

Joint Standing Committee on Aboriginal and Torres Strait Islander Affairs

Inquiry into the Application of the *United Nations Declaration on the Rights of Indigenous Peoples*

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Background

Acknowledgment of Country

Terri Janke and Company acknowledge the Aboriginal and Torres Strait Islander peoples of the land on which we live and work, and all Aboriginal and Torres Strait Islander peoples in Australia. We extend our respect to Aboriginal and Torres Strait Islander Elders – past, present and emerging.

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Background

Terri Janke and Company have been asked to provide further information and address additional queries posed by the Joint Standing Committee on Aboriginal and Torres Strait Islander Affairs (the **Committee**) as part of the Committee's inquiry into the application of the *United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP)* in Australia.

This request follows on from the appearance of Terri Janke and Company solicitors, Neane Carter and Adam Broughton, at the Committee's public hearing on Thursday 8 June 2023.

Our responses to the request for additional information and accompanying queries of the Committee are detailed below.

Terri Janke and Company's True Tracks® Principles

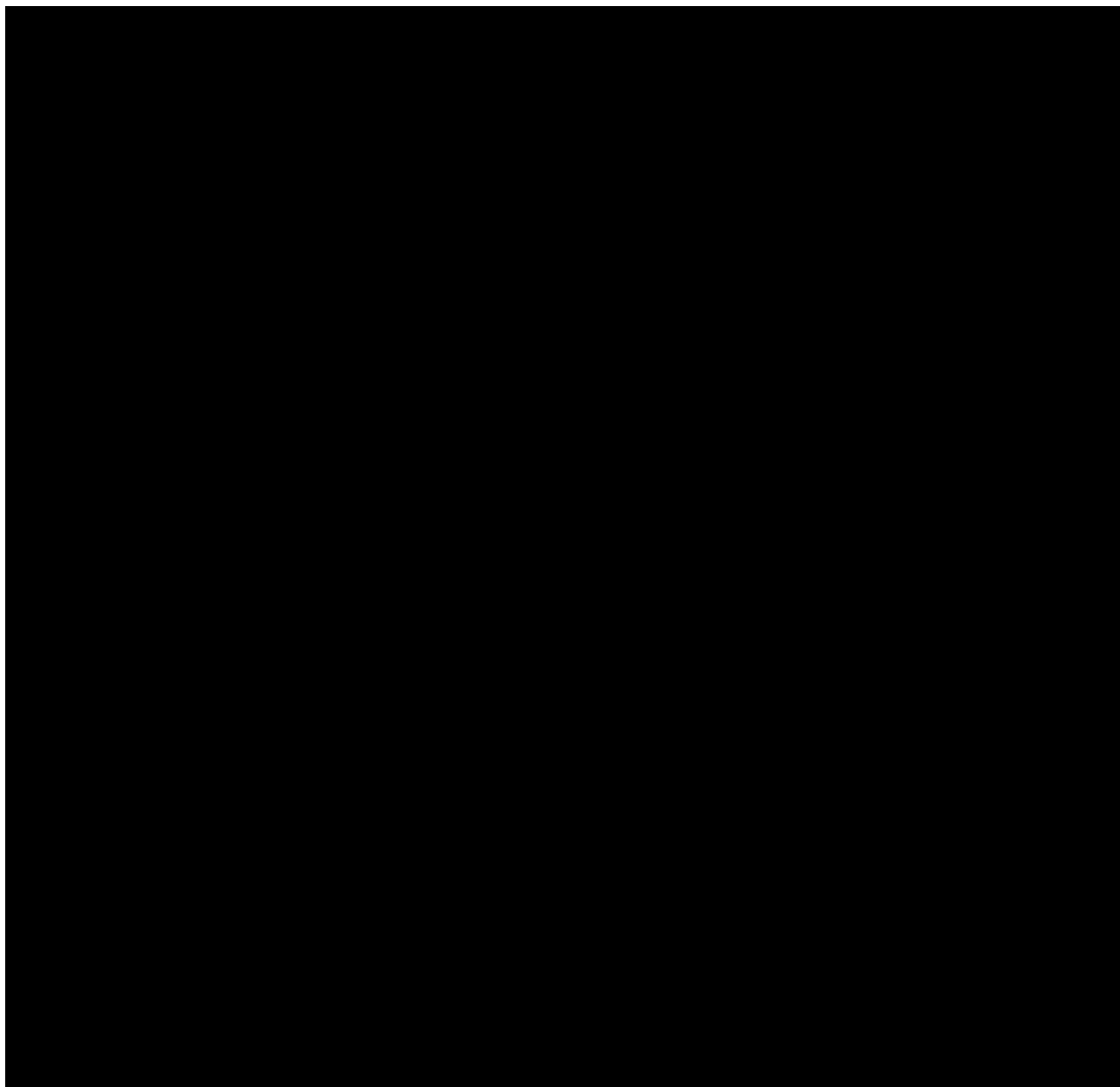
Terri Janke and Company (**TJC**) is a 100% Indigenous owned, managed and controlled law firm established in 2000 by Dr. Terri Janke. TJC is a commercial law firm that specialises in intellectual property (**IP**) and Indigenous Cultural and Intellectual Property (**ICIP**), advising a diverse range of Indigenous and non-Indigenous clients on legal and consulting matters.

TJC is a leading global authority on ICIP, being Indigenous people's rights to their cultural heritage, traditional knowledge and traditional cultural expression, as those terms are now understood in accordance with UNDRIP. This includes objects, sites of significance, languages, songlines, stories, ecological knowledge and documentation of heritage.

TJC's work in this space centres on upholding and advancing the ICIP rights of Indigenous peoples as outlined in the [Our Culture: Our Future](#) report prepared by Dr. Janke in 1998, commissioned by the Aboriginal and Torres Strait Islander Commission and the Australian Institute of Aboriginal and Torres Strait Islander Studies. This report canvassed the concept of ICIP, containing findings and recommendations arising from extensive consultation with Indigenous reference groups, stakeholders and interested parties. Of note, the report identified a comprehensive list of ICIP rights that Indigenous peoples want recognised and protected, largely aligned to the rights set out under UNDRIP.

Terri Janke and Company has since developed its True Tracks® framework based on the findings of the *Our Culture: Our Future* report, to guide appropriate engagement with Indigenous peoples and their ICIP. The True Tracks® framework is comprised of 10 principles which provide a practical pathway for respectful, ethical and appropriate engagement with Indigenous peoples and their culture in line with best practice.

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The True Tracks® principles are often used to form the foundation for development of best practice ICIP protocols, tailored for particular industries, institutions, Indigenous representative bodies, government agencies, organisations and businesses. TJC strongly advocates for the adoption and use of project, organisation and industry-specific ICIP protocols as a means of protecting ICIP and upholding the rights of Indigenous peoples.

The use of best practice protocols is key given the absence of *sui generis* legislation and enforceable obligations in Australia that adequately protect ICIP. In the absence of such legislation, TJC utilise protocols as a means of navigating the lack of clarity and guidance on best-practice engagement, recognition and protection, going above the existing law and seeking to enforce the protocols through the use of contracts. The interplay between the guidance of protocols and enforceability of contracts is a key mechanism that TJC employs to assist our clients.

In 2021, Dr. Janke published the *True Tracks®* book. The book considers in detail the challenges Indigenous peoples face in the protection of their ICIP and Indigenous Ecological

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Knowledge, and the achievement of Caring for Country, Indigenous Data Sovereignty and self-determination. In exploring these issues, *True Tracks*® provides practical guidance and application of the 10 principles as part of a pathway for recognising and upholding Indigenous rights, with particular alignment to Articles 3, 19 and 31 of UNDRIP. This book has served a particularly positive purpose in raising awareness for the key issues faced by Indigenous peoples and communicating the True Tracks® principles to a wider audience.

Committee Queries

1. Do you think we could ever expect the government to take sufficient steps to fully implement UNDRIP if it is not enacted?

TJC believes that it would be difficult to fully implement UNDRIP without it being enacted.

There are examples of current ad hoc steps taken to implement UNDRIP, including:

- Amendments to the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) in line with the independent statutory review conducted in 2019;
- Reforms to the *Biodiscovery Act 2004* (QLD) completed in 2021 which incorporates Access and Benefit Sharing, recognition of connections to Country and Traditional Knowledge, support of cultural rights and self-determination; and
- Recognition and protection of intangible cultural heritage in the *Aboriginal Heritage Act 2006* (Vic).

These examples provide isolated protections for certain aspects of cultural heritage and cultural rights. However, it is difficult for ad hoc implementation to appropriately reflect the interconnected nature of many of the rights Indigenous peoples are calling for, including those under UNDRIP such as self-determination and free, prior and informed consent.

Implementation of UNDRIP requires a concerted approach tailored to enforce, provide clarity on, and accommodate for, its complex principles. *Sui generis* legislation adopted by the Australian government will undoubtedly assist in reducing the inconsistencies of ad hoc implementation at state and national levels and provide surety for Indigenous peoples when protecting and exercising their sovereign rights.

2. What kind of enforceable mechanisms do you think should be established, and how should they operate?

We believe that holistic and enforceable mechanisms should be established to actively ensure the recognition and upholding of the rights of Indigenous peoples under UNDRIP.

This can be through standalone *sui generis* legislation that provides a mechanism for protecting against misuse of ICIP. Industry-wide protocols or codes of conduct can also be employed to support the implementation of legislative requirements by guiding and enabling best practice, which can be reinforced in contracts that incorporate obligations in relation to ICIP, self determination and free, prior and informed consent.

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Regardless of the form of any potential mechanism, they must:

- be Indigenous-led in design and development;
- signify a shift away from relying upon the goodwill of organisations and agencies in supporting the rights contained within UNDRIP to enforcement;
- provide clarity and guidance on the rights of Indigenous peoples, including the key principles of self-determination and free, prior and informed consent;
- identify that individuals and communities hold ICIP rights and what those rights are;
- provide clear obligations on parties to recognise, protect and uphold the rights of Indigenous peoples in all engagements with Indigenous communities and ICIP;
- not place undue burdens on Indigenous communities to uphold their rights;
- serve an educative role to advocate and raise awareness of the rights of Indigenous peoples.

However, as previously identified at the public hearing, we are not best placed to determine the granular details of such mechanisms, including their operation or the content of any such mechanism, without wider Indigenous leadership and consultation.

3. What sorts of accountability mechanisms do you think need to be in place for governments and other bodies who breach UNDRIP?

Avenues of redress for misuse and misappropriation of Indigenous people's culture are limited, and in Australia appropriate engagement with Indigenous peoples and their cultural heritage is predominantly left to the goodwill of the individuals, groups or organisations engaging with them. Our written submissions identify that if Australia continues to endorse, instead of formally implement UNDRIP, there remains no legal means to keep government, corporations and the wider public accountable. Deliberate and comprehensive action must be taken to deliver tangible legal rights to Indigenous peoples in line with sovereign rights entrenched in UNDRIP.

We acknowledge the role of the Law Council of Australia, and their position and experience in the realm of law reform and the administration of justice. As such, we support the Law Council of Australia's submissions identifying potential mechanisms, such as additional duties for government and other bodies, right of actions, remedies and timelines for review.

4. You have extensive expertise on Indigenous Cultural and Intellectual Property (ICIP). What are the current challenges to legally protecting ICIP and how would implementing UNDRIP improve this?

Some of the identified challenges experienced by our Indigenous clients include:

- the lack of awareness of ICIP rights and the communally held importance of culture and heritage;
- the lack of recognition or respect of ICIP rights;
- the lack of mandatory, enforceable obligations surrounding ICIP and ICIP rights;
- the lack of general knowledge, education and understanding of UNDRIP;
- differing interpretations on UNDRIP and ICIP rights – What constitutes self-determination? How should consultation occur? Who should be consulted? What is free, prior and informed consent? etc.;
- that best practice protocols for engagement with Indigenous peoples and their ICIP are not legally binding on their own;
- inconsistent and informal implementation of UNDRIP and ICIP protections;
- that protection of ICIP is left to those who proactively recognise its significance.

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Implementation of UNDRIP at a national level will not only provide guidance and surety for community but also for the general public through:

- recognition and respect for Indigenous people's rights and ICIP;
- foundational principles (a benchmark if you will) for engaging with Indigenous peoples and their ICIP;
- upholding the importance of ICIP and ICIP rights for Indigenous peoples;
- interpretation of ICIP rights from the perspective of Indigenous peoples;
- providing mandatory and enforceable obligations.

5. How do you think the principle of FPIC, which is central to UNDRIP, could be implemented in practice?

Free, prior and informed consent (**FPIC**) is an essential element of self-determination in practice. In our attendance at the public hearing, it was stated that FPIC cannot be severed from self-determination.¹ Without any mandatory legal obligation to implement and enforce FPIC, the decision-making, participation and self-determination of Indigenous peoples is severely inhibited.

FPIC is multi-layered both in its procedural and substantive aspects and may look different in practice depending on the nature and scale of the activity, project or action that requires consent, and the community/stakeholders from which consent is sought. In over 23 years of practice, TJC has continuously navigated the sensitivities associated with, and ambiguity and inconsistent interpretations of, FPIC from Indigenous and non-Indigenous perspectives in community, government, industry, arts and entertainment, research, environment, health, education, collecting institutions and business.

Despite Federal Government inquiries following the destruction of the Juukan Gorge,² and proposed regulatory reforms to the Biodiversity Act,³ FPIC remains uncodified in Australian law. FPIC has not been adequately or clearly incorporated into legislation other than through piecemeal adoption.

In seeking FPIC in practice, TJC works with clients to:

- consider whether the context of the activity, project or action is appropriate and what Indigenous peoples want;
- ensure Indigenous leadership and co-design at all levels;
- develop strategies for engagement with community and ICIP rights holders;
- identify the right community members and ICIP rights holders who have the authority to speak for culture and provide FPIC, and cast the net widely;
- engage in broad and meaningful consultation with community and ICIP rights holders, ensuring transparency and appropriate time is allocated for informed decisions to be made;
- seek free, prior and informed consent or otherwise wide-reaching support where FPIC cannot be achieved;
- ensure FPIC is recorded in writing, where possible, or otherwise recorded in an appropriate form;

¹ Hansard Transcript page 3.

² See <https://www.dcceew.gov.au/sites/default/files/documents/australian-response-to-destruction-of-juukan-gorge.pdf>.

³ *Environment Protection and Biodiversity Conservation Act 1999* (Cth). See also <https://www.dcceew.gov.au/environment/epbc/publications/proposed-timeline-for-epbc-act-reforms>.

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- recognise that FPIC is ongoing and consent must be sought for any alternative use.

6. How do you consider the introduction of an Australian Human Rights Bill would assist in advancing the rights sought to be protected under UNDRIP and what is the best alternative?

As discussed during our attendance at the public hearing, TJC is not best placed to advise on whether an Australian Human Rights Bill would assist in advancing UNDRIP rights and principles.⁴

Generally, we support the Law Council of Australia's submission that recommends the introduction of a Federal Australian Human Rights Bill that includes UNDRIP rights and principles.⁵ TJC also notes the Law Council of Australia's assertion that further consideration and consultation with Indigenous peoples must proceed the drafting of a bill.⁶

Additionally, TJC supports *sui generis* legislation as an alternative to a Human Rights Bill.⁷ UNDRIP sufficiently affirms existing international human rights and how they apply to Indigenous people, articulating Indigenous people's collective rights. Standalone UNDRIP legislation will greatly improve the surety for Indigenous people and their human rights.

7. How do you think the implementation of UNDRIP might help to address the climate crisis, either in litigation cases, policy development or otherwise?

While acknowledging that TJC does not specialise in climate change law, and therefore we are not best placed to talk on the climate crisis, it is clear that climate change has particularly significant impacts on the livelihood, culture and overall health and wellbeing of Indigenous peoples. This is a result of the strong, lasting connections that Indigenous communities have with their Country.

TJC supports our clients through the implementation of UNDRIP when addressing the climate crisis through:

- the development of seasonal calendars;
- promoting Indigenous self-determination in traditional land management practices and caring for Country;
- advocating for FPIC in relation to the collection, access and use of ecological resources and biodiversity from Country;
- advising on reports and policies relating to environmental issues and Country,

- protection of ICIP and Indigenous ecological knowledge in relation to land management and biodiscovery research; and
- facilitating ICIP recognition and awareness around traditional land management practices (including cultural burning) in the research, pastoral, carbon farming, native foods and agricultural sectors.

⁴ Hansard transcript p5.

⁵ [46] – [56].

⁶ [50] – [51].

⁷ Hansard transcript p5.