Tea without sugar: the mediation of agreements between pastoralists and Aboriginal peoples in a native title environment

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No sugar: such negotiations are not sweet for the most part. Black tea without sugar is a common cultural element between Aboriginal peoples and pastoralists. Usually people drink together in a break in the work schedule. It is a symbol of what is possible.

Introduction

First some history to see how we got here and why native title or some form of agreement-making between Aboriginal peoples and pastoralists should not be seen as surprising. Then I want to talk about why agreement-making is a relevant, indeed necessary topic of discussion. I will follow this with the core of my paper today, that is, an outline of a model and method that has been used in agreement-making between pastoralists and aboriginal peoples. Finally I draw some conclusions about the issues I have raised. Here I also want to point out some of the weaknesses and strengths in my argument/propositions.

Relevance

There are three court cases I want to draw your attention to. *Millirpum v Nabalco* (1971), *Mabo No 2* (1993) and *Wik* (1996). In the *MvN* case the federal court recognised and Aboriginal system of law and custom but kept *terra nullius*. The *Mabo* case recognised that native title formed part of the common law of Australia and the *Wik* case that while pastoral leases may not extinguish native title, the right of the lease holder are not toppled by native title. So since sovereignty there have been common law holders of native title on much of the pastoral estate.

Let me share with you an axiom "While there are Aboriginal peoples there will be a land question". In the past this question has been answered in one of three ways:

Direct action - Gurindji walkoff 23 August 1966 - Vincent Lingiari Jupurula

Legislative path - bark petition from Yirrkala, Woodward Royal Commission, *Land Rights Act 1976* (NT), *Aboriginal Land Rights Act 1991* (Qld)

Legal rememdy. *Mabo, Wik*

Indeed, the failure of the federal government to address the land question at a policy level in 1983 (Hawke government proposed national land rights scheme) probably led in way or another to the *Mabo* decision (Farley, 1997 pers comm) and to the policy outcome represented by the *Native Title Act 1993*.

OK, what about the land. Well 75% of Australia is rangeland (Holmes). About 2/3 of this is pastoral lease. About 45% of Queensland is pastoral lease. Native title potentially exists across much of this land.

Along with this area of land the pastoral industry contributes about $6 billion to the Australian economy each year. The cattle and industry and its people are central to the myth-making of

Australian national identity. For these reasons the pastoralists and their industry are not going anywhere and for the reasons mentioned earlier neither are Aboriginal people.

Thus native title is a question that Australia needs to answer. The native title question needs to be addressed by pastoralist and Aboriginal peoples in particular. Certainly it has been one of the major policy concerns for succession Federal and State governments since 1993.

What is the native title question? How is it going to be answered and by whom?

Roughly the native title question is about co-existence and mediation under the NTA is the method by which it will be addressed. (However, I want you to keep in mind that this is only a smaller though important subset of the bigger issue of how Australia will answer the Aboriginal land question).

Why mediation?

Why mediation? - probably before this question comes what is mediation? And after comes But is it mediation?

The NTA says it is mediation (s86(1) (A)) so it is! Mediation is general terms is the intervention in a dispute by a neutral third party to assist the parties in the dispute to get to an outcome of their own making. Barnes calls this kind of work with more than three parties facilitation [Barnes, 2001 #28]. My term for it is facilitated negotiation. That is the facilitation of multi-party, resource-based, cross-cultural negotiation. OK so we can't escape the NTA so its called mediation, but what kind of mediation?

The mediation method used by the tribunal is a variation of the interest-based model [see Fisher, 1991 #5]. The interest-based method has four basic principles:

- separate people from the problem
- get parties to focus on their interests not their position
- devise options with parties
- use objective standards in evaluating solutions

There are of course other mediation methodologies that could perhaps be usefully applied in he circumstances described earlier. These are:

- Narrative mediation [see Winslade, 2000 #2]; or
- Transformative mediation [see Bush, 1994 #29].

Winslade and Monk criticise the Fisher and Ury model by saying that it is based on the assumption that human conflict derives from basic needs (biological) which overlayed by culture (values and position). They suggest that the interest-based model is about getting back to the needs from which interests can be derived and through negotiation of interests the conflict resolved. For Winslade and Monk the conflict derives from a clash of stories. At the heart of the narrative model is social-constructivist theory. This theory suggests that humans use stories to create the world and themselves. The theory has a group or collectivist focus rather than an individualist one. In this framework culture is a collection of stories and how the group operationalises them. They make use Foucault's notions of "archive" and "discourse". Thus the stories or archives govern a person's behaviour. The stories interact powerfully to make a discourse. Thus narrative mediation is an attempt to take a story of conflict and change it to a story of harmony and resolution.

Transformative mediation focuses on the relationships between people. The model assumes that conflict is centred on dysfunctional relationships and that by restoring balance or harmony here that the resolution of conflict will follow.

Both narrative and transformative mediation models are said to be more effective in cross-cultural

conflict resolution while interest-based is said to be less effective.

I disagree!

I fear that for the same reasons that these methods are said to be effective may in fact be the reasons why they are not. Narrative mediation for instance lends itself quite readily to an assimilation discourse. The core of the problems lies in the values we bring to mediation. This problems effects any form of mediation - it is the management of this issue that I think will lead to the development of an effective cross-cultural mediation model.

Context

Before going further I want to talk a little about the context of mediation work.

There are a number of assumptions that plague the application of mediation to native title matters. The assumptions are always political or ideological in function.

The main assumption that leads to difficulty in the mediation of multi-party, cross-cultural, resource-based negotiations is that local people cannot solve these problems - real solutions must be based in centralised systems.

The assumption is a version of Hardin's *Tragedy of the Commons.* Thus if people are left to their own devices they will exploit the commons to environment collapse. In order to avoid this problem a state or centralised system of management is need to keep the excesses of people in check or at least to provide limits. Similarly Hobbes theorised that people will fight unless they give up their power to a "leviathan" - in other words a centralised system is necessary to prevent the destruction of society in a war over the allocation of resources.

Another assumption in relation to the mediation of native title matters is that they are rights-based issues which therefore need a centralised arbitration system to ensure that there is an objective and fair balancing of rights. I think this assumption derives from the fact that the native title field is dominated by black letter lawyers. The problem is that the native title arena is cross-cultural by its very nature, negotiations between pastoralists and Aboriginal peoples for instance. In this arena the lawyers, for the most part, are out of their depth but being powerful people they bring it back to what they know - away from mediation and toward arbitration.

The answer to these assumptions like in a closer examination of the circumstances under which the assumptions were made and the mediations occur. Hardin for instance, did not take into account the cultural limits to exploitation or the power of local agreements and contracts or indeed, practical reality. On closer inspection we find that the commons in England were only exploited to collapse after the enclosure acts, that is, after the application of a centralised solution to a perceived problem. In relation to the rights issue we shall see later that mediation is not about the mediation or bargaining of rights rather it is about the negotiation of interests.

Ironically however, the NTA is a centralised system. The centralised system in this case provides a framework for the resolution of these matters rather than a detailed solutions. The details are left to the parties to fill in.

So what to do?

I will outline some of my own assumptions at the outset.

- It is better that people either as individuals or as local groups make their own decisions rather than having them imposed by a centralised system such as the state;
- People want control over their lives;
- The role of the mediator (neutral third party/facilitator) is to facilitate effective interaction

between the parties;
- Negotiation between local groups is an effective decision-making tool that allows people to achieve control over their lives.

These assumptions are derived from a libertarian philosophy rather than socialist, reformist or fascist philosophies.

The next step in the process is about conceptualising the interaction between parties in order to facilitate effective conflict resolution or negotiation design.

Conflict Resolution/Negotiation Model

The diagram has its genesis in Noel Pearson's recognition space (see Mantziaris and Martin, 2001:9)

What happens in the CR Domain?

Mediator invites parties into the space and sets up rules by agreement (remembering the interest-based model is the engine).

Things to remember

The mediator stays in the conflict resolution zone - to go outside of the zone is to breach neutrality and threaten the entire process.

Example of outside the CRD.

This brings me to design.

First step is the private meeting.

Why?

The first phase is the story-telling phase. (See, I haven't thrown the narrative baby out with the bath water).

Allows for capacity building both about the process and about internal issues like decision-making, eg. Aboriginal native title claim group not "natural group" i.e. it doesn't normally make decisions as a collectivity.

Allows mediator to get behind position to identify interests (BATNA and WATNA etc.

The second stage of the process brings the parties together.

Note: The *Wik* principle - when the rights of the pastoralist and the native title holder clash the rights of the pastoralist prevail AND connection to comfort standard not proof standard. These are the basic requirements for negotiation to commence.

Story telling. No story no agreement

Principled approach - what are the basic principles of agreement - not the details. This process allows the parties themselves to negotiate directly about the basic parameters of an agreement rather that through lawyers about what form the legal wording might take. These principles form the core of an agreement. The principles help manage the lawyers ie, legal docs must reflect the core principles as agreed between the parties. The principles approach also helps manage the no party is monolithic

problem. Once the principles are establish these set the negotiation parameters for all participants in the negotiation. Examples: Aborigines - negotiation group versus decision-making group. Process allows space for Aboriginal politics. The presence of politics does not equate to an inability to make decisions, similarly because pastoralists may in general have conservative politics does not mean that they cannot make agreements with Aboriginal peoples. In this regard the practice of negotiating lease by lease rather than regional agreements and the presence of the State as a party has given pastoralists the confidence to mediate in a hostile highly political environment.

The problem of agreement-making between pastoralists and Aboriginal peoples is addressed through:

- A practical topic - land use and access - gates, guns, dogs etc.;
- Connection - comfort level not proof;
- The *Wik* principle - the relationship between lessee rights and native title holder rights; and
- Not negotiation of rights rather mutual recognition of rights and negotiation of interests.

Weaknesses

Cross-cultural issues should never be taken for granted. The NTA is still part of an imposed state system and mediation is derived from a western cultural system. The cross-cultural problem is really a question of differential power. This question is addressed through domain modelling and a capacity building in relation to decision-making capacity. The negotiation of interests occurs in the conflict resolution domain while any arbitration of rights is outside of this domain.

The lines of neutrality in the conflict resolution domain model need better definition through further research in cross-cultural mediation/negotiation theory. Some of this research may be profitably focused on the negotiation methods and values systems within the particular cultural groups that make up the parties to these conflicts. At the moment the model is an intellectual construct to aid the mediator. Having said this it is important that mediators do not blindly apply models rather they should design a negotiation or conflict resolution system.

Advantages

Reduces native title to a human level

Localist focus

Local decision making is empowered.

Parties have real issues to deal with and therefore they build a working relationship. Thus a practical land use and access agreement is about practical reconciliation.

It achieves the CERTAINTY that lease-holders and the State want in relation to native title and it offers a chance for native title holders "to bring up the grand-children in the law. We can do that".

These people, Aboriginal and settler, are seeking to build an Australia for the future. I can see why some might want to tear them down.

Cases

Wik Peoples vs Queensland (1996) 187 CLR 1

Mabo vs Queensland (No 2) (1992) 166 CLR 1