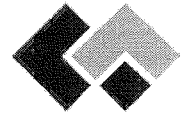


Submission No. 53
Date Received



Law Council
OF AUSTRALIA

*From the Office of
the President*

W. ROSS RAY QC

president@lawcouncil.asn.au

RECEIVED
11 AUG 2008

BY: A.D.I.A.

Mr Richard Marles MP
Chairman
Standing Committee on Aboriginal and Torres Strait Islander Affairs
House of Representatives
Parliament House
CANBERRA ACT 2600

Dear Mr Marles,

INQUIRY INTO DEVELOPING INDIGENOUS ENTERPRISES

The Law Council of Australia is pleased to provide a short submission to this important House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs' Inquiry into Developing Indigenous Enterprises.

The Law Council of Australia is the peak body representing the Australian legal profession. The Law Council represents over 50,000 Australian lawyers through the Law Societies and Bar Associations of the Australian States and Territories.

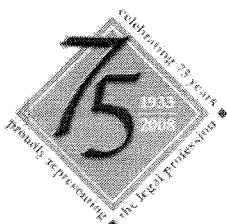
This submission is necessarily brief and is directed at the first item listed in the Inquiry's terms of reference, "whether current government, industry and community programs offering specific enterprise support programs and services to Indigenous enterprises are effective, particularly in building sustainable relationships with the broader business sector".

Access to commercial legal assistance

The Law Council considers that access to commercial legal advice and assistance is a key concern for Aboriginal and Torres Strait Islander people, organisations and entities seeking to establish a new enterprise.

Commercial legal assistance is practically essential for new entrepreneurs, who face significant risks and challenges when entering into business ventures. However such assistance is rarely available or affordable for low income business enterprises requiring guidance and legal advice on issues arising from their business, such as debt recovery or interpreting a lease or other business contract, or concerning start-up issues such as:

- determining the best business structure;



GPO Box 1989, Canberra
ACT 2601, DX 5719 Canberra
19 Torrens St Braddon ACT 2612

Telephone +61 2 6246 3788
Facsimile +61 2 6248 0639

Law Council of Australia Limited
ABN 85 005 260 622
www.lawcouncil.asn.au

- determining whether they will require a licence or permit and helping them to obtain an appropriate one;
- advice on legal tax matters such as understanding GST and other taxes;
- assistance to determine ways to raise capital;
- interpreting purchase and sale contracts;
- negotiating favourable leases; and
- reviewing the loan documents that a micro lender may require them to sign.

'Gap' in Legal Aid and Pro Bono Assistance

There is presently a significant gap in the forms of legal assistance available to Aboriginal and Torres Strait Islander people through legal aid or pro bono schemes.

Presently, the Federal and States/Territories' governments provide funding to the Legal Aid Commissions, Aboriginal and Torres Strait Islander Legal Services/Agencies and Community Legal Centres. Legal services provided by those non-profit agencies do not extend to commercial legal assistance and are generally devoted toward criminal defence, family law advice, tenancies, debt, discrimination, child welfare and other matters falling within the prescribed guidelines or policies of those agencies.

The Law Council is also unaware of any coordinated national or state/territory pro bono legal assistance scheme or network directed at arranging or facilitating commercial legal assistance on a referral basis. However, the Law Council considers that there is great scope for the creation of such a scheme to assist Indigenous entrepreneurs.

Existing pro bono programs

Australian lawyers and law practices have traditionally contributed pro bono legal assistance very generously, offering thousands of hours each year in legal assistance to those who would otherwise be unable to obtain access to justice. There are excellent examples of pro bono assistance projects, or programs managed by Australian law firms, which have greatly assisted Indigenous communities or enterprises. These include:

- The Aurora Project – A private initiative to assist Indigenous communities or individuals with native title claims or questions concerning the establishment of Native Title Representative Bodies (NTRBs). The Project was established with funding from both private and public sources and aims to build the capacity of Indigenous bodies in native title negotiations through education, training, legal assistance and other support.
- The Public Interest Law Clearing House (PILCH) – A non-profit independent body which facilitates access to pro bono legal assistance, though generally not the provision of commercial law assistance to entrepreneurs. There are PILCHs established in Victoria and NSW, with broadly the same objectives. Law practices and lawyers may choose to become members of PILCH. Individual clients, who raise issues of public interest that require legal resolution, who satisfy legal merits and means tests and who are ineligible for legal aid, qualify for referral to a PILCH member. The member then acts for the client on a pro bono basis.

- Indigenous Enterprise Partnerships (IEP) – A private initiative established in the Cape York region in 2001 and, more recently, in the Goulburn/Murray region of Victoria. IEP is a capacity and leadership building project which, among its other objectives, aims to assist communities and community organisations to establish viable businesses and skills through training. IEP is assisted by a number of philanthropic and corporate entities, including financial institutions offering low interest loans, legal advisers, accountants and business consultants. Gilbert + Tobin Lawyers has been active in IEP programs in the Cape York region for a number of years.
- Legal pro bono programs managed by individual firms –
 - Gilbert + Tobin manages a considerable pro bono program with significant assistance offered to *Aboriginal and Torres Strait Islander communities and businesses or organisations*. Gilbert + Tobin provides pro bono assistance through the Aurora Project and IEPs, and to Indigenous individuals and organisations which approach Gilbert + Tobin due to its relationships and reputation among certain Indigenous communities, established over a number of years.
 - Allens Arthur Robinson (AAR) provides substantial pro bono assistance to Indigenous organisations, although it is generally not directed toward commercial entities, Indigenous or otherwise. Much of AAR's pro bono work is directed at disadvantaged individuals, through established clinics and legal centres and within its policy that includes advancing the cause of reconciliation. AAR also assists the Aurora Project and shares its expertise in native title and intellectual property (primarily for Indigenous artists, through Indigenous Cultural and Art Centres). AAR has also established relationships with particular communities and has a long standing relationship with National Indigenous Television.
 - Arnold Bloch Leibler (ABL) enjoys a strong reputation in providing pro bono assistance, arising from its strong association with some communities, most notably the Yorta Yorta community in Victoria. Much of ABL's pro bono work is done for non-profit entities, though discrete advice is provided in relation to commercial ventures from time to time. Due to its reputation in the provision of assistance to Indigenous communities, and corresponding demand, ABL also facilitates introductions between Indigenous clients and other firms, or commercial clients who may be interested in providing other forms of assistance (such as accounting, business modelling, governance, training, etc).
 - Blake Dawson (BD) directs around 30 per cent of its annual pro bono budget toward assisting Indigenous organisations and communities. A significant proportion of this work is carried out through IEP and the Aurora Project. BD has assisted Indigenous organisations with advice over tax and governance issues, intellectual property matters and training. The majority of BD's pro bono work relates to non-profit entities, though a few cases have involved direct assistance to Indigenous enterprises establishing themselves.
 - Clayton Utz (CU) spent over 6000 billable hours on pro bono legal assistance for Indigenous clients between 2004 and 2008. Much of this has included commercial legal assistance, including corporate and employment law advice, intellectual property advice for Indigenous artists, advice to NTRBs, assisting trust fund beneficiaries and many other forms of assistance.

There are numerous other examples of law firms offering pro bono legal assistance to Indigenous communities, which are not mentioned in this submission due to time constraints and the fact that the information is generally not published or accessible from sources other than the individual firms. It must also be noted that the above does not refer to the extensive contribution of Australian lawyers in terms of more traditional forms of pro bono assistance, in relation to criminal law advice, family law, discrimination, human rights, child welfare, etc. However, the Law Council considers that the examples above demonstrate a strong will and desire within the Australian legal profession to make commercial legal assistance available to Aboriginal and Torres Strait Islander people under existing pro bono programs. Anecdotally, the Law Council notes that firms which currently provide pro bono assistance to Indigenous communities and organisations report great satisfaction with their work and the outcomes they have been able to achieve.

The Law Council considers that this generosity and enthusiasm can be better utilised or coordinated toward addressing, at least in part, the unmet needs of new or aspiring Indigenous entrepreneurs.

Review into unmet commercial legal assistance required

The Law Council considers that the Commonwealth should commence a review into existing pro bono referral schemes and the extent of the shortfall in the availability, and capacity of Indigenous entrepreneurs to obtain, commercial legal advice and assistance to establish a new business or enterprise.

Two matters which should be specifically examined under such a review are:

1. the possible development of a pilot pro bono legal assistance program directed at facilitating, or coordinating the provision of, pro bono legal assistance for Indigenous entrepreneurs or business enterprises across Australia; and
2. the provision of Commonwealth funding to either (a) establish dedicated clinics or business centres, staffed by legal professionals, accountants and business planners, or (b) aid the expansion of existing programs.

In particular, the Law Council considers that there may be a role for a Commonwealth funded coordinating body to facilitate the provision/referral of commercial legal assistance for *bona fide* Indigenous entrepreneurs. Such a body could usefully assist in introducing law practices to Indigenous entrepreneurs or organisations where no previous relationship exists. Such a body could also assist in ensuring Indigenous communities have a trusted source through which to apply for advice and are able to apply at the most appropriate point in the development of their business proposal. The existence of such a body may also entice law firms, which do not currently provide such assistance, to join a panel of firms to whom such work could be directed.

As noted above, there exist a number of bodies that may be well placed to carry out such a role.

However, the Law Council notes the following with respect to its inquiries to date:

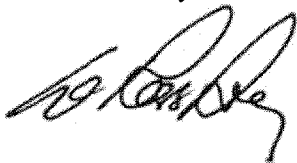
- Presently, firms offering pro bono assistance generally allocate an annual budget toward pro bono and appoint a partner or senior lawyer in charge of managing the scheme on behalf of the firm. The constraints in terms of that allocation would need to be considered if a national scheme were to be developed.

- In addition, the Law Council has been advised by some pro bono assistance coordinators that the most effective and rewarding pro bono assistance has arisen from ongoing relationships between an Indigenous community or organisation and a law firm. A singular ongoing relationship between a firm and community or organisation has the benefit of fostering trust and greater understanding between clients and their legal adviser.
- Any assistance model that may be developed should, in addition to legal expertise, also seek to draw upon assistance from accountants and business advisers, as well as the local expertise of Land Councils, representative bodies and financiers. In this regard, there are existing models that may demonstrate a useful starting point for a federally piloted scheme (including IEPs and Aurora Project).
- Cultural awareness is an issue that may also need to be addressed to assist legal practitioners in understanding the needs of clients living in Aboriginal and Torres Strait Islander communities.
- It should also be noted that government funded legal services dedicated to the provision of such assistance may have a significant advantage over pro bono assistance schemes. Funded services have the capacity to develop and build upon experience advising micro-enterprises, and augment awareness and understanding of Indigenous culture and values. Whilst the 'lions share' of pro bono legal assistance is carried out by large firms, which have the resources to operate extensive programs within corporate social responsibility frameworks, those firms seldom have extensive experience dealing with small or micro-enterprises.

The Law Council would be pleased to assist any inquiry into unmet commercial legal assistance needs of indigenous Australians (and for disadvantaged groups within Australia more generally).

If you have any questions concerning this submission, please contact Nick Parmeter on (02) 6246 3733, or nick.parmeter@lawcouncil.asn.au.

Yours sincerely,



W. Ross Ray QC

11 August 2008