Doing Native Title as Self-Determination:
Issues From Native Title Negotiations in South Australia

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The evolving Native Title system 's failure to deliver appropriate concrete outcomes to its stakeholders (both Indigenous and non-Indigenous Australians) presents a substantial challenge. Working at a statewide scale, South Australian claimants and institutions have aimed to deliver a set outcomes that reflect a high level of mutual recognition and commitment to self-determination. The South Australian approach offers lessons that are more widely applicable to other conflict situations and this paper explores those lessons.

Judicial recognition of native title in the early-1990s placed Australia at a crossroads. It offered a vantage point from which quite divergent futures – and very different relationships with various representations of the past – seemed possible. For the first time it seemed that the 'monstrous injustice' and 'juridical denial' (Langton 2001: 13) of dispossession might be redressed. Pearson suggests the High Court used three relatively simple principles in laying the foundations for the current native title system. In simplified terms, he suggests, the principles can be expressed thus:

> *The whitefellas keep all that is now theirs, the blackfellas get whatever is left over, and there is some categories of land where there is coexistence and in the coexistence the Crown title always prevails over the Native Title (Pearson 2002).*

The processes by which Australians choose to meet the opportunities and challenges of native title will have lasting consequences. Yet the processes that currently dominate native title have come under relatively little critical scrutiny. The *Native Title Act's* procedural demands specifically disadvantage the "high context culture" (Hall 1990) characteristics of most native title claimant groups. For example, rules of evidence, deadlines and the implicit authorization of 'expert' over 'indigenous' knowledge all reinforce the marginalisation of indigenous participants from decision-making. In contrast, technical questions about the substance, nature and limitations of native title have received extensive critical and expert attention. Questions of self-determination and justice for indigenous Australians seem to have been overwhelmed by technical questions about the administration of the *Native Title Act*. Indeed, Australia's native title system rapidly developed as a domain for experts from which many Aboriginal and Torres Strait Islander Australians are deeply alienated. In choosing either to ignore or endorse this, Australians risk wasting its "once-in-a-nation's-lifetime opportunity to settle a question of fundamental grievance" (Pearson 2002) and reproducing the alienation and pauperisation of previous well-intentioned policy settings. This paper reconsiders questions of process and argues for prioritisation of self-determination as a fundamental principle in native title processes.

[1] This paper session will be supplemented by a practical workshop dealing with process issues and aiming to alert participants to the wider relevance of the issues raised in this paper.

The emerging native title system

It is not this paper's aim to review in detail the native title debates of the late-1990s. It is, however, worth acknowledging that the 'right to negotiate' and 'Indigenous Land Use Agreement' (ILUA) provisions of the *Native Title Act* encouraged a shift towards negotiated settlement of land use conflicts around native title rights. Yet, even agreement making in the native title system, has emerged as a domain for experts – presented and pursued as a precondition for indigenous Australians achieving self-determination rather than constructed as an opportunity for them to exercise this fundamental right. In many jurisdictions, ILUA negotiations have become another mechanism that facilitates use of indigenous lands in resource development. Expert consultants employed by representative Aboriginal bodies do deals with experts from industry to deliver the benefits that they decide should be delivered to indigenous people. The National Native Title Tribunal's approach to mediation reinforces the notion that process is aimed at meeting the needs of the Act rather than ensuring that operation of the Act meets the needs of the participants in the native title system.

In our view, this situation risks usurping indigenous peoples' right to self-determination and self-governance. It risks reinforcing the paternalism of previous generations of policy and practice in Australia and further entrenching the systemic failure to recognize the contemporary persistence of the ancient jurisdictions that give rise to native title. It also reflects a reduction of negotiations to a resolution of substantive issues over which there is conflict which can be resolved in the form of a 'deal' – a set of trade-offs, a quid for a pro, a project site for a royalty equivalent. This fails to acknowledge other critically important issues involved in the negotiation relationship – emotional and procedural (Figure 1). People in any negotiation process have these three interdependent needs, as shown in the diagram. Procedurally, people need to believe that a process is fair – that it gives them an opportunity to have their say and that it is not biased or prejudiced in any way. Emotionally, people need to feel OK about themselves and their participation in the negotiation – they need to feel listed to, acknowledged, respected and validated. Substantive issues are the issues and things that are the subject of negotiation. Dealing with just one or two sides of this "satisfaction triangle" does not produce sustainable, just and equitable outcomes. In this paper, we explore how practices which address all these issues with native title holders themselves can open up different possibilities for them. We will illustrate our argument with insights from innovative native title negotiations in South Australia.

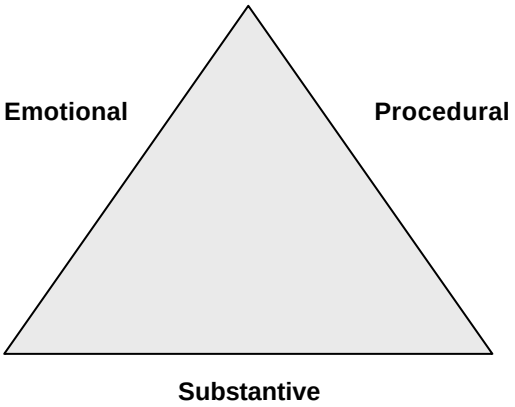

Figure 1: The Satisfaction Triangle (Based on the work of Chris Moore, CDR Associates, Boulder Colorado USA)

What is fundamental?

Indigenous participation in native title processes is fundamental to meeting the sorts of challenges that Australia has been presented with through native title. It might seem self-evident, to point to the importance of direct participation, self-representation by self-authorizing indigenous peoples, and the basic right to self-determination, but it is worth reminding ourselves that the native title system is fundamentally an invention of whitefella law.

We should never forget that native title is not a right created within the ancient jurisdictions of customary law. Rather, it is those elements of customary law that the common law is able to recognize and, subsequent to the passage of the *Native Title Act*, the elements of customary law that non-indigenous parliaments, tribunals and courts have decided can be accommodated in practice. It is, as Pearson (1997) pointed out, the "recognition space" between customary law and the common law. The Act has twice been the most amended piece of legislation to come before the Australian Parliament (in 1993 and 1998). It established a native title system that entrenches non-indigenous expert testimony and denies claimants' right to represent their own cultures as they decide it should be represented to the wider world – including the judicial structures of the nation-state. It reinforces the denial of indigenous self-authorization and the transfer of indigenous authority to representative bodies and authorised experts acceptable to the whitefella courts – and governments. Even where native title is determined to exist (or co-exist), indigenous governance structures are prescribed by the whitefella law in the form of 'prescribed bodies corporate' which the Act requires native title holders form as the only acceptable structure to hold this fragile form of title. In this framework, indigenous participation is largely conditional, depending on conformity with what the whitefella law, parliaments and courts have imagined is appropriate and authentic.

In the development literature it has long been acknowledged that "authentic participation" is "indispensable in the pursuit of equitable development and political democracy" (Goulet 1989). Yet in the Australian experience, the parameters of native title negotiations commonly seem to be set by experts before any participation by native title holders or other indigenous groups affected by them or the projects being negotiated. Substantive targets for the deal are often set according to financial information or benchmark precedents before any consideration of (or consultation about) the experience, concerns or aspirations of the indigenous people who should be the principals of negotiations about their own rights and futures. Despite the rhetoric of 'recognition' as a foundation in such negotiations, it is often representative bodies rather than native title holders that are being recognized and empowered. And it is often the case that it is non-indigenous staff and consultants, empowered as experts, who are the term-setters, deal-makers and deal-breakers – not the native title holders themselves.

Grassroots indigenous criticism of the emerging native title system is fairly consistent and recognisable. It often refers to the failure to deliver land, services, self-determination, reconciliation or even recognition in many settings. It is couched in terms of disappointment, frustration and anger. These emotional responses arise from unfulfilled expectations such as the idea that native title might allow people who had been dispossessed to possess; people who had been homeless to be housed; people who had been denied to be recognized, people who had been removed to be returned. Amazingly, in many circumstances, such simple expectations have been derided as being outside the principles of the High Court's recognition of native title or the parliaments' codification of it in the *Native Title Act* and supplementary legislation from the states and territories. What the Act (or the Federal Court) says native title is has become much more significant – even in many voluntary negotiations and agreement making – than what particular native title holders think they hold under the terms of their own customary laws. Even the debates about 'certainty' and

'workability' generally failed to consider those ideas in terms of Aboriginal perspectives and have been largely Eurocentric.

But in any negotiation, the ethics of respect – the principles of mutual recognition and acknowledgement – are always the "foundational, ethical challenge" (Cohen 2002: 115). In cross-cultural negotiations, the reduction of the terms of negotiation to a common expertise risks reimposing, under the guise of neutrality and even-handedness, the understandings of the dominant culture as the only possible terms of negotiated engagement (see eg Kahane 2003). If it is only the *Native Title Act* that is authorized to provide the terms of engagement, then the playing field is already capitulated to the whitefella law and the lived experience – the emotional, procedural and substantive issues arising within indigenous lives – is once again marginalized.

Clearly, even though the native title system is barely a decade old, something needs to change drastically if the playing field is to be reconstructed as a truly inter-cultural domain, rather than constructed by non-indigenous institutions as a 'neutral' space that, in effect, reflects the house of cards and mirrors the dominant culture constructs around itself.

The importance of process

In our view, the critical issue here is process – good process is one of the key outcomes, and the critical means to achieving just and sustainable outcomes on substantive, emotional and procedural dimensions. This is discussed in terms of the specifics of the South Australian experience below, but some more general comments are appropriate to introduce the issues. In many settings, pre-ordained processes proscribe the terms of indigenous participation. The terms of inter-cultural engagement are pre-empted by the structural and cultural privilege accorded to non-indigenous institutional forms and procedures. Indigenous peoples must conform to duly authorized criteria approved by the dominant culture to register a potential native title interest.[2] Rules of evidence require indigenous testimony to conform to criteria that many indigenous groups find offensive and trivialising. Timeframes are set to accord with non-indigenous priorities – negotiation periods are defined by development timeframes, and judicial deliberations by the courts themselves. If indigenous people need time to discuss, consult, debate, decide, the Act prescribes specific timeframes for their internal processes. And in case management, critically important political decisions about how to represent indigenous culture to the courts are often made not by indigenous people in their own governance structures in accord with customary law and The Dreaming, but by their legal representatives in accordance with what they judge is likely to succeed in winning the 'case'.

This turns the process of self-determination completely on its head. It creates process in which legal representation risks being reconfigured as some form of power of attorney rather than a trust relationship involving the execution of an autonomous client's instructions. The highly political questions about how a people wish to represent their culture to the world – how they might explain themselves, how they might govern themselves – are reconfigured as technical questions to be answered authoritatively by technical experts. The crucial independence of indigenous peoples' political leadership, an independence which is fundamental to the exercise of self-determination as peoples, is thwarted as the indigenous sector's equivalent to the public service (which is, of course, ironically, often employed on public service conditions funded by the public purse in institutions

[2] Hall (1990) refers to the ways in which differences in perceptions of time, personal space and the importance of 'context' as key elements in cultural difference affect intercultural communication. For participants from "low context cultures", Hall specifically nominates 'English', American, German and Scandinavian cultures as 'low context',

that operate under whitefella legislation but are labelled 'Aboriginal') treats indigenous politics as incapable of producing coherent responses to the (wait for it) --- the needs of the native title system!

Here we see the spectacular deception of the native title system. In the guise of recognising some subset of indigenous rights, the normal operation of the system denies the right of indigenous people to do anything but conform to the highly circumscribed role set out for them. Failure to conform, or inability to demonstrate conformity at a sufficient level, results in authoritative rejection of a peoples' claim by the courts. Legal representatives are required to exercise a duty of care that all too often couched in terms defined by the western legal system in a way that all too easily removes indigenous peoples' claims from an overtly political domain, in which indigenous institutions are empowered, to a technical domain, in which in which various authorized experts, particularly lawyers, hold the power.

There is an urgent need to reconsider practices within the native title system that reconstruct non-indigenous privilege and undermine indigenous self-determination. In considering agreement-making and ILUA negotiations, for example, the principle of self-determination, what might be called accountability to The Dreaming, must be made paramount. In doing this, a critical engagement with questions of process is crucial. Such processes must become a domain in which indigenous peoples exercise self-determination, rather than domains in which non-indigenous experts establish the pre-conditions for some future opportunity for indigenous self-determination.

Good intention is absolutely insufficient in this system. Good process is indispensable.

A brief account of statewide negotiations in South Australia[3]

A statewide process to address native title claims in South Australia commenced in 1999. The South Australian Native Title Representative Body, the Aboriginal Legal Rights Movement (ALRM), drew on both legal and human services insights in developing its response to a state government proposal to explore prospects for a negotiated settlement of issues. One of the attributes of ALRM's approach has been that 'experts' have not been given primacy in setting the agenda. Rather ALRM's process has delivered information, challenge and expertise into a largely Aboriginal political debate about how people should best act to secure their rights and interests. And Aboriginal interests have largely represented themselves (and have also been accepted by political, industry and community groups as appropriately representing themselves) in most of the political discussions generated by the process.

The South Australian process assumes that informed political judgement about how their society is represented to the wider world through claims, negotiations and other activities, and about the balance between litigation, legislation and negotiation in pursuing settlement of native title issues, is the political and moral responsibility of native title claimants themselves, not of their advisers. Agius et al (2003: 3-4) provide a useful summary of the ten core principles underpinning this process:

1. Native Title is about people, not legal technicalities: agreement-building must be about relationships between people and cannot be reduced to a legal definition.
2. The standing of the Aboriginal claimants as the principals in the negotiations: Native Title rights are real property rights that make Aboriginal people a real part of South Australia.
3. Non-extinguishment: agreement-building should not require extinguishment of Native Title.

[3] In this section we refer specifically to 'Aboriginal' concerns because the native title claimants in South Australia are all Aboriginal groups.

4. Self-determination: agreement-building should be an exercise of self-determination – not a precondition for it.
5. Fairness: agreement-building should be fair – all participating groups should be better off, and none should be worse off because of an agreement, including not only Native Title interests, but also other Aboriginal groups and non-Aboriginal interests.
6. Inter-generational equity: agreements should recognise the principle of inter-generational equity, because they are likely to set important aspects of the conditions facing Aboriginal people for several generations – they should not short term deals.
7. Sustainability: negotiated outcomes should be sustainable for the Aboriginal principals, including the transfer of skills and knowledge that makes the capacities developed within the Aboriginal domains sustainable into future generations.
8. Meaningful benefits: negotiated outcomes should be meaningful to the Aboriginal principals - agreement-building is only worthwhile if the Aboriginal principals judge that it will produce outcomes they want.
9. Benchmarks: to be worthwhile, outcomes should not only be better than exist now, but should also be better than can be achieved through other means (eg litigation or legislation) and reasonable against appropriate benchmarks (eg in comparable international settings). Appropriate benchmarks should be reviewed over time and opportunities to improve benchmarks should be taken from time to time.
10. An *act* of choice, not the only choice: agreement-building should not lock Aboriginal people into an 'all-or-nothing' situation, where they rely on complete settlement to achieve any gains at all - Aboriginal people should continue to negotiate only if they judge it to be producing worthwhile outcomes.

While the drafting of any final settlement remains a long way off, the process was designed to deliver meaningful outcomes along the way rather than locking claimants into waiting for an all-or-nothing settlement solution. The State Government agreed to deal with registered claimants as if they were native title holders, and other stakeholders in the South Australian process have accepted this innovative approach.[4] To date the South Australian process has delivered significant procedural, emotional and substantive outcomes (Agius et al 2003), including:

- High levels of community and stakeholder participation in relationship-building and cross-cultural recognition;
- Establishment of the Congress of South Australian Native Title Management Committees (Congress)[5] as a recognised peak body on native title issues in the state;
- Development of Native Title Management Committees' (NTMC) capacity to make decisions for themselves, to choose whether or not to be involved in negotiations proposed by the state, to set strategic direction and priorities in the process, and to participate directly in decision-making and deliberations about native title and Indigenous rights;

[4] The non-Aboriginal participants in the South Australian process are the South Australian Government, South Australian Chamber of Mines and Energy, South Australian Farmers Federation, South Australian Fishing Industry Council, Seafood Industry Council of South Australia, and the Local Government Association of South Australia. The National Native Title Tribunal has had official observer status in the process.

[5] See eg Davies (2001).

- Significant increases in the capacity of NTMCs and the Congress to drive and manage complex negotiations;
- Reduced anger, frustration and time delays for native title interests and other parties in Native Title processes;
- Withdrawal of a Government argument that native ttle was historically extinguished across the state in 1836;
- Substantial amendment of the *Confirmation and Validation Bill* before it was presented to the South Australian Parliament in December 2000;
- Aboriginal representation on the State Government's Ministerial Advisory Board;
- Several Pilot Projects involving negotiations between NTMCs and development interests, which have produced Memoranda of Understanding and ILUAs with support from the Congress;
- On-going multi-stakeholder working parties actively reviewing a range of issues, including Aboriginal heritage management, National Parks and land access; and
- Continuing engagement from native title claimants, the State Government (including both Liberal and Labor majority governments), the South Australian Farmers Federation (SAFF) and the South Australian Chamber of Mines and Energy (SACOME), South Australian Fishing Industry Council (SAFIC) and Seafood Council of Australia, and South Australian Local Government Association (SALGA) on issues of policy and process.

These outcomes are significant and have produced high levels of Aboriginal, industry, community and Government confidence in a process that targets a transformative approach to the politics of native title. Rather than doing deals – or even the more generous notion of 'doing business', the South Australian experience has really prioritised doing self-determination. The process less about making a deal than shifting the relationship between Aboriginal and non-Aboriginal people and effectively rebuilding the State with recognition of native title and Aboriginal rights built-in.

What is possible?

In many ways, non-indigenous Australians have assumed that the question 'What is possible?' can be answered appropriately in terms that they – or at least 'their' representatives – define. Most native title processes have left this assumption unquestioned. Indeed, in privileging whitefella law as the authoritative source of the answers to this question by defining it as a technical legal question in the first place, the native title system has reinvented a new form of *terra nullius* in which the ancient jurisdictions of customary law are reduced to ghosts of a lost past and held accountable and subsidiary to an authoritative whitefella law. This has contributed to a political climate in which official refusal to acknowledge self-determination as a fundamental right of indigenous Australians is possible.[6] It also makes it possible to institutionalise practices and processes that reinforce and reproduce a 'monstrous injustice' as the foundation of Australian society. The idea that it is appropriate for whitefella law, rather than The Dreaming, to be the source of authority in native title processes, or that whitefella institutions, rather than indigenous institutions should be decisive in

6 Jonas (2003) offers a detailed discussion of the Commonwealth's policy position to oppose indigenous self-determination in international forums, and explores its implications.

shaping the future place of indigenous peoples in Australian social, cultural and political life, is rarely challenged. Such ideas are both deeply entrenched and 'deeply colonising' (Rose 1999) assumptions that limit the vision of those who leave it unquestioned and proscribe the vision of those who dare to question them.

The recent South Australian experience of developing processes that might facilitate a just and sustainable resolution of native title issues at the scale of the whole state has explored very different sorts of processes in order to open up very different sorts of social, political and administrative possibilities. Agius et al (2001) identified a range of issues including administrative, legislative and constitutional change as possibilities for the South Australian negotiations. It is clear that the scope of the negotiations in South Australia have not, and will not be unilaterally established by non-indigenous institutions of government and industry. The process requires both institution building, or perhaps more accurately what Cornell and Katz (2002) refer to as 'nation building', within Aboriginal domains, and relationship building between Aboriginal and non-Aboriginal domains. Rather than reducing native title holders to what was graphically described as "fighting over the scraps of what was once a wholistic indigenous landscape" (Bauman 2001: 202), the South Australian process has sought to create processes in which the integrity of cultural landscapes can (and ultimately must) be rewoven into the contemporary social fabric. Rather than taking what well-meaning government or industry groups have offered, ALRM's approach has gone back to the questions of what is at stake, and taken the Aboriginal stake seriously. It has operated with accountability to the ancient jurisdictions as well as conformity to the legal demands of the Act. But, perhaps most significantly, it has consistently argued that the law should not be mistaken for a straightjacket that disadvantages Aboriginal people negotiating about their rights and identities, but as a starting point for deliberate and conscious negotiation of new relationships which can then be codified as appropriate.

Doing Self-determination

The challenge of self-determination is not relevant only in indigenous settings. Participatory processes that ensure that inter-cultural negotiations facilitate direct participation by the parties involved are fundamental to questions of justice and fairness. An inclusive social fabric cannot be woven from threads that are excluded from the pattern maker's vision. Whether it is displaced dairy farmers, restructured sugar growers, dispossessed indigenous people, undocumented asylum seekers, or some other marginalised 'other' of the Australian mainstream, processes which offer emotional and procedural resolution as well as addressing substantive issues of concern are fundamental to securing sustainable social relations and a sustainable and just place in the world. The broader lesson of the South Australian native title negotiation process is that even in politically hostile circumstances, abdicating the fundamental principles of good process is bad practice. While the ultimate goal of a signed, sealed and delivered comprehensive settlement agreement is some way off, the fact that native title holders have succeeded in achieving the levels of recognition and relationship-building that they have has changed the cultural landscape of the state – and with it, the possibilities for innovative and inclusive solutions to the historic challenges native title has presented to all Australians.

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