
QUADRIVUM: SO YOU WANT TO BE A LAWYER?

by Dennis Foley

INTRODUCTION

Quadrivium; we are at a crossroads, a place where many journeys meet. For there are many choices for Aboriginal¹ students to pursue successful careers in law, however the study of law is not uniform—it has as many differing forms and specialisations as there are colours in confectionary. As a vocation some are simple and sweet and others difficult and sour. Within the next few pages I will discuss—based on my own academic research—an area where Aboriginal Australia desperately needs Indigenous lawyers to help our people achieve self-determination and financial independence.

For almost two decades I have given academic advice to Australian Indigenous students as to which vocation to pursue. Many want to study law and ever since the successful High Court challenge by the late Eddie Mabo², there has been a growing stream of students with a compelling desire to correct past injustices and work for their communities in the area of native title. You see them in the interview all “bright eyed and bushy tailed”, first semester they are still effervescent and keen, and by about mid semester year one, they realise that law is hard work with some law professors almost destroying their desire to help their people. By the end of second year many have swapped over to other degrees, by first semester of the last year of those that remain, few know where they want to specialise, while the rest just want to finish. Statistically and sadly of those Aboriginal or Torres Strait Islander students who finish, only a small percentage will follow their passion and become practitioners. The difference between those that start and those that finish is a human quality that we all have, but only few of us master. It’s about being able to maintain your driving ambition, your passion to achieve or keeping that “fire in the belly” alive.³

THE IMPORTANCE OF COMMERCIAL LAW

Lawyers can specialise in many different areas of law which can include: equal opportunity law; tort law; industrial law; family law; consumer law; taxation law; environmental law; native title law and constitution law. However from my academic experience one of the most important areas of practice for Aboriginal Australians is the area of *commercial law*.

The numbers of Aboriginal owned small business enterprises have exploded within the last 20 years. When I commenced my research in the early 1990s it was difficult to locate Aboriginal businesses due to their physical lack of numbers. This was further hampered as many hid their identity due to overt and covert racism from the dominant culture. Now Aboriginal enterprises are becoming an important group within the Australian commercial sector and are more easily identified because society is more acceptable of Aboriginal people being active in the commercial world.⁴

THE GROWTH OF INDIGENOUS BUSINESSES

With increasing education levels being attained by Aboriginal people in general, and improved knowledge of recognising potential business possibilities, Aboriginal commerce in Australia has bloomed—resulting in more Aboriginal enterprises producing goods and services for sale in the modern market economy.⁵ Aboriginal enterprises by and large contribute to fostering social cohesion and recognition of Aboriginal people.⁶ The establishment of more Aboriginal businesses is crucial for fostering independence for Aboriginal people from government welfare and largely non-Aboriginal workplaces.⁷

Self-employed Aboriginal people who are entrepreneurial are becoming an increasingly important component of Indigenous economic activity. The numbers of self-employed people have increased from 4600 to 12 500 in the two decades to 2011. Research by the author⁸ and Foley and Hunter⁹ has shown a link between self-employment and entrepreneurial activity. Due to the poor statistical data sets available to academics, such as the pre 2012 National Aboriginal and Torres Strait Islander Social Surveys (‘NATSISS’) (which had a limited sample base and true representation) the author, after extensive consultation with peers at the Australian National University (‘ANU’); networking with Victorian, Queensland and New South Wales Indigenous Chambers of Commerce; as well as other Aboriginal representative bodies, more accurately estimates the number of self-employed Aboriginal businesses to be at 25 000.

In conducting my research over the last 15 years—which covers over 770 formal qualitative case study interviews and around 200 informal interviews of Aboriginal business people—a common occurrence for a majority of businesses was a period in their business life cycle where they suffered from a substantial financial loss following poor advice. Their own ignorance or lack of knowledge in business practices, such as leases and tenancy agreements, or illegal activity by a partner/landlord/accountant (a person that they placed trust in) have also been reasons for their businesses suffering financial losses. Considering that I interview only successful operating enterprises, it can therefore be concluded that there must be a large amount of failed Aboriginal enterprises who have also suffered financial loss in similar circumstances.

The common statement among these business owners was that they all wished they were better prepared before entering business and had a person that they could trust—like an Aboriginal solicitor—in whom they could confide in and who could help them in the early stages of their business. Nearly all of those interviewed cut their losses and did not seek reimbursement or compensation for numerous reasons, writing it off to ‘experience’. Had they had access to a competent Aboriginal lawyer specialising in commercial law, the chances of incurring expensive losses might have been greatly reduced; their enterprises made more profitable and, no doubt, some of the many business failures might have survived.

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WHAT IS COMMERCIAL LAW?

Justice Giles believes that commercial law is:

...almost anything. It goes beyond the regulation of the relationships between merchant and traders, and it goes beyond those parts of the law most commonly associated with business activities in that all major and fundamental areas of law are now most commonly associated with business activities.¹⁰

Commercial law is linked to many different types of business activity and the boundaries are not easily identified given that commercial law shifts with developments within society. For example, since 1995 corporate lawyers in Australia have had to skill up on tort law

and principles of negligence in respect to a director’s duty of care.¹¹ Another example is the creation and significance of the alternative dispute resolution practices since the 1980s, which negated many costly litigation matters that were clogging up the court system.¹² Other areas include the rise of e-commerce and the growth of a new field of complicated enterprise, together with the increasing development of the field of intellectual property, especially for Aboriginal Australians in art and design.

Commercial lawyers have a long familiarity with the impact of statutes in commercial undertakings such as the *Trade Practices Act 1974* (Cth), the *Contracts Review Act 1980* (NSW), the *National Consumer Credit Protection Act 2009* (Cth) and the *Financial Services Reform Act 2001* (Cth), whereby a statutory attempt has been given to provide overarching complex regulation of commercial activity that the commercial lawyer must work within. Commercial law is an interdisciplinary, varied and complex area of law. It is interesting to note that major law firms no longer show ‘commercial law’ on their websites opting to describe their specialisations such as banking and finance or competition law. Clayton Utz as an example shows their areas of law as: Banking and Finance; Capital Markets and Securities; Competition; Construction and Major Projects; Corporate; Energy and Resources; Environment and Planning; Governance and Compliance; Insurance and Risk and so on.¹³ It’s no wonder that Aboriginal business operators don’t turn to them for help or advice. When surveyed as to why they didn’t have a legal adviser, Aboriginal enterprises mostly responded that they: “Didn’t know an Aboriginal lawyer in business matters and they didn’t trust a [non-Aboriginal] stranger... that’s how they got into trouble in the first place”.¹⁴ The second reason cited was that they couldn’t afford it—as a consequence some business owners wore a \$10 000; \$20 000 and in one case an \$80 000 loss.¹⁵ In most cases, if they were returned just 10 per cent of the loss, it would have covered the solicitor’s costs. It is another compelling reason why we need more Aboriginal solicitors in commercial practice.

CONCLUSION

There are 25 000 Aboriginal people in small business out there who need good commercial legal advice and ongoing assistance. Many have suffered financially and physiologically due to issues such as poorly worded contracts; placing faith in others; and/or not reading the fine print. These business owners need commercial advice from a lawyer that is culturally appropriate and this is one of the reasons why I strongly encourage up-coming lawyers to consider practicing in the area of commercial law.

So you want to be a lawyer? In economic development, Aboriginal Australia is at a *quadrivium*—a crossroad. Aboriginal commercial lawyers have the power to assist Aboriginal Australians to be

financially independent and achieve self-determination. They play a significant role in providing us with the freedom to make choices and to not be reliant on the 'colonial masters'. Aboriginal commercial lawyers will also play a big part in helping Aboriginal entrepreneurs achieve success while retaining their Aboriginality in business.

We stand on the shoulders of those that have walked this land before us, may the spirits of our old ones guide you and help you in your travels as a lawyer.

Dennis Foley is an Indigenous Research Professor in the School of Humanities and Social Sciences at the University of Newcastle, NSW Australia.

- 1 The words 'Aboriginal' and 'Indigenous' are synonymous with the terms Aboriginal and Torres Strait Islander. Popular choice amongst numerous contemporary writers including the author is preference of the term Aboriginal, as the word Indigenous is commonly applied to flora and fauna.
- 2 *Mabo and Others v Queensland* (No. 2) (1992) 175CLR 1.
- 3 Raymond Smilor, 'Entrepreneurship: Reflections on a Subversive Activity' (1997) 12(5) *Journal of Business Venturing* 341.
- 4 B Hunter and D Foley, 'What is an Indigenous Australian Business?' (2013) 16(3) *Journal of Australian Indigenous Issues* 66.
- 5 K Klyver and D Foley, 'Networking and Culture for Minority Entrepreneurship' (2012) 24(7) *Journal of Entrepreneurship & Regional Development* 1; D Foley and Allan O' Connor, 'Social Capital and the Networking Practices of Minority Entrepreneurs' (2013) 55(3) *Journal of Small Business Management* 276.
- 6 S Kleinert, 'Aboriginal Enterprises: Negotiating an Urban Aboriginality' (2010) 34 *Aboriginal History* 171.
- 7 N Biddle et al, 'Labour Market and Other Discrimination Facing Indigenous Australians' (2013) 16(1) *Australian Journal of Labour Economics* 91.
- 8 D Foley, 'Successful Indigenous Australian Entrepreneurs: a Case Study Analysis' (Aboriginal and Torres Strait Islander Studies Unit Research Report Series No 4, The University of Queensland, 2000); D Foley, *Understanding Indigenous Entrepreneurs: A Case Study Analysis* (PhD Thesis, The University of Queensland, 2005); D Foley, 'Does Business Success make you any less Indigenous?' (Paper presented at the Third Annual AGSE International Entrepreneurship Research Exchange, Auckland, February 7-10, 2006) 241-57; D Foley 'Indigenous Australian Entrepreneurs: Not Community and Not in the Outback' (Research Discussion Paper No 279, The Centre for Aboriginal Economic Policy Research, 2006) <<http://caep.r.uq.edu.au/Publications/DP/2006DP279.php>>; D Foley, 'Jus Sanguinis: The Root of Contention in Determining What is an Australian Aboriginal Business' (2013) 8 (8) *Indigenous Law Bulletin* 25.
- 9 D Foley and B Hunter, above n 4.
- 10 Justice Roger Giles, 'Commercial Law – What is it?' (1997) 11(2) *Commercial Law Association Bulletin* 16.
- 11 The NSW Court of Appeal in *Daniels v Anderson* (1995) 37 NSWLR 438 held that arguments against directors being under a common law duty of care to the company were based on historical considerations and should be considered outdated.
- 12 Exemplified in the establishment of the Australian Commercial Disputes Centre.
- 13 Clayton Utz, Expertise <http://www.claytonutz.com/area_of_law/expertise.page>.
- 14 D Foley above n 8.
- 15 There is no published reference to these incidents as the participants requested that their statements not be recorded.

Burrul Warrambool (Milky Way)

Sky colourway

Lucy Simpson

Digital print on silk

