

INNOVATING A DJÄKAMIRR WORK MODEL

Western Industrial Legislative Compliance

TO BE BORN UPON A PANDANUS MAT- YOTHUW GAYATHA
DHÄWAL' GUYAÑA' NHARAW

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Innovating a Djäkamirr Work Model: Western Industrial Legislative Compliance

To Be Born Upon a Pandanus Mat- Yothuw gayatha dhäwal' guyaṇa' nharaw

Aim

This brief document aims to:

- Introduce the project 'To Be Born Upon a Pandanus Mat- Yothuw gayatha dhäwal' guyaṇa' nharaw
- Explore key characteristics of doula working models
- Describe key characteristics necessary in a djäkamirr work model
- Explore industrial relations compliance framework including laws, risks and liabilities
- Offer Recommendations to mitigate risks

Project Description

The *Molly Wardaguga Research Centre* at Charles Darwin University has partnered with Red Cross, Careflight, Yalu Aboriginal Corporation, Australian Doula College, Miwatj Aboriginal Health Corporation and NT Health on the research project titled:

To Be Born Upon a Pandanus Mat Yothuw gayatha dhäwal' guyaṇa' nharaw' Redesigning maternity services for Yolṇu mothers and babies living on Elcho Island Northern Territory (NT), using Birthing on Country principles and the RISE translational Framework, to reduce preterm birth and improve health outcomes. (1)

Also known as the **Pandanus Mat Partnership Project (PMPP)**, the study aims to establish and evaluate Australia's 'Birthing on Country' very remote, demonstration site in Galiwin'ku, Elcho Island, Arnhem Land (see figure 1). We will redesign the health service to increase continuity and quality of maternity care as Yolṇu women move through services in Galiwin'ku, Nhulunbuy and Darwin. We will facilitate early medical and allied health referral for women with complex needs and chronic conditions and enable Yolṇu to use First Nations knowledges across the first 1,000 days by providing **djäkamirr** (First Nations doula) support to women during pregnancy, childbirth and until baby turns 2-years old.



Figure 1 Location of Yolŋu Country and Galiwin'ku

Project Governance

The project has strong Yolŋu Governance and leadership. The Yolŋu-led and developed Governance model (see figure 1) includes strong representation from Ancestral Knowledge holders- the *Rom Wataŋu* and is centred on the Yolŋu Backbone Committee- *Gumurr gayandhanamirr* who oversee and nurture the project including Yolŋu djäkamirr, mothers- *ŋandi* and babies- *yothu*. We work with Industry, community members and stakeholders to operationalise innovation and lead health service reform through three formal groups that report to the *Gumurr gayandhanamirr*. The groups include a senior executive Steering Committee and two site-based working groups.

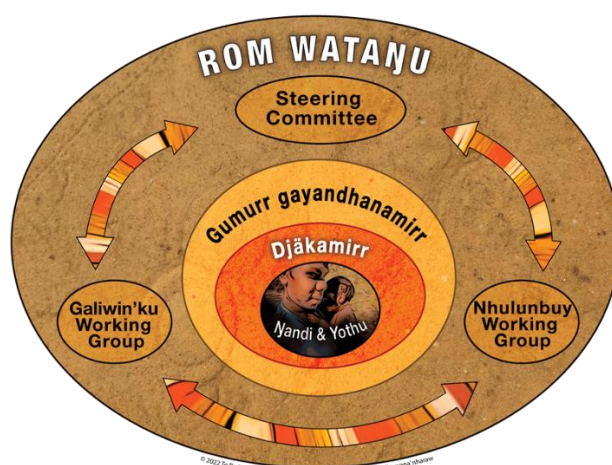


Figure 2: Pandanus Mat Partnership Project Governance Model

Doula Industry

Doula's provide skilled companionship, support, resources and advocacy for women and families during and after the birth of a baby. (2) The Australian Doula Industry is unregulated and almost all doulas work with women and families as private contractors using a fee-for-result arrangement. Care Packages provide skilled companionship, support and resources during a set time period. Examples include Childbirth or Postpartum care packages. There is no accrual of benefits added to care packages. For example, there are no additional fees or compensation for overtime and being on-call. One of the main practical reasons for this is the impossibility of predicting when and how long doula services will be required for labour and birth.

Doulas **rarely provide services per hour; and nor do they routinely provide continuity of care** across the whole of the pregnancy, birth and early parenting period. We know of one third party contracting model that provides acute short-term doula support for women who are heightened risk of their baby being removed for safety concerns.(3)

Djäkamirr Work Model

Working in the complex sociocultural and multilingual setting of remote Galiwin'ku, our project is proposing to innovate a **unique doula work model featuring continuity-of-care** through the whole reproductive journey including early and continued support through the full duration of pregnancy, travelling with women during routine relocation to wait for birth- the 'sit-down' period, attending the birth, travelling back to community with the woman and baby; and finally providing early parenting and ceremonial support. **Djäkamirr want to be recognised and paid for their commitment and contribution in caring for their own women during pregnancy and childbirth.** Employment opportunities and capacity building offered through djäkamirr training and working can address many social determinants of wellbeing and contribute to improving the current inequities experienced in Galiwin'ku.

Yolŋu Ways of Working, Indigenous Rights & Time

According to the project's Yolŋu Governance, djäkamirr must be able to work using Yolŋu ways of being, doing and thinking. These ways of working are explicitly based on Yolŋu economic concepts of relationality and reciprocity, alongside *Gurrutu*-kinship protocols. Kinship is system whereby every Yolŋu has a prescribed relationship to each other and elements in the natural non-human World. (4) In this Yolŋu system of care, Western constructions and concepts of time and employment do not have a shared intercultural understanding and are not used by Yolŋu to structure relationships. The forced application of these Western concepts into a djäkamirr working model places unnecessary and rigid rules arising from colonisation, jeopardising the success of the remote project, and imposing significant risk of stakeholder harm.

Yolŋu rights to be self-determining in revitalising and practicing their cultural healing and caring practices as djäkamirr working in Maternity Health Services, are supported by the *United Nations Declaration on the Rights of Indigenous People*.(5) Without exempting the process from regulations imposed by colonisation, Yolŋu participants, and especially djäkamirr, face significant structural and legal impediments to engaging in providing such services. Further, non-Yolŋu stakeholders working to support and capacity build djäkamirr, as well as the management of administration and financial relationships, are exposed as accessories or participants in relationships.

Unless we can establish a means by which non-Yolŋu stakeholders can work with the djäkamirr to revitalise self-determined cultural healing and caring practices in Maternity Health Services, it is likely that the achievement of true self-determination will be outside of reach.

In addition to these concerns, the duration of the sit-down djäkamirr work period is impossible to accurately determine as some women spend days and others many weeks awaiting the arrival of baby. The determination of active djäkamirr support (i.e. work) versus expectant waiting is **unable to be defined in employment legislation and therefore unable to be recorded to create accurate time and wage records.** The complexity of these determinations are compounded by current health practices that routinely removes women and thus the djäkamirr worker, from their usual home environment with a range of complex negative impacts to reproductive rights and autonomy, perinatal health outcomes, alongside cultural and physical safety. This then compounds pre-existing social and health perinatal inequities.

Addressing Known Inequities

Djäkamirr workers will require significant on-the-job mentoring to address vocational readiness and financial literacy challenges such as developing a shared understanding about taxation, superannuation, Centrelink reporting requirements and depending on the work model, administrative compliance such as insurance, Australian Business Number, invoicing etc. It is likely that most djäkamirr will have low functional English literacy, which will further complicate and compound existing inequities and require more time to provide adequate support.

Work Model Compliance Framework

Western Employment Law

Djäkamirr work is broadly framed by Australian commonwealth employment legislation including the *Fair Work Act 2009 (Cth)*, *Independent Contractors Act 2006 (Cth)*, the *Superannuation Guarantee Act 1992 (Cth)* and taxation legislation. These laws are not recognised by Yolŋu living and working on their sovereign Yolŋu lands.

In Western employment law, workers can only be classified as being in relationship as an employee and employer, or principal and contractor. These definitions rely on common law and various statutory instruments depending on the context that the question is being asked. For instance, payments made to workers are treated differently for the purposes of superannuation compared to the accrual of service-based entitlements such as annual leave.

Changes introduced under the *Fair Work Amendment (Protecting Vulnerable Workers) Act 2017, section 557:C* clearly places burden on employers to disprove workers allegations of failure to pay entitlements. This can only be achieved by keeping contemporaneous and accurate time and wage records. **This means any djäkamirr work model where such records are unable to be contemporaneously kept are vulnerable to materially indefensible claims in breach of the *Fair Work Act, 2009, as well as the Independent Contractors Act 2006.***

Risks

Workers may contest their relationship is one of employment- a 'sham contract' *Fair Work Act 2009: sect 357* or that the contract terms are unfair under the *Independent Contractors Act 2006 (Cth)*. In either case, accurate contemporaneous wage records are essential to navigating a resolution.

An unfair contract is broadly determined through considering:

- Terms of when contract was made
- Relative bargaining strengths of parties
- Undue influence or pressure, or unfair tactics
- Remuneration less than an employee
- Additional matters (6)

In circumstances where there is significant inequality in bargaining power and a sociocultural driver to contribute to community and be of service, there is likely a heightened risk of a contract being viewed by the Court as unfair or harsh. One of the key means to reflect on the relative unfairness of the contract and the means for determining damages, is by calculating the specific benefits that would be otherwise payable demonstrated by reviewing accurate time and wage records.

Liabilities

Where it is found that the contract between the djäkamirr and the principal is either a ‘sham’ or otherwise to be set aside as ‘harsh’ or ‘unfair’, the consequences arising are significant and multifaced.

Damages

The principles of remedies apply broadly such that the applicant be paid at least the amount they would have received were they engaged as an ‘employee’ appropriately, relying on the time and wage records (with the reverse onus outlined above), where the principal will be vulnerable to paying:

1. Back-payment of wages, based on the assertion of the applicant as to the amount of the time actually worked; and
2. Accrued entitlements to service-based leave (such as annual and long service).

The Fair Work Act 2009 was amended by the *Fair Work (Protecting Vulnerable Workers) Act 2017* to include a presumption where accurate records are not kept in favour of the applicant (section 557C, *Fair Work Act 2009*). In circumstances where it is impossible for the records to be kept, the damages awards for back-payments are likely to be extreme.

Penalties

Due to the changes introduced in 2017 in the *Fair Work (Protecting Vulnerable Workers) Act*, where contraventions of civil remedy provisions in the Fair Work Act are found, the penalties applicable to that contravention are increased by a factor of 10 where they are ‘serious contraventions’. Broadly, a contravention will be ‘serious’ where it involves more than one applicant who has suffered as a result of the breach (section 557A, *Fair Work Act 2009*).

In the case of the djäkamirr work model, given it is intended to be applicable across all participants, a breach will most likely classify as ‘serious’.

The penalties are:

- \$66,600 per contravention for corporate entities (and \$666,000 for ‘serious contraventions’); and
- \$13,320 per contravention for individuals ‘involved in’ the contraventions (and \$133,200 for ‘serious contraventions’).

The *Fair Work Act 2009 (Cth)* allows parties to litigation to seek to have the penalties awarded in a case paid to parties other than the Commonwealth. In many cases, the applicant will seek to have them paid to themselves, and it has been known for third parties to be awarded the penalties as compensation for taking the time to run the case for the applicant – such as unions.

In *Construction, Forestry, Mining and Energy Union v BHP Coal Proprietary Limited (No.5)* [2013] FCA 1384, Collier J observed at [25]:

There is extensive authority supporting the proposition that, in circumstances where penalty proceedings in an industrial context were commenced by a party other than an enforcement agency, any pecuniary penalties ordered payable by the Court are ordinarily be paid to the party prosecuting the proceedings. Such an order has been referred to as the usual order.

In practice, the award of penalties in employment litigation often far outstrips the total amount of damages paid to an aggrieved worker. For many applicants, there is an explicit commercial motivation

for bringing a claim which achieves a substantial penalty award. It is not a stretch to consider that an interested legal third party would fund litigation to target the substantial penalty that could be awarded and request the amount to be paid to them. The public profile of the research project mayacerbate the likelihood of this occurring.

Accessorial Liability

Section 550 of the *Fair Work Act 2006* (Cth) provides that individuals ‘involved’ in the contravention of civil remedy provisions can be held personally accountable, such that:

1. Penalties can be awarded for each contravention (and it is noted that in this instance, this would be increased due to the ‘serious contraventions’ provisions).
2. The court may make orders to ensure that the individual makes the payment out of their own resources, and not be ‘indemnified’ for that liability (see *Australian Building and Construction Commissioner v Construction, Forestry, Mining and Energy Union* [2018] HCA 3); and, in some cases
3. The accessory be liable for the damages ordered (in essence, piercing the ‘corporate veil’ and making the accessory obliged to pay as if they were the principal) (see *Fair Work Ombudsman v Step Ahead Security Services Pty Ltd* [2016] FCCA 1482, and the numerous cases that have applied this principle since then).

In the context of the djäkamirr work model that is embedded in a research project the court could determine that Industry partners, research staff, and steering committee members are also accessories to the contraventions.

Funding & Stakeholder Impacts

If it is not possible to quantify the costs of the djäkamirr work model due to the relationship being found to be a ‘sham’, or the contracts being set aside for being ‘unfair’ or ‘harsh’, then the model is liable to be significantly impacted. Claims against any funding pool may be substantial, and if funding has been exhausted, the individual accessories are exposed to meet that judgement debt.

Further, due to the ability to obtain penalties as a benefit of litigation under the *Fair Work Act 2009*, stakeholders are exposed to the financial incentive that applicants will have to include, as accessories to the contraventions, as many individuals and organisations as they possibly can. Even beyond the risk of actually being subject of a penalty order, each of those respondents will need to engage in a litigation process, which in and of itself contains a significant time and financial cost.

International Examples

While further investigation is necessary, of note is Canada which legally recognises the right of First Nations people to self-government in *section 35 of the Constitution Act, 1982*, (7) Tailored Community Self-Government Agreements empower First Nations people to practice self-determination by lawfully enabling them to make critical decisions about services and programs delivered in their community. This includes choices around:

- Protecting language and culture
- Education of people
- Land management
- Business partnerships
- Job creation. (7)

This legislated right to self-determination has allowed health service innovation, with Ontario and Quebec having laws that provide exemptions from registration for First Nations midwives working

within their own communities.(8) In Ontario, First Nations midwives are recognised and regulated by their own communities and are exempt from colonial registration requirements with the *Ontario Midwifery Act* endorsing traditional midwives to publicly use the title ‘Aboriginal Midwife’.(8) While not yet activated, Quebec also has a statutory exemption that allows First Nations midwives to not be registered as long as they are recognised as midwives by the First Nations community they serve and have an entered an agreement with Government. (8)

These international examples provide compelling examples of a Western Government making **legislative exemption to free First Nations people from rigid and harsh colonial legislation that inhibits them from exercising their rights to self-determination.**

Possible Work Models & Implications

In consideration of these legislative frameworks and the context-bound inability to keep accurate time and wage records, it is very difficult to **operationalise a Western employment legislative compliant decolonised work model.** At this stage of the project and in accordance with the unique working context, we can only identify four work model options all with legal and cultural risks (see Table 1).

Table 1: Djäkamirr Work Models & Implications

Model	Characteristics	Outcomes & Risks
Djäkamirr private contractors	<ul style="list-style-type: none"> No mechanism of transferring funding to women and families to contract their own djäkamirr. No oversight and accountability of how funds are spent. Djäkamirr do not have necessary vocational readiness to work as private contractors 	<ul style="list-style-type: none"> Failure Misappropriation of funding ‘Sham’ as well as ‘harsh’ and ‘unfair’ contracting risk on participants (primarily Yolŋu)
Third Party contracts djäkamirr workers	<ul style="list-style-type: none"> Fee-for-result payment i.e., Care Packages No accurate time and wage records possible. Mentoring to address vocational readiness. 	<ul style="list-style-type: none"> Breach of employment legislation and significant liabilities. Decolonised and culturally appropriate work model ‘Sham’ as well as ‘harsh’ and ‘unfair’ contracting risk on participants (expanding to include more stakeholders)
Third Party employs djäkamirr workers	<ul style="list-style-type: none"> Fee-for-service payments i.e., Hourly payment No accurate time and wage records possible, especially during sit down period. 	<ul style="list-style-type: none"> Breach of employment legislation and significant liabilities for a wide range of stakeholders Time focussed employment and colonised way of working. Contravention of the Rights of Indigenous People
Djäkamirr Yolŋu Cooperative	<ul style="list-style-type: none"> Group membership and cultural governance Requires bookkeeping and financial oversight with auditing. 	<ul style="list-style-type: none"> Decolonised and culturally appropriate work model

	<ul style="list-style-type: none"> • Will take time to establish membership and reach shared understanding 	
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Recommendations

To address the complexities of operationalising a djäkamirr work model that is compliant with Western employment legislative and supports decolonised employment, embracing Yolŋu ways of working, we recommend seeking further consultation and advice from Industrial Relations Industry experts, government, and project stakeholders to develop:

- Short term low-risk alternatives
- Long-term sustainable djäkamirr work model

The project has an approved Ethics approval undertake these consultations [HREC# 2022-4291].

Short term alternatives

Possible short-term alternatives to paid work could be framed around vocational educational training placement stipends as the djäkamirr undertake their certified training. This requires further consideration of compliance regarding Vocational Training Certificates, Abstudy benefits and stipend payments. **This in no way addresses the long-term project vision of djäkamirr** being given recognition and payment for working with Yolŋu during their pregnancy and childbirth journey. It does however prevent the project from stalling and provides a short-term low risk solution.

Legislative Exemption and Reform

Longer term, we hope that we will be able to replicate the successful models shown by other jurisdictions, and especially Canada, such that:

- Financial relationships between stakeholders are lawful (which will require an endorsement of self-determination that will sit outside of colonial regulation);
- Efficiency of funding allocated to achieve support is optimised (which will streamline administrative costs for government whilst also allowing administration of the payments to be managed with cultural sensitivity, allowing djäkamirr to provide services without financial detriment); and
- Success of the model be used as a template to allow other Yolŋu enterprise initiatives to be explored.

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