First Nations Law Bulletin

2023 . Vol 1 No 2

Contents

General Editor's Note

Patricia Adjei *STANDALONE LEGISLATION, OFFICE FOR THE ARTS*

Welcome to the second edition of the *First Nations Law Bulletin*. We are living in a post-referendum time, a time for reflection as Australia grapples with the shocking Referendum result that would see Indigenous communities in the Constitution and supported by an advisory body to inform the Australian Government on how to address Indigenous affairs. Many Indigenous peoples needed time to grieve from the shock and dismay that racism and denial are still strong in this country. While we regroup, we continue to have Indigenous voices heard and be seen by the general public. This makes this edition even more important to read and understand what First Nations lawyers are writing and telling the legal fraternity. We are still here and we are stronger than ever. I would recommend looking at the Reconciliation Australia website on how to best support our First Nations communities and peoples post Referendum.

This second edition is an excellent mix of First Nations legal articles which reflects our diversity of practices and voices. Our first article written by Dr Kristopher Wilson explores the world of Indigenous data sovereignty and how to allow for Indigenous community controlled data governance structures which leads to empowerment of Indigenous communities. The next article, by John Southalan, considers engagement and consultation with First Nations communities in the resources industry. This is even more important now as we need to hear First Nations voices even more for issues that concern our lands, waterways, air, animals and plants. We see an article by Sheree Sharma on carbon farming with Indigenous communities as also an important, new innovative, economic and sustainable opportunity, and Sheree considers the legal ramifications of this work. The last article written by Trent Wallace looks at how reconciliation can be supported through strong Indigenous recruitment, self-determined practice and pro bono support in the social justice sector. This work around ethical practice in companies' policy and pro bono support leads to better outcomes and support for Indigenous peoples. It also enshrine the principles from the United Nations Declaration on the Rights of Indigenous Peoples into the work place, leading to stronger Closing the Gap reform work. We hope this edition is informative and provides more insights into issues around Indigenous governance, proper consultation, engagement and self-determined practice for First Nations people.

Patricia Adjei
Director
Standalone Legislation, Office for the Arts
saibai5000@hotmail.com

Indigenous data sovereignty in practice

Dr Kristopher Wilson *UNIVERSITY OF TECHNOLOGY SYDNEY*

Introduction

Indigenous data sovereignty (ID-Sov) is an emerging movement seeking to empower Indigenous Communities to define themselves, develop policy solutions that reflect Indigenous realities and aspirations, and preserve cultural heritage by implementing community-controlled data governance structures.[1] These ID-Sov informed approaches centre Indigenous self-determination over collecting, owning, analysing and using data about or affecting Indigenous peoples, their communities, traditional knowledge, language, cultural practices and lived experiences. ID-Sov is a direct response to the historic and continuing misuse of Indigenous data and is gaining international law recognition within and outside broader discussions on data governance, ethics and human and Indigenous rights discourse.

Why ID-Sov?

Governments of all persuasions interact with Indigenous Peoples through the development of Indigenous policy, often with and after reference to an evidence base of data collected to show Indigenous disadvantage, deficit and dysfunction.[2] The narrative this data tells carries clear and consistent *sameness* across colonised nations (Australia, New Zealand, Canada and the United States in particular). There is a gap across many benchmarks between the Indigenous population and the non-Indigenous population.[3] Still, while the data may represent a numerical reality, this does not lend itself to productive solutions, as evidenced by continuous poor policy outcomes. Determining the cause of these poor policy outcomes is often attributed to one of two alternative and competing explanations: either a lack of connection, involvement or interaction of Indigenous people with policymakers (who are generally non-Indigenous) or, instead, it is the individual failings of Indigenous people in not making the most of the policy programs *gifted* to them by the state.[4]

An alternative explanation, however, is that while in a domestic context we may be drawn to one view or the other, neither can explain the consistency in the outcome and experience of Indigenous Peoples around comparable colonised nations. This similarity cannot be explained based on the traits of the distinct Indigenous populations spanning continents.[5] The real issue comes from how the state itself views and defines its Indigenous population — the data that is collected and the questions asked of it delineates what is seen and how it is responded to through policy.[6] On this view, it is the data that signifies difference, that problematises Indigenous experiences as deficient, and ultimately leads to successive policy failure. The solution is in Indigenous control of data across the entire data life cycle: its collection, control, and scope and use. In that sense, the ID-Sov movement seeks to transform the data landscape for the benefit of Indigenous Peoples.[7]

The Legal Foundation of ID-Sov

ID-Sov is a concept grounded in self-determination, human rights, and respect for Indigenous knowledge and cultural rights. While there may not be any specific domestic or international legal instruments exclusively dedicated to ID-Sov, several broader legal frameworks and documents provide a foundation for understanding, advocating and importantly enacting Indigenous peoples' rights in the data context.

Of significance is the *United Nations Declaration on the Rights of Indigenous Peoples* (UNDRIP), which provides recognition of the individual and collective rights of Indigenous Peoples. In particular is the right to maintain, control, protect, and develop cultural heritage, traditional knowledge, and expression,[8] to participate in decision making,[9] the right to self-determination and to maintain and strengthen distinct political, legal and cultural institutions,[10] and the right to free, prior and informed consent.[11] UNDRIP adopts and expands on the language, concepts and practices arising out of the *International Labour Organization Convention No 169 — Indigenous and Tribal Peoples Convention*.[12] Particularly in relation to consultation and participation in matters that affect them. Full involvement and participation necessarily involve access to, control over, and knowledge about data relating to the community and that which informs broader decision-making mechanisms.

Similar concepts have operated within Intellectual Property Law, from the development of benefit-sharing arrangements[13] and broader restrictions on the creation of IP rights over knowledge and innovations drawn from work with Indigenous communities, particularly in the biological space.[14]

While these international instruments provide a framework for the rights of Indigenous peoples, the extent to which these rights are implemented and enforced for the benefit of Indigenous communities largely relies on communities advocating themselves for the inclusion of ID-Sov clauses in contracts, policies or other terms of engagement. It is crucial for legal practitioners to be aware of the broader framework supporting ID-Sov and its implications and pre-emptively considering the issues an ID-Sov lens raises for work involving Indigenous communities and organisations. Specific provisions relating to ID-Sov considerations should be included in contracts and policies where appropriate, including setting out mechanisms for oversight and accountability.

Putting ID-Sov into practice

There are a number of principles that support and guide the implementation and enactment of ID-Sov. These principles are not unique to researchers or the State, but ought to inform the collection and use of all data involving Aboriginal organisations, corporations or communities.

A useful, if not entirely comprehensive, tool for lawyers working in this space are the CARE Principles, developed through the advocacy of Indigenous Peoples from around the world through the International ID-Sov Interest Group at the Research Data Alliance.[15] The CARE Principles invite consideration of and the taking of steps to support **C**ollective Benefit to the community; that **A**uthority to control data is appropriately defined and centred within the relevant community through clearly defined Indigenous data governance structures; that **R**esponsibility and accountability mechanisms are articulated and enforceable; and that **e**thical consideration is placed to minimise the risk to Indigenous communities arising from the use or disclosure of data now and in the future.[16]

Support to flesh out and understand considerations informing the implementation of the CARE Principles can be found by drawing on the broader international Indigenous Rights discourse by considering self-determination, cultural context, consent and benefit-sharing, data governance, and capacity building.

In supporting *self-determination*, Indigenous communities should have the right to determine how their data is collected, used and shared. This includes setting priorities, defining appropriate research methodologies and setting clear access control parameters with respect to information about themselves or their community.

Data should be understood and managed within its unique *cultural context*. This involves respecting the unique perspectives, values and meanings embedded in the data through establishing and empowering Indigenous Advisory Boards from within the community who can speak to and for the data.

Indigenous communities should provide *free, prior and informed consent*[17] for collecting and using their data. Additionally, they should *benefit*, or, in the least, share in the benefits, from any research or projects involving their data, with outcomes that align with their needs and aspirations.

Indigenous communities should be supported to build and develop governance structures to oversee their data management. This can involve the establishment of protocols, policies and mechanisms to safeguard data and ensure its appropriate use within community, as well as beyond. In doing so, *capacity building* activities should be considered to assist Indigenous communities in developing the knowledge and skills needed to manage their data effectively. This may include training community members in data literacy, research methodologies, and technology use, and in ensuring they understand their right to refuse access.

These principles should inform and be embodied in formal contracts and/or policies that sit alongside and within, for example, intellectual property agreements and data collection and sharing agreements, and privacy policies. These should clearly set out and define mechanisms for Indigenous communities to exercise their rights to control knowledge and data. This might include but is not limited to the recording or filming language, stories and songs, recording intangible knowledge around practices or about land, flora and fauna, and data around experiences, aspirations and other community characteristics.[18] Ownership of this data must be vested with an Indigenous person, community or advisory board, with any use, analysis, sharing or adapting that data requiring free, prior and informed consent of the community and specific individuals involved.

Conclusion

ID-Sov rights and concerns are increasingly becoming front of mind for Indigenous communities, organisations and businesses. Therefore, legal practitioners must be aware of the concerns and considerations informed by ID-Sov so community rights and interests can be clearly understood and endorsed through clear and transparent inclusion in IP and data sharing agreements and data collection and governance policies. When Indigenous communities are supported to control their own knowledges and to define and articulate themselves within and through the data generated about and by them.

Dr Kristopher Wilson
Lecturer, Faculty of Law,
University of Technology Sydney
Kristopher.Wilson@uts.edu.au

Footnotes

1. See, generally, T Kukutai and J Taylor, *Indigenous data sovereignty: Toward an agenda* (ANU Press, Canberra, 2016).
2. M Walter and S Russo Carroll, "Indigenous Data Sovereignty, governance and the link to Indigenous Policy" in M Walter et al, *Indigenous Data Sovereignty and Policy* (Routledge, 2021) 1, 2.
3. Ibid 2–3.
4. Ibid 3–4.
5. M Walter, "Data politics and Indigenous representation in Australian statistics" in Kukutai (n 1) 79, 85.
6. Ibid; Walter (n 2) 8–9; C Andersen, *Métis: Race, Recognition, and the Struggle for Indigenous Peoplehood*. (University of British Columbia Press, Vancouver, 2014).
7. R Lovett et al, "Good data practices for indigenous data sovereignty" in A Daly, K Devitt and M Mann (eds), *Good Data*. (Institute of Network Cultures Inc, Amsterdam, 2019).
8. UN General Assembly, United Nations Declaration on the Rights of Indigenous Peoples, GA Res 61/295, UN GAOR, 61st sess, 107th plen mtg, Supp No 49, UN Doc (A/RES/61/295) 13 September 2007), Articles 15(i), 31.
9. Ibid Article 18.
10. Ibid Articles 3, 4, and 5, 20(1), 33.
11. Ibid Article 19.
12. International Labour Organization's Convention No 169 (adopted 27 May 1989, entered into force 5 September 1991) 1650 UNTS 383.
13. See, eg, N Stoianoff and A Roy, "Indigenous knowledge and culture in Australia-the case for sui generis legislation" (2015) 41(3) *Monash University Law Review* 745; and T Tone-Pah-Hote and N Redvers, "The commercialization of biospecimens from Indigenous Peoples: A scoping review of benefit-sharing" (2022) 9 *Frontiers in Medicine* 978826.
14. M Yolanda Teran, "The Nagoya protocol and indigenous peoples" (2016) 7(2) The *International Indigenous Policy Journal* Article 6.
15. The CARE Principles for Indigenous Data Governance were drafted at the International Data Week and Research Data Alliance Plenary co-hosted event "Indigenous Data Sovereignty Principles for the Governance of Indigenous Data Workshop," 8 November 2018, Gaborone, Botswana. See, "CARE Principles — Global Indigenous Data Alliance", *Global Indigenous Data Alliance* (Web Page) <www.gida-global.org/care>.
16. S Carroll at al, "Using Indigenous Standards to Implement the CARE Principles: Setting Expectations through Tribal Research Codes" (2022) 13 *Frontiers in Genetics* 823309.
17. See Human Rights Council, "Free, Prior and Informed Consent: A Human Rights-Based Approach. Study of the Expert Mechanism on the Rights of Indigenous Peoples" (10 August 2018) UN Doc A/HRC/39/62, para 3.
18. T Janke, C McKenzie, and N Carter, "Indigenous Data Sovereignty: The legal and cultural considerations", *Terri Janke and Company* (Web Page, 10 August 2023) <www.terrijanke.com.au/post/indigenous-data-sovereignty-the-legal-and-cultural-considerations>.

Increasing attention to Indigenous engagement and consultation

John Southalan[1] *RESOURCES LAW NETWORK*

Recent decisions — from courts, tribunals and others — show increasing attention to Indigenous issues and engagement, and legal implications where this is found inadequate. Six decisions are summarised below.

Santos NA v Tipakalippa[2]

(Dec 2022, Full Federal Court)

The Full Federal Court dismissed an appeal against the first instance Judge's decision quashing the approval by the Commonwealth offshore regulator (**NOPSEMA** — National Offshore Petroleum Safety and Environmental Management Authority) of a drilling environment plan submitted by Santos NA Barossa Pty Ltd (**Santos**). Apart from detailing how the Commonwealth's offshore regulation works, an interesting aspect of this decision was the majority's drawing from "native title" concepts to inform the understanding of consultation in other legal regimes.

The relevant legislation required that NOPSEMA, before it could accept a company's proposed environmental plan, had to be satisfied the applicant had carried out consultations including of each party "whose . . . interests or activities may be affected by the activities to be carried out under the environment plan".[3] Where NOPSEMA accepted an environmental plan, that legally permitted the company to proceed with the specified petroleum drilling activities.[4] Proceedings here had been brought by Dennis Tipakalippa, an elder of the Munupi clan and who lives on the Tiwi Islands, complaining that he and the Munupi clan were not consulted by Santos regarding the plan submitted to NOPSEMA.[5] Santos had conducted consultation, including providing information to the Tiwi Land Council.[6] On appeal, both Santos and NOPSEMA argued that "interests" in the relevant law should not be understood to require that Mr Tipakalippa and the Munupi clan be consulted because such an understanding "would make reg 11A(1) unworkable and that this tended against the adoption of such a construction".[7] Regulation 11A (of the Commonwealth's Offshore Petroleum and Greenhouse Gas Storage (Environment) Regulations 2009) was the relevant law, which stated the company "must consult . . . each . . . a person or organisation whose functions, interests or activities may be affected by the activities to be carried out".

The Full Federal Court unanimously rejected the appeal, through two sets of reasons. The joint reasons of Justices Kenny and Mortimer are those of interest here. Their Honours considered the *purpose* of consultation and how that informs understanding of what consultation was required, and drew from understandings in native title practice. Relevant extracts from the majority judgement show this reasoning.

> [89] ... [S]tatutory consultation provisions, imposes an obligation that must be capable of practicable and reasonable discharge by the person upon whom it is imposed. Consultation ... purpose is to ensure that the titleholder has ascertained, understood and addressed all the environmental impacts and risks that might arise from its proposed activity. **Consultation facilitates this outcome because it gives the titleholder an opportunity to receive information that it might not otherwise have received from others affected by its proposed activity.** Consultation enables the titleholder to better understand how others with an objective stake in the environment in which it proposes to pursue the activity perceive those environmental impacts and risks. ...
>
> [94] ... **[C]onsultation with First Nations groups may not be as simple (or quick) as sending an email with a package of information,** ... [I]t cannot be assumed that by sending an email with an information package attached, and perhaps following up with one further email, the requirement to consult in reg 11A has been satisfied.
>
> [95] **Where interests are held communally, or across a group, a different approach to consultation is likely to be required**. ...
>
> [96] ... [T]he authorities in relation to processes under the NTA [Native Title Act] to be illustrative of how a seemingly rigid statutory obligation to consult persons holding a communal interest may operate in a workable manner. Whilst some differences in statutory language exist, the most relevant assistance is to be gained from those authorities that have considered s 251B of the NTA. Section 251B contains a statutory definition of the term "authorise", which is a key concept in the NTA governing decision-making by native title or compensation claim groups. ...
>
> [104] ... [T]here is no definition of what constitutes "consultation" for the purposes of reg 11A, and what does not. ... Just as under the NTA the Courts have explained that **the underlying premise of the authorisation provisions is to give all group members a "reasonable opportunity"**

> **to participate in decision-making**, so too there is good reason to **adopt a similarly pragmatic and practical approach to reg 11A.** ... In short, **the NTA authorities require reasonable notice to group members, but not any exhaustive communications with each and every person**.
> [109] ... [T]here is nothing unworkable about a construction of the phrase "functions, interests or activities" in reg 11A that extends to the interests of First Nations groups by reason of a traditional connection to sea country and its marine resources which may be affected by the activities to be carried out ... [A]s the heritage protection cases at the State and federal levels demonstrate, and **as the NTA cases ... emphasise, it is possible to construe a consultation requirement in a practical and pragmatic way that makes a process both reasonable and workable.** ... [emphasis added]

This reasoning suggests that anyone dealing with legal provisions involving engagement or consultation with Indigenous groups ought to be familiar with native title "authorisation" and engagement process, because these may be used by the courts in how to understand cod inform other requirements. This was particularly noteworthy in this case because there were no native title claims or determinations relevant to the area or issues in question.[8]

Forrest & Forrest v Aboriginal Affairs Minister[9]

(Apr 2023, WA State Administrative Tribunal)

This decision, of WA's State Administrative Tribunal, affirmed a previous Ministerial refusal to consent to impacts on Aboriginal heritage in proposed weirs being built across a river near Onslow in north-western Australia. The relevant WA law prohibited interference with Aboriginal sites unless the Minister has granted consent.[10] Forrest & Forrest P/L (operating Minderoo pastoral station) applied for consent to construct 10 weirs on the Ashburton river, to assist the company's horticultural and beef production. The Minister refused consent (in 2019), the company applied to the Tribunal to remake the decision (in 2021), and the Tribunal's decision (in 2023) rejected the application and affirmed the Minister's decision.[11]

The Tribunal's decision was given by President Pritchard, Senior Member Willey and Member Barton. They acknowledged that the legal regime (and deciding whether to consent to the damage) involved a balance of interests for development against interests for the protection of heritage.[12] In explaining how that balance be approached, the Tribunal's reasoning included the following.

> *[148]* ***The general interest of the community in the preservation of an Aboriginal site of very significant historical, archaeological or ethnographical interest*** *(for example, because it constituted unique evidence that Aboriginal people lived in a particular area thousands of years ago where they were previously unknown to have lived, or which site contained unique evidence that Aboriginal people used particular tools, or on which was located a unique example of ancient Aboriginal artwork)* ***would strongly support the preservation of that site, rather than the grant of consent to permit the complete destruction or permanent damage of that site. If consent were to be warranted, a compelling interest of the community would need to be identified to support the use of the land in that way.***
> *[613] The preservation of Aboriginal culture, through the preservation of sites of importance and significance to Aboriginal people, is an important aspect of the preservation of the cultural heritage of the State.* [emphasis added]

The Tribunal did not mention the words "Juukan Gorge" but it is difficult not to see influence of the events and response to the damage of Juukan Gorge in 2020. The Tribunal's wording here seemed to describe those events,[13] being "the grant of consent to permit the complete destruction or permanent damage of . . . an Aboriginal site of very significant historical, archaeological or ethnographical interest . . . because it constituted unique evidence that Aboriginal people lived in a particular area thousands of years ago where they were previously unknown to have lived, or which site contained unique evidence that [A]boriginal people used particular tools". What is interesting is that the Tribunal's reasoning here gives greater emphasis to the protection of Indigenous heritage than had been apparent from previous decisions (both by the Tribunal[14] and also courts).[15]

The Western Australian Parliament has recently reverted to its 1972 Aboriginal heritage law.[16] That gives extra relevance to the Tribunal's reasoning here on how to approach the consideration of consents under that law,[17] unless and until this decision is altered on appeal.[18]

Yunupingu (Gumatj Clan) v Cth[19]

(May 2023, Full Federal Court)

This decision, of a unanimous Full Court (Mortimer CJ, Moshinsky & Banks-Smith JJ) was an interlocutory ruling in ongoing proceedings about compensation for historic impacts on native title in Gove Peninsula in the Northern Territory. There is little of relevance to Indigenous engagement in the Court's reasons, but there was a noteworthy paragraph regarding the role of historical records.

> [72] In some of the following sections, there are **titles to legislative instruments, provisions in those** instruments or in statutes, **and descriptions of powers and circumstances** which **resonate with the past injustices inflicted on First Nations Peoples in this country.** The **reproduction of them here is necessary** because those are the historic facts relevant to the Court's consideration of the parties' arguments, **but that reproduction should not occur without the Court expressly recognising the impact**

> **that the use of such terms and descriptions may have on First Nations Peoples, and the way those terms and descriptions may recall the trauma of their lived experiences, and those of past generations**.
>
> [emphasis added]

Barngarla Corp v Resources Minister[20]

(July 2023, Federal Court)

This decision concerned the Commonwealth Government's declaration that land near Kimba (in western South Australia) was selected as the site for the establishment of a radioactive waste management facility, and that interests in the land were acquired or extinguished under Commonwealth law. The land was within a previous native title determination, recognising the traditional country of the Barngarla People, and they now brought proceedings challenging the Commonwealth's declaration under various grounds. The Court ruled that the allegation of apprehended bias was established, and quashed the Commonwealth Minister's decision.[21]

Relevant here is a short preliminary matter of whether the applicants had standing, because the particular land had previously been ruled to not hold native title (due to extinguishment by historical dealings with the land).[22] The Commonwealth accepted the applicants had standing, to seek judicial review of the decisions, because of statutory rights under South Australian heritage laws.[23] Justice Charlesworth also stated, however, that the applicants had standing because it was their traditional land (even though native title had been extinguished).

> [16] ... **[T]he act that extinguished native title** in the subject land (the grant of freehold title) **did not alter the traditional laws and customs of the Barngarla people. The spiritual connection asserted by the Barngarla people under their traditional laws and customs is sufficient to justify their standing to claim relief**, in addition to their status as native title holders in nearby Pinkawillinie Conservation Park and their asserted rights under the SA Heritage Act. [emphasis added]

Cooper v NOPSEMA[24]

(Sep 2023, Federal Court)

This case involved the same consultation regulation as the earlier Santos case, but this time concerning Woodside seismic surveying off the Pilbara coast in Western Australia. In this instance, NOPSEMA has approved the company's plan, effectively with a condition "to undertake further consultation with [Indigenous] representatives . . . prior to the commencement of the seismic survey".[25]

Justice Colvin quashed the approval, ruling that NOPSEMA was not empowered "to make the decision to accept the environment plan on the stated conditions ... where it was not reasonably satisfied that the consultation required" had occurred.[26] Aspects of His Honour's reasoning reinforced and developed the Full Federal Court's approach in the earlier Santos case.

> [40] ... [T]he statutory process requires the titleholder to undertake the consultation and then to include in the environment plan material .... **NOPSEMA does not conduct the consultation. Rather, it depends upon the titleholder undertaking a consultation of the requisite kind and then including the outcomes and measures that have been adopted in the environment plan**.
>
> [41] ... [T]he information obtained from the consultation ... will "provide a basis for NOPSEMA's considerations of the measures, if any, that a titleholder proposes to take or has taken to lessen or avoid the deleterious effect of its proposed activity ..."
>
> [59] ... **NOPSEMA is materially dependent upon the consultation undertaken by the titleholder in order to identify all environmental impacts and risks. The fundamental importance of the consultation is reflected in the requirement for the inclusion of the report as to the consultation in the environment plan that is submitted for acceptance by NOPSEMA.** The separate opportunity in the case of a seismic or exploratory drilling plan for public submission is addressing a different concern. ... [emphasis added]

Project Sepik and PanAust[27]

(Oct 2023, Australian National Contact Point for Responsible Business Conduct)

This was a decision of the Australian National Contact Point for Responsible Business Conduct (**AusNCP**), which promotes the *OECD Guidelines for Multinational Enterprises*[28] and provides conciliation to resolve complaints against multinational enterprises.[29] This complaint, by non-government organisations in Australia and Papua New Guinea, was that Australian company proposals (to develop a mine and infrastructure in PNG) did not comply with the OECD Guidelines.

The AusNCP's decision considered most of the company's actions identified were not inconsistent with the OECD Guidelines.[30] It noted that consultation and engagement were ongoing in Papua New Guinea, making some matters inappropriate "to be subject to determinations in this statement".[31] The statement did, however, address the concept of "free, prior, informed consent" (**FPIC**), summarising standards and cases, and explaining its application.

> [3.2] The proposed project entails significant impacts on Indigenous groups, such that those groups' free, prior, informed consent (FPIC) will be necessary **... FPIC is not simply evidenced or achieved by a government's grant of all necessary permits or licences** ... It is not evident that the position of the notifiers and those they represent in relation to the project means FPIC cannot exist for the project ...
>
> [89] **The presence, or absence, of FPIC** (summarised in paragraphs 77–86 above) **cannot be determined simply by one party's assertion that they are Indigenous and what their opinion is. Instead, it depends on:**

89.1 **an objective understanding of the physical impacts;**
89.2 **a subjective understanding of the cultural impacts** — referenced to the relevant Indigenous culture and credibly substantiated within that;
89.3 **consideration of whether either of those types of impacts are of such significance that FPIC would be required** (see 81.4 above); and
89.4 **the relevant group's views after appropriate engagement**. [emphasis added]

Reflections

These decisions perhaps indicate a trend of increasing legal relevance and significance to how governments and companies engage with Indigenous groups. The Full Federal Court has drawn on native title experience and processes to explain and understand what consultation ought involve in other legal regimes. The OECD Guidelines are expectations which adhering governments, including Australia, "encourage the enterprises operating in or from their territories to observe ... wherever they operate",[32] — and corporate inconsistency with the Guidelines (eg regarding stakeholder engagement) can lead to a complaint to the AusNCP.[33]

John Southalan
Mediator and Legal Practitioner
Global Faculty (Centre for Energy Petroleum and Mineral Law and Policy)
Adjunct/Clinical Professor (University of Western Australia, Murdoch University, Curtin University)
john@southalan.net

The author holds the (part-time) role of Independent Examiner with the AusNCP. This article is written in personal capacity and does not represent the views of the AusNCP, the Australian Government, the OECD, nor any organisation with which the author is associated.

Footnotes

1. Grateful thanks, for comments and feedback on earlier drafts, to Dr E. Wensing, C McKellar, N Case and Dr C Tan. Any errors remain the author's responsibility.
2. *Santos NA Barossa Pty Ltd v Tipakalippa* (2022) 296 FCR 124; 406 ALR 358; [2022] FCAFC 193; BC202216406.
3. Described in *Santos* [2022] FCAFC 193; BC202216406 at [11]–[14].
4. *Tipakalippa v National Offshore Petroleum Safety and Environmental Management Authority (No 2)* (2022) 406 ALR 41; [2022] FCA 1121; BC202209643, [2].
5. *Tipakalippa* [2022] FCA 1121, [8]–[9].
6. *Tipakalippa* [2022] FCA 1121, [105] & [203] and Annexure 2 (which the trial judge explained thus: "Annexure 2 to these reasons contains a copy of a 'stakeholder consultation package' provided to the TLC and to all persons Santos identified as relevant persons. That material, which is included in Appendix E of the Drilling EP, comprised the 'Q2 2021 Barossa Quarterly Update' and a pro forma email distributed on 11 June 2021.").
7. *Santos* [2022] FCAFC 193; BC202216406, [86].
8. *Santos* [2022] FCAFC 193; BC202216406, [36].
9. *Forrest and Forrest Pty Ltd v Minister for Aboriginal Affairs* [2023] WASAT 28; BC202302916.
10. Aboriginal Heritage Act 1972 (WA), s 17 (prohibition) and s 18 (consent).
11. *Forrest & Forrest* [2023] WASAT 28; BC202302916, [635]–[636].
12. *Forrest & Forrest* [2023] WASAT 28; BC202302916, [142] and [150]–[152].
13. A comprehensive account of the events regarding J Gorge is provided in Joint Standing Committee on Northern Australia *A Way Forward* (Final report into the destruction of Indigenous heritage sites at J Gorge, 18 October 2021) Parliament of the Commonwealth of Australia.
14. eg *Traditional Owners (Nyiyaparli) — Indigenous Affairs Minister* (2009) 62 SR (WA) 118; [2009] WASAT 71 per Chaney P (relevant aspects summarised in Southalan, "Case note: *Forrest & Forrest and Minister* [2023] WASAT 28" (2023) *42 Australian Resources & Energy Law Journal* 1). President Chaney's reason included the following comments (emphasis added) at [21] "Provision for the Minister's consent arises in the context where a particular 'owner' wishes to undertake work (on the land which they 'own') which might interfere with places or objects of Aboriginal heritage significance. **The scheme of the Act is to vest in the Minister** the ultimate control of activities affecting such sites or objects. The interest which the Minister is required **to preserve is the general interest of the community.** The competing interest is that of the proponent of the particular activities which require consent. I am unable to see any basis upon which some other 'owner' of the type described in ss 18(1) and 18(1a) might be extended a right of review in the context of those competing interests. Another owner, who is not the proponent of the proposed activity, has no interest in whether the works are permitted. Nor could such other owner sensibly propound **the general interest of the community, protection of which the Act reposes in the Minister**".
15. Examples of previous court statements include the following (emphasis added).
    - "**[T]he Act should provide the scope for political direction in the national interest when it** be thought that the right to **preservation should give way to some competing interest**": *Noonkanbah Pastoral v Amax Iron* [1979] WASC 124, [14] per Brinsden J.
    - "[T]he statutory provisions ... do not confer private rights or purport to directly advantage Aboriginal people or any class of people. ... [I]t is unlikely that Parliament intended that the ... Committee ... should have the de

facto responsibility to weigh ... the general interests of the community. That task — weighing the public interest — is plainly for the minister, and for good reason. It is a political function. ... **The possibility that the minister might, after a proper consideration of the [committee's] recommendation against the development, decide that the general interests of the community should prevail over cultural considerations, is inherent in the whole process**": *State of WA v Bropho* [1991] WASC 429; 5 WAR 75, 93–94 per Anderson J (agreed by Malcolm CJ & Franklyn J).

- "**[A] ministerial consent obtained by the ... 'owners' under s 18(3) is likely to be a necessary component of an overall wider expansion in iron ore mining** operation plans. The Minister's s 18(3) consent for the owners is likely to be of a wider commercial significance — well beyond being a personal protection against a future prosecution for infringing s 17 of the AH Act. Obtaining of the s 18(3) consent of the Minister would likely be of project due diligence importance in the wider context as a required milestone necessary to be met in a project expansion process. Obtaining the s 18(3) consent is likely to carry affirmative implications for project expansion needed to satisfy persons such as bankers, financiers or the like. The advancing of a massive iron ore expansion project would typically require a satisfaction of a multitude of due diligence steps or enquiries all assembled to be fulfilled towards satisfying pre-requisites such as project funding, venture participation by others and the like.": *Wintawari Guruma Corp v Aboriginal Affairs Minister* [2019] WASC 33, [114] per K Martin J.
- In *Wintawari Guruma*, Justice Martin rejected the notion that a Minister's decision may be invalidated because of irregularities in how the ACMC earlier dealt with the matter. Such an outcome, His Honour considered, was incorrect when "seen within the framework of the AH Act as a whole as the antithesis of providing long term commercial certainty for a major expansion of a mining project once the Minister's consent had finally issued ... . An undermining of a s 18(3) consent ... would deliver obvious and unacceptable long-term and destabilising economic uncertainty — in the nature of a concern akin to a sovereign risk. Such **commercial uncertainty is discordant with the statutory objectives of the AH Act assessed as being enacted for the benefit of the whole West Australian community**": *Wintawari* [2019] WASC 33, [116]–[117].
- "Pursuant to s 18(3), the Minister must consider the ACMC's recommendation and, having regard to the general interest of the community, either consent to the use of the land the subject of the notice, or part thereof, for the purpose proposed, with or without conditions, or wholly decline to consent to the use of the land for that purpose, and advise the owner of that decision.": *Abraham v The Hon Peter Charles Collier Mlc, Minister For Aboriginal Affairs* [2016] WASC 269; BC201607189, [16] per Pritchard J.

16. Aboriginal Heritage Legislation Amendment and Repeal Act 2023 (WA), the bulk of which comes into operation on 15 November 2023: Aboriginal Heritage Amendment Proclamation 2023, SL 2023/161 (WA), item 2.
17. The Tribunal outlined factors relevant to a Minister's decision whether to grant consent at *Forrest & Forrest Pty Ltd v Minister for Aboriginal Affairs* [2023] WASAT 28; BC202302916, [147]–[149].
18. The Tribunal's decisions can be appealed to the WA Court of Appeal (only on a question of law, and only if that Court gives leave): State Administrative Tribunal Act 2004 (WA), s 105.
19. *Yunupingu (on behalf of the Gumatj Clan or Estate Group) v Commonwealth of Australia* (2023) 410 ALR 231; [2023] FCAFC 75; BC202305149.
20. *Barngarla Determination Aboriginal Corp RNTBC v Minister for Resources* [2023] FCA 809; BC202309786.
21. *Barngarla* [2023] FCA 809; BC202309786 per Charlesworth J at [5] (summary of claims), [7] (summary of decision) & [8]–[11] (summary of parties).
22. *Barngarla* [2023] FCA 809; BC202309786, [12]–[15] (describing the relevant land).
23. *Barngarla* [2023] FCA 809; BC202309786, [16].
24. *Cooper v National Offshore Petroleum Safety and Environmental Management Authority (No 2)* [2023] FCA 1158; BC202313789.
25. *Cooper* [2023] FCA 1158; BC202313789, [1].
26. *Cooper* [2023] FCA 1158; BC202313789, [4].
27. Independent Examiner *Complaint submitted by Project Sepik and Jubilee Australia Research Centre on behalf of affected Sepik River communities against PanAust Limited* (Final Statement, 3 October 2023) Australian National Contact Point for Responsible Business Conduct, Department of Treasury. Available at https://ausncp.gov.au/complaints/complaint-29 (accessed 5 Nov 2023).
28. Adhering nations, *OECD Guidelines for Multinational Enterprises on Responsible Business Conduct* (2023, OECD Publishing). Available at https://doi.org/10.1787/81f92357-en (accessed 5 Nov 2023).
29. The AusNCP is part of Commonwealth Treasury and its functions, procedures and decisions are available at the website https://ausncp.gov.au/ (accessed 5 Nov 2023).
30. *Project Sepik Final Statement*, [3] & [114].
31. *Project Sepik Final Statement*, [3.1], see also [58] and [114].
32. OECD Guidelines (n 28 above), ch I, [3].
33. The AusNCP *Complaint Procedures* are available at the AusNCP website (n 29 above).

Carbon farming — leveraging native title rights and interests

Sheree Sharma *QUEENSLAND SOUTH NATIVE TITLE SERVICES*

Carbon farming promised to pave the way for jobs on country and a range of economic, environmental and cultural benefits.

According to the Indigenous Carbon Industry Network, in 2022, out of the 852 registered carbon projects, only 4% of those were Indigenous owned.[1] Almost all of these projects are classed as savannah burning projects, done exclusively in the northern part of Australia.

Of the other kinds of carbon projects, the Emissions Reduction Fund Project Register indicates that the project proponent, being the party that receives all of the Australian Carbon Credit Units (ACCUs), that is, the financial benefit are either pastoralists or carbon developers, even where the project area sits on land over which native title rights and interests exist.

Looking specifically at the southern part of Queensland, where native title has been recognised in 41 native title determinations, registered carbon projects have the following characteristics.

a. The project site is a pastoral property over which the pastoralist holds a non-exclusive lease.
b. Native title holders hold non-exclusive native title rights and interests over the lease area.
c. The rights of native title holders co-exist with the pastoral interests, subject to the extent of any inconsistency.[2]
d. The carbon project generally involves vegetation regrowth.
e. Typically, the pastoralist either enters into an agreement with a Carbon Project Developer or aggregator (collectively referred to as the "**carbon developer**"). Under the agreement:
    i. The pastoralists sign over the "legal right" to develop and carry out the project to the carbon developer which then allows the carbon developer to be registered as the project proponent.
    ii. The project proponent is entitled to **all** of the **ACCUs** generated from the project.
    iii. In exchange for signing over the "legal right" to carry out the project, the pastoralist negotiates to receive a decent percentage of the ACCUs.

    Alternatively, the pastoralist, enters into an agreement with a Carbon Service Provider. Under those agreements:
    iv. The pastoralist is said to hold the "legal right" to carry out the project.
    v. As the project proponent, the pastoralist is entitled to all of the ACCUs generated from the project.
    vi. The pastoralists agrees to exchange some of the ACCUs to the Carbon Service Provider or aggregator, in exchange for the service provider's assistance in the implementation and management of the project.

What is the legal right and why it is important is explained below. Leaving that aside, under both forms of these agreements, the pastoralist and carbon developer or service provider initially negotiate and reach a concluded agreement without any involvement from native title holders. It is via these negotiations that key aspects of the project are discussed and locked in, including:

- who the project proponent (the person entitled to all the ACCUs) will be;
- the length of the project;
- the project area; and
- the project method.

The way in which carbon farming has been approached by the carbon industry has clearly not afforded native title holders the right to free, prior and informed consent. That failure is not cured by eligible interest holder status held by native title holders under the relevant carbon legislation.

As an eligible interest holder, native title holders have the ability to veto a project. Eligible interest holder consent to a project is a critical step in getting the project registered and being profitable.

By withholding consent, an eligible interest holder has the ability:

- To prevent the project from progressing past the first reporting period, which can be between 6–24 months from initial registration.

- Prevent the project from being profitable.

Notionally, this "right to veto" is not a bad negotiation position to be in. However, most native title holders are only receiving a small percentage of the ACCUs generated from projects that can be on foot for up to 100 years.

Given native title holders' consent is being sought so late in the process, the room to negotiate changes to the project and the benefits being offered is often restricted because of the preceding agreement reached between the pastoralist and the carbon developer.

So why are native title holders getting such a bad deal? Well, like a lot of negotiations between a developer and a First Nations group, there is a power imbalance. This can potentially be overcome with a shifting in approach that more closely aligns with the High Court's thinking in *Wik*.

Currently, carbon negotiations are being approached by pastoralists and the carbon industry on the basis that the pastoralist holds the "legal right".

Holding the legal right is important. Holding the legal right requires the following:

- the right to carry out the project activities on the site; and
- a lawful and exclusive right to be issued all of the ACCUs that may be created as a result of the project activities.

When registering a project, the Clean Energy Regulator requires the project proponent to provide a statement about its legal right to undertake the project. The Regulator does not "test" the validity of a project proponent's legal right. Instead, it relies on the information contained in the project proponent's application to have the project registered with the Regulator, being agreements reached between the relevant parties. That is, the agreements under which the pastoralist and carbon developer assign or confirm the holder of the legal right becomes the basis upon which the project proponent (whether that be the developer or pastoralist) is said the hold the legal right, and thus the entity that receives the ACCUs.

This approach to carbon projects conveniently fails to appreciate that any rights held by a pastoralist pursuant to a non-exclusive lease, co-exist with the non-exclusive native title rights held by native title holders over the lease area.

Given the co-existence principles established in *Wik* it can be argued that native title holders and the pastoralist **jointly** hold the legal right to carry out the project and be issued ACCUs created as a result of the project activities.

It follows that, the pastoralist does not hold the power to unilaterally assign the legal right (held jointly with the native title party) to a project developer under an agreement to which the RNTBC is not a party.

Given the administrative way in which the Regulator approaches whether the project proponent holds the legal right, the implications of a jointly held legal right has not been tested.

Moving forward there are a few ways this issue could play out if pushed by native title holders and their representatives:

- The validity of currently registered projects, registered on the basis that the pastoralist holds or assigned the legal right without agreement from native title holders, could be tested.
- A new approach whereby, any new agreements assigning the legal right to a carbon developer, be entered into by the pastoralists and native title holders on the basis that the two entities jointly hold the legal right.
- Pastoralists and native title holders as joint holders of the legal right, cut out the carbon developer and work together as joint project proponents and enjoy a more equal distribution of the economic benefits.
- Native title holders withhold eligible interest holder consent until conditions around ACCU distribution and project design are met, forcing pastoralists and carbon developers to engage with native title holders in the concept stage of the project.

The take home for native title holders and their representatives is to leverage and maximise hard fought, recognised native title rights and interests in their negotiations with an industry that has severely underestimated the bargaining position of native title holders.

Sheree Sharma
(Acting) Principal Legal Officer — Capability
Queensland South Native Title Services
Sheree.Sharma@qsnts.com.au

Footnotes

1. *Mapping the Opportunities for Indigenous Carbon in Australia*, Indigenous Carbon Network, September 2022.
2. *The Wik Peoples v State of Queensland (Pastoral Leases case); The Thayorre People v State of Queensland* (1996) 187 CLR 1; 141 ALR 129; [1996] HCA 40; BC9606282 (Wik).

First peoples and pro bono in Australia: good intentions lost in translation?[1]

Trent Wallace

As we usher in a post-referendum society, we must examine the roles of the pro bono and social justice sectors for First Nations people. The denial of a Voice to Parliament is a damning indictment of our society and reflects the egregious scenario First Nations people find themselves in.

However, the outcome provided clarity as to the state of Australia. Though devastating, there is a clear path forward. We must revise our efforts in the pro bono and social justice spaces. We must rethink how the social justice sector and pro bono sector deliver services to First Nations individuals and organisations through a culturally safe and collaborative model. One that requires First Nations leadership.

This article will explore:

- **Self-determination as the path ahead**
- **Establishing the aboriginal legal service: a case study for best practice**
- **The case for cultural competency**
- **The Australian pro bono centre and the commercial reasoning for pro bono**
- **What next? The path forward**

(Nomenclature note: First Nations people will be used interchangeably with other terminology, such as Indigenous and First Peoples)

1. Self-determination as the path ahead

The gap between First Nations and non-First Nations peoples has been exacerbated by the referendum results.[2] However, the gaps existed long before discussion of a referendum,[3] and part of the pathway forward as established by the *Closing the Gap Implementation Plan 2023* listed the need for self-determination:

> *Empowering Aboriginal and Torres Strait Islander people to enact self-determination in formal partnership and shared decision-making with all levels of government is key to delivering outcomes under the National Agreement.*[4]

Self-determination is defined as ". . . an 'on going process of choice' to ensure that Indigenous communities are able to meet their social, cultural and economic needs."[5]

The United Nations Declaration on the Rights of Indigenous Peoples explicitly indicted "Encouraging States" to comply with and effectively implement all their obligations as they apply to indigenous peoples under international instruments, in particular those related to human rights, in consultation and cooperation with the peoples concerned.[6] The concept of "self-determination" in First Nations communities globally through the United Nations grew from the development of the Working Group on Indigenous Populations (WGIP) in 1982.[7] Between 1985 and 1993, the draft Declaration ("the Declaration") on the Rights of Indigenous Peoples was developed by the WGIP.[8] Punctuating the development of the Declaration was the recognition that Indigenous peoples have the right to self-determination.[9] However, debate has regularly ensued, with countries, including Australia in that time period, sought to limit the application of "self-determination" concerned with issues such as separatism and wanted to ensure that broader human rights are not "threatened".[10]

The ideas fleshed out in the debate, such as the concern of "special status" being granted to Indigenous peoples are still felt today.[11] Indigenous people indicated that:

> *". . . nothing less than the recognition of a full right of self-determination is acceptable. They have argued that the international covenants provide that 'all peoples' have the right of self-determination and that this applies without discrimination*"[12]

The sociological consequences that unfortunately underpin the arguments against "self-determination" have been realised through the referendum debate in Australia.

The role of pro bono in Australia should be one that embodies the concept and intention of self-determination. Examples of how self-determination could be embedded in the pro bono sector include:

- Programmes and projects developed and delivered by First Nations people for First Nations people.
- Ongoing access to cultural learning and anti-racist training when working on First Nations matters.

- Collaborative partnerships developed with frontline/ grassroots organisations to acknowledge and be led by the expertise of such organisations.
- Recognition that First Nations lived experience is critical and valid expertise.
- Acknowledging the role of ally and allyship is to platform and prioritise the solutions held by First Nations people and organisations. Allys do not centre themselves or their brand in solutions.
- Those who are not First-Nations people working in First Nations organisations bring cultural humility and observe continuous cultural learning in the space through understanding that privilege creates an inherent and undeniable power imbalance.
- Building out diverse teams that hold experience outside of academic and the general commercial performance measures.

These dominant themes will be threaded through the rest of the article and feed into the argument for self-determination through pro bono.

2. Establishing the aboriginal legal service: a case study for best practice

In his essay to mark the 50th anniversary of the Aboriginal Legal Service, *White Police and Black Power: The Origins of the Aboriginal Legal Service*, Dr Gary Foley, founder of the Aboriginal Legal Service (ALS) noted:

> *"It was a revolutionary body in the sense that it was a completely new concept of Aboriginal organisation. Previously virtually all organisations and agencies that purported to exist for the 'benefit' of Aboriginal peoples had been (and were still then) dominated and controlled by white administrators and white staff."*[13]

With the emergence of the ALS, community-driven organisations were described as "*Aboriginal community-controlled survival programs*".[14] This early example marks self-determination in action — solutions developed and led by those whose communities and lives were impacted.

This early development led Australia down a progressive path: with the opening of the ALS in Redfern, 1970. This marked a significant shift in access to justice as it was the first Aboriginal Legal Service in Australia and the first free legal assistance service on the continent.[15]

Critically, Dr Foley voiced that other organisations established outside of self-determination principles of "Aboriginal developed and led" asserted assimilationist views and policies that were detrimental and operated against First Nations values:

> *The policies of such organisations were created by non-Aboriginal people and were invariably in accordance with governmental assimilationist policies and were primarily focussed on welfare and education issues. It might be noted that education was a key component of the policy to indoctrinate Aboriginal children into accepting and absorbing the Anglo-Celtic values that the eugenicist-inspired policy of assimilation required.*[16]

The advancement of self-determination continued when the ALS established its first full Aboriginal Council in 1973 in recognition that Aboriginal people in managerial and service-delivery positions was essential to speak to the unique needs of First Nations communities.[17]

3. The case for cultural competency

In *R v Kina*,[18] the appellant was convicted in the Supreme Court of Queensland of murdering her de facto partner. The trial lasted less than four hours, the appellant pleaded not guilty to murder on the grounds that she had not intended to kill the deceased. She did not give or call evidence. It only took the jury 50 minutes to return a verdict of "guilty". The appellant was sentenced to life imprisonment.

The case explored three key issues on appeal:

> "1. I did not receive a fair trial and a miscarriage of justice was occasioned thereby by reason of:
> (1) problems, difficulties, misunderstandings and mishaps occurring in the communication of my instructions to the Lawyers who prepared my case and represented me upon my trial; and
> (2) which led to errors so fundamental as to vitiate entirely the decisions of myself and those Lawyers that I would neither give nor call evidence upon my trial.
> 2. Further, or in the alternative, there is now available to myself evidence which should be accepted as fresh evidence and which is of such a nature that, had it been placed before the jury who decided my case, there is a significant possibility that that jury, acting reasonably, would have acquitted me of the offence of murder.
> 3. Further, or in the alternative, whether or not that evidence be fresh evidence, it is of such a nature that a refusal by this Court to receive it would lead to a miscarriage of justice, in that its receipt would demonstrate that it is unsafe in the administration of justice to allow my conviction for murder to stand."(p 3)[19]

Through the court assessing the cultural communicative differences, it was established that none of the lawyers who acted for Kina had received any training on how to communicate and work effectively with First Nations clients. From a Eurocentric perspective, Kina was perceived as being reluctant to communicate with the lawyers and in her affidavit, Kina acknowledged the difficulty she had in communicating with her lawyers.[20]

To work effectively with a First Nations client, it is essential that trust is established through building rapport. Trust is the foundation of working through cultural competency through understanding communication differences. Kina's affidavit stated that she did what her

lawyers had suggested as she felt that what she said held no relevance to her lawyers[21]. Although it is not a clear example, this is an emerging example of a feature of communicative difference known as *gratuitous concurrence*, which refers to the pattern of responding with "yes" — regardless of understanding or actual agreement.[22] This feature of communication is also employed by First Nations people with English as their first language.[23] However, differences in communication between First Nations and non-First Nations people was initially fleshed out via the establishment of the *Anunga Rules*, which were developed in the Northern Territory in the late 1970s. The Anunga Rules have not been embedded in legislation.[24]

The risk of culturally unsafe work is much larger than incompetence. It is the foundation of injustice.

In 2019, I developed course content for the University of New South Wales Practical Legal Training (UNSW PLT) Program. This program provides a unique offering for aspiring lawyers to consider communicative differences. It provides a practical way to apply the knowledge in a legal setting. Indigenous Cultural Competence (ICC), has long been a dominant topic in the university. It is well established that ICC must be understood by student and staff across the higher education sector. ICC is a fundamental tenet to creating respectful and meaningful relationships with First Nations people as peers and as clients. The latter group in acute need for ICC. A significant gap of access to justice is evidenced through First Nations people feeling reluctant to access mainstream services due to the lack of cultural safety through experiences of racism and discrimination.[25]

As the demands on the legal assistance sector continues to grow along with the development of pro bono practices across Australia, it is abundantly evident that the need for cultural competency is growing. The theory and practical application must not be practised on harmed and marginalised people. We must not learn on the go, rather, there needs to be an adoption of cultural humility and a commitment to learning to ensure First Nations people are not disadvantaged further by a deficit of cultural competency. To assist in mitigating this risk and harm, it would be beneficial to collaborate on the development of programmes through First Nations consultation by employing First Nations expertise. The *Kina* case provides an extreme example of cultural incompetence, but the elements of miscommunication accounts for the need for ongoing training and consideration given to cultural nuances.

4. The Australian pro bono centre and the commercial reasoning for pro bono

I The definition, development and target

> "Pro bono" comes from the Latin phrase *pro bono publico* which means "for the public good". In the legal context it generally means the provision of legal services on a free or significantly reduced fee basis, with no expectation of a commercial return.[26]

The National Pro Bono Task Force was established in 2001 by the then Commonwealth Attorney-General, the Hon Daryl Williams AM QC MP. The Task Force was headed by then President of the Australian Law Reform Commission, Prof David Weisbrot, who recommended the development of a secretariat or centre to develop and encourage the expansion of pro bono services, particularly through the collection and exchange of information. In 2002, the Centre opened at the University of New South Wales.[27] The National Pro Bono Target provides an aspirational target of at least 35 hours of pro bono legal services, it is a non-binding commitment and open to:

- law firms;
- incorporated legal practices;
- individual law firm solicitors;
- individual barristers; and
- barristers' chambers.

The National Pro Bono Target for in-house corporate and government lawyers is a voluntary and aspirational target of at least 20 hours of pro bono legal services per lawyer per year that can be signed up to by:

- in-house legal teams; and
- individual in-house lawyers.[28]

II Commercial Requirements

Businesses operating in Australia and globally have developed sophisticated programmes to navigate corporate social responsibility. To assist in their goals, many businesses have significant requirements related to the corporate social responsibility space, including pro bono requirements when selecting a firm from a bids and tenders process. In Australia, the most common requirement is work around First Nations people, relating to employment, procurement, pro bono and other factors to ensure there is a corporate alignment of goals and outcomes.

To be on the "panel" or "list" of the Australian Commonwealth and state/territory government departments, an eligibility criteria applies, which include pro bono requirements that has seen a significant increase of pro bono contributions made in Australia. A demonstration of this is highlighted by the Victorian Government Legal Services Panel, where a contribution of pro bono hours amounted to a value of $5.2 million in 2005–06 to reaching $25 million in 2016–17, with the sharpest increase coming from $7.7 million in 2006–07 to $22.08 million in 2010–11.[29]

III National law firm pro bono survey: first nations focus and report on the nature and prevalence of pro bono partner roles globally

The National Law Firm Pro Bono Survey is a biennial survey of Australian firms with 50 or more full-time equivalent lawyers. The Survey was first conducted in 2008.[30]

The 2008 and results from the report (from responses of 25 firms) listed that 44% of firms had developed pro bono work from an Indigenous legal organisation.[31] Results from the 2022 survey results demonstrate:

Indigenous organisations, including Aboriginal Land Councils — received 240.8% more nominations than in 2020 (having been nominated by 70.2% of firms, up from 20.6%).[32]

The Survey asked if firms had a Reconciliation Action Plan (RAP), results reflect:

Thirty-four of the 47 firms (72.3%) reported that they did have a RAP and the remaining 13 firms (27.7%) did not. The proportion of firms that had a RAP has increased significantly from 22 of 38 firms (57.9%) in 2020 (+24.9%).[33]
Of the firms that had a RAP:
- *Twenty-one of 33 firms (63.6%) indicated that Aboriginal & Torres Strait Islander peoples were one of the three main client groups (in respect of clients who are individuals) for whom they providedpro bono legal services in the 2022 FY. 110.*
- *Twenty-three of 34 firms (67.6%) indicated that Indigenous organisations, including Aboriginal Land Councils, were one of the three main client groups (in respect of clients that are organisations) for whom they provided pro bono legal services in the 2022 FY.*

Of the 13 firms that did not have a RAP:
- *Six firms (46.2%) indicated that Aboriginal & Torres Strait Islander peoples were one of the three main client groups for whom they provided pro bono legal services in the 2022 FY.*
- *Ten firms (76.9%) indicated that Indigenous organisations, including Aboriginal Land Councils, were one of the three main client groups for whom they provided pro bono legal services in the 2022 FY.*[34]

As evidenced by the results, there is a major focus on providing pro bono assistance for First Nations people and organisations, however, the element of cultural competency had not been a point of reflection in the survey(s). To promote cultural consciousness and competence, it would be a key recommendation to measure cultural competence given the dominant focus on First Nations pro bono efforts.

In many pro bono practices, particularly across global law firms, there are often dedicated pro bono staff. The 2022 survey indicated:

Of the 47 respondent firms, 37 firms (78.7%) reported that they did have dedicated pro bono staff.[35]

The composition of staff through cultural backgrounds, was not measured. It may be suggested that alongside the way forward proposed previously, through the measurement of cultural competency, the number of First Nations staff is reported on. It may be argued that, through the lens of self-determination and cultural considerations, First Nations leadership is necessary when the prevalence of First Nations pro bono support is growing, as the survey results have suggested. The way forward is employing First Nations expertise and leadership to design the work.

In 2020, the release of the Report on the Nature and Prevalence of Pro Bono Partner Roles Globally identified that there were 66 dedicated pro bono partners across 55 firms globally.[36] The report indicated that a large majority of partners had developed specialised expertise in a variety of areas, including Indigenous issues.[37] From 2010 to 2019, Australia had the most significant increase of promotions to partnership for pro bono roles with the figure reaching 11.[38] The report did not indicate where any First Nations partner existed in pro bono roles in Australia. As an Aboriginal person, I am mindful of the severe gaps in First Nations knowledge across the sector and beyond. Any faux pas are put down to good intentions, however, we must be cognizant of our roles to facilitate access to justice — we cannot use the most actively oppressed and marginalised as a learning curve for those who do not live the experience they intend to address

The ALS hierarchy is sustained through Aboriginal leadership, which models the operation of self-determination. Through this model, authenticity, commitment and cultural competency may be inferred with ease. The First Nations experience cannot be homogenised, particularly due to the vast and diverse array of lived experience. Contributing factors that relate to this are matters of geography, intersectionality through gender and disability (amongst others) and intergenerational experiences. Non-First Nations people could never be wholly culturally competent, but they can be conscious of cultural nuances through continually working towards a model of competence. These complexities can be navigated through the employment and recognition of senior First Nations stewardship.

In 2020, the creation of the role "First Nations Lead" at Ashurst was a global first.[39] I have occupied this role since its inception and have provided thought leadership to the pro bono and broader social justice sectors through numerous articles, podcasts and panel appearances. Since the development of this role, I have observed several other firms create roles of a similar nature to sit in their teams of corporate responsibility and/or pro bono. As the sector grows and commercial requirements around First Nations increase, emphasis

must be placed on First Nations advancement and promotion to ensure we, as First Nations employees, would not be discarded for broader leadership opportunities and fall behind the current generation of leadership.

Many non-First Nations people have built careers and developed passion off the existence of First Nations disadvantage. Those in leadership in pro bono and the social justice sector must establish pathways for leadership in junior practitioners and create more dedicated roles for First Nations people.

IV The Australian pro bono manual

The pro bono sector is mindful of the need for cultural awareness in the development and navigation of administering pro bono for First Nations communities and individuals. However, there needs to be a sector commitment, outside of RAP's, to showcase culturally safe work models they have developed in equal partnership with First Nations employees.

In 2022, I contributed to the fourth edition of the *Australian Pro Bono Manual: A practice guide and resource kit for law firms,* provides advice on the development of pro bono programs in firms.[40] The treatment of raising cultural awareness is directly in proportion to how successful a First Nations program will be. As more firms continue to establish pro bono practices and as the increase in First Nations work is mandated from commercial requirements, the focus must be on creating culturally safe practices.

5. What next? The path forward

We do not need another hero[41]

The pro bono and social justice sector are continuing to grow and mature in the Australian legal landscape. However, we have reached a critical juncture with the emphatic No vote at the 2023 referendum. This situation forces us to confront our efforts and reimagine how we develop and deliver programmes for and with First Nations people and organisations.

Effective service delivery requires cultural competence and an understanding of structural racism as a bare minimum. This will provide the foundation on which programmes are built upon — programmes that platform First Nations solutions and leadership. First Nations practitioners and seekers of access to justice must be put at the centre of solutions and leadership in Australia.

For the pro bono and social justice sector to continue to mature meaningfully, self-determination through First Nations leadership must be demonstrated. Legitimacy of programmes and commitment to change through inclusion will create successful outcomes. Collaboration and respect for lived experience as a First Nations person will shape authentic programme delivery.

In summary, we require:

- First Nations developed and led programmes;
- open access to cultural and anti-racism training;
- collaborative partnerships with frontline/ grassroots First Nations organisations;
- First Nations lived experience being seen as a critical element to the success of a programme and such experience being seen as valid;
- First Nations issues should not be discussed at length by non-First Nations people/practitioners;
- cultural humility;
- understanding how privilege operates and the imbalance of power it creates;
- hiring and building out practices with cultural understanding and safety underpinning First Nations employment; and
- integrity of practice maintained through senior First Nations employee(s).

The adoption of these practical ways forward will ensure that the good intentions expressed will not be lost in translation. First Nations knowledge and expertise is unique, rare and steeped in the oldest continuous living culture in the world. The dominant paradigm must recognise we hold the solutions, but we have been actively oppressed and ostracised from structures of power and authority. It is your role as workers in the sector(s) to dismantle the barriers to ensure we achieve true access to justice.

Trent Wallace
Lawyer, Law Lecturer, Consultant

Footnotes

1. The views expressed by Trent Wallace are his own.
2. https://tallyroom.aec.gov.au/ReferendumNationalResults-29581.htm (accessed 31/10/23).
3. www.niaa.gov.au/sites/default/files/publications/closing-the-gap-implementation-plan-2023.pdf (accessed 31/10/23).
4. Ibid.
5. https://humanrights.gov.au/our-work/rights-and-freedoms/right-self-determination#:~:text=The%20right%20to%20self%20determination%20has%20particular%20application%20to%20Aboriginal,social%2C%20cultural%20and%20economic%20needs. (accessed 31/10/23).
6. www.un.org/esa/socdev/unpfii/documents/DRIPS_en.pdf.
7. https://humanrights.gov.au/about/news/speeches/indigenous-peoples-and-right-self-determination (accessed 1/11/23).

8. Ibid.
9. Ibid.
10. Ibid.
11. Ibid.
12. Ibid.
13. www.alsnswact.org.au/white_police_black_power_1.
14. Ibid.
15. Our history — Aboriginal Legal Service (NSW/ACT) Limited (alsnswact.org.au) (accessed 1/11/23).
16. www.alsnswact.org.au/white_police_black_power_1 (accessed 2/11/23).
17. www.alsnswact.org.au/white_police_black_power_1 (accessed 2/11/23).
18. R v Kina.
19. Pringle, Karen L. — "R v Robyn Bella Kina" [1994] AboriginalLawB 15; (1994) 3(67) Aboriginal Law Bulletin 14 (austlii.edu.au) (accessed 6/11/23).
20. Ibid.
21. Ibid.
22. www.austlii.edu.au/au/journals/PrecedentAULA/2015/12.pdf (access 6/11/23).
23. Ibid.
24. www.publicdefenders.nsw.gov.au/Documents/admissibilityofadmissionsatsisuspects.pdf (accessed 6/11/23).
25. Marcelle Burns, "Are We There Yet? Indigenous Cultural Competency in Legal Education" (2018) 28(2) Legal Education Review 1.
26. www.probonocentre.org.au/information-on-pro-bono/definition.
27. www.probonocentre.org.au/about-the-centre/ (accessed 6/11/23).
28. www.probonocentre.org.au/provide-pro-bono/target/ (6/11/23).
29. www.probonocentre.org.au/provide-pro-bono/government-tender-arrangements/ (accessed 6/11/23).
30. www.probonocentre.org.au/information-on-pro-bono/survey/ (accessed 6/11/23).
31. http://probonocentre.org.au/wp-content/uploads/2015/09/Firms-survey-report-FINAL-100908.pdf (accessed 6/11/23).
32. www.probonocentre.org.au/wp-content/uploads/2023/02/FINAL-8th-National-Law-Firm-Pro-Bono-Survey-Report-2022-2.pdf.
33. Ibid.
34. Ibid.
35. Ibid.
36. www.probonocentre.org.au/wp-content/uploads/2020/02/Report-on-the-Nature-and-Prevalance-of-Pro-Bono-Partner-Roles-Globally.pdf (accessed 6/11/23).
37. Ibid.
38. Ibid.
39. www.probonocentre.org.au/wp-content/uploads/2020/06/AUSTRALIAN-PROBONO-CENTRE-2020-First_Nations.pdf.
40. www.probonocentre.org.au/aus-pro-bono-manual/about-manual/.
41. www.youtube.com/watch?v=Gcm-tOGiva0.

For editorial enquiries and unsolicited article proposals please contact Johnny Mannah at johnny.mannah@lexisnexis.com.au.
Cite this issue as (2023) 1(2) *FNLB*
SUBSCRIPTION INCLUDES: 4 issues per volume www.lexisnexis.com.au
SYDNEY OFFICE: Locked Bag 2222, Chatswood Delivery Centre NSW 2067
CUSTOMER RELATIONS: 1800 772 772
GENERAL ENQUIRIES: (02) 9422 2222
ISSN: 2981-9334