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RESTORATIVE JUSTICE PROCESS IN CASE LAW

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In a pivotal decision in the case of *Garrett v Williams*, Justice Brian Preston, Chief Judge of the Land & Environment Court, recommended a unique conflict resolution process to help deliver a deeper resolution in a case involving environmental offences committed by a mining company on an Aboriginal place, including destroying Aboriginal objects. In the course of the hearing — and with the consent of the prosecution and the defence — a restorative justice or TJA conference¹ was held prior to sentencing. A landmark agreement was reached between the affected Aboriginal people and the mining company, in addition to the sentence imposed by the court.

There were two offences in this case. The first involved Craig Williams instructing contractors to undertake earthworks for the construction of a railway siding on his mining lease. His company had recently lost access to a siding used to load material from the mine for transport to South Australia. The site where the new siding was to be located had previously been the subject of an archaeological survey. The survey identified Aboriginal objects at the site and indicated that, for any work to be undertaken, Craig Williams would firstly need to obtain the consent of the Director-General of National Parks and Wildlife to destroy, damage or remove Aboriginal objects from the site (under S 90(2) of the *National Parks and Wildlife Act 1974*). Williams was under considerable financial pressure to resume loading materials for transport and made the decision to proceed with the earthworks and build the railway siding, considering that the process of gaining consent would have taken far too long and been at considerable cost to his business. He instructed the contractor to proceed, having inspected the site himself and been satisfied that the Aboriginal objects would not be harmed. This was clearly not the case.

The second offence on a different area of his mining lease, involved excavating a costean or open trench — a traditional and much used method of exploring for mineral samples in the area. In this case the costean was between 100 to 150 metres long, 1.2 metres deep and about .5 metres wide. The method used by Craig Williams to determine exactly where to excavate in relation to a designated Aboriginal place on his mining lease, was not satisfactory. It resulted in a contractor, using a hydraulic excavator, excavating a costean into the Aboriginal place, with the full knowledge of Craig Williams. Again Williams did not apply for or obtain consent under S 90(2) of the *National Parks and Wildlife Act 1974*.

In both cases, Williams was aware that he might be causing harm to Aboriginal objects and should have sought consent to work in those areas.

While the inclusion of the restorative justice process in the proceedings was new, it is also noteworthy because it bodes well for those seeking a deeper justice, not always available with even a favourable court ruling. Perhaps the most impressive result was that the defendant, despite being fined by the court, also found the result to be highly satisfying.

In this case, the restorative justice process was initiated by the Chief Judge of the Land & Environment Court after the plea of guilty and before the sentence had been determined.

Background

On 20 May 2005, investigations began into three possible environmental offences in the area known as the Pinnacles, 15 kilometres south of Broken Hill in western NSW.² The offences involved the possible destruction of Aboriginal artifacts without consent and damage to a designated Aboriginal place. Charges were laid against Craig Williams as the sole director of Pinnacle Mines. The defendant pleaded guilty to all offences.

The Pinnacles comprise three small pointy hills — the North Pinnacle, Middle Pinnacle and the South Pinnacle. These hills and much of the surrounding country are culturally significant to the Wilyakali people and to the Bronze Wing Pigeon story line, central to their dreaming. The Wilyakali Aboriginal people of western NSW have inhabited the area around Broken Hill for tens of thousands of years. There is a long and deep connection with the land and like many other Aboriginal people they have experienced the effects of colonialism and the invasion of European settlers into their country. The importance to the Aboriginal people of the country around the Pinnacles was recognised in 1996 by a declaration that the Pinnacles be an Aboriginal Place protected under the *National Parks and Wildlife Act 1974* (NSW).

Maureen O'Donnell, a Wilyakali elder responsible for the stories and the land, is a long term activist, advocate and protector of her country and represented the traditional owners in the matter before the court. In an excerpt from the case transcripts, O'Donnell spoke of the significance of both the stories and the land:

My knowledge of the Pinnacles came from my teaching by my family and Aboriginal elders. The Pinnacles is tied to the Marnbi Bronze Winged Pigeon story. I was told that the

REFERENCES

1. TJA (Transformative Justice Australia) Conferencing is a process to address conflict in groups and is often referred to in the justice arena as Restorative Justice Conferencing.
2. In writing this article, those intimately involved, including Maureen O'Donnell, Craig Williams, Williams' counsel, the prosecutor from the Department of Environment and Conservation, Justice Preston, and people close to both Maureen O'Donnell and Craig Williams have contributed to the story and agreed to its publication. In addition, the judgment of the court is available publicly on the AustLII web site at <http://www.austlii.edu.au/au/cases/nsw/NSWLEC/2007/96.html> while the contact for Craig Williams' solicitor, Robert Wilcher of Herbert Geer and Rundle Lawyers, is available at <http://www.hgr.com.au/>. The solicitor for the Department of Environment and Conservation, Rasheed Sahu Khan, can be contacted at rasheed.sahukhan@environment.nsw.gov.au and Patrick Shepherdson of the Attorney-General's Department of NSW can be contacted at patrick_shepherdson@agd.nsw.gov.au. (Note: the Department of Environment and Conservation is now known as the Department of Environment and Climate Change, though this was not the case at the time of the trial.)

Pigeon flew to the Pinnacles from South Australia where it was wounded; dropping its blood and feathers indicating that there is gold and silver in the area. The Pinnacles area was a large gathering place for Aboriginal people from Broken Hill and surrounding area, including South Australia. Aboriginal people used to camp along the surrounding creeks, trade and dance and feed together at the Pinnacles. The Pinnacles and the whole area surrounding the Pinnacles is a spiritual ground.³

Pinnacle Mines has been operating in the area since 1884 and has been owned by the Williams family since 1952, following family involvement with the mine from 1948. Craig Williams had continued a family tradition that started with his grandfather and continues through to today with his wife and son who work with him in the business.

Maureen O'Donnell and Craig Williams were both born and raised in and around the Pinnacles country. Craig is in his late 40s and Maureen, in her late sixties, has been around a bit longer. The two have had little to do with each other, maintaining a respectful distance over the years and had not met until the TJA Conference was convened on 10 November 2006.

Turning conflict into cooperation

Restorative Justice (or TJA) Conferencing is designed to turn conflict into cooperation. The process achieves this transformation by allowing communities caught up in a complex system of relationships and histories to clarify what has happened, understand why events unfolded as they have, appreciate the consequences of the actions and together develop a plan to learn from the events and ensure they are not repeated.

In his judgment, Justice Preston further defines the process:

A restorative justice programme, whether general or case-specific, uses restorative processes and seeks to achieve restorative outcomes. A 'restorative process' can be defined as 'any process in which the victim and the offender, and, where appropriate, any other individuals or community members affected by a crime, participate together actively in the resolution of matters arising from the crime, generally with the help of a facilitator' ... A 'restorative outcome' is an agreement reached as a result of a restorative process. The agreement may include the offender making reparation or restitution.⁴

According to the United Nations Office on Drugs and Crime's (UNODC) *Handbook on Restorative Justice Programmes (2006)*, in order for a restorative process to achieve its objectives there must be:

- (a) an identifiable victim;
- (b) voluntary participation by the victim;
- (c) an offender who accepts responsibility for his/her criminal behaviour; and
- (d) non-coerced participation of the offender.⁵

In this case, there was certainly an identifiable victim, and an offender who had taken responsibility for his behaviour. The court, as reflected in Preston J's judgment, viewed this as indicative of Williams' genuine contrition and remorse' and 'desire to make reparation

for the harm he [had] caused and intention to ensure that the offences do not reoccur'.⁶

In deciding how to proceed, Preston J would have considered the possible consequences of taking a more traditional approach against offering this option to the parties. His considerations would have included:

- The significant financial costs had the court simply heard the arguments, taken submissions and imposed a sentence (under the Act his options were either a fine and/or imprisonment).
- The mine owner and the Aboriginal people would not have had the opportunity to get to know one another.
- The Aboriginal people would not have been provided with the opportunity to educate the mine owner and his staff.
- The miner would not have considered the possibility of employing Aboriginal people in the mine operation.
- The court could not have required the parties to consider developing a tourist walk in and around the North Pinnacle.
- The court would not have had the authority or resources to follow through with the parties and support any initiative to improve relationships and ensure the Act is complied with, though that is precisely what is happening on an ongoing basis as a direct result of the TJA Conference.
- The officials, whilst operating within the framework of the existing system in the Land and Environment jurisdiction, would not normally have been exposed to an additional process that offered such a comprehensive outcome.

The restorative justice conference offered representatives of the Wilyakali people and Pinnacle Mines an opportunity to meet in a safe, neutral setting and engage in a structured discussion of what had happened. As the facilitator, I ensured that Maureen O'Donnell was able to talk to Craig about the physical, emotional and spiritual importance of the land. It was also an opportunity for Maureen to receive answers to questions about what happened and be directly involved in the development of a plan to ensure the management of the Aboriginal place and the Pinnacles area in general. Bazemore and Umbreit refer to this approach in 'A Comparison of Four Restorative Conferencing Models' in the *Juvenile Justice Bulletin*, February 2001.

Moving toward resolution

At a hearing on 29 September 2006, Preston J offered the parties an opportunity to participate in a restorative justice conference prior to sentencing. This was the first time such a process was offered in criminal proceedings in the Land and Environment Court in NSW. William's lawyers, Philip Clay and Alice Spizzo, advised that the offer be accepted as an opportunity to explore the possibilities that meeting directly with the traditional owners would present. Stephen Garrett for the prosecution also accepted the offer on behalf of the Department of Environment and Conservation.

3. *Garrett v Williams, Craig Walter* [2007] NSWLEC 96 para 75.

4. *Ibid* para 41.

5. *Ibid* para 44.

6. *Ibid* para 113.

As with all TJA conferences, preparation is crucial to success. In this instance, a full understanding of the politics of the communities in which the events took place was paramount.

The court approached Patrick Shepherdson, Manager, Crime Prevention Programs, for the Attorney-General's Department of NSW for advice on a possible facilitator. The conference took place on 10 November 2006, and lasted just over six hours.

At least 30 people were identified for interviews in preparation for the TJA conference, including:

- Members of the Broken Hill Local Aboriginal Land Council;
- Representatives of the Wilyakali people (regarded as the traditional owners of the Pinnacles area);
- The mine owner and various members of his staff;
- Consultant archaeologists;
- Officers of various state government departments including:
 - Department of Primary Industries (Mines)
 - NSW Roads and Traffic Authority
 - Department of Environment and Conservation
 - Attorney-General's Department of NSW.

As with all TJA conferences, preparation is crucial to success. In this instance, a full understanding of the politics of the communities in which the events took place was paramount. There were a number of stakeholders with interests to be considered:

1. The Wilyakali people were represented by Maureen O'Donnell, her daughter Dulcie and son Raymond, and members of her extended family. Maureen is chairperson of the Broken Hill Local Aboriginal Land Council and has been actively involved in Aboriginal cultural and heritage issues for decades. She is the matriarch of a large family and, apart from her role at the Land Council, she also runs Poolamacca Station 60 kilometres north of Broken Hill, with Raymond and his family.⁷
2. The principals of Pinnacle Mines are members of the broader Broken Hill community. Craig Williams and his family are well-known and active participants; Craig grew up in Broken Hill, his son works at the mine and Cheryl, his wife, works in the office of Pinnacle Mines.
3. The Pinnacles have historical significance to European Australians. The first European settlement in the area, even before the establishment of Broken Hill, was between two of the Pinnacles well over a hundred years ago, and while the settlement no longer exists, the foundations of settlement dwellings are still visible. In addition there are at least twenty-seven graves in a small cemetery located

close to the remnants of the old village. Residents of the Broken Hill area have also long enjoyed walking and picnicking in and around the Pinnacles. Since the area figures so significantly in the leisure and cultural pursuits of locals, the offences were reported in and followed by the local newspapers with great interest, as were developments in the case.

4. There were and are a number of state government departments with an interest in events surrounding the offences and the outcome of the court case. The then Department of Environment and Conservation, comprising the Environment Protection Authority, National Parks and Wildlife Service, Botanic Gardens Trust and Resource NSW; the Department of Primary Industries (responsible for mines), the Roads and Traffic Authority and the Attorney-General's Department of NSW. Each of these agencies was involved in the preparation of the TJA conference with the Department of Environment and Conservation taking a significant role in supporting the implementation of the Agreement that was developed in the conference.

Once preparation was complete, the TJA conference was convened at a community hall in Broken Hill on 10 November. During the conference, the conversation and interaction, though at times difficult, was thoughtful, sincere and respectful. Talk ranged over subjects as diverse as the connection of the traditional owners to the land, the history of the mine, methods and people used to survey the Aboriginal place for artefacts, family connections, shared acquaintances, children and plans for future opportunities.

Craig Williams, personally and on behalf of Pinnacle Mines, apologised to Maureen O'Donnell as the representative of the Broken Hill Local Aboriginal Land Council and the Wilyakali people, for the offences committed. Maureen accepted this apology in good faith.

Conclusion

The TJA Conference Report was tendered by consent as evidence in the sentencing hearings, and Preston J referred to it in his judgment:

The fact of and the results of the restorative justice intervention can be taken into account in this sentencing process, but the restorative justice intervention is not in itself a substitute for the Court determining the appropriate sentence.⁸

On 27 February 2007, the Land and Environment Court sentenced Williams to pay a total penalty of

7. Maureen is also involved in numerous committees with National Parks and Wildlife and other government and community agencies, and is on the Board of Management for Mutawintji, a national park with significant importance to Aboriginal people. As stated earlier, the Pinnacles are of special significance to the Wilyakali people and their involvement was central to any understanding and possible resolution.