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Indigenous Experiences in Negotiation

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Editors' Note: *In a contribution likely to shake many readers' implicit assumptions, an Australian Aboriginal mediator uses a detailed examination of one key type of case to examine how negotiators who make the common Western assumptions can trip over their own feet as soon as they find themselves negotiating with people who operate from totally different cultural assumptions. The lessons from this chapter are relevant even for ordinary negotiators with no plans to go to the outback.*

Negotiating with people from another culture can be awkward and taxing. When the other party is not only from another culture but is a *community* of people,[1] the difficulties are doubled. In this chapter I provide some hints for a 'western' negotiator when tackling such a situation. I write from my perspective as an Australian Aboriginal lawyer and mediator.

Although I have mediated many inter- and intra- cultural disputes,[2] it is my experience in native title negotiations that I draw upon in this chapter. Native title negotiations have become an excellent illustration of the problems that tend to arise in other settings. A little of the legal background, however, is necessary first.

Native title—also known in other Anglophile countries as 'aboriginal title'—is a complex area of property law. It is an attempt to shoe-horn the Indigenous relationship to our land into a new category of Australian common law—native title—first recognized in the Australian High Court case of *Mabo v. Queensland*,[3] and consequently formalized by the Federal Government in statute[4] establishing the National Native Title Tribunal.

In some Australian states and territories, such as New South Wales (NSW), Aboriginal land rights were created prior to the *Mabo* decision. Land rights are purely a creature of statute, and quite distinct from native title. In NSW this form of land tenure was created in 1983 by the *Aboriginal Land Rights Act*. The interplay between title created by Aboriginal land rights legislation,[5] native title, Crown ('state government') title and leasehold title has created the sort of complexity in Australian property law not seen since we switched our system of freehold land tenure from 'old system' title (still prevalent in the United States) to statutory ('Torrens') title more than a century ago.

If we go a little further back in NSW history—to the early part of the 19th century—we see that the emerging law of the new colony of NSW (based entirely on British law) was complicit in, and adapted to suit, the progressive parceling-out of Indigenous lands (that is, the entire Australian continent and islands) to white 'settlers' without payment to, or treaty with, its Aboriginal and Torres Strait Islander owners. It is the 'remnant' lands—the (at the time) uneconomic land not wanted by either settlers or the government—with which both land rights and native title are principally concerned. These remnant Crown lands—mainly existing in the less populated areas of the country—provide less disputation than the far more contentious 'leasehold lands.' The latter are the vast (mainly) pastoral lands in western NSW, Queensland and Victoria (also northern South Australia and throughout Western Australia), often held under 99-year or perpetual leases. The other ground-breaking native title case, *Wik*,[6] held that native title could survive on leasehold land. The practical import of that decision, however, is the subject of ongoing, often heated, negotiation, mediation and litigation.

This history must be kept in mind when reading the following scenario, for it is only recently that Indigenous tenure of land (the sort of tenure that existed prior to invasion in 1788) has been recognized by the legislature and judiciary of Australia.

The scenario used here for illustration is an agglomeration of facts from the author's experience on the management team of the Gumbaynggirr[7] Nation Aboriginal Corporation (which will hold the title to several small pieces of land on the north coast of NSW, if our native title claims are successful); my interviews conducted as part of an Australian Research Council grant with native title claimants, mediators and professional consultants (such as anthropologists); and my personal contacts with Aboriginal people from central Australia.

The scenario is intended to highlight aspects of negotiation with a non-western people that can easily go awry for a well-meaning 'western' negotiator. But it is not only that we are 'the other' (a non-western people) that makes the negotiation challenging; it is that we have been devastated by colonization, marginalized by dominant institutions, and stripped of dignity. In the midst of a wealthy nation, our people hang on to what little we have. It is no wonder a mindset exists in our community that whatever we have will be taken away.

A Negotiation Scenario

The setting is the board room of an Aboriginal land council in the Northern Territory, Australia. The land council's premises are located in Alice Springs, the major town in central Australia.

A large table separates the two parties. You are the lawyer for a mining company. You are keen to obtain exploration rights for gold over a large tract of land in central Australia. The land concerned is approximately 500km from Alice Springs—at least a day's drive.

There is a (Aboriginal) native title claim over the land: it has not yet been determined by the National Native Title Tribunal, but given the success of a similar claim in nearby South Australia, it is likely to be successful.

The lawyer for the Northern Territory government sits next to you. She is determined to get a good deal for your client as well: the larger the mining operation, the bigger the royalties for the Government.

There are eight native title claimant representatives present. These are all Aboriginal people from the tribe making the native title claim. They have been given authority by the larger claimant group (the tribe) to deal with your application for exploration. Six women sit towards the back, one of them a young woman breastfeeding. Two of them, both men, sit towards the front. One is a young man who is very talkative (he appears to be in his 30s). An older, quiet man (with initiation scars evident through his T-shirt) sits nearby. Your experience with Aboriginal people is that men with initiation scars, especially if they are older, have considerable power in their community. Sitting in between the two Aboriginal men is their lawyer, a young and assertive white man.

You sit opposite these two men with your colleague. You are keen to negotiate directly with the Aboriginal claimants, aware that—based on your previous negotiations with other Aboriginal group—their lawyer will probably try to dominate.

The meeting starts with the introductions. The young Aboriginal man is charismatic; he speaks fluent English and appears to have influence over the other claimants.

The negotiation proceeds quickly. You and your colleague establish a good rapport with the young man; he appears to be friendly with the lawyer and constantly speaks with the other claimants sitting behind him (in their local language). The old man nods and smiles often.

Before you know it, their lawyer says that there is agreement to start exploration immediately. All that is required is that you employ the young man, who will ensure that exploration activities are kept well away from sacred sites. Your company is also required to keep the Aboriginal claimants fully informed of any mineral discoveries on the land.

The Aboriginal claimants' lawyer asks the six women sitting behind: "you understand? Mining company not touch sacred country." Several of the older women nod.

You shake hands with their lawyer, the young man and the older man. As you walk towards the door, you see all the women talking. The young woman who had been breastfeeding comes up to you and says: "you understand this is only 'in principle' agreement—we take this back to community to get approval. You know that fella (she points to the young man) don't know about women's sites—that's where you wanna look for gold, hey?"

This startles you—you thought the lawyer, the young man and the old man represented the interests of all the claimants. Why didn't the women speak up during the negotiation? You thought this group had authority to negotiate for the entire claimant group. And what do you do if the young man doesn't know about the women's sites on the exploration land?

Native Title

In this chapter, I will use Australian native title negotiations as proxy for many other kinds of negotiations in which Indigenous and Western negotiators encounter each other, with frequent incomprehension and just as frequent long-term failure. Often, the failure occurs when, on the surface, a "deal" was reached.

Native title is an Indigenous right to land that has not been extinguished by inconsistent Crown (Government) grants. It arises where there is continuing connection to that land according to traditional (pre-western colonization) Indigenous laws and customs.

Australian courts and commentators have described native title interests as a "bundle of rights." It could just as easily be said that native title interests have given rise to a

"bundle of disputes!" The nature of the conflicts resulting from native title claims is multi-faceted in nature, and complex.

In order to process native title claims the Australian (Federal) Government has established a system of determining whether native title exists, and what rights it consists of, through the National Native Title Tribunal and the Federal Court. There is also, within the native title regime, a mechanism that allows for negotiation and mediation, an explicit part of the alternative dispute resolution "spectrum." The primary reason for establishing an alternative dispute resolution process was the ever-present imperative to cut the cost of litigation.

Since the enactment of the Federal *Native Title Act* in 1993, Aboriginal and Torres Strait Islander peoples have been participating in processes of negotiation and mediation regarding native title. Despite the potential of the alternative dispute resolution process, Indigenous people involved in the native title claims process express frustration, disappointment and disillusionment. To an average native title claimant, the native title system has the appearance of a huge, impenetrable, alien edifice that was constructed in order to deliberately complicate and delay. The systemic bias is summed up by the words of Wayne Atkinson, Yorta Yorta claimant:

> Proof requirements in native title claims fall heavily on Indigenous applicants. The non-Indigenous parties, who have usually been the prime beneficiaries of Indigenous land and resources, are not required to prove their identity or connection to the land. Nor, as stated by Yorta Yorta elder Margaret Wirripunda, are they required "to prove by what authority they are on our land."[8]

Aboriginal Decision-Making

The landscape is richly symbolic for Indigenous Australians. Creation stories dictated appropriate modes of behavior, and set standards. Collectively affirmed standards were enforced by applying social pressure to ensure conformity. Children were taught acceptable modes of behavior through stories[9] [Volpe, et al., *Unknown*] and were taught by example rather than by direct instruction.

For these and other reasons, prior to invasion of Australia by the British, there was an egalitarian diffusion of power amongst Aboriginal tribes, rather than a single leader. The British found it hard to deal with this egalitarian system—the lack of Kings and Queens. Early British invaders nominated people within the community to act as representatives of the community, handing out the titles "King" and "Queen" to those they considered to be leaders of their people. These titles ignored the reality of collective Aboriginal decision-making. Such titles were bestowed by white people in positions of authority to make it easier for them to identify Aboriginal leaders with whom they could deal. The consequences of this practice, whether or not intentional, were the mocking of traditional laws and disharmony in the community. This autocratic approach of governing was totally alien to Aboriginal culture. The communal approach to decision-making continues, to the most part, in Aboriginal communities today. As Behrendt argues, the liberal concept of the autonomous self-interested individual is contrary to Aboriginal customs of decision-making through group consensus for the benefit of the community, rather than the individual.[10]

Indigenous Lack of Power

There are many contexts in which power imbalances are so great that parties cannot negotiate on fair grounds. [Bernard, *Powerlessness*] Gender-related inequalities, power differentials caused by political, financial and psychological factors, as well as unequal access to resources (including lawyers), limited educational opportunities, lack of confidence and unfamiliarity with negotiation techniques are some such contexts.[11] Power imbalances between disputants "may be reflected in outcomes, rendering them fundamentally unfair and unreasonable."[12]

Aboriginal people are even more disempowered than the non-English speaking working class; indeed, we are often referred to as the under-class. The systemic and chronic disadvantage suffered by Aboriginal people through over 200 years of oppression, discrimination, violence and attempted genocide means that we display many of the same psychological characteristics as victims of long-term domestic violence.

It is this historical and contemporary disempowerment of Indigenous Australians that impacts on our ability to negotiate in the native title arena. We are the most socio-economically disadvantaged group in Australian society. We fall short on all social and economic indicators compared to non-Indigenous Australians. This lack of social and economic power coupled with the small Aboriginal population (about 2% of the total Australian population) means that our political power within the non-Aboriginal community is minimal, even though our moral persuasiveness and media exposure are greater than our numbers would predict. This lack of political power should be noted in relation to the ability of Aboriginal people to deal with powerful government, mining and pastoral interests. Aboriginal communities do not have the resources available to us that our adversaries do to undertake complex and costly litigation, despite some funding of native title claims with public monies. Nor do we sit down as equals in negotiations or mediations. Native Americans are in a similarly disadvantaged position. If anything, they have even less 'voice' in the US than Indigenous people do in Australia. It is likely that much of my discussion about disempowerment of Indigenous Australians could equally be applied to Indigenous peoples of the Americas, Pacific Islands, New Zealand and Scandinavia.

Over the last 200 years, the lives of Australian Aboriginal people have been controlled and dominated by white people and governments. Yet it is these very government institutions and white powerful companies with whom we are required to negotiate for our native title interests. There are numerous problems facing native title claimants in the native title system; in particular, claimants have identified problems in undertaking negotiations with non-native title claimants. These problems include the lengthy timeframes and stress placed on claimants, the failure of the system to empower claimants, and the dominance of white structures and white people within the system.

Empowerment as the Goal

The core objective of negotiation should be empowerment of the parties. This may be financial, professional, social, emotional, spiritual or even physiological (or a combination of these). However, the perspectives of many native title claimants suggest that this objective is lost in the native title structure.

If Aboriginal people are to achieve empowerment through a process that is designed by—and for—non-Aboriginal people, the 'goal posts' have to be shifted much further

than would otherwise be needed in the situation where all parties are westerners. Socio-economic disadvantage, as well as the historical factors of dispossession, means that native title claimants are not able to negotiate on an equal footing. Native title claimants come to the negotiation with a mindset of disempowerment.

In referring to an experience with negotiation, one claimant commented:

> Well I've never felt empowered by them (the National Native Title Tribunal). I more or less might have felt intimidated by them. I don't think they empowered me in any way … both sides are trying to win something, and they say it's a win-win situation. The way we've been treated, as I say, is that they want us to give everything. When the minister said he was too busy to see us, and he sent this other government representative, all this person offered was all the welfare things that's normal: "we'll give so much to Aboriginal health; do this and do that." There were no other benefits than what comes from the mainstream welfare anyway. So she wasn't offering nothing. When we went to negotiate with the government, they seemed to try to intimidate you. It seemed to be just the opposite to empowerment.[13]

Structural Empowerment

The intent of the native title alternative dispute resolution (ADR) process has evolved over the past decade to explicitly include 'non-native title outcomes' to try to redress some aspects of these long-term grievances. The reason that the ADR process can work much more effectively than the litigation process is because of its broader objective of empowerment (see my 'core objective' of negotiation, above). Perhaps the power-brokers in native title are beginning to realize that financial and time efficiencies may be the *outcome* of ADR, but should not be the *motive* for preferring ADR.

Yet is this objective of empowerment possible, without mechanisms not provided for in the legislation? I would argue that it is not. In particular, the negotiation process cannot achieve this purpose unless it is reorganized to provide a space for re-empowerment. The representatives of the dominant party need to create a forum where the disempowered feel that we have a legitimate voice; while some might think that the non-dominant party should do this in its own interests, in practice a disempowered party is not in a position to take on this task. Despite all the strategies a good negotiator might use to equalize the power of the parties, the fact is, as Dodson says, "Aboriginal people haven't had much of a chance to get used to having a say in decisions affecting our land."[14] Furthermore, when we do speak about our land:

> Because native title is at the core of Indigenous identity, every native title claim will have a complex social dimension and significant social consequences.[15]

Thus there is no way around the need for structural change: the negotiation model used and the strategies adopted by representatives of both parties need to address the inherent power imbalances, or enduring agreements cannot be reached. In native title negotiations, the need for emotional and spiritual empowerment are perhaps more significant than financial or proprietary restitution. Therefore, a culturally safe space needs to be provided to enable the disadvantaged parties to tell their story. As Dodson says, native title dispute resolution needs:

> [To] become a truly cross-cultural negotiation instead of a coercive and predetermined story in which Aboriginal people have their limited role already scripted for them.[16]

From an Aboriginal perspective, the negotiation process can seem confrontational. One native title claimant stated: "I don't like talking to white people [seated] all in rows."[17] Although claimants may be wishing to tell their story in a negotiation, the forum can be confrontational and intimidating. Dodson comments:

> In my experience, Aboriginal people do not usually use verbal confrontations, insults, interruptions, objections, etc as a rhetoric device in argument. Lawyers do. Non-Aboriginal people are generally familiar with this and understand it as theatrics.[18]

My own experience of inter-cultural negotiation tends to agree with Dodson's observations: non-Aboriginal professionals not only understand the theatrics, but are willing and ready to 'perform' accordingly. Presenting an argument to a group is part of a university education in any of the arts; graduates know that part of their job will more than likely require them to 'perform' a presentation to stakeholders. For Aboriginal people not so educated (in the western sense), it is far more difficult. It is a big personal risk to stand up in front of people to talk about something of great personal significance. Aboriginal people often cannot hide our emotion behind a modernist façade of objectivity—something that lawyers, sociologists, anthropologists, social workers, and so on, are trained to do. In any case, "opening up" emotionally is difficult for any person who has been badly hurt.

There is also an operational risk that conflict will escalate: our social and cultural experience is that verbal confrontation is often a precursor to physical confrontation. Dodson confirms this point: "for Indigenous people, verbal confrontation is often the start of violence.'"[19]

Lawyers Do Not Empower

One supposed solution to our avoidance of verbal confrontation is for the (white) lawyers to intervene on our behalf: to jump in and "save us;" to "fight our battles." Well-intentioned lawyers can do this without realizing that its effect is further disempowerment. Given that the dynamics of native title negotiation and mediation can result in confrontation, the lawyers (being accustomed to this confrontation) for the claimants often intervene and argue on behalf of the claimants. The dilemma has been described by claimants in their interviews with me. While there is a desire on the part of claimants to articulate their views in the negotiation, the process can be intimidating, particularly when non-claimant groups get confrontational, so "we can tend to hand it over to our lawyer."[20] One claimant stated that she felt so intimidated—because of all the non-Aboriginal parties—that she allowed her lawyer to take control of the negotiations:

> Because, they [the non-claimants] know so much about us—like the land claim and all about us, where we was, you know what I mean—the land claim itself. They needed to know any more, but I couldn't tell em anymore anyhow—told em what I knew—about the land and our place and all that sort of thing—walking and talking. I didn't think I could say anything more to us. But some of those meetings I didn't agree with them—some of them. But I didn't say anything.[21]

This quote raises two important issues. First, the claimant who said this to me was trying to convey her exasperation with the unending need of opposing parties and counsel for information. She told them all the creation stories she knew about her country, but it wasn't enough for them; they wanted more detail, more words, more justification for the claim. Lawyers think that if someone has a plausible and solid claim, then one can submit a plausible and extensive argument to those who dispute the claim. The problem is that the claim of each tribe/nation to their parcel of land ("country") was never in dispute until the British came. It is only recently that we have had to develop an argument about our continuing connection to the land.

Secondly, the solution, clearly, does not lie in our lawyers taking over the process and speaking on our behalf. Again, this ultimately disempowers native title claimants. Yet our lawyers, particularly when the issues are legally technical, will dominate the negotiation process—of course, "in our best interests!" This particular problem extends even beyond Indigenous people. [Nolan-Haley, *Informed Consent*] At one of my own native title meetings, when a report by our solicitor was provided, several claimant group members demanded to know from the lawyers why they were doing the negotiating instead of claimant representatives. The response was that "there were many technical issues that needed to be addressed."[22] One claimant member responded, "we're sick of you whitefella lawyers speaking on our behalf."[23]

It is thus the dispute resolution process itself that needs to change to ensure that claimants are empowered by the process. There are, in fact, some surprisingly simple measures that might be adopted. One is to have the lawyers sitting behind the claimants, to give the claimants a sense of being in charge of the claim (and in charge of the lawyer). In the same vein, the Northern Territory Aboriginal Land Commissioner has an interesting way of breaking up the conventional courtroom setup. He goes and sits right near the Aboriginal witness who is giving evidence. There is no amplification, so anyone who wants to hear has to come around too. This means that the Aboriginal speaker is the center of the process, and the lawyers are marginalized.[24] At the end of this chapter, I will consider some other possibilities.

But without a change in other aspects of the process, including appropriate venues and facilitators, such seating arrangements will not achieve the necessary shift in the power dynamics that is required to see true empowerment of native title claimants.

No Incentive for Good Faith Negotiations

There are several provisions in the *Native Title Act 1993* (NTA) that require parties to negotiate in good faith. But the positions of power that governments and huge companies hold in negotiating with Indigenous parties, leaves the non-Indigenous parties with little incentives to negotiate in good faith. In a recent study,[25] I found that failure on the part of governments to negotiate in good faith was a common concern:

> We tried to get the government to mediate with us to come to some agreement, but with politicians, they always know how to maneuver out of it. The only time they met with us was when we first went into their office. The minister met with us and said he would negotiate native title, but that was the last time we seen him. We repeatedly sent letters to him, but we always got a smart answer. You know how they maneuver out of it? They are spin doctors, that what we call them here—they can spin out of anything. Then the minister sent another person to negotiate with us. She didn't know nothing about native title. And she

> was more or less just insulting our intelligence ... they claim that for years they've been negotiating with us. But in reality, they've just been evading negotiating with us.[26]

Yet cynicism is an easy answer. With this daunting array of obstacles, there are still some strategies and tactics that might help. The procedurally minor (and economical) matter of who sits where is one example; in the concluding section of this chapter, I will attempt some others, with the "fair warning" that here I am advocating, in part, untested theory.

Some Concrete Suggestions Resulting From the Scenario

What are some of the strategies that you could have adopted to ensure better outcomes in the negotiation scenario presented above?

Choose your negotiating team carefully.

- If you are not from the same cultural/ethnic group as the other party, choose a trusted colleague who is of the same ethnicity as the other party. If there is no-one of the same ethnicity in your organization, contact a consultant from outside your organization who is.
- But be wary of engaging a consultant who is (what we Aboriginal people call) a "big talker" some of our own people who set themselves up as experts or consultants, like the young man in the scenario, are eloquent and charismatic. But under the slick exterior, they garner far less respect, knowledge and trust than they claim; sometimes they are simply bullies.
- So, not sure who to ask? Why not ask the other party (or other people of their community) whom they would recommend? This demonstrates respect for the integrity of the other party and trust in their character.
- Make sure you match the gender and other demographics of the other party. If your side is currently all male, but theirs includes some females, then you should similarly include women. If they have an older person(s), you should too.

Engage personally in extensive pre-negotiation.

- It is most likely that the other party will be intimidated by you. Look for common areas of interest during pre-negotiation meetings.
- Get to know the other party/ies informally; perhaps share a meal with them. Meet in a place they choose.
- Keep them informed every step of the way; if you are going to be late, phone them. They may not phone you; some of their representatives may not show up; some may even verbally abuse you when things become "emotional"—but you must keep up your standards as a mark of respect for them.
- If you leave them in the dark about anything you're up to, your faithfulness will immediately be doubted.[27]
- Find out who people are, how they're related to each other, and what roles they have in the community. But be careful not to look like you're conducting an investigation. If you're not interested in such relationships (even though it will assist your negotiation)—don't ask.

- Don't talk about 'business' in pre-negotiation—unless they ask you to. Then you should be brief, but open.
- In the scenario above, for example, if the western negotiators had met with the other party beforehand, they would have discovered some key information:
  - That the woman breastfeeding is the grand-daughter of a prominent and respected old man who had recently passed away. She is one of the few in the community to have finished year 12 of school and is studying at university by correspondence.
  - That none of the Aboriginal representatives (other than the young man) have respect for their lawyer, Simon; he was known as "six-month Simon" when he used to work for the Aboriginal legal service. This was because of his propensity to advise his clients to plead guilty (regardless of their actual guilt) to their charges and they would routinely receive a six-month prison sentence. And the Aboriginal representatives had no choice of lawyer—he was appointed to them by their native title representative body.
  - The Government's lawyer—your colleague—had lost all respect from the community; she had (on behalf of the Government) consistently refused a "consent native title determination." As a result, two years ago the claim went to the Federal Court for adjudication, and there is still no determination.
  - That the young Aboriginal man was raised in a (white) foster family in Darwin from the age of seven. He returned home about five years ago, but mainly lives in Alice Springs, where he runs his native title consultancy firm. He has several vehicles on permanent loan to community members, including to the older man sitting next to him—whom he employs as a "consultant" for various projects. The young man is known to "run" the native title claim.

The negotiation should be "owned" by both parties.

- In the stated scenario, you are representing the powerful party. It is important that some of your power is surrendered to the less powerful party.
- Have the negotiations take place in a venue of their choice. In the scenario, the non-Aboriginal parties thought they were being culturally sensitive by holding it in an Aboriginal venue—in the office of the land council. If the Aboriginal party had a choice, most likely they would have preferred to negotiate at home—"on country."
- Make sure that the dates of the negotiation are not at times when large numbers of the community may be absent; for example, during school vacation periods. It is also best to avoid the two days after "pension day" (payment by government of unemployment, old age and disability benefits) for any serious discussions: even if a community member does not drink or gamble, they have to deal with family members who do. Substance abuse, gambling addiction and family violence are serious problems in many Indigenous communities; the negotiating team members may have to take time out to deal with these problems.
- Avoid jargon or technical terms. In the stated scenario, the young man may feel that you are being condescending to him if you explain technical terms that he already understands. Pre-empt this by saying, for example, "I know some of you

already know what "future acts" means in native title law. But I want to be sure that everyone understands."

- Make sure everyone has had a feed and there are plenty of refreshments, especially tea and coffee. Allow time to have plenty of breaks—we all like to "caucus" during such moments to check our understandings and argue our viewpoints less formally. Don't try to 'be friendly' by intruding on the informal gatherings of the other party during breaks (unless asked); they need this time to talk frankly or simply to relax.

Ensure you are negotiating with representatives of the other party who have authority not only to make decisions but to make good decisions.

- As implied above, one 'big talker' on the other side can disrupt negotiations. He or she may be unrepresentative of the other party. Worse still, the other party may have no respect for the big talker.
- Don't address your questions to their lawyer. Even if they speak a different language, address the person concerned (not the interpreter) in the first person. [Kaufman, *Interpreter*] Unfortunately, the lawyer for the other party will probably not be Indigenous; most Indigenous law graduates are absorbed by the public service where better conditions of employment are received.
- Even though the representatives of the other party may, in western terms, have authority to make decisions, it is unlikely that they will be comfortable doing so without consulting the rest of the community. Communal decision-making is something that hierarchical cultures have trouble grasping; they are anxious for someone to make a decision. Be patient.
- If the other party agrees to something that is beneficial to you, but detrimental to them, then that is a bad decision for *both* parties. The agreement is unlikely to last and will probably result in litigation.

Active listening is the key to good communication.

- Yes, an obvious principle. But do we practice it? You should be doing a lot of listening and not much talking (but of course you should be open about what your side is offering).
- Ask open questions (as long as it does not intrude on their privacy).
- Make a point of talking to the quiet ones. In the scenario, the women kept quiet (this is not always the case with Aboriginal communities—sometimes we can be the most vocal). Perhaps the women did not speak because they were not asked; maybe they were in fear of the two men. In this scenario, the western negotiators did not know that the older man was a domestic violence perpetrator—one of the six women was his first wife who had been badly injured by him in an assault. In any event, the problem was not their failure to speak, but rather the negotiator's failure to involve them in the process. The knowledge of the women about sacred sites on the prospect land may be one of their few sources of power; they were not going to reveal this readily (and certainly not to any men).
- Allow silence; don't be embarrassed by it and try to "fill" it. In the scenario, the Aboriginal claimants' lawyer liked to take up any silent periods to show off his knowledge of Aboriginal law and culture. Yet he completely misunderstood the reaction of the women to his question: "you understand? Mining company not

touch sacred country." The women who nodded thought that he was saying the mining company will not go on to sacred country; that is, that they will not even *explore* it. The non-Aboriginal people understood it as being that the company will not *mine* any sacred sites. The negotiation did not even raise what the women defined as *public* sacred sites versus *secret* sacred sites, or what sort of activities would be involved in exploration

Be aware of non-verbal communication.

- Check your understanding; not just of words, but of tone and body language. For example, in the given scenario, the negotiator could have asked the women, "I notice that you have not said anything yet. Can you help me to understand your point of view?"
- If they dress casually, you should do so as well. But if the other party uses profanities, this is not a signal for you to do likewise; as a "professional," they probably expect higher standards of you.

Monitor yourself.

- your language and tone
- your body language
- your assumptions
- In relation to the latter, be particularly careful about stereotypes. For example, in the stated scenario, the negotiator for the mining company may have assumed that women are not permitted to engage in "business," or that they don't understand what's going on, or that the woman breastfeeding is not interested in the discussion.
- Another common (false) assumption about Aboriginal people is that we don't look you in the eye. In earlier times, non-Aboriginal people thought that this was a sign of our untrustworthiness; later, anthropologists claimed that this is just part of our culture. Wrong. In my experience, it is when an Aboriginal person feels disempowered we will not make eye contact. The other common reason for avoiding eye contact is when we do not respect or trust the other (usually non-Aboriginal) person. An exception: in "traditional" Aboriginal communities (usually in remote Australia), avoidance of eye contact also occurs in the context of "avoidance" relationships, such as between a son and his mother-in-law.
- Be careful of your body language and tone of voice: in "high context" cultures (such as indigenous cultures), it's pretty obvious if you're in a hurry or if you don't want to be there. Be honest; if you cannot stay long, say so—don't try to hide it, because it will show.

Don't try to "push" the negotiation process

- Even in the negotiation, don't be concerned if the discussion moves "off point." The other side is as much aware as you are of the reason you are here: they will come back to "business" when they are ready.
- And don't push for an immediate answer to your proposal. If you do have a commercial deadline, say so early on, and make it clear that it cannot be postponed (if that is true). The more you push, the more you'll encounter resistance.

- If you are personally 'invested' in this negotiation, it simply looks to the other side like another person/company is trying to take advantage of them. This deal may be important for your career, but for them, life will go on just like before if nothing eventuates. For disadvantaged communities, it is sometimes hard to believe that life can get better.

This chapter has really only touched on the nature of negotiation with Indigenous communities. I have used native title negotiations in Australia to illustrate the different approach required by western corporate or government negotiators when the other party is a non-western community that utilizes collective decision-making. But there are "western" communities that emphasize collective decision-making. For example, multiple-occupancy communities—known in our vernacular as "hippy communes"—are collectives with diffuse sources of power. They are critical of modernist liberalism's emphasis on the autonomy of the individual and its belief that self-interest leads to the greatest satisfaction.

Over the past decade (at least in Australia) we have seen conservativism appropriate the terminology of communitarianism, in order to camouflage itself amongst "aspirant" class hopes for a richer-but-still-friendly nation. For example, both sides of politics now refer to "our community" instead of "this society." This has muddied the waters for Aboriginal people; we have to counter the argument from government that their particular proposal is "better for the community," with our argument that *their* community is not *our* community. This use of communitarian language by conservative forces, however, is only a thin veneer over 19th century liberalism, with its emphasis on such things as the ability of any individual to freely negotiate an agreement that is beneficial to them. In native title negotiations this duality from government can be confusing: their rhetoric speaks of group identity and communal interests, but it's a disguise for law and policy that is grounded in laissez-faire economics.

Poor ethnic and indigenous minorities are well aware that we possess very little wealth or power. So when government or corporate Australia comes knocking, we are defensive: "what do they want from me?" rather than optimistic: "could this deal be beneficial to me?" We are so afraid of being tricked or trampled upon that it can be difficult to perceive that the other party is offering something that may result in our empowerment: economists call this "risk-aversion."

I am hesitant to extend my "suggestions" to negotiations with other marginalized ethnic communities, simply because of my lack of experience and research outside of Aboriginal-western ADR processes. But my intuition is that much of this is applicable to negotiations with anyone who comes from shattered communities where trust is crushed. Yet there are people who gain from our remaining like that: our disadvantage supports a vast number of mainly white middle-class professionals: police, lawyers, court staff, juvenile justice officers, corrective services, social and welfare workers, child protection officers, special education teachers, mental health workers, hospital staff, funeral homes (as well as the owners of pubs, liquor shops, casinos, licensed clubs and gambling agencies). So in our dealings with this "helping" class (excluding those mentioned in parentheses), we feel the pull of the undercurrents that are the converse of (but created by) this huge swell of "help:" undercurrents of complacency, condescension and control.

Indigenous communities across the colonized developed world exist in a disadvantaged and disempowered reality. Even when western negotiators adopt the principles

and techniques outlined above, they must nevertheless "come to the table with truth, compassion and a commitment to human rights and social justice."[28] Governments and commercial organizations need to commit to the principle that when parties are empowered they are more likely to reach fairer and more reasonable outcomes that will benefit all parties involved.

Endnotes

[1] The community is usually represented by several people in the negotiation process.
[2] I use these terms to mean disputes between: a party who is of the minority culture and a party who is of the majority culture (inter-cultural); and parties who are both of the minority culture.
[3] (No 2) 175 C.L.R. 1 (1992).
[4] *Native Title Act 1993* (Commonwealth of Australia).
[5] Only a few jurisdictions in Australia enacted statutes that gave ownership of land to Indigenous people. The one I am referring to is the New South Wales *Aboriginal Land Rights Act (1983).*
[6] *Wik Peoples v State of Queensland* 187 C.L.R. 1 (1996).
[7] Pronounced roughly as "goom [as in book]-bayn-gear."
[8] Wayne Atkinson, *Mediating the Mindset of Opposition: The Yorta Yorta Case*, 5(15) INDIGENOUS LAW BULLETIN 8, 9 (Feb./Mar. 2002).
[9] The use of stories transcends culture; note the similarity in the training of hostage negotiators in the New York Police Department, in Maria R. Volpe, Jack J. Cambria, Hugh McGowan and Christopher Honeyman, *Negotiation with the Unknown*, Chapter 74 in this volume.
[10] LARISSA BEHRENDT, ABORIGINAL DISPUTE RESOLUTION 17 (1995).
[11] LAURENCE BOULLE, MEDIATION: PRINCIPLES, PROCESS, PRACTICE 57-58 (1996).
[12] *Id.* at 57.
[13] Anonymous native title claimant 'E', *Interview with Loretta Kelly,* Oct. 2 2003 (location of interview withheld as it may identify the interviewee).
[14] Mick Dodson, *Power and Cultural Differences in Native Title Mediation*, 3(84) ABORIGINAL LAW BULLETIN 8, 9 (Sept. 1996).
[15] *Id.* at 9-10.
[16] *Id.* at 10.
[17] Anonymous native title claimant 'C', *Interview with Loretta Kelly,* May 28, 2003 (location of interview withheld as it may identify the interviewee).
[18] Dodson, *supra* note 14, at 8.
[19] *Id.*
[20] Anonymous native title claimant 'C', *Interview with Loretta Kelly,* May 28, 2003 (location of interview withheld as it may identify the interviewee).
[21] Anonymous native title claimant 'C', *Interview with Loretta Kelly,* May 28, 2003 (location of interview withheld as it may identify the interviewee).
[22] Solicitor for anonymous native title claimant group, North Coast NSW, *Meeting of claimant group attended by Loretta Kelly,* 2004. Location and precise date of meeting withheld, as it may identify the claimant group and their solicitor.
[23] Anonymous native title claimant, North Coast NSW, *Meeting of claimant group attended by Loretta Kelly,* 2004 (location and precise date of meeting withheld, as it may identify the claimant group and individual participants at the meeting).
[24] Dodson, *supra* note 14, at 10.
[25] Note that the main findings of this research, which was funded by the Australian Research Council, are found in the forthcoming Federation Press book by Loretta Kelly and Larissa Behrendt—(working title) *Native Title Mediation and Aboriginal Empowerment*.
[26] Anonymous native title claimant 'E', *Interview with Loretta Kelly,* Oct. 2 2003 (location of interview withheld as it may identify the interviewee).

[27] As in endnote 4 above, this is similar to the advice given to NYPD hostage negotiators.

[28] Tony Lee, *The Natives are Restless: A Personal Reflection on Ten Years of Native Title, in* 23 HISTORY AND NATIVE TITLE: STUDIES IN WESTERN AUSTRALIAN HISTORY 29, 32 (Chistine Choo & Shawn Hollbach eds., 2003).