up Evaluation Workshop, South West Land and Sea Council, Perth, 26 May 2004 (T. Bauman and R. Williams facilitators).

7. Evaluation of Mediation and Facilitation Training Workshop, AIATSIS, Canberra, 18 October 2004 (J. Rivers facilitator).

8. Native Title Representative Bodies and Community Justice/Dispute Settlement Centres Forum, AIATSIS, Canberra, 26-27 October 2004 (J. Rivers facilitator).

9. Indigenous Native Title Mediation Practitioners Workshop, AIATSIS, Canberra, 17-18 February 2005 (E. Watkin facilitator).

10. Native Title Mediation Practitioners Workshop, AIATSIS, Canberra, 15-16 March 2005 (F. Kingham and E. Watkin facilitators).

11. Implementing the recommendations of the NTRB Report – Indigenous Facilitation & Mediation Project Workshop, Native Title Conference 'The Human Face of Native Title', Coffs Harbour, 2 June 2005.

12. Third Party Involvement in Agreement Making and Participatory Community Development Workshop, AIATSIS, Canberra, 9 July 2005.

13. Indigenous Community Facilitators and Mediators Workshop: Towards a Supported National Network of Indigenous Facilitators and Mediators, AIATSIS, Canberra, 4 – 5 October 2005.

14. Facilitating decision making and managing disputes in Indigenous communities workshop, Australian Indigenous Leadership Centre Certificate 2 Course, Canberra, 21 November 2005.

15. Evaluation Toolkit: training and service delivery in decision-making and dispute management processes in native title Workshop, AIATSIS, Canberra, 5-6 December 2005 (J. Loza and J. Prince - Social Compass facilitators).

16. Pilot 2-day Training Introductory Workshop in Dispute Management, Native Title Services Victoria, Melbourne 20-21 February 2006 (T. Bauman and R. Williams facilitators).

17. Pilot 2-day Training Introductory Workshop in Dispute Management, Central Land Council, Alice Springs, 6-7 March 2006 (T. Bauman and R. Williams facilitators).

18. IFaMP Training and Evaluation Tools Workshop, Native Title Conference, Darwin, 24 May 2006 (T. Bauman facilitator/presenter).

Appendix II: List of IFaMP papers, publications and reports

Journals

Bauman, T. 2006. 'Nations and tribes 'within': Aboriginal 'nationalisms' in Katherine', *The Australian Journal of Anthropology,* Special Issue **'**Delimiting Indigenous Cultures: Exploring Conceptual Boundaries. (Toni Bauman and Patrick Sullivan, eds). (forthcoming, tentative title)

Sullivan, P. and T. Bauman (eds) 2006. 'Delimiting Indigenous Cultures: Exploring Conceptual Boundaries. Special Issue of *The Australian Journal of Anthropology,* Sydney. (forthcoming, tentative title)

Native title Research Unit Issues Papers

Bauman, T. 2006. 'Waiting for Mary: process and practice issues in negotiating Indigenous decision-making and dispute-management frameworks in native title agreement-making', *Land, Rights, Laws: Issues of Native Title,* Vol 3. No. 6. Native Title Research Unit, Australian Institute of Aboriginal and Torres Strait Islander Studies, Canberra.

Bauman, T. 2005. 'Whose Benefits? Whose Rights? Negotiating rights and interests among native title parties', *Land, Rights, Laws: Issues in Native Title* Vol.3 No.2. Native Title Research Unit, Australian Institute of Aboriginal and Torres Strait Islander Studies, Canberra.

NTRB Practice Papers and Resources

Indigenous Facilitation & Mediation Project and Capital Careers. 2006. *Finding Training Solutions in Indigenous Decision-Making and Conflict Management: A Resource for Native Title Representative Bodies.* Native Title Research Unit, Australian Institute of Aboriginal and Torres Strait Islander Studies, Canberra.

Indigenous Facilitation & Mediation Project and Social Compass. 2006. 'Evaluation Toolkit: Training and Service Delivery in Decision-Making and Dispute Management Processes in Native Title.' Native Title Research Unit, Australian Institute of Aboriginal and Torres Strait Islander Studies, Canberra.

Indigenous Facilitation and Mediation Project 2006. 'Guidelines for Developing Decision Making and Dispute Management Policy for Native Title Representative Bodies, Native Title Services and Land Councils.' Native Title Research Unit, Australian Institute of Aboriginal and Torres Strait Islander Studies, Canberra.

Indigenous Facilitation and Mediation Project 2004. Negotiating Native title. Options for Dispute Management and Decision-making. A Flier. Native Title Research Unit, Australian Institute of Aboriginal and Torres Strait Islander Studies, Canberra.

Indigenous Facilitation and Mediation Project 2004. Making a complaint about native title mediation. Briefing Paper, No 5, May 2005. Native Title Research Unit, Australian Institute of Aboriginal and Torres Strait Islander Studies, Canberra.

IFaMP Reports, Papers and Publications

2006

Bauman, T. 2006. 'Final Report of the Indigenous Facilitation & Mediation Project July 2003/04 – June 2006: research findings, recommendations and implementation.' Native Title Research Unit, Australian Institute of Aboriginal and Torres Strait Islander Studies, Canberra.

Indigenous Facilitation and Mediation Project. 2006. 'Implementation of the Initiatives and Recommendations of the Indigenous Facilitation and Mediation Project (2006-2009)'. Briefing Paper, Native Title Research Unit, Australian Institute of Aboriginal and Torres Strait Islander Studies, Canberra.

Kingham, F. and Bauman, T. 2006. 'Native title mediation: issues identified, lessons learnt: proceedings and findings of IFaMP workshops with native title Indigenous and non-Indigenous mediators, February and March 2005.' IFaMP Report No 5, Native Title Research Unit, Australian Institute of Aboriginal and Torres Strait Islander Studies, Canberra.

2005

Bauman, T., Clements, J., and A. Koeman 2005. 'Making a Difference: towards establishing national networks of Indigenous process experts in a whole-of-government approach,' final report of Workshop of Indigenous Mediators and Facilitators, 4-5 October 2005. Native Title Research Unit, Australian Institute of Aboriginal and Torres Strait Islander Studies, Canberra.

Bauman, T. and R. Williams 2005. *The Business of Process: Research Issues in Managing Indigenous Decision-Making and Disputes in Land*. Indigenous Facilitation & Mediation Project, Report No.1, Native Title Research Unit, Australian Institute of Aboriginal and Torres Strait Islander Studies, Canberra (Formerly published as AIATSIS Research Discussion Paper No. 13).

Brockwell, S. Eggerking, K. Morphy, R. and T. Bauman, 2005. *Culture, Conflict Management and Native Title: An Emerging Bibliography*. Indigenous Facilitation & Mediation Project, Report No. 4, Native Title Research Unit, Australian Institute of Aboriginal and Torres Strait Islander Studies, Canberra.

Indigenous Facilitation and Mediation Project 2005. 'Towards a National Network of Indigenous Process Experts in Agreement-Brokering, Decision-Making and Conflict Management,' backgrounder for Workshop of Indigenous Mediators and Facilitators, 4-5 October 2005. Native Title Research Unit, Australian Institute of Aboriginal and Torres Strait Islander Studies, Canberra.

Indigenous Facilitation and Mediation Project 2005. 'Building Indigenous Capacity in Consultation, Negotiation and Agreement-Brokering: The Need for Procedural Expertise,' backgrounder for Workshop of Indigenous Mediators and Facilitators, 4-5 October 2005. Native Title Research Unit, Australian Institute of Aboriginal and Torres Strait Islander Studies, Canberra.

Indigenous Facilitation and Mediation Project 2005. 'Issues associated with the establishment, maintenance and distribution of a list of Indigenous mediators and

facilitators', Native Title Research Unit, Australian Institute of Aboriginal and Torres Strait Islander Studies, Canberra.

Kingham, F. and T. Bauman 2005. 'Report on proceedings of the Indigenous Native Title Mediation Practitioners Workshop 17 - 18 February 2005', Indigenous Facilitation & Mediation Project, Native Title Research Unit, Australian Institute of Aboriginal and Torres Strait Islander Studies, Canberra.

Kingham, F. Bauman, T and M. Black 2005. 'Report on Proceedings of Workshop of Native Title Mediators 15 and 16 March 2005', Indigenous Facilitation & Mediation Project, Native Title Research Unit, Australian Institute of Aboriginal and Torres Strait Islander Studies, Canberra.

Williams, R. 2005. *Native Title Mediation Practice: The Commonalities, the Challenges, the Contradictions: A Survey of Native Title Mediators.* Indigenous Facilitation & Mediation Project, Report No. 3, Native Title Research Unit, Australian Institute of Aboriginal and Torres Strait Islander Studies, Canberra.

Williams, R. and T. Bauman 2005. *Report on Native Title Representative Body Workshops: Directions, Priorities and Challenges*. Indigenous Facilitation & Mediation Project, Report No. 2, Native Title Research Unit, Australian Institute of Aboriginal and Torres Strait Islander Studies, Canberra (First published in 2004, re-printed in 2005).

2004

Bauman, T. and S. Brockwell 2004. 'Community Mediation Centres and Native Title Representative Bodies Forum 26-27 October 2004: Summary of Proceedings and Outcomes', Indigenous Facilitation & Mediation Project, Native Title Research Unit, Australian Institute of Aboriginal and Torres Strait Islander Studies, Canberra.

Bauman, T. and S. Close 2004. 'IFaMP Evaluation Workshop – 18 October 2004: Summary of Proceedings and Outcomes', Indigenous Facilitation & Mediation Project, Native Title Research Unit, Australian Institute of Aboriginal and Torres Strait Islander Studies, Canberra.

Bauman, T. 2004. 'Confidential Report on Gurang Land Council Aboriginal Corporation and Central Queensland Land Council Aboriginal Corporation – Workshop on Decision-Making and Dispute Management - 10-11 May 2004', Indigenous Facilitation & Mediation Project, Native Title Research Unit, Australian Institute of Aboriginal and Torres Strait Islander Studies, Canberra.

Bauman, T. 2004. 'Confidential Report on North Queensland Land Council Aboriginal Corporation and Torres Strait Regional Authority – Workshop on Decision-Making and Dispute Management – 13-14 May 2004', Indigenous Facilitation & Mediation Project, Native Title Research Unit, Australian Institute of Aboriginal and Torres Strait Islander Studies, Canberra.

Bauman, T. 2004. 'Confidential Report on Yamatji Marlpa Barna Baba Maaja Land Council Aboriginal Corporation – Workshop on Decision-Making and Dispute Management – 24-25 May 2004', Indigenous Facilitation & Mediation Project, Native Title Research Unit, Australian Institute of Aboriginal and Torres Strait Islander Studies, Canberra.

Bauman, T. 2004. ‘Emerging issues in native title mediation and facilitation research and practice for NTRBs.’ Presentation in the session ‘Mediation and Facilitation in Native Title Processes’ at the Native Title Conference ‘Building Relationships’, Adelaide, 3 June.

Appendix III: IFaMP presentations, conferences, and seminars

2006

Bauman, T. 2006. 'Issues in native title decision-making and conflict management', PowerPoint presented by video-conference to National Native Title Tribunal offices, Facilitation & Mediation Project, Native Title Research Unit, Australian Institute of Aboriginal and Torres Strait Islander Studies, Canberra, 24 July.

Bauman, T., Dodson, M., and J. Glanville 2006. 'A casual conversation around photographs: the Australian Indigenous governance study tour to British Columbia, Arizona and New Mexico, 26 May - 13 June 2006'. PowerPoint presentation to the public, Australian Institute of Aboriginal and Torres Strait Islander Studies, Canberra, 14 July.

Bauman, T. 2006. 'Indigenous Facilitation & Mediation Project Final Seminar', PowerPoint presentation delivered at Australian Institute of Aboriginal and Torres Strait Islander Studies, Canberra, 11 July.

_____ 2006. 'Waiting for Mary: Process issues in facilitating Indigenous decision-making and managing disputes in an agreement making process', PowerPoint presentation, National Mediation Conference, Hobart, 5 May 2006, Indigenous Facilitation & Mediation Project, Native Title Research Unit, Australian Institute of Aboriginal and Torres Strait Islander Studies, Canberra.

_____ 2006. 'Waiting for Mary: Process issues in facilitating Indigenous decision-making and managing disputes in an agreement making process', Paper presented at Native Title Conference, Darwin, 25 May 2006, Indigenous Facilitation & Mediation Project, Native Title Research Unit, Australian Institute of Aboriginal and Torres Strait Islander Studies, Canberra.

2005

Bauman, T. 2005. 'Indigenous Facilitation & Mediation Project', PowerPoint presentation delivered to the Native Title Representative Body Professional Officers Workshop, Office of Indigenous Policy Coordination, Canberra, 10 October.

_____ 2005. 'The relevance of mediation to Aboriginal people', address to the Aboriginal Community Justice Centres' 25th Anniversary celebration, Tranby College, Sydney, 15 December.

_____ 2005. 'Facilitating decision making and managing disputes in Indigenous communities workshop', PowerPoint presentation to the Australian Indigenous Leadership Centre Certificate 2 Course, Canberra, 21 November.

_____ 2005. 'Learning from the Indigenous Facilitation & Mediation Project, the Australian Institute for Aboriginal and Torres Strait Islander Studies', PowerPoint 'brown bag' presentation to the Governance and Public Administration Branch, Department of Economic and Social Affairs, United Nations, New York, 18 May.

_____ 2005. ‘Indigenous Facilitation & Mediation Project’, PowerPoint presentation delivered to the Office of Indigenous Policy Co-ordination’s (OIPC), Native Title Representative Body CEO Forum, Adelaide, 8 April.

_____ 2005. ‘Learning from the Indigenous Facilitation & Mediation Project’, PowerPoint presentation delivered at the Federal Court of Australia Native Title Workshop, Brisbane, 6 April.

2004

Bauman, T. 2004. ‘Culture’, Conflict and Competing discourses of Indigenous rights, interests and needs in native title’, paper and PowerPoint delivered in session ‘A Theoretical and Practical Framework for Dealing with Culture and Conflict’ at the AIATSIS Conference ‘Indigenous Studies: Sharing the Cultural and Theoretical Space’, Canberra, 22-25 November.

_____ 2004. ‘Australian Indigenous ‘Cultures’, Conflict and Categorisation’, PowerPoint presentation delivered at New Humanities Conference ‘Rethinking the Theory and Practice of Ethnic and Indigenous Conflict and Conflict Management’, Prato, Italy, 20-23 July. Participation sponsored by Newmont Australia.

_____ 2004. ‘Building on Indigenous Skills in Decision-Making and Dispute Management in Native Title’, Power point presentation delivered at National Mediation Conference ‘True Talking, Forward Walking’, Darwin, 30 June – 2 July.

_____ 2004. ‘Emerging issues in mediation and facilitation research and practice for NTRB’s’, paper presented at the Native Title Conference ‘Building Relationships’, Adelaide, 3-4 June.

_____ 2004. ‘Anthropological praxis in Australian Indigenous Decision-making and Dispute Management’, PowerPoint presentation to Masters of Applied Anthropology class, Australian National University, 8 April.

Williams, R. 2004. ‘The practice of mediation in native title in Australia: a survey’, paper presented in the session ‘Mediation and Facilitation in Native Title Processes’ at the Native Title Conference ‘Building Relationships’, Adelaide, 3 June.

2003

Bauman, T. 2003. ‘Nations within Nations, Tribes within Tribes: Aboriginal ‘nationalism’ in Katherine’, paper presented in the session ‘Critiquing Ideologies of Boundaries and Borderlands’ at the Australian Anthropological Society Conference, University of Sydney, 1-3 October.

_____ 2003. ‘In the Middle: Bringing Communities Together Indigenous Capacity in facilitating decision-making and managing disputes’, overhead presentation as part of the Cross-Cultural Research Centre 20/20/20 Series, Australian National University, 23 October.

_____ 2003. ‘Towards a Common Practice Investigating Australian Indigenous Dispute Management Needs in Land Issues’, PowerPoint presented to Rio Tinto Beechworth Workshop ‘Current Research in Monitoring and Implementing Indigenous Land Use and Related Agreements in the Minerals Industry’, 8-9 December.

_____ 2003. ‘Anthropology, Identity, Native title and conflict’, presentation with Bradfield, S., Kelly, G., Oxenham, D. and L. Strelein at Native Title Research Unit Workshop, Native Title Business Forum, National Museum of Australia, Canberra,11 December.

Bauman, T. and R. Williams. 2003. ‘Towards a Common Practice Investigating Australian Indigenous Dispute Management Needs in Land Issues’, overhead and paper presented at the Asia Pacific Mediation Forum, Singapore, 19-22 November. Travel for Toni Bauman sponsored by the Minerals Council of Australia.

Appendix IV: Presentations in the IFaMP AIATSIS Seminar Series, 'Native title, Decision-Making and Conflict Management'

Agius, P. 2005. 'Aboriginal Law and Native Title Mediation: the Spear Creek, Port Augusta Example', paper delivered at the AIATSIS Seminar Series 'Native Title, Decision-making and Conflict Management', Semester 1 2005, Australian Institute of Aboriginal and Torres Strait Islander Studies, Canberra, 28 February.

Noble, K. 2005. 'The Trouble with Native Title Mediation', paper delivered at the AIATSIS Seminar Series 'Native Title, Decision-making and Conflict Management', Semester 1 2005, Australian Institute of Aboriginal and Torres Strait Islander Studies, Canberra, 7 March**.**

Tim, K. 2005. 'Leading New Ways of Doing Business', paper delivered at the AIATSIS Seminar Series 'Native Title, Decision-making and Conflict Management', Semester 1 2005, Australian Institute of Aboriginal and Torres Strait Islander Studies, Canberra, 14 March**.**

Weiner, J. 2005. 'Contemporary Socio-political Fragmentation in Native Title Claim Groups in Queensland', paper delivered at the AIATSIS Seminar Series 'Native Title, Decision-making and Conflict Management', Semester 1 2005, Australian Institute of Aboriginal and Torres Strait Islander Studies, Canberra, 22 March.

Burton, J. 2005. 'The People Remember and the Government Forgets: the last 100 years of land disputes at Mer, Torres Strait', paper delivered at the AIATSIS Seminar Series 'Native Title, Decision-making and Conflict Management', Semester 1 2005, Australian Institute of Aboriginal and Torres Strait Islander Studies, Canberra, 22 March.

Jones, C. 2005. 'Apples and oranges: The intersection of Aboriginal law and native title mediation', paper delivered at the AIATSIS Seminar Series 'Native Title, Decision-making and Conflict Management', Semester 1 2005, Australian Institute of Aboriginal and Torres Strait Islander Studies, Canberra, 11 April.

Cochrane, M. 2005. 'Native Title, Cultural Heritage and Land Management: Issues in Decision-Making and Conflict Management for the Aboriginal Rainforest Council', paper delivered at the AIATSIS Seminar Series 'Native Title, Decision-making and Conflict Management', Semester 1 2005, Australian Institute of Aboriginal and Torres Strait Islander Studies, Canberra, 18 April.

Williams, R. 2005. 'Native Title Mediation Practice: the Commonalities, the Challenges, the Contradictions', paper delivered at the AIATSIS Seminar Series 'Native Title, Decision-making and Conflict Management', Semester 1 2005, Australian Institute of Aboriginal and Torres Strait Islander Studies, Canberra, 26 April.

Bulan, R. 2005. 'Decision-making, Conflict Management and Representation in Native Title: A case study of the Kelabit Dispute Resolution in Sarawak, Malaysia', paper delivered at the AIATSIS Seminar Series 'Native Title, Decision-making and Conflict Management', Semester 1 2005, Australian Institute of Aboriginal and Torres Strait Islander Studies, Canberra, 2 May.

Bauman, T. 2005. ‘Whose Benefits? Whose Rights? Negotiating rights and interests among native title parties’, paper delivered at the AIATSIS Seminar Series ‘Native Title, Decision-making and Conflict Management’, Semester 1 2005, Australian Institute of Aboriginal and Torres Strait Islander Studies, Canberra, 9 May.

Brigg, M and P. McIntyre. 2005. ‘Cross-Cultural Mediation and Training: Problems and Prospects’, paper delivered at the AIATSIS Seminar Series ‘Native Title, Decision-making and Conflict Management’, Semester 1 2005, Australian Institute of Aboriginal and Torres Strait Islander Studies, Canberra, 16 May.

Sullivan, P. 2005. ‘Complexity in the New Regime for Indigenous Affairs Policy and Administration: Implications for Native Title Mediation and Facilitation’, paper delivered at the AIATSIS Seminar Series ‘Native Title, Decision-making and Conflict Management’, Semester 1 2005, Australian Institute of Aboriginal and Torres Strait Islander Studies, Canberra, 23 May.

Appendix V: Examples of feedback on IFaMP activities

IFaMP NTRB pilot training

- regret that IFaMP's advice that three days were required for the training to be optimal;
- an average rating of 4.3 out of 5;
- a CEO reported that staff had indicated the two days had been 'very well spent';
- thanks - 'terrific training from which we all benefited. I hope there can be more to come!';
- indication by NTRB staff that this was the type of training they needed as part of induction;
- the training gave the staff a model (eg: the satisfaction triangle) to articulate what they could sense/see was going on but were unable to describe systematically/enunciate, express clearly;
- recognition by staff that they were part of the conflict they were engaged in mediating and this impacted on the process and the results.
- conflict can be prevented with proper planning, including staff being trained in, very early on, strategies for dealing with conflict as it arises**.**

Need for a national approach to provision of services by Indigenous mediators, facilitators and negotiators.

"I believe your project may be of real interest to many at Commonwealth and State level, particularly in light of the new direction in Indigenous Affairs…[A difficulty in] consulting with community [is that] many times one comes up against a perceived 'preference' or 'particular bent' in relation to community consultations. Many Indigenous people choose not to participate due to these perceptions and we lose out in being able to get feedback on current need and most suitable response to it. It would be great if there was actually a national accreditation/regulation framework and recommended list so that the public (and other consultants) are confident that these consultants all face the same hurdles in relation to appointment."

AIATSIS Seminar Series in 2005

"…your seminar series is extremely impressive – the best yet…this seminar series is the best ever to come out of the institute. Congratulations…"(28 Feb 05).

Training Resource Guide

Feedback from a person responsible for training in an NTRB was that the resource is 'by far one of the best "Where to, How to" resources around' and that it will 'help draft and implement a training plan for the NTRB as a whole'.

March 2005 Mediation Practitioner's Workshop

"Thank you and AIATSIS for the opportunity to participate in the Workshop and congratulations to you and your 'team'. The workshop was well and efficiently run (things happened when we had been told they would happen – a

rarity these days in seminars, workshops), was extremely informative and there was an interesting group of participants."

October 2005 workshop of Indigenous Facilitators and Mediators

"Your persistence and commitment to the project is most inspiring. Thanks for the opportunity to have been both a facilitator and a participant at various workshops throughout the year. I enjoyed myself in both roles and believe that I am professionally a better facilitator as a consequence of your fine project. Once again, congratulations on the fine work."

Appendix VI: Examples of programs which would benefit from skills in Indigenous decision-making and dispute management processes.

(Extract from IFaMP workshop report, *Making a Difference: towards establishing national networks of Indigenous process experts in a whole-of-government approach, final report of Workshop of Indigenous Mediators and Facilitators, 4-5 October 2005*. (Bauman, T., Clements, J., and A. Koeman, 2005.)

Whole-of-Government

- Facilitating the improvement of whole of government processes and the implementation of the new arrangements between community and governments and between government departments, local and regional authorities and state and territory and federal governments (police, roads, local councils, education, health, welfare etc).
- Evolution of SRAs and RPAs: it is the first time that people have been able to negotiate service delivery outside of the native title regime. Hence they have a new negotiation platform and need to develop skills in this area. People may withhold agreement when thrust into key positions, particularly when historical issues involving conflict are involved.

Native title and land ownership

- **NNTT and Federal Court:** negotiation and mediation of native title and non-native title outcomes and the need to supplement NNTT and Federal Court services which are limited and unable to involve the longer term facilitations which are necessary to provide appropriate support to community groups.

- **Agreement making and negotiation:** focus of Attorney-General's Department (AGD) is agreement making rather than litigation – process skills are in high demand.

- **NTRBs:** negotiation, facilitation, mediation of many issues in relation to native title claims. NTRBs have a dispute resolution under the *Native Title Act 1993* for resolving disputes in the community. This is ultimately about lawyers taking effective instructions from their clients.

- **Reforms to land rights legislation and native title processes**: the effects of proposed changes to the *Aboriginal Land Rights Northern Territory Act 1976 Act* will need communicating in well facilitated discussions, as will reforms to NTRBs and possible changes arising out of the review of the roles of the Federal Court and the NNTT.

- **Prescribed Bodies Corporate**: there is an ongoing need to facilitate communications around membership of PBCs and jurisdictional issues.

Natural Resource Management (NRM)

- **Land Management:** negotiation of land and sea rights.
- **Natural Resource Management (NRM) Plans/Agreements:** support for the development of these agreements, which are tending to become regional in scale is needed also in dealing with native title issues and helping to strengthen native title holders in their dealings with resource developers.

- **Caring for Country coordination with SRAs and RPAs:** in the *Caring for Country* program, there have been hundreds of country related management plans developed. It is very important that the ICCs engage with these plans in order to co-ordinate SRAs and RPAs with them. This will avoid duplication and utilise existing agreements and structures, where much hard work has already taken place, and continues to take place. (This is already taking place in Western Australia and OIPC and the Department of Environment and Heritage are looking to build on this experience).
- **National approaches to forestry and collaborative forest management.**

Employment

- **Employment opportunities**: process experts can facilitate employment of community members in a fair way when there are limited employment offers. For example, when mining companies have offered a number of jobs to a community, this has resulted in conflict over who will take the positions. In some instances, positions remain unfilled because people wish to avoid conflict.
- **Reforms around Community Development Employment Projects (CDEPs):** the linking of CDEPs to SRAs is a key area where Indigenous practitioners can contribute (if there are multiple CDEPs per SRA, there are multiple agreements being made, and thus funding and impact is increased).
- **Keeping CDEP alive:** assist communities in developing options around and making decisions about how CDEP can be better integrated into broader and ongoing employment opportunities and community initiatives by drawing on the positive aspects of the program.
- **Indigenous recruitment and retention in the Australian Public Service (APS):** there are significant issues in Indigenous recruiting and retainment in the APS which need workplace facilitation between staff and management.

Family and Community Services

- **FACS (federal) and DOCS, DCD (state):** there is a strong need for independent mediators and facilitators as staff of these bodies may be considered biased and viewed with suspicion (as a result of past policies, there is a fear that children will be 'stolen' again).
- **Relationships Australia:** provide culturally appropriate resources to and training of existing staff in Relationships Australia (a 'white' mediation and counselling service) in order that there is a service provided by and for Indigenous people.
- **Family Relationship Centres:** work to ensure the inclusion of Indigenous specialists in these from the day they commence operation; mediation is central to their operations which also involve child care and protection.
- **Restoring connections to communities (Stolen Generations):** there is a need for facilitators and mediators who can mediate processes where people have lost connections with communities and wish to restore connections or return to these communities – these processes can be vexed.
- **Government focus on engagement with families and individuals:** the ability to identify appropriate interest groups in communities and to work with them at their level requires significant skills.

- **Family cohesion:** mediating family breakdowns and relationships to create better family cohesion within and across families and mediate more widely on the family violence issues (cross-family violence is being neglected).

- **Community relationships:** facilitating holistic approaches to community issues and disputes including establishing agreed processes of decision-making and conflict management.

Education

- **Relationships in educational institutions:** there are often issues between Indigenous students and/or staff and other students, staff and management in educational institutions at all levels (schools, TAFEs and Universities) which required facilitated discussion and/or mediation.

Youth, health and well-being

- **Facilitating responses to better managing substance abuse:** petrol sniffing is a major issue and the federal government is going to dedicate significant energies to tackle it. The current response – dealing with aromatic fuels - is insufficient as there are two hundred other alternative substances that sniffers can turn to. Causality needs to be addressed.

- **Youth issues:** There is an urgent need to better involve youth in the future of communities and to have informed conversations amongst themselves and with their elders around issues such as substance abuse, youth suicide, and improved opportunity.

Welfare Reform

- **Welfare reform:** welfare reform is a priority agenda item for the Government. Around 165,000 Indigenous people receive some sort of benefit per fortnight, which equates to around $1.41 billion in direct welfare payments. Proposed changes to family payments and remote area exemptions may well give rise to an increased health bill as they place extra burdens on the physical, social, mental, and emotional health of Indigenous families who are trying to look after those no longer qualifying for payments/exemptions. These reforms need careful discussion amongst Indigenous people who have little understanding of them to improve the effectiveness of family payments and negotiate better reforms to the remote area exemption.

Housing

- **Commonwealth/state housing arrangements:** Indigenous people are keen to work at building community houses, but contracts are often awarded outside the community; allocation of housing is also a significant cause of conflict in communities and there need to be transparent processes of decision-making around them. There will also be a need to facilitate housing reforms on-the-ground around the CHIP program.

Resources

- **Facilitating appropriate and effective resources:** informed Indigenous discussion and decision-making is required around the allocation of resources to housing, education, and community infrastructure; it is also required around issues of access to and quality and appropriateness of service delivery.

Outstations and homelands

- **Outstations and homelands debate:** this issue appears to have been caught up in the bilateral agreements between the Commonwealth and States. There is a need to articulate how vital this movement is for the nation, not just in terms of preservation of culture, but also in a purely monetary sense - it reduces expenditure on other compensatory type programs such as those dealing with family violence.

Economic development

- **Approaches to community stores:** there are hundreds of community stores with substantial turn-overs across Australia servicing Indigenous communities. These businesses are attractive and are worth millions. There is a need to facilitate discussions and decisions around store ownership, franchises and local business opportunities.
- **Indigenous Business Australia: IBA** has a number of opportunities but Indigenous businesses often become bogged down in conflicts and factional tensions which can see businesses boycotted. The feasibility of businesses needs careful discussion and there are often land tenure issues which need resolving for businesses to prosper. Areas of micro-financing need attention to ensure the involvement of experienced people.

Criminal and Restorative Justice

- **Courts:** effective facilitative processes can assist criminal and family courts and those appearing at court and their families. They can help reduce criminal justice contact in facilitate restorative justice measures and alternative forms of community owned sentencing such as circle sentencing.

Return of Aboriginal Remains

- **State, Territory and National Museums**: facilitate processes with relevant elders and government authorities and institutions regarding return of Aboriginal remains and build the capacity of cultural heritage officers to deal with these issues. These processes are often accompanied by much prolonged and longstanding conflict.

6.3 Non-Government areas requiring process services

- **Development and charitable organisations (Oxfam, Smith Family, World Vision etc)**: review NGO engagement with Indigenous people and provide assistance to those coming to work with Indigenous communities; many are new to communities. Build cultural competencies within these organisations; increasing their ability and capacity to work with community, while at the same time increasing the ability and capacity for community to access what these organisations offer.
- **International multinational companies and philanthropic groups**

- **Environmental Groups**: facilitating conversations between Indigenous people and environmental groups to ensure that the Indigenous viewpoint is not misrepresented either in favour of or against the views of the conservationists; achieving conservation outcomes that contribute to social and economic development as required by communities.
- **Reconciliation Australia**: assisting RA in its engagement with communities and partners and stakeholders (see below);
- **Resource developers - mining companies, for example and corporate sector (banks, supermarkets, retail etc)**: build their capacity in working with Indigenous communities, undertaking agreement brokering, and consumer advocacy. Resource developers such as mining companies need to have appropriate people brokering their agreements and not necessarily lawyers who often do not understand the needs of Indigenous communities. This also applies to corporations such as Woolworths and Coles who are entering into bush tucker deals with communities.
- **Consumer Advocacy**

Appendix VII: IFaMP Native Title Recommendations

1. Extract from: *Native title mediation: issues identified, lessons learnt: proceedings and findings of IFaMP workshops with native title mediators February and Match 2005*. (Kingham and Bauman, 2006) IFaMP Report No. 5.

A range of common best practice themes and training needs have been identified through IFaMP's workshops with native title mediation practitioners. They provide the basis for action which should be considered by the National Native Title Tribunal, the Federal Court of Australia, the Department of Attorney-General and the Office of Indigenous Policy Co-ordination.

Recommendations include:

- the development of more holistic approaches to native title mediation, including co-mediation, which recognise and account for not only the legal context in which native title issues are mediated, but also the Indigenous community and whole-of-government context;
- the incorporation of Indigenous expertise into native title mediation processes, and support for the development of Indigenous expertise, particularly in the form of a supported national network of Indigenous process experts;
- the development of specific native title national standards and/or a code of ethical conduct which addresses the roles and responsibilities of all participants in native title including the mediator, parties and their advisers;
- the provision by the NNTT and the Federal Court of training and information about native title legislation and processes to trained Indigenous mediators who do not have experience in native title of training; and
- the development by the NNTT of native title training packages which address the specific training needs identified in this report.

2. Extract from: *Indigenous Facilitation and Mediation Project Report on Native Title Representative Body Workshops: Directions, Priorities and Challenges* (Williams and Bauman, 2004, IFaMP Report No. 2).

1. Existing native title education and information packages and kits need review and assessment in relation to their ease of use, ability to be easily and quickly updated and their appropriateness for a variety of Indigenous audiences.

2. The level of resources required by NTRBs and applicants to update, develop and deliver native title education and information packages should be identified and allocated by those responsible including NNTT, NTRBs, OIPC and others.

3. Opportunities for developing joint strategies for claim management, including better co-ordination of the range of processes, could be explored further by NTRBs, the NNTT and others in order to minimise duplication and enhance the efficient use of resources.

4. NNTT should give consideration to sponsoring a workshop to develop best practice approaches to dealing with overlapping claims.

5. There is a need to review the processes by which NTRBs collect, exchange, and allow access to connection materials in order to develop best practice guidelines and policies.

6. As part of this review process, IFaMP should identify strategies to co-ordinate a workshop to review and agree upon joint approaches between lawyers and researchers and the range of agencies involved for the use of connection materials.

7. IFaMP should explore the possibilities of piloting the creation of a dedicated staff position of process manager in NTRBs in collaboration with interested NTRBs.

8. The NNTT should give consideration to holding a series of workshops for applicants to discuss applicant roles and responsibilities. This would require liaison between NTRBs and those presenting information to ensure that information presented is congruent with NTRB approaches.

9. IFaMP recommends that OIPC identify ways it can assist and support neighbouring NTRBs to meet and explore further ways of sharing resources and working together strategically. This would also support co-ordinated approaches to claim management.

10. There is a need for regular and separate state-based forums for researchers and lawyers to learn from each others' expertise and experience and to carry out strategic planning. This needs to also happen for NTRB field/project officer staff to allow and encourage them to share information and practical strategies including approaches to decision-making and conflict management.

11. A code of conduct and terms of reference must be developed which detail the ethical and professional obligations of native title mediators.

12. The training of regionally based Indigenous mediators and facilitators, both male and female, is an urgent priority.

13. OIPC and IFaMP, as a matter of priority, should identify strategies to secure resources for a consultant who could identify approaches including funding opportunities to support the achievement of vocational qualifications for ALOs.

14. IFaMP recommends that OIPC identify the resources required for:
    - the development of a standard induction process;
    - the development of localised cross-cultural training; and
    - the trialling and evaluation of pilots in these training programs.

15. IFaMP recommends that OIPC identify the resources required for developing strategies and providing pilot training and evaluation in the 20 priority training modules identified in this report.

16. IFaMP should continue to identify potential training providers and pilot training activities in the areas identified in this report.

17. IFaMP should develop an evaluation framework which can be used to evaluate training activities.

18. IFaMP should continue to progress discussions for a coordinated national approach to the issues identified in this report including the development of regional panels of Indigenous mediators and facilitators.