ABORIGINAL BOUNDARIES:
THE MEDIATION AND SETTLEMENT OF
ABORIGINAL BOUNDARY DISPUTES
IN A NATIVE TITLE CONTEXT

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Title: Aboriginal boundaries: The mediation and settlement of Aboriginal boundary disputes in a native title context.

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Introduction
The aim of this paper is to promote the use of interest-based mediation methodology in relation to the resolution of overlaps between native title claims and to introduce the concept of the conflict resolution domain as part of this methodology. The paper develops and extends the interest-based mediation model (Fisher and Ury 1991) in the context of mediation under the Native Title Act 1993 (NTA). I shall use a particular example of overlapping claims to illustrate the use of the model and the development of the conflict resolution domain. The paper will have achieved its aims if it contributes to the debate about mediation across cultures.

The members of the National Native Title Tribunal commonly employ interest-based mediation methodologies in the mediation of matters under the NTA. This mediation work is focused on multi-party, resource-based, cross-cultural negotiation. This paper deals with a subset of those negotiations, that is, negotiations between Aboriginal groups associated with overlapping native title claims.

On occasion the Federal Court requests that the Tribunal mediate between native title claimant groups who have overlapping claims. The Aboriginal parties in this sense are brought together in a bi-cultural context. The context is bi-cultural in the sense that issues relating to Aboriginal culture, the boundaries of traditional territory, are played out under the auspices of the NTA. The resolution of such matters under the NTA most commonly involves the use of mediators and mediation.

This bi-cultural context can be typified as the space defined by the intersection of Aboriginal laws and customs and the NTA or Australian law. This has been termed the "recognition space" (Mantziaris and Martin, 2000:9). It is in the recognition space that the mediation is conducted usually by mediators from the National Native Title Tribunal or Native Title Representative Body. The paper presents a number of practical options which seek to empower Aboriginal peoples in the native title process through enhancing their ability to manage native title issues and their ability to make collective decisions in the native title context, while contributing to the possibility of sustainable outcomes within an appropriate timeframe.

Mediation across cultural boundaries.
Despite mediation being seen as a viable alternative to court based resolution there is a need to approach conflict resolution in the native title context with a degree of caution. In this regard Beattie suggests that mediation may in fact be a tool of social

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1 Much of the paper is drawn from a draft of a chapter in my PhD thesis - Mending Fences: An analysis of cross-cultural mediation techniques in Australia's rangelands (in prep.). Aboriginal Environments Research Centre, Brisbane, University of Queensland. A version of this paper was presented at the Re-thinking Indigenous Self-determination conference at the University of Queensland.
control by the legal system that requires the Aboriginal participant to “…acquiesce to [her] own subjugation in the name of fairness and cultural re-empowerment” (Beattie, 1997: p58). This criticism of mediation is not uncommon in the literature (Dodson, 1996; Sauvé, 1996; Beattie, 1997; Spencer, 1997).

Alternatively the use of mediation in this native title context could be seen as a parallel to the notion of development in the Third World. From this view mediation is an attempt to modernise the decision-making process of Aboriginal peoples allowing for progress to be made within their communities toward self-determination. Sutton sees such formulations as “progressivist public rhetoric” which he contrasts against a background of the “raw evidence of a disastrous failure in major aspects of Australian Aboriginal Affairs policy since the early 1970s…” (Sutton, 2001: P. 125). Certainly the failure of development policy in the Third World as practiced by such institutions as the World Bank is well documented. There is a risk that the National Native Title Tribunal or Native Title Representative Bodies could fall into a similar trap through the mediation methodologies that they employ. The goal of these institutions in Australia should be to go beyond progressivist public rhetoric to the application of a pragmatic mediation model employed in the resolution of native title matters.

The interest-based mediation model advanced in this paper needs to address the following problems in resolving disputes in the native title context:

1. Mediation is a western model for dispute resolution and as such may advantage western cultural groups over indigenous groups (Beattie, 1997);
2. This western model may also disadvantage indigenous peoples in intra-cultural disputes because of a power imbalance between the non-indigenous system in the form of the mediator and mediation methodology and indigenous peoples and indigenous dispute resolution methodologies (Dodson, 1996);
3. Mediators in native title matters are generally not Aboriginal people and consequently may be seen by Aboriginal peoples to be biased toward non-aboriginal people and non-aboriginal concerns (if not actually biased in this manner);
4. Aboriginal parties may also see Aboriginal mediators as problematic – an Aboriginal person from the same group or closely related group maybe seen to have biases toward particular Aboriginal families or clans. There may also be difficulties for the Aboriginal mediator in the sense that it is culturally inappropriate for Aboriginal people to deal with land issues outside of their own country;
5. Mediation of intra-indigenous disputes within the native title context could deliver outcomes that are appropriate in the native title domain and not the Aboriginal domain (and consequently do not represent durable resolutions of issues) An example of this kind of problem sometimes occurs with court imposed timelines for the resolution of issues. These timelines may result in outcomes that have not be fully canvassed by the native title group;
6. The native title claim group may be a group of Aboriginal people who would not normally make decisions as a collectivity and consequently need to develop a decision-making process among themselves.

In part, this paper seeks to address this question about the role and legitimacy of mediation in the Aboriginal domain by consideration of issues related to the use of mediation in the resolution of overlaps between native title applications lodged under the NTA.

I will briefly touch on one aspect of the views about mediation and decision-making before moving on to address the broader conflict resolution issues. I have observed in the course of my work in land-use negotiations between Aboriginal peoples and non-Aboriginal peoples since 1990, that there is a view held by some non-Aboriginal people and some Aboriginal people that Aboriginal peoples because of their traditions or culture, or because of the impact of colonialism, are incapable of effective, efficient or durable land-use decisions. Similarly, Williams observes that,

considerable other evidence suggests that white administrators have doubted Aborigines’ ability to arrive at anything recognisable as a decision. They have often expressed this doubt in observations ‘decisions’ were not binding, or that decision-makers did not or could not ensure their implementation (Williams, 1985: P 241)

While Williams was referring to the Aboriginal local government context, I believe that this attitude pervades the native title arena. As a result of this belief about Aboriginal peoples and their decision-making there has been a reliance on the use of literature written about Aboriginal peoples or anthropological reports to deal directly with conflict between Aboriginal groups. The written material is used to determine which group is the appropriate claim group for a particular area. Indeed, these materials are often valued more highly that the opinions of the Aboriginal peoples themselves are. While the use of such material may assist Aboriginal peoples to resolve their disputes, the short hand application of this material in the imposition of an outcome over groups of conflicting Aboriginal peoples, has in my view almost always resulted in very fragile outcomes (not to mention inappropriate). The hope is that the literature-based resolution will be more durable than one arrived at through mediation. While the literature sources may be authoritative and the anthropological reports expert they do not constitute a solution to overlapping native title claims of themselves. They are better employed as tools in a properly constituted people centred conflict resolution process. This paper proposes that a fear of Aboriginal decision making is misplaced. Mediation attempts to avoid the application of an external solution to Aboriginal disputes by focusing on issues raised by the disputing parties.

The Potential of Mediation

Mediation is a flexible tool that is adapted for use by the parties, in this case Aboriginal peoples, with the help of a mediator to suit their needs in dispute resolution. Indeed, the “…result of transplanting the Western mediation model into Aboriginal communities is the hybridisation of the Western mediation model” (Spencer, 1997: 258). This adaptation of the model is similar to the manner in which Aboriginal peoples have adopted other western technologies to suit their needs. For example, the use of the “toyota” (Northern Territory word for any four wheel drive) in the Tanami Desert is central to the management of Warlpiri “business”. Warlpiri men use toyotas to travel in company to conduct business at particular sites. On these occasions the Tanami road is closed to women. The toyota (or other motorised...

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3 This is not to say that colonialism has had no impact on Aboriginal decision-making or that some form of capacity building is not necessary.
transport) has become central to the life of these town-based desert communities and, as well as being used to transport people to ceremony, they are used to maintain kinship networks (above and beyond providing more mundane transport needs). Similarly the use of mediation techniques may be adapted to suit uniquely Aboriginal needs in dispute resolution between Aboriginal groups and in negotiations between Aboriginal groups and non-Aboriginal parties in native title matters. The paper proposes that the use of an interest-based mediation model is one of the best approaches in dealing with such cross-cultural issues. Fundamental to this approach though, is the design of an appropriate conflict resolution system for each case. Simple blind application of a model will almost certainly result in failure to reach agreement or resolve conflict, as well as in the disempowerment of the parties. Blind application of the model may also result in agreement but usually in a way that involves imposition of resolution on the parties and consequent disempowerment and once again a lack of durability in the ultimate outcome.

The High Court’s Mabo decision in 1992 and the Wik decision in 1996 created the potential for native title to exist across virtually the whole continent (Holmes, 2000: 237) and led to the declaration that terra nullius was dead. The end of terra nullius was of course not the end of colonialism. Native title has become an element of Australian common law and statute law. Native title is not Aboriginal law, rather it is the recognition of elements of Aboriginal law and custom by the Australian legal system. To some extent it is also a cultural recognition of indigenous Australians by non-indigenous Australians albeit a contested recognition. The intersection of the two systems of law and custom can be seen as the “recognition space” (imagine a Venn diagram – two overlapping circles: see Diagram 1) (reproduced from Mantziaris and Martin, 2000:9). It is in this recognition space that the NTA operates and where native title determination applications are lodged.

The mediation of native title matters also occurs in the recognition space.

**The Context for Mediation of Overlapping Native Title Applications**
The NTA provides for a system of mediation to resolve claims for native title in Australia. Native title exists (potentially) wherever it is has not been extinguished by the grant of a valid tenure by the crown. Consequently there are claims in pretty much every region of Australia.

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4 Martin acknowledges Noel Pearson as the source of the concept of the recognition space (See Mantziaris and Martin 2000: 10)
Many of the native title applications currently lodged with the Federal Court are overlapped by one or more other native title claims. To some extent the registration test provision of the NTA provides for a limiting of the number of applications that overlap. S190C 3 of the NTA requires that a claim may not pass the registration test if it is overlapped by a previously lodged application that has applicants in common with the new application. However, this does not eliminate all overlaps, indeed the most common form of overlap is a situation where there are neighbouring claimant groups, who do not share common applicants, overlap with each other.

There can only be one determination of native title over any particular area. Thus overlaps require resolution in one way or another if there are to be positive outcomes in the native title process in the form of determinations in the Federal Court. Also, if future acts are proposed within the area of overlap between native title applications the degree of difficulty in getting to a negotiated outcome which allows the future act to take place validly is dramatically increased.

In general it is the responsibility of the Native Title Representative Body (NTRB) for a region to resolve issues between native title applicant groups both prior to lodgement of the application and during the mediation process. The National Native Title Tribunal may be requested by the Federal Court to mediate between native title claimant groups to see if there can be a resolution of any overlaps (s86B).

**The mediation model**

One way of looking at the conflict resolution system is as a series of domains. I am using the term domain here to represent all of the societal elements – social, political and legal – that impact on a particular Aboriginal group. These domains can be visually constructed in a similar fashion to the Venn diagrams used by Mantziaris and Martin to describe the recognition space between the Australian legal system and Aboriginal traditional laws and customs (2000: 9) (see Diagram 1 above).

I have extended this visual model by transforming the recognition space into a **conflict resolution domain** (see Diagram 2 below). The importance of this space is in defining the territory in which facilitated mediation/negotiation can occur. The negotiating parties also have interacting domains (in this case the overlapping native title parties). Thus in using the term ‘domain’ I have attempted to capture all of the influences on that party, that is, cultural, societal and political. It is important to note that the influences on a particular party are present over the whole domain including within the conflict resolution domain. The native title domain constitutes the ‘legal order’ in which the Aboriginal parties interact and includes the apparatus’ of the NTA – Native Title Representative Bodies, Federal Court, and the National Native Title Tribunal.

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Part 2 Subdivision 3 of the Native Title Act 1993 – Future Acts are basically things to be done in the future that potentially effect native title.
The model presented here of course can be generalised for use in any mediation context. The important factor to note is the creation of the conflict resolution domain as the concept behind the design of a conflict resolution or negotiation system.

Perhaps some explanation of the diagram is necessary here. First look at the overlap between Aboriginal Domain 1 and the Native Title Domain. In this area of overlap the interaction of the group with the native title regime is occurring. For example, the activity of lodgement of the original native title application in the Federal Court by the group and the subsequent court hearings would be situated here. There is also an area of overlap between the Aboriginal domains that is outside any overlap with the native title domain. The social and legal relationships required to conduct a joint ceremony would exist in this area.

The creation of the conflict resolution domain defines the limited area in which the mediator operates and the mediation occurs. In this space the mediator legitimately has control of the conflict resolution process but not the interests of the parties. The mediator invites the parties into the conflict resolution domain and sets the rules of engagement by agreement. Once these rules are set the mediator has a set of tools which can be used to manage the interaction of the parties in negotiation.

There are other interactions between the parties and within the parties that may have an influence on the conflict but are in a sense excluded from the conflict resolution domain. An example of this may be how the group interacts with its elders, in other words, how decisions about important issues are made within that group. Another example might be conflict between members of the group that is only amenable to resolution by traditional law means. This kind of conflict may have a profound influence over the mediation of native title issues but cannot be dealt with within the scope of the native title mediation. An understanding of these interactions and the boundaries between them allows the mediator to stay within the conflict resolution space and not wander into the exclusive domains of the parties. It also allows the mediator to make decisions about what issues should be in negotiation and which should not. Finally it allows the mediator to manage the resolution of conflict without breaching the neutrality that is the foundation of trust between the parties and the mediator. Thus the careful management of the boundaries between the parties and the
conflict resolution domain enables the mediator to construct a process that is not only effective but is culturally sensitive.

The Problem – Overlapping applications.
A hypothetical, but common, native title situation might be as follows: there are several overlapping native title claims that overlap east to west and north to south. The claims are all registered under the NTA and were lodged several years ago. There has been limited negotiation/mediation with non-indigenous parties (where they exist) because of the overlaps. The Federal Court has requested that the Tribunal mediate the overlaps between the claims with a view to assisting the parties to reach agreement about who holds native title in the overlap area (NTA s86A b (i)). Possible resolutions for the overlap areas include:
1. removal of one or both claims;
2. defining more precisely the area of overlap eg, reducing it; and
2. defining areas of shared rights and perhaps agreement about the nature of those rights and how they co-exist.

The interest-based mediation methodology involves identifying issues, options, interests and alternatives including discussion about what might happen if there is no negotiated outcome. The parties in this mediation are Aboriginal and the issues relate squarely to Aboriginal law but the context in which the interaction is played out is under Australian law. Thus while the purpose of mediation is to provide an outcome under the NTA, the goal of the mediation is to produce outcomes under Australian and Aboriginal law. There is a strong need to reflect on Aboriginal law and Aboriginal processes in order to achieve durable outcomes – in this sense the two processes are strongly linked and the mediation itself will take place in the conflict resolution space as defined above. It should be noted that mediation may occur simultaneously with processes that are proceeding under Australian law or under Aboriginal law.

The method mostly employed by the Tribunal is termed interest-based mediation. This method is based on a model developed by Fisher and Ury (1991). The model presented here is based on developments that have occurred in mediation practice under the native title regime since 1994. Table 1 outlines the basic elements of the interested based model as applied to native title mediation.

Table 1 Interest Based Mediation Model – multi-party resource based cross-cultural negotiation/conflict (adapted from, Jones, nd)

<table>
<thead>
<tr>
<th>1. Pre-mediation – building the basis for successful mediation.</th>
</tr>
</thead>
<tbody>
<tr>
<td>1.1 Private meetings with individual parties.</td>
</tr>
<tr>
<td>1.2 Mediation begins with a question: What should the relationship between the parties be like? This question is answered by asking a number of preceding questions at this stage of the mediation:</td>
</tr>
<tr>
<td>• The party should consider – What happens if there is no agreement?</td>
</tr>
<tr>
<td>• Capacity building – How is the group made up? What should the internal decision-making of the group be like?</td>
</tr>
</tbody>
</table>

6 The techniques discussed here are drawn from the actual practice of mediation in Qld. However, no specific details from the mediations has been included.
7 See Lane (2000) for a discussion of Tribunal mediation technique. She concludes that the Tribunal uses a combination of many different models: narrative, transformative and interest-based.
• Identification of the parties interests in the problem (this may flow into the mediation proper).
• Narrative of the conflict. What has gone on between the parties in the past? Or Do the parties have a previous relationship?

2. Mediation – the conflict resolution domain

2.1 Joint meetings with parties and some private meetings as necessary.

2.2 Interests. The question at this stage is: What is in the parties’ best interest collectively and individually? (Just to be clear this is not a question that the mediator can answer).

2.2.1 Options. Develop options with the parties. Options for outcome should reflect the parties’ interests in the problem.

2.2.2 Legitimacy – Rules about the process have been developed. These rules belong to the mediator not the parties. The parties own the context of agreement-making ie., their interests and the options developed from them. Parties need to be confident that the rules of the conflict resolution domain have been adhered to and will be adhered to. The parties need to be confident of each other’s decision-making capacity and coherence.

2.2.3 Communication and relationships. An important part of mediation is the development of a conflict narrative. In order that there be a relationship between the parties that contributes to positive outcomes parties need to hear each other’s stories. The mediator must recognise that no group is monolithic – those decision-makers outside of the mediation will not be part of the conflict resolution domain, they are not part of the story. The domain needs to be extended to them in order that decisions are durable and relationships are manageable.

3. Mediation closure – Is the agreement durable?

3.1 In what context is the agreement to be delivered? Most agreements must be legitimate in an institutional context as well as at the local level. Parties need to live with each other and governments (for example) need to be able to manage processes with certainty.

3.2 Following the steps above should make the agreement legitimate and therefore durable.

Notes:

Power – power is managed at the pre-mediation stage and during the mediation.
• Pre-mediation – capacity building ensures that the party is capable of making durable decisions which are meaningful in the context of the group. This ensures that the party can participate effectively in the mediation thereby decreasing the potential for power imbalances during and after the mediation.
• Mediation – the story-telling or narrative part of the mediation allows for the parties to develop a relationship in the context of conflict resolution rather than in the context of a dispute. The development of a relationship can assist in the balancing of differences in power between the parties.

Mediation
• Elements of the mediation can be moved around in order to suit the needs of the parties.
• Many of the steps in the process overlap – the process is developmental ie parties become more competent at agreement making as the process continues thus to some extent the process may cycle back on itself to take advantage of this competency.
• Each step in the process is like a paragraph in a story in that it needs to be linked by a bridging concept. It is the job of the mediator to help parties find these concepts in order that the parties can build their story.

The Mediation Process – What happens in the Conflict Resolution Domain?
In this section I shall touch on a number of techniques that may be used to resolve overlapping native title claim issues. The headings I use in this section follow the interest-based mediation process as outlined in Table 1.

Narrative – the conflict story (from Table 1 – #1.2)
The heart of the mediation could be said to be at the beginning of the process. This is where the mediator sets up the conflict resolution space and develops a relationship with each of the parties. In listening to the parties the mediator acquires the tools to
design the conflict resolution system. The parties get to tell their story and get to understand the process in which they are involved. The relationships developed at this stage of the process between the mediator and the parties are critical in terms of achieving outcomes. Indeed, no story, no agreement! The narrative part of the mediation is about changing the parties’ conflict stories into conflict resolution stories.

The telling of the conflict story allows two things to happen. First, the parties can use their stories to engage with the mediation process and the mediator. Here issues such as recognition – the simple act of being heard – are vital if Aboriginal people are to see any value in the mediation process. The declaratory nature of the story telling also allows for the native title group to reinforce internal relationships thereby ensuring more effective participation in the mediation process. Second, the story-telling allows the mediator to commence the work of designing a conflict resolution system for the particular parties involved in the dispute. In this regard the mediator is able to hear where the parties have been in terms of their own attempts at resolution and in terms of how the conflict has developed. This story builds the party’s position in relation to the conflict. The mediator is seeking to get behind this position to identify the party’s interests and ultimately using those interests to assist the party to identify options for resolution of the conflict. In this case that would include proposals for dealing with the overlaps claims in the native title system.

In this narrative phase of the mediation the mediator is seeking to move the parties from their conflict story which exists in the overlap between their domains to a conflict resolution story which exists in the conflict resolution domain.

This preliminary stage is often termed ‘pre-mediation’ and commonly involves private meetings. Typically in a private meeting the mediator explores with the party what might happen if there is no agreement.

There are a number of problems for the groups if the overlaps are not resolved. There can only be a single determination of native title for any particular area. Given this the Federal Court may seek a resolution of the overlaps between claims, if it can be done by agreement. If there can be no mediated outcome then the Court will set the applications down for trial.

The problem here is the clash of systems. A dispute between Aboriginal groups, which arose under Aboriginal law and has been expressed through overlapping native title claims may end up before the Federal Court as a trial. The focus of the Federal Court is not the resolution of the dispute between the overlapping groups but rather the questions of whether or not native title exists and who holds the native title if anyone. The Federal Court has already made a negative determination in relation to the Yorta Yorta people (NSW/Victoria). There is the danger (for the native title claimants) that the Court will find that the evidence put before it is insufficient to sustain native title over the land. This danger is enhanced through the adversarial nature of the court process. To be clear I am speaking here of a cultural clash of systems. I am not talking about the possibility of native claimants who do not have connection to land gaining a determination of native title via the agreement path. I am talking about the possibility of the Federal Court finding that the native title has been extinguished despite the group having sufficient connection to land. This finding being the result of cultural communication difficulties between the Aboriginal system
and the Australian legal system. In this sense the mediation path represents a compromise between resolving Aboriginal disputes under Aboriginal law and resolving them in the courts.

The presence of overlaps also delays or complicates any negotiation with other non-indigenous parties in terms of the applications themselves and any proposed future acts, particularly in the area of overlap.

**Interests (from Table 1 – #2.2)**

There are many reasons why groups may lodge native title applications that overlap. It is not my intention to explore those reasons here. However, there are two important factors to note in relation to the resolution of overlaps:

1. The basis for the native title applications come from the Aboriginal domain; and
2. The native title applications are an artefact of the NTA.

These two factors place the interaction of the neighbouring claimant groups in the conflict resolution domain. With these factors in mind, it is not the task of the mediator to determine a truth under Aboriginal Law, nor is it the task of the mediator to determine a truth under Australian Law. These arbitral functions belong to the Aboriginal people concerned and the Court respectively. The parties, though may focus on these issues as part of the resolution process.

In order to help the parties in this example discover the issues behind the overlaps senior people in each of the groups were asked about how their country is defined. How does one know whose country you are on? The answer to this question is termed a “tenure theory”.

Under Aboriginal law this question is relational – it is important to link ancestors to country in order to make appropriate decisions. Under the mediation process we are seeking to find out what the native title claimant groups’ interests are in the context of overlapping claims under the NTA. The interest in this circumstance is focused on country rather than the traditional underpinning of that country (the relationship between genealogy and territory). Thus questions that help establish a tenure theory do not necessarily need to establish genealogies. Questions about genealogies may in fact hinder the identification of interests in land as genealogies also provide the political basis for decision making and establishing a connection to country. By asking questions about genealogies in the context of mediation the mediator has stepped beyond the conflict resolution domain and into the Aboriginal domain. This is not to say that there is no role for say an anthropologist in collecting genealogies as part of the overall process of reaching a determination of native title. What I am concerned with here is the process of mediation, and in this particular example in dealing with overlapping native title claims. It is also important to recognise that the Aboriginal party will be operating in the Aboriginal domain and the conflict resolution domain at the same time. In this, the traditional underpinning of Aboriginal land tenure and its attendant politics are important influences on the Aboriginal parties that the mediator needs to take into consideration in the management of the mediation and the design of the conflict resolution system.

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8 I borrow the term Tenure Theory from its informal use by anthropologists in the land rights regime in the Northern Territory (*Land Rights Act (NT) 1976*). In those circumstances it was used to describe the how people were connected to country (usually in the context of developing a claim book).
The mediator empowers the group to participate effectively in the mediation not by questioning its fundamental basis for existence or questioning the legitimacy of its politics (or by giving the impression of doing these things) but rather by seeking to establish with the group what is the rule for identification of country. Questions about people’s genealogies in the context of conflicting native title claims will give the impression (in my view) that the mediator is seeking to establish to truth of the party’s claim. The mediator is no-longer seen as a mediator under these circumstances, he or she has become an arbitrator in the eyes of the parties.

Aboriginal law provides that certain people are empowered to discuss issues related to making decisions about country. By working with these people it is possible to establish a tenure theory. In this example the tenure theory related to the direction of flow in the river systems on the region. The boundary of a particular group’s country is defined by a water courses in which the water flows in a particular direction. This level of detail was sufficient for the purposes of resolving the native title dispute. The tenure theory was a generally accepted ‘rule’ of thumb by each of the groups involved in the conflict.

Options (from Table 1 - #2.2.1)
In this example the tenure theory process is crucial to establishing viable options between the parties that deal with the resolution of the overlaps. Essentially the current boundaries, in the hypothetical example, have been established without appropriate interaction between the parties under Aboriginal Law. The mediation process via the establishment of a tenure theory allows elements of Aboriginal Law to operate effectively within the context of the NTA with a new set of boundaries being produced. Practically this means a discussion around a map with parties drawing the boundaries as they are agreed. This process of mapping is discussed below in the section on legitimacy. The creation of a space where the conflict between parties in native title terms could be resolved not only allowed the parties to redraft their claim boundaries so that they did not overlap but also enable the parties to claim country that had not been previously subject to claim.

Legitimacy (from Table 1 - #2.2.2)
One of the tools used in this kind of mediation is mapping. Maps provide a visual representation of the country under discussion between groups. In general Aboriginal people find maps easier to work with than the legal drafting commonly found in agreements between native title parties. The outcome of the agreement between the groups is represented by a map, indeed parties sign the map rather than an agreement drafted by lawyers. An agreement is drafted by lawyers to represent the ultimate outcome. This has the purpose of communicating the agreement to the Federal Court. The lawyers in drafting the document have been instructed by the parties to reproduce in words what the map shows. Each of the Aboriginal parties can potentially check

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9 The group is self-identifying. As a group they lodged an application for the determination of native title. That application process involved the authorisation of the applicants by the group to lodge the application on their behalf. The authorisation process has been reviewed by the National Native Title Tribunal as part of the application registration process (NTA 190C 4 (b)).

10 Maps, of course, are not without their own cross-cultural communication difficulties. The point here is that they are a step away from the legal process and a step toward Aboriginal processes. Some mapping systems are able to include aerial photography as well as the more usual cadastral or topographical elements. The aerial photography greatly enhances the usefulness of maps in the mediation of matters involving Aboriginal peoples.
the agreement by referring back to the map. The map allows for the parties to have an objective measure of the outcome that is reasonably intelligible and reliable. The map is an artefact of the agreement process and as such represents a tangible outcome of the process. Importantly the map can serve as a symbol of ownership. It is the ownership of the process by the parties that gives it legitimacy.

Generally not all of a particular claimant group would be present at any mediation meeting. This represents a problem in terms of the legitimacy of any decision for the broader claimant group. In order to overcome this problem it is generally the case that the people at the meetings are viewed as representatives by the broader native title claimant group and they must bring information and/or decisions back to that broader group for ratification. An aspect of this issue is discussed in the next section on communication. It is important that the native title claim group be able to make decisions effectively in relation to native title matters. The group needs to be able to respond effectively to the mediation process as much as the mediation process needs to be able to respond to the needs of the native title claimant group. In the example discussed the groups needed to be able to operate across the two domains: the conflict resolution domain and their own cultural domain. Members of the groups clearly indicated in the mediation process that all decisions would need to be “taken back” to the broader claim group in order to be discussed an ultimately ratified or rejected. The Aboriginal groups here are in a sense no different from any other group involved in mediation. They are not monolithic, in other words all groups have someone else to report back to whether it be the politicians in the case of government negotiators or the CEO of a mining company in the case of the industry negotiators. What will vary will be the style of decision-making once a matter is taken back to the broader group for the ultimate decision.

In this case the Aboriginal people wanted to assert their authority over this part of the process. They stated clearly that the mediator was not be involved in this part of the decision-making. In this sense the boundary between the conflict resolution domain and the Aboriginal domain was clear.

Communication (from Table 1 - #2.2.3)
One crucial issue for communication in this mediation example does not relate to communication with the mediator or between the parties. Each of the claimant groups needs in the first instance to have good internal communication. Essentially, this means the group should be able to make decisions about native title issues.

Often the claimant group is not a pre-existing body making decisions of the nature required by the native title process. The group also requires a level of internal cohesion in order to survive the pressures that they will come under in mediation and negotiation with other parties. This decision-making capability is addressed as part of the pre-mediation process and can be viewed as capacity building. The difficulty for the mediator with this capacity building phase is knowing whether or not the boundary between the conflict resolution domain and the Aboriginal domain has been crossed\(^{11}\). The capacity building falls into three areas: the provision of native title information, that is, information about the NTA and its processes, information about the mediation process and assistance with group decision-making capacity. The

\(^{11}\) The definition of the conflict resolution domain boundary is the subject of ongoing research in my PhD project.
information provision functions are not controversial in terms of positioning in the conflict resolution domain. The information provision usually occurs in private meetings where members of the claimant group can freely ask questions and gain the information they need\textsuperscript{12}. The later form of capacity building presents a greater challenge in terms of staying within the bounds of the conflict resolution domain. In the example discussed in this paper an issue arose for one of the parties in relation to decision-making. This issue was centred on who should be present at decision-making meetings and conflict between particular group members at those meetings. In order to stay within the boundaries of the conflict resolution domain the mediator chose to deal with issues relating to decision-making within the group but not issues related to the politics of decision-making within the group. In this case the group identified the members who should be present at meetings and agreed on steps to ensure their presence. Also the conflict between particular members of the group was identified. The group agreed that this conflict should be resolved in private by the group, that is, without the assistance of the mediator. The mediator and the group recognised that even though the internal conflict was affecting the mediation it was more appropriately resolved using Aboriginal conflict resolution methods. This private resolution of conflict occurred in the Aboriginal domain outside of the conflict resolution domain.

**Relationships (from Table 1 - #2.2.3)**
The process seeks to preserve the relationship between the neighbouring Aboriginal groups. It is unlikely that any positive or trusting relationship would be created or preserved through an adversarial court-based process. The mediation process also reinforces the notion that the local Aboriginal groups should be making decisions about country not an alien body like the court. The relationship between the Aboriginal parties is preserved through establishing effective communication within the negotiation and capacity building within the groups themselves. Groups that are able to make their own decisions are in a much better position to resolve conflicts with neighbouring groups.

**Commitment (from Table 1 - #3.0)**
The measure of the success of the agreement is its durability. There have been a number of agreements within the native title process in Queensland that have drawn on elements of the above. These agreements have remained durable because they involved Aboriginal decision making in a real sense while at the same time providing for outcomes under the NTA.

**Conclusion**
The conflict resolution space is a useful construct to assist in the mediation of disputes between Aboriginal Peoples within the native title process. In particular, the construction of the conflict resolution space as a bi-cultural space allows for the notions behind interest based mediation to operate in a way that is effective for Aboriginal peoples both in terms of outcomes in the native title system and in its appropriateness for Aboriginal cultural systems. The incorporation of capacity building into the mediation process allows for Aboriginal peoples to make their own decisions means that they can interact with other parties in the native title system in a much more effective manner. The capacity to make decisions goes to the core of

\textsuperscript{12} The information needs to be presented in a manner that is accessible for the group.
notions such as empowerment, self-determination and ultimately freedom. The mediation process may not be the “revolution” but it is in my opinion a step on the road to freedom – not just for Aboriginal peoples but for all local communities.

Cases
Wik Peoples vs Queensland (1996) 187 CLR 1
Mabo vs Queensland (No2) (1992) 166 CLR 1

Legislation
Land Rights Act (Northern Territory) 1976
Native Title Act 1993

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