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**“Developing a mediation culture”**

**NEW WAYS OF DOING BUSINESS –MOVING FROM A CULTURE OF  
DISPUTE TO A CULTURE OF NEGOTIATION**

**ABSTRACT**

In Australia the Mabo decision overturned the legal fiction of *terra nullius*. It recognised that Indigenous Australians have ongoing native title interests, which co-exist alongside non-Indigenous interests in land. This has created a complex site for negotiations between stakeholder groups and in many instances has seen a highly adversarial culture emerge.

In South Australia, the Native Title Unit of the Aboriginal Legal Rights Movement has sought to work with all the stakeholders to create a culture of dialogue and negotiation. Recognising that Aboriginal communities and interests have often been poorly served by lawyer-driven, outcome-focussed, processes, the Unit has sought to develop facilitative mediation processes that are driven, not by lawyers, but by the very people whose interests are being negotiated – the stakeholders themselves.

This paper seeks to explore the new ways of doing business that emphasise building relationships and understanding between stakeholder groups that have been trialled and developed in South Australia. It will also explore what is necessary to bring about a cultural shift in the expectations that stakeholders bring to negotiations so that they are prepared for dialogue rather than dispute.

In conclusion the paper will argue that a new way of doing business that is just, sustainable and driven by the stakeholders rather than imposed by external experts is necessary in order for cultures of dialogue and negotiation to emerge even from the most battle-hardened and scarred participants.

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**Author:**

**Parry Agius  
Executive Officer  
ABORIGINAL LEGAL RIGHTS MOVEMENT –  
NATIVE TITLE UNIT**

**Mailing Address:**

**Mr Parry Agius  
Executive Officer  
ALRM – NATIVE TITLE UNIT  
Level 4, 345 King William Street  
ADELAIDE SA 5000**

**Contact:**

**Cheryl Newman**

**Telephone:**

**(08) 8110 2800**

**Fax:**

**(08) 8211 7424**

**Email:**

**[parrya@nativetitlesa.org.au](mailto:parrya@nativetitlesa.org.au)**

## NEW WAYS OF DOING BUSINESS

### MOVING FROM A CULTURE OF DISPUTE TO A CULTURE OF NEGOTIATIONS

**Parry Agius (Aboriginal Legal Rights Movement – Native Title – Adelaide)**

As part of my traditions and customs, I would like to acknowledge the traditional owners of this country on behalf the Aboriginal Legal Rights Movement Board and the Native Title Unit and myself as a Narungga person. I wish to thank the organisers for the opportunity to come to this country and to share and talk about our experiences in South Australia

I want to present to you a picture and a question. How do a house, a sea tide, and a book lead to justice, recognition and inclusion? These elements describe what has happened and is happening in Australia between Aboriginal and non Aboriginal people. First the house: What is it and why is it important to this presentation?

Imagine you and your family with your house and land. You have had this property in the family for over 150 years or seven generations. You have used the land for your pastoral and grazing activities and lifestyle. You plan for the future using this land. You have had full and exclusive rights to the land and no one has interfered with your decisions and use of it.

It's now 1992, and the highest court in the land known as the High Court of Australia determines that the Aboriginal people who were the prior owners of the land now have rights in relation to the land. The Court declares that Aboriginal people had land rights which were not considered when the land you have, was made available by the government of the day back in 1788 and this was a violation of the common law. As a result Aboriginal rights in relation to the land now have to be considered along side the rights of existing landholders and that is **YOU**. Suddenly you and your family have to negotiate how your rights and interests will co-exist with Aboriginal rights and interests in the same parcel of land.

How might you be feeling right now? Are you anxious, concerned, angry, outraged, defiant, fearful or a combination of all these emotions? How might Aboriginal people be feeling right now? Are they elated, happy, joyful, triumphant, ecstatic and hopeful that the government and the Australian public will accept this new and momentous decision? These emotions were very much in evidence at the time of High Court's Mabo decision, which recognised the common law rights of Aboriginal people at the time of white settlement in Australia. Whilst Aboriginal people saw it as a decision to rectify past injustices, many non-Aboriginal Australians saw it as an invasion of their rights and interests in land they saw as exclusively theirs.

The Commonwealth Government of the day created the Native Title Act 1994 to give recognition to native title, acknowledge past injustice and to create processes to ensure the rights and interests of Aboriginal and non Aboriginal people were fairly treated and considered. The scene however, was set for bitter conflict. The non-Aboriginal people who had the land did not want to give away their rights and interests or to recognise Aboriginal people's rights and interests. At both National and State levels the most powerful and influential non-Aboriginal peak bodies, such as the National Farmers Federation, the Minerals Council of Australia, the Fishing Industry and many others, lobbied hard for the extinguishment of native title. The Aboriginal and Torres Strait Islander Commission and Aboriginal leaders across the nation called for a calm approach and looked for ways to work with the issues and non-Aboriginal stakeholders.

If we return to our house what would we see? If we look inside the house we see people who do not want to negotiate, who are fearful, and have built fences, closed the gate and who have employed lawyers to fight for them.

Now imagine that it is 1787. You are an Aboriginal person, you and your family are using the land in line with your customs and your cultural practices and laws. Your connection with the land is your identity; it describes who you are, where you come from, what you can do, how you are connected with family and your spiritual and religious obligations. The land is not for you to sell, barter, or give away in return for something. Your ancestors connect you to specific areas of land and this entails customary legal obligations and responsibilities on you for the land. You enjoy life, learning from elders, teaching and educating the young, and participating in the rich cultural life of your tribal group.

Imagine now it's 1788 and some very strange and very pale people arrive to your shores. They take everything from you without your permission. They move you to other areas, which are not your ancestral lands and for which you have no customary legal obligations and responsibilities. Many members from your tribal group are killed, dispossessed and forbidden to return to your land. You are required to abide by rules and laws that are different to yours and your laws and language are forbidden. The non-Aboriginal people create the notion of Terra Nullius or "empty land" which denies that you are even there, to justify the taking of your land.

It is as if a tidal wave has arrived and washed away all that was before. You and your family and members of your tribal group are adrift and clinging to whatever is floating by. Even though a sea of non-Aboriginal faces, non-Aboriginal laws and non-Aboriginal language covers your land, you know that underneath it all it is your land and for years you try to present to any who would listen, your inherent rights. It isn't until 1992 when the High Court of Australia hears your voice, and delivers the Mabo judgement that the truth about the past is exposed and the sea tide goes out revealing Aboriginal interest in the land.

Up until Mabo, Governments at all levels created processes for dealing with Aboriginal people. The policies right up until 1967 were left with the State Governments whose emphasis was on the exclusion and isolation of Aboriginal people from the wider Australian community. Aboriginal people were encouraged to assimilate, further dispossessing them from their land. The 1967 Australian Referendum saw responsibility for Aboriginal and Torres Strait Islander people transferred to the Commonwealth Government. This, combined with Aboriginal activism, led to policies centred on representation, consultation, participation, self-management and self-determination. The political system created processes to hear from Aboriginal people but then applied non-Aboriginal ways to address those concerns. This still left Aboriginal people in a position of powerlessness in Australian society. This has not led to civil disobedience or internal violence against the State or its people as is happening in other countries. Aboriginal people have placed their faith in the system hoping it will shift the power imbalance and give them due and fair recognition.

Australian law is in a book that has been written by non-Aboriginal people in non-Aboriginal ways and language. It was not written properly until the Mabo decision, which recognised that Aboriginal law, is a properly authorised and constituted law which must also be included in the book. Aboriginal people for the first time have had recognised their legal right to have a say about what happens on their ancestral lands. This gives Aboriginal people the opportunity to bring Aboriginal Law and ways of doing business into their negotiations with non-Aboriginal Australians. It creates a level playing field by placing Aboriginal Law on a par with non-Aboriginal Law.

Mabo has created a complex site for negotiation between Aboriginal and non-Aboriginal stakeholders and in many instances a highly adversarial culture has emerged. In South Australia, the Native Title Unit of the Aboriginal Legal Rights Movement has sought to work with all the stakeholders to create a culture of dialogue and negotiation. Aboriginal communities and interests have often been poorly served by expert driven, outcome focussed processes. The Native Title Unit has sought to develop facilitative processes that are driven not by experts but by the very people whose interests are being negotiated - *the stakeholders themselves.*

Recent court cases have shown that they are long, drawn out and extraordinarily expensive ways of dealing with native title. For example, seven years for a matter to be heard and a final determination to be made by the High Court can cost between \$AU10-\$AU15million. There six hundred matters before the Federal Court and in South Australia alone there twenty-nine matters. In addition, the Aboriginal

community find the judicial system combative and strange. The time taken means that elders who hold the laws and customs and who are critical to proving the existence of native title may be dead and gone well before the judicial process is finished. Litigation is not the way to go and the most obvious path to native title resolution is through negotiations.

The uniqueness of the South Australian experience is the desire and commitment by the Parliament of South Australia, the Government, non-Aboriginal and Aboriginal peak bodies and the Aboriginal and non-Aboriginal community to build a process for negotiations and the resolution of everyone's interests in land. In South Australia the planners of the negotiation process had to first give thought to the creation of a relevant and agreed process. The parties needed to understand each other and why and how their interests were and are important to them. Our starting point was to create processes and not outcomes. Without good processes and planning, outcomes won't be achievable or if they are achieved won't last, unless the parties understand one another and the processes they are part of.

All the parties involved also needed to understand that they were in a cross-cultural negotiation process. In South Australia, English is sometimes the second or third language or not even a language of the Aboriginal participants in the negotiations. Translators or interpreters create the communication link between parties in the negotiation. It takes time to present information in translation, as it is critical for the interpreters to understand what is being said and find the appropriate Aboriginal words to express non-Aboriginal concepts. It is also important to point out that there are some non-Aboriginal words or concepts, which don't have Aboriginal equivalents. One of the key tasks in South Australia was to produce a jointly agreed set of terms that would be useful in translation and in discussions.

The Native Title Unit also recognised that Aboriginal people did not always have a comprehensive understanding of specific industries and the business and legislative environments in which they operate. To address this, the Native Title Unit sought to increase the knowledge and skills of the Aboriginal communities involved in the negotiations. The Native Title Unit did not want experts to take control of or drive the process of negotiations. The role of the experts was to impart their knowledge and skills and to use their networks to introduce the Aboriginal people, so as to allow the Aboriginal people to effectively negotiate their own interests.

Non-Aboriginal parties also needed to understand the protocols of Aboriginal decision making processes and the ways in which cultural and traditional authority are exercised. In many instances the ways that non-Aboriginal and Aboriginal people do business is vastly different. Leading up to Mabo there was very little requirement for industries to negotiate with Aboriginal people. Consequently neither group was experienced in *how* to do business with the other group.

The importance of understanding the context in which you are negotiating cannot be overstated. For example an Australian businessperson negotiating with Japanese business would recognise the importance of understanding Japanese culture and ways of doing business. Indeed many Australian businesses have had to learn this the hard way. There is recognition that doing business with our Asian neighbours requires an understanding of cultural dimensions.

In South Australia, the Native Title Unit has had to create a similar cross-cultural recognition for non-Aboriginal groups who are negotiating with Aboriginal people. One of the tools used to create this understanding has been the building relationship workshops conducted between industry, government and Aboriginal people. These workshops focus on people's stories and understandings with the aim of building shared understanding and better relationships. They are independently facilitated by Aboriginal and non-Aboriginal persons working together. They are not about the content of issues or about reaching settlement, they are about allowing the people to meet and mingle without the pressure to finalise outcomes.

Initially non-Aboriginal parties just wanted to get on with negotiating and found the process frustrating and an unnecessary delay. Aboriginal participants however saw this as a great process because it allowed for them, often for the first time, to speak for themselves and to share important stories. It gave them a sense of confidence and got them past their initial anxieties of meeting new people. Ultimately the non-Aboriginal parties also endorsed the value of the process because it allowed them to see the people across the table as no longer strangers. Friendships were created and things in common were identified where

before people only saw difference. This in turn enhanced the effectiveness of the formal negotiations. It also addressed things such as the logistical arrangements in ways that were not embarrassing to anyone.

There are many consequences if there is no pre-negotiation relationship building. There may be mistrust, misleading assumptions, poor communication and misunderstandings, which may lead to delays which in turn exacerbate tensions and anxieties. This may compromise the ability to reach substantive outcomes.

Critical to our approach in South Australia has also been the recognition that lawyers are trained in a very specific way. Their way of doing negotiation is very commercially orientated, often highly adversarial and ignores the emotions and history that people bring to the cross-cultural negotiations. Their focus is on outcomes and on resolving facts. They often see their role as one of interpreting what is being said. Our approach in South Australia is to allow the Aboriginal stakeholders themselves to participate, observe, advocate, hear, clarify and question what the other parties are saying so they can make informed decisions. This process means that the stakeholders decide what is and what isn't important. Stakeholders may see many things, which their lawyers may not see as important. For example a lawyer may come to their clients and report that a proposal has been rejected. Whereas the stakeholder may see the same "no" very differently if it is accompanied by non-verbals that soften or indicate the depth beneath the "no" or any other communication. Having the stakeholders at the negotiating table means they witness and are party to the fullness of the negotiation.

Another factor that affects the negotiation process is when lawyers act as gatekeepers to limit the contact of stakeholders with each other. This limits the access to information and inhibits the relationships between the stakeholders and maintains the centrality of the lawyers in the process. It also means that stakeholders are getting information second hand, which may be inaccurately interpreted.

To date many negotiated arrangements over land have been done by the experts from beginning to end and presented to the stakeholders as a done deal. This is not what we are doing in South Australia. Our process is to have stakeholders directly and actively involved right from the beginning. This is a time consuming process but it's a process that meets the requirements under Aboriginal law for Aboriginal people to be informed and involved in the development of negotiated positions and the negotiations of those positions. This delivers certainty to the issues and most importantly it delivers certainty to the non-Aboriginal stakeholders.

During the developmental stages of the South Australia process it was decided to have an independent facilitator to manage the negotiation process so that control of the process did not reside with any one party involved in the negotiations. All the parties agreed to the choice of the facilitator and that person has overseen the process for the past four years. When local negotiations have taken place the principle of all stakeholders scrutinising and choosing the facilitator or mediator has been critical to maintaining their control over their negotiating process. This principle of choice is in marked contrast to other processes where a mediator or facilitator is allocated without input from the stakeholders.

What have we learnt from this process? To start with parties have come to acknowledge that cross-cultural negotiations are different to other forms of negotiation. Parties have learnt that time is the key to effective negotiation. Time for the creation of processes. Time for relationship building. Time for interpreting. Time for pre-negotiation preparations. Time for informed decision making processes and observing protocols. Time for parties to develop and understand the range of stakeholder perspectives. Time for cross cultural understanding, whether that is Aboriginal people getting informed about how the business world does business or business getting informed about how Aboriginal people practice their culture, law and traditions. Time to understand that if not all these issues are covered the only certainty is that the negotiation will fail.

Further, the stakeholders must have the choice to decide on processes and personnel involved such as facilitators or mediators. The more choice that is given the more in control the stakeholders will feel. The more in control they feel the more they are free to agree and make decisions. Finally the mindset of professionals such as lawyers who see themselves in control of the negotiations must move to one side where they see the stakeholders as having the control of their destiny. Professionals need to trust and respect their clients and not treat them as children under their control.

Now we can return to our house, our sea tide and our book. How does it fit with justice, recognition and inclusion?

Aboriginal people and Aboriginal Law were not swept away by European settlement. The land and the people remain strong and connected with ancestors, who are here today to guide us and help us plan for future. The Book of Australia was half written when it told only of non-Aboriginal stories, language and law. Aboriginal people have known this and have wanted their own stories, language and law to be included in the book. Non-Aboriginal people cannot live as if Aboriginal people are not here. Their own law and systems have created the path to including and recognising Aboriginal people and law.

Aboriginal and non-Aboriginal people are neighbours and not enemies in our land. Our houses provide shelter, safety and a home to live in. Just as non-Aboriginal people know their homes are safe, Aboriginal people know their rights and interests are safe guarded as well.

I would like to conclude by acknowledging the support from the ALRM Board, Aboriginal people of South Australian, the Congress of Native Title Management Committees, the staff of the Native Title Unit, Parliament of South Australia, Government and non government parties, non-Aboriginal peak bodies, experts and consultants to the processes, the non-Aboriginal community of South Australia, ATSIC South Australia and the ATSI National Office.

Justice for Aboriginal people demands their recognition and inclusion. In South Australia we are all of us building justice with the cornerstones of recognition and inclusion and a commitment to a shared future.