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Aboriginal rights, interests and ADR — a new epoch?

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Commercial Australia has long benefited from timely, cost-effective and private dispute resolution; fostering the certainty that profitable industry and businesses need to thrive. Aboriginal owned enterprises, as a bourgeoning segment of the commercial sector, are poised to benefit from far greater use of Alternative Dispute Resolution (ADR) processes.

The Aboriginal business sector is in a phase of considerable growth. In 2018, a PWC report highlighted that Aboriginal enterprise contributed between $1.5 billion and $5.9 billion to Australia's gross domestic product (GDP).[1]

Census data indicates there were 11,538 Indigenous business owner-managers in 2016, an increase from 8,891 in 2011.[2] Government initiatives such as the Indigenous Procurement Policy launched in 2015, has generated over $2.7 billion worth of contracts for Indigenous businesses,[3] as well as the more recent Indigenous Advancement Strategy that has committed $5.2 billion over 4 years from its launch in the 2019–20 Budget through to 2022–23.[4]

Thus, if one accepts the premise that access to ADR is a corollary of maintaining profitable businesses, ADR is of increasing importance to Australia's Aboriginal and Torres Strait Islander ("ATSI" or "First Nations") communities.

On 5 September 2019, the Australian Disputes Centre (ADC) considered three central aspects of this increased focus on ADR processes and our First Nations people. Speaking on "Aboriginal Rights, Interests & ADR — A new Epoch?"[5] leading experts in the sector — Anthony McAvoy SC, Stephen Wright, and Helen Shurven — emphasised a consistent message that effective engagement with, and within, ATSI communities is rooted in the principles of interest-based negotiation, mediation and effective dispute systems design. For our First Nations commercial interests to succeed, these factors are emerging as essentials.

The fillip of Timber Creek

Native Title compensation claims, of which the High Court's decision in *Northern Territory v Mr A Griffiths (decd) and Lorraine Jones obh of Ngaliwurru and Nungali Peoples*[6] (*Timber Creek* decision) is one, are delivering increasing economic independence to First Nation's communities and enterprises across Australia. Anthony McAvoy SC,[7] highlights the significant quantum of potential compensation claims on foot. Citing Minter Ellison's analysis,[8] he notes that:

> To date, Native Title has been determined over approximately 280 million hectares of land and waters nationally. While only some of those determined areas will have been affected by relevant acts attracting compensation (for example, it was approximately 6% of the claim group's determined native title land in Timber Creek), the total compensation bill will likely be very large. For illustrative purposes, applying the Timber Creek award of $20,000 per hectare to just 1% of Australia's total determined native title area, yields an overall compensation figure of $56 billion. [Or at] 5% this increases to $280 billion.[9]

The increased potential for compensation claims in the Native Title context means that there is an ongoing and increased need for effective and cohesive dispute resolution mechanisms for future disputes arising from the flow-on effects of compensation payouts, and Indigenous access to capital. McAvoy SC connects current treaty making processes, underway in Victoria, Northern Territory and Queensland, with further growth in the sector. He is of the view that these agreements are likely to take the form of agreements between state and territory governments and the local First Nation peoples, and should set out a clear framework of engagement with each other, and a clear process in the event of a dispute.

From the heart comes the Uluru Statement

The stability and cohesion of the complex Aboriginal and Torres Strait Islander geo-political landscape prior to European settlement points directly to systems of governance and dispute resolution processes that seem extraordinary in today's context. That "special something" in the decision-making processes of these ancient societies, today shines through in the *Uluru Statement from the Heart.*

The *Uluru Statement from the Heart* was negotiated, agreed and presented to Parliament by a bipartisan-appointed Referendum Council (First Nations National

Constitutional Convention) that met over 4 days at Uluru in May 2017. The Statement calls for the constitutional recognition of Aboriginal and Torres Strait Islander peoples and a proposed new relationship between the Australian Government and its First Nations people. McAvoy SC highlights the importance of focussing on the words of the Uluru Statement that characterise this new relationship:

> When we have power over our destiny our children will flourish. They will walk in two worlds and their culture will be a gift to their country.
> We call for the establishment of a First Nations voice enshrined in the Constitution.
> Makarrata is the culmination of our agenda: *the coming together of a struggle*. It captures our aspirations for a fair and truthful relationship with the people of Australia, and a better future for our children based on justice and self-determination.[10]

The 250 signatories to the Statement, and the standing-ovation with which it was met,[11] is a testament to the effective consultation and negotiation process used to garner support and craft its final terms. While this complex negotiation was not without its critics,[12] the overwhelming majority of First Nations representatives were able to reach consensus.

The existence of a mechanism to resolve internal disputes is central to any existing nation, community group or entity. It is a necessary aspect of the mere existence of that body, and this is not any different for First Nations. At the heart of the Uluru Statement McAvoy SC identifies the notion of self-determination and the need for *makarrata,* the concept of "coming together after peace or struggle", as crucial to the reconciliation of the Australian Government with its First Nations people.

Two aspects of the Uluru Statement in particular speak to this coming together; the treaty process and the truth-telling process. The Uluru Statement asked for a Makarrata Commission that would establish an agreement making process by which First Nations communities can negotiate agreements with the federal and state governments.[13] The second function of the Makarrata Commission would be to provide for "truth-telling", allowing for indigenous experiences to be heard, and creating a path for reconciliation.[14]

McAvoy SC raises *Transitional Justice* as another field from which opportunities abound for the implementation of ADR processes. He argues that there remains an ongoing need for a truth commission into the past, for the purposes of moving forward and developing as a Nation. Specialist skills are needed in the agreement and negotiation process to close the gap, and McAvoy SC concludes:

> I am not sure that we can say that there's a new epoch, but I do believe that there are very many opportunities for ADR practitioners in the indigenous space from dealing with the sacred to the mundane, from the very highly commercial native title compensation issues to the very emotional truth commission issues.[15]

Principled deal making

In New South Wales, there are 120 Local Aboriginal Land Councils (LALC) that are autonomous bodies governed by Boards, and elected by Aboriginal community members.[16] Part of an LALC's role is assisting their members with land claims disputes. In NSW alone, there are nearly 30 thousand undetermined land claims.

Covering most of Western Sydney including Penrith, the Hawkesbury and up into the Blue Mountains, Deerubbin Local Aboriginal Land Council (Deerubbin) is the largest freehold landholder in the region, in part due to large Crown Land divestments on sites including the Westmead and North Parramatta development area.

Deerubbin frequently interacts with government and corporations who are wanting to use the LALC's land for development and other purposes. Stephen Wright, Chief Operating Officer of Deerubbin, highlights the unique challenges faced by the LALC's, and the significance of dispute settlement in this context:

> Land Councils have … massive land holdings which require land use planning, lots of commercial development, lots of biodiversity issues, Aboriginal cultural heritage, management work, joint management of national parks and community schemes like ensuring equity and benefits to Aboriginal people and partnerships in one way, shape or form. So, if you are dealing with a large landholding cooperation, **agreement making** is essential deal making.[17]

To mitigate the risk of conflict in this context, Deerubbin has embedded a framework for negotiations and business dealings that draws on the fundamental principles of ADR: honesty, openness, good faith, confidentiality and the acceptance of an authority structure. Deerubbin deals with stakeholders through its carefully crafted "Principles of Engagement" agreement, which ensures consistency of treatment and transparency for all those involved with this LALC. Deal making with Deerubbin means that large commercial and government interests, such as the Greater Sydney Commission, Universities, local councils and construction multinationals are signing up to Deerubbin's Principles of Engagement.

Having a clear and ADR-premised framework governing negotiations between parties is a necessity for LALC agreements, given their role and functions and the ubiquity of their interactions with government bodies and corporations Wright argues. This ADR framework is effective for several reasons:

- ADR processes inherently embed the respectful treatment of the other party to the dispute.

- They provide a sound legal mechanism for establishing the process of negotiation with the LALC, given its corporate characteristics in structure, legal framework and jurisdiction that may otherwise pose challenges, such as on the question of who has authority to settle in a complicated bureaucracy.
- Knowing that the principles of ADR have been embedded into the agreement provides certainty for negotiating parties. Certainty of process in turn can aid the negotiation of substantive issues, and is mutually beneficial for the parties considering the inevitable need to negotiate these issues. Wright comments that these issues can be "mediated explicitly, or mediated almost by stealth".

Use of dispute resolution clauses

Deerubbin has introduced its Principles of Engagement as an effective tool for pre-empting disputes and embedding this ADR framework in all its commercial dealings. Another key tool used by contracting parties to facilitate early access to ADR is an effective dispute resolution clause in their contracts.

The commercial imperative of incorporating a well-drafted ADR clause in contracts is long established. Speaking in 1990, Dr Michael C Pryles AO PBM argued that an ADR clause in a commercial agreement is worth including as "the cost savings are enormous if [the mediation] is successful".[18]

More recently, in commenting on the importance of a well-drafted dispute resolution clause, Donna Ross observes:

> [Dispute resolution clauses] are often an afterthought and an inopportune one at that, as once the rest of the contract has been agreed, the parties prefer celebration to discussing what might go wrong.[19]

Engagement in mediation allows any business the opportunity to contain litigation costs and risk, limit brand damage and potentially continue their relationship with the contracting party. Such benefits of the mediation process can be of critical solvency importance for small–medium enterprises. As a vital element of contemporary commercial contracts, ensuring certainty of an effective dispute resolution process is supported by Australia's ADR institutions that provide sample dispute resolution clauses for business owners, and as called upon act as neutral bodies in appointing mediators, and other neutrals.[20]

Once a clear and transparent process is in the parties' contract, they can engage in fair and open negotiations with confidence that when a dispute arises they will have recourse to an alternative to the various costs and risks of litigation. This route to ADR can make the difference between a business thriving and a business liquidating.

The micro-skills of the cross cultural, multi-party mediator

If Indigenous enterprises are to successfully leverage current and emerging commercial opportunities in Australia, they require mediators with cross-cultural know-how and specific communication micro-skills.[21] Drawing on her significant experience as a mediator since 1993, and a Member of the National Native Tribunal since 2010, Ms Helen Shurven presents a tool-kit of tips and tricks on how to navigate the dynamics of cross-cultural, and multi-party mediations.[22]

Shurven notes that multi-party mediations differ from two-party mediations in several important ways:

- Mapping the often complex relationships at hand, Shurven says the process is often like untangling a plate of spaghetti. Referring to the model that is taught in mediation training programmes, Shurven highlights that "these skills; identifying interests, agenda-setting, generating options and moving toward resolutions, remain critically important in both multi-party and cross-cultural mediations."
- Citing research by Susskind and Mnookin,[23] Shurven says that mediators dealing with multiple parties must also handle less linear mediation progressions, the formation of coalitions between parties and their changing dynamics over the course of the mediation, and the corresponding challenges to applying BATNA analysis with multiple and changing interests.
- Multi-party mediations produce the amplified challenges of managing multiple parties' expectations of time, changes in representation and self-representation, and the costs for all parties to convene in the same place at the same time.
- Changes in representation is also a key issue, particularly in Native Title Mediations. In the absence of a solid handover, files can get lost and frustrate the progress of the mediation.
- Funding, or the lack thereof, can also raise issues for multi-party mediation, manifesting power imbalances.

In the policy-driven Native Title context, there is an additional influential factor in the form of changes to government policy that can affect parties' decision making. For example, in Western Australia, the government amended its fracking policy; placing a moratorium on certain areas of the state. Consequently, many petroleum mediations were affected, adding further considerations and complexities to agreement making.

Citing research by Peter Coleman,[24] Shurven identifies constraints to constructive engagement as including:

> … visceral things that we cannot ignore when we are dealing with a multi-party or a two-party mediation. They include ... a sense of hopelessness, a real fear of the other, fear of in-group retribution, distrust of the other, the third party, and the decision making process in general, lack of sufficient support, and seeing few alternatives to the current process that the people are in.

Shurven highlighted that another key difference between multi-party and two-party mediation is the coalition-forming and shifting alignment of interests that is inevitable where multiple parties are involved. This dynamic system results in the unique use and reliance on the "Best Alternative to a Negotiated Agreement" (BATNA).

Central to Shurven's discussion was her emphasis on relationship building:

> Relationship building is vital. The participants usually each bring a representative. In family mediations you may also have a social worker, support person or financial advisor. It is important that everyone knows their role and particularly, their role in relation to your role.

The flexibility, integrity, and respectful nature of mediation is key to negotiating the emotions, positions, and interests that underpin conflict. Analysing the unique challenges that can emerge from the multi-party mediation process that is prevalent amongst Native Title matters, Shurven suggests four micro-strategies for mediators in handling a multiparty mediation:

1. Pre-mediation to assist with process management, noting that there may be cost, location and timing issues.
2. Allowing private sessions with parties but maintaining transparency with others involved, that the private session has happened, and providing them with their own opportunities to discuss privately.
3. Ensuring confidentiality is maintained from separate sessions.
4. Co-mediation for gender-balancing and/or cultural understanding purposes.

The ubiquitous need for deep listening

For Aboriginal and Torres Strait Islanders *listening* is a central aspect of culture. It is how children learn and communities bond, and it is fundamental to finding resilience and strength through adversity. Deep listening remains a central tenet of Indigenous Australians' communication and decision-making.

Listening is also central to the skills of both lawyers and mediators, who may not be listening enough to Indigenous clients. For example, a recurrent theme for ATSI clients, in accepting advice from their solicitor, is the assumption that the solicitor knows what is best, without the clients understanding, or being given the chance to understand, the issues that will enable them to make an informed decision.

This tool-kit of micro-strategies that allow ADR practitioners who are operating in a multiparty and Indigenous Australian context can help in managing their process, and navigating complicated power dynamics, more seamlessly.

Conclusion

The myriad of business opportunities inherent in LALC agreements, National Native Title claims, and the relationship between the Australian Government and its First Nations people, have created a bourgeoning range of commercial enterprises across Australia. The need for transparent negotiation frameworks is evident in initiatives such as the Principles of Engagement adopted by the Deerubbin Local Aboriginal Land Council, and the call for *makarrata* to be enshrined in the Constitution.

Presented to the Australian Government as part of the Uluru Statement from the Heart, *makarrata is* a concept that is inherently compatible with the fundamental principles of ADR: good faith, deep listening, transparency and respect for the other party/ies to the dispute. As such, Australia's Indigenous dispute resolution capabilities are something that all legal and ADR practitioners can learn from and support. In turn through their training and experience, Australia-trained lawyers and mediators bring a suite of skills that can be honed and applied in helping Australia's First Nations commercial sector continue to thrive.

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Footnotes

1. PWC *The contribution of the Indigenous business sector* (April 2018) www.pwc.com.au/indigenous-consulting/assets/the-contribution-of-the-indigenous-business-sector-apr18.pdf.
2. Above, at pp 15–16.
3. National Indigenous Australians Agency, Indigenous Procurement Policy, www.niaa.gov.au/indigenous-affairs/economic-development/indigenous-procurement-policy-ipp.
4. Australian Government, *Indigenous Advancement Strategy*, www.indigenous.gov.au/indigenous-advancement-strategy.
5. Australian Disputes Centre, G Lockhart and Z Cieplinska, Aboriginal Rights, Interests & ADR — A new Epoch?, 5 September 2019, www.disputescentre.com.au/aboriginal-rights-interests-adr-a-new-epoch.
6. *Northern Territory v Mr A Griffiths (decd) and Lorraine Jones obh of Ngaliwurru and Nungali Peoples* (2019) 364 ALR 208; [2019] HCA 7; BC201901700.
7. Frederick Jordan Chambers, Tony McAvoy, https://fjc.net.au/barrister/tony-mcavoy-sc/.
8. R Abraham and W Isdale “Timber Creek: the most significant native title decision since Mabo” *Minter Ellison* 21 March 2019 www.minterellison.com/articles/timber-creek.
9. Above.
10. Referendum Council, *Final Report of the Referendum Council* (30 June 2017, National Constitutional Convention); The Uluru Statement from the Heart, https://ulurustatement.org/the-statement.
11. N Chrysanthos, “What is the Uluru Statement from the Heart?” *The Sydney Morning Herald* 27 May 2019, www.smh.com.au/national/what-is-the-uluru-statement-from-the-heart-20190523-p51qlj.html.
12. Amnesty International submitted criticism of the process because the convention was by invitation only, potentially creating a perception that the process was exclusive. Some of the delegates, moreover, walked out of the conferences. For further details, see: Parliament of Australia, D Mckay “Uluru Statement: a quick guide” (19 June 2017) www.aph.gov.au/.
13. The University of Melbourne Law School, Uluru Statement from the Heart: Information Booklet, https://law.unimelb.edu.au/__data/assets/pdf_file/0010/2764738/Uluru-Statement-from-the-Heart-Information-Booklet.pdf.
14. Above.
15. Above n 5.
16. NSW Aboriginal Land Council, Overview, http://alc.org.au/land-councils/overview.aspx.
17. Stephen Wright, Australian Disputes Centre, “Aboriginal Rights, Interests & ADR — A new Epoch?” Speech (5 September 2019).
18. Professor M Pryles “Dispute Resolution Clauses in Contracts” (1990) 1 *ADRJ* 116, 120.
19. D Ross “Beware the champagne clause: When the effervescence fades, it may just be pathological” (2018) ADC Bulletin, www.disputescentre.com.au/beware-the-champagne-clause.
20. For example see Australian Disputes Centre draft clauses on www.disputescentre.com.au.
21. The Australian Disputes Centre’s First Nations ADR Panel, established in 2018, supports this need for ADR practitioners with skills and experience in resolving cross-cultural disputes.
22. See H Shurven and C Berman-Robinson “Design in Dispute Resolution Practice: Tips and Tools” (2017) 28 *ADRJ* 121.
23. See L Susskind, R Mnookin, L Rozdeiczer and B Fuller “What we have learned about teaching multiparty negotiation” (2005) 21 *Negotiation Journal*, 395-408.
24. See P Coleman, A Hacking, M Stover, B Fisher-Yoshida and A Nowak “Reconstructing Ripeness I: A Study of Constructive Engagement in Protracted Social Conflicts” (2008) 26(1) *Conflict Resolution Quarterly*, DOI: 10.1002/crq.222 and P Coleman, B Fisher-Yoshida, M Stover, A Hacking and A Bartoli “Reconstructing ripeness II: Models and methods for fostering constructive stakeholder engagement across protracted divides” (2008) 26(1) *Conflict Resolution Quarterly*, DOI: 10.1002/crq.223.