

Cultural Connections Immersion Festival

Acknowledgements

I want to acknowledge the Turrbal and Yuggera People the traditional owners of the land on which I am speaking from today and pay respects to their Elders past, present and emerging.

I also acknowledge the Gurang, Gooreng Gooreng, Tuluwa, Byellee and Taribelang People, the traditional owners where this important festival is being held and also pay respects to your Elders past, present and emerging.

My People are the Ugaram Le and Erubam Le of the eastern Islands of the Torres Strait. As a saltwater man I would have very much enjoyed being personally present in beautiful 1770 to share my thoughts and risk being distracted by the waft of sea air and the caress of ocean breeze. Alas, I am stuck in my home office and participating virtually not because of COVID restrictions but a broken foot and wrist due to a recent mishap with a ladder. I am there in spirit though! So debe idim, nuko ma nali (Good morning and how are you)

Overview

This festival is about celebrating *big cultures* and inspired by that theme I want to share some *big ideas*. Due to time constraints, I intend to skim across the top of those big ideas to highlight the linkages, rather than undertake a deep dive into one or two particular topics. The risk of dealing at a high level is to convey a sense of superficiality and nothing could be further from the truth as I am passionate about all of the things I will traverse. I have to say though that for me the linkages are becoming just as important as some of the individual topics and in understanding the linkages a renewed respect and perspective for the different topics is gained and I hope this comes through. The only exception to this general comment is the paramount importance of culture and everyone here today shares or at least respects that view.

I want to draw out the interrelationship between: Culture, Rights, Governance, Policy, Self-Determination, Partnerships, Treaty and Reconciliation. Did I say I would be dealing with big ideas! I probably should disclose upfront some personal biases. There was a time when I believed that Rights was a foundation, a scaffold and a springboard to solve Indigenous Disadvantage. Both spear and shield and that was all we needed to fight injustice. As they say there is always a simple answer to a complex problem and it is always wrong. Nevertheless, old habits die hard and I still see the world through a rights frame but accept the importance of the other topics. I choose these topics as separate threads to be woven together and I hope something intelligible comes out the other end. I also know I am talking to a very informed audience so I apologise in advance if I give undue weight to some topics, or have erroneously included or omitted things. I also apologise if am stating the bleeding obvious as I have a tendency to do.

Culture

I start with culture, as we must. Any discussion about First Nation cultures must start, be carried and conclude with Country. As a Torres Strait Islander who was born and lived on the mainland, on Aboriginal Country, my Elders reinforced in me that my *Giz*, the deep tap root of the Coconut tree, is in the Torres Strait no matter how far I travel, my *Giz* remains there. Every Aboriginal person or Torres Strait Islander, regardless of age knows that culture is connection to Country, wherever they currently live.

Country is a holistic term for the Land, Sea, Sky and every animal, plant, and object that is on, in and between those spaces. Culture is about the people, the law, the language and ceremony that springs forth from Country and in turn is eternally connected to it.

First Nation cultures are not bound by linear time because Country remembers, lives and sees the past, present and future simultaneously. As People bound to Country we too must respect the past, present and future, simultaneously.

First Nation cultures are communitarian not individualistic, cultures where power is diffuse not hierarchical, where law must be followed and even though punishment is exacted for breach it is never done as retribution rather as an overriding consideration to restore balance.

For these reasons, First Nation cultures are intricate and sophisticated and probably incomprehensible to cultures that do not share similar values. I would like to think that these values are universal because all cultures are nested in place or Country and there is no more powerful word in any language than the word “home” – and home is sacred to all people. First Nations have just had a little longer to work these things out, and in the case of Aboriginal First Nation cultures, 40,000, 50,000, 60,000 years and counting.

First Nation cultures are inherently caring and sharing and festivals like this one are message sticks to welcome other cultures to sit, yarn and share.

In a world currently suffering tumultuous times there are important lessons to be learned from First Nations even if the time for heeding lessons is running short. But we are patient people, ‘Murri time’ and ‘Ailan time’ requires us to be – even still, time is running.

Rights

As First Nation Peoples we know the importance of law and custom more than most. It was the strict adherence to our laws and customs that assured our well-being and prosperity for thousands of years prior to the invasion.

Invasion brought the attempted subjugation of those laws and customs and their purported replacement by an imported common law. Invasion was facilitated by the perverse legal fiction of *terra nullius* and the subsequent acts of decimation, dispossession and discrimination that underwrote the development and prosperity of the original colonies, then states and territories and eventually the federated nation state of Australia.

Legal invisibility has played a significant role in the shameful creation of chronic and ongoing overrepresentation of Aboriginal and Torres Strait Islander Peoples across every possible social and economic indicator area. Plainly, if *legal invisibility* was a significant contributor to our current malaise, then *legal visibility* must be part of the cure but it is can never be a complete solution. Native title alone can never solve Indigenous overrepresentation in the criminal justice system, nor the right to native title compensation deliver us from economic poverty. However, these rights in conjunction with other rights can make major in-roads – we have known this for a long time and everyone has known it since the publication of the reports into the Royal Commission into Aboriginal Deaths into Custody 30 years ago. I would argue that it is the use of rights at different levels (here I mean international, domestic legislation and private rights) in combination with other processes that are needed.

Before I proceed, it is important that we remind ourselves that our culture survived colonial-imposed *legal invisibility* not because of the weakness in the legal fiction of *terra nullius*. After all, it

was very effective for over 200 years to the benefit of those who weaponised it while inflicting great havoc on our people. Rather it could not withstand the strength of our continuing connection to our Country and Culture despite what was thrown at us – our Giz ran deeper than this *fig-leaf* legal fiction.

I wanted to make this very clear to avoid any suggestion that our culture must be propped up by rights to survive. We have proved that wasn't the case. However, it was the rights movement that helped us to shake off the shackle of *terra nullius*. The international civil and political rights movement of the sixties and seventies and corresponding land rights cases of Aboriginal and Torres Strait Leaders proved important, that eventually culminated in the historic Mabo High Court judgment - a short 29 years ago. A case that finally blew the grit of *terra nullius* from Australia's eye that had blinded it to its past for so long. It was the recognition of legal rights based on culture and continuing connection to Country that finally prevailed. It is with sweet irony we are today partaking in a festival celebrating and sharing with the broader community the vibrancy of First Nation cultures at a town named 1770 that nicely makes this point.

Culture is everything but rights are very important – they can and do make a difference.

The native title story tells us there is a powerful relationship between culture and rights. It tells us that strong culture cannot be denied and must be legally recognised. Yet the Mabo Judgment itself as well as the Native Title Act tells us that native title rights can be lost if culture is not maintained, so there is a link. This is why festivals like this are important to rights because they celebrate culture and in doing so make each grow stronger as well as the linkage.

I have spoken about the importance of native title but it is by no means perfect because all it does is recognise remnant rights and interest in land and waters and not the full rich tapestry of rights we possessed and enjoyed as Peoples. Indeed, the Mabo judgment handed down 29 years ago was both the beginning and the highpoint, the intervening years of constraining jurisprudence and legislative change has watered down native title considerably. As limited as it is, maybe our expectations were too high for it in the first place noting that the social justice policy was part of the three-pronged response to the Mabo judgment and it was never implemented. The second prong of an Aboriginal Land Fund was significantly circumscribed. Leaving us with all our big aspirations in the tiny native title corner. It was never intended to be a silver bullet.

If our expectations were unrealistic, it is critical that we re-frame the way we think about native title. It has only ever been a tool in our toolbox of rights. But that toolbox is getting bigger.

I believe that the **United Nations Declaration on the Rights of Indigenous Peoples** (UNDRIP) may prove to be a far more powerful tool than native title ever could be because it doesn't limit us to rights and interests in land and waters but covers the full array of rights necessary for societies to build and thrive.

UNDRIP is a blueprint for First Nation re-vitalisation. If we overlaid UNDRIP as a blueprint over the innumerable Closing the Gap challenges, there are ready made solutions to be taken up with the Right to Self Determination as its foundation. UNDRIP is a community governance and development model for nation-building. I will return to this point under the topic of governance – the point here though is that UNDRIP contains instructions on how nations should be built based on rights and respect for culture.

Some final comments on UNDRIP. It may have had a slow start and remains non-binding on Nation-States but it is building momentum and we as First Nation Peoples need to understand and wield its

transformative power. It is a powerful tool because it is authentic. It is the melding of intergenerational wisdom and harshly-learned lessons of many Indigenous nations and Brothers and Sisters from all the world, including our own, into an international instrument ready to be tailored to our domestic circumstances.

UNDRIP contains the important Indigenous Right to Self Determination and the corresponding duty for nation states to ensure there is Free, Prior and Informed Consent (FPIC) on matters that impact upon that right, in diverse areas such as: education, language, intellectual property, art and culture, juridical systems, economies, natural resources, land and much more.

These international rights are increasing in prominence. Importantly, they are entering the commercial space, and we all know that 'money talks' and if that is so, rights can be a big megaphone to effect change. The Indigenous Right to Self Determination and FPIC have made their way into a code for global ethical lending practices as embodied in the *Equator Principles*. It is pivotal in the emerging ESG principles that go to ethical environmental, social and governance practices that is changing corporate social responsibility. It is opening shareholder minds and changing attitudes and hence corporate behaviour and accountability - the sacking of Rio Tinto Executives for permitting the 'bombing' of Juukan Gorge in Western Australia is proof that shareholders want a different way, a respectful way to deal with our cultural heritage. In Queensland, the right to self determination has found its way into the *Human Rights Act* against which all state legislation must now be assessed. UNDRIP has been expressly included as a protection and leverage point in the commercial utilisation of cultural knowledge in recent amendments to the Biodiscovery Act – in fact the full right of veto as an expression of Free, Prior and Informed Consent is included in this legislation. The right to self determination will play a very prominent role in the global decarbonisation processes that the world is embarking upon, especially around how cultural practices are used in cool burning and how rights can be utilised in carbon capture and storage.

This is not some nebulous, inaccessible jumble of unenforceable aspirations – these rights are having real, practical effect now and we need to get our collective heads around it to not only protect culture but to make it strong and sustainable.

Our job as First Nations is to understand the tools in the toolbox; whether it is UNDRIP, domestic legislation in the form of the Native Title Act, cultural heritage laws, Biodiscovery and so on as well as the myriad of private agreements we strike in Indigenous Land Use Agreements, s31 agreements or cultural heritage agreements.

Governance

First Nations have at their disposal a suite of rights that can be utilised to meet their objectives. However, rights need to be activated through governance and I now turn to this topic. A simple definition for governance is how people organise themselves collectively to get the things done that matter to them. The challenge for First Nations is organising themselves using a rights-based framework.

The trick to navigating governance and rights is to organise specific governance domains around the different layers of rights.

For instance, if the Right to Self Determination is held at the communal level then governance structures must be organised at that level. UNDRIP provides a perfect blueprint to set up communal governance models that are based on the cultural, social, economic and political frameworks that best suit each First Nation. Arguably, the best communal governance model is the tried and tested

models that have been in place for millennia. I am not suggesting a frozen in time governance model rather the implementation of the values that underpinned those governance models, such as the clear roles and respect for Elders and other knowledge holders, reciprocity, equitable distribution, inclusion, restorative justice and many more. UNDRIP accommodates adaptation.

The next layer of governance deals with the institutions that manage domestic rights. They are often the vehicles responsible for developing the strategies and implementation plans to realise community level objectives. For instance, prescribed bodies corporate, the entities established under the native title regime and *Corporations (Aboriginal and Torres Strait Islander) Act (CATSI Act)*, are good examples of this level of governance. Let's call this layer of governance, corporate governance. We all know that corporate governance has strategy and compliance dimensions and both must be done well to achieve community objectives and aspirations.

The third layer of rights relate to the implementation of private agreements such as Indigenous land use agreements, mining future act agreements, cultural heritage agreements, etc as well as rights of a procedural nature such as rights of notification, consultation and comment under the native title future act regime and cultural heritage laws. Just a point on lower-order procedural rights – they may sound weak but the only weak right is the one that is never used and is allowed to wither by those who hold it. We have too few rights to let that happen - so comment, consult, demand insistence of that right because Country can be as adversely affected by a 'thousand little cuts' as a gaping hole. Remember too that native title compensation is in its infancy and it will be relevant to these subsidiary rights and breaches of them. For these rights to be protected, enforced or implemented there needs to be a governance regime appropriate for this level – let's call this operational governance.

You will see that there is a governance model that is suited to the layer of rights that is being exercised; at the communal, organisational or operational levels. The challenge for First Nations is to ensure that there is a high level of integration between these three layers of governance – easier said than done but necessary nonetheless.

We should not consider governance as a dirty-word or another humbugging bureaucratic process - although at time it can be. It is far too important to get right and there are dire consequences when it is not. Yet, we are no strangers to governance structures and good governance practice - we have been doing it longer than any other culture. Our traditional laws and customs required governance structures to make them work. Our challenge is to ensure that we keep those traditional governance systems strong within the community while transferring those values to the organisational and operational governance layers that are critical for intercultural governance or 'two-world' governance.

Self-determination

I have spoken quite a bit about the Right to Self Determination. That term gets used frequently and it can be confusing because it can be described as a principle, a framework, a process and an outcome. I think it is all of those things but we should look at *Article 3 of UNDRIP* if we are after a definition:

Indigenous peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

If that is what the right entails, *Article 4* tells us how the right is exercised:

*Indigenous peoples, in exercising their right to self determination, have the right to autonomy or **self-government** in matters relating to their internal and local affairs, as well as ways and means for financing their autonomous functions.(my emphasis)*

I would argue that the right to self-determination and manner in which it is exercised is really for only one objective - the continuation of CULTURE! The holding of this festival is an exercise of the right to self determination because you are freely pursuing your cultural development and it is being exercised through your institutions.

Article 4 is plain enough, it talks about self-government relating to internal and local affairs. However, I would argue that Self Determination is not confined to internal and local affairs because everything that happens on Country is your business and this is where policy comes into the mix.

Policy

I would argue that there are four levels of government in this country: Federal, State/Territory, Local Government and First Nations. The Right to Self Determination and the exercise of Self-Government or autonomy crystallises when the three other levels of government recognise the legitimacy of the fourth. Remember, recognising yourself as sovereign only takes you half-way, other sovereign entities must recognise that status and interact with us accordingly. Importantly, this recognition includes our First Nation neighbours. When this recognition happens at a policy level that is when relationships have matured to move to the next stage.

I would also argue that the business of government cannot be done until the Federal Government provides adequate resources for First Nations to function as a fourth level of government. In the absence of a rates base or licensing and permitting regimes such as those possessed by local governments, or the ability to levy stamp duty or GST for States, or the Federal Government's constitutional ability to raise taxes, there has to be a policy that provides a permanent funding source for First Nation Governments. It is hypocritical for those governments to superficially acknowledge us but not to support a realistic funding source for us to do business, noting that part of their business is to interact with us. This requires realistic, sustainable resources, independent of government and not linked to the whims of electoral cycles.

I would argue that First Nations must be funded in perpetuity and the simplest way of doing that is to fund PBCs for the duration of the existence of native title and term of the PBC – which is forever, because native title is forever! The National Native Title Council has developed an advocacy position in conjunction with the Centre for Aboriginal Economic Policy Research, for the establishment of a PBC Future Fund. It would be a sovereign capital fund that is invested with the returns bankrolling the organisational and operational needs of a PBC in perpetuity. This is not a radical concept – the Indigenous Land Sea Corporation (ILSC) and IBA are funded through this mechanism as are other sovereign wealth funds. I would commend people to look at the NNTC, CAEPR or QSNTS websites for details.

Partnership

My view is that treaty negotiations should hasten slowly because we do not want to enter a negotiation space without our internal governance sorted and our capacity built to ensure that there is a parity in negotiation position. The best vehicles to undertake these negotiations are autonomous or self-governing First Nations. There has to be an internal capacity development phase, a relationship building phase and then an agreed process of engagement to commence Treaty. This all takes time, resources and capacity.

Treaty

My view is that Treaty should be nothing less than shared sovereignty. If it is accepted that Aboriginal sovereignty was never ceded, then that means the Nation State of Australia cannot replace *terra nullius* with another legal fiction of *cession*. I agree with the principle of treaty making between First Nations, local governments and states/territories but there has to be a national process to frame the complex mosaic of rights and relationships within and between these different levels of government to secure consistency and integration. The 'whole is greater than the sum of its parts' and coordination is critical to transformation.

This country could not advance while *terra nullius* was in place nor can it advance in a genuine way unless sovereignty is acknowledged and shared. What that shared sovereignty looks like should not be rushed because it is too important.

Reconciliation

Finally, real and enduring reconciliation is based on shared truth, respect for First Nations and an acceptance and mutual commitment to build a common future.

We are not there yet and we shouldn't kid ourselves that we are because there is too much unfinished business to deal with but we can start the conversation and festivals like this bring us together to do just that.

Au eswau, thank you.

Kevin Smith, CEO, Queensland South Native Title Services

(Delivered virtually from Brisbane to the Cultural Connections Immersion Festival, Town of 1770, Queensland 2 October 2021)