

# background paper 12

## Indigenous cultural and intellectual property and customary law

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## Introduction

Indigenous Australians are the Aboriginal and Torres Strait Islander people, the original inhabitants of Australia. Indigenous cultural and intellectual property refers to Indigenous Australians' heritage. It includes items of cultural expression such as the songs, dances and stories; the traditional knowledge of Indigenous people; and the cultural objects, sites, places, human genetic material including DNA and tissue, environmental material including minerals and species of flora and fauna, ancestral remains and documentation of Indigenous peoples' heritage. Indigenous cultural property and intellectual property are connected, as Indigenous people see the intangible aspects linked with tangible things.

Our research focuses on the following components of Indigenous intellectual property:

- (a) Indigenous cultural expression – including songs, stories, dance and other cultural expression.
- (b) Traditional knowledge – including ecological knowledge of biodiversity, medicinal knowledge, environmental management knowledge, and cultural and spiritual knowledge and practices.

Indigenous cultural and intellectual property rights refer to the inherent rights of Indigenous Australian's to ownership and control of their heritage

Indigenous people today still assert rights to the intellectual property aspects of their Indigenous heritage. Indigenous customary law plays a large part in determining the ownership, use and exploitation of aspects of Indigenous heritage. This Background Paper will explore some of the ways in which Indigenous customary laws relating to the ownership, use and exploitation of Indigenous intellectual property are restrained, protected or facilitated by Commonwealth and state laws.

## Part I: Indigenous customary law and intellectual property

### 1. Indigenous customary law

'Indigenous customary law' in Australia is the body of rules, values and traditions that are accepted by the members of an Indigenous community as establishing standards or procedures to be upheld in that community. Indigenous customary laws are central to identity and cultural maintenance. There are customary laws that govern the ownership and dissemination of songs, stories, dances and ceremonies, medicinal knowledge, and knowledge relating to land care and management. Knowledge often belongs collectively to Indigenous people, according to their laws and customs.

Indigenous people have strong connections with the intellectual and cultural property pertaining to their country and heritage. This connection is the heart of Indigenous people's identity. Indigenous customary laws impose certain obligations and responsibilities over Indigenous intellectual and cultural property. In considering this issue, it should be noted that the recognition of these customary laws may vary from community to community and may be practised at different levels of operation depending on the impact of western influence upon Aboriginal cultures, traditions and lifestyles.<sup>1</sup> Protocol, for instance, is one form of recognising Indigenous customary laws within arts and cultural practice.

Indigenous customary laws are not recognised in the western legal system. Third parties outside the relevant Indigenous community have in the past used Indigenous intellectual property without proper respect for Indigenous laws. This includes unauthorised use as well as the derogatory treatment and distortion of the cultural, religious and social interests of Indigenous communities.

In 1974, the Commonwealth Government set up a working party to investigate the protection of Aboriginal folklore. The Working Party on the Protection of Aboriginal Folklore conducted research and consultation of folklore and customary laws. The working party produced a report in 1981.<sup>2</sup> The main recommendation was the enactment of an Aboriginal

1. Weisbrot D, 'Customary Law' (1981) 1 *Aboriginal Law Bulletin* 3.

2. Findings of the working party are recorded in Department of Home Affairs and Environment, *Report of the Working Party on the Protection of Aboriginal Folklore* (December 1981). The working party defined 'folklore' as the 'body of traditions, observances, customs and beliefs of Aboriginals as expressed in Aboriginal music, dance, craft, sculpture, painting, theatre and literature'.

Folklore Act which would safeguard against certain uses of Aboriginal arts and cultural material that are offensive to Aboriginal people and their traditions, while at the same time encouraging fair and authorised use of Aboriginal arts and cultural material. The report's recommendations were never followed up and such an Act was neither drafted nor enacted.

To oversee the operation of the Act, the working party proposed the establishment of a Folklore Commission and a Folklore Board made up of Indigenous custodians. In this way, Indigenous custodians would have the power to authorise the use and reproduction of their arts and cultural material and receive payment for such uses.

The report recommended a regime for dealing with Aboriginal folklore that was out of copyright.<sup>3</sup> The report also recommended that copyright owners should not be able to stop Indigenous groups from using traditional designs, dance or music. It also recommended that copyright and designs legislation should be altered to allow customary users to exercise their customary rights freely in relation to folklore and not have their rights to use folklore interfered with by other copyright owners.<sup>4</sup>

Further recommendations covered the issues of secret/sacred material. 'Secret/sacred' refers to information that, under customary laws, is made available only to the initiated or information that can be seen only by men or women or particular people within the culture. With respect to non-customary use of secret/sacred materials, the working party recommended that there should be criminal sanctions.<sup>5</sup>

The recommendations of the report were not acted upon. In 1986 the Australian Law Reform Commission (ALRC) released a report,<sup>6</sup> which recommended that Indigenous customary laws should be recognised in appropriate ways by the Australian legal system to the extent that it is acceptable to the communities and individuals concerned and in such a way that is consistent with fundamental human rights. The ALRC supported specific legislative protection for the use of secret/sacred material other than in accordance with custom; the mutilation, debasement or export of items of folklore; and the use of items of folklore for commercial gain without payment to traditional owners.<sup>7</sup>

Since the above two reports were completed there have been a number of cases in the courts where Indigenous artists have used copyright laws to protect their cultural expression.<sup>8</sup>

In 1994, the then Keating government released an Issues Paper, *Stopping the Rip-Offs*,<sup>9</sup> seeking comments about the issues that affect the intellectual property protection of Indigenous arts and cultural expression. The paper focussed mainly on the operation of copyright in protecting the ownership and integrity of Indigenous arts and cultural expression. An Inter-Departmental Committee on Indigenous Arts and Cultural Expression (IDC) was established to evaluate the submissions; to consider legislative and policy reform in this area; and to make recommendations to the government. The IDC favoured the enactment of specific legislation; however, it was considered that further consultation with Indigenous Australians was required to gain more insight into the reform needs of Indigenous people. The Howard government took power in 1996 and changed the focus of reform agenda in this area. No report was given by the government in respect of the many submissions received in response to the Issues Paper.

In 1997, the Aboriginal and Torres Strait Islander Commission (ATSIC) established an Indigenous Reference Group on Indigenous Cultural and Intellectual Property (IRG). The IRG, chaired by then Commissioner Ian Delaney, consisted of Indigenous people from around Australia who had expertise and experience regarding cultural and intellectual property. ATSIC also funded the Australian Institute of Aboriginal and Torres Strait Islander Studies to coordinate a project and work with the IRG to develop practical reforms, which would improve protection and ensure recognition of Indigenous cultural and intellectual property. *The Our Culture: Our Future* report<sup>10</sup> was the outcome of that consultancy project. The report outlines Indigenous peoples' desired outcomes of how Indigenous cultural and intellectual property should be protected and recognised at law. The main recommendation was for sui generis legislation to recognise Indigenous peoples' rights to their cultural and intellectual property. The report also sets out a range of reforms, including changes to existing and new laws, administrative changes, and education and awareness.

Since the report there have been increased global calls from Indigenous knowledge holders, for the western laws relating to intellectual property, to recognise the rights of Indigenous knowledge holders and creators of traditional

3. Ibid 37.

4. Ibid 45.

5. Ibid 31.

6. Australian Law Reform Commission, *The Recognition of Aboriginal Customary Laws*, Report No 31 (1986).

7. Ibid, vol 1, [470].

8. *Milpurrru v Indofurn Pty Ltd* (1995) 30 IPR 209 (*Carpets Case*); *Bulun Bulun v R & T Textiles Pty Ltd* (1998) 157 ALR 193.

9. Commonwealth, *Stopping the Rip-Offs: Intellectual Property Protection for Aboriginal and Torres Strait Islander Peoples*, Issues Paper (1994).

10. Janke T, *Our Culture: Our Future, Report on Australian Indigenous Cultural and Intellectual Property Rights* (Sydney: ATSIC, 1999).

cultural expression. In 1992 the parties to the Earth Summit adopted the *Convention on Biological Diversity*.<sup>11</sup> A number of Articles require the parties to consider the rights of Indigenous peoples. Article 8(j) of the *Convention on Biological Diversity* requires member states, subject to their national legislation, to

respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity and promote their wider application with the approval and involvement of the holders of such knowledge, innovations and practices and encourage the equitable sharing of the benefits arising from the utilization of such knowledge, innovations and practices.

In 2000, the World Intellectual Property Organisation (WIPO) established an Inter-Governmental Committee (IGC) on Intellectual Property Genetic Resources, Traditional Knowledge and Folklore. In 2003, the IGC extended its mandate for a further three years and is expected to deliver some form of international instrument. Within this framework, several member states and many Indigenous people have argued for greater recognition and use of customary laws and protocols in formulating systems for protection of expressions of folklore and traditional cultural expression. In particular this includes applying customary laws to issues relating to acquiring, maintaining and enforcing traditional cultural expression rights.<sup>12</sup>

## 2. Indigenous intellectual property: scope and terminology

### Terminology

Indigenous Australians view the world they live in as an integrated whole.<sup>13</sup> The land, cultural sites and objects are interlinked with the knowledge, stories, dances and motifs associated with them. Indigenous intellectual property is entwined with Indigenous cultural property. Cultural property is distinguished from intellectual property in western law and is regarded as being the tangible aspect of culture, whereas intellectual property refers to the intangible aspect.<sup>14</sup> From an Indigenous worldview, both are seen as linked and make up the past and living heritage of Indigenous Australians.

The terminology used in this area includes: 'Indigenous cultural and intellectual property (ICIP)'; 'Indigenous heritage'; 'folklore'; 'Indigenous cultural expression'; and 'traditional knowledge'. In Australia the terms 'Indigenous cultural and intellectual property' and 'Indigenous heritage' are mostly used. This usage stems from the *Our Culture: Our Future* report commissioned in 1997. The following definition appears in that report.

Indigenous cultural and intellectual property refers to Indigenous peoples' rights to their heritage. 'Heritage' consists of the tangible and intangible aspects of the body of cultural practices, resources and knowledge systems that have been developed nurtured and refined (and continue to be developed, nurtured and refined) by Indigenous people and passed on by Indigenous people as part of expressing their cultural identity including:

- Literary, performing and artistic works (including music, dance, song ceremonies, symbols and designs, narratives and poetry);
- Languages;
- Scientific, agricultural, technical and ecological knowledge (including cultigens, medicines and sustainable use of flora and fauna);
- Spiritual knowledge;
- All items of moveable cultural property, as defined by the UNESCO Cultural Property Convention 1970, including burial artefacts;
- Indigenous ancestral remains;
- Indigenous human genetic material (including DNA tissues);
- Cultural environment resources (including minerals and species);
- Immovable cultural property (including Indigenous sites of significance, sacred sites and burials);
- Documentation of Indigenous people's heritage in all forms of media (including scientific, ethnographic research reports, papers and books, films, sound recordings).

Indigenous heritage is a living one and includes items that may be created in the future based on that heritage.<sup>15</sup>

11. [1993] ATS 32 5, June 1992 (entered into force on 29 December 1993).

12. World Intellectual Property Organisation, 'Traditional Cultural Expressions/Expressions of Folklore Legal and Policy Options' (Paper prepared by the Secretariat, Inter-Governmental Committee on Intellectual Property Genetic Resources, Traditional Knowledge and Folklore, 6th Session, Geneva, 15–19 March 2004).

13. Janke, *Our Culture: Our Future*, above n 10, 2.

14. Aroha Te Pareake Mead, 'Cultural and Intellectual Property Rights of Indigenous Peoples of the Pacific' (Paper presented to the Pacific Regional Workshop on UN Draft Declaration, Suva, Fiji, 4 September 1996) 3.

15. Janke, *Our Culture: Our Future*, above n 10, 11.

This definition follows the international standard developed in 1997 by a worldwide study undertaken by the Chairperson of the United Nations Working Group on Indigenous Populations, Professor Daes.<sup>16</sup> This terminology was also used in the *Our Culture: Our Future* report as its point of reference.<sup>17</sup> 'Indigenous cultural and intellectual property' is also the term used in the *Draft Declaration of the Rights of Indigenous Peoples*.<sup>18</sup>

Likewise, in this paper we use the term 'Indigenous cultural and Intellectual property'. However, we note that internationally the terminology in this area is developing given that, since 2000, the WIPO has the international mandate for preparing policy objectives and principles for the protection of traditional knowledge and folklore through the work of the IGC.<sup>19</sup>

## ICIP rights

The *Our Culture: Our Future* report<sup>20</sup> found that Indigenous Australians have a comprehensive view of culture. ICIP includes literary, performing and artistic works; scientific, agricultural and technical knowledge; all items of movable cultural property; human remains; immovable cultural property; and documentation of Indigenous peoples' heritage in archives, films, photographs and all forms of new media.

Within Indigenous Australian groups, there are consistent principles underlying the ownership and control of ICIP relating to communal ownership, cultural integrity and consent procedures. However, the Australian legal framework limits the ability of Indigenous people to adequately protect their ICIP from exploitation by outsiders.

ICIP is commercially sought after by non-Indigenous entities and has applications in a range of industries. The Aboriginal art industry turns over tens of millions of dollars every year. The primary retail sale of Aboriginal art was estimated to be \$18.5 million in 1988.<sup>21</sup> The secondary sales market has become the stronger sector of the industry in recent years with auction houses such as Sothebys and Deutche-Menzies recording record sales in Aboriginal art. Additionally, there is a large reproduction market of Aboriginal art. Indigenous motifs and designs appear on a range of products including wine bottles, carpets, t-shirts, aeroplanes and cars. The turnover from licensing of Indigenous art has been estimated by one industry representative to be in the vicinity of \$180 million per annum.

The success of the industry has also generated a large spin-off fake market which produces bogus items of Aboriginal art that are not produced by Indigenous people. Some examples include copyright infringements of art, from text books to making carpets.<sup>22</sup> Many rip-offs of Indigenous art are stylised versions of Indigenous art such as the x-ray koala. The x-ray style of art comes from the Arnhem Land region where there are no koalas; therefore, to depict an x-ray style koala is a bastardisation of Aboriginal art.<sup>23</sup>

The *National Aboriginal and Torres Strait Islander Rural Industry Strategy* valued the Australian rural industry at \$27 billion each year.<sup>24</sup> Indigenous people contribute their knowledge and resources to this industry including wild animal resources, bush foods and traditional medicines.

Within the tourism industry Indigenous stories and traditional knowledge are used by tour operators to relate information about sites and places, as well as to promote bush tucker tours. Research on the subject indicates that international tourists wish to have an Aboriginal experience.<sup>25</sup>

Indigenous Australians are concerned that, in light of new technology, their cultures may be under threat even further from unauthorised exploitation. For example, digital images of Aboriginal art, MP3 files of Indigenous traditional music or sacred information about cultural heritage sites, or stories on government databases can be used by third party commercial operators from the far corners of the globe without Indigenous people even knowing that the information has been taken or used.

16. Daes EI, *Final Report on the Protection of the Heritage of Indigenous Peoples* Report E/CN.4/Sub.2/1995/26 (1995) and *Supplementary Report: Protection of the Heritage of Indigenous Peoples* Report E/CN.4/Sub.2/1996/22 (1996).

17. Janke, *Our Culture: Our Future*, above n 10.

18. International Work Group for Indigenous Affairs, *Draft Declaration of Indigenous People's Rights* (2004).

19. See <<http://www.wipo.int>> for the papers relating to the work of the Inter-Governmental Committee on Intellectual Property Genetic Resources, Traditional Knowledge and Folklore.

20. Above n 10.

21. Department of Aboriginal Affairs, *The Aboriginal Arts and Crafts Industry: Report of the Review Committee* (1989) (Altman Report).

22. The source of unauthorised copyright for some of the artwork in *Milpurruru v Indofum* above n 8 was an art portfolio produced by the National Aboriginal Gallery with authority from the artists.

23. Golvan C, 'Aboriginal Art and the Protection of Indigenous Cultural Rights' (1992) 7 *European Intellectual Property Review* 227, 229.

24. ATSIC and Department of Primary Industries and Energy, *National Aboriginal and Torres Strait Islander Rural Industry Strategy* (May 1997) 7.

25. Guldberg HH, *The Arts Economy 1968–1998: Three Decades of Growth in Australia*, Research Report (Sydney: Australia Council, 2000) 55.

## The nature of ICIP

There are many different Indigenous Australian groups. Each particular group has ownership of rights over its particular cultural heritage. There may also be some overlap between groups and a number of groups may share certain cultural stories and traditions.

Despite the many different Indigenous groups, the *Our Culture: Our Future* report found that there were consistent principles underlying the ownership and control of ICIP.<sup>26</sup>

### 1. Communal ownership and attribution

Indigenous cultural and intellectual property is collectively owned, socially based and evolving continuously. A great number of generations contribute to the ongoing creation of ICIP. Attribution as a group for this contribution is a cultural right.

### 2. Continuing obligation under Indigenous laws to maintain cultural integrity

Another common factor shared by Indigenous groups is that there are generally well-defined laws within each group governing rights to use and deal with Indigenous cultural and intellectual property. These laws are based on positive obligations toward cultural knowledge and the need to ensure that the culture is maintained and protected so that it can be passed on to future generations. To ensure this, there is often an individual or group who is the custodian or caretaker of a particular item of heritage. The traditional custodian acts as a trustee, whose role it is to pass on the knowledge and ensure that its use conforms to the best interests of the community. This type of relationship was noted in *Milpurruru v Indofurn*<sup>27</sup> where the court noted that the Indigenous Australian artist, Ms Banduk Marika, had the authority to depict traditional, pre-existing designs in her artworks by virtue of her birth. Whilst she held this right, she held the knowledge embodied in the work on trust for the rest of the clan. In the more recent case of *Bulun Bulun v R & T Textiles*,<sup>28</sup> the court held that the Indigenous Australian artist, Johnny Bulun Bulun, owed fiduciary obligations to the traditional custodians of Ganabingu culture, to preserve the integrity of their culture and ritual knowledge.

### 3. Consent and decision-making procedures

Similarly, consent to share Indigenous cultural knowledge must be given by the group as a collective. Such consent is given through specific decision-making procedures, which differ depending on the nature of the particular cultural item. Consent procedures may differ from group to group. Furthermore, consent is not permanent and may be revoked.

## What ICIP rights do Indigenous people want recognised?

In the research and consultation phase for the *Our Culture: Our Future* report,<sup>29</sup> over 80 submissions were received in response to a discussion paper that asked a range of questions. One issue concerned what rights Indigenous people want recognised to their ICIP. The final report considered that there are fundamental rights Indigenous people need in order to protect and maintain their cultures including the right to own and control ICIP. Based on the submissions received, the following rights were listed:

- The right to own and control ICIP.
- The right to control the commercial use of ICIP in accordance with traditional customary laws.
- The right to benefit commercially from the authorised use of ICIP.
- The right to full and proper attribution.
- The right to protect sacred and significant sites.
- The right to own, use, control and manage lands, territories and natural resources including biological materials such as minerals and species.<sup>30</sup>
- The right to prevent derogatory, offensive and fallacious uses of ICIP.

26. Janke, *Our Culture: Our Future*, above n 10, 7–9.

27. Above n 8.

28. Above n 8.

29. Janke, *Our Culture: Our Future*, above n 10.

30. Daes EI, *Prevention of Discrimination and Protection of Indigenous Peoples, Indigenous People's Permanent Sovereignty Over Natural Resources*, E/CN.4/Sub.2/2004/30, 13.

- The right to have a say in the preservation and care, protection, management and control of cultural artefacts, human remains, archaeological and significant traditional sites, traditional food resources, and traditional and contemporary cultural expressions such as rituals, legends, and the designs used in, for instance, art, weaving, dances, songs and stories.
- The right to control use of traditional knowledge of medicinal plants, agricultural biodiversity, environmental management, and the recording of cultural customs and expressions.
- The right to control use of the particular language, which may be intrinsic to cultural identity, knowledge, the skill and teaching of culture.<sup>31</sup>
- The right of permanent sovereignty over natural resources.<sup>32</sup>

The rights of Indigenous people are not adequately protected within the Australian legal framework. These will be discussed in the following sections of this Background Paper. The *Our Culture: Our Future* report recommended a range of proposals for recognising these rights including changes to laws; developing sui generis legislation and administrative systems; developing monitoring and collection systems; developing cultural infrastructure; and developing protocols and codes of ethics.

### 3. Intellectual property laws

'Intellectual property' refers to the bundle of rights that the law grants to individuals for the protection of creative, intellectual, scientific and industrial activity, such as ideas (also in material form) and inventions. Such rights are for the protection of economic investment in novel, inventive and/or creative effort. The *Convention Establishing the World Intellectual Property Organisation* defines 'intellectual property' as:

The rights relating to

- literary, artistic and scientific works,
  - performances of performing artists, phonograms, and broadcasts,
  - inventions in all fields of human endeavour,
  - scientific discoveries,
  - industrial designs,
  - trademarks, service marks, and commercial names and designations,
  - protection against unfair competition,
- and all other rights resulting from intellectual activity in the industrial, scientific, literary or artistic fields.<sup>33</sup>

Intellectual property rights are designed to inspire creative and innovative efforts by granting specific economic rights to inventive persons as a reward for sharing their contributions and to stimulate further inventive activities. Through international treaties such as the *Berne Convention for the Protection of Literary and Artistic Works*,<sup>34</sup> intellectual property rights are enforced internationally in countries that are signatories to such treaties.

In Western Australia the Commonwealth intellectual property laws apply. The *Australian Constitution* gives the Commonwealth power to make special laws regulating 'copyright, patents of inventions and designs, and trade marks'.<sup>35</sup> The following Commonwealth laws protect intellectual property:

- *Copyright Act 1968* (Cth)
- *Patents Act 1990* (Cth)
- *Trade Marks Act 1995* (Cth)
- *Designs Act 2003* (Cth)
- *Plant Breeder's Rights Act 1994* (Cth)
- *Circuit Layouts Act 1989* (Cth).

Australian intellectual property laws provide some protection for Indigenous intellectual property where Indigenous people can meet the criteria for protection. To some extent the laws can be used to protect ICIP and Indigenous Australians have used copyright in particular to protect their cultural interests. Despite this, intellectual property laws have limitations in recognising customary laws relating to ICIP.

31. Janke, *Our Culture: Our Future*, above n 10, 8.

32. Daes, above n 30.

33. *Convention Establishing the World Intellectual Property Organisation*, 14 July 1967, Stockholm (entered into force 26 April 1970) Art 2(viii).

34. ATS 1978 No 5, Paris, 24 July 1971 (entered into force 1 March 1978).

35. *Australian Constitution* s 51(xviii).

## 4. Recognition of ICIP within Australian intellectual property laws

### Copyright

#### What is copyright?

Copyright is a bundle of rights granted by statute to creators of artistic and cultural material. The law protects categories of works under the *Copyright Act 1968* (Cth) (Copyright Act) from unauthorised use and dissemination of:

- literary work,
- dramatic work,
- artistic work, and
- musical work.<sup>36</sup>

Under Part IV of the Copyright Act, rights are given to subject matter other than works; that is, the makers of:

- sound recordings,<sup>37</sup>
- cinematograph films,
- television and sound broadcasts, and
- published editions.

#### Requirements of copyright

Copyright protection does not require registration. Copyright exists in a work as soon as it is made. It protects a sound recording as soon as it is made. It also protects a film when it is made, when the things necessary for the production of the first copy of the film have been completed.<sup>38</sup>

The following requirements must be met for copyright to exist in a work:

##### (a) Originality

For copyright to subsist in a work, the work must be original.<sup>39</sup> This means that it is not copied from another work in that the creator has put into the work the necessary degree of labour, skill and judgment to produce the work, giving it some quality or character, which the raw material did not possess.

As a continuing expression of culture, many Indigenous people draw from the wealth of their cultural heritage by painting pre-existing clan designs, dancing ceremonies and telling stories which have been handed down from their ancestors. It is this nature of Aboriginal art that has raised the question of whether a new Aboriginal work, based upon or derived from a traditional pre-existing theme, could satisfy the copyright requirement of originality in that its reliance on tradition limits scope for interpretation and individuality.<sup>40</sup> While the issue depends on the particular facts at hand, von Doussa J in *Milpurruru v Indofurn* stated that 'although the artworks follow traditional Aboriginal form and are based on dreaming themes, each artwork is one of intricate detail and complexity reflecting great skill and originality'.<sup>41</sup>

This issue was examined in Australian case law including *Bulun Bulun v Nejlam Investments Pty Ltd*<sup>42</sup> and in *Milpurruru v Indofurn*.<sup>43</sup> Based on the specific facts of these cases, the courts considered that there was sufficient scope for individual artistic interpretation notwithstanding that the Indigenous artworks in question followed pre-existing traditional designs.

##### (b) Material form

A work must be written down or recorded in some permanent tangible form. Non-permanent forms of cultural expression such as performances of stories, songs and dances will not meet this requirement. The person who records or writes down information, including important cultural material, will be considered to have put it into material form and

36. While the *Copyright Act 1968* (Cth) does not define these terms, s 10 provides guidance on what these categories include.

37. *Copyright Act 1968* (Cth) s 10 defines a sound recording as 'the aggregate of the sounds embodied in a record'.

38. *Copyright Act 1968* (Cth) s 23(4)(a).

39. *Copyright Act 1968* (Cth) s 32.

40. See Banki P, 'Protection of Expressions of Folklore' in World Intellectual Property Organisation *Australian Copyright Program for Asia and the Pacific* (Canberra, 2–13 November 1987) 222.

41. Above n 8, 216.

42. (Unreported settled matter, Federal Court, Darwin, 1989).

43. Above n 8.

is therefore recognised as the author and copyright owner. Copyright law provides protection for the form of expression of ideas rather than the ideas themselves.<sup>44</sup>

Many Indigenous cultural works are oral and are not recorded in material form. Some forms of art are ephemeral such as body painting and sand paintings. These may not be protected under copyright.

As Indigenous oral stories, songs and information are recorded for the first time, the person putting them into material form is recognised as the copyright owner. If the traditional owner writes down an oral story, that individual is recognised as the copyright owner. Problems arise for Indigenous people when someone outside the community or group has recorded an oral story because the recorder or their employer is the copyright owner of the recording. Similar issues arise for Indigenous dances, songs and music.

#### (c) Identifiable author

There must be an identifiable author for copyright to subsist in a work.<sup>45</sup> Given the nature of Indigenous arts and cultural expression, an individual person or persons may not always be identifiable. For example, many rock paintings depict important cultural works. There is no identifiable artist; therefore, copyright is never asserted by any individual. The works are being reproduced in an increasing variety of ways including postcards, websites and books. Some uses, especially where the rock art images are altered, are inappropriate and cause offence to the Indigenous custodians.

#### (d) Meet the connecting factors

The author must be a qualified person when the work is first published; that is, 'an Australian citizen, an Australian protected person or a person resident in Australia'.<sup>46</sup> Published means supplied or made available to the public.<sup>47</sup>

### Expression not style or idea that is protected

It is the expression that is protected and not the underlying idea. For example, copyright protects an Indigenous painting such as Johnny Bulun Bulun's *Magpie Geese and Waterlilies at the Waterhole*. The artist has permission to paint the images and rarrk designs in that painting under Ganalbingu law. The underlying story and images are not protected by copyright. In Western Australia, the situation is the same. Rock art images/styles such as the wandjina can only be reproduced and used according to customary laws. The wandjina has been used and reproduced in art, literature and media in a range of ways without proper customary ties being recognised.

#### Wandjina surfboard logo

The wandjina is a creative being which is part of the cultural heritage of the Ngarinyin people. In 1996 the wandjina was reproduced as a logo for a surfboard manufacturer. The actual image comes from a cave painting that only initiated men were permitted to visit. According to customary laws only traditionally authorised men are allowed to reproduce the image.<sup>48</sup> The reproduction of the wandjina on the surfboard angered the Ngarinyin elders. To them, such use was against the cultural laws and undermined their cultural processes. They wanted it stopped.

The surfboard maker alleged to have obtained permission from one member of the clan. According to the other traditional custodians, the particular person did not have authority to authorise reproduction of the image in this way. The traditional custodians could not use copyright laws to stop the reproduction because the image was taken from rock art created many years ago. The communal ownership and reproduction rights under Mowanjum law were not recognised under copyright.<sup>49</sup> The traditional custodians were able to speak directly with the surfboard maker who, out of respect for their law, stopped using the logo.

### Authorship and ownership

Under the Copyright Act, the author of a work is the person who first reduces it to material form.<sup>50</sup> The general rule is that the author of a work is usually the first owner of copyright in that work.<sup>51</sup> However, there are circumstances that will

44. *Walter v Lane* [1900] AC 539.

45. *Copyright Act 1968* (Cth) s 32.

46. *Copyright Act 1968* (Cth) s 32(4).

47. *Copyright Act 1968* (Cth) s 29(1)(a).

48. Janke T, *Indigenous Arts and Cultural Expression: Cases and Matters Settled Out of Court and Disputes that Never Went to Court* (1996).

49. *Ibid.*

50. Rickertson S & Creswell C, *The Law of Intellectual Property: Copyright, Designs and Confidential Information* (Sydney: Law Book Company, 2nd ed., 2002) [14.10].

51. *Copyright Act 1968* (Cth) s 35(2).

vary from this and it is not unusual for the author and the owner of the copyright to be different entities. For example:

(a) Employees' works owned by employers

Employers will own the copyright in works created by their employees in the course of a contract of employment. The work must be created as part of the artist's employment duties.<sup>52</sup>

(b) Government copyright

The Crown refers to the Commonwealth or state government. Works, films and sound recordings made under the direction and control of the Crown may be asserted to be owned by the government.<sup>53</sup>

## Who owns copyright in films and sound recordings?

The copyright in films and sound recordings is quite distinct from copyright in works. The maker of the sound recording is the owner of copyright in the sound recording.<sup>54</sup> The owner is the person who owns the master tape at the time it is first recorded. However, where the recording is made for another person and fees are paid, then the copyright in the recording belongs to the person who commissions it.<sup>55</sup>

The maker of a cinematograph film is the owner of any copyright in the resulting film.<sup>56</sup> However, where films are made for another person and fees are paid, then the copyright in the film belongs to the person who commissioned it.<sup>57</sup>

This is a concern for Indigenous people whose stories and knowledge have been recorded in the past without proper consent. There is no copyright recognised in a performance and the person who made the recording is often the controller of the material. For example, one Indigenous community was concerned about a linguist who had copyright ownership of a tape recording of a deceased elder speaking language. The community wanted access to the tape and to control the dissemination of the information contained on it; however, the linguist asserted copyright in the recording.

## Rights of copyright owners

The rights granted to copyright owners under the Copyright Act are:

### Literary, dramatic or musical works (such as books, plays or songs)

The exclusive right to:

- reproduce the work in material form,<sup>58</sup>
- publish the work,<sup>59</sup>
- perform the work in public,<sup>60</sup>
- communicate the work to the public,<sup>61</sup> or
- make an adaptation of the work.<sup>62</sup>

### Artistic works (such as paintings, photographs, carvings and jewellery)

The exclusive right to:

- reproduce the work in material form,
- publish the work, or
- communicate the work to the public.<sup>63</sup>

52. Section 35(6) of the *Copyright Act 1968* (Cth) states that where the work 'is made by the author in pursuance of the terms of his or her employment by another person under contract of service of apprenticeship, that other person is the owner of any copyright subsisting in the work'.

53. *Copyright Act 1968* (Cth) s 176.

54. *Copyright Act 1968* (Cth) s 97(2).

55. *Copyright Act 1968* (Cth) s 97(3).

56. *Copyright Act 1968* (Cth) s 98(2).

57. *Copyright Act 1968* (Cth) s 98(3).

58. *Copyright Act 1968* (Cth) s 31(1)(a)(i).

59. *Copyright Act 1968* (Cth) s 31(1)(a)(ii).

60. *Copyright Act 1968* (Cth) s 31(1)(a)(iii). A public performance refers to any form of presentation to the public, whether visual and aural, or merely even aural. The definition of performance includes not only performances of works encompassed in films, CDs etc, but extends to live performances, speeches, addresses, lectures and sermons, for example. The right to make a public performance or material protected by copyright is a separate right to the right to communicate to the public.

61. *Copyright Act 1968* (Cth) s 31(1)(a)(iv). This is a broad-based, technology-neutral right. Introduced by the *Copyright Digital Amendment Act 2000* (Cth), it replaces the previous technology-specific rights of broadcast and transmission to subscribers of a diffusion network.

62. *Copyright Act 1968* (Cth) s 31(1)(a)(v).

63. *Copyright Act 1968* (Cth) s 31(1)(b).

Sound recordings (such as tapes and CDs)

The exclusive right to:

- make a copy of the sound recording,
- cause the recording to be heard in public,
- communicate the recording to the public, or
- enter into a commercial rental arrangement.<sup>64</sup>

Cinematograph films (such as videos and movies)

The exclusive right to:

- make a copy of the film,
- cause the film to be seen or heard in public, or
- communicate the film to the public.<sup>65</sup>

## Duration of copyright

The period for protection of copyright is, generally:

- published artistic, literary, musical and dramatic works – 70 years from the death of the author/creator;<sup>66</sup>
- unpublished artistic, literary, musical and dramatic works – 70 years from the date of publication;<sup>67</sup> and
- films and sound recordings – 70 years from when they are made.<sup>68</sup>

After the period of copyright protection ends, anyone can copy or make use of that work, film or sound recording without seeking permission from the copyright owner. After the copyright period ends, there is no need for copyright fees to be paid. Moral rights also cease to exist in that work.

The Copyright Act does not recognise any continuing right of the Indigenous custodians to their ICIP after the term of copyright protection has expired. Cultural works remain part of an Indigenous clan's culture and are of great significance to their traditional custodians in perpetuity. The unauthorised use may be against cultural laws and may cause deep offence. For instance, the reproduction of wandjina and mimi figures on commercial products is a concern for Indigenous custodians. These images are copied from rock art, which has no copyright protection; therefore, traditional owners cannot use copyright to stop reproductions of the rock art. There are many types of Indigenous cultural works that do not fit within the legislative scheme of the Copyright Act. For instance, works that were produced a long time ago or where the author cannot be identified accurately and, in any case, has passed away long ago, are not easily protected under the Copyright Act.

The duration periods for protection of copyright were extended to 70 years in accordance with the Australia–United States Free Trade Agreement<sup>69</sup> to be consistent with United States copyright laws. This extension was effective on 1 January 2005. Any works, films and recordings that expired before 1 January 2005 are out of copyright. This development would extend protection for Indigenous works that meet the requirements of copyright; however, there would still be the problem of works falling into the public domain after the end of the copyright period.

The prominent Indigenous artist, Albert Namatjira died in 1959 and the copyright in his works passed to the Public Trustee for the Northern Territory government who, in 1983, authorised the sale of Namatjira's copyright to Legend Press. Senator Aden Ridgeway proposed that the artworks of Albert Namatjira should be protected in perpetuity and not just for the conventional copyright period. He called on the government to protect the Namatjira legacy by giving it ongoing protection, and to arrange a buy back of the copyright in Namatjira's works to be held in trust for the benefit of his family.<sup>70</sup> According to Dr Matthew Rimmer, 'there is no scope under the *Copyright Act 1968* (Cth) to extend the duration of copyright beyond its natural term in individual cases'.<sup>71</sup> This is because the idea runs counter to the underlying notion of intellectual property that cultural works should enter the public domain. However, in the United

64. *Copyright Act 1968* (Cth) s 85(1).

65. *Copyright Act 1968* (Cth) s 86.

66. *Copyright Act 1968* (Cth) s 32(2).

67. *Copyright Act 1968* (Cth) s 32(3).

68. *Copyright Act 1968* (Cth) s 93.

69. Signed 18 May 2004.

70. Ridgeway A, Namatjira Exhibition Speech, National Gallery of Australia, 22 November 2002, <[http://www.adenridgeway.com/speeches/namatjira\\_nga.pdf](http://www.adenridgeway.com/speeches/namatjira_nga.pdf)> 7.

71. Dr Rimmer, 'Albert Namatjira: Copyright Estates and Traditional Knowledge', (June 2003) *Incite*, Art 24(6) <[www.alia.org.au/publishing/incite/2003/06/albert.namatjira.html](http://www.alia.org.au/publishing/incite/2003/06/albert.namatjira.html)>.

Kingdom the famous work 'Peter Pan' is protected under the United Kingdom's copyright law for the benefit of a charitable cause.<sup>72</sup>

## Communal ownership

ICIP is communally owned. Traditional knowledge, songs, stories, dances and resources are held for the benefit of the group as a whole. Copyright provides ownership of a work to the individual creator. But how does this apply to Indigenous material that is created through the process of handing on a song or story and creating over the generations?

There are provisions for joint ownership of copyright for works produced by 'the collaboration of two or more authors and in which the contribution of each author is not separate from the contribution of the other author or the contributions of the other authors'.<sup>73</sup> Each author must have been responsible for reducing the work to a material form rather than having an incidental role or supplying the idea for the work.<sup>74</sup> The artist must contribute to the work by way of skill and labour. It is not enough to inspire or make suggestions. Hence, the joint ownership of a work does not refer to the handing down of Indigenous knowledge over the generations.<sup>75</sup> The following example illustrates this.

Magabala Books is an Indigenous publishing house based in Broome, Western Australia. Magabala Books publishes traditional stories. These stories will be protected by copyright. The author is the person who has written the story and he or she is the copyright owner of his or her expression. The rights of the community to the story are not protected under copyright; however, the role of customary laws and communal ownership of stories are recognised by Magabala Books in terms of the protocols and management practices.

Recent copyright case law has commented on the role of Indigenous customary laws and communal ownership. In *Bulun Bulun v R & T Textiles*,<sup>76</sup> the applicant claimed that the rights to paint and permit the reproduction of the artistic work are native title rights. The court found that such rights were not native title rights. Firstly, on the grounds that certain statutory procedures regarding determinations of native title rights were not followed; and secondly, there was a larger conceptual barrier. Von Doussa J stated:

The principle that ownership of land and ownership of artistic works are separate statutory and common law institutions is a fundamental principle of the Australian legal system which may well be characterised as 'skeletal' and stand in the road of acceptance of the foreshadowed argument.<sup>77</sup>

However, the court did recognise that the artist owed a fiduciary obligation to the group. In this way, he had to deal with the copyright in a manner consistent with the customary obligations associated with his right to depict the images in his work. This might allow the clan representative to take action where the author is unknown or unwilling to take action against a third party infringer.

## Performers' rights

Performers' rights are rights provided under the Copyright Act to performers of performances including readings, recitals, dances and dramatic improvisations.<sup>78</sup> The performers' rights allow performers to prevent certain unauthorised uses of their performances,<sup>79</sup> such direct or indirect recordings and broadcast of the performances<sup>80</sup> without the authority of the performer. There are some exceptions including news reading, recital or delivery<sup>81</sup> and sports activities.<sup>82</sup>

Filmmakers and sound recordists must obtain consent from performers for the recording of performances of dance and story. Such consent may be in writing but it may also be implied. Once consent is given, the filmmaker or sound recordist can deal with the film or recording by way of the copyright without consulting the original performer.

72. World Intellectual Property Organisation, Intergovernmental Committee of Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore, 'Traditional Cultural Expressions/Expressions of Folklore: Legal and Policy Options' (6th Session paper prepared by the Secretariat, 15–19 March 2004) 23.

73. *Copyright Act 1968* (Cth) s 10(1).

74. Ricketson S, *The Law of Intellectual Property: Copyright, Designs and Confidential Information* (Sydney: Law Book Co, 2nd ed., 1999) [14.135].

75. Above n 8.

76. *Ibid.*

77. *Ibid* 204.

78. *Copyright Act 1968* (Cth) s 248A(1) defines 'performance'.

79. *Copyright Act 1968* (Cth) s 248J.

80. *Copyright Act 1968* (Cth) s 248G.

81. *Copyright Act 1968* (Cth) s 248A(2)(b).

82. *Copyright Act 1968* (Cth) s 248A(2)(c).

A performer's right is not the same as copyright.<sup>83</sup> Indigenous performers may think they are consenting for a film to be used for one purpose only, but then the use is much wider. The film may be circulated to a much wider audience than the original performance. The story or dance performance told on the film is in this way controlled by the filmmaker or sound recordist without the ability of the relevant Indigenous community to ensure that the cultural material is portrayed in a respectful way. There are also cultural issues in some communities where it is against customary practices for images of deceased persons to be circulated. This type of cultural practice is not recognised under copyright law. However, we note that there is a developing industry practice within the Australian film industry to include warning and notice before broadcasting images of Aboriginal people that may have deceased since the filming occurred.<sup>84</sup>

Performers' rights do not apply to still photography. Indigenous performers of ceremonies or songs who are photographed by still photographers cannot use these provisions to stop unauthorised use. A commercial photographer at an Indigenous dance festival photographed an Indigenous dance group.<sup>85</sup> The photographer reproduced the photograph as postcards and licensed the rights to a CD manufacturer to reproduce on the cover of CDs of stylised Indigenous music that was unrelated to the dance group or their clan. The image was also reproduced on a related website. All of this was done without the dance group's permission. The dance group wanted the commercial sale of the image stopped. The unauthorised commercial sale of the photograph was offensive as it reproduced the group in body paintings for ceremony; they were also in a particularly relevant dance stance and one of the dancers had since died. Copyright in a photograph vests with the maker of the photograph and, under copyright laws, the photographer is generally free to exploit that photograph commercially.

The WIPO Performances and Phonograms Treaty (WPPT)<sup>86</sup> requires contracting parties to grant performers the exclusive right to exploit their performances, whether live or recorded. The performer's consent is necessary before exploitation of any recording of a performance can take place. This includes the making and selling of records or videos of the performance. Prior authorisation by a performer would not be required before the broadcasting or public performance of a record, but the performer would share a statutory payment with the producer of the recording. The WPPT also includes the moral or personal rights of attribution and integrity for sound performers,<sup>87</sup> along the lines of the moral rights it is proposed to grant creators of works and makers of films.

Australia has not acceded to the WPPT; however the signing of the Singapore–Australia Free Trade agreement and the Australia–United States Free Trade Agreement requires the nation to accede to the WPPT.<sup>88</sup> The Free Trade Agreement Implementation Bill 2004 (USA) introduces a range of changes to the Copyright Act, which would expand performers' rights, including the creation of performers' copyright in sound recordings. The changes introduce a new definition of performance, as required by Art 2(a) of the WPPT, to expand the current definition to include a performance on an expression of folklore.<sup>89</sup> This may be of benefit to Indigenous performers as the consent of the folklore performer would be required prior to commercial exploitation of the film or recording, and the performer may also be entitled to share in any royalties.

## Copyright cases

### *Yangarriny Wunungmurra v Peter Stripes Fabrics*

In 1983, Yangarriny Wunungmurra took Peter Stripes Fabrics to the Federal Court for unauthorised use of his painting, *Long-necked Freshwater Turtles by the Fish Trap at Gaanan*.<sup>90</sup> The artwork was an important cultural work. The artist had learnt to paint the story from Gawirrin Gumana's father, a senior member of the clan who also had rights under Aboriginal laws to the story embodied in the painting. However, the artist added his own style of signature to the work in the way he depicted the turtle. The work also included the background diamond shapes and cross-hatching patterns to denote social and ancestral relationships. By changing elements of the design, Peter Stripes Fabrics offended Aboriginal law.<sup>91</sup>

83. Janke, *Our Culture: Our Future*, above n 10, 56.

84. Janke T, *Towards a Protocol for Filmmakers Working with Indigenous Content and Indigenous Communities* Issues Paper (Australian Film Commission, 2003) 11.

85. See Janke T, *Minding Culture: Case Studies on Intellectual Property and Traditional Cultural Expressions* (Geneva: World Intellectual Property Organisation, 2003) 87–99.

86. World Intellectual Property Organisation, *Performances and Phonograms Treaty*, Geneva, 20 December 1996.

87. *Ibid*, Art 5.

88. Art 17.1.3.

89. Varghese J, 'Guide to Copyright and Patent Law Changes in the US Free Trade Implementation Bill 2004', (2004) 3 *Current Issues Brief* <<http://www.aph.gov.au/library/pubs/CIB/2004-05/05cib03.htm>>.

90. *Wunungmurra v Peter Stripes Fabrics*, (unreported, Federal Court of Australia, 1983). See the recent article by Burns E Coleman, 'Aboriginal Art and Identity: Crossing the Border of Law's Imagination' (2004) 12 *Journal of Political Philosophy* 24.

91. Stevenson N, 'Infringement of Copyright in Aboriginal Artworks' (1985) 17 *Aboriginal Law Bulletin* 3.

Using copyright laws, the artist was able to show that his painting had been copied from a catalogue produced as part of one of the first major Aboriginal art exhibitions, *Aboriginal Australia*. The court awarded damages of \$1 500 and account of profits as well as ordering the delivery up of the infringing fabric.<sup>92</sup>

### ***Yumbulul v Reserve Bank***

In *Yumbulul v Reserve Bank of Australia*,<sup>93</sup> Mr Yumbulul created a morning star pole under the authority given to him as a member of the Galpu clan group. The pole, a funerary object, was sold to the Australian Museum for public display. As part of an agency agreement, Mr Yumbulul licensed his reproduction rights to the Aboriginal Artists Agency. The right to reproduce the pole was subsequently licensed to the Reserve Bank of Australia to reproduce on the bicentennial \$10 note.

Mr Yumbulul received considerable criticism from his community for allowing this to happen. According to the traditional custodians, such use exceeded the authority he had been given under customary laws. While it was permissible for the pole to be permanently displayed to educate the wider community about Aboriginal culture, it was not considered culturally appropriate for such a sacred item to be reproduced on money.

Mr Yumbulul initiated action in the Federal Court against the Aboriginal Artists Agency and the Reserve Bank. The Court found that Mr Yumbulul mistakenly believed the licence to the Aboriginal Artists Agency and the Reserve Bank would impose limitations on the use of the pole similar to those in Aboriginal customary laws. Mr Yumbulul alleged that he would not have authorised the licence to the Reserve Bank had he fully understood the nature of it. However, the court ruled that there was insufficient evidence to establish this. In reaching its decision the court noted that 'Australia's copyright law does not provide adequate recognition of Aboriginal community claims to regulate the reproduction and use of works which are essentially communal in origin'.<sup>94</sup>

### ***Bulun Bulun v Flash T-shirt (settled matter)***

In 1989, the artistic works of Johnny Bulun Bulun and 13 other Aboriginal artists were reproduced without authority on t-shirts. The artistic works embodied pre-existing traditional images of the artist's clan group. Johnny Bulun Bulun was entitled by custom to depict magpie geese and waterholes. The case did not proceed to hearing and was settled for approximately \$150 000 for compensation and costs for alleged infringement of their copyright in the artworks by the manufacturer and two retailers.

### ***Milpurrruru v Indofurn Pty Ltd (Carpets Case)***

In *Milpurrruru v Indofurn Pty Ltd*,<sup>95</sup> von Doussa J discusses copyright infringement of Indigenous artworks, which concerned creation of stories of cultural significance to the artist applicants and the cultural groups to which the artists belonged. The case involved the unauthorised reproduction of Indigenous artworks on carpets that were made in Vietnam and imported into Australia. The main findings of the case covered the following issues.

**Originality:** Despite the fact that many Indigenous artworks follow pre-existing traditional designs, a work may be original if there is sufficient detail and complexity reflecting great skill and originality.

**Substantial reproduction:** Some carpets had altered versions of the artworks. Under the Copyright Act it is not necessary for an artwork to be an exact copy for it to infringe copyright. Copying occurs when an artwork has been substantially reproduced. Generally, to consider this the court will look at the striking similarities between the original artwork and the infringing copy. Quality is more important than quantity and depends largely on the nature of the parts taken from the original artwork. Von Doussa J noted that the altered images on the carpets, although not identical to the artworks, reproduced parts of the original artworks that were centrally important to that particular artwork. For example, the part taken from Tim Payunka Tjapangati's artwork *Kangaroo and Shield People Dreaming* to produce one of the infringing carpets reproduced an important part of the painting which depicted a sacred man's story. This was one factor that led the court to conclude that copyright had been infringed.<sup>96</sup>

92. Johnson V, 'The First Copyright Case' in National Indigenous Arts Advocacy Association and Macquarie University *Copyrites: Aboriginal Art in the Age of Reproductive Technologies* (Sydney, 1996) 15.

93. (1991) 21 IPR 481.

94. *Ibid* 490.

95. *Above n 8*.

96. *Ibid* 678–679.

**Cultural harm damages:** The court's decision regarding damages was also significant. Having decided that the carpets were infringements of copyright, the court awarded approximately \$188,000 in damages and ordered the importers to hand over the unsold carpets. Part of the award was given in consideration of the personal hurt and cultural harm. The judge considered that the misuse of the artwork caused great upset and cultural harm to the artists. The court noted that the standing of the artist within the community can be affected where the artworks are reproduced without the consent of the group and in a culturally offensive manner. This was because, regardless of whether the artists authorised the reproduction of their artworks on carpets, they were responsible under Indigenous law for the transgression that had occurred and were liable to be punished for such a breach.

**Remedies – jointly awarded:** The joint applicants of the case requested that the damages be made as a global award to the artists as a group so that the artists, the representatives of the deceased artists and the Public Trustee could discuss and determine the distribution in accordance with their cultural wishes. The court looked at the fact that the *Administration and Probate Act 1969* (NT) allowed the estate of intestate Aboriginals to 'be distributed in accordance with the traditions of the community or group to which the intestate Aboriginal belonged'.<sup>97</sup>

The court agreed to make a global award to the artists as a group rather than by assessing each artist separately according to the loss and damage that each suffered.<sup>98</sup> The court considered that:

[T]here may be scope, even in the case of the estates administered by the Public Trustee, for the distribution of the proceeds of the action to those traditional owners who have legitimate entitlements according to Aboriginal law to share compensation paid by someone who has without permission reproduced the artwork of an Aboriginal artist.<sup>99</sup>

We note that the Western Australian administration laws allow for similar distribution of intestate Aboriginal estates. There is a special section dealing with customary law for intestacy in the *Aboriginal Affairs Planning Authority Act 1972* (WA).<sup>100</sup>

### ***Bulun Bulun v R & T Textiles***

In *Bulun Bulun v R & T Textiles Pty Ltd*<sup>101</sup> issues of collective ownership and copyright were discussed. Johnny Bulun Bulun is a well-known Indigenous artist from Arnhem Land. His work *Magpie Geese and Water Lilies at the Waterhole* was altered and copied on fabric imported into Australia by R & T Textiles. The artistic works incorporated imagery that is sacred and important to the Ganalbingu people's cultural heritage.

The important aspect of the case was that George Milpurrruru, a representative of the Indigenous owners of the Ganalbingu people, also commenced action as co-applicant. Mr Milpurrruru brought proceedings in his own right, claiming that the Indigenous owners of Ganalbingu country are the equitable owners of the copyright subsisting in the artistic works. The court dismissed Mr Milpurrruru's claim on the basis that in doing so provided some interesting points regarding the application of copyright to Indigenous culture as follows:

- Evidence of customary law may be used as a basis for the foundation of rights recognised within the Australian legal system.
- The applicants claimed that intellectual property is an incident of native title in land. The Minister for Aboriginal and Torres Strait Islander Affairs, who was granted leave to make submissions to the court, argued that pleading may give rise to the claim that the Ganalbingu people were entitled to a determination in the proceedings that they were the native title holders of the Ganalbingu country. The *Native Title Act 1993* (Cth) contains provisions for applications for determination of native title. In the absence of such an application, the Federal Court has no jurisdiction to make a determination of native title in land. Von Doussa J considered that in this case there was no application for determination of native title; therefore, the court did not have jurisdiction to make a determination on the issue of native title.
- The joint ownership provisions of the Copyright Act effectively preclude any notion of group ownership in an artistic work, unless the artistic work is a 'work of joint ownership' within the meaning of s 10(1) of the Copyright Act. In this

97. *Milpurrruru v Indofurn*, above n 8, 688; *Administration and Probate Act 1969* (NT) s 71B.

98. Remedies are usually calculated on the basis on loss and damage to each individual.

99. *Milpurrruru v Indofurn*, above n 8, 240.

100. *Aboriginal Affairs Planning Act 1972* (WA) s 35.

101. Above n 8.

case, von Doussa J considered that there was no evidence to suggest that any person other than Mr Bulun Bulun was the creative author of the artistic work.

- There was no evidence as to any form of express agreement of a contractual nature that vested an equitable interest in the ownership of the copyright in Mr Milpurrurru or the Ganalbingu people.
- Mr Bulun Bulun owes under fiduciary duty to Mr Milpurrurru and the Ganalbingu people to protect the ritual knowledge that he has been permitted to use under customary laws. Their primary right, in the event of a breach of obligation by the fiduciary, is a right in personam to bring an action against the fiduciary to enforce the obligation. The court considered that Mr Bulun Bulun had fulfilled this obligation by taking legal action; therefore there was no need for the intervention of equity to provide any additional remedy to the beneficiaries of the fiduciary relationship.

### ***Bulurru v Oliver***

In *Bulurru Australia Pty Ltd v Oliver*<sup>102</sup> an Indigenous artist, Mr Dale Oliver, licensed his artwork to Bulurru. Mr Oliver owned copyright in his artworks and entered into a written agreement with Bulurru in 1992 for a term of three years with an option to renew. In 1994 a disagreement arose, in which Mr Oliver sought to reject the renewal option. Bulurru commenced court action against Mr Oliver seeking a declaration that its option to renew was validly exercised.

Around the time the dispute arose, Bulurru engaged a graphic designer to produce designs that reflected aspects of Mr Oliver's designs. Mr Oliver argued as a cross-claim that the new designs infringed the copyright in his original licensed designs. The court accepted that the Bulurru artworks were derivative and reflected Mr Oliver's ideas, concepts and many of his techniques. The court held that some of the new designs were substantial reproductions of the original artworks of Mr Oliver. Davies AJ stated:

Overall I am satisfied that there has been deliberate copyright, not merely of Mr Oliver's ideas but of the essence of the design which appears in the bottom half of Mr Oliver's Kangaroo Tracking, and that a substantial part of Mr Oliver's work has been reproduced.<sup>103</sup>

However, the court looked at some of the other new designs and considered that they were substantially different from Mr Oliver's work. Even though the designer used Mr Oliver's artwork in preparing the new designs, they did not breach copyright.<sup>104</sup>

## **Moral rights**

Moral rights were introduced into the Copyright Act by the *Copyright Amendment (Moral Rights) Act 2000*.<sup>105</sup> Moral rights are:

- The rights of attribution of authorship.
- The rights not to have authorship falsely attributed.
- The rights of integrity of authorship.<sup>106</sup>

Only individuals have moral rights.<sup>107</sup> Companies do not have moral rights. Currently, an Indigenous clan group or community cannot generally assert moral rights collectively. However, the federal government has recently drafted the Indigenous Communal Moral Rights Bill 2003 (Cth). The rights apply to creators of artistic, literary, dramatic or musical works, and directors, producers and screenwriters of films. The rights apply to authors of literary, dramatic, musical and artistic works and authors of cinematograph films.<sup>108</sup>

Unlike copyright, moral rights are not economic rights, although damages may be granted as relief for an infringement of moral rights.<sup>109</sup> Moral rights are inalienable rights. They cannot be assigned or sold. Moral rights are in addition to other rights under copyright;<sup>110</sup> therefore, they remain with the author where the copyright does not belong to the author. For instance, employees hold moral rights in created works, even if the copyright belongs to the employer.

The current moral rights provisions exist for the benefit of individuals.

102. (2000) 49 IPR 384.

103. *Ibid* 14.

104. *Ibid* 13.

105. The new laws came into effect on 21 December 2000.

106. *Copyright Act 1968* (Cth) s 189.

107. *Copyright Act 1968* (Cth) s 190.

108. Authors of cinematograph films include the director, the producer (where that person is a natural person) and the screenwriter of the film.

109. *Copyright Act 1968* (Cth) s 195AZA.

110. *Copyright Act 1968* (Cth) s 192.

- **The right of attribution**

The author of a work has a right to be identified as the author of that work.<sup>111</sup> The author is entitled to be attributed where the work has been used in a certain way. For example, the author of an artistic work is entitled to be attributed where his or her work is reproduced in material form, published, exhibited or transmitted.<sup>112</sup>

Identification of the author of a work must be clear and reasonably prominent;<sup>113</sup> that is, attached to each copy or adaptation made of the work.<sup>114</sup> The right of attribution in all works continues for the period of copyright;<sup>115</sup> that is, 50 years after the death of the author.

- **The right not to be falsely attributed as the author**

An author has the right not to have authorship of a work falsely attributed.<sup>116</sup> It is false attribution to deal with an altered literary, dramatic, musical or artistic work, or reproduction of the work, as if it were unaltered, knowing that the work or reproduction is in fact altered.

- **The right of integrity**

The author has the right of integrity of authorship in respect of the work.<sup>117</sup> This right provides that an artist may bring an action if the work is subjected to derogatory treatment. 'Derogatory treatment' in respect of an artistic work includes:

- (a) the doing, in relation to the work, of anything that results in a material distortion of, the destruction or mutilation of, or a material alteration to, the work that is prejudicial to the author's honour or reputation; or
- (b) an exhibition in public of the work that is prejudicial to the author's honour or reputation because of the manner or place in which the exhibition occurs.<sup>118</sup>

The right of integrity is not infringed if a work is subjected to derogatory treatment and it can be proved that the treatment was reasonable in all the circumstances,<sup>119</sup> or if the author consented to the treatment.<sup>120</sup> Indigenous authors should be cautious when considering commercial agreements and contracts of employment that ask them to consent to acts that would usually infringe their moral rights. However, even if consent was not given, the fact of employment<sup>121</sup> and industry practice may be taken into account when deciding whether the derogatory treatment was reasonable in all the circumstances.<sup>122</sup>

Preserving the overall integrity of the work and the underlying story or ritual knowledge is extremely important to the proper representation of Indigenous art and film. Digital technology allows greater access to copyright materials and increases the ways in which copyright works and films can be distorted and altered. The right of integrity is a useful right for Indigenous artists to protect the integrity of their works.

- **Remedies for moral rights infringements**

The remedies available for a successful action include:

- An injunction imposed by the court.
- Damages for loss resulting from the infringement.
- An order for a public apology.
- An order that the false attribution or derogatory treatment be removed or reversed.

When pursuing copyright claims, Indigenous artists have asked for public apologies from infringers to rectify their reputations. This had not been a remedy until moral rights laws were introduced. The moral rights laws open the door to this type of remedy.<sup>123</sup>

111. *Copyright Act 1968* (Cth) s 193(1).

112. *Copyright Act 1968* (Cth) s 194(2).

113. *Copyright Act 1968* (Cth) s 195AA.

114. *Copyright Act 1968* (Cth) s 195 AB.

115. *Copyright Act 1968* (Cth) s 195AM.

116. *Copyright Act 1968* (Cth) s 195AC.

117. *Copyright Act 1968* (Cth) s 195AI.

118. *Copyright Act 1968* (Cth) s 195 AK.

119. *Copyright Act 1968* (Cth) s 195AS. Certain matters must be taken into account when determining if the treatment was reasonable. These are listed in s 195AS(2) for literary, dramatic, musical and artistic work; and s 195AS(3) for films.

120. *Copyright Act 1968* (Cth) s 195AW (film or work included in a film); and s 195AWA (work that is not a film or included in a film).

121. *Copyright Act 1968* (Cth) s 195AS(2)(e)–(g) (literary, dramatic, musical or artistic works); and s 195AS(3)(f)–(h) (films).

122. *Copyright Act 1968* (Cth) s 195AS.

123. Janke T, 'A Moral Issue: Moral rights and Indigenous People's Cultural Rights', *NIAAA Newsletter*, Autumn 2001, 2–3.

## Balgo Artists: Olympic museum website

From 10 July to 15 October 2000 in Lausanne, Switzerland, the Olympic Museum Foundation presented an exhibition entitled *Aboriginal Art: An Immemorial Fountain of Youth*. This exhibition contained works by Australian Aboriginal artists including Western Australian Aboriginal artists Tjampitjin and Richard Tax Tjupurulla. The exhibition posters, the invitations to its preview, the promotional flyers and the exhibition catalogue featured a reproduction of a work entitled *Kulkun Near Lake Mackay in the Great Sandy Desert* by Tjampitjin, without indicating the name of the artist or the title of the work.

During the exhibition, and for several weeks afterwards, the Olympic Museum website<sup>124</sup> featured images of three of the works shown at the museum; viz *Bush Flowers* by Mary Kemarre; *Tiddal in the Great Sandy Desert* by Richard Tax Tjupurulla; and *Kulkun near Lake Mackay in the Great Sandy Desert* by Tjampitjin. These works were reproduced on the museum website without the authorisation of the authors or their assigns. During this time, people visiting the website were able to download the images to use them as wallpaper on their computer screens.

The artists pursued the matter arguing that under the Swiss Copyright Law<sup>125</sup> the Olympic Museum had infringed their copyright and rights of paternity (moral rights). When notified of the issue, the Olympic Museum immediately agreed to stop its conduct and removed the images from its website. The issue relating to damages continued and the matter was settled, damages paid, and a written letter of apology given to the artist signed by Juan Antonio Samaranch, President of the Olympic Museum Foundation.<sup>126</sup> The apology was also published on the website in four languages asking any people who downloaded the images to delete them from their hard drives.

## Indigenous communal moral rights

Moral rights are individual rights only. They belong to the copyright owner of a work. For example, the work 'Djanda and the Sacred Waterhole', created by Banduk Marika, is a communally owned design and theme belonging to the Rirratingu clan. If the work was derogatorily treated, Banduk would have a remedy under moral rights. However, the Rirratingu clan do not have any moral rights under the Copyright Act even though, under their customary laws, the clan or a person on behalf of the clan may have responsibility for the cultural integrity of a work. This does not necessarily have to be the artist. This requirement excludes Indigenous persons with authority other than the author (creator) from legally exercising moral rights over works embodying traditional ritual knowledge.<sup>127</sup>

## Exposure Draft Copyright Amendment (Indigenous Communal Moral Rights) Bill 2003

In December 2003, the government drafted proposed amendments to the Copyright Act for Indigenous communal moral rights. The draft Bill is said to give effect to the government's 2001 election policy commitment and to a commitment made to Senator Aden Ridgeway in parliament during the passing of the Moral Rights Bill in December 2000.<sup>128</sup>

The Exposure Draft Copyright Amendment (Indigenous Communal Moral Rights) Bill 2003 (Cth) was sent to selected Indigenous organisations for comment. To date, there has been no public discussion relating to the amendments. The Bill proposed the following regime:

### Must be a copyright work or film

For Indigenous communal moral rights to be recognised, they must be in a copyright work or a film with the rights attached. This means that there must be a work as defined under the Copyright Act; that is, the particular cultural item must be:

- an artistic, musical, dramatic or literary work which meets the requirement of the Copyright Act, or
- a film as defined under the Copyright Act.

124. <<http://www.museum.olympic.org>>.

125. Federal Law on Copyright and Neighbouring Rights (RS/SR 231.1) October 1992, as last amended in December 1994.

126. E Colman, 'Olympic Apology to Artists', *The Australian*, 17 February 2003, 3.

127. Janke, 'A Moral Issue', above n 123, 2–3.

128. Intellectual Property Branch, Department of Communications, Information Technology and the Arts and the Copyright Law Branch, Attorney General's Department, *Indigenous Communal Rights Paper*, (Canberra, December 2003).

To be protected under communal moral rights, the cultural material item must be one that is:

- in material form and is original, or
- created by a living artist or one that has only been deceased for less than 50 years.

Many works of cultural significance will not meet this requirement because they will be oral in form or older than 50 years after the death of the artist.

#### Communal moral rights exist alongside individual moral rights

The Bill provides that communal rights will be exercisable independently of the individual author's copyright. It also exists separately from the copyright in the relevant material. In this respect, Ian McDonald notes that Indigenous communal moral rights apply to a cultural work. A person seeking permission to use the work will need to address:

- copyright clearance,
- individual moral rights issues to be observed, and
- Indigenous communal moral rights issues to be observed.<sup>129</sup>

#### Duration of Indigenous communal moral rights

The Bill proposes that Indigenous communal moral rights would exist in a work for the duration of the copyright period. The right should be in perpetuity if it is to adequately recognise Indigenous customary laws to protect cultural material.

#### Before first dealing requirements

For there to be Indigenous communal moral rights in a copyright work, the following requirements must be met before the first dealing of the work:

##### (i) Drawn from traditional base

The work must be drawn from the 'particular body of traditions, observances, customs and beliefs held in common by the Indigenous community'.<sup>130</sup> A community is defined loosely and can include an individual, family, clan or community group.

##### (ii) Voluntary agreement that communal moral rights exist

A voluntary agreement must be entered into between the creator of the work and the Indigenous community. The requirement of a voluntary agreement puts the onus on the Indigenous community. Most Indigenous artists and creators who live and work in their communities would obligingly meet this requirement. It is current practice for them to consult and practice cultural protocols or to observe customary laws, and to seek consent and permission to use culturally owned material. Outsiders who are not Indigenous or third party users perform the majority of abuses of communal moral rights. For example, in the *Carpets Case*<sup>131</sup> the altered designs were copied images from text books. These types of abuses will not be protected against by the proposed amendments. The community would not be able to make third party non-Indigenous users subject to a voluntary agreement, and in many cases may not even know about them until they have occurred.

##### (iii) Notice of association must be given to third parties

There must be acknowledgement of the Indigenous community's association with the work.<sup>132</sup> This requires notice of association to be given by the community and the author. This can be done by the community in respect of works and films on which it has been consulted; however, it will not be able to give 'notice' on works and films on which it has not been consulted. These are likely to be the works and films that are infringing communal moral rights.

##### (iv) Consent from interest holders

Interest holders in the work need to have consented to the Indigenous communal rights in the work. In this respect, an Indigenous community has no rights if an interest holder refuses or fails to consent to the Indigenous communal moral rights arising.

129. McDonald I, 'Indigenous Communal Moral Rights', *Australian Intellectual Property Law Bulletin*, 16 July 2003.

130. Exposure Draft Copyright Amendment (Indigenous Communal Moral Rights) Bill 2003 (Cth), clause 195AZZZT, 1(a), 39.

131. Above n 8.

132. Exposure Draft Copyright Amendment (Indigenous Communal Moral Rights) Bill 2003 (Cth), clauses 195AZZL, 195AZZM.

## How are Indigenous communal moral rights exercised?

An Indigenous community that has Indigenous communal moral rights in respect of a work may exercise those rights only through an individual who is the authorised representative in respect of the work. This authorised representative may be recognised by the community according to its cultural practices, or may be appointed by the community according to decision-making processes.

### Defences, notices and consents

There is no Indigenous communal moral rights infringement if the actions were reasonable or if the authorised user consented.

### Reasonableness defence

Matters to be taken into account when considering whether an action has been given derogatory treatment are listed in the proposed legislation and include the nature of the relationship between the author of the work and the Indigenous community at the time of any contact, or attempted contact, by the person for the purposes of:

- determining whether the community has a right of integrity in respect of the work;
- seeking consent to an act or omission that would infringe the right;
- the nature of the Indigenous community at the time of any contact or attempted contact for the purposes of:
  - determining whether the community has a right of integrity, or
  - seeking consent to an act or omission;
- the nature of the work;
- the purpose for which the work is used;
- the context in which the work is used;
- any practice, in the industry in which the work is used, that is relevant to the work or the use of the work;
- any practice contained in a voluntary code of practice, in the industry in which the work is used, that is relevant to the work or the use of the work; and
- whether the treatment was required by law or was otherwise necessary to avoid a breach of any law.<sup>133</sup>

### Consent

It is not an infringement of an Indigenous communal moral right of an Indigenous community in respect of a work to do, or omit to do, something if the act or omission is within the scope of a written consent given by the community's authorised representative in respect of the work. There is provision which makes consent from undue pressure invalid. It is important to note that there already is considerable inflexibility in some industries with individual moral rights. Many authors are faced with wide consent clauses in funding and commission agreements. A similar situation could occur with Indigenous communal moral rights if there is a consent regime in the model.

### Remedies

If the authorised representative brings a successful action of infringement, the following remedies are available:

- Injunction;
- Damages for resulting loss;
- Declaration that an Indigenous communal moral right has been infringed;
- An order that the defendant make a public apology for the infringement; and
- Any false attribution or derogatory treatment be removed or reversed.

The public apology is often a remedy that Indigenous artists and communities consider culturally appropriate and it is sought as retribution.

### Commentary on the Bill

The draft Bill has been criticised as not being effective. According to Jane Anderson, 'the draft Bill is highly complicated and legalistic, presenting serious practical hurdles for Indigenous people and communities seeking to protect their

<sup>133</sup>. Draft Copyright Amendment (Indigenous Communal Moral Rights) Bill 2003 (Cth).

knowledge and its use'.<sup>134</sup> Jane Anderson states that there is a big difference between the government's stated objective and the current draft presented. She states that it is difficult to see where a remedy might arise for infringement.

Another issue is that there has been limited consultation by the government with Indigenous peoples on the draft Bill. The government has failed to engage Indigenous stakeholders in a meaningful debate on the contents of the Bill. This seems to be a major oversight if the main impetus for the introduction of the Bill was to benefit Indigenous communities. Robynne Quiggin criticises the Bill as being based on the need to provide certainty to third parties in their dealings with Indigenous art, rather than being based on the nature or content of communal ownership.<sup>135</sup>

If Indigenous communal moral rights only exist where there is a voluntary agreement between the creator and the Indigenous community then the following situations occur:

- Non-Indigenous people, who use Indigenous knowledge, stories and songs without permission and do voluntarily agree that the new copyright work they produce has Indigenous moral rights, will not be actionable under these provisions.
- Indigenous creators are more likely to voluntarily agree that Indigenous communal moral rights exist in their works. For these creators, issues of giving attribution and guarding integrity will need to be observed in their arts practice.

Is a violation of customary law an infringement of moral rights? Not all violations of customary law are likely to be infringements of moral rights. The role of customary law in moral rights issues will be important in determining the content of the rights of attribution and integrity.

## Resale royalty

For many years artists, Indigenous and non-Indigenous, have sought the introduction of a resale royalty scheme in Australia. The resale royalty, also known as the *droit de suite*, is an amount paid to artists on sales of their work in the secondary art market.

Underlying the arguments for the resale royalty include concerns for:

- recognition of the poor economic status of artists; and
- large profits made, in some instances by purchasers and sellers of artistic work, with no returns to the artist.

In the case of an Indigenous artist, these arguments are strengthened by recognition of the artist's ongoing connection to the cultural material embodied in some artistic works. For instance, if a painting or other work includes cultural information relevant to the artist, it may often be appropriate that the artist be informed about subsequent sales and receive some share of the sale price. Introduction of the resale royalty in Australia is consistent with Article 14<sup>ter</sup> of the *Berne Convention for the Protection of Literary and Artistic Works*<sup>136</sup> which provides that members of the union may provide for the protection of a resale royalty for artists,<sup>137</sup> but the protection is available only where national legislation for the right is implemented. The nature of the legislation is to be determined by the member country.

The resale royalty operates in a number of jurisdictions in the United States and Europe. Members of the European Union have been directed to implement domestic resale royalty arrangements by 2006.<sup>138</sup>

## Registered designs <sup>139</sup>

Designs laws protect designs as they are applied to products and items. Under Indigenous customary laws, a design or motif belongs to a certain Indigenous cultural group, and there are laws that govern who can use and

134. Anderson J, 'Indigenous Communal Moral Rights: The Utility of an Ineffective Law' (2004) 5(30) *Indigenous Law Bulletin* 8.

135. Quiggin R, 'The Contribution of Protocols and Moral Rights' (Paper presented to the Arts Management Advisory Group, Snapshot 2, Melbourne, 5 August 2004).

136. Article 14ter of the Berne Convention for the Protection of Literary and Artistic Works, (Paris, 24 July 1971) states:

(1) The author, or after his death the persons or institutions authorized by national legislation, shall, with respect to original works of art and original manuscripts of writers and composers, enjoy the inalienable right to an interest in any sale of the work subsequent to the first transfer by the author of the work.

(2) The protection provided by the preceding paragraph may be claimed in a country of the Union only if legislation in the country to which the author belongs so permits, and to the extent permitted by the country where this protection is claimed.

(3) The procedure for collection and the amounts shall be matters for determination by national legislation.

137. Article 1 of the *Berne Convention for the Protection of Literary and Artistic Works*, (Paris, 24 July 1971) states: 'The countries to which this Convention applies constitute a Union for the protection of the rights of authors in their literary and artistic works.'

138. Directive 2001/84/EC, European Parliament and Council of the European Union, *Artists' Resale Right (Droit de Suite) Directive*, 21 September 2001.

139. This section is adapted from Janke, *Looking Out For Culture: Introduction to Indigenous Arts and Culture and Copyright, Trademarks and Designs*, Workshop Paper (Sydney, 2004) 14.

reproduce this material. Can the designs laws be used to protect Indigenous clan designs, didgeridoos, morning star poles and basket weaving techniques that are produced in recognition of Indigenous cultural rights?

In 1993, a review of the *Designs Act 1906* (Cth) undertaken by the ALRC looked at the issue of protecting Indigenous designs as part of the overall review of the Act. The Issues Paper, *Designs*, noted as follows:

Reports of misappropriation and misuse of Aboriginal designs and art have increased with the growing popularity of Aboriginal art. Existing copyright and design law is not adequately equipped to deal with the particular ownership rights which are recognised under Aboriginal customary law. In relation to a particular design, a select few Aborigines, because of their position in the community, may understand the cultural and spiritual significance of the design and have rights to 'own' the design. Other Aborigines will also hold rights of another kind, while others may have no rights in the design. In traditional Aboriginal society the responsibility for safeguarding cultural heritage is vested in a few custodians or guardians who have been given this authority by the community, and free or unrestricted access to traditional designs will result in a serious abuse of the rich Aboriginal heritage.<sup>140</sup>

In its Final Report released in 1995,<sup>141</sup> the review team considered that the issue should be dealt with in a broad-based approach rather than including them as part of the Designs law review. There is no special protection for Indigenous designs or cultural material under the new *Designs Act 2003* (Cth) which came into operation in 2004. The Designs law applies to Indigenous designs as it does to all designs that meet the requirements for protection.

## What is a design?

The *Designs Act 1906* (Cth) defined a design as the 'features of shape, configuration, pattern or ornamentation applicable to an article, being features that, in the finished article, can be judged by the eye, but does not include a method or principle of construction'.<sup>142</sup> An 'article' was defined under the Act to mean any article of manufacture.

The 1906 Act was replaced by the *Designs Act 2003* (Cth). The 2003 Act defines 'design' much more broadly as follows:

'Design' in relation to a product, means the overall appearance of the product resulting from one or more visual features of the product.<sup>143</sup>

A design can only be registered in relation to a product. It is not possible to register a design itself. A 'product' is 'a thing manufactured or hand made'.<sup>144</sup> There is a commercial focus. Indigenous designs such as wandjinas and other clan insignia may not be commercially applied to a product; therefore, they are not registrable as a design under the *Designs Act 2003* (Cth).

## Registration process

Applications must be lodged with the Designs Office of IP Australia, a federal government agency. There is a standard form for applications. Applications must meet minimum filing requirements as stipulated under legislation.<sup>145</sup>

Registered designs can be made enforceable by certification, can carry exclusive rights or can be published only. Published designs do not give any rights.

There are costs and fees payable to IP Australia associated with the registration of a design and the examination process. This does not include legal fees if a lawyer or patent attorney is involved in lodging or prosecuting the application. To register Indigenous designs for protection under this system could be expensive. Many Indigenous groups have little access to legal services and resources to afford registration costs and legal fees.

## Exclusion for insignia

There are exclusion categories in the Designs Regulations for certain insignia, Australian state and Commonwealth flags and emblems, medals and scandalous designs.<sup>146</sup> Clan motifs are signifiers of Indigenous groups and are arguably the same as insignia; however, there are no exclusion categories for Indigenous insignia.

140. Australian Law Reform Commission, *Designs*, Issues Paper No 11 (April 1993) [9.9].

141. Australian Law Reform Commission, *Designs*, Final Report No 74 (1995).

142. *Designs Act 1906* (Cth) s 4(1).

143. *Designs Act 2003* (Cth) s 5.

144. *Designs Act 2003* (Cth) s 6.

145. *Designs Act 2003* (Cth) s 21(2) and Designs Regulations 2004 (Cth) reg 3.01.

146. Designs Regulations 2004 (Cth) reg 4.06.

## New and distinctive

Under the *Designs Act 1906* (Cth), a design had to be 'new' and 'original' at the date of application (priority date). The 2003 Act retains the requirement of 'new' but replaces the 'original' requirement with 'distinctive'.<sup>147</sup> A design must be new in that it is not known or previously used in Australia. A design is new unless it is identical to a design that forms part of the prior art base. The Registrar of Designs may refuse to register a design if, before the date of application, the design has been used previously in Australia or published anywhere in the world.<sup>148</sup>

A design must be 'distinctive' in that it must not be 'substantially similar in overall impression to a design that forms part of the prior art base'.<sup>149</sup> This concept of 'substantial similarity in overall impression' is critical to considering the issue of distinctiveness. The design will be assessed from the point of view of someone who is familiar with the product to which the design relates; that is, from the informed user's point of view. This is quite different from the test under the 1906 Act which required expert evidence to identify the similarities and differences and an alleged infringing article.

## How long does design registration last?

Under the 1906 Act, protection for registered designs lasted for up to 16 years from the date of filing the application.<sup>150</sup> The 2003 Act now reduces the period of protection to a maximum of 10 years. An initial term of five years from the filing date is given after acceptance.<sup>151</sup> The registered owner may apply for renewal of the registration for a further five years.<sup>152</sup> There is a renewal fee payable at this time.

Once design protection expires the registered designs are released into the public domain where they are free for all to use – commercially or otherwise. Indigenous people's right to use their communal owned designs, and to exclude use by others under their customary law, is a cultural practice that continues in many Aboriginal communities. This practice continues for as long as the culture continues.<sup>153</sup> The limited term of protection for designs limits the rights of Indigenous cultural custodians to control the use of their sacred motifs or clan identified designs outside this period. Once the period has expired, any person, either inside or outside a cultural group, can use an Indigenous motif or design without seeking proper consent under customary law. For this reason, the ALRC Discussion Paper on *Designs* considered that:

Such an outcome would be inappropriate when designs are sacred and reproducing them would cause offence to Aborigines. The Working Party found that in such circumstances reproduction outside the traditional or customary law context should be prohibited.<sup>154</sup>

## Who may register a design?

Generally, the person who creates the design or a person who employs the creator, or derives title from the creator, is entitled to be entered on the register as the registered owner of the design.<sup>155</sup> There is no recognition of the communal ownership of the design as belonging to a cultural group or groups. This is not applicable to Indigenous cultural iconography that is often collectively owned.

## Exclusive rights of registered owners

During the term of protection, the registered owner has the exclusive right to use the design and to prevent others from using the design without permission, including 'to make or offer to make a product, in relation to which the design is registered, which embodies the design'.<sup>156</sup> These rights are personal property and can be assigned and licensed. They are also transferable under will or by operation of law.

147. *Designs Act 2003* (Cth) s 15(1).

148. The 2003 Act extends the prior art base: *Designs Act 2003* (Cth) s 15.

149. *Designs Act 2003* (Cth) s 16(2).

150. *Designs Act 1906* (Cth) s 27A.

151. *Designs Act 2003* (Cth) s 46(1).

152. *Designs Act 2003* (Cth) s 47.

153. Janke, *Our Culture: Our Future*, above n 10, 64.

154. Australian Law Reform Commission, *Designs*, Discussion Paper 58 (1994) 16.

155. *Designs Act 2003* (Cth) s 13(1).

156. *Designs Act 2003* (Cth) s 10(1)(a).

## Infringement

A person infringes a registered design if he or she deals and uses it as per any of the exclusive rights of the registered owner. It is also an infringement to use or deal with a design that is substantially similar in overall impression to a registered design.<sup>157</sup> The registered owner may bring an infringement action against the other person in the Federal Court of Australia; however, only after the design has been examined and a certificate of examination has been issued.<sup>158</sup>

## Remedies

The relief that a court may grant in an infringement of a registered design includes:

- An injunction – this is the power to stop the other person from making, selling or using the design without permission; and
- At the option of the plaintiff – damages or an account of profits.<sup>159</sup>

## Designs and copyright

Copyright protection and designs law overlap in some ways. Under copyright laws, it is not necessary for an 'artistic work' to have artistic merit to gain protection. Hence, production, engineering and design drawings, moulds and prototypes produced for the design and manufacturing process of an article, may fall within the definition of an 'artistic work' under the Copyright Act.<sup>160</sup> Further, some artistic works that qualify for protection under the *Designs Act 2003* (Cth) would also be considered works of artistic craftsmanship under the Copyright Act. This latter category would include sculptures, jewellery and ceramics. Many artistic works such as paintings may also be directly applied as a design to t-shirts or fabric. The Copyright Act protects artistic works from unauthorised reproduction in material form.<sup>161</sup> This includes making a three-dimensional work from a two-dimensional work and vice versa.<sup>162</sup>

At the same time that the *Designs Act 2003* (Cth) was enacted, a separate piece of legislation was enacted to alter the design/copyright overlap – the *Designs (Consequential Amendments) Act 2003* (Cth).

Design registration provides an enforceable property right that can be used to prevent slavish copying of manufactured products. Design protection is generally inexpensive to obtain and gives the registered owner a property right from a registered date. Copyright protection is no longer lost when a 'flat design' (two dimensional artistic work) is applied to the surface of an article for mass production. However, to protect the three-dimensional application of a design in mass production, it is necessary to obtain registered design protection. For example, if a design for morning star poles or other three-dimensional works were to be mass-produced with the authority of the artist, copyright protection would be lost.<sup>163</sup>

Three-dimensional designs that have been applied industrially by, or with the licence of, the owner of the monopoly in the corresponding design may lose copyright protection.<sup>164</sup> A design is taken to be applied industrially if it is applied to more than 50 articles or to one or more articles (other than handmade articles) manufactured in lengths or pieces.<sup>165</sup> It is not an infringement of the copyright in the artistic work to reproduce the work on or after the day on which articles made to the corresponding design are first sold, let for hire, or offered or exposed for sale or hire, by applying that or any other corresponding design to an article.

## Relevance for Indigenous designs

The *Designs Act 2003* (Cth) protects three-dimensional items for industrial or commercial purposes. It would be difficult and impractical to use the designs law, for instance, to protect against Indigenous designs that are protected

157. *Designs Act 2003* (Cth) s 71.

158. *Designs Act 2003* (Cth) s 73(3).

159. *Designs Act 2003* (Cth) s 75.

160. *Copyright Act 1968* (Cth) s 10(1) defines 'artistic works'. See *Warman International v Environtech Australia Ltd* (1986) 6 IPR 578.

161. *Copyright Act 1968* (Cth) s 31(1)(b)(i).

162. *Copyright Act 1968* (Cth) s 21(3).

163. McKeough J & Stewart A, 'Intellectual Property and the Dreaming' in E Johnston, M Hinton and D Rigney (eds), *Indigenous Australians and the Law* (Sydney: Cavendish Publishing, 1997) 53, 73.

164. *Copyright Act 1968* (Cth) s 77(1)(b).

165. Copyright Regulations, reg 17(1).

under customary laws such as wandjinas, mimis and styles. Protection under the Act is focused on the commercial production of products and it would be necessary to be the producer of such products.

The *Designs Act 2003* (Cth) may offer some protection for commercially applied Indigenous peoples' designs that meet the registration requirements. A group of Queensland Indigenous artists who made jewellery designs from Indigenous motifs including platypuses, echidnas and Torres Strait Islander drums registered their designs with IP Australia in 2003 before being commercially released. The Saltwater Collection designs are made for mass production so the registration of the designs would give protection.<sup>166</sup>

## Trademarks<sup>167</sup>

### What is a trade mark?

A trade mark is 'a sign used, or intended to be used, to distinguish goods or services dealt with or provided in the course of trade by a person from goods or services so dealt with or provided by any other person'.<sup>168</sup> A sign includes 'any letter, word, name, signature, numeral, device, brand, heading, label, ticket, aspect of packaging, shape, colour, sound or scent'.<sup>169</sup>

Under the *Trade Marks Act 1995* (Cth) the registered owner of a trade mark is granted a statutory property right to use that trade mark in association with his or her trade and in accordance with the class of goods and services approved by the Trade Marks Office of IP Australia. Trade marks are personal property;<sup>170</sup> therefore, they can be licensed, assigned and transmitted.

### Trade mark application process

An application to register a trade mark must be made on an approved form and accompanied by a specified fee. The mark must be represented graphically. Once lodged, the application is examined to see if the mark complies with the requirements for registration. This takes approximately 12 months. Rights are granted in the specified classes of goods and services.<sup>171</sup> Applicants must apply and pay a registration fees based on each class of goods or services for which registration is sought. This could make the registration of some cultural material quite expensive and may limit many Indigenous groups from using the trade mark laws to protect Indigenous cultural material.

### Who can apply?

The person who claims to be the owner of the mark and is using or intends to use the trade mark may apply to register the mark with the Trade Marks Office at IP Australia.<sup>172</sup> This includes if he or she intends to license use of the trade mark. When applying for a trade mark in respect of goods and services, the applicant is not required to obtain any 'permission' to use the Indigenous cultural material. It is not necessary for a person to show he or she has the prior informed consent of the Indigenous traditional owners in order to register a trade mark related to an Indigenous word, symbol or design, and thereby become the registered owner of the mark.

Indigenous groups have complained that non-Indigenous companies have trade marked Indigenous words without prior informed consent and without observance of Aboriginal customs or laws. The following examples are cited in *Minding Cultures*:<sup>173</sup>

- Monaro is the name of a clan group – it has been the subject of several trade mark applications. Three trade marks have been registered using this word.
- One attempt has been made to register the term 'wandjina'.

The registered owner of a regular trade mark can be an individual, a company, an unincorporated club or association, or any group of individuals in a business together and who jointly use a trade mark.<sup>174</sup> Therefore, it is possible for

166. Janke, *Looking Out For Culture*, above n 139, 14.

167. This section is adapted from Janke, *ibid*.

168. *Trade Marks Act 1995* (Cth) s 17.

169. *Trade Marks Act 1995* (Cth) s 6.

170. *Trade Marks Act 1995* (Cth) s 21(1).

171. For list of classification of goods and services in Australia, see <[http://www.ipaustralia.gov.au/trademarks/apply\\_classes.html](http://www.ipaustralia.gov.au/trademarks/apply_classes.html)>.

172. *Trade Marks Act 1995* (Cth), s 27(1)

173. Janke T, *Minding Cultures: Case Studies on Intellectual Property and Traditional Cultural Expressions* (Geneva: WIPO, 2003).

174. Australian Government, *The Trade Marks Application Kit: An Easy Guide to Applying for Your Trade Mark*, (Canberra: IP Australia, 2000) 4.

Indigenous people either individually or collectively to register trade mark rights accordingly. For instance, an Indigenous community organisation, an individual Indigenous person or an unincorporated Indigenous association can be a registered owner of a trade mark. The *Draft Manual of Practice and Procedure*<sup>175</sup> notes that there is no prohibition in relation to the entry of notice of trusts in the register. This may allow Indigenous groups to register a trade mark in the name of the trustee and/or on behalf of the beneficiaries.<sup>176</sup> For example, an Indigenous community organisation could register as a trustee on behalf of the Indigenous clan members as beneficiaries. An individual traditional custodian, such as Mr Milpurruru in *Bulun Bulun*<sup>177</sup> may be able to register a design as a trade mark and the beneficiaries could be the entire clan group.

## Examination

Once lodged, a trade mark application is examined by an officer at the Trade Marks Office. The examiner considers whether there are any grounds for rejecting the application and whether it has been made according to the legislation. Division 2 of Part 4 of the *Trade Marks Act 1995* (Cth) lists grounds by which the registrar can reject an application. There are no specific grounds that address the registration of Indigenous knowledge. There is currently no basis in the Act or Regulations that would require inquiries to be made as to whether a word or design is used with the consent of the relevant traditional owners. However, grounds for rejection of a trade mark include:

- Not distinctive

A trade mark can be rejected if the applicant's mark is not distinctive from the goods and services of other persons in the relevant classes of goods or services.<sup>178</sup> The test for capacity to distinguish is the likelihood that other traders, in the ordinary course of their business and without improper motive, will wish to use the same mark.<sup>179</sup> Geographic marks and descriptive marks may not be distinctive for registration. This is because descriptive words describe a product and should be available for other traders to use. A geographic name, such as the town or area where goods are produced, would not be registrable. This is because other traders from the same region would want to use the geographic name without necessarily trying to ride off the applicant's reputation.<sup>180</sup>

- Likely to deceive or cause confusion

A trade mark can be rejected if it is likely to deceive or cause confusion<sup>181</sup> or if it is substantially identical with, or deceptively similar to, the trade mark of another person who has an earlier priority date for registration.<sup>182</sup>

- Scandalous and contrary to law

A trade mark or part of the trade mark which comprises of scandalous matter or is contrary to law may be rejected by the registrar.<sup>183</sup> This provision is not often used but may provide scope for Indigenous people to challenge registration of culturally offensive marks.

## Challenging trade marks

The *Trade Marks Act 1995* (Cth) allows third parties to oppose the registration of a trade mark.<sup>184</sup> Grounds for opposition are similar to those that the registrar can use to reject applications. They include that the trade mark does not distinguish the applicant's goods and services from the goods and services of others; is scandalous or contrary to law; or is likely to deceive or cause confusion.<sup>185</sup>

Indigenous people may be able to make use of the restrictive provisions under the *Trade Marks Act 1995* (Cth) to challenge culturally offensive trade marks that are scandalous or contrary to law. It is arguable that trade marks which make use of sacred material are scandalous and contrary to Indigenous customary laws. Perhaps there is scope for an Indigenous community to challenge marks that are against customary laws as scandalous marks. It may at least be possible to draw offensive use to the attention of the registrar.

175. Australian Government, IP Australia, *Draft Manual of Practice and Procedure* (Canberra, 1 March 2001).

176. *Ibid*, Part 10: Formalities [1.1.8].

177. *Above n 8*.

178. *Trade Marks Act 1995* (Cth) s 41.

179. *Registrar of Trade Marks v W & G DuCros Ltd* [1913] AC 624.

180. *Re Registered Trade Mark "Yanx"; Ex parte Amalgamated Tobacco Corp Ltd* (1951) 82 CLR 199.

181. *Trade Marks Act 1995* (Cth) s 43.

182. *Trade Marks Act 1995* (Cth) s 44.

183. *Trade Marks Act 1995* (Cth) s 42.

184. *Trade Marks Act 1995* (Cth) s 52(1).

185. *Trade Marks Act 1995* (Cth) s 43.

In New Zealand, recent changes to the *Trade Marks Act 1953* (NZ) requires the New Zealand Trade Mark Commissioner to establish a Maori Trade Mark Advisory Committee to provide advice on the registrability of trade marks which contain Maori signs, such as text or imagery. This will take into account a new offensiveness test,<sup>186</sup> which provides an absolute ground for refusing registration of a trade mark if the mark would be likely to offend a significant section of the community including Maori. There has been significant debate on this section. Regulations relating to this process are due to be drafted by the end of 2004. A similar process was recommended for adoption in the Australian Trade Marks Office.<sup>187</sup> However, there have been no legislative moves towards this by IP Australia.

## Utopia Batik trade mark

In 2003, a group of Aboriginal artists opposed a trade mark application by a proprietary limited company. An opposition was made on behalf of Aboriginal individuals regarding an application for the registration of a trade mark 'Utopia Batik' by Utopia Batik Proprietary Limited. The artists argued that the word 'Utopia' should not be the subject of a trade mark monopoly and that it should be available to all artists from the region. The artists were successful in opposing the trade mark on the grounds that the applicant is not the owner of the trade mark.<sup>188</sup>

## Rights

If successful registration of the application occurs, the registered owner of the trade mark holds the following rights for his or her exclusive use:

- To use the trade mark.
- To authorise other persons to use the trade mark in relation to the goods and/or services in respect of which the trade mark is registered.<sup>189</sup>
- To obtain relief if the trade mark's rights are infringed.<sup>190</sup>

This means that the owner of a trade mark can generally prevent other traders from using that mark, or a very similar mark, on or in relation to goods and services for which it has been registered.

## How long does trade mark protection last?

Once registered, the trade mark is protected for 10 years, which may be renewed, in sets of 10 years, for as long as the registration is kept current. In this respect, trade mark registration is continuous and can be useful to protect Indigenous cultural material for long periods of time, even beyond the copyright period. This feature of trade marks law makes it more flexible than copyright, designs and patents for protecting Indigenous rights because the problem of the public domain may be avoided.<sup>191</sup>

## Infringement

Under the *Trade Marks Act 1995* (Cth), a registered trade mark is infringed if a person uses a sign as a trade mark which is identical with, or deceptively similar to, the trade mark of goods or services that are similar to those for which the trade mark is registered.<sup>192</sup> Protection is also available to the registered owners of famous trade marks, to the extent that such owners will be able to take infringement action if a person uses a sign that is identical with or deceptively similar to the trade mark in respect of goods or services unrelated to those for which the trade mark is registered.

## Certification marks

The *Trade Marks Act 1995* (Cth) has provisions that allow for registration of certification marks. Certification marks are trade marks which denote something about the quality or a characteristic of the goods or services. For example, one well-known Australian certification trade mark is the 'Woolmark' logo used for 100 per cent wool products.<sup>193</sup>

186. *Trade Marks Act* (NZ) s 17(1)(b).

187. Janke, *Our Culture: Our Future*, recommends the establishment of an Indigenous Staffing Unit and an Indigenous Trade Mark Focus Group: above n 10, 149.

188. *Trade Marks Act 1995* (Cth) s 58 applied in opposition by M Turner, R Kunoth Kngwarry, L Skinner Ngai, DR Apwerl, J Apetyarr, M Apetyarr and Desart Inc to registration of trade mark applications 802956 and 802957, Trade Mark Hearing, 31 August 2003.

189. *Trade Marks Act 1995* (Cth) s 20(1).

190. *Trade Marks Act 1995* (Cth) s 20(2).

191. Janke, *Minding Cultures*, above n 173, 25.

192. *Trade Marks Act 1995* (Cth) s 120.

193. Trade Mark 185835 registered by the Australian Wool Research and Promotion Organisation.

Under the *Trade Marks Act 1995* (Cth), a certification trade mark is a sign used, or intended to be used, to distinguish goods or services that are:

- (a) dealt with or provided in the course of trade; and
- (b) certified by a person (owner of the certification trade mark), or by another person approved by that person, in relation to quality, accuracy or some other characteristic, including (in the case of goods) origin, material or mode of manufacture;

from other goods or services dealt with or provided in the course of trade but not so certified.<sup>194</sup>

A mark or label verifying that a product or service is authentically Indigenous could be registered as a certification mark under the *Trade Marks Act 1995* (Cth).<sup>195</sup> A certification trade mark is a sign used to distinguish goods or services which possess a certain quality, accuracy or characteristic.<sup>196</sup> The distinguishing characteristics may include geographic origin, quality of material used or the mode of manufacture.<sup>197</sup> Use of the mark is certified by the registered owner of the certification trade mark, or by representative organisations approved by the registered owner in accordance with the rules for use.

To register a certification mark, the traditional owners would need to adopt a process and rules associated with the use of the certification mark. The mark would need to be examined by the Trade Marks Office and approved by the Australian Consumer and Competition Commission. There is considerable value in a certification mark. It allows for control of the use of the trade mark by the registered owner. The system requires rules upon which authorised users must comply.

A certification trade mark may be useful for Indigenous cultural products if the mark is intended to certify that the work is authentic; that is, it is produced by Indigenous people who have a claim to the type of style or to use the type of knowledge or information embodied in that product. This option would allow Indigenous people to encourage and promote authenticity and cultural integrity. The degree of protection that the mark provides would only be to the extent of unauthorised use of the mark.

## NIAAA's label of authenticity

In 2000 the National Indigenous Arts Advocacy Association (NIAAA) launched the label of authenticity system. The label of authenticity is the primary mark that, when affixed to goods or services, denotes that a product or service is created, authored or produced wholly by an Aboriginal or Torres Strait Islander person. The rules have incorporated terms for complying with Indigenous customary law. In particular, rule 4.1 states that:

The label can only be used where works which purport to encode, depict or reflect ceremony, law knowledge, customs, stories, dreaming or ritual of traditional owners of land are produced in accordance with any customs or laws of the relevant traditional owners and permission of the traditional owners has been given for creation and dealing with the work.

The rules also require that the label can only be used alongside information about the traditional group, language group or land to which the creator belongs, where they live if relevant to the work, and the way in which they regard the work as reflecting their Indigenous heritage or experience.<sup>198</sup>

A second level of the system involves the collaboration mark, for products and services derived from a work of art which has been created by an Aboriginal or Torres Strait Islander person or people who satisfy the definition, and which has been reproduced or produced and manufactured under fair and legitimate licensing arrangements with non-Aboriginal and Torres Strait Islander people. There is also a third level of the system for use by retailers.

The label of authenticity has not enjoyed wide support from artists or retailers. Its limited use has been for collaboratively produced goods such as t-shirts. The future of the label is uncertain in light of recent funding cuts to NIAAA. However, the label did inspire the New Zealand mark, *Toi Iho*, the Maori made mark.<sup>199</sup> It is possible that Indigenous people could adopt a similar mark for goods and services that originate from Indigenous people.

194. *Trade Marks Act 1995* (Cth) s 169.

195. *Trade Marks Act 1995* (Cth) Pt 16.

196. *Trade Marks Act 1995* (Cth) s 169(a).

197. *Trade Marks Act 1995* (Cth) s 169(b).

198. National Indigenous Arts Advocacy Association, Label of Authenticity Trade Mark Certification Rules, r 4.2–4.3. For a full version of the rules, see Janke, *Minding Cultures*, above n 173, 153–158.

199. See <<http://www.toiho.com>>.

## Collective marks

Collective marks were introduced to the Australian trade marks regime in 1995.<sup>200</sup> A collective trade mark is a sign used in relation to goods and services provided in the course of trade by members of an association to distinguish their goods and services from those of non-members.<sup>201</sup> Like ordinary trade marks, collective trade marks are used to denote the trade origins of the goods and services rather than indicating that the goods and services meet a certain standard. However, the particular source indicated in the case of a collective trade mark is not a single trade source but one comprising of the members of the association which has registered the collective mark. Registration is not available for trade marks which are used solely to indicate membership of an association or any other organisation. The trade marks must be applied to goods and/or services.

Unlike certification marks, there is no requirement that rules for use of a collective trade mark be developed. Only members of the association in whose name a collective trade mark is registered may use the collective trade mark. A member of an association in whose name a collective trade mark is registered does not have the right to prevent another member of the association from using the same trade mark, unless the use does not comply with any rules of the association governing that trade mark.<sup>202</sup> Collective trade marks include 'Toyota Dealer Group'.<sup>203</sup>

Indigenous associations, including groups of artists, could use the collective mark system to indicate their association within a group. The mark, of course, would need to be applied to goods and services but can be used by individual members of that association.<sup>204</sup> Unlike certification marks, there are no rules of requirement and use of the mark can be controlled by the rules of the constitution of the association.

In the United States, the *Indian Arts and Craft Act 1935* (US) allows Indians to apply for a collective membership design mark that denotes membership in an organised collective association that 'promotes the preservation of the Native American or American Indian culture, tradition, art and related activities'.<sup>205</sup> It is unlawful for a person to display or sell a good 'in a manner that falsely suggests it is Indian produced'.<sup>206</sup> There may be scope for Indigenous Australians to develop similar marks for protection of Indigenous Australia arts and cultural expression.

## Geographic indications

Geographic indications identify a good as 'originating in the territory of a Member, or a region or locality in that territory, where a given quality, reputation or other characteristic of the good is essentially attributable to its geographic origin'.<sup>207</sup>

The most common type of geographic indication is the name of the place of origin of the goods. For example, products made from the land that have a local or regional agricultural influence—such as cheese, wine and olives—have qualities that result from the region in which it is grown and nurtured. Whether these rights are recognised depends on the domestic law of a country and the perceptions of consumers.

In Europe, the geographic indication has been used by the makers of wines, cheeses and other food stuffs, for the protection of well-known regionally produced goods that have distinctive qualities. For example, 'Tuscany' is a geographic indication protected under Italian law for olive oil produced in the Italian region of Tuscany.<sup>208</sup> 'Roquefort' for cheese produced in France is also protected under European Union (EU) regulations.<sup>209</sup> The geographic registration system in Europe has developed to an extensive system. Once registered, a geographic registration may only be used by approved producers. In 2004, the World Trade Organisation supported a complaint brought by Australia, the United States and a number of other countries, and ruled that the EU had to open its trade mark system to protect geographic indicators from other countries.<sup>210</sup>

200. Part 15 of the *Trade Marks Act 1995 (Cth)* introduces collective trade marks as a new category of trade mark.

201. *Trade Marks Act 1995 (Cth)* s 162.

202. *Trade Marks Act 1995 (Cth)* s 165.

203. As noted in Dwyer J, Duffy A, Lahore J & Garnsey J (eds), *Patents, Trade Marks and Related Rights* (Sydney: Butterworths, 1996) 50, 138.

204. Compare registered trade mark owners who are unincorporated groups and associations. Use is made of the trade mark to, or in relation to, goods or services on behalf of all its members. See IP Australia *Draft Manual of Practice and Procedure*, above n 175, Part 10: 'Formalities'.

205. Title 25 of the *United States Code*, s 205(c).

206. *Ibid.*

207. Trade-Related Aspects of Intellectual Property Rights (TRIPS) Agreement, Art 22(1).

208. World Intellectual Property Organisation, *About Geographical Indications*, Law No 169 of 5 February 1992, Italy, <[http://www.wipo.int/about-ip/en/geographical\\_ind.html](http://www.wipo.int/about-ip/en/geographical_ind.html)>.

209. *Ibid.*, Under Regulation (European Community) No 2081/92 and in the United States under US Certification Registration Mark No 571.798.

210. Editorial, 'Victory for Aussie Foods in EU Trademark Ruling', *The Canberra Times*, 23 December 2004, 19.

The most established geographic indications in Australia are used in the wine industry. The *Australian Wine and Brandy Corporation Act 1980* (Cth) protects the names of Australian grape growing regions.

There may be scope for Indigenous cultural material to be protected by a geographic indications system given that many artistic designs, motifs, stories and knowledge originate from specific geographic regions. However, this would depend on regional associations of Indigenous people gaining government or corporate recognition to set up their own appellations of origin or certification-issuing entities.<sup>211</sup>

## Business names are not trade marks

Business names do not provide property rights to the registered business name owners for use of the trading name, unlike trade marks. A business name is the name under which a business operates and registration thereof identifies the owner of that business. Registration is legally required before the business can start to trade. Laws against passing off can protect business names.

## Domain names

Under customary laws, the rights to use names and identifiers belonging to the group require consent and consultation. How does this apply to the use of Indigenous words for domain names?

A domain name is the Internet address used to locate websites on the World Wide Web. Only one entity in the world can have a specific domain name and for this reason, the registration and use of certain words is seen in the same way as trade marks. The WIPO has established the Internet Domain Name Process, which sets out best practices for registration authorities. The list of standard practices relate to registration of the generic top-level domain names including dispute resolution procedures and registration of domain names of famous and well-known marks.<sup>212</sup> Disputes about international domain names should be taken to the WIPO Dispute Resolution Centre.<sup>213</sup>

The Australian Domain Name Registry manages the Australian domain names. There are certain rules that must be met before registration of a domain name is allowed. For instance, it must be either the person's name or a business name belonging to the relevant person. It is possible for domain names to be registered and protected before use, if these requirements are met.

The use of Indigenous names and words for domain names is an important cultural issue for Indigenous people. Indigenous people may want to make use of their cultural names to promote their cultures. Some are finding that as they attempt to register, the words are already used. For example, Ngarinyin elders Paddy Neowarra and Scotty Martin have set up a website <<http://www.wandjina.com>> to spread the message of their culture worldwide. In the process, they have found on the Internet three companies named after the 'wandjina' and have politely requested the relevant owners to change the names appropriately. Two of the companies have handed over the names at the request of the owners.<sup>214</sup>

Another example of use of Indigenous identifiers involved the use of the surname of Eddie Mabo. The website <<http://www.mabo.com.au>> was offered for sale at \$165 000. The Mabo family was outraged at this and asked for the removal of the site. The website was removed from the web domain.<sup>215</sup>

Other words may not be appropriate in the first place for use as a domain name; for example, sacred words. The *Our Culture: Our Future* report suggested that there should be some level of inquiry about whether an Indigenous word is appropriate or has consent from relevant persons in cultural authority when registration of a domain name is being considered by the domain name registration agency.<sup>216</sup>

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211. Posey D & Dutfield G, *Beyond Intellectual Property: Toward Traditional Resource Rights for Indigenous Peoples and Local Communities* (Canada: International Development Research Centre, 1996) 91.

212. World Intellectual Property Organisation, *The Management of Internet Names and Addresses: Intellectual Property Issues*, Final Report (Geneva: WIPO, 30 April 1999).

213. For more information, see <<http://www.wipo.org>>.

214. Jopson D, 'Misused Spirits of Creation Returned to Proper Custodians', *Sydney Morning Herald*, 7 March 2001, 7.

215. 'Family Upset Over Misuse of Name Mabo on Website', *Sydney Morning Herald*, 8 August 2002, Editorial.

216. Janke, *Our Culture: Our Future*, above n 10, 149.

## Patents

### What is a patent?<sup>217</sup>

A patent is a right granted for any device, substance, method or process that is new, inventive and useful. A patent is legally enforceable and gives the owner the exclusive right to commercially exploit the invention for the life of the patent. Unlike copyright protection, patent protection is not automatic. An application must be lodged for the grant of a patent.

There are two types of patents in Australia:

- (i) a standard patent gives long-term protection and control over an invention for up to 20 years; and
- (ii) an innovation patent is a relatively fast, inexpensive protection option, lasting a maximum of eight years. The innovation patent replaced the petty patent on 24 May 2001.

Patents provide effective protection to the owners of inventions of new technology that will lead to a product, composition or process with significant long-term commercial gain. In return for the patent protection, patent applicants must share their knowledge by providing a full description of how their invention works. This information eventually becomes public and can provide the basis for further research by others.

### Manner of manufacture<sup>218</sup>

To be patentable, an invention must be a manner of manufacture.<sup>219</sup> A good idea or a mere discovery is not patentable. The discovery of existing, naturally occurring substances cannot be patented unless there is some newly invented method of using the material or some new adaptation of it to serve a new purpose.<sup>220</sup> As Stephen Gray notes:

On this analysis, it is clear that the mere existence of genetic resources on land owned or formerly owned by Indigenous people will not give the Indigenous people any intellectual property rights in those resources, should they turn out to have some scientific or commercial value. In order to gain patent protection or to prevent others from gaining it, the Indigenous people would have to 'discover' the resources, and put them to a new use with commercial significance.<sup>221</sup>

Naturally occurring genetic material found on Indigenous land is potentially patentable under the *Patents Act 1990* (Cth), if a new use for that material can be identified.

### Novelty<sup>222</sup>

An invention must be novel and involve an inventive step.<sup>223</sup> An invention is generally considered novel and involving an inventive step when it is compared with the prior art base.<sup>224</sup>

### Indigenous perspectives<sup>225</sup>

Across the world, many Indigenous peoples and organisations have expressed their opposition to patenting of genetic materials, life forms generally and inventions derived from Indigenous knowledge where there was no compliance with customary laws. In order to challenge a patent, interested parties can oppose the grant of the patent using various grounds, including that it is part of the prior art base within the three-month period after its publication in the *Official Journal of Patents*.<sup>226</sup> The *Patents Act 1990* (Cth) also allows any person, with information that may show a patent should not have been granted, to apply to court for an order to revoke the patent. These avenues require considerable legal and technical resources that Indigenous peoples frequently do not possess.

217. Adapted from IP Australia *What is a Patent* (2004) <[http://www.ipaustralia.gov.au/patents/what\\_index.shtml](http://www.ipaustralia.gov.au/patents/what_index.shtml)>.

218. Adapted from Janke T, *Biodiversity, Patents and Indigenous Peoples*, Media Development (Vol XLVI, No 2, March 1999).

219. Within the meaning of s 6 of the *Statute of Monopolies 1623* (England).

220. *National Research Development Corporation v Commissioner of Patents* (1990) 102 CLR 252.

221. Gray S, 'Vampires Round the Campfire' (1997) 22(2) *Alternative Law Journal* 61.

222. Adapted from Janke, *Biodiversity, Patents and Indigenous Peoples*, above n 218.

223. *Patents Act 1990* (Cth) s 18(1).

224. *Patents Act 1990* (Cth) s 7(1).

225. Adapted from Janke, *Biodiversity, Patents and Indigenous Peoples*, above 218 and Janke, *Our Culture: Our Future*, above n 10.

226. Australian Government, IP Australia.

Gray notes that Indigenous groups, wishing to challenge the use of Indigenous genetic resources on the basis of lack of novelty, have to prove their knowledge of that use as part of the 'prior art base'.<sup>227</sup> For instance, while Indigenous people were aware that smokebush had certain healing properties, they were not aware that it was a potential cure for AIDS.

For Indigenous people who do wish to patent inventions themselves the technical expertise and infrastructure is prohibitive. Patent applications for biotechnological inventions usually apply to the novel compound, a process for producing that compound and sometimes the compound when produced by a particular process. Scientists are able to extract the pharmaceutical components of medicinal plants to a level by which the active ingredients can be isolated and defined. It is often this process or the pharmaceutical composition of the Indigenous resource that becomes the subject of patents.<sup>228</sup> This process requires great technical knowledge and resources which Indigenous communities do not have readily available. Professor Blakeney estimates the cost of patenting an invention in Australia is about \$14,000 and ranges from \$5,000 to \$23,000 in other countries.<sup>229</sup> He notes that such a high cost to apply for and further enforce patent rights often precludes Indigenous communities from making use of patent law to legitimise their rights.

Indigenous people who seek to patent their inventions may also be hindered by previous publication of their knowledge. Blakeney notes that the practice of ethnobotanists and ethnopharmacologists publishing accounts of the uses of plants by Indigenous people has created a problem with Indigenous people being able to claim patents for their traditional medicinal remedies.<sup>230</sup> This is because, once published, such information becomes public knowledge and therefore part of the prior art base. By publishing information themselves about the traditional uses of plants in leaflets and books, Indigenous people also risk being able to patent their traditional medicinal knowledge.<sup>231</sup>

The increase in bioprospecting and successful exploitation of biological resources has led to global moves to protect the interests of nation states. International instruments have been developed to enunciate standards and mechanisms for dealings between nation states in relation to access and benefit sharing of biological resources. This has included limited recognition of the role of Indigenous knowledge. Further, when Indigenous knowledge is accessed and used to contribute to the development of products that can be patented, Indigenous people may have no control over or benefits from their contribution.

## Plant breeder's rights

Indigenous people face similar problems accessing protection through the *Plant Breeder's Rights Act 1994* (Cth). The Act gives plant breeders the exclusive commercial rights to market a new plant variety or its reproductive material. Such rights allow the plant breeder to produce, reproduce, sell and distribute the new plant variety, and to receive royalties from the sale of the plant or sell the rights to do so.<sup>232</sup> Holders of plant breeder's rights can prevent others from selling seeds of that variety.<sup>233</sup>

Applications are costly, and the applicant must provide extensive information requiring considerable labour, expense and expertise. For instance, the applicant must

provide descriptions of the plant sufficient to establish a *prima facie* case that the variety is distinct from other varieties of common knowledge; particulars of the location at which and manner by which the variety was bred; particulars of the names (including pseudonyms) by which that variety is known and sold in Australia; and particulars of any [plant breeder's rights] granted in that variety in Australia as well as of any application.<sup>234</sup>

The accrual of commercial monopoly rights to plant varieties has the potential to contravene Indigenous customary laws in relation to plant knowledge, land management and caring for the country. Indigenous peoples, especially

227. Gray, above n 221, 62.

228. Power PA, 'Interaction Between Biotechnology and the Patent System' (1992) 3 *Australian Intellectual Property Journal* 214, 217.

229. Blakeney M, 'Bioprospecting and the Protection of Traditional Medical Knowledge' (1997) 6 *European Intellectual Property Reports* 298, 300.

230. *Ibid* 298.

231. While communities may own copyright in such publications, their rights to the information contained in the book does not amount to patent rights.

232. *Plant Breeder's Rights Act 1994* (Cth) s 11.

233. Janke, *Our Culture; Our Future*, above n 10, 68.

234. Lotz M, 'Indigenous Plants, Indigenous Rights: A Discussion of Problems Posed for Protecting Indigenous Intellectual Property (Paper presented at 8th Annual Conference of Australian Association for Professional and Applied Ethics, Adelaide, 27–29 September 2001). See *Plant Breeder's Rights Act 1994* (Cth) s 26(2)(e)–(h).

Indigenous farmers, have registered their complaints about the loss of control over plant varieties and seeds for collection, exchange and replanting.<sup>235</sup>

## Breach of confidence laws

Breach of confidence laws refers to an area of the common law that has developed to protect confidential knowledge or trade secrets from wide dissemination by unauthorised persons. The common law makes the taking without permission of confidential information an illegal act if:

- the information has the necessary quality of confidence about it;
- the information was imparted in circumstance where there was an obligation of confidence; or
- there was an unauthorised use of that information which was detrimental for the party whose confidence was communicated.<sup>236</sup>

Indigenous people have used these laws to protect their cultural interests. The most notable case is *Foster v Mountford*,<sup>237</sup> which related to sacred material that was not suitable for wide publication. In this case the Federal Court granted an injunction in favour of members of the Pitjantjatjara Council, who took the action under breach of confidence laws to stop the publication of a book in the Northern Territory. Mountford, an anthropologist, undertook a field trip in 1940 into remote areas of the Northern Territory. The Pitjantjatjara male elders revealed tribal sites and items of deep cultural and religious significance to the anthropologist. Mountford recorded the information and later revealed them in a book, *Nomads of the Australian Desert*, which was distributed for sale in the Northern Territory. The book contained photographs, drawings and descriptions of persons, places and ceremonies of deep religious and cultural significance to the Pitjantjatjara people. The wide dissemination of this information could cause serious disruption to Pitjantjatjara culture and society should this material be revealed to women, children and uninitiated men. The information was shown to have been given to Mountford in confidence.

## 5. Intellectual property and contracts

While contracts are not strictly an area of intellectual property, they are often used in the assignment and licensing of intellectual property and for this reason are discussed in this section of our paper.

Agreements and contracts are being used to take into account customary law obligations and responsibilities over intellectual property. They include sharing of benefit provisions and can allow scope for Indigenous people to negotiate culturally advantageous terms that strengthen customary laws.

The use of contracts between knowledge holders and developers has become the main method of resolving problems arising from the lack of correlation between Indigenous knowledge structures and the intellectual property system. Contractual arrangements have the benefit of flexibility, but can sometimes provide a lesser form of protection than a statute, because they bind only the parties to the agreement. Once a successful product is exposed to the market place, it is common for competitors to emulate it. Indigenous people may find their knowledge used by third parties who have struck upon the component, ingredient or recipe or whatever knowledge may have been used. Indigenous people may have no remedy against such a third party under contract. In this instance, private agreements provide flexible but limited protection compared to legislation. On the other hand, perhaps such accepted business practice cannot be legislated against and Indigenous people remain in the position of weighing commercial benefits against cultural values. In some cases Indigenous knowledge holders may attempt to force third parties into action on their behalf based on the fiduciary duty recognised in *Bulun Bulun*.<sup>238</sup>

Other remedies might be found through the common law action of passing off or under trade practices laws. In any event, the ability of Indigenous people to assert and seek enforcement of their rights will be dependent on their capacity to access the legal system. This is limited by the high costs of litigation. In view of this situation, the commercialisation of culture should be seriously considered prior to commercialising or making public important cultural knowledge.

235. Ridgeway A, 'Plant Breeders Intellectual Property' (Australian Democrat Speech, Canberra, 21 October 2002). See also the work of international non-government organisation, Grain <<http://www.grain.org/>>.

236. *Coco v AN Clark (Engineers) Ltd* [1969] RPC 41.

237. (1977) 14 ALR 71.

238. Above n 8.

## 6. Intellectual property: protocols and ethics

Protocols and ethics in the use of Indigenous cultural and intellectual property are useful non-legal options where intellectual property laws fall short of adequately catering for Indigenous cultural issues. This has been an area of growth in Australia and the development of codes and protocols for various sectors of our wider cultural industries have worked with Indigenous communities to develop various standard-setting protocol and ethical documents.

Some of the existing protocols and ethical documents include:

- Australian Institute of Aboriginal and Torres Strait Islander Studies, *Guidelines for Ethical Research in Indigenous Studies*.
- Code of Ethics and Standards of Practice of the International Society of Ethnobiologists.
- Bostock L, *The Greater Perspective: Protocol and Guidelines for the Production of Film and Television on Aboriginal and Torres Strait Islander Communities* (2nd ed., 1997).
- Byrne A, Garwood A, Moorcroft H & Barnes A, *Aboriginal and Torres Strait Islander Protocols for Libraries, Archives and Information Services*, endorsed by Aboriginal and Torres Strait Islander Library and Information Resources Network (1995).
- Johnson D, *Indigenous Protocol* (2003), written for Special Broadcasting Services – refers to documentary production.<sup>239</sup>
- Mellor D with a legal section by Janke T, *Valuing Art, Respecting Culture: Protocols for Working with the Australian Indigenous Visual Arts and Craft Sector* – written and researched by Published by National Association for the Visual Arts, Sydney, 2001
- Janke T, under commission for the Australian Film Commission, *Towards a Protocol for Filmmakers Working with Indigenous Content and Indigenous Communities*, Issues Paper (February 2003).
- Australia Council protocols for various Indigenous artforms, written for the Aboriginal and Torres Strait Islander Board of the Australia Council:
  - Janke T, *Visual Cultures: Protocols for Producing Indigenous Australian Visual Art and Craft*.
  - Janke T, *Writing Cultures: Protocols for Producing Indigenous Australian Literature*.
  - Janke T, *New Media Cultures: Protocols for Producing Indigenous Australian New Media*.
  - Quiggin R, *Song Cultures: Protocols for Producing Indigenous Australian Music*.
  - Quiggin R, *Performing Cultures: Protocols for Producing Indigenous Australian Performing Arts*.
- Akwe: Kon Guidelines (see Part 5, 3.5 *Convention on Biological Diversity*).
- Bonn Guidelines (see Part 5, 3.5 *Convention on Biological Diversity*).
- Nationally developed protocols: Human Rights and Equal Opportunity Commission and Griffith University, *Development and Indigenous Land: A Human Rights Approach* (2002).
- Some locally developed protocols, such as Hurley A, *Respect, Acknowledge, Listen: Practical Protocols for Working with the Indigenous Community of Western Sydney* (Community Cultural Development, New South Wales, 2003).

There is scope for the Western Australian government and its industries to adopt existing protocols or develop local and regional protocols to specifically cover Western Australian cultural material.

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239. Available at <<http://www.sbs.com.au/sbsi/documentary.html>>.

## Part II: Recognition of Indigenous intellectual property in the regulation of resources

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### 1. Introduction

Indigenous peoples hold important knowledge in relation to the cultivation, collection, preparation and uses of many plants, animals and minerals. Indigenous people's knowledge about the biota of a region relates to, inter alia, medicine, nutrition, agriculture and land care, the arts, ceremony and other uses. While Indigenous people may not regard the biota of a region as resources,<sup>240</sup> much of Australia's law in relation to management of resources has implications for Indigenous knowledge holders.

Knowledge of the properties and uses of these materials that is held by Indigenous people is often referred to as 'traditional knowledge' or 'Indigenous knowledge'. Customary law may inform the content of Indigenous knowledge; for instance it may set out the manner in which a remedy is prepared, when it can be used and who can use it.

The Anmatyerr women of Laramba (Napperby) community, recently published material about the names of plants and their uses in their area.

For them the names of plants (as of other natural phenomena) go beyond the merely lexicographical. The names of things signify a complex relationship between living people, their country and their antecedents, many of whom bore the names of particular plants and animals.

Respect for Aboriginal law and a sophisticated use of the Anmatyerr language means knowing the detailed names for plants and for the particular parts of plants – seed, roots, flowers and leaves. Some plants have a different name for ripe fruits, unripe fruits and for fruits that have fallen to the ground. For some plant species there are also specialised verbs which describe the method of collecting the fruit, seeds, resins or tubers, and of processing and eating them.

Using this specialised vocabulary shows respect for the custodians of the Dreaming manifest in the plants themselves.<sup>241</sup>

Customary law may also regulate the transmission and dissemination of Indigenous knowledge; for instance, it may determine issues such as the age and gender of recipients of the knowledge. Customary law contains 'positive obligations towards cultural knowledge and the need to ensure that the culture is maintained and protected so that it can be passed on to future generations'.<sup>242</sup>

### 2. Bioprospecting and biotechnology

Across the world, Indigenous or traditional knowledge has attracted the attention of universities and other commercial research and development companies. Indigenous knowledge of the particular characteristics and applications of biological resources provides valuable insights for researchers into potential treatments, herbicides, insecticides and other products derived from biological material. For example, in September 2004 an agreement was announced between the Samoan government and the University of California at Berkeley to share equally in royalties arising from any sales of an anti-AIDS drug derived from the genes of the native Samoan tree mamala.

The agreement, signed by Prime Minister Tuila'epa Aiono Sailele Malielegaoi of Samoa and UC Berkeley's Vice Chancellor for Research Beth Burnside, gives Samoa and UC Berkeley equal shares in any commercial proceeds from the genes. Samoa's 50 per cent share will be allocated to the government, to villages, and to the families of healers who first taught ethnobotanist Dr Paul Alan Cox how to use the plant.<sup>243</sup>

The agreement also provides that if the drug is successfully developed, the University of California and the Samoan government can negotiate distribution of the drug in developing nations at a minimal profit.<sup>244</sup>

240. The biological components of land, sea and air are generally referred to as interrelated elements of life, past present and future rather than as resources for commercial exploitation.

241. Anmatyerr Women of Laramba (Napperby) Community, *Anmatyerr Ayey Amang-akert, Anmatyerr Plant Stories* (Alice Springs: IAD Press, 2003) viii.

242. Janke, *Biodiversity, Patents and Indigenous Peoples*, above n 218, 2.

243. Sanders R, *Land Mark Agreement Between Samoa and UC Berkeley Could Help Search for AIDS Cure* (2004) <[http://www.berkeley.edu/news/media/releases/2004/09/29\\_samoa.shtml](http://www.berkeley.edu/news/media/releases/2004/09/29_samoa.shtml)>.

244. *Ibid.*

There are many instances of Indigenous knowledge contributing to the development of useful medicinal and other products. But there are many instances in which Indigenous peoples' customary laws have been contravened or disregarded through lack of accurate information, consultation, consent, acknowledgement and benefit sharing.

One recent example is the development of a new drug based on the knowledge held by the San people of Southern Africa about the appetite suppressant qualities of the hoodia cactus. The San had used the hoodia cactus as an aid when hunting over vast distances for long periods of time.

In the 1960s the Council for Scientific and Industrial Research (CSIR), based in South Africa, isolated the appetite suppressant molecule in the hoodia and patented it. In 1997 the CSIR licensed the rights to the molecule, named P57, to a UK-based company, Phytopharm. After initial tests on the drug looked promising, Phytopharm sold on the rights for US\$21 million to the pharmaceutical giant, Pfizer.<sup>245</sup>

In July 2001, describing research progress on P57, a Pfizer spokesperson in the UK linked the Hoodia to the San but said they were extinct. An international outcry followed and the South African San Council, set up in November 2001 and representing the Khomani, the !Xun and the Khwe, threatened a lawsuit. Negotiations with the CSIR followed and the San demanded recognition of their knowledge and a share of benefits.<sup>246</sup>

[T]he CSIR will pay the San eight per cent of all milestone payments it receives from its licensee, UK-based Phytopharm plc, as well as six per cent of all royalties that the CSIR receives once the drug is commercially available. Milestone payments are subject to agreed technical performance targets of P57 during its clinical development over the next three to four years, and royalties are based on sales which are not set to commence before 2008. This benefit-sharing model ensures that the San will receive equitable benefits if the drug is successfully commercialised, and is based on established international benefit-sharing models for the pharmaceutical industry. Factors, such as the size of the global anti-obesity market and the percentage of total market that the potential new drug could capture, are typically factors which determine the translation of the royalty percentage into monetary value.<sup>247</sup>

Pfizer have since suspended their efforts to develop a commercial appetite suppressant for marketing in the west.<sup>248</sup> Unless another pharmaceutical company undertakes the drug development work, the San may not receive any commercial benefit for the use of their knowledge.

Many of the developments that rely on Indigenous knowledge have come about because of the increase in advances in biotechnology and bioprospecting. Biotechnology has been defined as:

a broad term covering the use of biological discoveries for the development of industrial processes and the production of useful organisms and their products. Uses include the production of foods and medicines, the reduction of wastes and the creation of renewable energy sources.<sup>249</sup>

Bioprospecting has been defined as:

the search for and sourcing of organisms from the natural environment with the purpose of extraction of compounds for further investigation of their potential for development in therapeutic or industrial applications.<sup>250</sup>

Bioprospecting and biotechnology involve a number of sectors including government, public and private research facilities, biotechnology companies, Indigenous peoples, their organisations and others. Each group has distinct and often divergent interests. Matthew Rimmer describes the dynamics of bioprospecting as follows:

There has been much conflict and misunderstanding between the stakeholders because of the lack of certainty about the rights and responsibilities of the parties involved in natural drug discovery. Indigenous people have desired legal protection; researchers and scientists looked for guidance as to their legal responsibilities; green groups sought to conserve the environment; and biotechnology companies and pharmaceutical drugs companies have wanted commercial certainty.<sup>251</sup>

The Australian government considers Australia to be well placed for strong participation in biodiscovery and biotechnology industries because of its substantial research infrastructure, robust and internationally compatible

245. Wise J, 'Hunter-Gatherers Win Profit Sharing Deal for Obesity Drug (2003) 81 *Bulletin of the World Health Organisation* 382.

246. Integrated Regional Information Network, *Marginalised San Win Royalties from Diet Drug* (2003) <<http://www.kalahari.peoples.org/documents/diet%20drug.html>>.

247. Working Group for Indigenous Minorities of South Africa, *WIMSA Report on Activities, 2002–2003* <[http://www.san.org.za/wimsa/ar2002\\_3/annualrep10.htm](http://www.san.org.za/wimsa/ar2002_3/annualrep10.htm)>.

248. Interview with Owen Hughes, Senior Counsel, Pfizer, 15 February 2005.

249. Biotechnology Australia, *Fact Sheet 1: What is Biotechnology?* (2003) <[http://www.biotechnology.gov.au/library/content\\_library/BA\\_FS1\\_Whatis\\_Jan04.pdf](http://www.biotechnology.gov.au/library/content_library/BA_FS1_Whatis_Jan04.pdf)>.

250. Jones J, 'Regulating Access to Biological and Genetic Resources in Australia: A case Study of Bioprospecting in Queensland' (1998) 5 *Australasian Journal of Natural Resources Law and Policy* 89.

251. Rimmer M, 'Blame it on Rio: Biodiversity, Native Title and Traditional Knowledge' (2003) 7 *Southern Cross University Law Review* 11.

intellectual property protection system, and a regulatory framework for management of the risks and ethical issues associated with genetic research.<sup>252</sup>

In Australia, the search for organisms from the natural environment that might provide the basis for product development involves the use of Indigenous knowledge. Henrietta Marrie<sup>253</sup> provides the following example:

The Australian Tree Seed Centre of the Commonwealth Scientific and Industrial Research Organisation (CSIRO) Division of Forestry is heavily engaged (in a number of African dry-land countries) in trialling various acacia species to suit a range of needs (soil conservation, firewood, food).<sup>254</sup> Aboriginal knowledge was instrumental in identifying 44 of the 49 species of acacias traditionally used by central Australian Aboriginal communities as potential food species for planting overseas. Also critical to the project is knowledge of traditional techniques for food preparation as the seed of a number of these species is toxic to humans unless properly prepared. As Devitt concluded, *With respect to food potential, what is currently known about the food value of acacias has been largely the result of tapping into Aboriginal knowledge.*<sup>255</sup> And yet Aboriginal people are not involved in the subsequent research, development and application processes regarding these overseas projects.<sup>256</sup>

These issues have particular relevance to Western Australia for at least two reasons. Firstly, Indigenous people of Western Australia have a rich knowledge of their biological environment. Secondly, the state of Western Australia has significant biological resources particularly flora. 'About half (12 000) of the total number of species of flowering plant in Australia occur in Western Australia. Further, 42 per cent of Australia's rare or endangered flora is in Western Australia'.<sup>257</sup>

The best-known example of the interface between the Western Australian government and Indigenous people in relation to traditional knowledge held in respect of flora is the commercial exploitation of smokebush. Henrietta Fourmile<sup>258</sup> has reported on the patenting by an American company of an element found in smokebush, a plant that has been traditionally used by the Indigenous people of Western Australia for its healing properties. In the 1960s, the Western Australian government granted the United States National Cancer Institute (NCI) a license to collect plants for screening for the presence of cancer-fighting properties.

The specimens were found to be ineffective, but they were held in storage until the late 1980s when they were tested again in the quest to find a cure for AIDS. Out of 7 000 plants screened from around the world, the smoke bush was one of four plants found to contain the active property Conocurovone, which laboratory tests showed could destroy the HIV virus in low concentrations. This 'discovery' was subsequently patented.<sup>259</sup>

The NCI sought further samples and a licence to collect more samples in Western Australia. The Department of Conservation and Land Management (CALM) attempted unsuccessfully to negotiate a contract with the NCI.

When after four months or so had gone by and there was no contract agreed between Western Australia and the NCI, the collector attempted to leave the country with the samples. He was found at Tullamarine airport with two of his three cases full of smokebush and other plants.<sup>260</sup>

The claims of biopiracy<sup>261</sup> and the negative publicity for the NCI that followed these events led ultimately to the NCI granting Victorian pharmaceutical company Amrad an exclusive worldwide licence to develop Conocurovone. An agreement was made between CALM and Amrad for Western Australian scientists to be involved in the research on production and preparation of Conocurovone and a provision for royalties from any commercial drug development, where the leading compound is Conocurovone, to come to Western Australia.<sup>262</sup> According to Blakeney, Amrad paid \$1.5 million to the Western Australian government and it was agreed that, if Conocurovone was successfully commercialised, the Western Australian government would be paid royalties of \$100 million by 2002.<sup>263</sup>

252. Commonwealth Biotechnology Ministerial Council, *National Biotechnology Strategy* (2000) <[http://www.biotechnology.gov.au/library/content\\_library/BA\\_strategy.doc](http://www.biotechnology.gov.au/library/content_library/BA_strategy.doc) on 29 October 2004> 7.

253. Previously Henrietta Fourmile-Marrie.

254. In particular in the drought and famine prone areas of countries such as Senegal, Niger, Burkina Faso, Somalia, Kenya, and Zimbabwe: see Fourmile-Marrie H, 'Developing a Regime to Protect Indigenous Traditional Biodiversity – Related Knowledge' (2000) 1 *Balayi: Culture, Law and Colonialism* 165.

255. Devitt J, 'Acacias: A Traditional Aboriginal Food Source in Central Australia', in House AP & Harwood CE (eds) *Australian Dry-zone Acacias for Human Food. Proceedings of a Workshop Held at Glen Helen, Northern Territory, Australia* (Melbourne: CSIRO, 1991) 51, cited in Fourmile-Marrie, *ibid.*

256. Fourmile-Marrie, above n 254.

257. Parke M & Kendall C, 'Bioprospecting of Traditional Medical Knowledge' (unpublished paper, Murdoch University School of Law, Perth, 1997) 2, citing Armstrong J & Hooper K, 'Nature's Medicine', in Department of Conservation and Land Management *Landscape* (Winter 1994) 12, 14.

258. Fourmile H, 'Protecting Indigenous Intellectual Property Rights in Biodiversity' (Paper presented at Kaltja vs Business Conference, 28 August 1996), cited in Janke, *Our Culture: Our Future*, above n 10, 24.

259. Janke, *Our Culture: Our Future*, *ibid.*, 24.

260. Marchant N, Bailey C & Cannon J reported these events in Parke and Kendall, above n 257, 13.

261. 'Biopiracy' is the term used to describe bioprospecting, biodiscovery and biotechnology where it contravenes Indigenous cultural or customary law requirements.

262. Parke & Kendall, above n 257, 13–14.

263. Blakeney, above n 229, 298; cited in Janke, *Our Culture: Our Future*, above n 10, 25. To date no large scale commercialisation has occurred.

Property in the flora and fauna of Western Australia vests in the Crown. Western Australian legislation in the 1980s also provided the Minister for the Environment with the power to grant exclusive rights to Western Australian flora and forest species for research purposes. In 1990 the Western Australian government awarded Amrad the rights to develop an anti-AIDS drug.

While Indigenous people generally support development of important medical treatments, they should not be disadvantaged by such work. Indigenous people's customary law should be respected and complied with. Some ways to achieve this include, but are not limited to:

- Seeking consultation with Indigenous people as to their customary law and other requirements.
- Compliance with Indigenous peoples' customary law and other requirements.
- Provision of comprehensive information to Indigenous people on proposed collection activities, research, development, commercial exploitation of any biological resources and knowledge, potential impacts on daily activities of Indigenous peoples, the ownership of biological resources and their derivatives, the ownership of Indigenous knowledge, and any possible future impacts or uses of resources and knowledge.
- Seeking prior informed consent for the use of any Indigenous knowledge.
- Seeking prior informed consent for access to Indigenous land for any purposes including collection.
- Ethical conduct in any consultation, collection or other processes.
- Agreements on mutually agreed terms with Indigenous people for all parts of the process.
- Equitable benefit sharing arrangements.
- Acknowledgement of Indigenous peoples contribution.
- Other requirements determined by Indigenous people according to their customary law.

The experience of the Western Australian government and Indigenous people in relation to smokebush is proof of the need for regulation of biological resources. Such regulation would acknowledge Indigenous peoples' rights over land, biological resources and related knowledge, as well as respect for Indigenous customary laws. For Indigenous people, lack of recognition, consultation, participation and benefit-sharing has made the smokebush case synonymous with biopiracy. Strong regulation is needed to provide recognition, respect and enforcement of Indigenous customary law.

### 3. Commonwealth public inquiry – access to biological resources in Commonwealth areas

In 2000, an inquiry into access to resources in Commonwealth areas was conducted. The inquiry was required to advise on a scheme capable of implementation through regulations under s 301 of the *Environment Protection and Biodiversity Conservation Act 1999* (Cth). The significant contribution of Indigenous knowledge to the development of commercial products was acknowledged by the Inquiry's Chair, John Voumard, who stated:

There is considerable commercial interest in Indigenous knowledge of plant and animal species for food, medicine and other purposes. Much of this knowledge has already been published and is readily available to the public. Their knowledge helps to locate species that could be used, for example, by:

- (a) the pharmaceuticals industry for developing new drugs;
- (b) herbalists and the medical profession in developing natural therapies and nutraceuticals;
- (c) the bush food industry, for new herbs, spices, flavours and food staples;
- (d) agricultural, aquaculture and floriculture industries;
- (e) industries based on developing personal care products, ie cosmetics, soaps, shampoos, fragrances, sunscreens, aromatic oils, etc;
- (f) biotechnology industries, in which biotechnology can be used to develop products associated with any of the above industries, as well as in the development of industrial products and processes.<sup>264</sup>

The inquiry received many submissions about the requirements of Indigenous peoples for recognition, acknowledgement, information, ethical conduct in collection processes, agreements with mutually agreed terms,

264. Voumard J, *Commonwealth Public Inquiry: Access to Biological Resources in Commonwealth Areas* (Canberra: Australian Government Printing Service, July 2000) 84.

equitable benefit sharing and the need for parties to seek the prior informed consent of Indigenous peoples.<sup>265</sup> The inquiry considered the submissions and the need to establish a system that respects Indigenous peoples' customary law obligations and provides an equitable platform for negotiation of rights.

The scheme takes into account the concerns of Indigenous organisations and communities by recommending that the regulations include:

- The requirement that the Minister take certain factors into account, when deciding whether to grant or refuse and access permit; and
- Provision that the decision of the owners of biological resources to deny access to their resources is not reviewable.<sup>266</sup>

The Inquiry also sought consultation with Commonwealth agencies and the states and territories on the establishment of a nationally consistent approach.

## 4. The Commonwealth regime

### Nationally consistent approach for access to and the utilisation of Australia's native genetic and biochemical resources (NCA)

On 11 October 2002, the 14 Commonwealth, state and territory ministers of Australia constituting the Natural Resource Management Ministerial Council endorsed the NCA.<sup>267</sup> The NCA makes adoption of the Bonn Guidelines explicit in its preamble in which all Australian governments state their acceptance of the invitation by the *Convention on Biological Diversity*<sup>268</sup> to apply the guidelines. The connection is further reinforced by including key elements of the guidelines among the features of the NCA.<sup>269</sup>

The NCA includes a set of principles to underpin the development of legislative, administrative or policy frameworks in Commonwealth, states and territories. The principles also aim to deliver important elements of the National Strategy for the Conservation of Australia's Biodiversity. One aspect of the NCA is Indigenous biodiversity knowledge.

The foreword to the NCA states that frameworks for access and benefit sharing must respect Indigenous people's special knowledge of biodiversity and ensure that Indigenous people have a choice and means to share their knowledge on fair and equitable terms.<sup>270</sup> It is noted in the Introduction that the NCA makes a significant contribution to achieving objective 1.8.2 of the National Strategy which states:

Ensure that the use of traditional biological knowledge in the scientific, commercial and public domains proceeds only with the cooperation and control of the traditional owners of that knowledge and ensure that the use and collection of such knowledge results in social and economic benefits to the traditional owners. This will include:

- a. encouraging and supporting the development and use of collaborative agreements safeguarding the use of traditional knowledge of biological diversity, taking into account existing intellectual property rights;
- b. establishing a royalty payments system from commercial development of products resulting, at least in part, from the use of traditional knowledge.

One general principle is that frameworks will 'recognise the need to ensure the use of traditional knowledge is undertaken with the cooperation and approval of the holders of that knowledge and on mutually agreed terms'.<sup>271</sup> A second general principle of the NCA is that where governments develop or review legislative, administrative or policy frameworks, the frameworks will be consistent with the *Native Title Act 1993* (Cth).<sup>272</sup> In the application of the general principles, governments are required, as far as is practical and appropriate, to apply a number of elements. One element, relating to the need for consistency between jurisdictions in the development or review of access and benefit sharing frameworks, requests that governments have regard to the value of 'collaborating when considering common issues such as the ownership of resources and the possible application of frameworks to private land'.<sup>273</sup>

265. Schnierer S, Submission, in Voumard, *ibid*, *Executive Summary*, 77.

266. Voumard, *ibid*, viii.

267. Australian Government, Department of the Environment and Heritage, *Understanding the Nationally Consistent Approach for Access to and the Utilisation of Australia's Native Genetic and Biochemical Resources* (2003) <<http://www.deh.gov.au/biodiversity/science/access/nca/pubs/understanding.doc>>1.

268. Above n 11.

269. *Ibid* 4.

270. Natural Resource Management Ministerial Council, *Nationally Consistent Approach For Access to and the Utilisation of Australia's Native Genetic and Biochemical Resources* (adopted 11 October 2002) 1.

271. *Ibid* [7], 'General Principles Underpinning Development or Review of Legislative, Administrative or Policy Frameworks in Australian Jurisdictions'.

272. *Ibid* [4(c)].

273. *Ibid* [11(j)], 'Common Elements of Access and Benefit-sharing Arrangements Established in Australian Jurisdictions'.

The emphasis of the NCA is to give effect to Australia's obligations under the Convention on Biological Diversity, to encourage investment in Australia's biotechnology capacity, ecological sustainability, certainty, transparency and a fair and equitable sharing of benefits. While Indigenous peoples may gain some benefits from outcomes of the NCA, the NCA does not mandate the creation, implementation or enforcement of Indigenous peoples' rights to Indigenous knowledge according to customary law. The NCA provides potential for governments to develop and review frameworks that provide respect for, or even implement, Indigenous customary law as it relates to Indigenous traditional knowledge. Whether governments maximise that potential in favour of Indigenous people will depend on many factors, including political will and the influence of stakeholders.

## Environment Protection and Biodiversity Protection Act

In 2000, the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (EPBC Act) was passed by the federal government. The EPBC Act implements Australia's obligations under the *Convention on Biological Diversity*. It includes specific references to the interests of Indigenous Australians. The objects of the Act include:

- (a) to protect the environment;
- (b) to promote ecologically sustainable development through the conservation and ecologically sustainable use of natural resources;
- (c) to promote the conservation of biodiversity;
- (d) to promote a co-operative approach to the protection and management of the environment involving governments, the community, land-holders and Indigenous peoples;
- (e) to assist in the implementation of Australia's international environmental responsibilities and in relation to Indigenous peoples;
- (f) to recognise the role of Indigenous people in the conservation and ecologically sustainable use of Australia's biodiversity; and
- (g) to promote the use of Indigenous people's knowledge of biodiversity with the involvement of, and in co-operation with, the owners of the knowledge.<sup>274</sup>

In order to achieve its objects, the Act:

promotes a partnership approach to environmental protection and biodiversity conservation through:

- (i) bilateral agreements with States and Territories; and
- (ii) conservation agreements with land-holders; and
- (iii) recognising and promoting Indigenous peoples' role in, and knowledge of, the conservation and ecologically sustainable use of biodiversity; and
- (iv) the involvement of the community in management planning.<sup>275</sup>

The Environmental Protection and Biodiversity Conservation Regulations 2000 (EPBC Regulations) provide procedures for checking research and certain activities on Commonwealth territories. This has allowed Indigenous concerns to be considered as an important part of management in the territories. One example is the clearance procedure operated by national parks for use of images from Uluru-Kata Tjuta National Park. The traditional owners of the park and the Department of the Environment and Heritage manage the park jointly. The EPBC Regulations provide that anyone wishing to conduct commercial filming, videoing, photography or art in the park must obtain a permit from the Director of the National Park. There are also guidelines for photographing and filming that must be adhered to as part of the permit conditions.<sup>276</sup>

### Draft amendments to the EPBC Regulations 2000 – access and benefit sharing arrangements under section 301

Section 301 (control of access to biological resources) of the EPBC Act provides for the making of regulations for the control of access to biological resources in Commonwealth areas.<sup>277</sup> The regulations may contain provisions for the

274. *Environment Protection and Biodiversity Protection Act 1999* (Cth) s 3(1).

275. *Environment Protection and Biodiversity Protection Act 1999* (Cth) s 3(2)(g).

276. Uluru-Kata Tjuta National Park, *Film and Photography Guidelines* (Northern Territory, 2002).

277. *Environment Protection and Biological Conservation Act 1999* (Cth) s301(1).

equitable sharing of benefits arising from the use of biological resources, facilitation of access to biological resources, the right to deny or grant access, and to set the terms of access.<sup>278</sup>

Regulations for administration of access and benefit sharing arrangements pursuant to s 301 of the EPBC Act have been drafted and currently await approval by the minister.<sup>279</sup> These proposed regulations<sup>280</sup> amend the EPBC Regulations.

The purposes of Part 8A of the regulations are:

- (a) providing for control of access to biological resources in Commonwealth areas, promoting their conservation and ecologically sustainable use;
- (b) ensuring equitable benefits by providing for agreements between the party seeking access and the access provider;
- (c) recognising the special knowledge of Indigenous people about biological resources;
- (d) establishing an access regime providing certainty, minimising cost for access seekers; and
- (e) seeking to endure that social and economic benefits of access accrue to Australia.<sup>281</sup>

Indigenous people are regarded as access providers to the land for the purpose of the regulations, in instances where the land is held under lease by the Commonwealth or a Commonwealth agency and is Indigenous peoples' land<sup>282</sup> and where they are the native titleholders for the area.<sup>283</sup> Access for persons who are not access providers for a Commonwealth area is only available in accordance with a permit in force under Part 17 of the proposed regulations. A 50-unit penalty applies to contraventions.<sup>284</sup>

Applicants for access must enter into a benefit sharing arrangement with all access providers.<sup>285</sup> These may include Indigenous land use agreements<sup>286</sup> within the meaning of the *Native Title Act 1993* (Cth). Benefit sharing agreements must provide for reasonable benefit sharing arrangements, including protection for, recognition of and valuing of any Indigenous knowledge given by the access provider.<sup>287</sup>

The regulations provide that where the access provider is an Indigenous owner, the access provider must have given informed consent to the benefit sharing agreement.<sup>288</sup> The matters the minister must consider in determining whether informed consent was given include the adequacy of the information provided by the applicant, the conduct of the negotiations, adequacy of the time provided for consideration of the permit application, consultation and negotiation of the benefit sharing agreement, the views of representatives of the access provider, and the availability of independent legal advice for the provider.<sup>289</sup> In assessing the agreement the minister may be satisfied that informed consent was given by native titleholders where there is a registered Indigenous land use agreement that purports to reflect the benefit sharing agreement.<sup>290</sup>

This system is important to Western Australia because states and territories have committed to a NCA for development or review of laws, administrative or policy frameworks for access to biological resources discussed above. The proposed Commonwealth regime may provide a model scheme for adoption by other states and territories. The standards of access and benefit sharing in relation to Indigenous people were strongly informed by the Voumard Report.<sup>291</sup>

The proposed Commonwealth scheme has been criticised on a number of grounds including failure to secure the right of prior informed consent, reliance on Indigenous land use agreements for benefit sharing,<sup>292</sup> failure to create Indigenous rights to biological knowledge as intellectual property or resource rights, and inadequate infrastructure arrangements for administering benefits accrued.<sup>293</sup>

278. *Environment Protection and Biological Conservation Act 1999* (Cth) s 301(2).

279. Department of Environment and Heritage, 'Access to Biological Resources in Commonwealth Areas – Draft Amendments to the Environment Protection and Biodiversity Conservation Regulations 2000 Access Permits and Benefits Sharing Arrangements: A Guide' <<http://www.deh.gov.au/epbc/about/amendments/pubs/guidetodraftregs.pdf>>.

280. Department of Environment and Heritage 'Draft Environment Protection and Biodiversity Conservation Amendment Regulations' (2001) <<http://www.deh.gov.au/epbc/about/amendments/pubs/draftbiologicalreg.pdf>>.

281. Environmental Protection and Biodiversity Conversation Regulations 2000 (Cth) reg 8A.01.

282. Environmental Protection and Biodiversity Conversation Regulations 2000 (Cth) reg 8A.03(1)(c).

283. Environmental Protection and Biodiversity Conversation Regulations 2000 (Cth) reg 8A.03(1)(j).

284. Environmental Protection and Biodiversity Conversation Regulations 2000 (Cth) reg 8A.05.

285. Environmental Protection and Biodiversity Conversation Regulations 2000 (Cth) reg 8A.06 (1).

286. Environmental Protection and Biodiversity Conversation Regulations 2000 (Cth) reg 8A.06 (3).

287. Environmental Protection and Biodiversity Conversation Regulations 2000 (Cth) reg 8A.08.

288. Environmental Protection and Biodiversity Conversation Regulations 2000 (Cth) reg 8A.09.

289. Environmental Protection and Biodiversity Conversation Regulations 2000 (Cth) reg 8A.09(2).

290. Environmental Protection and Biodiversity Conversation Regulations 2000 (Cth) reg 8A.12(2).

291. Voumard, above n 264.

292. Rimmer, *Blame It On Rio*, above n 251, 12.

293. Langton M, Rhea ZM, Ayre M & Pope J, 'Composite Report of the Status and Trends Regarding Knowledge, Innovations and Practices of Indigenous Local Communities' UNEP/CBD/WG8J/3/INF/4, (UNEP, CBD, 2003) 80–81.

## 5. Indigenous protected areas

Knowledge about land management is an important aspect of Indigenous knowledge. Where Indigenous people manage land their knowledge is utilised and intellectual property issues may arise in the recording or other uses of that knowledge. This is especially relevant to joint management arrangements. Customary law should be considered in land management and any uses of Indigenous knowledge in relation to land management.

The Indigenous Protected Areas (IPA) program is part of Australia's National Reserve System Program which aims to establish a network of protected areas which includes a representative sample of all types of ecosystems across the country. The National Reserve System Program is itself a part of the Australian government's Natural Heritage Trust.

The IPA program supports Indigenous landowners who seek to commit themselves 'to manage their lands for the protection of natural and cultural features in accordance with internationally recognised standards and guidelines'.<sup>294</sup> The IPA program funds management plans and practical work to protect natural and cultural features and to contribute to conserving biological diversity.

Indigenous groups who wish to seek funding to develop an IPA should:

- Have legal ownership of the land where they wish to establish an IPA. Note that different forms of tenure such as freehold, deed of grant or leasehold can all potentially be considered IPA establishment.
- Have land which has high natural and cultural heritage values.
- Have a clear intention to manage the land for the conservation of natural and cultural features for the long term.
- Not intend to use the proposed IPA for any land use that will have a detrimental effect on the cultural or natural heritage values.
- Have legal or other effective means available to manage and protect an IPA. For example traditional management practices such as patch burning can be an effective means of management. Customary Law is recognised as a form of management which satisfies the International Union for the Conservation of Nature (IUCN) guidelines. Legal mechanisms for protecting IPAs might include Commonwealth, State or Territory legislation, which may be implemented through an agreement with the appropriate government agency.<sup>295</sup>

Where Indigenous peoples' land management practices correspond to those required by the IPA, the IPA arrangement may provide an opportunity for Indigenous people to be supported while practising their customary law obligations in relation to land management.<sup>296</sup>

### Indigenous protected area in Western Australia

Paruku Indigenous Protected Area (IPA) covers 434 600 hectares, including an internationally significant wetland system, south of Halls Creek in the Kimberley region of Western Australia. It was the first IPA declared in WA and the 15th declared in Australia.<sup>297</sup>

Paraku was declared an Indigenous Protected Area (IPA) in September 2001 and was the first IPA to be declared in West Australia. The IPA, which covers an area of 434 000 ha and includes an internationally significant wetland system, is managed by the Tjurabalan Pastoral Company. Paraku (Lake Gregory) is of enormous spiritual significance to the Traditional owners including the Walmajarri, Jaru and Kukatja peoples.<sup>298</sup>

### Indigenous advisory committees

Although to date there has not been any legislative recognition of substantive rights in relation to customary law and Indigenous knowledge, there has been some implementation of rights to effective participation and consultation. The constitution of Indigenous advisory groups provides an opportunity for input on issues of customary law and Indigenous knowledge.

294. Department of Environment and Heritage, *The Indigenous Protected Area Program* (2002) <<http://www.deh.gov.au/indigenous/ipa/pubs/ipa-advice-02-03.doc>> 1.

295. *Ibid* 6.

296. This is not always the case. In some nations arrangements for protected areas have led to the forced removal of Indigenous peoples from their lands, dispossession of Indigenous peoples' legal rights to land and interference with customary law practices. See F MacKay, 'Addressing Past Wrongs: Indigenous Peoples and Protected Areas: The Right to Restitution of Lands and Resources' (October 2002) <[http://forestpeoples.gn.apc.org/Briefings/Indigenous%20Rights/ips\\_restitution\\_protected\\_areas\\_oct02\\_eng.htm#IV\\_B](http://forestpeoples.gn.apc.org/Briefings/Indigenous%20Rights/ips_restitution_protected_areas_oct02_eng.htm#IV_B)>.

297. Department of Environment and Heritage, 'Paruku Indigenous Protected Area' (2001) <<http://www.deh.gov.au/indigenous/fact-sheets/paruku.htm>>.

298. Agreements Treaties and Negotiated Settlements Project, 'Paruku Indigenous Protected Area' (2001) <<http://www.atns.net.au/biogs/A000460b.htm>>.

## The Indigenous Advisory Committee – EPBC Act

The EPBC Act establishes an Indigenous Advisory Committee which advises the Minister for the Environment and Heritage on the operation of the EPBC Act, taking into account the significance of Indigenous people's knowledge of the management of land and the conservation and sustainable use of biodiversity. The EPBC Act also provides for appointment of Indigenous people to the Biological Diversity Advisory Committee.<sup>299</sup>

## Indigenous Protected Areas Advisory Group

In June 1999 the Minister for Environment and Heritage established an Indigenous Protected Areas Advisory Group to provide advice on the development of the IPA program. The membership of the group reflects a range of participants with both expertise and commitment to promoting the benefits of Indigenous involvement in the management and protection of Australia's biodiversity. The Advisory Group has representation from Indigenous people from across the country as well as other stakeholders such as the World Wide Fund for Nature and Government Nature Conservation Agencies.<sup>300</sup>

# Part III: Recognition of Indigenous cultural and intellectual property in land and heritage legislation

## Land rights legislation and the common law

In the Northern Territory, land rights legislation has been an important means of enforcement of customary obligations. For example, the permit system allows communities to decide issues of access to land. The *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) also provides for respect of customary law. For example, in 1998 Mr Yunupingu, a senior custodian, successfully defended the charge of assault when he enforced his cultural obligations and prevented the photographing of children. The photographs were understood to be property in the case. Gillies SM heard the case of *Colin Goodsell v Galawruy Yunupingu*,<sup>301</sup> in the Northern Territory Court of Summary Jurisdiction. The facts are as follows:

The defendant was charged with assault, criminal damage to film and a camera, and theft of a camera, arising out of an incident in which a commercial photographer who entered Aboriginal land without a statutory permit and contrary to Yolngu law (that is, the traditional laws of north-east Arnhem Land) had taken photographs of the defendant's extended family.

The defendant is the senior elder of the Gumatj clan and is responsible under Yolngu law for authorising photography on Gumatj land and ensuring the spiritual welfare of two children who were present (and were photographed). Attempts to settle the dispute failed and in accordance with Yolngu law, the defendant seized the camera and destroyed the film. Although there was no body contact, the seizing of the camera caused the camera strap to impart force to the photographer.<sup>302</sup>

Gillies SM held:

1. The defendant was authorised under s 26(1)(a) of the *Criminal Code Act 1997* (NT) to seize the camera (by means of a technical assault) and destroy the film. His entitlement to act under Yolngu law is recognised by, and enforceable under, the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth). The beneficial purpose of this Act is to enable Aboriginal people to pursue traditional lives on Aboriginal land which implicitly means, inter alia, the observance and enforcement of traditional laws on that land. Since Yolngu rights are enforceable under the Act, it was not necessary to determine whether these rights are also recognised as native title under the common law.

2. Further, the defendant acted under an honest belief that Yolngu law had been recognised as native title by the *Land Rights Act* and the common law, thus could rely on an 'honest claim of right' (a 'mistake of law') under s 30(2) of the *Criminal Code Act* (NT). This section provides a defence regarding acts 'done with respect to property' such as criminal damage to a camera. The assault, being for the purpose of seizing property, was 'done with respect to property' and thus came within the section.<sup>303</sup>

299. *Environment Protection and Biological Conservation Act 1999* (Cth) s 504(4)(ea).

300. Department of Environment and Heritage, above n 294, 7.

301. (1999) 4 AILR 29.

302. *Ibid* 29.

303. *Ibid*.

Although Western Australia does not have land rights legislation, the case is a useful example of the incorporation of Indigenous customary law in areas where Indigenous rights to land are recognised, or where an honest belief in the applicability of customary law could be inferred.

The Aboriginal Heritage Regulations 1974 (WA) apply 'in relation to any Aboriginal site or protected area or land held subject to a covenant in favour of the minister in relation to which the minister has a duty under the Act'.<sup>304</sup> Regulation 10(h) states that 'written permission is required before photographs or recordings of Aboriginal sites can be published or used for commercial reproduction'. A penalty of \$50 is imposed for breaches. The Aboriginal Affairs Department of WA noted that this provision is regularly overlooked by publisher, and if publishing occurs outside WA little can be done under the Act. Reproduction for post cards, material or ceramics and the like are equally hard to enforce.<sup>305</sup>

## Cultural heritage laws

Currently, the Australian legal system protects Indigenous heritage in a legal framework that offers limited recognition and protection of Indigenous cultural heritage. Tangible heritage is protected through a system of Commonwealth and state heritage laws<sup>306</sup> including the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth) and the *Protection of Moveable Cultural Heritage Act 1986* (Cth). Aboriginal heritage laws have been the subject of great dissatisfaction among Indigenous people and significant reform of the system was recommended in the 1996 Evatt review.<sup>307</sup> The long-standing pursuit of heritage protection of Boobera Lagoon by the traditional owners in New South Wales is an example of the difficulties faced by Indigenous people using the Commonwealth heritage protection system.<sup>308</sup>

## The Aboriginal Heritage Act 1972 (WA)

### Places and sites

The *Aboriginal Heritage Act 1972* (WA) provides for Indigenous cultural heritage protection in Western Australia. The Act protects Aboriginal sites, places and objects.

The Act applies to:

- Any place of importance and significance where persons of Aboriginal descent have, or appear to have, left any object, natural or artificial, used for, or made or adapted for use for, any purpose connected with the traditional cultural life of the Aboriginal people, past or present;<sup>309</sup>
- Any sacred, ritual or ceremonial site, which is of importance and special significance to persons of Aboriginal descent;<sup>310</sup>
- Any place associated with the Aboriginal people that the Aboriginal Cultural Material Committee (ACMC) considers is important and of special significance to persons of Aboriginal descent and which is also of historical, anthropological, archaeological or ethnographic interest;<sup>311</sup>
- Any place where objects are traditionally stored, or to which, under the provisions of this Act, such objects have been taken or removed.<sup>312</sup>
- The right to excavate or remove anything from any Aboriginal site is reserved to the Registrar who on advice of the ACMC may authorise these actions, taking into account any conditions made by the ACMC.<sup>313</sup>

### Objects

The Act also protects objects, whether natural or artificial:

- which are or have been of sacred, ritual or ceremonial significance to persons of Aboriginal descent; or
- which were made or used for or adapted for use for, any purpose connected with the traditional cultural life of Aboriginal people, past or present.<sup>314</sup>

304. Aboriginal Heritage Regulations 1974 (WA) s 3(a).

305. Janke, *Our Culture: Our Future*, above n 10, 296.

306. Ibid 283–298.

307. Evatt E, *Review of the Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Canberra: Commonwealth of Australia, 1996).

308. Quiggin R, 'Boobera Lagoon' (2001) 5(6) *Indigenous Law Bulletin* 4. Boobera Lagoon is a site of particular cultural and spiritual significance to the Goomeroi people of the Toomelah, Boggabilla, Goondawindi area. They sought protection for the lagoon for over 30 years. For 20 years they sought protection under the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth). In 2002 they were successful in their application for a declaration under s 10 of the Act which lasted for two years.

309. *Aboriginal Heritage Act 1972* (WA) s 5(a).

310. *Aboriginal Heritage Act 1972* (WA) s 5(b).

311. *Aboriginal Heritage Act 1972* (WA) s 5(c).

312. *Aboriginal Heritage Act 1972* (WA) s 5(d).

313. *Aboriginal Heritage Act 1972* (WA) s 16.

314. *Aboriginal Heritage Act 1972* (WA) s 6.

The Act applies to objects that resemble sacred objects and are likely to deceive or be capable of being mistaken for such an object.<sup>315</sup> However, the Act does not apply to objects made for the purpose of sale that is not an object of sacred significance to Aboriginal people.<sup>316</sup>

It is an offence to alter, damage, remove, destroy or conceal an object on or under an Aboriginal site without authority of the ACHM or the minister; to deal with an object in a manner not sanctioned by relevant custom; or to assume the possession, custody or control of such an object.<sup>317</sup>

The Act focuses on the protection of tangible heritage such as sites and objects. The Indigenous knowledge that is associated with all tangible heritages and held by custodians ought to be recognised and protected under the Act. Some protection of customary law obligations in relation to knowledge is found in s 7 of the Act.

Subject to subsection (2), in relation to a person of Aboriginal descent who usually lives subject to Aboriginal customary law, or in relation to any group of such persons, this Act shall not be construed –

- (a) so as to take away or restrict any right or interest held or enjoyed in respect to any place or object to which this Act applies, in so far as that right or interest is exercised in a manner that has been approved by the Aboriginal possessor or custodian of that place or object and is not contrary to the usage sanctioned by the Aboriginal tradition relevant to that place or object; or
- (b) so as to require any such person to disclose information or otherwise to act contrary to any prohibition of the relevant Aboriginal customary law or tradition.<sup>318</sup>

These laws are primarily aimed at protecting sites and objects, which are of significance to Indigenous people, from destruction. In most jurisdictions—except Victoria who have legislation pertaining to folklore—the intangible aspects of a site or object including, for instance, knowledge, art and stories are not protected under these laws.

## Confidentiality

When Indigenous people engage in legal systems to achieve rights to land or rights to protect sites or objects, they are required to disclose information. Indigenous people need mechanisms to ensure confidentiality of the information generated for claims, applications for heritage protection and land management arrangements.

For example, in *Ngalpil v State of Western Australia*<sup>319</sup> Carr J made orders in respect of native title over an area surrounding Paruku (Lake Gregory) near Mulan. One issue remained in dispute at the time of the consent determination, relating to the anthropological reports generated during the course of the matter. The applicant wanted the reports to be subject to confidentiality orders by the court. The terms of such an order and whether they were authorised under the relevant statutory provisions were in dispute. Carr J resolved the matter by granting 'confidentiality orders which followed those proposed by the State of Western Australia with the requirement that the native title holders are given notice and consulted regarding their use'.<sup>320</sup>

## Native title

Since *Mabo v Queensland (No 2)*<sup>321</sup> in 1992, native title rights to land have been recognised. Native title has its origins in, and gets its content from, the traditions and customs of the Indigenous inhabitants. The extent to which native title incorporates customary law in relation to cultural knowledge has been an aspect of a number of important recent native title cases.

The *State of Western Australia v Ward*<sup>322</sup> is the most well known of these cases. At trial Lee J held that 'the native title rights held by the Miriuwung Gajerrong People included 'a right to maintain, protect and prevent the misuse of cultural knowledge'.<sup>323</sup> However, Lee J's judgment in this respect was subsequently overturned by the majority of the Full Court of the Federal Court on appeal.<sup>324</sup> The case went to the High Court, and the issue was apparently put to rest when it handed down its judgment on 8 August 2002.<sup>325</sup>

315. *Aboriginal Heritage Act 1972* (WA) s 6(2).

316. *Aboriginal Heritage Act 1972* (WA) s 6(3)(a).

317. Janke T, *Indigenous Cultural and Intellectual Property and Cultural Heritage Legislation* (Unpublished paper, Sydney, 2004).

318. *Aboriginal Heritage Act 1972* (WA) s 7.

319. [2001] FCA 1140 (20 August 2001).

320. *Ngalpil*, *ibid.* Agreements, Treaties and Negotiated Settlements Database <<http://www.atns.net.au/biogs/A000013b.htm>>.

321. (1992) 175 CLR 1.

322. [2002] HCA 28.

323. *Ben Ward v State of Western Australia* (1998) 159 ALR 483, 640.

324. *Western Australia v Ward* (2000) 170 ALR 159.

325. *Western Australia v Ward* [2002] HCA 28, See K O'Brien, 'The Appropriation of Indigenous Ecological Knowledge' (2004) 1 *Macquarie Journal of International and Comparative Environmental Law* 44.

In the majority judgment, the judges note the decision of the Full Federal Court as follows:

Although the relationship of Aboriginal people to their land has a religious or spiritual dimension, we do not think that a right to maintain, protect and prevent the misuse of cultural knowledge is a right in relation to land of the kind that can be the subject of a determination of native title.<sup>326</sup>

The majority of the High Court held:

In this Court, it was submitted that the Full Court erred in this respect and that this Court should restore par 3(j) of the first determination. The first difficulty in the path of that submission is the imprecision of the term 'cultural knowledge' and the apparent lack of any specific content given it by factual findings made at trial. In submissions, reference was made to such matters as the inappropriate viewing, hearing or reproduction of secret ceremonies, artworks, song cycles and sacred narratives.

To some degree, for example respecting access to sites where artworks on rock are located, or ceremonies are performed, the traditional laws and customs which are manifested at these sites answer the requirement of connection with the land found in par (b) of the definition in s 223(1) of the [*Native Title Act 1993* (Cth)]. However, it is apparent that what is asserted goes beyond that to something approaching an incorporeal right akin to a new species of intellectual property to be recognised by the common law under par (c) of s 223(1). The 'recognition' of this right would extend beyond denial or control of access to land held under native title. It would, so it appears, involve, for example, the restraint of visual or auditory reproductions of what was to be found there or took place there, or elsewhere. It is here that the second and fatal difficulty appears.

In *Bulun Bulun v R & T Textiles Pty Ltd*, von Doussa J observed that a fundamental principle of the Australian legal system was that the ownership of land and ownership of artistic works are separate statutory and common law institutions. That is the case, but the essential point for present purposes is the requirement of 'connection' in par (b) of the definition in s 223(1) of native title and native title rights and interests. The scope of the right for which recognition by the common law is sought here goes beyond the content of the definition in s 223(1).

That is not to say that in other respects the general law and statute do not afford protection in various respects to matters of cultural knowledge of Aboriginal peoples or Torres Strait Islanders. Decided cases apply in this field the law respecting confidential information, copyright, and fiduciary duties. Provision respecting moral rights is now made by Pt IX (ss 189–195AZO) of the *Copyright Act 1968* (Cth).<sup>327</sup>

The joint majority judgement noted that s 233(1)(b) of the *Native Title Act 1993* (Cth) required consideration of whether, by the traditional laws acknowledged and the traditional customs observed by the peoples concerned, they have a 'connection' with the land or waters. However, the court found it unnecessary to form a conclusion as to whether there could be a spiritual connection to the land.

In particular, we need express no view on when a 'spiritual connection' with the land (an expression often used in the Western Australian submissions and apparently intended as meaning any form of asserted connection without evidence of continuing use or physical presence) will suffice.<sup>328</sup>

[The majority judgment] reads down the scope of the *Native Title Act 1993* (Cth), so that it does not encompass cultural knowledge...The majority argued that native title rights were limited to tangible property, and did not extend to intangible property because of a cultural materialism and a legal pragmatism. Arguably there is a need to take a more expansive view of the relationship between native title rights, customary law and spiritual custodianship.<sup>329</sup>

Kirby J, in his dissenting judgment, acknowledges the limitations of the existing legal regime for the protection of cultural property.<sup>330</sup>

[Kirby J] seeks to rebut the comments of Justice von Doussa<sup>331</sup> that recognition of native title rights analogous to intellectual property rights would fracture a so-called 'skeletal principle' of the common law in Australia by contravening the 'inseparable nature of ownership in land and ownership in artistic works' and that therefore such recognition would be contrary to s 223 (1)(c) of the *Native Title Act*.<sup>332</sup>

Kirby J also explores the possibility that cultural knowledge may be protected under s 116 of the *Constitution* (Cth)<sup>333</sup> which provides: 'The Commonwealth shall not make any law for establishing religion, or for imposing any religious

326. *Western Australia v Ward* above n 322, 84.

327. *Ibid* 84–85 (footnote omitted).

328. *Western Australia v Ward* (2002) 213 CLR 1, 86.

329. Rimmer, *Blame it on Rio*, above n 253, 27.

330. Rimmer, *ibid* 28.

331. In *Bulun Bulun v R & T Textiles*, above 8.

332. Rimmer, *Blame it on Rio*, above n 251, 28.

333. See *Western Australia v Ward*, above n 328.

observance, or for prohibiting the free exercise of any religion.' Kirby J believes that s 116 of the *Constitution* (Cth) has the potential to provide for the right to cultural knowledge insofar as it is based upon the spirituality of Australia's Indigenous people.<sup>334</sup>

In South Australia native title claimants in the *De Rose* case, sought a limited right to protect their cultural knowledge by preventing

the disclosure otherwise than in accordance with traditional laws and customs of tenets of spiritual beliefs and practices (including songs, narratives, rituals and ceremonies) which relate to areas of land or waters, or places on the land or waters.<sup>335</sup>

The Full Federal Court cited *Ward*<sup>336</sup> stating:

[T]he joint judgment in *Ward* rejected a contention that a determination of native title can include a right or interest exercisable by reason of the existence of native title to protect and prevent the misuse of 'cultural knowledge of the ... holders associated with the "determination area".' A recognition of such a right 'akin to a new species of intellectual property' went beyond the content of the definition in s 223(1), specifically the requirement of 'connection' in s 223(1)(b).<sup>337</sup>

The Full Federal Court went on to consider the position of cultural knowledge in relation rights to land.

[T]he High Court in *Ward* expressed the view that the distinction between pars (a) and (b) of s 223(1) can be 'critical' to the resolution of a particular case. The relevant issue in *Ward* was whether the NTA is concerned with the maintenance and protection of cultural knowledge. Their Honours pointed out that cultural knowledge may be possessed under the traditional laws acknowledged and traditional customs observed by the relevant people. However, they held that the asserted right to maintain, protect and prevent the misuse of 'cultural knowledge' did not satisfy the requirement of connection with the land imposed by s 223(1)(b) of the NTA. This was so because recognition of the asserted right would extend beyond denial or control of access to land held under native title and would amount to acknowledgement of a new species of intellectual property.

Their Honours did not explicitly address whether the asserted right, insofar as it went beyond permitting or controlling access to sites where artworks were located or ceremonies performed, could be said to be a right possessed under traditional laws and customs 'in relation to land'. It may be implicit in their Honours' reasoning that the asserted right was possessed 'in relation to land'. If so, that fact was not enough, in their Honours' view, to establish that the claimants had a 'connection' with the land for the purposes of s 223(1)(b). The explanation may be that a right can exist 'in relation to land' for the purposes of s 223(1)(a), even if the 'right' carries with it no entitlement to do or prevent anything from being done on the land; but that such a right is not of itself necessarily sufficient to establish that, by traditional laws and customs, the holder of the right has a 'connection' with the land for the purposes of s 223(1)(b).<sup>338</sup>

The Aboriginal and Torres Strait Islander Social Justice Commission has commented that:

[The court's approach] makes clear that it is unlikely that the NTA will be seen as a vehicle for the protection of cultural knowledge, even though the High Court in *Miriwung Gajerrong* identified some of the conditions under which this might be possible.<sup>339</sup>

However, O'Brien J notes the case of *Wongatha People v Western Australia (No 6)*,<sup>340</sup> in which the applicants sought leave and succeeded to amend their application in response to *Miriwung Gajerrong* to 'include in their list of native title rights and interests claimed, the right to 'teach and pass on knowledge of the applicant group's traditional laws and customs pertaining to the ... area' and the right to 'learn about and acquire knowledge concerning the applicant group's traditional laws and customs pertaining to the ... area'.<sup>341</sup> O'Brien notes that the explicit linking of rights to teach and pass on culture to land may allow the judge to recognise and protect the right under the native title regime.<sup>342</sup>

334. Rimmer, *Blame it on Rio*, above n 251, 31.

335. *De Rose v South Australia*, [2002] FCA 1342 (1 November 2002) [50].

336. *Western Australia v Ward*, above n 328.

337. *De Rose v State of South Australia* [2003] FCAFC 286 (16 December 2003) [171].

338. *Ibid* [306]–[307] (footnotes omitted).

339. Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report* (Sydney: Human Rights and Equal Opportunity Commission, 2002) 41.

340. [2003] FCA 663.

341. O'Brien, above n 325, 45.

342. *Ibid* 46. Oral submissions were concluded in June 2004 and at the time of writing the claimants were awaiting the judge's decision on the determination.

## Part IV: International laws and developments in Indigenous cultural and intellectual property

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### Introduction

'International laws' refer to the rules governing relations between nation states. They take the form of treaties, declaration, conventions, protocols and agreements. Through their participation in the United Nations systems many international laws are drafted by nations.

The value of international laws is that they set the standards for the international community on how to implement the obligations contained in the treaties. However, Australian law itself does not recognise treaty obligations as a source of law unless the treaty is specifically incorporated into Australian law through legislation.

International laws do not automatically turn into domestic laws and a range of political factors impact on whether a nation state will sign, ratify or accede to a particular treaty or convention. Nation states are not legally bound to implement the provisions of an international agreement even if they have ratified it. However, in *Minister for Immigration & Ethnic Affairs v Teoh*,<sup>343</sup> a majority of the High Court of Australia considered that the Australian government's entry into international conventions gives rise to a legitimate expectation that, in reaching their decisions, administrative decision makers should consider all relevant treaties to which Australia is a party. If a decision maker does not act in accordance with a treaty, an affected individual may have a right to a hearing. After the Teoh Case, the Minister for Foreign Affairs and the Attorney General for the then Keating government released a formal statement which stated that Australia's ratification of an international treaty could not give rise to a legitimate expectation that government decision makers would take international treaties and conventions into account.<sup>344</sup> The Howard government has also upheld this position.

The Crown has exclusive power to make treaties; the authority being exercised by the Governor General in Council. The federal government's Department of Foreign Affairs and Trade is responsible for concluding internationally binding treaties between Australia and other countries. Prior to signing or ratifying a treaty, the approval of the federal Cabinet is required. Since 1998 there has been a Joint Parliamentary Committee on Treaties whose main role is to scrutinise treaties signed by the Executive and report on the implications for Australian domestic law.

The right of the Commonwealth Government to give effect to treaties is recognised as being under the external affairs power.<sup>345</sup> Many international treaties need state and territory cooperation for their domestic implementation. In this respect, discussions with state and territory governments occur at many levels. The peak consultative body is the Treaties Council consisting of the Prime Minister, the premiers and the chief ministers.<sup>346</sup> Once a treaty has been entered into on behalf of Australia, it is binding upon the entire territory of Australia.

The usefulness of international law to a large extent depends on how fully these treaties and conventions are implemented into domestic law. International law has an influence on the development of the common law and may also be used to interpret statutes.<sup>347</sup>

### International instruments and policy development

Traditional knowledge and cultural expressions of Indigenous people are the subject of discussion in the international arena.

### Human Rights Conventions and Indigenous Cultural and Intellectual Property

Article 27 of the *International Covenant on Civil and Political Rights*<sup>348</sup> recognises the collective rights to culture, language and religion of minorities. Article 27 states:

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343. (1995) 183 CLR 273.

344. Minister for Foreign Affairs and the Attorney-General, 'The Effect of Treaties in Administrative Decision-Making' (Joint Statement, 25 February 1997).

345. *Australian Constitution* s 51(xxix). See *Commonwealth v Tasmania (The Tasmanian Dam Case)* (1983) 158 CLR 1.

346. Department of Foreign Affairs and Trade, 'Australia and International Treaty Making Information Kit' <<http://www.austlii.edu.au/au/other/dfat/reports/infokit.html>>.

347. Department of Foreign Affairs and Trade, 'Negotiating and Implementing Treaties: Non-government Organisations and State and Territory Participation' (2004) <<http://www.dfat.gov.au/treaties/making/making3.html>>.

348. *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, [1980] ATS 23 (entered into force in Australia 13 November 1980).

In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.

Article 15 of the *International Covenant on Economic, Cultural and Social Rights*<sup>349</sup> recognises the rights of individuals to participate in cultural life, to benefit from scientific progress and to benefit from their intellectual property. Article 15 states:

1. The States Parties to the present Covenant recognize the right of everyone:
  - (a) To take part in cultural life;
  - (b) To enjoy the benefits of scientific progress and its applications;
  - (c) To benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.
2. The steps to be taken by the States Parties to the present Covenant to achieve the full realization of this right shall include those necessary for the conservation, the development and the diffusion of science and culture.
3. The States Parties to the present Covenant undertake to respect the freedom indispensable for scientific research and creative activity.
4. The States Parties to the present Covenant recognize the benefits to be derived from the encouragement and development of international contacts and co-operation in the scientific and cultural fields.

## Draft Declaration on the Rights of Indigenous People

The Declaration on the Rights of Indigenous Peoples was developed from the work of the United Nations Working Group on Indigenous Populations. Over the years, Indigenous peoples, non-government organisations and representatives of United Nation member states have met at regular intervals to discuss the articles. The purpose of these meetings is to reach agreement on the wording and progress of the declaration through established United Nations processes culminating in adoption by the United Nation's General Assembly. Once the declaration is adopted it will constitute a non-binding declaration.

Although the declaration will not create any legal obligations on states in the sense of a treaty, it will

contribute to a growing body of customary international law in the area of Indigenous peoples' rights. Customary international law is associated with the concept of 'State practice'. This is the notion that binding rules of international law can be discerned in the ways States habitually behave with one another. Particular principles can acquire the status of customary law and become binding on States, even when the State is not a party to a treaty, such a resolution or declaration of the UN General Assembly.<sup>350</sup>

Articles 12, 13, 14, 24 and 29 of the draft Declaration include protection for Indigenous heritage rights. Article 12 states: 'Indigenous peoples have the right to practise and revitalize their cultural traditions and customs.' This includes all manifestations of culture, such as archaeological sites, artefacts, designs, ceremonies and art forms. It also includes the right of return of tangible and intangible cultural property which was taken without their consent.

The Australian government representatives expressed concern with respect to the rights of third parties to ownership within the framework of Article 12. The representative of Australia also expressed concern as to the practicality and feasibility of restitution for past acts and referred to the need to clarify the term 'intellectual property' in Articles 12 and 29.<sup>351</sup>

These comments are instructive of the kinds of objections Indigenous Australians might expect to encounter when negotiating Indigenous heritage rights within Australia. For instance, the collection, distillation, production and application of tea tree oil is arguably derived from Indigenous knowledge concerning the healing properties of the tea tree. Many companies commercially offer tea tree oil products. How would Indigenous people receive restitution for the use of this knowledge? These kinds of issue will need to be thought through by Indigenous communities and negotiators.

During negotiations of the declaration it has been suggested that Articles 12, 24 and 29 be brought together into a single article, but this would not accord with the broad definition of Indigenous heritage adopted by Indigenous Australians.

349. *International Covenant on Economic, Cultural and Social Rights*, opened for signature 16 December 1966, [1976] ATS 5 (entered into force in Australia 10 March 1976).

350. Pritchard S, *Setting International Standards: An Analysis of the United Nations Declaration on the Rights of Indigenous People and the First Six Sessions of the Commission on Human Rights*, 3rd edn (Canberra: ATSIC, 2001) 50.

351. *Ibid* 126.

Article 13 protects Indigenous peoples' rights to their spiritual and religious traditions, customs, ceremonies, sites and ceremonial objects; to the repatriation of human remains; and to preservation and protection of sacred places including burial sites. These rights currently find some representation in Australian law and policy. The return of human remains is a significant issue for Indigenous Australians. In 2000, the British and Australian prime ministers issued a joint statement pledging their commitment to repatriation of Indigenous remains held in British museums.<sup>352</sup>

Article 14 protects the rights to Indigenous history, language, oral traditions, philosophies, place and community names, and the right to an interpreter in political, legal and administrative proceedings. This Article combines the rights of Indigenous people to ongoing language, linguistic identity and to procedural fairness where language differences may be a barrier. Indigenous Australian's definition of Indigenous heritage includes linguistic identity, but has not so far linked this to procedural fairness in legal or administrative matters.

Article 24 protects rights to traditional medicines and health practices, including the right to the protection of vital medicinal plants, animals and minerals. It combines these cultural rights with rights to access health services of all kinds.

Article 29 focuses on the right to protection and control of intellectual property and to develop sciences, technologies and cultural manifestations, including human and other genetic resources, seeds, medicines, knowledge of the properties of fauna and flora, oral traditions, literatures, designs, and visual and performing arts. This article is arguably the most comprehensive representation of Indigenous heritage as defined by Indigenous Australian representatives.

## Pacific model law for the protection of traditional knowledge

Regionally, a model law for protecting traditional knowledge in the Pacific was drafted and completed in July 2002. The *Pacific Regional Framework for the Protection of Traditional Knowledge and Expression of Culture* establishes 'traditional cultural rights' for traditional owners over traditional knowledge and expression of culture.<sup>353</sup> The prior and informed consent of the traditional owners is required, among other things, to:

- reproduce or publish the traditional knowledge or expressions of culture;
- perform or display the traditional knowledge or expressions of culture in public;
- make available online or electronically transmit to the public (whether over a path or a combination of paths, or both) traditional knowledge or expression of culture; and
- use the traditional knowledge or expression of culture in any other form.

If individual Pacific countries wish to enact laws for protection of traditional knowledge, the model law is a useful starting point. Fiji is currently drafting a law based on this model.

## World Intellectual Property Organisation (WIPO)

In 2000 WIPO established an Inter-Government Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore to discuss issues relating to:

- access to genetic resources and benefit sharing;
- the protection of traditional knowledge, innovations and creativity; and
- the protection of expressions of folklore.

WIPO is currently evaluating policy and legal issues and facilitating development of national and international responses to issues raised by Indigenous peoples in relation to the use of their knowledge and the intellectual property system.<sup>354</sup>

## The Convention on Biological Diversity

The objectives of the *Convention on Biological Diversity*<sup>355</sup> are the conservation of biological diversity, the sustainable use of its components, and the fair and equitable sharing of the benefits arising out of the utilisation of genetic

352. Forde C & Ormond-Parker L, 'Repatriation Developments in the UK' (2001) 5 *Indigenous Law Bulletin* 6

353. Working Group for Legal Experts on the Protection of Traditional Knowledge and Expressions of Culture, 'Model Law for the Protection of Traditional Knowledge and Expressions of Culture', (Noumea, New Caledonia, 26–28 June 2002) s 6.

354. Information on the World Intellectual Property Organisation's work can be found at <<http://www.wipo.int/tk/en/>>.

355. Above n 11.

resources – including by appropriate access to genetic resources and by appropriate transfer of relevant technologies, taking into account all rights over those resources and to technologies by appropriate funding. Discussions and negotiations between the parties to the convention have resulted in decisions in relation to the development of an international regime for access and benefit sharing; domestic access and benefit sharing laws; and the role of the knowledge of Indigenous peoples.

The sixth conference of the parties of the *Convention on Biodiversity* adopted the Bonn Guidelines on Access to Genetic Resources and Fair and Equitable Sharing of the Benefits Arising out of their Utilization (Bonn Guidelines). The guidelines are voluntary. They identify the steps in the process of access and benefit sharing, and emphasise the need for the prior informed consent of the nation in which the resources are located.<sup>356</sup> The Bonn Guidelines make a number of references to Indigenous peoples and local communities, and to traditional knowledge. All provisions are subject to the national legislation in force in each member state. Clause 31 states:

Respecting established legal rights of indigenous and local communities associated with the genetic resources being accessed or where traditional knowledge associated with these genetic resources is being accessed, the prior informed consent of indigenous and local communities and the approval and involvement of the holders of traditional knowledge, innovations and practices should be obtained, in accordance with their traditional practices, national access policies and subject to domestic laws.

Subject to national legislation, the Bonn Guidelines require the parties to ensure that the commercialisation and any other use of genetic resources should not prevent traditional use of genetic resources,<sup>357</sup> and support measures, as appropriate, to enhance Indigenous and local communities' capacities to represent their interests fully at negotiations.<sup>358</sup>

Indigenous peoples and local communities are regarded as stakeholders and states are encouraged to seek their views in relation to access, benefit sharing, mutually agreed terms, and the development of national strategy, policies or regimes on access and benefit sharing.<sup>359</sup> The guidelines recommend the establishment of national consultative groups, comprising relevant stakeholders including Indigenous peoples and local communities, in order to facilitate their involvement.<sup>360</sup>

The parties have also endorsed the *Akwé: Kon Voluntary Guidelines for the Conduct of Cultural, Environmental and Social Impact Assessments Regarding Developments Proposed to Take Place, or Which Are Likely to Impact on Sacred Sites, and on Land and Waters Traditionally Occupied or Used By Indigenous and Local Communities*.<sup>361</sup> In Decision VII/16 the Conference of the Parties encourages governments to initiate a legal and institutional review of matters related to cultural, environmental and social impact assessment, with a view to exploring options for incorporation of these guidelines into national legislation, policies and procedures.<sup>362</sup> Parties are also requested to use the guidelines as appropriate.<sup>363</sup> The purpose of the *Akwé: Kon Voluntary Guidelines* includes the following reference to the traditional knowledge of Indigenous peoples.

[T]he purpose of these Guidelines is to provide a collaborative framework within which Governments, Indigenous and local communities, decision makers and managers of developments can ... take into account the traditional knowledge, innovations and practices of Indigenous and local communities as part of environmental, social and cultural impact-assessment processes, with due regard to the ownership of and the need for the protection and safeguarding of traditional knowledge, innovations and practices.<sup>364</sup>

Article 8(j) of the *Convention on Biological Diversity* reads:

Subject to its national legislation, respect, preserve and maintain knowledge, innovations and practices of Indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity and promote their wider application with the approval and involvement of the holders of such knowledge, innovations and practices and encourage the equitable sharing of the benefits arising from the utilization of such knowledge, innovations and practices.

356. 'Bonn Guidelines on Access to Genetic Resources and Fair and Equitable Sharing of the Benefits Arising Out of Their Utilization' (Bonn Guidelines), Introduction.

357. Bonn Guidelines, *ibid.*, Cl 11 (iii).

358. *Ibid.*, cl 11 (vii).

359. *Ibid.*, cl 18. Special Rapporteur, Erica Irene Daes notes that there is considerable developing international law which recognises Indigenous people's status as rights holders, not just stakeholders in relation to natural resources: see E/CN.4/Sub.2/2004/30 Prevention of Discrimination and Protection of Indigenous peoples: Indigenous Peoples' Permanent Sovereignty Over Natural Resources, 13.

360. Bonn Guidelines, *ibid.*, cl 19.

361. Report of the Seventh Meeting of the Conference of the Parties to the Convention on Biological Diversity (UNEP/CBD/COP/7/21, 13 April 2004) n 57. (Pronounced 'agway-goo'. A holistic Mohawk term meaning 'everything in creation' provided by the Kahnawake community located near Montreal, where the guidelines were negotiated.)

362. *Ibid.*, Decision VII/16, [2] 260.

363. *Ibid.* [3].

364. *Ibid.*, Annex, 261.

Australia ratified the Convention in 1993, and has implemented the National Strategy for Conservation of Australia's Biological Diversity. The strategy has a policy and legislative element.

The National Strategy for the Conservation of Australia's Biological Diversity<sup>365</sup> adopts a number of principles. The following relate to Indigenous concerns:

Although all levels of government have a clear responsibility, the cooperation of conservation groups, resource users, Indigenous peoples, and the community in general is critical to the conservation of biological diversity.<sup>366</sup>

The close, traditional association of Australia's Indigenous peoples with components of biological diversity should be recognised, as should the desirability of sharing equitably benefits arising from the innovative use of traditional knowledge of biological diversity.<sup>367</sup>

The Australian government implemented the Natural Heritage Trust, which consists of a series of programs and includes the appointment of 13 Indigenous land management facilitators around Australia who provide information to Indigenous communities about the types of support and technical advice that is available to assist them with the land management issues of their lands. The facilitators also provide feedback to Commonwealth Government policy-makers on land management issues that are of concern to Indigenous communities. Land management projects involving Indigenous communities include:

- Establishing nurseries for revegetation with native plants;
- Rabbit and weed control;
- Fencing out stock from ecologically sensitive areas such as river banks; and
- Developing interpretation trails to inform the broader community about Indigenous land management practices and the benefits of protecting cultural sites.<sup>368</sup>

## Indigenous statements

### Maatata Declaration 1993

In 1993 the nine tribes of Maatata in the Bay of Plenty Region of Aotearoa, New Zealand convened the first ICIP Rights Conference. The Maatata Declaration was adopted by the delegates and includes the following principles among many others in the declaration:

The right to self determination, the exercise of which includes recognition of Indigenous people as the exclusive owners who are capable of managing their ICIP, and their intellectual property.<sup>369</sup>

Indigenous people affirm that 'the knowledge of Indigenous peoples of the world is of benefit to all humanity'. The sharing of this knowledge is qualified by the requirement that Indigenous people's fundamental rights to define and control this knowledge are protected by the international community.<sup>370</sup>

### Julayinbul Statement

In 1993, a meeting of Indigenous delegates in Australia developed and endorsed the Julayinbul Statement,<sup>371</sup> which identifies the rights of Indigenous people to continue to live within and protect, care for, and control the environment and Indigenous heritage. The statement includes recognition of the right of Indigenous people to define themselves and their Indigenous heritage. The statement echoes the Maatata commitment to sharing Indigenous heritage provided fundamental rights are respected. The statement locates Indigenous heritage within the framework of Aboriginal customary laws. Aboriginal intellectual property, within Aboriginal common law, is an inherent inalienable right which cannot be terminated extinguished or taken.

Any use of the intellectual property of Aboriginal Nations and Peoples may only be done in accordance with Aboriginal Common Law, and any unauthorised use is strictly prohibited.

365. Department of the Environment, Sport and Territories, *National Strategy for the Conservation of Australia's Biological Diversity* (1996) <<http://www.deh.gov.au/biodiversity/publications/strategy/>>.

366. *Ibid.*, 'Principles' (2).

367. *Ibid.* (9).

368. See Department of the Environment and Heritage <<http://www.ea.gov.au/indigenous/programs.html>>.

369. Maatata Declaration, preamble.

370. *Ibid.*

371. 'The Julayinbul Statement on Indigenous Intellectual Property Rights' (Jingarrba, 25–27 November 1993).

Just as Aboriginal Common Law has never sought to unilaterally extinguish English/Australian Common Law, so we expect English/Australian Common Law to reciprocate.<sup>372</sup>

The statement then calls upon Indigenous people to develop means to implement these principles. It calls upon governments to review legislation and policy with regard to ICIP, and to implement international standards which protect ICIP rights. The Julayinbul Statement provides important guidance on standard setting for development of legal protections of Indigenous heritage.

## Part V: Australian reports and developments in Indigenous cultural and intellectual property

### The Working Party Report on the Protection of Aboriginal Folklore

In 1974, the Commonwealth Government set up a working party to investigate the protection of Aboriginal Folklore.<sup>373</sup> Generally, the working party's report, completed in 1981, recommended the enactment of an Aboriginal Folklore Act which would, among other things:

- Prohibit non-traditional uses of secret/sacred materials.
- Prohibit debasement, mutilation or destruction of folklore and impose criminal sanctions.
- Allow payments to traditional owners for the commercial use of items of their folklore.
- Provide for a system of clearances for prospective users of items of folklore.

To oversee the operation of the Act, the working party recommended the establishment of a Folklore Commission to issue clearances and negotiate payments. In this way, Indigenous custodians would have the power to authorise the use and reproduction of their arts and cultural material and receive payment for such uses.

The working party's report considered that it would be impractical to grant a property right which vested in Indigenous groups. The report recommended against the introduction of such a property right because:

- According to Indigenous customary law, there is no right of ownership as distinct from other right.
- There was a concern about giving Indigenous communities the right to isolate their 'folklore' from Australian culture generally which may have the effect of allowing Indigenous groups the right to control the reproduction of items of folklore.
- There was a concern about the capacity of the courts to deal appropriately with the rights arising out of oral tradition.<sup>374</sup>

These above grounds must be seen to have been eradicated in light of the Mabo case and the recent copyright cases which have gone through the federal courts. They are also based on the premise that the purpose of the legislation is not solely to recognise Indigenous interests in relation to art, but for a national interest perspective on reform.<sup>375</sup> In order to prevent the potential conflict between the rights of traditional custodians and the rights of individual copyright owners, the working party recommended that the rights of Indigenous groups, to make claims through the Aboriginal Folklore Commissioner, would only apply to items of folklore that were out of copyright.<sup>376</sup>

The working party's report also recommended that copyright owners should not be able to stop Indigenous groups from using traditional designs, dance or music. It recommended that copyright and designs legislation should be altered to allow customary users to exercise their customary rights freely in relation to folklore and not have their rights to use folklore interfered with by other copyright owners.<sup>377</sup>

With respect to non-customary use of secret/sacred materials, the working party recommended that there should be criminal sanctions imposed.<sup>378</sup>

372. Ibid.

373. Findings of the Working Party are recorded in Department of Home Affairs and Environment, *Report of the Working Party on the Protection of Aboriginal Folklore*, above n 2. The Working Party defined 'folklore' as the 'body of traditions, observances, customs and beliefs of Aboriginals as expressed in Aboriginal music, dance, craft, sculpture, painting, theatre and literature'.

374. Department of Home Affairs and Environment, *Report of the Working Party on the Protection of Aboriginal Folklore*, ibid 36.

375. Davis M, Science, Technology, Environment and Resources Group, *Biological Diversity and Indigenous Knowledge*, Research paper 17 (Parliamentary Library: AGPS, 1997) 18.

376. Department of Home Affairs and Environment, above n 373, 37

377. Ibid 45.

378. Ibid 31.

## The Myer Report of the contemporary visual arts and crafts inquiry

In 2003, the then federal Minister for the Arts appointed Mr Rupert Myer to conduct an independent inquiry into the contemporary visual arts and crafts sector. The inquiry took submissions and consulted widely. The inquiry found that intellectual property issues are of considerable importance to the arts and crafts sector, to ensure both the successful functioning of the sector and as a source of income for artists.<sup>379</sup> The report made a number of recommendations in relation to ICIP including:

- The report recognised the importance of protecting communally owned cultural material embodied in works and recommended extension of moral rights to Indigenous groups;
- The report recommended that Commonwealth Government departments take action in relation to the misappropriation of cultural imagery and iconography.
- Action was recommended on the importation of works purporting to be on Indigenous origin.
- Commonwealth Government departments were encouraged to take action in relation to the exportation of Indigenous art under cultural heritage provisions.<sup>380</sup>

Recommendation 5 of the report suggested the introduction of a resale royalty for artists.<sup>381</sup>

## The ALRC Report on the Recognition of Aboriginal Customary Law

The recognition of Indigenous customary law within the Australian legal framework was discussed at length in the ALRC's 'Report on the Recognition of Aboriginal Customary Law'.<sup>382</sup> The report, which was released in 1986, concluded that Indigenous customary law should be recognised in appropriate ways by the Australian legal system to the extent that it is acceptable to the communities and individuals concerned and in such a way that is consistent with fundamental human rights. The report made specific recommendations in relation to family law, evidence and traditional hunting and gathering rights. Although the report's terms of reference did not include Indigenous intellectual and cultural property, the ALRC supported specific legislative protection for the use of secret/sacred material other than in accordance with custom; the mutilation, debasement or export of items of folklore; and the use of items of folklore for commercial gain without payment to traditional owners.<sup>383</sup>

Since the report, there has been increased support for the recognition of Indigenous customary law by such bodies as the Royal Commission into Aboriginal Deaths in Custody and the Council for Aboriginal Reconciliation. The Northern Territory has already enacted legislation to recognise Indigenous customary law in several areas of civil law. For instance, the recognition of traditional marriages and kinship obligations has been incorporated in legislation pertaining to adoption, child welfare and the distribution of property on intestacy. Traditional relationships to land and sea areas including the custodianship of sacred sites and traditional hunting, gathering and fishing rights are also protected under Northern Territory legislation.

## The Northern Territory Law Reform Committee

The Northern Territory Law Reform Committee has formed a sub-committee to inquire into Aboriginal customary law in the Northern Territory. The terms of reference of the inquiry are as follows:

- To inquire into the strength of Aboriginal customary law in the Northern Territory.
- To report and make recommendations on the capacity of Aboriginal customary law to provide benefits to the Northern Territory in areas including but not limited to governance, social well being, law and justice, economic independence, wildlife conservation, land management and scientific knowledge.
- To report and make recommendations as to what extent Aboriginal customary law might achieve formal or informal recognition within the Northern Territory.

The preamble to the terms of reference states in part:

Aboriginal Law is commonly misunderstood as relating primarily to issues of punishment and payback and its interface with the Northern Territory Criminal Code. This is simply untrue. Aboriginal Law encompasses an extremely

379. Myer R, *Report of the Contemporary Visual Arts and Craft Inquiry*, Executive Summary (Commonwealth of Australia, 2002) 7.

380. *Ibid* 13, Recommendation 4.

381. *Ibid* 14, Recommendation 5.

382. Australian Law Reform Commission, *The Recognition of Aboriginal Customary Laws*, Report No 31 (1986).

383. *Ibid*, Vol 1, [470].

broad and complex set of rules and unwritten legislation governing social relationships, economic rights, land ownership, wildlife conservation, land management and intellectual property rights.<sup>384</sup>

The committee made many recommendations including '[t]he Northern Territory Statehood Conference resolution that Aboriginal customary law be recognised as a "source of law" should be implemented'.<sup>385</sup>

## Part VI: Conclusion and proposals for reform

### Conclusion

Indigenous people have strong connections with the intellectual and cultural property pertaining to their country and heritage. This connection is at the heart of Indigenous people's identity. Indigenous customary law imposes certain obligations and responsibilities over Indigenous intellectual and cultural property. It is very important to recognise that customary laws may vary from community to community and may be practised at different levels of operation depending on the impact of western influence upon Aboriginal cultures, traditions and lifestyles.<sup>386</sup>

Indigenous customary laws are not recognised in the western legal system. Third parties outside the Indigenous cultural group have in the past used Indigenous intellectual property without proper respect for Indigenous laws. This includes unauthorised use as well as the derogatory treatment and distortion of the cultural, religious and social interests of Indigenous communities. Reform of state and commonwealth legislation is required to give effect to Indigenous customary laws and to provide adequate protection to Indigenous intellectual property and cultural material.

This paper has considered national legislation, regulation and policy across a broad range of areas including intellectual property, environment protection, conservation and biodiversity, and heritage. The paper has also considered international developments in the areas of intellectual property, biodiversity and human rights. Across all these areas, there is a strong and clear need to recognise Indigenous self determination and Indigenous customary law practices. Law reform is necessary to implement the rights of Indigenous Western Australians to recognise self determination and customary law. Further consultation with Indigenous Western Australians is essential in developing specific law reform for each legal area.

### Proposals for reform

Some issues for reform that the Law Reform Commission of Western Australia could focus upon include:

- Protection of intangible, performance and oral forms of Indigenous knowledge and cultural expressions including languages and dances.
- Protection of Indigenous cultural and intellectual property including Indigenous knowledge and Indigenous cultural expressions in perpetuity.
- Protection of rock art sites and information associated with sites of cultural significance – these are not protected by copyright and are often exploited in film and photography. Cultural information is often used without permission of Indigenous custodians.
- Indigenous knowledge and patents, and plant breeder's rights include a number of issues for consideration by Indigenous people and their customary law obligations. For instance: What are the implications of the patenting of life forms and the derivatives thereof for Indigenous peoples? Should there be exclusions from patentability and exemptions from the application of the plant breeder's rights regime for some Indigenous materials?

In the examination processes, consideration should be given to disclosure provisions in the patents and plant breeder's rights regime. Are certificates of disclosure practical and would they benefit Indigenous peoples?

Should there be defensive protection measures adopted—such as databases—or are the unresolved issues of control and management of such databases, the ethics of engaging in patenting of Indigenous knowledge and the limited protection provided by patents too restricting?

These issues require careful consideration by Indigenous peoples and their decisions must inform policy.

384. Northern Territory Law Reform Committee, *Report of the Committee of Inquiry into Aboriginal Customary Law*, (2004) 42.

385. *Ibid* 5, Recommendation 11.

386. Weisbrot, above n 1.

- Implementation of the Nationally Consistent Approach for Access to and the Utilisation of Australia's Native Genetic and Biochemical Resources. Should Western Australia draft laws which regulates access to genetic resources and provides Indigenous people with rights to implement their customary law obligations?
- The interpretation of the *Native Title Act 1993* (Cth) in relation to Indigenous knowledge.
- Individual Indigenous rights versus communal rights – how do individual and communal rights coexist?
- Inclusion of international obligations in Western Australian law.
- Protocols and ethics – adoption of international protocol guidelines such as the *Akwe: Kon Guidelines* and other national guidelines and development of local and regional Western Australian focussed protocol guidelines in all areas including film, art, bioprospecting and Indigenous knowledge.
- Dispute resolution between Indigenous groups/communities claiming ownership and between communities and individuals.
- Trade marks and Indigenous cultural expression – should the trade mark examination process take into account Indigenous cultural interests?  
For example, guidelines and information about state cultural expression could be developed for trade mark examiners so that they can use the material as a reference during the trade mark registration process.
- Sacred and secret material needs special protection – can state heritage laws be changed to provide more protection for intellectual property associated with sites, places and objects?
- False labelling and authenticity – state law relating to competition and fair trading could address rip-offs that make use of false labelling. A state developed authenticity Aboriginal art and culture label may be an initiative that could give protection as a certification mark registered under the *Trade Marks Act 1995* (Cth).
- A state-based Indigenous controlled coordinating body/authority could assist Indigenous Western Australian communities with information and advice about intellectual property and heritage laws.

## Appendix I: Non-Indigenous laws vs Indigenous customary laws <sup>387</sup>

NON-INDIGENOUS LAWS	INDIGENOUS CUSTOMARY LAWS
<ul style="list-style-type: none"> <li>• Emphasis on material form.</li> </ul>	<ul style="list-style-type: none"> <li>• Generally orally transmitted.</li> </ul>
<ul style="list-style-type: none"> <li>• Limited in time; eg copyright for 50 years after the death of the artist; patent rights are 20 years.</li> </ul>	<ul style="list-style-type: none"> <li>• Emphasis on preservation and maintenance of culture.</li> </ul>
<ul style="list-style-type: none"> <li>• Individually based – created by individuals.</li> </ul>	<ul style="list-style-type: none"> <li>• Socially based – created through the generations via the transmission process.</li> </ul>
<ul style="list-style-type: none"> <li>• Intellectual property rights are owned by individual creators or their employers and research companies.</li> </ul>	<ul style="list-style-type: none"> <li>• Communally owned but often custodians are authorised to use and disseminate.</li> </ul>
<ul style="list-style-type: none"> <li>• Intellectual property can be freely transmitted and assigned—usually for economic returns—for a set time, in any medium and in any territory.</li> </ul>	<ul style="list-style-type: none"> <li>• Generally not transferable but transmission, if allowed, is based on a series of cultural qualifications.</li> </ul>
<ul style="list-style-type: none"> <li>• Intellectual property rights holders can decide how or by whom the information can be transmitted, transferred or assigned.</li> </ul>	<ul style="list-style-type: none"> <li>• There are often restrictions on how transmission can occur, particularly in relation to sacred or secret material.</li> </ul>
<ul style="list-style-type: none"> <li>• Intellectual property rights are generally compartmentalised into categories such as tangible, intangible, arts and cultural expression.</li> </ul>	<ul style="list-style-type: none"> <li>• A holistic approach, by which all aspects of cultural heritage are inter-related.</li> </ul>
<ul style="list-style-type: none"> <li>• Emphasis on economic rights.</li> </ul>	<ul style="list-style-type: none"> <li>• Emphasis on preservation and maintenance of culture.</li> </ul>
<ul style="list-style-type: none"> <li>• No special protection of sacred secret material or gender restrictions.</li> </ul>	<ul style="list-style-type: none"> <li>• Specific laws on gender and sacred secret material.</li> </ul>

387. Source: Janke, *Looking Out for Culture*, above n 139.