JUS SANGUINIS:

THE ROOT OF CONTENTION IN DETERMINING WHAT IS AN AUSTRALIAN ABORIGINAL BUSINESS

by Dennis Foley

INTRODUCTION

Jus sanguinis, the right of blood is a principle of nationality law, whereby a person's citizenship is determined by having one or both parents who are citizens of a given nation, which has echoes in Justice Brennan's determination in the 1992 *Mabo (No.2)* judgement that acknowledges "membership of the indigenous people depends on biological descent".[1] Yet the Australian business community determines what is an Aboriginal business based on contested percentages of Aboriginal ownership.

Aboriginal people use the word 'business' in a distinct way. Funeral and mourning practices are commonly known as 'Sorry Business', financial matters are referred to as 'Money Business', and the secret-sacred rituals distinct to each gender are known as 'Women's' or 'Men's Business'.[2] This paper, however, is analysing another important form of Australian Aboriginal business, it is addressing enterprises that produce goods and services that are for sale in the modern market economy; the enterprises that contribute to fostering social cohesion and recognition of Aboriginal people.[3]

Creating more Aboriginal businesses is crucial for fostering independence for formerly colonised and suppressed Aboriginal people from government welfare and largely non-Indigenous workplaces.[4] Self-employed Aboriginal people with entrepreneurial proclivities are becoming an increasingly important component of Aboriginal economic activity, with the numbers of self-employment increasing from 4 600 to 12 500 in the two decades to 2011. Research by Foley has demonstrated that a link exists between self-employment and entrepreneurial activity: by becoming self-employed, Aboriginal people explore new boundaries in self-determination and become entrepreneurial if not continuously, for at least some period of their business life.[5]

During recent years Aboriginal people have developed the Indigenous Chambers of Commerce across Australia. On behalf of their members they have acted independently to Government in capacity building roles and as an advocate for Aboriginal business: pursuing opportunities and forging strategic alliances and networks. Mandurah Hunter Indigenous Business Chamber was the first to be established as a grassroots driven organisation in provincial NSW in 2006.[6] This movement has resulted in an increase in the development and self-identification of Aboriginal enterprises during the last decade. Opportunities afforded by the mining boom have simultaneously given rise to increased demand for Aboriginal contractors to provide services to mining communities.[7] Despite these trends however, Aboriginal businesses remain statistically more prevalent in urban areas corresponding with Indigenous population concentrations.[8]

Policy makers and many Australians more widely recognise the importance of Aboriginal business in enhancing social and economic outcomes for Aboriginal peoples, but it remains surprisingly difficult to adequately define an Aboriginal business because Aboriginal identity is no longer eternally fixed in the past—it has undergone constant transformation and has been subject to the continuous play of colonial history and power.[9] This paper firstly explains some of the ways in which the majority percentage argument can obscure and even render invisible the identity of an Aboriginal business, and secondly introduces a new more robust, defendable and more useable definition of an Aboriginal business for the purposes of operationalising effective policy and facilitating business prosperity.

CURRENT DEFINITIONS

There is a trend at present, a push to define an Aboriginal business as one with ownership at 51 per cent or more.[10] This simplistic definition has most likely been coined to exclude non-Aboriginal enterprises from fraudulently claiming an Aboriginal identity for commercial gain. There are many examples in Australia particularly within the tourism industry where non-Aboriginal owned businesses have falsely marketed a product as being "authentically Aboriginal", where Aboriginal involvement is tokenistic.[11] Forgery within the Indigenous art

industry has similarly become a major problem that negatively affects the profitability of bona-fide Aboriginal businesses.[12] In one recent case, a company displayed art for sale on its internet site, a number of artworks including paintings, boomerangs, didgeridoos and other items that it alleged were painted by an Australian Aboriginal artist. The Australian Competition and Consumer Commission ('ACCC') subsequently prosecuted the company for importing wooden ornaments from Indonesia and employing a non-Aboriginal graphic artist to paint them in ochre, earth and opal cross-hatching.[13] Other instances of misrepresentation involving Indigenous art include two art galleries, located in Kuranda and Cairns, which offered for sale so-called "genuine" Aboriginal artworks that were painted by three non-Aboriginal artists.[14] In another well-publicised case, a non-Aboriginal woman from Toorak, in Melbourne was found guilty of forging four paintings under the name of a renowned Indigenous artist who had lived in the Kimberley region of Western Australia prior to her death in 1998. The accused and her husband were initially sentenced to three years imprisonment.[15]

THE ARGUMENT

Intuitively, a business can only be characterised as Aboriginal if Aboriginal people are said to have ownership. However this can be complicated by numerous social and operational factors. For example, a Small to Medium Enterprise ('SME') may have three investors: two non-participatory investors at 25 per cent each and the Aboriginal owner operator at 50 per cent. Even though this Aboriginal owner-operator has a single majority shareholding, this business under the majority percentage argument would not be defined as Aboriginal, for to be an Aboriginal enterprise it must have 51per cent ownership.[16]

Mason Durie challenged the definition of what constitutes a Māori business in Aotearoa (New Zealand).[17] Durie argued that it is important to 'reconsider how commercial opportunities might contribute to Māori values and aspirations and provide synergies between Māori'.[18] Māori business ownership is determined by the degree of control, ownership, power and management within the firm's structure, vision, culture, assets, employment, financing and product.[19] This holistic approach is more visionary and enabling, rather than to reduce to a random percentage ownership.

Ngarda Civil & Mining Pty Ltd ('Ngarda P/L') is a mining contractor with an annual turnover of over $150 million and around 350 employees, of whom over half are Aboriginal. Ngarda P/L claims that it is the largest Aboriginal owned and operated contracting company in Australia. According to the company profile displayed on their internet site,[20] Ngarda P/L is jointly owned by Leighton Contractors (50 per cent), Ngarda Ngarli Yarndu Foundation ('Foundation') (25 per cent) and Indigenous Business Australia ('IBA') (25 per cent). Collectively the Foundation and IBA own half of the company, but Ngarda P/L would not be classified under the majority percentage framework as an Aboriginal business despite Aboriginal people making substantial contributions throughout the organisation.

The Pilbara Aboriginal Contractors Association ('PACA') developed an alternative definition of what constitutes an Aboriginal business. After deliberation with its members, PACA decided to base membership eligibility and recognition as an Aboriginal business in the Pilbara region of Western Australia to as low as 25 per cent Aboriginal ownership, on the conditional basis of a firm commitment to pursue all avenues of employment and training opportunities for local customary owners.[21] PACA defend this reduction in proprietary threshold on the basis that in the world of commerce, ownership of as little as five per cent of the issued shares in a company can secure a seat on the board, and 20 per cent of the issued shares of a public company can trigger the takeover provisions of the *Corporations Act 2001* (Cth).

The Australian Taxation Office ('ATO') policy document defines an Aboriginal small business as being 'at least one-half [is] Indigenous owned and managed'.[22] Taken literally, this definition includes a partnership based on mixed marriage and/or joint ventures where Aboriginal people own half of the company.

The Australian Bureau of Statistics ('ABS') currently defines the standard business as:

> A legal entity engaging in productive activity and/or other forms of economic activity in the market sector. Such entities accumulate assets on their own account and/or hold assets on behalf of others, and may incur liabilities. Excluded are the economic activities of individuals (except where individuals engage in productive activity either as sole traders or in partnerships) and entities mainly engaged in hobby activities.[23]

After lengthy consultation with stakeholders, the ABS settled on two operational definitions of an Indigenous business:

1. An *Aboriginal and Torres Strait Islander-owned business* has at least one owner who identifies as being of Aboriginal and Torres Strait Islander origin; and
2. An *Aboriginal and Torres Strait Islander-owned and controlled*

business is one that is majority owned by Aboriginal and Torres Strait Islander persons.[24]

The second definition specifies majority ownership as a proxy for controlling interest in the business (i.e Aboriginal equity is greater than 50 per cent). Note that the ABS deliberately limits the scope for both of these definitions to privately owned SMEs (i.e. organisations with less than 200 employees). Its rationale is that as businesses get larger and their ownership structures become more complex, assessing ownership becomes increasingly difficult. As an example, the evaluation whether a wholly-owned subsidiary of a publicly-listed company with majority Aboriginal and Torres Strait Islander management is or is not an Aboriginal business becomes a complex task.

The Indigenous Business Council of Australia ('IBCA'), the leading Indigenous business association in Australia responsible for representing the views of Indigenous business owners across mainland Australia, supports the ABS definition of majority-controlled Aboriginal business.[25] The IBCA also goes further, as it endorses a '*majority owned, controlled and managed*' definition that it claims is used by the United States and Canadian governments as well as peak Indigenous business organisations in these countries.[26] The criteria of majority Indigenous management is more stringent than applied by the ABS and is contestable in that the justification of using these international definitions may be too restrictive when you consider the distinct social and economic histories of Aboriginal Australians in comparison with other first nations peoples.

At first glance the ABS and IBCA majority-controlled definitions appear to be consistent with that used by Supply Nation (formerly the Australian Indigenous Minority Supplier Council, 'AIMSC'). Supply Nation was established to foster a prosperous, vibrant and sustainable Aboriginal enterprise sector by integrating Indigenous SMEs into the supply chains of Australian companies and Government agencies. Supply Nation defines an Aboriginal business as 'at least 51 per cent owned by Indigenous Australians and the principal executive officer [as] an Indigenous Australian and the key decisions in the business are made by Indigenous Australians'.[27] Interestingly, when Supply Nation was first established they supported a 50 per cent ownership and management definition.

These definitions are easy to defend in that one would expect these circumstances to be associated with a considerable measure of Indigenous control. However, the definition is also contestable in that it can exclude many businesses that may otherwise be classified as Aboriginal by the IBA and ATO. More importantly, the condition that principal executive officer and key decision makers are Aboriginal means that the Supply Nation definition is now more restrictive than the current ABS majority-controlled definition.

While the notion of majority control excludes enterprises with minority Indigenous ownership and partnerships between a married couple where only one partner identifies as an Aboriginal and Torres Strait Islander person (sometimes called mixed marriages), such businesses are picked up in the first ABS definition that does not specify the percentage equity. The majority ownership criteria is arguably too restrictive as it excludes numerous Aboriginal businesses that involve mixed marriages even if the owner's children identify as Aboriginal and/or the partner supports Indigenous issues.[28] In partnerships based on mixed marriage, the non-Aboriginal person is likely to be responsible for Aboriginal children and hence more than 50 per cent of income streams allocated from profits and equity growth will be available for Aboriginal recipients.

Importantly Ngarda P/L, the Pilbara, and many other businesses would not be classified as an Aboriginal business under the Supply Nation and ICBA definitions, despite substantial Aboriginal participation throughout the organisation.

Clearly the majority-controlled definition is not consistent with the practices of IBA, Australia's foremost lender and promoter of Aboriginal enterprises. IBA assists eligible Aboriginal Australians to establish, acquire and grow small to medium businesses by providing business support services and business finance. Their eligibility criteria for support and or funding is at least 50 per cent of the ownership of the business must be by a person(s) of Aboriginal and/or Torres Strait Islander descent.

The relaxation of the ATO definition would substantially increase the number of Aboriginal business. Some other definitions, however, would extend the coverage further. The ABS also canvassed alternative definitions of an Aboriginal business, based on criteria: 1. Industry; 2. Number of Indigenous Employees; 3. Geography; 4. Types of production; 5. Funding-source; and 6. Benefits received by Indigenous-communities.[29] The IBCA argues that these 'alternative definitions' will destroy the integrity and purity of the 'majority owned and operated' definition, and lead to a watered down and misguided version of an Aboriginal business, that is 50 per cent or less.[30] While the number of Aboriginal employees and benefits to

Aboriginal communities could add weight to claims for an individual business to be categorised as 'Aboriginal', such criteria are not necessarily defined characteristics of an Aboriginal Indigenous business.

WHERE ARE ALL THE INDIGENOUS BUSINESSES?

Supply Nation currently certifies only 198 Indigenous businesses (at the time of writing). This is a fraction of the Aboriginal entrepreneurs identified in recent census data.[31] Once the census counts are adjusted to take into account the propensity to undercount Indigenous people, Hunter estimates that there are around 5 500 Indigenous people who employ workers in their business.[32] There are another 7 000 people who only employ themselves and there are 12 500 people who could have potentially been classified as running Aboriginal businesses in 2011 who meet the 50 per cent or less definition of an Aboriginal business.[33] Supply Nation arguably only covers a fraction of potential Aboriginal businesses (less than 2 per cent).

DEFINITION OF AN INDIGENOUS BUSINESS

Many major Australian businesses have Reconciliation Action Plans ('RAPs'), and some of these include commitments to enhance their use of Aboriginal contractors (e.g., Rio Tinto, Woodside and Qantas). Many businesses, including those with relevant provisions in their RAPs, use Supply Nation to source Aboriginal contractors. The matter of definition is thus highly significant. It matters to legitimate Aboriginal businesses that may miss out on profitable opportunities. Another reason why the operational definition of Indigenous business matters is because government policy on Aboriginal business development may be inappropriately targeted. The majority-ownership definition of Supply Nation and others (i.e equity over 50 per cent) excludes some large companies like Ngarda P/L or where equity is exactly 50 per cent. Furthermore, the strict ownership definition excludes an even larger number of small Aboriginal businesses involving mixed marriages or partnerships where one contributor is non-Aboriginal. As Foley argues, [34] business partnerships involving mixed descent couples are an important means for Aboriginal businesses to overcome the financial, social and human capital constraints that face potential Aboriginal entrepreneurs. If the aim of public policy is to sustainably develop nascent Aboriginal businesses, then a strong case can be made to use a definition that has some latitude and can even recognise some businesses that have 50 per cent or less Aboriginal equity.

Historical debates about Aboriginal identity in mainstream society can be highly objectionable to Aboriginal people and their non-Aboriginal supporters when the language of scientific racism is mobilised. Terminology such as "half caste" and "full blood" is used to distinguish between racial purity and impurity based on blood quantum. Attempts to rely on objective criteria to determine what is and is not an Aboriginal business is arguably reminiscent of historical debates, and it is time to consider a more flexible definition that allows the Aboriginal business community to play a role in determining who is a member of their own community.

The legal definition of an Aboriginal Australian accepted under 'common law' follows a three-part definition that has been accepted and upheld by the High Court in *Commonwealth v Tasmania* (1983) 158 CLR 1. An Aboriginal or Torres Strait Islander person is a person:

1. Who is of Aboriginal and Torres Strait Islander descent;
2. Identifies as an Aboriginal or Torres Strait Islander person; and
3. Is accepted as such by the community in which they live. [35]

As Aboriginal people can now accordingly choose to identify as Aboriginal if they are accepted by the local Aboriginal community the author proposes that an Aboriginal business similarity be identified as one where:

1. *at least one person holding equity in the company identifies as* Aboriginal;
2. *the business identifies itself as an Aboriginal owned business*; and
3. *is accepted by the Aboriginal business community as an* Aboriginal *business*.

This definition relies on a clear definition of Aboriginal business community and it is proposed that this be taken to include IBCA and Indigenous Chambers of Commerce operating within different states and territories. One could also add criteria of a controlling Aboriginal interest or a business is managed and operated by Aboriginal people. However these criteria are probably too restrictive and hence will not address the concern that policy may become excessively focussed on too few businesses.

CONCLUSION

Historical debates over Aboriginal identity have tended to disadvantage the majority of Aboriginal people. This paper has sought to raise awareness of some of the complexities and alternatives to the majority percentile argument. It makes a case for the placement of trust and due-diligence on the Aboriginal business community. The crucial criterion is that the business must be accepted by the IBCA or similar body. Of course, the IBCA wants to

maximises its membership, but the integrity of the claims about the Aboriginality of its constituents are crucial to their legitimacy as an organisation and hence we can be reasonably confident that they will not knowingly make false claims about the Aboriginality of any business. In this way, policy can develop more Aboriginal businesses and hence further enhance Aboriginal economic development, prosperity, independence and contribution to Australian society.

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