

Have insurers already heard the voice to parliament?

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Introduction

What single act could cause three chief executives to lose their careers,¹ two-thirds of shareholders to oppose executive remuneration and the senseless destruction of a 46,000-year-old cultural site?² The short answer is a lack of consultation with First Nations Peoples. Such were the ramifications of Rio Tinto's decision in May 2020 to devastate rock shelters located at Juukan Gorge on the lands of the Puutu Kunti Kurrama and Pinikura people in Western Australia.³

Without proper interrogation, one might intuitively accuse the proposed Voice to Parliament (the Voice) of being likely to increase the cost of business through delay, bureaucracy and uncertainty. Directly or indirectly, those burdens are often carried by the insurance industry. However, as the Juukan Gorge incident demonstrates, the private sector is already well-aware of the commercial and statutory consequences that arise from a lack of consultation with First Nations People. The increase of concern within the private sector, and the take-up of reconciliation efforts within the insurance industry mean that the insurance market has already been accounting for risks associated with projects and investments requiring consultation with First Nations Peoples.

To the extent that much of the private sector has voluntarily elected to require Indigenous recognition and consultation, the Voice cannot be accused of creating a new consultative regime. Instead, it could be argued that the Voice will not facilitate an emerging change in culture, but rather, strengthen a recognition that has been steadily growing for some time. On that premise, the cost of the Voice to the insurance industry will be twofold. The first and more significant impact will be on companies that have yet to create any indigenous recognition action or consultation plan. The second and more discrete impact will be on companies that have already begun this process but will be required to refine their existing regimes to accommodate new legislative requirements. Either way, systemic change is not new for the insurance industry.

The hard cost of reconciliation

Various insurance organisations have already incurred a hard cost for reconciliation ahead of the commencement of the Voice — and regardless of the outcome of the Referendum. These costs are likely to be reflected in their Annual Reporting as Goodwill or within their charitable contributions, such as the examples given in the table below.

Institution	Good-will (\$M)	Charity, business partnerships or community investment
Suncorp	4719	community investment \$9,873,094 partnered with Firesticks Alliance Indigenous Corporation “Sorry Business” funeral financial hardship project
Insurance Australia Group	2823	target to increase Indigenous employment to 3% EOY 2023 “Sorry Business” funeral financial hardship project
Medibank	282.9	\$1M pa target in Aboriginal and Torres Strait Islander (ATSI) business procurement launch of 5 th Reconciliation Plan several Aboriginal and Torres Strait Islander partnerships
Steadfast Group	1494.1	sponsored Indigenous talent program reserved one of six summer internship programs for First Nations Persons \$497,700 donated to charitable causes
NIB Holdings	236.3	\$2.3M in community funding

Many Australian insurance companies have also created and currently hold Reconciliation Action Plans.⁴ Within that cohort, Insurance Australia Group has achieved the industry's highest classification of “stretch”, QBE, NIB and Steadfast have an “innovate” classification.⁵

Reconciliation Plans may become a source of increased cost and exposure for those in the insurance industry. Reconciliation Australia, the organisation behind the Reconciliation Action Plan (RAP) framework, advocates

for the Voice. Additionally, Reconciliation Australia's goals are largely in line with the principles underlying the Uluru Statement from the Heart. As such, a possible increase in cost for insurance companies may occur if RAPs become a legislative requirement. Alternatively, for companies that already have RAPs, a cost increase might occur where certain benchmarks are required within the RAP, or if they are required to reach a certain classification within a specified period. The difference lies between the work done on an elective basis and the work required under a prescriptive regime.

Along with RAPs, many companies host Aboriginal and Torres Strait Islander internships or scholarships.⁶ Partnerships with Indigenous charity organisations and small businesses were also featured in the Annual Reports, RAPs and other similar documents prepared by several insurers.

Therefore, the intended aims of the Voice and the likely policies it may inform will not present a novel risk or cost to many stakeholders in the insurance industry. Insurance organisations are already accounting for reconciliation, albeit at a lower cost to that which may occur should direct or indirect consultation with the Voice become mandatory.

Industry support

Insurers operate for the benefit of their members and shareholders. Every large policy decision carries with it an evitable cost-benefit analysis.

It appears that the IAG Group, NIB Holdings, NRMA and Bupa are the only large insurance entities to visibly commit their support to the Voice so far.⁷ Casting the net wider, the Business Council of Australia, REST, HESTA, ANZ, the Bendigo and Adelaide Banks, the Commonwealth Bank of Australia, Deloitte and KMPG are among many companies that have publicly committed to supporting the Voice.⁸ Without questioning the bona fide nature of that commitment, it is also the case that organisations may secure a competitive edge for being on what is seen to be the "right side" of history. Additionally, companies like the IAG Group who have made great efforts and significant investment into reconciliation and their relationships with Indigenous Australia are likely to face a lower cost post-Voice than a competitor that is yet to make the same efforts and investment. It is easier to advocate for reform down a path you have already committed to walk.

Effects on mining and resource sector

Arguably, the greatest increase in risk will likely fall upon insurance entities associated with large-scale infrastructure, resources or mining projects in remote areas. Historically, the resources and mining industries have been underpinned by the structural and legal inequality

between traditional landowners and business.⁹ It is highly likely that addressing this power imbalance will be a key issue for the Voice. Most of the land where mining takes place is protected by native title and land rights regimes.¹⁰

The proposed s 129 of the Constitution is intended to ensure that the Voice may make representations on matters relating to Aboriginal and Torres Strait Islander peoples. So whereas there is considerable uncertainty about the likely scope of the Voice, one area that is unequivocal will be its ability to make representations to Parliament on projects that fall within these legislative regimes. The section was specifically designed to ensure that this would be the case: an earlier proposed wording, being "laws that exclusively relate to Aboriginal and Torres Strait Island people" was not adopted by the final report as it was considered to have too narrow a scope. The Native Title Act 1993 (Cth) (NTA) was used to exemplify Acts that relate to Aboriginal and Torres Strait Island peoples, but that are not always exclusive to Aboriginal and Torres Strait Island people because the legislation also affects mining companies and pastoralists.¹¹

Other legislative regimes that may lead to an obligation or expectation to consult the Voice include the Environment Protection and Biodiversity Conservation Act 1999 (Cth) (EPBC Act) which references indigenous knowledge, views and heritage values as considerations for decision-making. Similarly, the Aboriginal and Torres Strait Islander Heritage Protection Act 1984 (Cth) aims to preserve and protect areas and objects of significance to Indigenous traditions.¹² Both Acts were criticised in the final report of the *Independent Review of the EPBC Act* for not meeting the aspirations of traditional owners and for being unsatisfactory in their operative effect.¹³

Additionally, more than 60% of operating mines are in close proximity to Aboriginal and Torres Strait Islander communities.¹⁴ As such, following the Carma Langton report, local and regional Voice bodies are likely to be active on this front. Under the Carma Langton report, local and regional Voice bodies are provided the scope of advising the non-government and private sector.¹⁵

Insurance products that will be affected

Leading industry expert Dr Allan Manning¹⁶ told the authors that he was not aware of existing insurance products that expressly cover loss arising from interference with indigenous rights, or indigenous risk more broadly. Neither was he aware of any exclusion in an existing policy that would prohibit insured entities from

claiming under their policy because of a lack of consultation with First Nations Peoples or a breach of Indigenous rights. Of course, as Dr Manning points out, this does not negate the fundamental principle of insurance law that an insured cannot recover on the policy if the loss or the event upon which the insurance moneys were expressed to be payable was intentionally caused by the insured.¹⁷ Notionally applying that principle to the Juukan Gorge example, Rio Tinto was first advised in 2008 as to the ethnographic significance of the site. In 2013, Rio Tinto submitted a s 18 notice under the Aboriginal Heritage Protection Act 1972 (WA) and omitted the archaeological recommendations.¹⁸ If it were found that Rio Tinto had identified the risk of not protecting the site and understood and courted that risk by not declaring it on the s 18 notice, it is unlikely to be indemnified against its consequential losses under most insurance policies.

Categories of insurance that may experience an increase in demand in the event the Voice is established would include those in which the subject-matter of the insurance covers risk of administrative oversight, improper consultation, failure to adhere to statutory obligations or property damage. These could include cover against legal liability to the public in respect of property damage to sacred Indigenous sites or land arising out of the operation of the insured's business. Policy holders may ask that the risks covered by their policy be expanded to include regulatory requirements and statutory penalties.

Statutory liability can arise when a harmful act contravenes a statute that imposes a legal liability.¹⁹ Standard third-party liability policies may respond according to their terms. So too, directors' and officers' liability cover may respond for the benefit of individuals. Perhaps more specifically, other policies have been developed to explicitly protect individuals and companies against liability for statutory penalties and fines that result from unintentional breaches of legislation.²⁰ For example, Marsh offers a statutory liability policy that covers any monetary sum payable to the relevant authority arising from the breach and legal costs, excluding deliberate and intentional acts, gross negligence, fraud and other typical exclusions.²¹ Berkeley Insurance Australia also provides statutory liability insurance as part of their management liability insurance, covering the relevant statutory fine and reasonable legal costs.²² Due to the likely increase in the extent and scope of regulatory regimes, policies such as these could become more conventionally included as part of a risk management regime if the Voice referendum is successful.

As discussed above, many insurance organisations have included reconciliation and consultation with First Nations Peoples within their business models. As such, they are, or ought to be, aware of what is expected of

private sector entities from groups such as Reconciliation Australia and by extrapolation, the Voice. When incepting a policy for a business that may interact with the Voice, insurance companies could investigate the business' reconciliation and compliance history to determine any risk that may arise from breaches of reconciliation, consultation or other Voice requirements. The insurance company could then decide what risks to include and exclude from the policy.

Limitations

Prime Minister Albanese has indicated that the Carma Langton report would be a starting point in the creation of the Voice.²³ As such, this article has been written on the assumption the Voice design will closely follow or predominantly be based on the proposed design from the Carma Langton report. However, as the Voice design is subject to Parliament, this article is written on a speculative basis.

Additionally, the actual cost insurance companies are spending on their reconciliation projects is unknown. It is difficult to discern from published accounts what costs are actually incurred from reconciliation action or indigenous advocacy as this expenditure is likely included within their goodwill or charitable donation expenditure.

Conclusion

An obligation to consult Indigenous peoples in a range of events is set out in the United Nations Declaration on the Rights of Indigenous People. In the Australian context, different pieces of legislation across federal and state levels also require indigenous consultation. These include the Environment Protection Biodiversity Conservation Act 1999 (Cth), the NTA and most recently, the Aboriginal Cultural Heritage Act 2021 (WA) (the Act). The latter gave rise to a troubling incident not long after its commencement whereby an Aboriginal corporation reportedly demanded payment in exchange for its approval of two-tree planting events. Under the Act, consultation about proposed activities is required under s 101 and should include the proponent making a genuine attempt to contact and consult each person that need to be consulted. The Act was made in response to the Juukan Gorge incident in May 2020. However, the Act has led to its own criticism with farmers in Western Australia reportedly suggesting the requirements and added bureaucracy could "hold business to ransom".

Arguably, the insurance industry is at no greater risk of incurring additional exposure to claims because of the Voice. Insofar as we have already seen, the creation of internal policies within the private sector that dictate

consultation with First Nations Peoples, the Voice presents a shift from internal policy to external, regulatory regime. For insurance companies that have already invested in reconciliation and consultation policies, the cost of meeting new legislative requirements post-Voice will be lower than insurance companies that have yet to make such an investment. Some delays in projects, particularly within the mining and resources sector, will likely occur while people familiarise themselves with the detail of new or amended laws. However, that will be a transitional phase, no different to that which occurred in relation to the more recent acknowledgement of other rights, such as privacy or gender equality. Additional delay, and new regulatory requirements may lead to an increase in market demand for insurance products that are more specifically responsive.



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Footnotes

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