

# **True Tracks: Indigenous Cultural and Intellectual Property Principles for putting Self-Determination into practice**

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## Declaration of Authorship

I hereby declare that, to the best of my knowledge, this thesis is entirely my own original work and has not previously been submitted for any degree or examination at any university.

This is a Thesis by Compilation comprising seven published papers that form Chapters 3-9, and newly written *Chapter 1: Introduction*, *Chapter 2: History of the Development of ICIP Protection* and *Chapter 10: Conclusion*.

The papers are refereed and have been published in edited books and journals between 2008 and 2018. I have obtained official permission to reprint them here for the purposes of this thesis, as well as relevant consent and ethics approval. Full citation details for each publication can be found at the beginning of each relevant chapter.

Given the period of time over which the publications have been written, the publications vary in format according to the style requirements of the respective journals and publishers. For the sake of a uniform thesis format and ease of reading, the publications follow a sequential page numbering system and, including the footnotes, have been reformatted into a single consistent style according to ANU PhD Thesis policy guidelines. Where the publications included internal numbering, this has been subsumed within the overall thesis number system. The only change that has been made to the content of the footnotes is to update broken website hyperlinks to allow readers to access the referenced information. The original page numbers are indicated in the citations at the beginning of each chapter. The bibliographic material of each publication and new chapters appear combined at the end of the thesis.

Importantly, as per ANU policy, no other changes have been made to the original text or content of any published work. In fulfilling this 'original content' requirement, firstly, no corrections have been made to any grammatical or spelling errors in the original publications, and secondly, some information and subject matter is repeated across the publications.

## Acknowledgements

This thesis nearly didn't happen. There were many occasions that I thought about giving up. When I started as a doctoral candidate in 2008, I was working as the sole lawyer in my firm. Over the subsequent 10 years, my firm has grown to 12 people.

I have always been fascinated by Indigenous arts and culture. It connected me to my culture. As a law student, I found the topic of Indigenous intellectual property compelling. I worked at the Aboriginal Arts Board in the 1990s and learned of the issue in the course of listening to the Indigenous arts call for copyright protection. I was further encouraged to focus on this area when I was working at the National Indigenous Arts Advocacy Association in the mid-1990s. My thanks go to Colin Golvan QC, Bronwyn Bancroft, Michael McMahon and Banduk Marika who were all involved in the fight for greater recognition of Indigenous artists rights. Indigenous intellectual property was what I chose to focus on as a lawyer.

When I set up my own firm in 2000, I was dedicated to providing advice to Indigenous clients, but I also loved the deeper debates and the visionary thinking about greater solutions. This thesis gave me the chance to take part in the deeper thinking, and I am grateful for this opportunity.

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## Abstract

The appropriation of Indigenous arts and knowledge is not adequately protected by Australian intellectual property laws. Indigenous Cultural and Intellectual Property (ICIP) rights include free, prior informed consent, integrity, attribution and benefit sharing. Appropriation of culture is demeaning but also steals economic opportunities from Indigenous people.

The main argument of the thesis is that the True Tracks ICIP provide a framework for negotiating rights between ICIP holders and users. Part one examines the issues in law and policy. Part two presents case studies from my published papers. The case studies cover performing arts; Indigenous arts; records management; film protocols; and traditional knowledge and biological materials.

This PhD research is an important contribution to understanding how Indigenous arts and knowledge is treated in the Australian legal system, in policy and practice. It outlines the issues and problems and then focuses on the 10 step True Tracks Framework, that can assist negotiations, planning and implementation of projects that include Indigenous cultural expression and knowledge.

Seven published papers are presented which collectively provide valuable lessons for ICIP. They are laid out in three parts – the concepts are detailed in Part 1, with the inclusion of two chapters on Indigenous cultural heritage and the applications of the law. Part 2 presents case studies for the relevant fields and industries where ICIP rights are being applied. Part 3 makes recommendations for change with a solid paper on governance and infrastructure arguing for self-determination through a National Indigenous Cultural Authority. In effect, this structure can be used locally and regionally to assist communities deal with the issues. The publications provide extensive analyses derived from long-term research and practice as a lawyer over the past 25 years working with Indigenous people, organisations, companies and government.

Three chapters are entirely new content. The Introduction chapter and the history and contextual chapter set the background for the work that has been done in the past,

both in terms of critical writing in the literature and the many responses, reviews and developments that have taken place over the past 40 years.

The concluding chapter brings together a cohesive framework. The True Tracks ICIP framework has a proven track record for dealing with ICIP. This framework can be used and adapted in various industries including technology, tourism and business. This approach can assist Indigenous people assert their ICIP rights with the necessary supporting infrastructure and governance. The demand is growing for Indigenous knowledge and arts, so the True Tracks framework provides a framework to negotiate, plan, manage and implement projects that involve ICIP

Furthermore, the True Tracks ICIP framework can inform new law. But most importantly, the framework addresses the deeper relationship between Indigenous and non-Indigenous people and the value they place on each other's knowledge systems. The framework is called 'True Tracks' because it is about creating meaningful relationships and connections; and keeping tracks into the future to enable Indigenous descendants to actively manage and practice and strengthen their cultural life.

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## Abbreviations

AAS	Australian Anthropological Society
ABS	Access and benefit sharing
ACCC	Australian Competition and Consumer Commission
ACL	Australian Consumer Law
AIATSIS	Australian Institute of Aboriginal and Torres Strait Islander Studies
AIDS	Acquired Immune Deficiency Syndrome
ALA	Atlas of Living Australia
ALHR	Australian Lawyers for Human Rights
ALRA	<i>Aboriginal Land Rights (Northern Territory) Act 1976</i>
ALRC	Australian Law Reform Commission
APRA	Australasian Performing Rights Association
ARIPO	African Regional Intellectual Property Organization
ATSIAB	Aboriginal and Torres Strait Islander Arts Board
ATSIC	Aboriginal and Torres Strait Islander Commission
AUSFTA	Australia–United States Free Trade Agreement
ASA	Australian Society of Authors
CAL	Copyright Agency Limited (now Copyright Agency)
CALL	Centre for Australian Languages and Linguistics
CBD	United Nations Convention on Biological Diversity
CEO	Chief Executive Officer
CPI	Code de la propriété intellectuelle
CRC	Cooperative Research Centre

CSIR	Council for Scientific and Industrial Research (South Africa)
CSIRO	Australian Commonwealth Scientific and Industrial Research Organisation
Cth	Commonwealth
ELR	Education Lending Right
EPBC	<i>Environment Protection and Biodiversity Conversation Act 1999</i>
FATSIL	Federation of Aboriginal and Torres Strait Islander Languages
FLO	Fairtrade Labelling Organizations International
GATT	General Agreement on Tariffs and Trade
GIs	Geographical Indications
ICH	Intangible cultural heritage
ICIP	Indigenous Cultural and Intellectual Property
ICMR	Indigenous communal moral rights
ICOMOS	International Council on Monuments and Sites
IEK	Indigenous Ecological Knowledge
IGC	Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore
IK	Indigenous Knowledge
ILO	International Labour Organization
ILUA	Indigenous Land Use Agreement
IP	Intellectual Property
NAIDOC	National Aboriginal and Islander Day Observance Committee (NAIDOC celebrates Indigenous achievement)
NAILSMA	North Australian Indigenous Land and Sea Management Association
NAISDA	National Aboriginal Islander Skills Development Association

NAVA	National Association for the Visual Arts
NCI	National Cancer Institute (US)
NCIS	National Centre for Indigenous Studies (ANU)
NDA	Non-disclosure agreement
NFSA	National Film and Sound Archive of Australia
NGO	Non-governmental organisation
NHMRC	National Health and Medical Research Centre
NIAAA	National Indigenous Arts Advocacy Association (no longer operating)
NIACA	National Indigenous Arts & Cultural Authority
NICA	National Indigenous Cultural Authority
NITV	National Indigenous Television
NNTT	National Native Title Tribunal
NRM	Natural resource management
NSCRAA	National Scientific Committee on Rock Art Australia
NSW	New South Wales
NT	Northern Territory
PBR	Plant Breeder's Rights
PIC	Prior informed consent
PLR	Public Lending Right
QLD	Queensland
SCBD	Secretariat of the Convention on Biological Diversity
TK	Traditional Knowledge
TKUP	Traditional knowledge on the use of plants
TRIP	Trade Related Aspects of Intellectual Property (Agreement)

UCC	Universal Copyright Convention
UN	United Nations
UNESCO	United Nations Educational, Scientific and Cultural Organization
UNDRIP	United Nations Declaration on the Rights of Indigenous Peoples
UPOV	International Convention for the Protection of New Varieties of Plants 1961
UTS	University of Technology Sydney
UWA	University of Western Australia
VIC	Victoria
VR	Virtual Reality
WA	Western Australia
WIPO	World Intellectual Property Organization
WTO	World Trade Organization



## Terms

**Biological Resources** includes ‘genetic resources, organisms or parts thereof, populations, or any other biotic component of ecosystems with actual or potential use or value for humanity’.<sup>1</sup>

**Biopiracy** refers to the appropriation of the knowledge and genetic resources of farming and indigenous communities by individuals or institutions who seek exclusive monopoly control (patents or intellectual property) over these resources and knowledge.<sup>2</sup>

**Bioprospecting** refers to corporate drug development based on medicinal plants, traditional knowledge, and microbes culled from the ‘biodiversity rich’ regions of the globe – most of which reside in the so-called developing nations.<sup>3</sup>

**Biotechnology** refers to ‘any technological application that uses biological systems, living organisms, or derivatives thereof, to make or modify products or processes for specific use’.<sup>4</sup>

**Cultural Knowledge** is a term used by the courts in *Western Australia v Ward* (2002)<sup>5</sup> and in the Australian Law Reform Commission’s (ALRC) review of the *Native Title Act 1993* (Cth).<sup>6</sup> It is also used by the ALRC review as an umbrella term to cover all types of Indigenous knowledge; is defined as an ‘intense affiliation with land and waters’<sup>7</sup>; and includes forms of expression like ‘dance, art, stories and ceremonies, to knowledge of the medicinal properties of plants and genetic resources.’<sup>8</sup>

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<sup>1</sup> *Convention on Biological Diversity*, opened for signature 5 June 1992, 1760 UNTS 79 (entered into force 29 December 1993) art 2.

<sup>2</sup> ETC Group, *Biopiracy* <<http://www.etcgroup.org/content/biopiracy>>.

<sup>3</sup> Cori Hayden, *When Nature Goes Public: The Making and Unmaking of Bioprospecting in Mexico* (Princeton University Press, 2003) 1.

<sup>4</sup> *Convention on Biological Diversity*, opened for signature 5 June 1992, 1760 UNTS 79 (entered into force 29 December 1993) art 2.

<sup>5</sup> CLR 1.

<sup>6</sup> Australian Law Reform Commission, ‘Connection to Country: Review of the *Native Title Act 1993* (Cth): Final Report’ (ALRC Report 126, April 2015) 262.

<sup>7</sup> *Ibid* [8.169].

<sup>8</sup> *Ibid*.

In the case of *Western Australia v Ward*, the court noted that there is a lack of precision in what encompasses ‘cultural knowledge’ but recognises that it includes such knowledge as ‘secret ceremonies, artworks, song cycles and sacred narratives.’<sup>9</sup>

**Droit de suite**, ‘a right to follow’, refers to resale royalty rights for artists. This involves the artist(s) receiving a certain percentage of the sale price of a work upon its resale.

**Folklore** is defined as traditions, observances, customs and beliefs as expressed in music, dance, craft, sculpture, theatre, painting and literature. Folklore would cover both material objects and more abstract concepts such as idioms and themes. The use of ‘folklore’ is out of favour with Indigenous Australians since the 1990s<sup>10</sup>; however the term is referenced in the *Copyright Act 1968* with respect to provisions adopted in the 1990s to do with performer’s protection.<sup>11</sup> The term is currently used by WIPO IGC (see term explanation, below) and is still commonly used in African countries.

**Indigenous** refers to the Aboriginal and Torres Strait Islander people, the original inhabitants of the land and seas in Australia. An Indigenous person is a someone who is of Aboriginal or Torres Strait Islander descent; who identifies as Aboriginal or Torres Strait Islander, and is accepted as Aboriginal and Torres Strait Islander by the Indigenous community.

**Indigenous Cultural and Intellectual Property (ICIP)** is a term that is now widely used in Australia following the report *Our Culture: Our Future*.<sup>12</sup> It followed the terminology used in the draft of the UN Declaration on the Rights of Indigenous Peoples in the mid-1990s and in the pivotal international study conducted by Madam Erica-Irene Daes.<sup>13</sup> ICIP includes the tangible and intangible aspects of Indigenous cultural heritage including artistic works, literature, performance, traditional and

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<sup>9</sup> *Western Australia v Ward* (2002) 213 CLR 1 [58].

<sup>10</sup> Terri Janke, *Our Culture: Our Future – Report on Australian Indigenous Cultural and Intellectual Property Rights* (Report commissioned by the Australian Institute of Aboriginal and Torres Strait Islander Studies (AIATSIS) and Aboriginal and Torres Strait Islander Commission (ATSIC), Michael Frankel & Company, 1998).

<sup>11</sup> *Copyright Act 1968* (Cth) s 84(f). The definition of live performance includes a performance of an expression of folklore.

<sup>12</sup> Terri Janke, *Our Culture: Our Future – Report on Australian Indigenous Cultural and Intellectual Property Rights* (Report commissioned by AIATSIS and ATSIC, Michael Frankel & Company, 1998).

<sup>13</sup> Erica-Irene Daes, *Study on the Protection of the Cultural and Intellectual Property of Indigenous Peoples*, UN Doc E/CN.4/Sub.2/1993/28 (28 July 1993).

scientific knowledge, documentation, cultural property and objects, human remains and documentation. The scope of ICIP is constantly evolving and it belongs to a living heritage.

**Indigenous Customary Law** or **Indigenous Law** in Australia is the body of rules, values and traditions which are accepted by the members of an Indigenous community as establishing standards or procedures to be upheld in that community. Indigenous customary law is observed and practised by many Indigenous Australians and varies from community to community.

**Indigenous Ecological Knowledge** (IEK) comes from Indigenous people. This knowledge is in a continual state of change 'as it acquires deeper and more extensive understandings of the local environment and adapts to environmental changes and intercultural interaction'.<sup>14</sup> IEK has been predominantly used in land management and in the natural resource management sector.<sup>15</sup>

**Indigenous Knowledge**, as defined under the *Biological Resources Act 2006* (NT), includes knowledge obtained from an Indigenous person, and not including knowledge obtained from scientific or other public documents, or otherwise from the public domain.<sup>16</sup> This approach to defining Indigenous Knowledge is significantly limited in scope and was criticised in a statutory review of the *Biodiversity Act 2004* (Qld) as having the potential to 'create more confusion than certainty especially where more than one Indigenous group may claim ownership of the traditional knowledge'.<sup>17</sup>

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<sup>14</sup> Adrian Fordman et al, 'Knowledge Foundations for the Development of Sustainable Wildlife Enterprises in Remote Indigenous Communities of Australia' (Working Paper No 62, Centre for Aboriginal Economic Policy Research, 2010) 5.  
<<http://caepr.anu.edu.au/sites/default/files/Publications/WP/CAEPRWP62.pdf>>.

<sup>15</sup> Terri Janke, 'Indigenous Ecological Knowledge and Natural Resources in the Northern Territory: Report on the Current Status of Indigenous Intellectual Property' (Report commissioned by the National Resources Management Board NT, April 2009b)  
<[http://media.wix.com/ugd/7bf9b4\\_af38431b79494d18bf4d8937fe4dbc11.pdf](http://media.wix.com/ugd/7bf9b4_af38431b79494d18bf4d8937fe4dbc11.pdf)>.

<sup>16</sup> Biological Resources Act 2006 (NT) s 29(2).

<sup>17</sup> DLA Phillips Fox, 'Statutory Review of the *Biodiscovery Act 2004* (Queensland)' (Report submitted to the Queensland Government, 19 October 2009) 32.

**Marjarla** or **Mudjala** plant is a tree growing in the Kimberley region of Western Australia, which is the subject of a patent co-owned by the Griffith University and the Jarlmadangah Burru Aboriginal Corporation. Both spellings are used in this document.

**Public domain** generally refers to work that does not have any legal restriction upon its use by the public.

**Secret sacred** refers to information that, under customary laws, is made available only to the initiated; or information that can only be seen by men or women or particular people within the culture.

**Sui generis**, 'of its own kind', refers to stand alone or specific legislation.

**Toi Iho** is the registered and globally recognised trade mark of quality and authenticity of Māori art and artists.<sup>18</sup>

**Traditional Ecological Knowledge** means a 'cumulative body of knowledge, practice and belief, evolving by adaptive processes and handed down through generations by cultural transmission, about the relationship of living beings (including humans) with one another and with their environment.'<sup>19</sup>

**Wandjina** is a sacred spiritual force and the creators of the land. They are the custodians of Wandjina law and iconography.<sup>20</sup> This thesis uses the spelling 'wandjina' and references 'wanjina' where it has been spelt this way by others.

**WIPO** refers to the World Intellectual Property Organization – the United Nations organisation created in 1967 to encourage creative activity by promoting the protection of intellectual property internationally. Since 2000, WIPO has convened an Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (IGC) 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.

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<sup>18</sup> Toi Iho, *Welcome to Toi Iho* <<http://www.toiho.co.nz/>>.

<sup>19</sup> Fikret Berkes, Johan Colding and Carl Folke, 'Rediscovery of Traditional Ecological Knowledge as Adaptive Management' (2002) 10(5) *Ecological Applications* 1252.

<sup>20</sup> Mowanjum Aboriginal Art & Cultural Centre, <[www.mowanjumarts.com](http://www.mowanjumarts.com)>.

# Chapter 1: Indigenous Knowledge, Indigenous Cultural and Intellectual Property Rights and Self-Determination

## 1.1 Introduction

Indigenous people have the right to self-determination. By that right they freely determine their political status and freely pursue their economic, social and cultural development. – Article 3, United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP).<sup>21</sup>

Indigenous peoples, in exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs, as well as ways and means for financing their autonomous functions.<sup>22</sup>

Indigenous peoples have the right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions, as well as the manifestations of their sciences, technologies and cultures, including human and genetic resources, seeds, medicines, knowledge of the properties of fauna and flora, oral traditions, literatures, designs, sports and traditional games and visual and performing arts. They also have the right to maintain, control, protect and develop their intellectual property over such cultural heritage, traditional knowledge, and traditional cultural expressions.<sup>23</sup>

Indigenous<sup>24</sup> Australians have been calling for stronger ways to protect their Indigenous Cultural and Intellectual Property (ICIP)<sup>25</sup> – their ‘cultural heritage, traditional knowledge and traditional cultural expressions’ (see Fig. 1.1). The challenge is that Indigenous arts, songs, designs, stories and knowledge have been and

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<sup>21</sup> *Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, UN GAOR, 61<sup>st</sup> sess, 107<sup>th</sup> plen mtg, UN Doc A/RES/61/295 (13 September 2007).

<sup>22</sup> *Ibid* art 4.

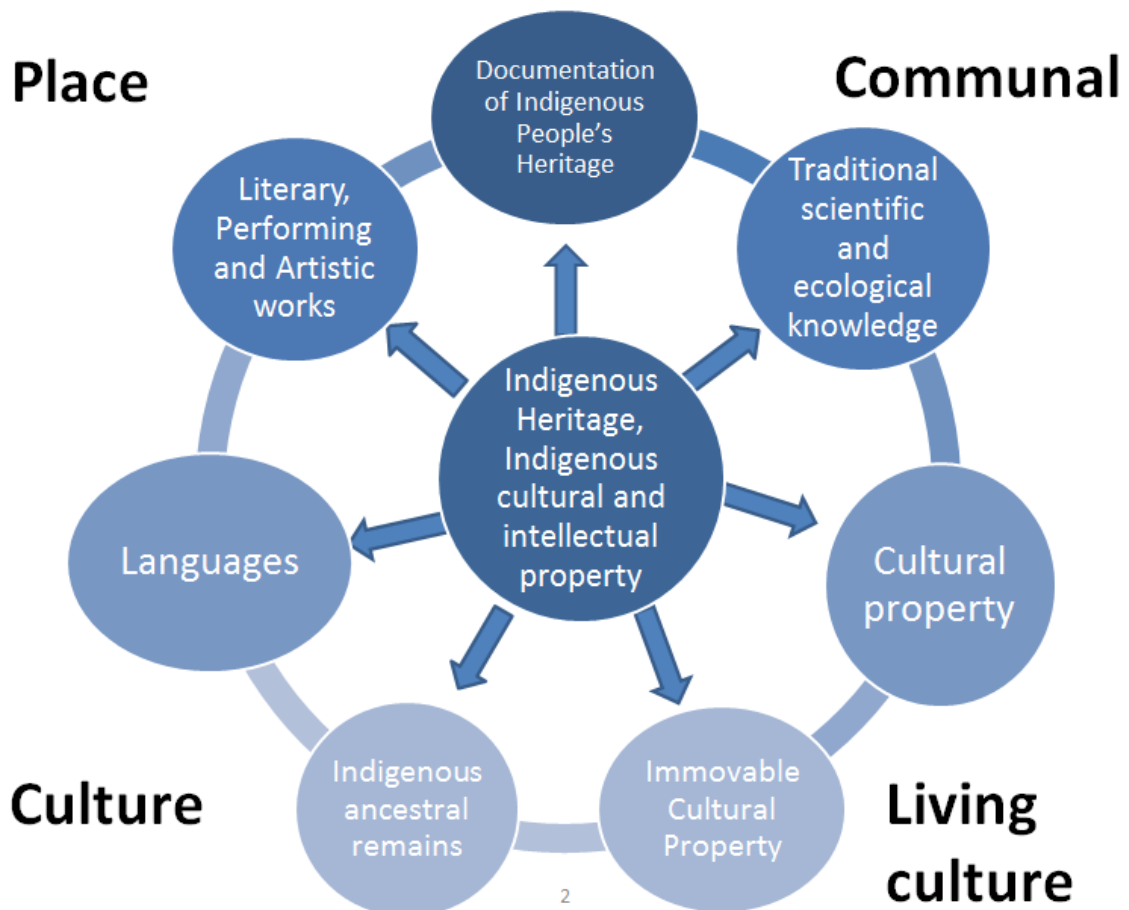
<sup>23</sup> *Ibid* art 31.

<sup>24</sup> Indigenous, used with a capital ‘I’ in this paper, refers to the Aboriginal and Torres Strait Islander people, the original inhabitants of the land and seas in Australia.

<sup>25</sup> ‘Indigenous Cultural and Intellectual Property’ refers to Indigenous peoples’ heritage.

continue to be exploited outside Indigenous peoples' communities by people not entitled to do so. Such exploitation occurs without recognition of any Indigenous control or consultation and without benefits accruing back to Indigenous people. Even more critical, this important collective heritage is displaced, distorted and debased.

ICIP is the heart of Indigenous identity. It connects Indigenous people to each other, and to the lands and seas that they have lived in, and around, for over 65,000 years. The many different Aboriginal and Torres Strait Islander clans and communities had developed complex systems of understanding and passing on their intangible heritage assets. This makes Indigenous Knowledge practices the world's oldest and most resilient systems of innovation. However, in the 230 years since colonisation, there has been large scale dismantling of these systems. Indigenous people assert their rights to their intangible heritage and their Indigenous Knowledge to continue the practice of their culture; to stop the misappropriation of their knowledge that happens without consultation or consent; and to stop the debasement and loss of cultural practice. The problem is that currently they cannot readily stop misappropriation of heritage by recourse to Australian laws.



**Fig 1.1 Indigenous Cultural and Intellectual Property Map of Categories**

In writing on this topic, I bring together over 23 years of professional experience in ICIP. This includes advising Indigenous people on their ICIP rights as a practicing lawyer, writing influential reports and scholarly papers<sup>26</sup> that have often set the national and international discussion, drafting the national standard protocol document, and preparing agreements and legal frameworks for rights recognition.

Furthermore, I have been an advocate for ICIP rights and have presented keynote papers at many conferences, including international events convened by WIPO and UNESCO. The subject matter of my papers has covered various domains in which Indigenous Knowledge is involved including research, native title, arts, tourism, libraries, natural resources and seed banks.

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<sup>26</sup> See list of publications in Appendix B: Curriculum Vitae, Terri Janke.

My interest in the topic arises out of my own personal Indigenous heritage as a Wuthathi and Meriam woman. However, I was also inspired to focus on Indigenous arts and intellectual property issues after working for the Aboriginal and Torres Strait Islander Arts Board of the Australia Council for the Arts whilst taking a break from university studies. I worked as a programs officer for three years in 1989–1992, before returning to my law degree.

In 1994, upon completion of my studies, I assisted legal advisers working on the Aboriginal Carpets case, *Milpurruru v Indofurn*,<sup>27</sup> and was inspired by barrister Colin Golvan to consider the application of copyright laws to protect Aboriginal and Torres Strait Islander culture. The case showed how the law can be flexible, to a certain extent, to cover Indigenous knowledge systems.

In 1998, I authored the report 'Our Culture: Our Future – Report on Australian Indigenous Cultural and Intellectual Property Rights'.<sup>28</sup> This ground-breaking report examined the rights Indigenous people want to their own Cultural and Intellectual Property, identified the shortfalls in the law, and set out measures for better protection, both legal and non-legal. The report called for new laws which were never realised. However, the report remains influential in focusing the debate both nationally and internationally.

I established my law firm, Terri Janke and Company, in 2000. My aim was to provide advice to Indigenous clients on how they could better use the law to protect their rights and to assert their ICIP rights. We use the existing intellectual property (IP) laws to the extent possible, with contracts, labelling and protocols to assist our Indigenous clients assert their ICIP rights. This approach has been successful in enabling our clients to plan and manage their ICIP in collaborative projects, and by providing a flexible means to articulate their protocols and customary laws.

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<sup>27</sup> *Milpurruru v Indofurn* (1994) 130 ALR 659.

<sup>28</sup> Terri Janke, *Our Culture: Our Future – Report on Australian Indigenous Cultural and Intellectual Property Rights* (Report commissioned by AIATSIS and ATSIC, Michael Frankel & Company, 1998).



In 2012, IP Australia<sup>29</sup> and the Commonwealth (Cth) Department of Industry, Innovation and Science began a dialogue with Indigenous Australians and received a number of written submissions, including my own.<sup>30</sup> In 2017, my firm was commissioned to write a discussion paper on Indigenous Knowledge and options for protection which will be used by government for further consultation in 2018.<sup>31</sup>

The issue of ICIP protection is currently a hot topic in Australia. This is due to a number of factors. Indigenous people have continued to call for legally enforceable rights, and in the post UNDRIP world they are more aware of ICIP rights.<sup>32</sup> As they seek to control and negotiate access, governments and corporations who want to access and use Indigenous Knowledge seek certainty around consultation and consent processes. In 2017 there was increased international media attention on the appropriation of Indigenous art. For example, the Chanel boomerang controversy in May 2017 was well covered in world media.<sup>33</sup> The 'Fake Art Harms Culture' campaign has also heightened public interest, with feature articles in major Australian newspapers<sup>34</sup> and a panel convened at the Cairns Indigenous Art Fair in 2017 which featured on national television.<sup>35</sup>

In the same year, Bob Katter, a MP from the North Queensland, put forward a proposed bill for the protection of Aboriginal art. The government has called for, and

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<sup>29</sup> IP Australia is the Australian Government agency responsible for administering patents, trade marks, designs and plant breeder's rights. IP Australia also advises the Australian Government on IP policy and takes part in international negotiations to promote the global IP system. IP Australia participates in international sessions on IP including WIPO and the WTO.

<sup>30</sup> Terri Janke and Peter Dawson, 'New Tracks: Indigenous knowledge and cultural expression and the Australian intellectual property system', (Submission to *Finding the Way: A Conversation with Aboriginal and Torres Strait Islander Peoples*, conducted by IP Australia and Office for the Arts, Terri Janke and Company, 31 May 2012).

<sup>31</sup> Terri Janke and Maiko Sentina, 'Indigenous Knowledge: Issues for protection and management' (Discussion Paper, IP Australia & Department of Industry, Innovation and Science, 2018).

<sup>32</sup> Article 31 rights assert Indigenous IP rights to traditional cultural expression, traditional knowledge and heritage.

<sup>33</sup> Eliza Buzacott-Speer, 'Chanel boomerang prompts Bob Katter to renew calls for protection of Aboriginal artists', *ABC News* (online), 18 May 2017 <<http://www.abc.net.au/news/2017-05-17/chanel-boomerang-sees-katter-call-for-aboriginal-art-protection/8534584>>.

<sup>34</sup> Frank Robson, 'Dead heart: the booming trade in fake Indigenous art', *The Sydney Morning Herald* (online), 8 December 2017 <<https://www.smh.com.au/lifestyle/the-booming-trade-in-fake-indigenous-art-20171122-gzqyam.html>>.

<sup>35</sup> NITV coverage of Indigenous panel at the Cairns Indigenous Art Fair on 24 July 2017; ABC TV, Q&A Indigenous panel filmed at Garma Festival in 2017 discussed Indigenous arts and lack of legal protection in response to a question from Banduk Marika, Rirratingu artist.

is currently conducting, an Inquiry into the Proliferation of Fake Aboriginal Art. The Albert Namatjira copyright handback to his family in October 2017 has renewed discussion about duration of Indigenous art heritage, copyright and the public domain.<sup>36</sup> Indigenous Knowledge and ICIP continues to be discussed in international meetings at WIPO, the World Trade Organization (WTO), the *Convention on Biological Diversity* (CBD) and the United Nations (UN) Permanent Forum on Indigenous Issues.<sup>37</sup> This all keeps the question of how Australia should deal with ICIP protection very much a 'live' issue.

It is against this background that I put forward this body of work. This is a thesis by compilation that allows me to examine the professional contributions I have made in order to provide a cohesive and detailed understanding of the nature of the articulation of ICIP within the western Australian legal system (ranging from enabling to disabling). From that evidentiary position I aim, by way of conclusion, to propose a model of the fundamental principles that could inform a practical and workable realisation of the UNDRIP Article 31. This model can be used for the benefit of Indigenous Australians in contemporary life, towards cultural and economic pursuits. In this way, the model provides a framework for Indigenous self-determination.

## **1.2 The research topic**

### **1.2.1 The nature of the problem**

In recent years, following the globalisation of trade, digital communication and open data, the interest in Indigenous cultural assets has risen in areas such as research, education, science, tourism, film, photography, advertising and publishing. The challenge is that Indigenous stories, designs, art, and knowledge are used without

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<sup>36</sup> Rosemary Neill, 'Namatjira landscapes: copyright breakthrough opens way for wider audience', *The Australian* (online), 14 October 2017 <<https://www.theaustralian.com.au/news/nation/namatjira-landscapes-copyright-breakthrough-opens-way-for-wider-audience/news-story/48b0fade1c16de2b520f178f223a0cd8>>.

<sup>37</sup> In April 2018, the topic of discussion at the UN Permanent Forum on Indigenous Issues was collective rights to land, territories and resources.

consent, recognition and benefit sharing. Furthermore, in many instances, the underlying cultural integrity of those assets may be distorted or taken out of context.

Indigenous cultural expression and knowledge are both tangible and intangible forms of cultural heritage. Collectively owned, this heritage is continuously nurtured, and is integral to the identity of the Indigenous groups it comes from. Some knowledge is sacred and cannot be made public. Indigenous people have customary laws that relate to who can hold, access, share and use their cultural and intellectual property. These are called Indigenous Cultural and Intellectual Property Rights (ICIP) and are rights to govern and maintain ICIP.<sup>38</sup>

Western IP laws do not adequately protect ICIP rights. In fact, IP laws automatically apply to dealings of ICIP and have often had the effect of alienating Indigenous people from their own ICIP. Western IP laws are not designed to protect oral cultures that hold and transfer intergenerational knowledge. A brief example demonstrates some challenges and misalignments involved. Copyright confers rights on individual authors of expressions in material form which are limited in time and economically focused. There have been some shifts in the common law to recognise that individual authors have a fiduciary duty to the clan whose 'traditional ritual knowledge' is embodied in copyright works.<sup>39</sup> However, to be protected by copyright, the work must be in material form and must also be attributable to an author. Furthermore, copyright protection lasts for only 70 years after the death of the author.<sup>40</sup> This is problematic for Indigenous cultures because cultural expression and knowledge is controlled and maintained as part of a continuing practice of culture. Indigenous knowledge, stories and designs are handed down through the span of many generations. Ancient traditions, such as story, art and dance, will not meet the criteria for copyright protection. Moreover, the introduction of moral rights to the copyright regime in 2000 introduced the right of attribution and integrity which align more with the needs of Indigenous people's cultural

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<sup>38</sup> ICIP is the term used throughout Australia to refer to Indigenous rights to culture following the language used in Terri Janke, *Our Culture: Our Future – Report on Australian Indigenous Cultural and Intellectual Property Rights* (Report commissioned by AIATSIS and ATSIC, Michael Frankel & Company, 1998).

<sup>39</sup> See *Bulun Bulun v R & T Textiles Pty Ltd* (1998) FCA 1082 ('Bulun Bulun case').

<sup>40</sup> Copyright protects works as soon as they are created until 70 years after the death of the author/creator.

rights to maintain integrity and connection. However, the limitation of moral rights is that they are focused on the individual and empower the creator of the copyright work.

Indigenous Australians are concerned that the misappropriation of their knowledge and expressions leads to the weakening of culture. Insensitive reproductions debase cultural beliefs and can cause cultural offence to Indigenous people. The lack of attribution to the source community distorts the cultural connection which can impact legal rights such as native title rights. Furthermore, the misappropriation of Indigenous cultural expression and knowledge has significant economic repercussions for future generations. For instance, the cheap imitations of generic Aboriginal art are seen by many as being culturally demeaning. These imitations also compete with legitimate and authentic art. Overall, this leads to the undervaluing of the authentic cultural product in the market. As Laurie Nona, Indigenous artist describes the impact on fake Indigenous artworks on him:

It really takes the core out from inside of you, it really dampens the spirit because you're telling your true story, and here are people taking patterns and colour just for the sake of creating a fake image so they can make money.<sup>41</sup>

Like Indigenous land and seas, ICIP is not *terra nullius*, free to be taken. Indigenous people seek to assert their rights to negotiate use, to be recognised as the cultural source, to receive payment where benefits accrue, to protect its culture from harm and destruction, and to ensure that it remains intact to be handed on to future generations.

### **1.2.2 Focus of this PhD**

In this thesis, I will examine how Indigenous people are operating at the legal and cultural interface,<sup>42</sup> designing and using protocols, and contracting with agreements that require people to comply. The published papers in the thesis show that this

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<sup>41</sup> Laurie Nona, Indigenous artist, quoted in Neda Vanovac, 'Indigenous artists battle mass-produced fakes, call for protection for their intellectual property,' *ABC News* (online), 9 August 2017 <<http://www.abc.net.au/news/2017-08-09/indigenous-artists-battle-fakes-urge-consumers-to-buy-ethically/8788116>>.

<sup>42</sup> Martin Nakata, 'Indigenous Knowledge and the Cultural Interface: Underlying Issues at the Intersection of Knowledge and Information Systems' (2002) 28 *International Federation of Libraries Association Journal* 281.

strategic approach can be flexible and deliver self-determination for Indigenous people. Over the past 20 years of my professional career, I have identified a set of underlying Indigenous cultural design principles which provide a flexible, culturally legitimate and workable model – a framework for dealing with Indigenous cultural assets and heritage in a way that promotes the intent of Article 31 of the UNDRIP. The principles, which I call True Tracks ICIP Principles, have been used across various sectors with practical applications in the arts, museums, archives and business. There is scope for the True Tracks Model to have wider application in technology, science and industry.

This thesis by compilation pulls together key papers that I have written since commencing my PhD in 2008. As a corpus they examine the nature and scope of ICIP, the extent to which IP laws are useful, and identify an emerging set of principles providing coverage of the gaps in the law.

In this PhD, I will provide additional context and analysis to present my thesis that the True Tracks ICIP Principles are a useful model for self-determination for Indigenous people to control and maintain their ICIP.

### **1.2.3 Significance of the research**

The research undertaken and presented in this thesis is aimed to advance the recognition of ICIP rights. The objective is to assist Indigenous people, all levels of government, businesses and industries in understanding what is involved when dealing with the interface between Indigenous cultural expression and knowledge and the Australian legal system. Whilst there has been much focus on the need for new laws in the literature and following from various law cases, there has been no will of government to enact laws, and in the meantime the issues perpetuate and compound. Alternatively, my focus has been to explore ways to address these shortfalls that do not involve just waiting for changes to law. This has included using existing law, contracts and licensing and protocols. Whilst not always perfect, this approach has enabled an understanding of the key issues for consideration when dealing with ICIP. In bringing these learnings together, I provide the True Tracks protocol model that is relevant not only to ICIP but is highly adaptable across various sectors and emerging industries. Indigenous people can, to some extent, put self-determination into practice by using existing laws and establishing infrastructure through protocols and

agreements. By doing this, Indigenous people's empowered actions could lead the development of the law. There is still, however, a need for legislation.

My work makes a significant contribution to several key areas. First, it contributes to the ongoing debate, explored in more depth in *Chapter 3: Indigenous Cultural Expressions with a western Australian IP legal framework*, in relation to how Australian laws should provide recognition for ICIP rights. This has been a challenge for law and policy makers over the last 40 years. Furthermore, it is useful to inform policy makers at an international level about how an international system might implement changes. Forums such as the WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (IGC) and the UN Permanent Forum on Indigenous Issues continue to debate the topic. It is hoped that this research will enable greater focus on the key issues requiring redress.

Second, the culmination of my papers, that are contextualised in this thesis, contribute to the research in the sector by providing an Indigenous lawyer's perspective to the growing body of literature on Indigenous IP; Indigenous knowledge, traditional cultural expression and traditional knowledge. As a practicing lawyer, I am in a unique position to provide a detailed insight into how IP laws are applied and used; where the shortfalls are; and how other tools and measures can assist and highlight the larger issues that require legal reform. In this way, my research provides a track record of the application of protocol models with insight into their success.

Third, the thesis challenges methodologies of Indigenous research to highlight the importance of meaningful Indigenous engagement when research and projects around Indigenous culture are undertaken. It builds on existing research ethics models, such as the *Guidelines for Ethical Research in Australian Indigenous Studies*,<sup>43</sup> to highlight the need for projects to carefully consider and plan how Indigenous knowledge and cultural expression is captured and recorded.

Fourth, my work has implications across a range of industries that make use of ICIP. This includes the arts, film, media, cultural and tourism sectors. Significantly, ICIP

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<sup>43</sup> Australian Institute of Aboriginal and Torres Strait Islander Studies, *Guidelines for Ethical Research in Australian Indigenous Studies* (AIATSIS, 2012).

issues also arise within science, environmental management, design and architecture, digital technology, health and genetics. When these sectors use Indigenous knowledge systems, Indigenous design concepts, and Indigenous cultural expression, there is a need for players in the industry to understand IP issues, and to plan for the ICIP management by adopting protocols. In this way, culturally appropriate collaborations can be encouraged and supported. This has benefit for all our society as it will contribute to innovation.

Fifth, the thesis contributes to the empowerment of Indigenous people by enabling them to assert their cultural rights using existing laws and tools. It can inform decision-making processes during interactions with any entity that approaches Indigenous people for use of their cultural knowledge. In this way, Indigenous communities can safeguard against cultural appropriation while allowing negotiation and benefit sharing for the commercial use of any ICIP. Further, it sets the framework for future laws.

A key development since I commenced writing in this area has been the growing number of Indigenous entities developing their own modes for recognition including protocols, clearance processes and notices. By contextualising the publications included in this thesis, I examine these topics and provide further insight to assist improvements in implementation for the future. This is about self-determination in that it creates opportunities, encourages informed negotiations, and has potential to contribute to the development of mutual respect that will enable sustainable economic development.

Lastly, the advance of ICIP rights has implications for reconciliation and social justice in relation to innovation in industry, both nationally and internationally. My work promotes collaborative approaches between Indigenous and non-Indigenous people in research and commercial pursuits, which will contribute to solving issues that confront humans across the world. This includes issues involving climate change, agriculture, food security and health. If we can work together on solutions, recognising that both Indigenous and western cultures offer valuable knowledge systems, we can innovate and simultaneously promote Indigenous social justice and reconciliation.

## 1.3 Research methodology

The True Tracks framework was developed through an applied research methodology of continual action inquiry. As my work involves ICIP and the rights of Indigenous peoples, I am also building upon Indigenous research methodologies that have emerged in response to the constraints and disadvantages of Eurocentric paradigms.

The 10 Principles of True Tracks were arrived at through years of culturally informed practice involving consultation and communication. Over the years, my work as a practising lawyer in various contexts has led to a deepened understanding of the needs and desires of Indigenous people when it comes to protecting their ICIP. It has also enabled me to put research insights and learnings into action to form the current design of a protocol model. The approach to research and implementation was thus through a praxis based on cultural principles, communication and action.

The published papers included in this thesis demonstrate the different mechanisms and strategies that Indigenous people use to protect their ICIP. The analysis spans art, film, archives, ecology and infrastructure. This wide scope of investigation underpins the development of an overarching set of principles for True Tracks. Thus, the framework did not develop independently, but in response to the cultural values and feedback of Aboriginal and Torres Strait Islander clients during workshops and at international panels.

### 1.3.1 Indigenous methodologies for investigating ICIP

Indigenist research is research which focuses on the lived, historical experiences, ideas, traditions, dreams, interests, aspirations and struggles of Indigenous Australians. I desire that Indigenist research contribute to methodological reform for social justice.<sup>44</sup>

– Lester-Irabinna Rigney

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<sup>44</sup> Lester-Irabinna Rigney, 'Indigenous Research and Aboriginal Australia' in J E Kunnie and N I Goduka (eds), *Indigenous Peoples' Wisdom and Power: Affirming Our Knowledge Through Narratives* (Ashgate, 2006) 45.



In order to examine the gaps in the western legal and Indigenous customary law systems, and consider solutions, I have sought guidance from the Indigenist theories of leading Indigenous academics whose research and writing has set standards in Indigenous research methodology. I aim to investigate the issues in protecting ICIP from an Indigenous standpoint in order to understand what happens at the intercultural space where ICIP confronts western IP. Accordingly, this relates to the Indigenist research methodologies of Indigenous researchers and academics who advocate innovative approaches that uphold Indigenous rights and aspirations.

Indigenous peoples are widely considered to be the most researched group in the world.<sup>45</sup> Eurocentric research methodologies and perspectives operate from the implicit belief of the superiority of western knowledge systems – an issue that is increasingly being acknowledged in the contemporary era. There is a need for Indigenous voices and actions that challenge these methodologies and viewpoints, especially in contesting European narratives, definitions and perceptions of Indigenous knowledge and cultural expressions.

Professor Martin Nakata, influential Torres Strait Islander academic, applies Michel Foucault's theory of power and knowledge in his call for Indigenous scholars to speak back to the knowledges that have formed around what is perceived to be the Indigenous position in the 'Western order of things'.<sup>46</sup> Nakata's concept of the cultural interface is the place where both knowledge systems meet, and where the greater recognition of Indigenous knowledge must be realised.<sup>47</sup> It involves a multilayered set of dynamic relations, points and trajectories of different peoples and histories that intersect and overlap to shape various frameworks.<sup>48</sup>

This is the same for the legal system. Nakata's cultural interface can be applied to the intersection where western legal systems meet Indigenous legal systems; at the point

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<sup>45</sup> Linda Tuhiwai Smith, *Decolonising Methodologies: Research and Indigenous Peoples* (Zed Books, 1999) 3.

<sup>46</sup> Martin Nakata, 'Anthropological Texts and Indigenous Standpoints' (1998) 2 *Australian Aboriginal Studies* 3, quotes Michel Foucault, *The Order of Things: An Archaeology of the Human Sciences* (Tavistock, 1970).

<sup>47</sup> Martin Nakata, *Disciplining the Savages: Savaging the Disciplines* (Aboriginal Studies Press, 2007) 198.

<sup>48</sup> *Ibid* 199.

where western knowledge disciplines undertake to record, interpret and value Indigenous knowledge systems. The inadequacy of western legal systems to deal with Indigenous IP is due to the undervaluing of Indigenous knowledge systems. As a result, 'the holders of traditional knowledge...are now required to protect their knowledge under the terms of an entirely alien regime'<sup>49</sup>, as noted by lawyer and social anthropologist Indrani Barpujari in the context of Indian traditional knowledge and IP. Nakata calls for engagement of Indigenous academics at the cultural interface. What if there was interaction at the legal cultural interface, at the point where IP laws are created? Could practices, guidelines and protocols at this interface in fact change current behaviour which devalues Indigenous IP, and establish new norms?

In her 1999 landmark text *Decolonising Methodologies*<sup>50</sup>, Māori academic Linda Tuhiwai Smith investigates the highly institutionalised nature of western research methods that intertwine with philosophies, political structures and industries related to European imperialism. The severe consequences these have had on the livelihoods and mainstream perceptions of Indigenous peoples and culture underpins the drive behind articulating an Indigenous research agenda. Smith offers alternatives to western paradigms that eschew racism, ethnocentrism and exploitation.<sup>51</sup> Along with this, Smith recognises the integral role that cultural protocols play in Indigenous methodologies for reclaiming control over research:

Indigenous methodologies tend to approach cultural protocols, values and behaviours as an integral part of methodology. They are 'factors' to be built in to research explicitly, to be thought about reflexively, to be declared openly as part of the research design, to be discussed as part of the final results of a study and to be disseminated back to the people in culturally appropriate ways and in a language that can be understood.<sup>52</sup>

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<sup>49</sup> Indrani Barpujari, 'Protection of Traditional Knowledge – Role of the National IPR Policy' (2018) 53(41) *Economic & Political Weekly* 29, 30 <<https://www.epw.in/journal/2018/41>>.

<sup>50</sup> Linda Tuhiwai Smith, *Decolonising Methodologies: Research and Indigenous Peoples* (Zed Books, 1999) 15.

<sup>51</sup> Carla Wilson, 'Book review – *Decolonising Methodologies: Research and Indigenous Peoples* by Linda Tuhiwai Smith, 1999, Zed Books, London' (2001) 17 *Social Policy Journal of New Zealand* 214, 216.

<sup>52</sup> *Ibid* 15.

In forming an Indigenous research agenda, Smith puts forward four essential processes – *transformation, decolonisation, healing, and mobilisation* – to incorporate into practices and methodologies.<sup>53</sup> Interacting with these processes are four conditions or states of being that Indigenous communities continue to move through, albeit not necessarily in a sequential manner; namely, self-determination, development, recovery and survival.<sup>54</sup> Self-determination is the central point for these conditions which are connected to political, social, spiritual, psychological, and economic revitalisation on local, regional, national and global levels.

Smith considers it to be a sheer act of survival that Indigenous and non-Indigenous organisations alike are now having to adopt cultural ethics or Indigenous codes of conduct.<sup>55</sup> From Indigenous perspectives, ethical codes of conduct serve partly the same purpose as the protocols which govern relationships within communities and the environment.<sup>56</sup> Smith acknowledges the significance of the overarching principle of respect within these relations; a key principle that is included in the True Tracks framework.

Lester-Irabinna Rigney is from the Narunga, Kurna and Ngarrindjeri nations in South Australia and has written extensively on Indigenist theory. Like Smith, Rigney sees reform of Indigenous research as needing the direct involvement of Indigenous peoples as researchers. Rigney believes that Indigenous people must analyse and critique the accepted non-Indigenous epistemologies that pervade educational, social and political processes.<sup>57</sup> He calls for new anticolonial methodologies that are informed by Indigenous perspectives and lived experiences to reaffirm Indigenous cultures and contribute towards self-determination.<sup>58</sup>

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<sup>53</sup> Ibid 116.

<sup>54</sup> Ibid.

<sup>55</sup> Ibid 119.

<sup>56</sup> Ibid 120.

<sup>57</sup> Lester-Irabinna Rigney, 'Internationalism of an Aboriginal or Torres Strait Islander Anti-Colonial Cultural Critique of Research Methodologies: A Guide to Indigenist Research Methodology and its Principles' (1997) 20 *Research and Development in Higher Education: Advancing International Perspectives* 629, 632.

<sup>58</sup> Ibid.

According to Rigney, the academy, responding to postmodern, postcolonial and feminist discourse, fostered the right conditions to nurture Australian Indigenism.<sup>59</sup> These conditions include the destabilisation of traditional disciplines, the ‘crisis of representation’, and the development of new interpretive and qualitative research practices.<sup>60</sup> He considers the ongoing challenge to involve ‘rethinking research methodologies towards the development of reflexive practices which investigate and represent Indigenous worldviews’ and acknowledging the diversity of ontology among Indigenous Australians.<sup>61</sup> Rigney’s work is useful to draw correlations in how the western legal system recognises ‘authors’ as those who write and commit knowledge and cultural expression to material form. As researched subjects, Aboriginal and Torres Strait Islander people have not been recognised as the authors in copyright law. His call for Indigenous researchers aligns with the ICIP right of Indigenous people to be the interpreters of their culture, to be the ones who are the ‘authors’ and rightsholders.

Karen Martin, a Noonuccal woman with ancestral ties to Bidjara land,<sup>62</sup> similarly recognises the significance of Indigenous ontologies within her research. She builds on Rigney’s principles for Indigenous research by highlighting the power in proactively drawing from her Aboriginal heritage rather than reacting to or resisting western research frameworks and ideologies.<sup>63</sup> She does this by focusing on the interrelated dimensions within the ontology, epistemology and axiology of Quandamooka country,<sup>64</sup> and by using traditional devices such as First Stories and Visual Stories.<sup>65</sup> Martin’s seven rules to direct culturally safe research were designed in close

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<sup>59</sup> Lester-Irabinna Rigney, ‘Indigenous Research and Aboriginal Australia’ in J E Kunnie and N I Goduka (eds), *Indigenous Peoples’ Wisdom and Power: Affirming Our Knowledge Through Narratives* (Ashgate, 2006) 32, 36, 38. (‘Indigenism’ being the Indigenous Australian academic body of knowledge that seeks to disrupt oppressive social constructs around Aboriginality, informing the emergence of a diverse Indigenist Research epistemological and ontological agenda).

<sup>60</sup> Ibid.

<sup>61</sup> Ibid 41.

<sup>62</sup> Karen Martin (Booran Mirraboopa), ‘Ways of Knowing, Being and Doing: A Theoretical Framework and Methods for Indigenous and Indigenist Re-search’ (2003) 27(76) *Journal of Australian Studies* 203, 204.

<sup>63</sup> Ibid 205.

<sup>64</sup> Ibid 206–208.

<sup>65</sup> Alison Laycock et al, *Researching Indigenous Health: A Practical Guide for Researchers* (The Lowitja Institute, 2011) 48.

discussion with key people where research took place and were based on their expectations. These tie in with the ethical research principles of the Australian Institute of Aboriginal and Torres Strait Islander Studies (AIATSIS)<sup>66</sup> and the National Health and Medical Research Council (NHMRC).<sup>67</sup>

### **1.3.2 Research methodology: an interactive process**

In conclusion, the research methodology for this PhD involved an iterative process of analysing insights and converting these into practice to eventually arrive at the cultural principle-based approach of True Tracks. This process relates to the Indigenous methodologies as set out by Smith, Nakata, Rigney and Martin. As highlighted by Rigney, Indigenism has no one singular method for research transformation and/or praxis.<sup>68</sup> In addressing the issues connected to protecting ICIP through this lens, my work provides mechanisms that allow Indigenous Australians to regain greater control and self-determination at the cultural interface of western legal systems and their own ICIP.

However, as will be discussed, True Tracks not only empowers Indigenous people but enables users of ICIP to follow protocols and implement them during projects that involve managing ICIP rights. In this way, the model serves as a solution to the problems of appropriation and mistreatment of ICIP. It is also adaptable to a number of sectors. Given that government has not legislated to protect ICIP despite Indigenous calls, Indigenous people and their supports must look to the law and additional methods to adequately protect their cultural heritage. This is where the 10 True Tracks protocols can be used as a voluntary and ethical approach. The innovative principles I put forward here will set standards that can inform future laws.

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<sup>66</sup> Australian Institute of Aboriginal and Torres Strait Islander Studies, *Guidelines for Ethical Research in Australian Indigenous Studies* (2012).

<sup>67</sup> National Health and Medical Research Council, *Ethical conduct in research with Aboriginal and Torres Strait Islander Peoples and communities: Guidelines for researchers and stakeholders* (2018).

<sup>68</sup> Lester-Irabinna Rigney, 'Indigenous Research and Aboriginal Australia' in J E Kunnie and N I Goduka (eds), *Indigenous Peoples' Wisdom and Power: Affirming Our Knowledge Through Narratives* (Ashgate, 2006) 32, 37.

## 1.4 Conceptual framework

This PhD examines the intercultural space where IP law interacts with Indigenous Australian ownership and management of ICIP. It looks at the ways Indigenous self-determination and customary laws are either enabled or undermined in that space. The following concepts anchor my thinking and are central to understanding the interplay of the IP framework and Indigenous peoples' claim to their cultural heritage.

### 1.4.1 Customary Law

In Australia, and internationally, Indigenous peoples have customary laws that govern the use and dissemination of their knowledge and cultural expression. 'Customary law' is the body of rules, values and traditions which are accepted by the members of an Indigenous community as establishing standards or procedures to be upheld in that community.<sup>69</sup> Indigenous customary laws are central to Indigenous identity and cultural maintenance. Customary laws govern the ownership and dissemination of songs, stories, dances and ceremonies, even knowledge that belongs collectively to an Indigenous people, according the laws and customs.

Indigenous people have strong connections with the IP pertaining to their country and heritage. This connection is the heart of Indigenous people's identity. Indigenous customary law imposes certain obligations and responsibilities over Indigenous IP. They define the rights, obligations and responsibilities of Indigenous people in respect of their relationships, world views, and cultures.<sup>70</sup> For instance, customary law may require knowledge to be kept secret; or that it only be used by members of the group.

In considering this issue, it should be noted that the recognition of these customary laws may vary from community to community and may be practiced at different levels of operation depending on impact of western influence upon Aboriginal cultures, traditions and lifestyles.<sup>71</sup>

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<sup>69</sup> Terri Janke and Robynne Quiggin, *Background Paper on Indigenous Cultural and Intellectual Property and Customary Law*, No 12 (Law Reform Commission of Western Australia, March 2005) 4.

<sup>70</sup> World Intellectual Property Organization, 'Customary Law and Traditional Knowledge' 7 *Background Brief* (Geneva, 2006) 1. [https://www.wipo.int/edocs/pubdocs/en/wipo\\_pub\\_tk\\_7.pdf](https://www.wipo.int/edocs/pubdocs/en/wipo_pub_tk_7.pdf)

<sup>71</sup> David Weisbrot, 'Customary Law' (1981) 1(1) *Aboriginal Law Bulletin* 3.

Indigenous customary laws are not formally recognised in the western legal system, and third parties outside of the Indigenous cultural group, have in the past used Indigenous IP 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.

For these reasons, my research on ICIP and the protocols framework has developed to recognise and support Indigenous customary laws. As noted by WIPO:

customary laws can be used in conjunction with formation intellectual property systems to fill some of the gaps in the protection of traditional knowledge. For example, customary laws concerning inheritance may determine ownership of intellectual property or the legal identity of a community as a right-holder; customary laws imposing an obligation of confidentiality may be effectively extended to prevent disclosure beyond the traditional circle; and customary laws governing use of a sacred symbol may be drawn upon to deny registration of the symbol as a trademark by a third party.<sup>72</sup>

#### **1.4.2 Indigenous Cultural and Intellectual Property**

Drawing from customary law foundations, the fundamental concept of the thesis, Indigenous Cultural and Intellectual Property (ICIP), is used to refer to the rights Indigenous Australians seek to adequately protect their cultural heritage. ICIP includes the tangible and intangible elements of this heritage, including artistic works, literature, performance, traditional and scientific knowledge, documentation, cultural property and objects, human remains and documentation. Internationally this term has been replaced by the term 'cultural heritage, traditional knowledge and traditional cultural expressions', which was adopted internationally following the UNDRIP.<sup>73</sup> In Australia, the term 'Indigenous Cultural and Intellectual Property' continues to have currency and due to familiarity and consistency, it is used throughout this thesis. It was the term used in the early drafts of the UN Declaration on the Rights of Indigenous People and

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<sup>72</sup> World Intellectual Property Organization, 'Customary Law and Traditional Knowledge', (2006) 7 *Background Brief*, (WIPO, Geneva) 2.

<sup>73</sup> *Declaration on the Rights of Indigenous Peoples*, GA Res 61, UN GAOR, 61<sup>st</sup> sess, 107<sup>th</sup> plen mtg, UN Doc A/RES/61/295 (13 September 2007).

was used in the key study by Madame Erica-Irene Daes and the Working Group of Indigenous Populations.<sup>74</sup> This international study was groundbreaking in that it identified the historical patterns of colonisation that have led to world Indigenous people being deprived of enjoying the tangible and intangible objects of their cultural heritage.<sup>75</sup> James Anaya, Native American lawyer and international indigenous advocate explains that Daes was requested to prepare a draft statement of principles on indigenous heritage following her 1993 *Study on the Protection of the Cultural and Intellectual Property of Indigenous Peoples*.<sup>76</sup> According to Anaya, the *Principles and Guidelines for the Protection of the Heritage of Indigenous Peoples*, developed in 1994, were solidly grounded because they built upon world indigenous peoples' demands and the key international instruments which arose from the 1992 UN Conference on Environment and Development. These instruments, the Rio Declaration on the Environment and Development, Agenda 21 and the Convention on Biological Diversity were adopted by states and included recognition of indigenous peoples' rights.<sup>77</sup>

My work in *Our Culture: Our Future* (see section 1.1) drew on the work of Daes, using the concept of ICIP embodied in Daes' *Final Report* and contained in the *Principles and Guidelines for the Protection of Heritage of Indigenous Peoples* as they were adopted by the Indigenous Reference Group for the project.<sup>78</sup> ICIP rights stem from Indigenous customary laws which existed prior to colonisation and continue to be expressed in a variety of forms by Indigenous peoples. As was acknowledged by Erica-Irene Daes, Indigenous customary laws include various laws and systems around sharing and protecting knowledge and heritage.<sup>79</sup> The scope of ICIP that is used in *Our Culture: Our Future* and this thesis follows the definition articulated by the

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<sup>74</sup> Erica-Irene Daes, *Study on the Protection of the Cultural and Intellectual Property of Indigenous Peoples*, UN Doc E/CN.4/Sub.2/1993/28 (28 July 1993) para 27.

<sup>75</sup> *Ibid*, paras 18–20.

<sup>76</sup> James Anaya, 'International Human Rights and Indigenous Peoples: The Move Toward the Multicultural State' (2004) 21(1) *Arizona Journal of International & Comparative Law*, 33.

<sup>77</sup> *Ibid* 34. Anaya particularly noted that the influence of the 1992 United Nations Conference on the Environment and Development and its resolutions adopted by the states. The Rio Declaration on the Environment and Development which recognised that Indigenous people have a 'vital' role in sustainable development 'because of their knowledge and traditional practices.' Agenda 21,

<sup>78</sup> Erica-Irene Daes, *Final Report on the Protection of the Heritage of Indigenous Peoples*, UN Doc E/CN.4/Sub.2/1995/26 Guideline 12.

<sup>79</sup> Erica-Irene Daes, *Study on the Protection of the Cultural and Intellectual Property of Indigenous Peoples*, UN Doc E/CN.4/Sub.2/1993/28 (28 July 1993) para 27.



Daes *Final Report*, with one addition, the inclusion of language as a category of ICIP. The concept of ICIP and the rights Indigenous Australians seek to protect their cultural heritage are identified and explored in Chapters 3 and 4.

Our Culture: Our Future listed 17 rights that Indigenous Australians hold in their heritage. This included the right to own and control ICIP, define it, and to be primary guardians of it as well as to authorise or refuse commercial use and the right of prior informed consent, attribution and the right to benefit commercially from the authorised use of ICIP, including the right to negotiate use.<sup>80</sup> Our Culture: Our Future found that these ICIP rights are not adequately accommodated for in existing IP laws.<sup>81</sup> Within Indigenous systems of knowledge management, ICIP is viewed collectively in terms of communal rights and individual responsibility. ICIP rights are continuous, spanning across generations, and thus do not have a limited timeframe where they can be freely used by outsiders.

However, in western IP regimes, rights granted to authors are balanced against the desire in IP law to maintain a healthy public domain; that is, knowledge that can be used freely at the end of the duration of protection. When copyright ends 70 years after the death of the author, materials can be freely used to foster knowledge creation for the good of all humankind. This has a significant impact on Indigenous artists and communities as they assert that the rights and cultural practices surrounding ICIP continue indefinitely.

The use of ICIP protocols can provide a remedy to the threat these gaps pose to Indigenous rights and the protection of knowledge. Kathy Bowrey<sup>82</sup> has discussed how protocols can locate, or create, a space for an Aboriginal dialogue about legal rights in the context of ICIP law.<sup>83</sup> Bowrey states:

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<sup>80</sup> Terri Janke, *Our Culture: Our Future – Report on Australian Indigenous Cultural and Intellectual Property Rights* (Report commissioned by AIATSIS and ATSIC, Michael Frankel & Company, 1998) 47–48.

<sup>81</sup> *Ibid* para 32.

<sup>82</sup> Kathy Bowrey is an Australian legal academic who has written extensively on IP.

<sup>83</sup> Kathy Bowrey, 'Alternative Intellectual Property? Indigenous Protocols, Copyleft and New Juridifications of Customary Practices' (2006) 6 *Macquarie Law Journal* 65.

One reading of Indigenous protocols is that they exist in place of formal legal recognition of community custom. They stem from the failure inherent in Anglo-Australian jurisprudence to respect Indigenous law. Thus, protocols can be characterised as the only avenue left for affected communities to post their views.<sup>84</sup>

This thesis proposes using the concept of ICIP and building on Daes' work and my previous work in *Our Culture: Our Future*, to develop the True Tracks Principles as a framework for meaningful dialogue between Indigenous people and users of ICIP – thereby supporting Indigenous self-determination. The framework is flexible in order to recognise the diversity of customary laws and support a contemporary meaning that acknowledges contemporary Indigenous authority structures and emerging applications of ICIP.

### **1.4.3 The theoretical underpinnings of IP laws**

Intellectual property rights are given to creators to provide an incentive for them to produce new information by giving them the means to prevent freeriding.<sup>85</sup> For a limited time, creators can exploit their intellectual property rights and stop others from doing so. Intellectual property rights are designed in ways that prevent the intellectual property owner from having total control of the information. This is why there are limited terms of protection build into the framework. After a period of exclusive rights ends, the information must be freely available so that others can use it. In this way, the information becomes part of the collective human knowledge. Peter Drahos explains:

the whole point of this government regulation is to ensure that the information is diffused into the intellectual commons where other produced and creators can make use of it.<sup>86</sup>

William Van Caenegem says that this 'incentive and reward' underpinning of IP laws 'has brought it (in recent times, quite starkly) into conflict with the more social and

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<sup>84</sup> Ibid.

<sup>85</sup> Peter Drahos, 'Introduction', in Peter Drahos and Ruth Mayne (eds), *Global Intellectual Property Rights* (Palgrave MacMillan, 2002) 4.

<sup>86</sup> Ibid 4.

historical notions of creativity and creation.<sup>87</sup> An example given by Caenegem, is in patent law where the notion of reward for individual inventiveness conflicts with the contemporary investment models involving research and pharmaceutical companies, thereby presenting challenges for modern patent law.<sup>88</sup>

The interface between IP and ICIP brings similar challenges. Indigenous knowledge systems are based on intergenerational belonging to country. Cultural and artistic practices form out of Indigenous peoples' deep and continuing connections to land, seas, and all things on it. Peter Drahos and Susy Frankl describe Indigenous innovation as place-based innovation, being produced and enacted on 'country; where the people observe and interact with plants and animals to which they are cosmologically linked.'<sup>89</sup> Drahos and Frankl note that the concept of traditional knowledge transcends the categories of IP law, copyright, trade marks, patents and plant-breeders' rights.<sup>90</sup> This mismatch has arisen largely due to the Eurocentric origins of IP law. When we take a more detailed look at the origins of IP law, and its key concepts of labour and individual authorship, we can get a greater undertaking of the complexities of using a western IP framework to protect ICIP.

#### 1.4.3.1 *Eurocentric Origins*

The Australian legal system has developed from western legal traditions stemming from Roman and canon law, influenced by Renaissance and Classical Greek and Roman knowledge systems. The IP<sup>91</sup> laws protect intangible property that is the result of human intellectual activity. But IP laws – copyright, designs, patents and trade marks – are selective in the knowledge that they cover as they are the product of western philosophical and legal traditions and were developed to promote intellectual

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<sup>87</sup> William Van Caenegem, *Intellectual Property*, 2<sup>nd</sup> ed (LexisNexis Butterworths, 2002) 4.

<sup>88</sup> *Ibid* 4; *Genetech v The Wellcome Foundation* (1989) 15 IPR 423.

<sup>89</sup> Peter Drahos and Susy Frankel (eds), *Indigenous Peoples' Innovation: Intellectual Property Pathways to Development* (ANU E Press, 2012) 13.

<sup>90</sup> *Ibid* 7.

<sup>91</sup> World Intellectual Property Organization, *What is Intellectual Property?* <<http://www.wipo.int/about-ip/en/>>.

outputs from Eurocentric knowledge systems.<sup>92</sup> These laws are frequently challenged when they are applied to Indigenous knowledge systems.

Eurocentric ideas around 'cultural practice' shaped the development of IP laws which grew out of the political and economic revolutions of the 15th Century onwards.<sup>93</sup> Commentators such as Battiste and Henderson have further highlighted how all of this occurred in connection to the colonisation of Indigenous peoples.<sup>94</sup> It is clear that the development of IP legislation in many countries largely ignored the rights of 'other' forms of culture and knowledge holders,<sup>95</sup> such as those in Indigenous and traditional communities. Ownership and protection are thus limited to those who can articulate their rights in a manner that meets the requirements of western IP regimes.<sup>96</sup>

Edward Said's work sets out how the concept and constructions surrounding the Orient involves the production of an exoticised 'Other', denigrating the knowledges and practices of peoples – Indigenous or otherwise – who are under the scrutiny of the dominant culture.<sup>97</sup> The ways in which the peoples and cultural practices of the Other or outside culture is defined, understood and depicted is always in relation to a western gaze that occupies a self-appointed superior position.<sup>98</sup> In connection to this, academics consider how IP regimes may support orientalist productions of meaning attached to non-western Others by exclusively protecting liberal authorship rights.<sup>99</sup> Kendall and Meddin have highlighted how the rights of non-western authors are rejected or ignored, as they simply do not fit into western jurisprudential paradigms.<sup>100</sup> In the same way, Indigenous people have been treated as the 'subject matter' for

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<sup>92</sup> Peter Drahos, 'The Universality of Intellectual Property Rights: Origins and Developments' in *Intellectual Property and Human Rights* (WIPO, 1999) 1341.

<sup>93</sup> Marie Battiste and James (Sa'ke'j) Youngblood Henderson, *Protecting Indigenous Knowledge and Heritage: A Global Challenge* (Purich Publishing, 2000) 147.

<sup>94</sup> *Ibid* 148.

<sup>95</sup> Rajat Rana, 'Indigenous Culture and Intellectual Property Rights' (2006) 11 *Journal of Intellectual Property Rights* 133.

<sup>96</sup> Christopher N Kendall and Sarah Meddin, 'Accessorising Aboriginality: Heritage Piracy and the Failure of Intellectual Property Regimes to Safeguard Intellectual Property' (2004) 16(1) *Bond Law Review* 166, 173.

<sup>97</sup> Edward Said, *Orientalism* (Pantheon Books, 1978).

<sup>98</sup> *Ibid* 44.

<sup>99</sup> Christopher N Kendall and Sarah Meddin, 'Accessorising Aboriginality: Heritage Piracy and the Failure of Intellectual Property Regimes to Safeguard Intellectual Property' (2004) 16(1) *Bond Law Review* 166, 173.

<sup>100</sup> *Ibid* 174.

research or exotica, merely existing alongside nature and their environments. Indigenous Australian were not recognised as authors and creators but subject matter and informants for Western research.

#### 1.4.3.2 *Labour theory*

William Fisher, Harvard University, cites several rationales for IP laws, noting that the most common is the labour theory.<sup>101</sup> In the labour theory reasoning, IP laws function as incentives for individual creators and inventors who are rewarded with economic rights, for a limited time, for the fruits of their intellectual labour. In John Locke's theory of labour and property<sup>102</sup> the labour of the individual informs the authority they have over what they produce. Here, the focus rests on tangible property, underpinning the protection bias towards material forms in IP laws. There are limitations of this theory in applying it to Indigenous intellectual production. For example, the trans-generational development of a cultural expression or knowledge is not recognised, nor is communal ownership. Further, oral based cultural transmission does not meet the material form requirement of IP laws.

Intergenerationally, cultural expression often lacks a permanent material form – for example, body paintings during ceremony or knowledge handed down through song and story told around the campfire. The labour framework also falters in regard to Indigenous communally owned knowledge, where works are often created by groups and primarily for cultural maintenance rather than financial reward.

Fisher notes that labour theory provides only weak support for the expansion of IP rights to cover Indigenous cultural expression because the labour was:

expended long ago by ancestors of the current members of the group, who are now seeking enhanced legal protection. It is far from clear that the natural rights of the original workers, whatever they may be, run to their descendants.<sup>103</sup>

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<sup>101</sup> William Fisher, 'Theories of Intellectual Property' in Stephen Munzer (ed), *New Essays in the Legal and Political Theory of Property* (Cambridge University Press, 2001) 168, 172.

<sup>102</sup> John Locke, *Two Treatises on Government* (Thomas Hollis, first published 1689, 1764 ed).

<sup>103</sup> William Fisher, 'The Puzzle of Traditional Knowledge' (2018) 67 *Duke Law Journal* 1511.

The revitalisation and reproduction of cultural expression is about the reinterpretation and nurturing of knowledge. This is a cultural right and responsibility of current and successive generations is not justified as labour unless the Indigenous creator contributes through their own creative endeavours. For instance, with copyright, Justice von Doussa in *Milpurrurru v Indofurn*<sup>104</sup> recognised that the Aboriginal artists had imparted skill, labour and effort to create their own works even though they depicted ancient symbols that formed part of their cultural heritage. In *Bulun v R & T Textiles*<sup>105</sup> the case did not recognise that the clan jointly held copyright in works that embodied traditional ritual knowledge because to do so moves away from the legal proposition that authorship requires some contribution to the work. The clan did not sit down and paint the work with the artist so therefore they had no right to copyright. However, the artist was held to owe a fiduciary duty to the clan to exercise his copyright in ways that were consistent with their customary laws.

Fisher instead points to cultural theory as providing a better justification:

Another way in which cultural theory can illuminate the problem of traditional knowledge concerns egalitarianism. Central to the theory offered here is a variant of distributive justice. All persons should be provided roughly equal access to the preconditions of a good life. Enhanced protection of traditional knowledge could help ameliorate the radical inequality in the world today in the degree to which the members of different groups enjoy such access, specially by mitigating the economic and social disadvantages from which indigenous groups currently suffer.

#### 1.4.3.3 *Individual rights*

Furthermore, the focus of IP laws is on protecting the rights of individual creators and their artistic works, inventions, designs and trade marks. Liberal imperialist narratives of discovery<sup>106</sup> and western economic markets and concepts of invention and

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<sup>104</sup> *Milpurrurru v Indofurn* (1994) 130 ALR 659.

<sup>105</sup> *Bulun v R & T Textiles* (1998) 41 IPR 513.

<sup>106</sup> Christopher N Kendall and Sarah Meddin, 'Accessorising Aboriginality: Heritage Piracy and the Failure of Intellectual Property Regimes to Safeguard Intellectual Property' (2004) 16(1) *Bond Law Review* 166, 172.

ownership<sup>107</sup> underpin IP laws, leading to the privileging of an individual author that is reinforced by notions of innovation and originality. This concept of individual authorship does not fit with collectively owned knowledge and is explored in the chapters of this thesis.

## 1.5 Knowledge, Power and IP

To draw the correlation between knowledge and legal rights thereto, I am interested in the interaction between knowledge, power and the law, because after all, intellectual property is the power to control knowledge, but only knowledge that meets the criteria of these western knowledge focused laws. Indigenous people assert their rights to control their knowledge, and the legal system is challenged. Michel Foucault's theories of power and the construction of knowledge are relevant for debates on the protection of Indigenous knowledge. Further, Foucault's relevance to the regulation of knowledge is useful in considering the transformative nature of law. This is because 'modern law is connected with the exercise of political sovereignty, which renders it the ability to co-constitute, authorise, and give force to different modalities of power.'<sup>108</sup>

In considering Foucault's writings, Turkel considers law to be an element in the expansion of power, arguing that

In modern society, law combines with power in various locations in ways that expand patterns of social control, knowledge, and the documentation of individuals for institutionally useful ends. Ultimately, legality and associated techniques of knowledge and control expand to define and to provide empirical knowledge of every aspect, every fibre of society.<sup>109</sup>

This in part explains how power has been exerted on Indigenous people leading to the exploitation of their knowledge. However, Foucault's concept of normalised power, which he considers can be stronger than legislative power, provides the impetus to

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<sup>107</sup> Rajat Rana, 'Indigenous Culture and Intellectual Property Rights' (2006) 11 *Journal of Intellectual Property Rights* 135.

<sup>108</sup> Leila Brännström, 'Law, Objectives of Government, and Regimes of Truth: Foucault's Understanding of Law and the Transformation of the Law of the EU Internal Market' (2014) 18 *Foucault Studies* 173, 177.

<sup>109</sup> Gerald Turkel, 'Michel Foucault: Law, Power, and Knowledge' (1990) 17(2) *Journal of Law and Society* 170.

look beyond the legislation, and to suggest ways that Indigenous people can challenge the dominant power knowledge structure.<sup>110</sup>

I will not consider Foucault's theories in detail in this thesis but point to the illuminating 2003 thesis of Jane Anderson, Australian legal academic now working with indigenous nations in the US. Anderson's thesis, *The Production of Indigenous Knowledge in Intellectual Property Law*, drew on the scholarship of Michel Foucault to appreciate strategies of managing and directing Indigenous knowledge.<sup>111</sup>

Anderson points out an important statement of Foucault:

Law is neither the truth of power, nor its alibi. It is an instrument of power which is at once complex and partial. The form of law with its effects of prohibition needs to be resituated among a number of other non-judicial mechanisms.

This leads her to the statement that the law can establish governing space but need not solely be the focus of solutions and outcomes:

Law, in establishing and directing a space, need not govern it directly. Management can be left to other influences that paradoxically add further layers of complexity. Teasing these layers apart reveals that the problem of Indigenous intellectual property is not only managed as a legal concern. Rather, the point of interest here is how precisely it has been produced as a legal issue and how this sets key expressions that structure the given terms of the debate. Law can identify and locate the problem at inception, or indeed others can identify the problem as 'legal' in nature. However, other strategies including the intersection of politics and social influence usually come into play.<sup>112</sup>

Anderson details the emergence of Indigenous knowledge as a category of intellectual property law. Anderson states that through locations such as the changing political environments, government focused reports, strategic case law and individual agency

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<sup>110</sup> Michel Foucault, *Discipline and Punish: The Birth of the Prison* (Vintage Books, first published 1975, 1995 ed) 305.

<sup>111</sup> Jane Anderson, *The Production of Indigenous Knowledge in Intellectual Property Law* (PhD Thesis, University of New South Wales, 2003. Revised and published as Anderson, Jane, *Law, Knowledge, Culture: The Production of Indigenous Knowledge in Intellectual Property Law* (Edward Elgar Publishing, 2009)

<sup>112</sup> Jane Anderson, *The Production of Indigenous Knowledge in Intellectual Property Law* (PhD Thesis, University of New South Wales, 2003) 337, 80.



has pushed the dominant legal system to consider expressions of Indigenous knowledge in intellectual property .<sup>113</sup>

Anderson postulates that a whole array of techniques, impress upon the individual about the preferred ways of acting. This is refreshing given that in Australia, there has been an absence of will on the part of lawmakers to legislate ICIP rights, despite calls for legislative protection by Indigenous peoples.

In this way, the law can be useful as a tool, and other solutions such as protocols, can assist deal complex situations. Law is the technology of governance, and whilst in the past it has been a function of the colonial managers, Anderson's thesis, and the historical developments outlined in Chapter 2, enables community capacity outside the body of the law.

### **1.5.1 Indigenous Knowledge**

Whilst this thesis uses the term ICIP, there is growing use of the terms Traditional Knowledge (TK) and Traditional Cultural Expression in the international debates. TK refers to the knowledge resulting from intellectual activity in a traditional context, and includes know-how, practices, skills and innovations. It exists in a wide variety of contexts, including: agricultural knowledge; scientific knowledge; technical knowledge; ecological knowledge; medicinal knowledge, including related medicines and remedies; cosmology; genetic resources; and biodiversity-related knowledge.<sup>114</sup> Traditional Cultural Expression, also referred to as 'expressions of folklore', refers to tangible and intangible forms in which traditional knowledge and cultures are expressed, communicated or manifested. Examples include languages, music, performances, literature, song lines, stories and other oral traditions, dance, games, mythology, rituals, customs, narratives, names and symbols, designs, visual art, crafts and architecture.<sup>115</sup>

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<sup>113</sup> Jane Anderson, *The Production of Indigenous Knowledge in Intellectual Property Law* (PhD Thesis, University of New South Wales, 2003) 337.

<sup>114</sup> WIPO, *Traditional Knowledge* <<http://www.wipo.int/tk/en/tk/>>.

<sup>115</sup> WIPO, *Traditional Cultural Expressions* <<http://www.wipo.int/tk/en/folklore/>>.

These terms are used in the UNDRIP<sup>116</sup> and by the WIPO IGC. The WIPO definitions of TK and Traditional Cultural Expression make it clear that the term ‘traditional’ is the method of transmitting cultural heritage and refer to contemporary cultural practice (see Table 1.1). However, some Indigenous Australians do not favour the use of the term ‘traditional’ due to concerns that it can imply that Indigenous Australian culture is locked in the past time, and the way it may perpetuate inappropriate past practices of classifying Indigenous peoples.<sup>117</sup> Hence, the term ICIP is commonly used in Australian debates. An exception to the use of the term ICIP is the 2018 discussion paper prepared for IP Australia which instead uses the term ‘Indigenous Knowledge’ in response to IP Australia’s specific terms of reference.<sup>118</sup>

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<sup>116</sup> *Declaration on the Rights of Indigenous Peoples*, GA Res 61, UN GAOR, 61<sup>st</sup> sess, 107<sup>th</sup> plenary meeting, UN Doc A/295 (2 October 2007).

<sup>117</sup> Flinders University, *Appropriate Terminology, Indigenous Australian Peoples* <[http://www.flinders.edu.au/equal-opportunity\\_files/documents/cdip/folio\\_5.pdf](http://www.flinders.edu.au/equal-opportunity_files/documents/cdip/folio_5.pdf)>.

<sup>118</sup> Terri Janke and Maiko Sentina, ‘Indigenous Knowledge: Issues for Protection and Management’ (Discussion paper, IP Australia & the Department of Industry, Innovation and Science, 2018) 18.

**Table 1.1 Components of Indigenous Knowledge and Traditional Cultural Expression**

Indigenous Knowledge	
Traditional Knowledge (TK)	Traditional Cultural Expression
<ul style="list-style-type: none"> <li>• agricultural knowledge</li> <li>• scientific knowledge</li> <li>• technical knowledge</li> <li>• ecological knowledge</li> <li>• medicinal knowledge related medicines and remedies</li> <li>• cosmology</li> <li>• biodiversity-related knowledge</li> <li>• knowledge about genetic resources</li> </ul>	<ul style="list-style-type: none"> <li>• languages</li> <li>• music, performance</li> <li>• literature</li> <li>• song lines, stories and other oral traditions, dance, games, mythology</li> <li>• rituals, customs</li> <li>• narratives, names and symbols, designs</li> <li>• visual art and crafts</li> <li>• architecture</li> </ul>

### 1.5.2 Self-determination

Another core concept investigated in the thesis in respect to ICIP is that of self-determination. Self-determination is an international concept that all peoples have the right to be in control of their own destinies equally. The *International Covenant on Civil and Political Rights*<sup>119</sup> and the *International Covenant on Economic, Social and Cultural Rights*,<sup>120</sup> both of which Australia has ratified, contain articles dealing with self-determination:

<sup>119</sup> *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, [1980] ATS 23 (entered into force 23 March 1976).

<sup>120</sup> *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976).

All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.<sup>121</sup>

#### 1.5.2.1 *United Nations Declaration on the rights of Indigenous peoples*

The UNDRIP includes self-determination for Indigenous people in Article 3, following the language of these two Covenants. Self-determination is not defined in UNDRIP. However, the content of self-determination under UNDRIP can be distilled to two essential prerequisites: meaningful participation in decision-making, and freedom from discrimination.<sup>122</sup> Megan Davis, Indigenous lawyer and Australia's representative on the UN Permanent Forum on Indigenous Peoples, points out that many Indigenous Australians contributed to the drafting of the Declaration which was 20 years in the making. Davis says that although the UNDRIP is not binding, it is often attributed as 'aspirational or persuasive as it provides a framework to guide states in their relationship with Indigenous peoples'<sup>123</sup>. The UNDRIP is influential in that it should be the document that governments, business and policy makers use to inform their reforms.

Article 31 of the UNDRIP recognises the right of Indigenous peoples not only to maintain and protect their traditional cultural expressions, cultural heritage and traditional knowledge, but also to *control* it as intellectual property. The rights outlined in the Declaration are collectively held and asserted. Their enshrinement in the Declaration is in response to the many appropriations of Indigenous knowledge and cultural expression that have occurred over the many years of contact by outsiders who have plundered culture for commercial gain without recognition of Indigenous people's prior ownership; and without regard for cultural context and the sacred; and without benefit sharing. Control is linked to self-determination and the right of free, prior informed consent which for Indigenous people, has evolved in international

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<sup>121</sup> International Covenant on Civil and Political Rights art 1; International Covenant on Economic, Social and Cultural Rights, art 1.

<sup>122</sup> Anna Cowan, 'UNDRIP and the Intervention: Indigenous Self-Determination, Participation, and Racial Discrimination in the Northern Territory of Australia' (2013) 22(2) *Pacific Rim Law & Policy Journal* 247.

<sup>123</sup> Megan Davis, 'To Bind or not to Bind: The United Nations Declaration on the Rights of Indigenous Peoples Five Years On' (2012) 19 *Australian International Law Journal* 17, 36.

human rights law.<sup>124</sup> The standard of free, prior informed consent requires that parties seek the freely given consent of the relevant Indigenous authorities and peoples before the commencement of a project or usage of cultural materials. This standard allows Indigenous peoples to have the right to self-determination in decision-making processes and prevent misuse of cultural material by granting the ability to exercise control over the usage and ownership of their cultural and intellectual property.

Indigenous people are increasingly seeking greater protection of their knowledge and cultural expressions to allow for self-determination. Therefore, the rights in Article 31 should allow Indigenous people to participate in entrepreneurial opportunities to innovate in ways that build on their cultural heritage. In the 21st Century it would be wrong to assume that Indigenous creators do not wish to receive economic benefits. On the contrary, there is a well-developed Indigenous arts market, and many Aboriginal artists earn money to support their families and communities, while also being mindful of their communal obligations to guard the cultural integrity of the culture they represent in their works.

The rights of Indigenous people are inherent rights. However, they remain a controversial and contested area of political and legal debate. Australia did not sign the UNDRIP when it passed through the UN in 2007, but in 2009 endorsed it. However, it is yet to enact laws or comprehensive policy in line with the Declaration. Given the Australian Government's response to the Uluru Statement from the Heart<sup>125</sup>, the call for an Indigenous voice is likely to be a long road. However, the main message in this thesis is that the successful approaches for dealing with ICIP through protocols can recognise the collective rights of Indigenous people and can provide self-determination; including opportunities for contemporary innovation and entrepreneurship.

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<sup>124</sup> Phillippe Hanna and Frank Vanclay, 'Human Rights, Indigenous Peoples and the Concept of Free, Prior and Informed Consent' (2013), 31(2) *Impact Assessment and Project Appraisal* 147 <[https://www.fpic.info/media/library/resources/human-rights-indigenous-peoples-concept-free-1/Human\\_Rights\\_Indigenous\\_vbP8ihA.pdf](https://www.fpic.info/media/library/resources/human-rights-indigenous-peoples-concept-free-1/Human_Rights_Indigenous_vbP8ihA.pdf)>.

<sup>125</sup> Uluru Statement from the Heart (by delegates at the 2017 First Nations National Constitutional Convention), < <https://www.1voiceuluru.org/the-statement/>>.

In this thesis, the concept of self-determination and Article 31 of the UNDRIP are the foundation for ICIP rights, and the basis for the protocols, especially the principle of consent and consultation. The right of Indigenous people to own, control and manage their ICIP is a key articulation on the principle of self-determination, which includes the right and duty of Indigenous people to maintain and develop their own cultures, knowledge systems and forms of social organisation.

### **1.5.3 Conceptual framework: concluding comments**

The conceptual frameworks discussed above were key in enabling the advancement of my thinking, the discussion and the development of the True Tracks ICIP Protocols Framework. Each concept provides insights into the interactions between the Australian IP legal system and Indigenous peoples' cultural heritage.

The concept of Indigenous customary laws existing for thousands of years prior to the introduction of western IP law is acknowledged as being the regulatory framework for Indigenous peoples, and the mode of handing down through the generations, in accordance with rights and responsibilities.

Indigenous Cultural and Intellectual property provides the fundamental structure for the thesis. The premise, as articulated in the UNDRIP, that Indigenous people have the rights to own and control their ICIP is the core consideration.

Seeking to understand the way in which the IP law is premised and structured and its foundations with an emphasis on Indigenous Cultural and Intellectual Property, is imperative when searching for a viable means of accommodating ICIP rights.

Australian IP law does not adequately protect the Indigenous Cultural and Intellectual property rights of Indigenous peoples, as Indigenous ownership and protection does not meet the western IP requirements, and subsequently fails to appropriately seek out a way to accommodate them. Thus, through exploring the foundations of Australian IP law we can consider ways in which the law can be adapted to absorb and protect ICIP rights, and assess where ICIP and Indigenous knowledge fits in.

Indigenous Knowledge was a wholistic concept including science and arts, where the tangible is connected with the intangible. As noted in the methodology, the Indigenous Knowledge discourse around Indigenous knowledge was useful to understand the

contestation of authorship including the control over production and transmission of knowledge.

Self-determination provided the foundation the realisation of ICIP rights and established the basis for the protocols discussed throughout this thesis. Self-determination is a key concept that has received international attention concerning the protection of ICIP. This involves granting Indigenous people power in decision-making processes and control over their cultural heritage.

The papers that follow in the thesis will further investigate the concepts. Each paper will inform a different aspect in more context.

## **1.6 Thesis by Compilation**

This PhD is submitted as a thesis by compilation which meets the requirements of The ANU's Higher Degree by Research procedure.<sup>126</sup> It includes seven academic papers and chapters I have written and which have been published in journals and books from 2008, when I commenced my PhD, to 2018. Throughout this thesis, they will be referred to as 'the publication/s' or 'the paper/s'. Each publication constitutes a chapter of the thesis.

To comply with Guideline 4 of the ANU Higher Degree by Research procedure, which requires that a PhD by Compilation provide an integrated and original contribution to knowledge, I have included below the overarching set of research questions and arranged the published papers to address these questions. I have prepared this Introduction, Chapter 1, to lay the conceptual and theoretical framework for my inquiry. Further, I have included prefaces to each paper that serve as linking text to establish the contextual information and relationship between the chapters. The Conclusion, Chapter 10, draws the discussions in the papers together in a cohesive manner,

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<sup>126</sup> Australian National University, *Procedure: Higher degree by Research – Thesis by Compilation and Thesis by Creative Works* <[https://policies.anu.edu.au/ppl/document/ANUP\\_003405](https://policies.anu.edu.au/ppl/document/ANUP_003405)>.

reflecting on the research questions and establishing the contribution the thesis makes to the advancement of the research area.

All of the papers are sole-authored and were peer reviewed prior to publication. I am the copyright owner of the papers. I confirm that I am not precluded by any publisher's agreement from including the published works in the thesis. To be sure, I have advised the publishers of my intention to include the papers in a PhD thesis, and obtained their approval.

## **1.7 Research Questions**

This section outlines the central research questions which the thesis research will attempt to answer. The thesis is structured to answer four central questions:

1. What is ICIP?
2. What rights do Indigenous people want to their ICIP?
3. How are ICIP rights recognised under Australia laws? What enables and disables protection?
4. What kinds of strategies and models would improve ICIP recognition and protection?

## **1.8 Structure of Thesis**

In selecting the papers for thesis, I chose articles that canvassed the different research questions and covered the key areas of ICIP. I have integrated the papers into two parts: the first part presents the key research issues and setting; while the second provides case studies that explore the issues, demonstrate an evidence-base for the model, and identify best-practice intercultural standards.

The articles are reproduced as they were published including any oversights. Where the footnotes referred to footnotes above, I have added a square bracket to denote the reference, as it appears in this thesis.



### **1.8.1 Part One: Identifying the program to be addressed**

The first part of the thesis defines the conceptual framework, presenting definitions, issues, and an interpretation of the legal landscape. Chapter 2 contextualises the topic of the thesis by examining the body of scholarship and literature, as well as the reports, enquiries and legislative developments that relate to the history and concept of ICIP protection. Chapter 3 focuses on Indigenous Cultural Expressions within a western Australian IP legal framework through the paper 'Indigenous Cultural Expression and Intellectual Property' from the edited publication *Indigenous Australians and the Law*.<sup>127</sup>

Chapter 4 is a paper I wrote for an international publication on *Intangible Cultural Heritage*.<sup>128</sup> In compiling the works for this book, Professor Toshiyuki Kono, Kyushu University, focuses the research on IP and cultural heritage. Professor Kono travelled to Australia and invited me to be a contributor to his publication. The chapter provides an outline of how IP laws align with the 2003 *Convention for the Safeguarding of Intangible Cultural Heritage*.<sup>129</sup>

### **1.8.2 Part Two: Case studies**

The second part of the thesis presents case studies in art, records management, performing arts, film and Indigenous knowledge. These case studies explore the issues and proposed solutions for each area of inquiry. Part Two illustrates how the issues for management and control of ICIP span a number of disciplines and industries. My inquiry in each area shows how the problem has manifested and how law and policy has attempted to deal with it. The case studies test the key 10 Principles that have come to form the True Tracks framework for dealings with ICIP. In terms of my contribution to knowledge of the thesis theme, this second part allows for the exploration and understanding of complex issues that will inform those working in each

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<sup>127</sup> Terri Janke, 'Indigenous Cultural Expression and Intellectual Property' in Elliott Johnston, Martin Hinton and Daryle Rigney (eds), *Indigenous Australians and the Law* (Routledge-Cavendish, 2<sup>nd</sup> ed, 2008) 61.

<sup>128</sup> Terri Janke, 'Indigenous Intangible Cultural Heritage and Ownership of Copyright' in Toshiyuki Kono (ed), *Intangible Cultural Heritage and Intellectual Property* (Intersentia, 2009) 159.

<sup>129</sup> *Convention for the Safeguarding of Intangible Cultural Heritage*, UN Doc MISC/2003/CLT/CH/14 (17 October 2003) <<http://unesdoc.unesco.org/images//0013/001325/132540e.pdf>>.

sector. Further, the case studies will enable future analysis that will hopefully lead to better management of Indigenous content and knowledge.

Chapter 5 presents a publication which arose out of my involvement in a forum convened by Michelle Evans, then at the Wilin Centre at the University of Melbourne.<sup>130</sup> Evans brought together key players in the Indigenous Performing Arts sector to speak about their views on the issues for the sector. I discussed copyright and Indigenous cultural expression, and made a keynote presentation to the public evening event that followed the forum. This publication was chosen because of its focus on performance. Most articles that canvas ICIP rights refer to the visual arts sector, including ones that I have written about. I chose this publication to discuss the particular issues that arise in ICIP and performing arts. Since writing this paper, I have written several protocols for the performing arts sector, including for Indigenous performing arts organisations Bangarra Dance Theatre and the National Aboriginal Islander Skills Development Association (NAISDA) Dance College.

Chapter 6 is a publication that came out of a presentation I gave to WIPO in Geneva in 2015. I was invited to present a paper for a seminar on Traditional Cultural Expression focusing on case studies. I chose the arts and records management of traditional cultural expression in the galleries, libraries, archives and museums sector. The paper was published in a special Indigenous edition of the *Australian Law Journal* edited by Professor Megan Davis.<sup>131</sup> It canvasses the issues of appropriation of Indigenous visual arts in the international arena, discussing the Bibi Barba and the Polish Hotel case. It also examines the management of traditional cultural expression by cultural institutions and advocates for protocols and policies.

Chapter 7 reproduces a book chapter included in the landmark publication *Indigenous Intellectual Property: A Handbook of Contemporary Research*<sup>132</sup>, edited by Matthew

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<sup>130</sup> Terri Janke, 'Copyright, Connections and Culture: Is There a Place in the Australian Arts Industry for a National Indigenous Cultural Authority?' in *Courageous Conversations* (Wilin Centre for Indigenous Arts and Cultural Development, 2010) 11.

<sup>131</sup> Terri Janke, 'Ensuring Ethical Collaborations in Indigenous Arts and Records Management' (2017) 91(5) *Australian Law Journal* 375.

<sup>132</sup> Terri Janke, 'Avatar Dreaming: Indigenous Cultural Protocols and Making Films Using Indigenous Content' in Matthew Rimmer (ed) *Indigenous Intellectual Property: A Handbook of Contemporary Research* (Edward Edgar Publishing, 2015) 177.

Rimmer, an Australian lawyer and academic who has written extensively on Indigenous IP. Rimmer was formerly at ANU and was on my supervisory panel when I commenced my PhD. He invited me to participate in a copyright conference he convened in 2010. I presented on *Avatar*, cinematographic films and Indigenous cultural protocols.<sup>133</sup> I was then asked to develop the paper for publication. The book chapter considers how Indigenous cultural expression and themes are incorporated into films, specifically James Cameron's *Avatar*. The publication provided a platform to explore copyright and contemporary adaptations of Indigenous cultural expression.

As Chapter 8, I have included my 2018 paper, 'From smokebush to spinifex: Indigenous knowledge and the commercialisation of plants' which was published by the *International Journal for Rural Law and Policy*, and examines seeds, traditional knowledge and IP laws.<sup>134</sup> The paper examines three patents which have resulted from collaborative research projects with Indigenous communities. I chose this publication for inclusion in this thesis because it covers genetic resources rights and the interface between patent rights and access to genetic resources.

The final case study in Chapter 9 sets out a model based on empowering Indigenous people to protect their rights by creating an alliance organisation to provide infrastructure for Indigenous people to manage and control their rights to Indigenous Knowledge. The publication, 'Guarding ground: A vision for a national Indigenous cultural authority', was presented at the 2008 Wentworth Lecture in Canberra, and in 2015 was edited and published for the 50th anniversary of AIATSIS.<sup>135</sup> It relates to further work I have done on this subject – including *Beyond Guarding Ground: A Vision*

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<sup>133</sup> Terri Janke, 'Avatar: Cinematographic Films and Indigenous Cultural Protocols' (Paper presented at *Copyright 2010: A Decade of Moral Rights and the Digital Agenda*, ANU, Canberra, 21–22 June 2010).

[https://law.anu.edu.au/sites/all/files/cipl/copyright\\_program.pdf](https://law.anu.edu.au/sites/all/files/cipl/copyright_program.pdf).

<sup>134</sup> Terri Janke, 'From Smokebush to Spinifex: Towards Recognition of Indigenous Knowledge in the Commercialisation of Plants' (2018) 1 *International Journal of Rural Law and Policy* 1.

<sup>135</sup> Terri Janke, 'Guarding Ground: A Vision for a National Indigenous Cultural Authority' in Robert Tonkinson (ed), *The Wentworth Lectures: Honouring Fifty years of Australian Indigenous Studies* (Aboriginal Studies Press, 2015) 258.

for a National Indigenous Cultural Authority<sup>136</sup> and the 2011 Mabo Oration, *Follow the stars: Indigenous culture, knowledge and intellectual property rights*.<sup>137</sup>

To bring these chapters together, the concluding Chapter 10 presents an integrated overview of the component principles and conditions that have been identified in the thesis publications, and which support my overall thesis argument that Indigenous people must be empowered to maintain and control their ICIP. In this way, cultures can continue, revitalise and strengthen and Indigenous people can negotiate benefits when it is appropriate to collaborate using their arts and knowledge. This approach empowers Indigenous people towards self-determination.

## 1.9 Summary

The concept of ICIP is pivotal to this PhD, and its many components are deeply connected to the fundamental rights of Indigenous peoples, including self-determination and the right to maintain, control, protect and develop cultural heritage, traditional knowledge and traditional cultural expressions, as outlined in the UNDRIP.<sup>138</sup>

In the following Chapter 2, I set out the historical context and outline the history of the development of ICIP protection, including the legislation, reports, case law and academia that relates to both specific issues and the bigger picture of ICIP in Australia and abroad. Some of the scholarship material in Chapter 2 picks up on the conceptual framework in this introduction, providing comprehensive commentary on the failure of governments to deal with ICIP protection. This allows me to go into further depth about the ways in which western IP law does not adequately protect ICIP to reveal the gaps in the legal system that threaten the crucial rights of Indigenous people.

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<sup>136</sup> Terri Janke, *Beyond Guarding Ground: A Vision for a National Indigenous Cultural Authority* (Terri Janke and Company, 2009a) <<http://www.terrijanke.com.au/beyond-guarding-ground>>.

<sup>137</sup> Terri Janke, 'Follow the stars: Indigenous culture, knowledge and intellectual property rights' (Speech delivered at the Mabo Oration, Anti-Discrimination Commission Queensland, Brisbane, 3 July 2011).

<sup>138</sup> *Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, UN GAOR, 61<sup>st</sup> sess, 107<sup>th</sup> plen mtg, UN Doc A/RES/61/295 (13 September 2007) art 31.

## Chapter 2: History of the Development of ICIP Protection

To contextualise the topic of my thesis, it is necessary to examine the body of scholarship and literature, as well as the key reports, enquiries and legislative developments that relate to the history and concept of ICIP protection. This comprehensive review includes the history as it relates to both the Australian and international context, and an overview of the academic discussions around the various facets of ICIP and IP. Some of this history is discussed in greater detail in the following thesis publications but is collated and analysed here to provide an integrated overview.

### 2.1 Key Australian developments

The following section analyses provides an overview of the key Australian development in the area of Indigenous Cultural and Intellectual Property. It covers a range of responses including the court cases, legislative changes, inquiries, reports, policy, certification trade marks and protocols. I present this diverse information as a history of developments in ICIP, in a chronological order.

#### 2.1.1 David Malangi and the one dollar note

One of the early attempts at redress occurred in 1966 after it was discovered that an artwork painted by Aboriginal artist David Malangi had been copied onto the AUD\$1 note. The Reserve Bank had never consulted with the artist. Following the revelation, correspondence between the officially interested parties – the Reserve Bank, the Methodist Church at Milingimbi, the Department of Territories, the Northern Territory Administration, the French museum in Paris, and Karel Kupka – did not involve Malangi.<sup>139</sup> In August 1967, the Governor of the Reserve Bank presented Malangi with \$1,000, a fishing kit, and an inscribed silver medallion.<sup>140</sup> Although a

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<sup>139</sup> Stephen Gray 'Government Man, Government Painting? David Malangi and the 1966 One-Dollar Note' in Matthew Rimmer (ed), *Indigenous Intellectual Property: A Handbook of Contemporary Research* (Edward Edgar Publishing, 2015) 134.

<sup>140</sup> Ibid.

significant move in the right direction, there were no legal proceedings and, as highlighted by law Professor Stephen Gray, concerns were focused on public relations.<sup>141</sup> Nevertheless, the event increased awareness of issues in ICIP protection.

### **2.1.2 The 1970s Push for Reform**

Momentum increased following the 1967 Referendum as Bill Wentworth, the first Minister for Aboriginal Affairs, began advocating for increased Indigenous traditional cultural property protection. Nugget Coombes, chairperson of the Council of Aboriginal Affairs at the time, outlined a proposal for a 'Traditional Aboriginal Property Act' that would introduce new legislation to establish and protect property rights for Aboriginal cultural and artistic works. This included protecting Aboriginal work from imitation and unreasonable commercial practice, as well as providing effective marketing of their products.<sup>142</sup> However, this Act was not implemented and these critical issues connected to inauthentic art are still being discussed today, including in an extensive report that was recently released by the Australian Government.<sup>143</sup>

In the 1970s in the political climate that involved momentum in the government acknowledging Indigenous land rights, the push for reform in copyright law was led by Wandjuk Marika, the first Chair of the Aboriginal Arts Board. Wandjuk called for increased protection of Aboriginal artwork under copyright after seeing his sacred designs reproduced on a tea-towel without his permission. Marika said:

It is not that we object to people reproducing our work, but it is essential that we be consulted first, for only we know if a particular painting is of a special sacred significance, to be seen only by certain members of a tribe, and only we can give permission for our own work of art to be reproduced. It is hard to imagine the works of great Australian artists such as Pro Hart or Sidney Nolan being reproduced without their permission. We are only asking that we be granted the

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<sup>141</sup> Ibid.

<sup>142</sup> Michael Davis, *Writing Heritage, the Depiction of Indigenous Heritage in European-Australian Writings* (Australian Scholarly Publishing, 2007) 283.

<sup>143</sup> Standing Committee on Indigenous Affairs, *Report on the Impact of Inauthentic Art and Craft in the Style of First Nations Peoples* (Commonwealth of Australia, December 2018).

same recognition, that our works be respected and that we be acknowledged as the rightful owners of our own works of art.<sup>144</sup>

In response to Indigenous calls and the international focus on folklore at the time, the Commonwealth Government established the Working Party on the Protection of Aboriginal Folklore in 1974 to investigate the protection of Australian Aboriginal art traditions.

### **2.1.3 Working Party on the Protection of Aboriginal Folklore**

In December 1981, the *Report of the Working Party on the Protection of Aboriginal Folklore* ('Working Party Report') was released. The Working Party Report considered that copyright could not protect pre-existing clan designs, the problem being that Aboriginal artworks would not meet the originality requirement.

The Working Party Report recommended an Aboriginal Folklore Act to protect against unauthorised uses of folklore and the establishment of an Aboriginal Folklore Board.<sup>145</sup> To oversee the operation of the Act, the Working Party recommended the establishment of a Folklore Commission, with a Commissioner for Aboriginal Folklore and a Folklore Board made up of Aboriginal members with knowledge of Aboriginal customary law and art.<sup>146</sup> 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 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>147</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

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<sup>144</sup> Wandjuk Marika, 'Copyright on Aboriginal Art' (1976) 3(10) *Aboriginal News*, 7 – 8.

<sup>145</sup> Department of Home Affairs and Environment, *Report of the Working Party on the Protection of Aboriginal Folklore* (Department of Home Affairs and Environment, 4 December 1981) 29.

<sup>146</sup> *Ibid* 50.

<sup>147</sup> *Ibid* 45.

information that can only be seen by men or women or particular people within the culture. With respect to non-customary use of secret/sacred materials, the Working Party Report recommended that there should be criminal sanctions.<sup>148</sup>

Yidinji woman, Henrietta Fourmile (now Marrie) praised the high quality of the report writing in 1988 that 'we are still awaiting an Aboriginal Folklore Act to provide us with adequate protection of an integral part of our cultural heritage.'<sup>149</sup> She quoted Peter Banki, then Executive Officer of the Australian Copyright Council, noting that the Report contained

innovative recommendations – far beyond the boundaries of copyright...not only as a suggested means of protecting an important cultural heritage, in addition to offering users improved certainty in the law, but as an attempt to employ fresh ideas in intellectual and industrial property.<sup>150</sup>

According to Martin Hardie, a legal commentator and former lawyer who worked on the Aboriginal copyright cases in the 1990s, the finding that Aboriginal art was not suitable for copyright protection because it lacked originality had a significant impact in that Aboriginal artists, government, lawyers and the arts industry were discouraged in asserting Indigenous artists rights.<sup>151</sup> This approach was changed in the 1990s with the Aboriginal Copyright Cases.

The proposed Aboriginal Folklore Act did not result. The idea of a national 'folklore commissioner' who made decisions about cultural works was not widely supported by Indigenous people.<sup>152</sup> However, the Working Party's work forms a key part in the momentum that lead to Indigenous artists exploring other means to have their rights recognised at law.

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<sup>148</sup> Ibid 31.

<sup>149</sup> Henrietta Fourmile (now Marrie), 'Who owns the Past? Aborigines as Captives of the Archives' (1989) 13 *Aboriginal History* 1, 6.

<sup>150</sup> Peter Banki, 'The Protection of Aboriginal Folklore: Report of the Working Party', *Australian Copyright Council Bulletin*, 44 (1983) 1, as cited in Henrietta Fourmile (now Marrie), 'Who owns the Past? Aborigines as Captives of the Archives' (1989) 13 *Aboriginal History* 1, 6.

<sup>151</sup> Martin Hardie, 'What Wandjuk Wanted' in Matthew Rimmer (ed), *Indigenous Intellectual Property: A Handbook of Contemporary Research* (Edward Elgar Publishing, 2015) 164.

<sup>152</sup> Terri Janke, *Our Culture: Our Future – Report on Australian Indigenous Cultural and Intellectual Property Rights* (Report commissioned by AIATSIS and ATSIC, Michael Frankel & Company, 1998) 189.



#### 2.1.4 Foster v Mountford

In *Foster v Mountford & Rigby Limited*<sup>153</sup> the Federal Court granted an interim injunction to Pitjantjatjara men to stop the publication in the Northern Territory of a book containing information about secret religious ceremonies, on the basis that publication would or might involve a breach of confidence. Christoph Anton, legal commentator, notes that the case ‘symbolises a shift from assimilation policies based on the notion of Australia as terra nullius at the time of ‘discovery’ towards a growing understanding of Aboriginal customs and associated rights.’<sup>154</sup> Further, this is the first case where Indigenous people assert their cultural rights to protect their sacred material from wide publication.

#### 2.1.5 The Wunungmurra Fabrics Case

The first copyright case in Australia dealing with commercial rights of Indigenous art, customary laws and the issue of originality was the unreported 1983 case of *Wunungmurra v Peter Stripes Fabric*.<sup>155</sup> Artist Yanggarnny Wunungmurra made a copyright infringement claim against Peter Stripes Fabrics for the unauthorised use of his painting, ‘Long-Necked Freshwater Tortoises by the Fish Trap at Gaanan’. The artist had learned to paint this significant cultural work from a senior member of his clan, according to customary laws. Using copyright laws, the artist was able to show that his painting had been copied from a catalogue produced as part of an early Aboriginal art exhibition. In his statement to the court, Wunungmurra pointed out that what had appealed to the designer as a pleasing border of diamond shapes and cross-hatching, was for him a profound statement of the tribal identity which conferred on him the custodianship of the stories.<sup>156</sup>

To protect the artist under copyright law, the element of originality needed to be reflected in the work, which was potentially problematic when the work in question

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<sup>153</sup> *Foster v Mountford & Rigby Limited* (1976) 14 ALR 71.

<sup>154</sup> Christoph Antons, ‘*Foster v Mountford*: cultural confidentiality in a changing Australia’, in A. T. Kenyon, M. Richardson & S. Ricketson (Eds.), *Landmarks in Australian Intellectual Property Law*, Cambridge University Press, 2009, 110-125, 110. Melbourne: Cambridge University Press.

<sup>155</sup> *Yanggarnny Wunungmurra v Peter Stripes* (Unreported, Federal Court of Australia, 1983).

<sup>156</sup> Elizabeth Burns Coleman, *Aboriginal Art, Identity and Appropriation* (Routledge, 2016) §4.2.

involved clan designs shared across an Indigenous group. In the proceedings it was established that the artist's work was original as the artist had depicted the tortoise, a clan-owned icon, in his own unique way which acted like a signature.<sup>157</sup> The court awarded damages of \$1,500 as well as ordering the delivery up of the infringing fabric.<sup>158</sup> This case is significant in the early development of ICIP protection as it occurred at a time when the treatment of Aboriginal art was still largely focused on the notion of 'folklore' and many Aboriginal artworks in museums and galleries still had the attribution of 'Author: Unknown'. However, as pointed out by Vivien Johnson, Indigenous arts commentator, the case was not seen as important at the time due to this focus on folklore legislation rather copyright.<sup>159</sup> Indigenous artists were now more aware of their stolen designs and this propelled them to seek change.

### **2.1.6 Land Rights**

The Australian Government passed the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth),<sup>160</sup> which established four land councils and was the first legislation to enable Indigenous people to claim land title upon proving traditional association.

In 1983 the *Aboriginal Land Rights Act 1983* was enacted in New South Wales. Under Section 3 it provided land rights to Aboriginal persons in NSW and formed Aboriginal Land Councils.

### **2.1.7 Cultural Heritage Protection Law**

In 1984, the Commonwealth Government introduced the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984*<sup>161</sup>, as an interim measure, to recognise the need to protect and preserve significant Indigenous areas and objects from desecration in accordance with Aboriginal traditions.<sup>162</sup> The laws were a response to the increasing

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<sup>157</sup> Ibid.

<sup>158</sup> Vivien Johnson, *Copyrites: Aboriginal Art in the Age of Reproductive Technologies* (National Indigenous Arts Advocacy Association and Macquarie University, 1996) 15.

<sup>159</sup> Vivien Johnson, *Copyrites: Aboriginal Art in the Age of Reproductive Technologies* (National Indigenous Arts Advocacy Association and Macquarie University, 1996) 16.

<sup>160</sup> Aboriginal Land Rights Act (Northern Territory) 1976 (Cth).

<sup>161</sup> Aboriginal and Torres Strait Islander Heritage Protection Act 1984 (Cth).

<sup>162</sup> Ibid s 4.

attention paid to protecting the natural environment as heritage, and as a response to the UNESCO Heritage Convention in 1972.<sup>163</sup> Further, the reason for a national law was the ineffectiveness of state and territory governments to protect Indigenous heritage and culture and provide effective protection of the areas and objects of significance to Indigenous Australians.<sup>164</sup>

The *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth) does not acknowledge Indigenous ownership of cultural heritage or recognise Indigenous IP rights but focused on the ongoing significance of cultural sites and objects, and the need to protect them from destruction.<sup>165</sup> Indigenous people were concerned about the lack of cover for IP and the legislators' separation of the tangible and intangible aspects of heritage.<sup>166</sup> Given Indigenous people's close connections with place, the protection of Indigenous cultural heritage under legislation was important.

The *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* empowered a Minister to make ultimate decisions.

After the Hindmarsh Island case<sup>167</sup> in 1998 and the Evatt Review<sup>168</sup> as commissioned and changes to the laws were made in 2016. The Commonwealth law is now a last resort law and the states have their own legislation to protect Indigenous objects. State heritage laws are being amended in the 2010s, to enable a decision-making framework within which indigenous people have a meaningful role in conserving their heritage.<sup>169</sup> Furthermore, post UNESCO Convention on Intangible Cultural Heritage

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<sup>163</sup> UNESCO, Convention Concerning the Protection of the World Cultural and Natural Heritage (16 November 1972).

<sup>164</sup> Department of Sustainability, Environment, Water, Population and Communities, Heritage Division, 'Introduction to the Aboriginal and Torres Strait Islander Heritage Protection Act' (2010) 3 <[https://www.adelaide.edu.au/legalandrisk/docs/resources/Aboriginal\\_and\\_Torres\\_Strait\\_Islander\\_Heritage\\_Protection.pdf](https://www.adelaide.edu.au/legalandrisk/docs/resources/Aboriginal_and_Torres_Strait_Islander_Heritage_Protection.pdf)>.

<sup>165</sup> *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth) s 4.

<sup>166</sup> Terri Janke, 'Our Culture: Our Future – Report on Australian Indigenous Cultural and Intellectual Property Rights' (Report commissioned by AIATSIS and ATSIC, Michael Frankel & Company, 1998) 80.

<sup>167</sup> *Kartinyeri v Commonwealth* [1998] HCA 22.

<sup>168</sup> Elizabeth Evatt, 'Review of the Aboriginal and Torres Strait Islander Heritage Protection Act 1984' (Review commissioned by the Minister for Aboriginal and Torres Strait Islander Affairs, 1996).

<sup>169</sup> Susan Shearing, 'One Step Forward? Recent Developments in Australian State and Territory Indigenous Cultural Heritage Laws' (2006) 3 *Macquarie Journal of International and Comparative Environmental Law* 35, 35.

2013, there is now increasing importance of the knowledge connected to sites is recognised. Victoria has enacted intangible heritage provisions to its Aboriginal Heritage Act and NSW aims to follow.

### **2.1.8 Recognition of Customary law**

The ALRC 1986 report, *The Recognition of Aboriginal Customary Laws*<sup>170</sup>, supported the specific legislative protection recommendations made in the 1981 Working Party Report. The ALRC Report made recommendation 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 recommendations made by ALRC around ICIP include protecting against the use of sacred or secret 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 remuneration to traditional owners.<sup>171</sup>

### **2.1.9 Bulun Bulun No 1 and Yumbulul**

Two significant Aboriginal arts copyright cases between 1989 and 1991 helped illuminate the limitations of the existing Australian legal system in protecting Indigenous artists working with clan designs and paved the way for the judgment in the *Milpurruru v Indofurn* case.

#### **2.1.9.1 *Bulun Bulun v Nejlam Investments***

*Bulun Bulun v Nejlam Investments Pty Ltd*<sup>172</sup> in 1989 involved Ganalbingu artist Johnny Bulun Bulun and 13 other Aboriginal artists. Bulun Bulun claimed infringement of his rights under the *Copyright Act 1968* (Cth) and the *Trade Practices Act 1974* (Cth) after his ceremonial artwork, 'Magpie Geese and Water Lilies at the Waterhole' (1980) was altered and reproduced by a T-shirt manufacturer without consent. The

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<sup>170</sup>Australian Law Reform Commission, *The Recognition of Aboriginal Customary Laws* (Report 31, Commonwealth of Australia, 1986).

<sup>171</sup> *Ibid* para 470.

<sup>172</sup> *Bulun Bulun v Nejlam Investments Pty Ltd* (G3 of 1989, Federal Court of Australia, NT Registry)

artistic works embodied pre-existing traditional images of the artist's clan group which he was entitled to paint under customary law. The case was settled with a payout for damages and undertakings to stop the manufacture and sale of the T-shirts.<sup>173</sup>

#### 2.1.9.2 *Yumbulul v Reserve Bank*

In 1991, *Yumbulul v Reserve Bank of Australia*<sup>174</sup> highlighted how Australian copyright law does not adequately recognise Aboriginal community claims to regulate the use of works containing pre-existing Indigenous designs after a ceremonial pole was placed on the AUD\$10 note. Mr Yumbulul had created '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 who printed it on the Bicentennial AUD\$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. He initiated action in the Federal Court against the Aboriginal Artists Agency and the Reserve Bank.

The Court found that Mr Yumbulul had mistakenly believed that 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 law. Mr Yumbulul alleged that he would not have authorised the license 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 significantly noted that:

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<sup>173</sup> Colin Golvan, 'Aboriginal Art and Copyright: The Case for Johnny Bulun Bulun' (1989) 10 *European Intellectual Property Review* 346.

<sup>174</sup> (1991) 21 IPR 481.

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>175</sup>

In relation to the *Yumbulul v Reserve Bank of Australia* case, Bunting has pointed out that the pole lost any quality of confidentiality it may have had once it appeared in on public display by virtue of its sale to the Australian Museum. Bunting further noted that this issue may equally be applied to music that has been published or recorded.<sup>176</sup>

These two copyright cases demonstrated how Indigenous people were willing to use the Australian legal system to enforce their rights to their culture, even though copyright law had limitations. These initial cases set the pathways for the concept that Indigenous artists could hold 'individual rights' to copyright in works that depicted collective heritage. This was ultimately made expressly clear in *Milpururru v Indofurn*, discussed below.

#### **2.1.10 Land Rights**

The *Aboriginal Land Rights (Northern Territory) Act 1976* was the first piece of legislation in Australia that enabled Aboriginal people to claim rights to land on the basis of proven traditional ownership. The bill was first introduced to parliament by the Whitlam government in mid-1975 but lapsed due to the dismissal of government. However, the bill was reintroduced by Malcolm Fraser's government upon election. Although the Act specified that at least two land councils were to be created,<sup>177</sup> four were established, with the function of consulting with Aboriginal peoples living in the area and expressing and protecting their wishes and interests. The Act has enabled Aboriginal people in the Northern Territory to gain inalienable ownership of around 50% of the Northern Territory, and almost 90% of the Northern Territory coastline.<sup>178</sup>

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<sup>175</sup> *Yumbulul v Reserve Bank of Australia* (1991) 21 IPR 481.

<sup>176</sup> Sue Bunting, 'Limitations of Australian Copyright Law in the Protection of Indigenous Music and Culture' (2000) 18 *Context* 15, 20.

<sup>177</sup> Aboriginal Land Rights Act (Northern Territory) Act 1976 s 21(1).

<sup>178</sup> Joe Morrison, 'There's no conflict between Indigenous people, native title and development', *ABC News* (Online), 16 November 2017 <<https://www.abc.net.au/news/2017-11-16/no-conflict-between-native-title-and-development/9146346>>.

### 2.1.11 The impact of the Mabo Case

The landmark case of *Mabo v Queensland (No 2)*<sup>179</sup> in 1992 recognised the native title rights of Indigenous people. Professor Kamal Puri, then a lecturer in IP law at the University of Queensland and WIPO consultant, suggested that it could lead to the expansion of common law beyond land, to ‘sacred objects, ceremonies or customs, which could be recognised at law, even though they do not stem from common law.’<sup>180</sup> In 2002, Kirsten Howden, lawyer, suggested that native title rights could be recognised as knowledge rights. ‘Just as intellectual property rights are constructed as knowledge rights from which flow certain physical entitlements, native title rights could be conceptualised in a similar way.’<sup>181</sup>

However, as Janke highlights in her Mabo Oration in 2011 ‘Follow the Stars: Indigenous Culture, Knowledge and Intellectual Property Rights’<sup>182</sup>, the *Native Title Act 1993*<sup>183</sup> and the common law has not progressed to recognise Indigenous rights to knowledge or art. This is discussed further in the historical developments section of this thesis in more detail, and in Chapter 8.

### 2.1.12 Milpurrurru v Indofurn

In 1994, the Federal Court judgment in *Milpurrurru v Indofurn*<sup>184</sup> recognised that Aboriginal artists owned copyright to works that followed pre-existing clan designs. The case involved the unauthorised reproduction of Indigenous artworks on carpets which were made in Vietnam and imported into Australia. Justice von Doussa considered this a copyright infringement of Indigenous artworks which concerned

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<sup>179</sup> *Mabo v Queensland (No 2)* (1992) 175 CLR 1.

<sup>180</sup> Kamal Puri, ‘Copyright Protection for Australian Aborigines in the Light of Mabo’ in M A Stephenson and Suri Ratnapala (eds), *Mabo: A Judicial Revolution. The Aboriginal Land Rights Decision and Its Impact on Australian Law* (The University of Queensland Press: Brisbane, 1993) 132, 157.

<sup>181</sup> Kirsten Howden, ‘Indigenous Traditional Knowledge and Native Title’ (2001) 24(1) *UNSW Law Journal* 60–84, 84.

<sup>182</sup> Terri Janke, *Follow the stars: Indigenous culture, knowledge and intellectual property rights*, 2011 Mabo Oration, Anti Discrimination Commission Queensland, <https://www.adcq.qld.gov.au/resources/Aboriginal-and-Torres-Strait-Islander/mabo-oration/2011-Mabo-oration>

<sup>183</sup> *Native Title Act 1993* (Cth).

<sup>184</sup> *Milpurrurru v Indofurn* (1994) 130 ALR 659.

creation stories of cultural significance to the Indigenous artist applicants, and the cultural groups to which the artists belonged. The main findings of the case covered originality – where Indigenous artists bring skill, labour and effort they may own copyright in works that include pre-existing clan designs. The court also awarded damages for ‘culturally based harm’<sup>185</sup> and amounts were allocated to the artists and their families to allow them to distribute monies in accordance with Indigenous principles.<sup>186</sup>

The case was a significant development towards greater protection under copyright laws for ICIP, dispelling the myth that there was no copyright in Aboriginal art. At the time I was finishing law school and working at the National Indigenous Arts Advocacy Association (NIAAA) with Michael McMahon, formerly a lawyer and Chief Executive Officer (CEO) at the Arts Law Centre of Australia, and Bronwyn Bancroft, Indigenous artist and Chair. This organisation was established in 1995 to advocate the rights of Indigenous artists. Towards this end, they coordinated the ‘Carpets case’ as a test case on behalf of the Indigenous artists and funded by the Aboriginal and Torres Strait Islander Arts Board of the Australia Council. I was lucky enough to work with the lawyers on the case. The barrister, Colin Golvan, particularly encouraged me to work in Indigenous IP. I wrote my first published case note on the matter in 1995.<sup>187</sup> *Milpururru* has been well cited in the literature and is regarded as influential.<sup>188</sup>

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<sup>185</sup> *Milpururru v Indofurn* (1994) 130 ALR 659, at 695.

<sup>186</sup> *Ibid* 688.

<sup>187</sup> Terri Janke, ‘The carpets case’ (1995) 20(1) *Alternative Law Journal* 36.  
<<http://www5.austlii.edu.au/au/journals/AltLawJl/1995/15.pdf>>.

<sup>188</sup> Natalie Stoianoff and Alpana Roy, ‘Indigenous Knowledge and Culture in Australia – The Case for *sui generis* Legislation’, *Monash University Law Review*, 41.3, (December 2015), 745, 746.



### 2.1.13 Bulun Bulun v R & T Textiles

In 1998, the *Bulun v R & T Textiles*<sup>189</sup> case highlighted the line between the recognition of private and communal rights.<sup>190</sup> The *Bulun Bulun*<sup>191</sup> case was significant in that it considered the recognition of communal ownership of traditional ritual knowledge works.<sup>192</sup> The case set precedent by recognising that copyright owners have fiduciary obligations to use their copyright works in accordance with customary law obligations. This so called *Bulun Bulun*<sup>193</sup> equity is an important framework to consider how Indigenous communities notify individual creators of their responsibilities when including clan owned knowledge in their works. This case is referred to in a number of chapters. Further in the Literature Review I have noted commentary around the case. The *Bulun Bulun*<sup>194</sup> case is an important step forward in recognising that Indigenous knowledge that is communally owned requires recognition of protocols including consultation and consent processes.<sup>195</sup>

### 2.1.14 ICIP Reports and IP Reviews

Flowing from the commencement of *Milpurrurru v Indofurn*, an Australian Government Inquiry, *Stopping the Rip-Offs: Intellectual Property Protection for Aboriginal and Torres Strait Islander Peoples* (1995), investigated the issues in protecting Indigenous IP.<sup>196</sup> As an employee, I wrote a submission on behalf of the NIAAA. At the same time, a House of Representatives Standing Committee on Aboriginal Affairs was looking

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<sup>189</sup> *Bulun v R & T Textiles Pty Ltd* (1998) FCA 1082.

<sup>190</sup> Colin Golvan, 'The protection of At the Waterhole by John Bulun Bulun: Aboriginal art and the recognition of private and communal rights' in Andrew Kenyon, Megan Richardson and Sam Ricketson (eds), *Landmarks in Australian intellectual property law* (Cambridge University Press, 2009)

<sup>191</sup> Colin Golvan, 'The Protection of At the Waterhole by John Bulun Bulun: Aboriginal Art and the Recognition of Private and Communal Rights' [2010] (81) *Intellectual Property Forum Journal of the Intellectual Property Society of Australia and New Zealand*, No. 80, March 2010: 38–48.

<sup>192</sup> *Bulun v R & T Textiles Pty Ltd* 1998) FCA 1082.

<sup>193</sup> Terri Janke and Maiko Sentina, 'Indigenous Knowledge: Issues for protection and management' (Discussion Paper, Intellectual Property Australia and Commonwealth of Australia, 2018) 32.

<sup>194</sup> *Bulun v R & T Textiles Pty Ltd* (1998) FCA 1082.

<sup>195</sup> *Bulun v R & T Textiles Pty Ltd* (1998) FCA 1082.

<sup>196</sup> Terri Janke and Maiko Sentina, 'Indigenous Knowledge: Issues for protection and management' (Discussion Paper, Intellectual Property Australia and Commonwealth of Australia, 2018) 32.

<sup>197</sup> Catherine Hawkins, 'Stopping the Rip-offs: Protecting Aboriginal and Torres Strait Islander Cultural Expression' (1995) 20(1) *Alternative Law Journal* 7.

into the protection of heritage. However, neither enquiry reported findings or recommendations.

In 1995, the ALRC released the *Designs Final Report* (No 74) reviewing the legislation and issues related to protecting Indigenous designs.<sup>197</sup> The report included some discussion about the protection for pre-existing Indigenous clan designs that are passed on through the generations and belong to a group. However, quite clearly, the ALRC noted that the scope of the design laws were industrial designs and not designs, icons or emblems. The ALRC report recommended that the issue be covered in the Senate Standing Committee Inquiry into Aboriginal Cultural Heritage which had commenced in 1995. In the 1996 change of government this inquiry was discontinued.<sup>198</sup>

Former judge Elizabeth Evatt's review of the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* commenced in 1995, following the controversial Hindmarsh Island case which related to the disclosure of sacred women's business. The Evatt Review involved consultation with Indigenous communities, State and Territory governments, business and industry, and received 68 written submissions.<sup>199</sup> It was hoped that the Review may extend protection to intangible aspects of culture such as oral histories, and stories associated with land. When delivered to the Australian Government, the Evatt Review Report<sup>200</sup> focused on the need to reform the Act to recognise the broader context and issues of tangible Indigenous heritage. The Report set out the Act's shortfalls in covering intangible aspects of cultural heritage important to Aboriginal people, such as IP.<sup>201</sup> This opened the debate to issues concerning the scope of heritage protection law to potentially include intangible cultural heritage such as songs, stories and knowledge, the content of the wider ICIP rights.

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<sup>197</sup> ALRC, *Designs*, Commonwealth of Australia, 1995.

<sup>198</sup> Terri Janke and Peter Dawson, 'New tracks: Indigenous knowledge and cultural expression and the Australian intellectual property system' (Submission to *Finding the Way: A Conversation with Aboriginal and Torres Strait Islander Peoples*, IP Australia, Terri Janke and Company, 31 May 2012) 18.

<sup>199</sup> Senate, Aboriginal and Torres Strait Islander Heritage Protection Bill 1998: Explanatory Memorandum.

<<https://www.legislation.gov.au/Details/C2004B00356/Explanatory%20Memorandum/Text>>.

<sup>200</sup> The Hon Elizabeth Evatt AC, 'Review of the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984*' (Report, August 1996).

<sup>201</sup> *Ibid* 2.37.

However, the Report's focus was very much on tangible heritage such as objects and sites, and establishing a nationally consistent Aboriginal heritage regime. The Evatt Review Report led to the 1998 amendments of the Commonwealth *Aboriginal and Torres Strait Islander Heritage Protection Act 1994* (Cth).<sup>202</sup>

The topic of ICIP was gaining momentum, as academic and university students also progressed the debate. In 1996, I attended a symposium on 'Intellectual Property Protection for the arts and cultural expression of Aboriginal and Torres Strait Islander People', convened by Kamal Puri, a Professor at University of Queensland. The conference in Brisbane was well attended by government policy makers and Indigenous people. Two speakers caught my attention: Henrietta Fourmile (now Marrie) a Yidinji woman and Indigenous environmental rights advocate, and Professor Michael Blakeney, then an IP lecturer with the University of Western Australia. This indicated that the issue of Indigenous IP was no longer a marginalised issue but was now a key issue for the IP legal system to deal with.

In 1998, a Federal court judgment involving Mr Bulun Bulun – *Bulun Bulun v R & T Textiles Pty Ltd*<sup>203</sup> – was delivered, breaking further legal ground. This time the court dealt with the communal ownership of clan owned designs, finding that the artist owed a fiduciary duty to the *Ganalbingu* people to exercise copyright in works that embody ritual knowledge consistent with customary laws. For the first time, the Federal Court had provided a judgment that gave a pathway for Indigenous clans to use as a means of controlling how a copyright owner can deal with a work that embodied the clan's communally owned cultural knowledge. Protocols and articulating rules about how Indigenous cultural knowledge can be recorded or depicted became important if the copyright owner was to understand the fiduciary obligations imposed upon them.

### **2.1.15 Our Culture: Our Future**

In 1997, working in partnership with AIATSIS, the Aboriginal and Torres Strait Islander Commission (ATSIC) commissioned the ICIP Research Project. ATSIC was an

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<sup>202</sup> Aboriginal and Torres Strait Islander Heritage Protection Act 1998 (Cth).

<sup>203</sup> (1998) 41 IPR 513.

elected Indigenous body established in 1990 to advance Indigenous social justice by, among other things, ensuring maximum participation of Aboriginal and Torres Strait Islander people in government policy formulation and implementation.<sup>204</sup> I worked on the ICIP Research Project as an employed solicitor for Michael Frankel and Company.<sup>205</sup> As part of the project, a discussion paper was released in 1997, drawing on over 80 submissions which had been received. I also undertook extensive consultations around the country and met with an Indigenous Reference Group chaired by an ATSIC Commissioner, Ian Delaney. From that inquiry process, the report, *Our Culture: Our Future – Report on Australian Indigenous Cultural and Intellectual Property*<sup>206</sup> was released in 1998. *Our Culture: Our Future* examined the rights Indigenous people wanted to their heritage; identified the gaps in the law; and went on to suggest options for reform. *Our Culture: Our Future* makes 115 recommendations covering a very wide range of law, policy, program and administrative subject areas. These recommendations include suggesting amendments to legislation dealing with cultural and IP rights, land, environment and heritage. They also advocate a range of administrative and common law measures. Further, it has been used to inform government and Indigenous organisation policy such as the *Guidelines for Ethical Research in Australian Indigenous Studies*<sup>207</sup>. Siobhan McDonnell, academic, criticised the report as lacking depth in that it failed to set priorities for reform, although noting that it could be argued that the report was not intended to fulfil an analytical role but served to present the findings of the extensive consultations with Indigenous groups.<sup>208</sup> Michael Davis, policy writer on Indigenous affair, noted that the most far-reaching recommendation is the call for the introduction of *sui generis* legislation that recognises and protects Indigenous cultural and IP

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<sup>204</sup> Aboriginal and Torres Strait Islander Commission Act 1989 (Cth) s 3.

<sup>205</sup> Now known as Frankel Lawyers.

<sup>206</sup> Terri Janke, *Our Culture: Our Future – Report on Australian Indigenous Cultural and Intellectual Property Rights* (Report commissioned by AIATSIS and ATSIC, Michael Frankel & Company, 1998).

<sup>207</sup> Australian Institute of Aboriginal and Torres Strait Islander Studies, *Guidelines for Ethical Research in Australian Indigenous Studies* (AIATSIS, 2012).

<sup>208</sup> Siobhan McDonnell, 'Book Review – *Our Culture: Our Future – Report on Australian Indigenous Cultural and Intellectual Property Rights*' by Terri Janke, (2000) 4(27) *Indigenous Law Bulletin* 23. <http://classic.austlii.edu.au/au/journals/IndigLawB/2000/19.html>

rights.<sup>209</sup> *Sui generis* law was the option preferred by the Indigenous Reference Group who advised the AIATSIS research project. The Our Culture: Our Future Report outlined the key features of an Australian *sui generis* scheme. This has been supported by legal commentators Natalie Stoianoff and Alpana Roy.<sup>210</sup> The Report prompted the government to examine the issue of lack of ICIP rights, however there have been no moves to implement new laws.<sup>211</sup> Then in its 2018 House of Representatives Standing Committee on Indigenous Affairs, *Report on the Impact of Inauthentic Art and Craft in the Style of First Nations Peoples*, the committee recommended that the Australian Government begin a consultation process to develop stand-alone legislation protecting ICIP.<sup>212</sup>

### 2.1.16 NIAAA and the Label of Authenticity

As result of the ‘Carpets case’ and the impending 2000 Olympics to be held in Australia, there was mounting pressure to introduce substantive ICIP improvements and safeguards. In 1999, the NIAAA received funding from the Australia Council and ATSIC to implement a national labelling system for authentic arts and craft produced by Aboriginal and Torres Strait Islanders and their licensees.<sup>213</sup> This included the Label of Authenticity and Collaboration Mark which were registered under the *Trade Marks Act 1995* (Cth) and used as a system to authenticate arts and craft produced by Aboriginal and Torres Strait Islanders and their licensees.<sup>214</sup>

The initiative ceased in 2002 when NIAAA disbanded, and the marks were not assigned to another certification body that could continue to control their use. However, in 2007, the Australian Senate Standing Committee’s *Inquiry into Australia’s Indigenous Visual Arts and Craft Sector* recommended that the government

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<sup>209</sup> Michael Davis, ‘Biological Diversity and Indigenous Knowledge’, (Research Paper 17, Parliamentary Library, Parliament of Australia, 1998).

<sup>210</sup> Natalie Stoianoff and Alpana Roy, ‘Indigenous Knowledge and Culture in Australia – The Case for *sui generis* Legislation’, *Monash University Law Review*, 41.3 (December 2015) 745.

<sup>211</sup> Virginia J Morrison, ‘Ancient Culture and Contemporary Art: Protecting Australia’s Indigenous Cultural Expression in a Modern IP Framework’, *Landslide* 5.3, (January–February 2013) 33, 34.

<sup>212</sup> House of Representatives Standing Committee on Indigenous Affairs, *Report on the Impact of Inauthentic Art and Craft in the Style of First Nations Peoples* (December 2018) 76.

<sup>213</sup> Terri Janke, *Minding Culture: Case Studies on Intellectual Property and Traditional Cultural Expressions* (WIPO, 2003) <[http://www.wipo.int/edocs/pubdocs/en/tk/781/wipo\\_pub\\_781.pdf](http://www.wipo.int/edocs/pubdocs/en/tk/781/wipo_pub_781.pdf)>.

<sup>214</sup> *Ibid.*

investigate the Label of Authenticity's demise, examine the schemes in Canada and New Zealand, and commence planning for a new Australian scheme.<sup>215</sup> A new system has not yet been developed. It should be noted that the Label of Authenticity inspired the New Zealand *Toi Iho* registered and globally recognised trademark of Māori arts and crafts, and this, along with the Canadian Igloo Tag Trade Mark provides a useful case study for developing future strategies in ICIP protection.<sup>216</sup>

### **2.1.17 Contemporary Visual Arts and Craft Inquiry**

In July 2001, the then Federal Minister for the Arts appointed Rupert Myer, entrepreneur and arts philanthropist, to conduct an independent inquiry into the Australian contemporary visual arts and craft section. The Inquiry team included an Indigenous Reference Group, and adviser Djon Mundine, Indigenous arts consultant. The *Report of the Contemporary Visual Arts and Craft Inquiry*<sup>217</sup> released in 2002 recommended that the Australian Government take action in relation to the issues of *droit de suite*, or resale royalties, acknowledging that whilst resale royalties would benefit all artists it could especially be of benefit for Indigenous artists.<sup>218</sup> The Myer Report made a specific recommendation to Government to take action in relation to ICIP including the extension of moral rights to Indigenous communities and the misappropriation of Indigenous cultural imagery. The Myer Report also recommended the extension of moral rights to Indigenous groups; the importation of works purporting to be of Indigenous origin; and the exportation of Indigenous art under cultural heritage provisions.<sup>219</sup> The report was influential in persuading the government to introduce resale royalty into Australia. However, the recommendation that moral rights legislation should recognise Indigenous artists' customary responsibilities was not

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<sup>215</sup> Senate Standing Committees on Environment Communications and the Arts, *Inquiry into Australia's Indigenous Visual Arts and Craft Sector* (20 June 2007) Recommendation 16 <[https://www.aph.gov.au/Parliamentary\\_Business/Committees/Senate/Environment\\_and\\_Communications/Completed\\_inquiries/2004-07/indigenousarts/report/b01](https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Environment_and_Communications/Completed_inquiries/2004-07/indigenousarts/report/b01)>.

<sup>216</sup> Terri Janke and Peter Dawson, 'New Tracks: Indigenous Knowledge and Cultural Expression and the Australian Intellectual Property System' (Submission to *Finding the Way: A Conversation with Aboriginal and Torres Strait Islander Peoples*, IP Australia, Terri Janke and Company, 31 May 2012) 17.

<sup>217</sup> Rupert Myer, *Report of the Contemporary Visual Arts and Craft Inquiry* (Commonwealth Government, 2002).

<sup>218</sup> *Ibid* 7, 158.

<sup>219</sup> *Ibid* 158.

taken up. Moral rights laws for all artists passed into legislation in 2000 as the *Moral Rights Act 2000* (Cth) amended the *Copyright Act 1968* (Cth).

### **2.1.18 Indigenous communal moral rights**

In 1999 when the moral rights amendments to the *Copyright Act 1968* (Cth) were being debated, the then Senator Aden Ridgeway proposed the inclusion of Indigenous communal rights of integrity and attribution.<sup>220</sup> Rather than include these in the amendments, the government made a commitment to Senator Ridgeway to explore Indigenous Communal Moral Rights at a later date. The Moral Rights changes to the Copyright Act passed in 2000 introducing the moral rights of attribution and integrity for individual creators.<sup>221</sup>

In December 2003, the Australian Government drafted proposed amendments to the *Copyright Act 1968* to include the communal moral rights of Indigenous groups. The draft bill was intended to give effect to the Government's 2001 election policy commitment, and to a commitment made to Senator Aden Ridgeway when the Moral Rights Bill was passed in December 2000. The Exposure Draft Copyright Amendment (Indigenous Communal Moral Rights) Bill 2003 was distributed to several organisations and individuals for comment. The draft bill was criticised as being 'highly complicated and legalistic, presenting serious practical hurdles for Indigenous people and communities seeking to protect their knowledge and its use'.<sup>222</sup>

The Arts Law Centre of Australia argued that the bill was 'seriously flawed' making it 'too difficult' for communities to secure the protection the legislation was intended to provide. The Arts Law Centre noted, for example, that the bill did not protect works where copyright had expired or elements of ICIP in which copyright subsists. Once again, no changes were made to include Indigenous communal moral rights. In 2004, the Arts Law Centre established Artists in the Black, a legal facility specifically for

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<sup>220</sup> Terri Janke, 'Berne, Baby Berne: The Berne Convention, Moral Rights and Indigenous People's Cultural Rights' (2001) 5(6) *Indigenous Law Bulletin* 11 <<http://classic.austlii.edu.au/au/journals/IndigLawB/2001/11.html>>.

<sup>221</sup> Copyright Amendment (Moral Rights) Act 2000 (Cth) sch 1.

<sup>222</sup> Jane Anderson, 'Indigenous Communal Moral Rights: The Utility of an Ineffective Law' (2004) 5(30) *Indigenous Law Bulletin* 8.

Indigenous artists, communities and art organisations in response to copyright and exploitation issues<sup>223</sup>. It aimed to increase Indigenous access to legal advice on arts law issues and ICIP<sup>224</sup>, and assist with negotiation and enforcement of contractual rights.

### **2.1.19 WA Customary Law Inquiry**

In 2005, my law firm contributed a paper to the Law Reform Commission of Western Australia's enquiry into Aboriginal customary laws.<sup>225</sup> Writing with Robynne Quiggin, then a solicitor at the firm, we provided background to the key issues and made recommendations to improve the acknowledgement of cultural rights.

In 2006, the Senate Inquiry into Australia's Indigenous visual arts and craft sector, *Indigenous Art – Securing the Future* recommended that the Australian Government introduce appropriate legislation to provide for the protection of ICIP rights, including communal moral rights.<sup>226</sup> That year, Quiggin and I outlined the main issues around ICIP for the Indigenous arts industry in a report written for the Australia Council.<sup>227</sup>

### **2.1.20 Protocols**

In conjunction with the growing pressure towards reform and recognition of ICIP rights, several leading ICIP protocol documents in the field were developed. Notably, the Australia Council for the Arts *Protocols for Working with Indigenous Artists*<sup>228</sup> and Screen Australia's *Pathways & Protocols: A Filmmaker's Guide to Working with*

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<sup>223</sup> Arts Law Centre of Australia, *Artists in the Black* <<https://www.artslaw.com.au/legal/artists-in-the-black/>>.

<sup>224</sup> Ibid.

<sup>225</sup> Terri Janke and Robynne Quiggin, 'Indigenous Cultural and Intellectual Property and Customary Law' in Law Reform Commission of Western Australia (ed), *Aboriginal Customary Laws: Background Papers* (January 2006) 451.

<sup>226</sup> The Senate Standing Committee on Environment, Communications, Information Technology and the Arts, *Indigenous Art – Securing the Future* (Report, Commonwealth of Australia, June 2007) 157.

<sup>227</sup> Terri Janke and Robynne Quiggin, 'Indigenous Cultural and Intellectual Property: The Main Issues for the Indigenous Arts Industry in 2006' (Discussion paper prepared for the Aboriginal and Torres Strait Islander Arts Board, Australia Council for the Arts, 10 May 2006).

<sup>228</sup> Terri Janke and Company, *Protocols for Working with Indigenous Artists* (Five artform guides: music, writing, visual arts, media arts, performing arts, Australia Council for the Arts, 2007) <<http://www.australiacouncil.gov.au/about/protocols-for-working-with-indigenous-artists/>>.



*Indigenous People, Culture and Concepts*<sup>229</sup> have set standards in the arts and film industries. Protocols are about developing processes for cultural clearance, consents for adapting cultural songs and stories, and ensuring proper attribution to Indigenous sources.<sup>230</sup> As well as the above protocols, I began developing the True Tracks Principles for dealing with ICIP. This framework has been used to guide projects in the arts (Bangarra Dance Theatre), film (First Footprints), galleries and museums sector (National Museum of Australia) and even in business (Lendlease).

### **2.1.21 2020 Summit**

In 2008, Prime Minister Kevin Rudd held the 2020 Summit at Parliament House in Canberra; I was one of the participants. We were asked to bring one big idea. My big idea was to pick up on the work in the *Our Culture: Our Future* Report and focus on the recommendation for a National Indigenous Cultural Authority (NICA). This led to researching and writing the discussion paper *Beyond Guarding Ground*<sup>231</sup> which included the content of my presentation for the 2008 Wentworth Lecture.<sup>232</sup> I proposed that a NICA be established as a peak-body organisation that develops and upholds standards for 'appropriate use to guard cultural integrity'.<sup>233</sup> I further proposed the establishment of a database to be managed by the NICA that could assist with the identification of source communities to facilitate agreements for use.<sup>234</sup> The NICA featured in the First Report from Rudd's Summit; however, in later papers the idea merged with the call for a National Indigenous Knowledge Centre, a space to bring together all Indigenous knowledge held in collections for better access and repatriation. Whilst of merit, this is somewhat different to the concept of a NICA focused on Indigenous IP rights. Dr Jackie Huggins, Indigenous academic and writer was commissioned to prepare an implementation report for the National Indigenous

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<sup>229</sup> Terri Janke, *Pathways & Protocols: A Filmmaker's Guide to Working with Indigenous People, Culture and Concepts* (Screen Australia, 2009d).

<sup>230</sup> *Ibid* 84.

<sup>231</sup> Terri Janke, *Beyond Guarding Ground: A Vision for a National Indigenous Cultural Authority* (Terri Janke and Company, 2009a) <<http://www.terrijanke.com.au/beyond-guarding-ground>>.

<sup>232</sup> Terri Janke, *Guarding Ground: A Vision for a National Indigenous Cultural Authority* (Wentworth Lecture AIATSIS, Terri Janke and Company, 22 August 2008).

<sup>233</sup> *Ibid* 5.

<sup>234</sup> *Ibid* 43.

Knowledge Centre. I was asked to contribute a section on how a NICA might be included in the model. The unpublished report gained little traction and in 2011 the Rudd/Gillard government lost power. A National Indigenous Knowledge Centre was never established.

### **2.1.22 Resale Royalties**

Meanwhile, movements towards the introduction of an artists' resale royalty were taking shape. The Berne Convention for the Protection of Literary and Artistic Works 1886,<sup>235</sup> the international copyright treaty which Australia is a signatory to, contained the option for member states to provide the resale royalty right.<sup>236</sup> The resale royalty applies to all artists but given the high amounts that Indigenous works were fetching in the secondary market, the enactment of the resale royalty was seen very much as an Indigenous artists rights response. Janke and Quiggin highlighted the opportunity for the resale royalty to benefit Indigenous artists in their report for the Australia Council for the Arts.<sup>237</sup> This paper was referred to in the Proposed Resale Royalty Arrangement Discussion Paper produced by the Department of Communications and the Arts in 2004. After further lobbying by Australian artists advocacy groups and the Copyright Agency and Viscopy, the *Resale Royalty Right for Visual Artists Act 2009* was enacted in relation to the right to receive resale royalty on the commercial resale of an artwork.<sup>238</sup> The rate is 5% of the sale price, and this right is held by the creator(s) of an artwork if it is resold over the price of \$1,000. According to Kathy Bowrey, the resale royalty system as implemented has problems. Royalties are paid to individual artists and the 'high mortality rates, high rates of intestacy and probate laws that

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<sup>235</sup> Berne Convention for the Protection of Literary and Artistic Works, September 9, 1886. Article 14~~ter~~ was incorporated into the Berne Convention in 1948 on an optional basis.

<sup>236</sup> Lan Pham, 'The Resale Royalty Right: What Does it Mean for Indigenous Artists?' (2010) 7(20) *Indigenous Law Bulletin* 21.

<sup>237</sup> Terri Janke and Robynne Quiggin, *Getting from Principle to Practice: An Australian Dialogue on Resale Royalty Rights (Consultations with the Indigenous Arts Sector for the Aboriginal and Torres Strait Islander Board of the Australia Council, 2001)*.

<sup>238</sup> *Resale Royalty Right for Visual Artists Act 2009* (Cth).

distribute benefits in a manner at odds with customary obligations seem to undermine the general move toward legal recognition of communal rights.’<sup>239</sup>

### **2.1.23 Indigenous Art Code**

The Indigenous Australian Art Commercial Code of Conduct (the Indigenous Art Code) was launched in 2010, consisting of voluntary guidelines for Australian galleries in dealing with Aboriginal and Torres Strait artists and the sale of authentic Aboriginal and Torres Strait Islander Art. The Code was introduced after the Senate Inquiry into Indigenous visual arts and crafts sector in 2007 which found that Indigenous artists lack of business acumen and an unequal bargaining position when dealing with art dealers and buyers.<sup>240</sup> The Code encourages commercial art dealers to sign up and commit to ethical treatment and fair pay for Indigenous artists. The Code is administered by the Indigenous Art Code Limited.

The Code has been considered by the Indigenous arts advocacy bodies including the Arts Law Centre of Australia and the National Association for the Visual Arts as being a limited solution.<sup>241</sup> The fact that it is voluntary means that galleries can choose to sign on, and there is no incentive to comply. With continuing inequity, the debate in this area concerns whether the guidelines should be mandatory. The worry with a mandatory code is that the bar will be lower, and therefore the standards of ethics would be reduced, and potentially not have any impact.

The Indigenous Art Code has been a strong advocate against fake arts and in 2017–2018 has led a campaign against the proliferation of commercially produced goods that pose as Aboriginal and Torres Strait islander artworks.

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<sup>239</sup> Kathy Bowrey, ‘Indigenous Culture, Knowledge and Intellectual Property: The need for a new category of rights’ in Kathy Bowrey, Michael Handler and Dianne Nicol, *Emerging Challenges in Intellectual Property* (Oxford University Press, 2011).

<sup>240</sup> Senate Standing Committee on Environment, Communications, Information Technology and Arts Committee Report, *Indigenous Art – Securing the Future of the Indigenous Visual Arts and Craft Sector*,

<sup>241</sup> David Price, et al, *Intellectual Property, Commentary and Materials*, Law Book Co, 2012, 835.

#### **2.1.24 Indigenous Ecological Knowledge Protection**

Over recent decades, Indigenous participation in natural resource management has increased in areas such as rangers and advisers. Government programs such as Caring for Country and Indigenous Protected Areas have supported the interplay of Indigenous knowledge to be applied to environmental management. Research and commentary have expanded to include issues relevant to Indigenous Ecological Knowledge (IEK) and its links to ICIP. With respect to environmental policy and natural resources, in 2009 I wrote a significant discussion paper for the Northern Territory Natural Resource Management Board which canvasses approaches for rights to IEK. The project was conducted by the National Centre of Indigenous Studies (at ANU) and resulted in practical guidelines for IEK for those working in natural resource management to follow when collecting, using and archiving IEK.<sup>242</sup>

#### **2.1.25 Indigenous research collaboration patents**

From 2002, there been several noteworthy collaborative efforts involving University researchers and Indigenous people working together on shared goals. This is probably due to the increasing awareness of Indigenous people of their rights to genetic material and traditional knowledge. But also, the international focus on access and benefit sharing in the Convention of Parties to the Convention on Biological Diversity meetings. Chapter 8 of this thesis details university collaborations with the Jarlmadangah Buru Aboriginal Corporation, Chuulangan Aboriginal Corporation and the Myuma Dugalunji Aboriginal Corporation.

In 2003 and 2004, the Jarlmadangah Buru Aboriginal Corporation and Griffith University filed their co-owned patents to novel analgesic compounds found in the Mudjala tree. Aboriginal Elder John Watson and the Nyikina Mangala community have substantially pioneered the way in which patent systems can be used regarding Indigenous TK. Working with Griffith University, the Nyikina Mangala's representative

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<sup>242</sup> Terri Janke, 'Indigenous Ecological Knowledge and Natural Resources in the Northern Territory: Report on the Current Status of Indigenous Intellectual Property' (Report commissioned by the National Resources Management Board NT, April 2009b) <[http://media.wix.com/ugd/7bf9b4\\_af38431b79494d18bf4d8937fe4dbc11.pdf](http://media.wix.com/ugd/7bf9b4_af38431b79494d18bf4d8937fe4dbc11.pdf)>.

organisation Jarlmadangah Aboriginal Corporation have patented use of the bark of the 'nyardoo mudjala' tree as a means of pain relief. This plant has long been known to the Nyikina Mangala community in this region for its pain control properties, holding cultural significance due to both its pain control abilities and in the creation story of the Fitzroy River.<sup>243</sup> This highlights that Indigenous communities are seeking to engage commercially with their knowledge and resources. However, the 'mudjala' patent case study illustrates the challenges for Indigenous communities particularly with making public TK that was only known in the cultural setting. Issues of consultation and consent arise, as well as ensuring benefit sharing for the whole of the community.

In 2008, the Chuulangan Aboriginal Corporation and the University of South Australia began working together to collect and test medicinal plants. An agreement was prepared to protect the Indigenous IP and share the commercial benefits and, importantly, it is the traditional owners who are driving the research and are partners in deciding how it is commercialised. The research team, using compounds extracted from a rainforest plant to develop a natural cream to treat inflammatory skin conditions. Together, they filed patents related to a medicine developed from the Cape York plant in 2009, acknowledging David Claudie, a Kuuku I'yu Northern Kaanju traditional owner and custodian of the northern Kaanju homelands where the plant originated, as one of the inventors. This was unique as in the past the Indigenous person is only recognised as the informant. Here Claudie was given equal status as the inventors, Susan Semple, Nicholas Smith and Bradley Simpson. Patents do not allow 'ancestors' or the whole clan to be named as 'inventors' so having Claudie as the custodian 'inventor' in transferring the knowledge and acting as guardian, the approach was to formally acknowledge Claudie as inventor.<sup>244</sup> The experience shows how the current patent system places emphasis on the value of the novel and inventive steps from a western scientific perspective.

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<sup>243</sup> Anthony Watson, Virginia Marshall and Terri Janke, 'Community Economic Development in Patenting Traditional Knowledge: A Case Study of the Mudjala TK Project in the Kimberley Region of Western Australia' (2013) 8(6) *Indigenous Law Bulletin* 17.

<sup>244</sup> David J Claudie, et al 'Ancient but New: Developing Locally Driven Enterprises Based on Traditional Medicines in Kuuku I'yu Northern Kaanju Homelands, Cape York, Queensland, Australia' in Peter Drahos and Suzy Frankel (eds), *Indigenous Peoples' Innovation, Intellectual Property Pathways to Development* (ANU E press, 2012) 29.

In 2015, the Myuma Dugalunji Aboriginal Corporation representing Camooweal's Indigenous community signed an agreement for a joint research project into spinifex. The agreement enabled the Myuma Dugalunji Aboriginal Corporation to control research by giving them the right to veto commercialisation. Benefits flowing back to the community included training programs for Indigenous youth.<sup>245</sup> A joint patent was filed in 2018 over materials containing cellulose nanofibres.<sup>246</sup>

### **2.1.26 Commonwealth Government and Indigenous Knowledge Inquiries**

In 2010, the Commonwealth Government, IP Australia and the Office for the Arts (Cth) released a public consultation brochure titled *Finding the Way: A Conversation with Aboriginal and Torres Strait Islander Peoples* (2010) seeking feedback on IK and the intellectual property system. My law firm was among the group of respondents, submitting the paper 'New Tracks: Indigenous knowledge and cultural expression and the Australian intellectual property system'.<sup>247</sup>

Several papers have advocated for legislation.<sup>248</sup> The *Our Culture: Our Future* Report canvassed the enactment of *sui generis* (standalone) legislation as it was one of the main recommendations of the Indigenous Reference Group who were the consultative body for the project.<sup>249</sup> In preparing the University of Technology Sydney (UTS) and North West Local Land Services White Paper for the Office of Environment and Heritage, *Recognising and Protecting Aboriginal Knowledge Associated with Natural Resource Management*,<sup>250</sup> Professor Natalie Stoianoff and a team of researchers worked with Indigenous communities in the north-west of New South Wales to develop

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<sup>245</sup> Hailey Renault, 'Indigenous Community Signs Landmark Agreement with University of Queensland to Develop Spinifex 'Nanofibre' Industry', *ABC News* (online), 29 April 2015 <<https://www.abc.net.au/news/rural/2015-04-29/spinifex-discoveries-drive-industry/6429716>>.

<sup>246</sup> Patent application 2018902088.

<sup>247</sup> Terri Janke and Peter Dawson, 'New tracks: Indigenous knowledge and cultural expression and the Australian Intellectual Property System' (Submission to *Finding the Way: A Conversation with Aboriginal and Torres Strait Islander peoples*, IP Australia, Terri Janke and Company, 31 May 2012).

<sup>248</sup> Erin Mackay, 'Regulating Rights: The Case of Indigenous Traditional Knowledge' (2010) 7(21) *Indigenous Law Bulletin* 41.

<sup>249</sup> Terri Janke, *Our Culture: Our Future – Report on Australian Indigenous Cultural and Intellectual Property Rights* (Report commissioned by AIATSIS and ATSIC, Michael Frankel & Company, 1998).

<sup>250</sup> UTS and North West Local Land Services, *Recognising and Protecting Aboriginal Knowledge Associated with Natural Resource Management: White Paper* (Delivered to the Office of Environment and Heritage, 2014).

a model law. The study recommended the adoption of a state based stand-alone regime to deal exclusively with protecting Aboriginal knowledge resources within a natural resource management framework.

The model law of Stoianoff and her team also proposed an independent Competent Authority to administer the legislation, provide education support, model clauses, establish codes of conduct and organise databases.<sup>251</sup> It aimed to make it compulsory for a party seeking access to an Indigenous knowledge resource, or a determination of whether a proposed activity will use a knowledge resource, to apply to the Competent Authority<sup>252</sup>. Whilst this model has not been acted upon by NSW Government, it provides a useful guide as to how such a law might work. Stoianoff and the UTS team have compiled a database of international traditional knowledge legislation, an extremely useful resource.<sup>253</sup>

The Productivity Commission's 2016 *Intellectual Property Arrangements*<sup>254</sup> Report from the Inquiry into Australia's Intellectual Property Arrangements included a brief section on ICIP protection. The Productivity Commission's Inquiry Report noted that the Australia Council for the Arts and AIATSIS had raised concerns about whether an economic framework was the appropriate lens to assess the way that IP rights relate to Indigenous cultural goods and TK.<sup>255</sup> While the Productivity Commission acknowledged calls by the Australia Council for the Arts, AIATSIS and other respondents to extend the scope of copyright for the protection of Indigenous culture,<sup>256</sup> it stated that 'IP arrangements alone are unlikely to be the most appropriate way to meet the broader goals of Indigenous cultural preservation raised in the inquiry'.<sup>257</sup> The Report concluded that:

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<sup>251</sup> Ibid 30.

<sup>252</sup> Ibid 110, s 5A.1.

<sup>253</sup> Natalie Stoianoff (ed), *Indigenous Knowledge Forum: Comparative Systems for Recognising and Protecting Indigenous Knowledge and Culture* (LexisNexis Butterworths, 2017).

<sup>254</sup> Productivity Commission, *Intellectual Property Arrangements* (Inquiry Report 78, 23 September 2016).

<sup>255</sup> Ibid 58.

<sup>256</sup> Ibid 125.

<sup>257</sup> Ibid 127.

expanding Australia's IP arrangements to protect traditional knowledge and culture...would depart from the fundamental 'ideas/expression' dichotomy at the heart of copyright, and would see perpetual protection granted over artistic styles and ideas.<sup>258</sup>

It was a predictable response, positioned in the perpetual desire to frame IP in its western knowledge origins which favour material form and the public domain. This finding from the Productivity Commission justified the approach of government to continue to do nothing to bring about new laws.

### **2.1.27 The Namatjira Family Copyright**

Following a decades-long campaign, the copyright ownership of Albert Namatjira's artwork was returned to the Namatjira family in 2017. Albert Namatjira, the famous Australian Aboriginal painter of watercolour landscapes, died in 1983. At the time he had a licence agreement with Legend Press which provided that they could manage his copyright in return for royalties.<sup>259</sup> That licence agreement ended in 1983. Then, the Public Trustee of the NT decided to sell the copyright to all his works for \$8,500 to John Brackenberg, the owner of Legend Press. The family was not consulted. The value of the copyright was much more than this. For the next 25 years Legend Press exercised full control of copyright in Namatjira's work, and received royalties for its use. The inequities of this arrangement were made public by curator Alison French<sup>260</sup>. This inspired calls from Indigenous people, including then then Senator Aden Ridgeway, for the copyright to be returned to the family.

The Namatjira Legacy Trust, represents the family's copyright, and is now the owner of copyright.<sup>261</sup> With only 17 years left of copyright, the Namatjira Legacy Trust is calling for Namatjira's copyright to be held in perpetuity in a similar way that the United Kingdom Government has enacted legislation to keep *Peter Pan* by J M Barrie in

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<sup>258</sup> Ibid.

<sup>259</sup> Matthew Rimmer, 'Albert Namatjira: Copyright Estates and Traditional Knowledge' (2003) 24 (6) <<https://eprints.qut.edu.au/86801/1/86801.pdf>>.

<sup>260</sup> Alison French, *Seeing the Centre: The Art of Albert Namatjira 1902–1958* (National Gallery of Australia, 2009).

<sup>261</sup> Copyright Agency, Namatjira Legacy Trust joins Copyright Agency <<https://www.copyright.com.au/2017/12/page/2/>>.



copyright, where royalties are collected and paid to a children's hospital.<sup>262</sup> The importance of this in the context of the Productivity Commission's report is that it engages the debate for perpetual copyright for Indigenous arts, although the argument put forward by the Namatjira Trust is that it should only be for Namatjira given the injustice of his copyright being sold for much less than its value, and that his family suffered in being denied copyright. It is less likely to open the doors for perpetual protection for all Indigenous works.

### 2.1.28 Stamping out Fake Arts

The *Fake Art Harms Culture* campaign estimates that up to 80% of the products available in shops are inauthentic.<sup>263</sup>

In February 2017, the Competition and Consumer Amendment (Exploitation of Indigenous Culture) Bill 2017<sup>264</sup> was introduced by Bob Katter, the Honourable Member for Kennedy in Far North Queensland, to deal with the sale of fake Indigenous art and souvenirs produced by non-Indigenous people. This was spurred on by the strong advocacy of the *Fake Art Harms Culture* campaign by the Indigenous Art Code, Australian Copyright Council and the Arts Law Centre of Australia.<sup>265</sup> The Bill was not enacted into legislation, but the Australian Government initiated another Standing Committee on Indigenous Affairs Inquiry – into the 'Proliferation of Inauthentic Aboriginal and Torres Strait Islander "Style" Art and Craft Products' in 2017.<sup>266</sup> Since Inquiry hearings were initiated in early 2018<sup>267</sup>, there have been over 150 submissions

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<sup>262</sup> Great Ormond Street Hospital Children's Charity has a right to royalty in perpetuity in the United Kingdom, granted by the *UK Copyright Designs & Patents Act* (1988). It applies to stage productions, broadcasting and publication of the whole or any substantial part of the work or an adaptation of it in the United Kingdom.

<sup>263</sup> Arts Law Centre of Australia, 'Fake Art Harms Culture Campaign: inauthentic art inquiry' (19 September 2017) <<https://www.artslaw.com.au/news/entry/fake-art-harms-culture-campaign/>>.

<sup>264</sup> Competition and Consumer Amendment (Exploitation of Indigenous Culture) Bill 2017 (Cth).

<sup>265</sup> The Fake Art Harms Culture Campaign was initiated by the Indigenous Art Code and is supported by the ALCA and Copyright Agency <<https://www.copyright.com.au/2017/09/fake-art-harms-culture-campaign-helps-bring-inquiry/>>.

<sup>266</sup> Standing Committee on Indigenous Affairs, The ' of inauthentic Aboriginal and Torres Strait Islander "style" art and craft products and merchandise for sale across Australia' (10 August 2017) <[https://www.aph.gov.au/Parliamentary\\_Business/Committees/House/Indigenous\\_Affairs](https://www.aph.gov.au/Parliamentary_Business/Committees/House/Indigenous_Affairs)>.

<sup>267</sup> Ibid.

made from Indigenous and non-Indigenous individuals, groups and larger organisations and institutional bodies.

In 2018, the Australian Competition and Consumer Commission (ACCC) took action against fake arts producers. *Australian Competition Consumer Commission v Birubi Art Pty Ltd*<sup>268</sup> heard by Justice Perry concerned whether Birubi Art Pty Ltd ‘misled’ consumers through their products when they advertised their items as having been painted by Indigenous Australians. This case was an inquiry into whether products claiming to be made in Australia, despite having been produced in overseas jurisdictions such as Indonesia, fall within the definition of ‘misleading and deceptive conduct’ under Australian Consumer Law. The court held that Birubi had engaged in ‘misleading and deceptive conduct’ under Australian Consumer Law when it represented their products to consumers as being painted and handcrafted by Aboriginal artists in Australia.

In December 2018, the Standing Committee on Indigenous Affairs released the *Report on the Impact of Inauthentic Art and Craft in the Style of First Nations Peoples*.<sup>269</sup> Among the eight recommendations from the committee are that: the Productivity Commission conduct a comprehensive structural analysis of the entire market for First Nations art and craft; the Indigenous Art Code be properly funded and then reviewed after two years; an Information Standard be developed for authentic First Nations arts and crafts; an information guide on authentic art be developed and presented to passengers arriving into Australia; and that a consultation process be initiated to develop stand-alone legislation to protect ICIP, including traditional knowledge and cultural expressions.<sup>270</sup>

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<sup>268</sup> *Australian Competition Consumer Commission v Birubi Art Pty Ltd* [2018] FCA 1595.

<sup>269</sup> Standing Committee on Indigenous Affairs, *Report on the Impact of Inauthentic Art and Craft in the Style of First Nations Peoples* (Commonwealth of Australia, December 2018). The use of the term ‘First Nations peoples’ is used interchangeably in this report along with ‘Indigenous’ and ‘Aboriginal and Torres Strait Islander’. Its use is becoming more common in Australia as it is inclusive of all Aboriginal and Torres Strait Islander groups and has international relevance. It also acknowledges Indigenous peoples as the original inhabitants of a place.

<sup>270</sup> *Ibid* xiv.

### **2.1.29 Indigenous intangible heritage**

In the past three years, amendments to state Aboriginal heritage laws in Australia have moved towards greater protection of intangible heritage. In 2017, the Victorian Government amended its *Aboriginal Heritage Act 2006*<sup>271</sup> to include the protection of Aboriginal intangible heritage. The amendment brings into play a registration system enabling Aboriginal communities to apply to register unpublished intangible heritage such as songs, stories, art, languages and knowledge. Anyone who seeks to commercialise any registered intangible heritage must have a negotiated agreement with the source Aboriginal communities. Additionally, in New South Wales, the *Aboriginal Languages Act 2017*<sup>272</sup> was enacted to protect Aboriginal languages and regulate processes. Further, in 2018, the NSW Government followed Victoria and proposed protection of intangible cultural heritage in the NSW Aboriginal Heritage Bill, for unpublished intangible cultural heritage (ICH), against commercialisation without consent. This marks the fact that the inter-related view of ICIP held by Indigenous people is being considered in western legal systems approaches to protecting heritage. This paves the way for greater recognition of ICIP rights, at least where the item is not known to the public.

### **2.1.30 Indigenous Knowledge Inquiry**

In 2018, Terri Janke and Company wrote a discussion paper for IP Australia and the Department of Industry, Innovation and Science called *Indigenous Knowledge: Issues for protection and management*.<sup>273</sup> It integrated and analysed much of the existing debate and issues, identifying six key areas for the Australian Government to focus on in the protection of Indigenous knowledge:

1. Misappropriation of Indigenous arts and crafts
2. Misuse of Indigenous languages, words and clan names
3. Recording and digitisation of Indigenous Knowledge

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<sup>271</sup> *Aboriginal Heritage Act 2006* (VIC) Pt 5A.

<sup>272</sup> *Aboriginal Languages Act 2017* (NSW).

<sup>273</sup> Terri Janke and Maiko Sentina, 'Indigenous Knowledge: Issues for protection and management' (Discussion paper, IP Australia & Department of Industry, Innovation and Science, 2018).

4. Misappropriation and misuse of Traditional Knowledge
5. Use of Indigenous genetic resources and associated Traditional Knowledge
6. Misuse and derogatory treatment.

The Australia Council for the Arts continued to advocate and commission reports which focus on Indigenous governance options for asserting ICIP rights throughout 2005–2015. Lydia Miller, Executive Director of Australia Council for the Arts has led the debate in terms of government policy with an eye to solutions. My discussion paper *Beyond Guarding Ground*<sup>274</sup> was commissioned by the Australia Council for the Art's Aboriginal and Torres Strait Islanders Board. Further, work by Robynne Quiggin, Indigenous lawyer, and Fieldworx Consulting proposed an organisation structure for an Indigenous controlled entity that could facilitate permissions and promote ethical dealings in ICIP. Collectively, this work has culminated into the proposal for a National Indigenous Arts & Cultural Authority (NIACA). In 2018, the Australia Council begun consulting widely about the scope, purpose and governance of this potential infrastructure body.<sup>275</sup> This includes consultation forums, an online survey and a discussion paper, as well as a proposed National Summit that is due to be held in the second half of 2019.<sup>276</sup> I participated in the well-attended Sydney forum where many people supported the established of NIACA, although it was clear that participants wanted an organisation that could support them in developing and strengthening their arts and cultural practice. It is not yet determined whether NIACA will have a role in facilitating prior informed consent by outsiders to use and reproduce cultural material.

### **2.1.31 Concluding summary of historical developments**

Indigenous people have increasingly been calling for greater recognition of their creative rights on the same level as that of other Australian artists since the 1970s.

The 1990s Aboriginal art cases show developments where the notion of Indigenous arts as *terra nullius* is contested, and reveals the ways in which the western legal

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<sup>274</sup> Terri Janke, *Beyond Guarding Ground: A Vision for a National Indigenous Cultural Authority* (Terri Janke and Company, 2009a) <<http://www.terrijanke.com.au/beyond-guarding-ground>>.

<sup>275</sup> See <[www.niaca.com.au](http://www.niaca.com.au)>

<sup>276</sup> Ibid.

framework does not align with customary laws or offer comprehensive protection. This lays the groundwork for Indigenous action in the decades to come. A series of enquiries and reports reveal further issues and limitations in the protection of ICIP in Australian law.

The analysis of historical developments in ICIP rights demonstrates some advances, slow and incremental, while significant constraints remain. Court cases such as *Milpurrurru v Indofurn* and *Bulun Bulun v R & T Textiles*, and landmark reports such as *Our Culture: Our Future* have created a strong foundation for ICIP recognition and canvas the legal options and solutions for the government. However, government legislation is slow to follow so very real gaps exist in the legal framework when it comes to protecting ICIP entirely

For this reason, avenues that support Indigenous led solutions, like protocols, trade marks and a National Indigenous Cultural Authority are ways that Indigenous people can assert self-determination in respect of their ICIP rights.

## **2.2 Key international developments**

Developments in the history of Australian recognition of ICIP rights have sometimes intersected with international initiatives, but just as often have been at odds with developing standards. At the international level, treaties and declarations can enforce IP and ICIP rights across the countries that are signatories to such agreements. Janke examines several international conventions to which Australia is signatory that are relevant to ICIP rights.<sup>277</sup> This section will discuss the key ICIP developments in the international setting, rather than present a detailed analysis.

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<sup>277</sup> Terri Janke, *Our Culture: Our Future – Report on Australian Indigenous Cultural and Intellectual Property Rights* (Report commissioned by AIATSIS and ATSIC, Michael Frankel & Company, 1998) 99–108.

### 2.2.1 WIPO and UNESCO in the 1970s–1980s

Australia is a party to the *Berne Convention for the Protection of Literary and Artistic Works*<sup>278</sup> which implements the world's copyright laws, requiring parties to protect the rights of authors of literary and artistic works. The Convention was originally adopted in 1886 and then amended in 1979 to include provisions for the protection of moral rights. These moral rights only vest in individual copyright owners. It also established an international framework for resale royalties 'Droit de suite in works of art and manuscripts'.<sup>279</sup> At the 1967 Stockholm Conference for the Revision of the Berne Convention, developing countries questioned the relevance of the international copyright system to protect their interests, including the protection of folklore. Blakeney notes that although a Protocol was adopted, it did not come into force because it never received enough ratifications from supporting member countries.<sup>280</sup>

In 1973, UNESCO began considering protection of folklore in response to a request from the Bolivian Government for UNESCO to examine the potential for an international protocol on the protection of folklore to be attached to the UNESCO Universal Copyright Convention 1952.<sup>281</sup> The UNESCO Universal Copyright Convention (UCC) attempted to bring more countries into the international copyright community by establishing protection that was more flexible and better suited to developing countries who were not signatories to the Berne Convention. Australia is a party to the UCC. In the mid-1970s, UNESCO undertook an international study on the feasibility of international protection for cultural expressions of Indigenous peoples.<sup>282</sup> This study found that the issue had broad scope and in response UNESCO's Director General put together a Committee of Experts on the Legal Protection of Folklore.

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<sup>278</sup> Berne Convention for the Protection of Literary and Artistic Works 1886.

<sup>279</sup> Berne Convention for the Protection of Literary and Artistic Works (as amended on September 28, 1979) art 14ter.

<sup>280</sup> Michael Leslie Blakeney, 'Protection of Traditional Knowledge by Geographical Indications' (2009) 3(4) *International Journal of Intellectual Property Management* 357, 359.

<sup>281</sup> *Universal Copyright Convention*, opened for signature 6 September 1952, 943 UNTS 178 (entered into force 10 July 1974) art 11.

<sup>282</sup> Michael Leslie Blakeney, 'Protection of Traditional Knowledge by Geographical Indications', (2009) 3(4) *International Journal of Intellectual Property Management* 357, 359.

UNESCO and WIPO began tracking the issue together. They collaboratively developed the *Tunis Model Law on Copyright for Developing Countries*<sup>283</sup> in 1976. The model law's provisions were compatible with the Berne Convention and the UCC, however it introduced protection of national folklore:

because in developing countries national folklore constitutes an appreciable part of the cultural heritage and is susceptible of economic exploitation, the fruits of which should not be denied to those countries.<sup>284</sup>

The Tunis Model Law proposed that commercial users of folklore must obtain authorisation from a competent authority<sup>285</sup> and that copies of national folklore works such as translations and adaptations made abroad without authorisation from the competent authority, should not be imported or distributed.<sup>286</sup>

In further collaboration, UNESCO and WIPO convened a Committee of Government Experts on the Intellectual Property Aspects of the Protection of Expressions of Folklore in the early 1980s.<sup>287</sup> As a result of the discussions, the Committee of Government Experts developed the *Model Provisions for National Laws on the Protection of Expressions of Folklore Against Illicit Exploitation and Other Prejudicial Action* which was adopted by UNESCO and WIPO in 1985. The Model Provisions state that folklore is a living, functional tradition, rather than a mere souvenir of the past.<sup>288</sup> It considers how the distortion of Indigenous cultural expressions can take place through the commercialisation of cultural heritage, as well as the need for benefit sharing.<sup>289</sup> It acknowledges that the legal protection of folklore by copyright laws and

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<sup>283</sup> *Tunis Model Law on Copyright for developing countries 1976* <[https://www.keionline.org/wp-content/uploads/tunis\\_OCR%20model\\_law\\_en-web.pdf](https://www.keionline.org/wp-content/uploads/tunis_OCR%20model_law_en-web.pdf)>.

<sup>284</sup> Tunis Model Law on Copyright for development countries 1976, s.17, 5.

<sup>285</sup> Ibid Section 6(1).

<sup>286</sup> Ibid Section 6(3).

<sup>287</sup> Michael Leslie Blakeney, 'Protection of Traditional Knowledge by Geographical Indications', (2009) 3(4) *International Journal of Intellectual Property Management* 357, 359.

<sup>288</sup> UNESCO-WIPO, Model Provisions for National Laws on the Protection of Expressions of Folklore Against Illicit Exploitation and other Prejudicial Actions (1985) para 1 <<http://www.wipo.int/edocs/lexdocs/laws/en/unesco/unesco001en.pdf>>.

<sup>289</sup> Ibid para 2.

treaties has not been entirely effective due to the gaps involving individual ownership and duration of copyright.<sup>290</sup> It also acknowledges that:

Protection not limited in time is justified by the fact that the protection of the expression of folklore is not for the benefit of individual creators but a community whose existence is not limited in time.<sup>291</sup>

This work impacted Australian developments which led to the work of the Australian Working Group on Aboriginal Folklore. A key recommendation of the Working Group was to establish a Folklore Commission. Though not implemented by the Australia Government, the dialogue had entered into our national Indigenous arts and Indigenous affairs policy debates.

It took another decade for momentum to gather, then in 1997, UNESCO and WIPO convened a joint World Forum on the Protection of Folklore in Phuket, Thailand.<sup>292</sup> The Forum's report provides an overview of the debate concerning ICIP, discussing communal ownership, moral rights, and the need for new legislation. I attended this Forum, as at this stage I was working on the ICIP Project which led to *Our Culture: Our Future*, and wrote a paper on the Forum proceedings.<sup>293</sup> The Forum influenced a wider scope of folklore – to include scientific heritage and biopiracy, and not just artistic, literary and performance creations which was the ambit of 'folklore'.<sup>294</sup> Responding to suggestions about the potential role of IP, WIPO participated in a joint study with the UN Environment Programme and commenced more work in this area. WIPO conducted an international Fact-Finding Mission in 2000–2001 and reported on the needs of TK protection in the IP system including patents, genetic material and cultural expression.<sup>295</sup> At the WIPO General Assembly in 2000, the Member States

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<sup>290</sup> Ibid para 10.

<sup>291</sup> Ibid para 65.

<sup>292</sup> Kamal Puri, 'Preservation and Conversation of Expressions of Folklore: The experience of the Pacific region' (UNESCO-WIPO World Forum on the Protection of Folklore, 8–10 April 1997) <<http://unesdoc.unesco.org/images/0022/002201/220168eo.pdf>>.

<sup>293</sup> Terri Janke 'UNESCO-WIPO World Forum on the Protection of Folklore: Lessons for Protecting Indigenous Australian Cultural and Intellectual Property' (1997) 15 *Copyright Reporter* 104.

<sup>294</sup> Michael Leslie Blakeney, 'Protection of Traditional Knowledge by Geographical Indications' (2009) *International Journal of Intellectual Property Management* 357, 360.

<sup>295</sup> WIPO, 'Intellectual Property Needs and Expectations of Traditional Knowledge Holders: WIPO Report on Fact-Finding Missions on Intellectual Property and Traditional Knowledge' (WIPO, April 2001).



agreed to establish the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (IGC). Facilitated since 2000, the IGC has had the mandate to develop practical methods such as guidelines and clauses for use, and to develop policy objective and core principles for protection of TK. Their work has been very slow with the draft articles going back and forth. As Blakeney said, it is unlikely that a *sui generis* instrument will be agreed to by member states in the near future.<sup>296</sup>

## 2.2.2 International Human Rights documents

The *International Covenant on Economic, Social and Cultural Rights*, which Australia adopted in December of 1975, recognises the rights of individuals to benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he or she is the author.<sup>297</sup> The Covenant brought the art and cultural rights into the international human rights arena, which Australian Indigenous people were consistently participating.

## 2.2.3 ILO 169

In 1989, the International Labour Organization (ILO) adopted the *Indigenous and Tribal Peoples Convention 1989* (No 169) to protect the social, cultural and economic rights of Indigenous peoples.<sup>298</sup> Convention 169 – Concerning Indigenous and Tribal Peoples in Independent Countries states that governments are responsible for developing coordinated and systematic action to protect the rights of Indigenous peoples, with their participation, with respect for their social and cultural identity, customs, traditions and institutions.<sup>299</sup> Moreover, it stated that due regard should be

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<sup>296</sup> Michael Leslie Blakeney, 'Protection of Traditional Knowledge by Geographical Indications' (2009) *International Journal of Intellectual Property Management* 357, 359.

<sup>297</sup> Natalie Stoianoff and Alpana Roy, 'Indigenous Knowledge and Culture in Australia: The Case for Sui Generis Legislation' (2015) 41(3) *Monash University Law Review* 756.

<sup>298</sup> See International Labour Organization, *Indigenous and tribal peoples* <<http://www.ilo.org/global/topics/indigenous-tribal/lang--en/index.htm>>.

<sup>299</sup> *Indigenous and Tribal Peoples Convention*, opened for signature 27 June 1989, 76<sup>th</sup> ILC session (entered into force 5 Sep 1991) art 2.

had to Indigenous customs or customary laws in applying national laws and regulations to the peoples concerned.<sup>300</sup>

Catherine Iorns, NZ Law Academic, reports that Indigenous peoples argue that, under Article 8 of the Convention, indigenous customs and institutions can be too easily overridden by the government in the name of other laws of the country. Therefore, she says that world Indigenous people, seeking self-determination, asked their governments not to ratify.<sup>301</sup>

Indigenous Australians attended the Convention including representatives from ATSIC who were involved in consulting Indigenous Australians on the impact of the Convention. According to Lisa Strelein, lawyer specialising in Indigenous rights, the convention was not unanimous amongst Indigenous people. Geoff Clarke, former ATSIC Chairperson, expressed concern that the document was not developed without Indigenous participation, and that the Convention did not enable Indigenous people rights to participate in decision making processes about programs that directly affect them.<sup>302</sup> Clark says that 'with no requirement of consent, indigenous peoples have less control over their lives, without consent, there is no power to resist pressure of assimilation and cultural denigration.'<sup>303</sup> Australia has not ratified the ILO Convention 169.

#### **2.2.4 The WTO, Trade Agreements and Traditional Knowledge**

The WTO was established in 1995 after 10 years of extensive negotiations during the Uruguay Round<sup>304</sup>. The result was revised international trade rules now embodied in the General Agreement on Tariffs and Trade 1994. A significant addition was the inclusion of IP aspects of trade which were outlined in another multilateral agreement

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<sup>300</sup> Ibid art 8.

<sup>301</sup> Catherine Iorns, 'Australian Ratification of International Labour Organization Convention No. 169' (1993) 1(1) *Murdoch University Electronic Journal of Law*, <<http://www5.austlii.edu.au/au/journals/MurUEJL/1993/1.html>>.

<sup>302</sup> Lisa Strelein, 'The Price of Compromise: Should Australia Ratify ILO Convention 169?' in Greta Bird, Gary Martin and Jennifer Nielsen, *Majah, Indigenous Peoples and the Law* (The Federation Press, 1996) 63, 64.

<sup>303</sup> Geoff Clarke, former ATSIC Commissioner, cited in Lisa Strelein, Ibid.

<sup>304</sup> World Trade Organization, *The Uruguay Round* <[https://www.wto.org/english/thewto\\_e/whatis\\_e/tif\\_e/fact5\\_e.htm](https://www.wto.org/english/thewto_e/whatis_e/tif_e/fact5_e.htm)>.

called the TRIPs Agreement 1994 (The Agreement on Trade Related Aspects of Intellectual Property). The TRIPs Agreement requires the WTO Members, many developing countries, to establish administrative and judicial procedures to enable the enforcement of intellectual property rights. Disputes between member countries may be resolved through a WTO dispute resolution process.

The reason why TRIPS and WTO are relevant to the TK debate is because the TRIPS agreement included, at Article 27.1, provision for Members to make patents available for 'inventions, whether products or processes, in all fields of technology, provided that they are new, involve an inventive step and are capable of industrial application.' Article 27.3(b) allowed plants and animals to be excluded from patentability. This clause operated to recognise protection of traditional knowledge.<sup>305</sup> However, Willem Pretorius states that the wording is unclear and further if a sui generis system did result it requires the introduction of complex legislation which is a significant challenge for developing countries. Instead, Pretorius says the most effective manner is the requirement of disclosure on registration of a patent of the country of origin of genetic materials and any traditional knowledge. Further, the application could state whether compensation was paid, and if so, what the nature of the compensation was. This will create transparent and hopefully result in fair compensation.<sup>306</sup>

Tania Voon, Australian legal academic, writes about the relevance of the WTO to indigenous peoples. She notes that the TRIPS Council is continuing discussions concerning these provisions including whether patent applications that involve traditional knowledge and genetic resources be required to disclose the country providing the resources and the source in the country providing the generic resources of traditional knowledge.<sup>307</sup> As yet there is no decision on whether such international policy should

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<sup>305</sup> Tania Voon, 'The World Trade Organization, the TRIPS Agreement and traditional knowledge', in Matthew Rimmer (ed), *Indigenous Intellectual Property: A Handbook of Contemporary Research* (Edward Edgar Publishing, 2015) 69.

<sup>306</sup> Willem Pretorius, 'TRIPS and Developing Countries: How Level is the Playing Field' in Peter Drahos and Ruth Mayne, *Global Intellectual Property Rights, Knowledge, Access and Development* (Palgrave Macmillan, 2002) 183,188.

<sup>307</sup> Tania Voon, 'The World Trade Organization, the TRIPS Agreement and traditional knowledge', in Matthew Rimmer (ed), *Indigenous Intellectual Property: A Handbook of Contemporary Research* (Edward Edgar Publishing, 2015) 69, 71.

be adopted. Debates in the WIPO IGC and the CBD and Nagoya Protocol also weigh in to the international trade debate.

However, as Voon points out, advances in the WTO on TK are ‘aggravated by procedural wrangling and substantive disagreement’.<sup>308</sup> In any case, the ability of the WTO as a forum to bring options for TK holders is perhaps limited given its political make up. It is beyond the scope of this thesis to consider the issues in more depth. Megan Davis<sup>309</sup> and Graham Dutfield<sup>310</sup> have written about the challenges of trade agreements and traditional knowledge. Megan Davis also notes Indigenous peoples concerns over the TRIPS and how it relates to the implementation of CBD.<sup>311</sup>

### 2.2.5 UN Permanent Forum on Indigenous Issues

The UN Permanent Forum on Indigenous Issues was established in 2000 and has provided a global voice for Indigenous concerns related to economic and social development, culture, environment, education, health and human rights. Its role is to provide expert advice to the Economic and Social Council in the form of commentary, reports and recommendations on the current framework surrounding indigenous peoples which does include issues relating to Indigenous Traditional Knowledge. In 2006, the UN Permanent Forum on Indigenous Issues appointed Michael Dodson, Indigenous Australian, as Special Rapporteur to prepare a concept paper on the scope of a study on customary laws and Indigenous traditional knowledge. The study delivered in 2007 scoped out three key issues: terminology, the nature of a *sui generis* system and intended beneficiaries.<sup>312</sup> The UN Permanent Forum on Indigenous Issues continues to call for action internationally to protect indigenous traditional

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<sup>308</sup> Tania Voon, ‘The World Trade Organization, the TRIPS Agreement and traditional knowledge’, in Matthew Rimmer (ed), *Indigenous Intellectual Property: A Handbook of Contemporary Research* (Edward Edgar Publishing, 2015) 69.

<sup>309</sup> Megan Davis, ‘International Trade Rules and Indigenous Knowledge: A Basic Introduction,’ *Indigenous Law Bulletin* (2006) 6(20) *Indigenous Law Bulletin* 10.

<sup>310</sup> Graham Dutfield, ‘TRIPS – Related Aspects of Traditional Knowledge’ (2001) 33(2) *Case Western Reserve Journal of International Law* 233, 275.

<sup>311</sup> Megan Davis, ‘International Trade Rules and Indigenous Knowledge: A Basic Introduction,’ *Indigenous Law Bulletin* (2006) 6(20) *Indigenous Law Bulletin* 10.

<sup>312</sup> Michael Dodson and Olivia Barr, ‘Breaking the Deadlock: Developing an Indigenous response to protecting Indigenous Traditional Knowledge’, (2007) 11(2) *Australian Indigenous Law Review*, 18, 24.

knowledge from misappropriation. Several Australians, including Megan Davis, elected Chair of the Forum, attend the Forum and they continue to keep traditional knowledge and intellectual property a key issue for Indigenous people.<sup>313</sup>

## **2.2.6 Fair Trade Certification mark**

In 1997, the Fairtrade Labelling Organizations International (FLO) was established in Bonn, Germany. FLO launched the international Fairtrade Certification Mark in 2002 which gradually replaced the former variety of individual national Marks.<sup>314</sup> By this stage, the NIAAA Label of Authenticity was in demise. The use of the Fairtrade label with respect to Indigenous Australian bushfoods was highlighted in a scoping study by Michael Spencer and Jocelyn Hardie in 2011, commissioned by Rural Industries Research and Development Corporation.<sup>315</sup>

## **2.2.7 Databases for defensive protection**

India's Traditional Knowledge Digital Library, established in 2001, is an important database that was developed to prevent the misappropriation of TK belonging to ancient Indian medicinal texts.<sup>316</sup> The database is recognised as a global leader in TK protection and has been successfully used as a time efficient and financially viable resource for patent examiners at International Patent Offices to prevent the grant of patents based on traditional knowledge. However, Seemantani Sharma notes limitations with its effectiveness given different countries approach to how they treat the Traditional Knowledge Digital Library as prior art, which directly relates to the question of novelty, a requirement of patent registration.<sup>317</sup>

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<sup>313</sup> In April–May 2019, the UNPFII theme is 'traditional knowledge'.

<sup>314</sup> Fairtrade International, *About* <<https://www.fairtrade.net/>>.

<sup>315</sup> Michael Spencer and Jocelyn Hardie, *Indigenous Fair Trade in Australia, Scoping Study*, Rural Industries Research and Development Corporation, January 2011.

<sup>316</sup> WIPO, *About the Traditional Knowledge yy*, <[https://www.wipo.int/meetings/en/2011/wipo\\_tkdl\\_del\\_11/about\\_tkdl.html](https://www.wipo.int/meetings/en/2011/wipo_tkdl_del_11/about_tkdl.html)>.

<sup>317</sup> Seemantani Sharma, 'Traditional Knowledge Digital Library: A Silver Bullet in the War against Biopiracy', 17 *The John Marshall Review of Intellectual Property Law*, 215–231, 226–227.

## 2.2.8 Indigenous peoples' declarations

In the 1990s, there were several Indigenous peoples' declaration about ICIP issues.<sup>318</sup> Two key Indigenous developed documents on Indigenous Cultural and Intellectual Property rights which were instrumental in influencing the Australian developments of ICIP, as well as the international community's response. These initiatives were important because they mobilised Indigenous people, providing them with language and themes to articulate their rights to their heritage. Self-determination was at the heart of these documents. The call was clearly to ensure that ICIP is prioritised for Indigenous peoples.

In June 1993, the UN International Year for the World's Indigenous Peoples, the *Mataatua Declaration on the Cultural and Intellectual Property Rights of Indigenous People* was developed and agreed to by global indigenous peoples gathering in 'Aotearoa, New Zealand'<sup>319</sup>. Among them were Indigenous Australians included ATSIC Commissioners. The focus of the *Mataatua Declaration* was on 'self-determination'<sup>320</sup> and enabling Indigenous people to make decisions about their cultural heritage. The *Mataatua Declaration* looks at the value of indigenous knowledge, biodiversity and biotechnology, environment, arts, languages and spiritual culture. The *Mataatua Declaration* also made recommendations to Indigenous peoples, countries and international agencies. Ngati Awa Ngati Porou woman Aroha Mead has been instrumental in advocating the message of the *Mataatua Declaration* at international sessions and in 2018 co-convened a conference to reflect of the recommendations in the document.<sup>321</sup>

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<sup>318</sup> The 1994 statement from the International Consultation on Intellectual Property Rights and Biodiversity organised by the Co-ordinating body of Indigenous peoples of the Amazon Basin.

<sup>319</sup> Mataatua Declaration on Cultural and Intellectual Property Rights of Indigenous Peoples, opened for signature June 1993, reproduced in Terri Janke, *Our Culture, Our Future*, 306.

<sup>320</sup> The opening paragraph of the declaration declares that Indigenous Peoples of the world have the right to self-determination, and in exercising that right must be recognised as the exclusive owners of their cultural and intellectual property'.

<sup>321</sup> Terri Janke, 'Protecting Indigenous Cultural Expressions in Australia and New Zealand: Two Decades After the Mataatua Declaration and Our Culture, Our Future' (2018) 114 *Intellectual Property Forum, Journal of The Intellectual Property Society of Australia and New Zealand*, 21 – 30.

The *Mataatua Declaration*<sup>322</sup> had a positive influence on international work in this area.<sup>323</sup> It was noted by Haidy Geismar, anthropologist, that some of the core rights stipulated in the Draft Declaration on the Rights of Indigenous Peoples were influenced by the *Mataatua Declaration* with a focus on rights all humans are entitled to, the ability to self-govern our ICIP and choose how to live as well as effective legal regulations.<sup>324</sup> Terri Janke attributes the *Mataatua Declaration*<sup>325</sup> as a fundamental source document for her report, *Our Culture, Our Future*.<sup>326</sup> The gathering of Indigenous advocates from around the globe served to talk about the importance of ICIP rights and empower Indigenous communities.<sup>327</sup>

In November 1993, another meeting of international indigenous advocates was held in Australia. Held in Jingarra, in the Wet Tropics region of Australia where biodiversity and traditional knowledge are abundant, the gathering declared the *Julayinbul Statement on Indigenous Intellectual Property Rights*.<sup>328</sup> The *Julayinbul Statement* noted increased concern on breaches of Indigenous Cultural and Intellectual Property so that future generations respectfully enjoy culture.<sup>329</sup> The *Julayinbul Statement* called for ICIP rights to be maintained particularly with a focus on caring for the environment and heritage. A key call was for Indigenous people to be able to govern

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<sup>322</sup> Mataatua Declaration on Cultural and Intellectual Property Rights of Indigenous Peoples, opened for signature June 1993.

<sup>323</sup> Haidy Geismar, *Treasured Possessions: Indigenous Interventions into Cultural and Intellectual Property* (Duke University Press 2013) 59.

<sup>324</sup> *Ibid.*

<sup>325</sup> Mataatua Declaration on Cultural and Intellectual Property Rights of Indigenous Peoples, Aotearoa, New Zealand, 18 June 1993.

<sup>326</sup> Terri Janke, *Our Culture: Our Future – Report on Australian Indigenous Cultural and Intellectual Property Rights* (Report commissioned by AIATSIS and ATSIC, Michael Frankel & Company, 1998) 310.

<sup>327</sup> *Ibid.*

<sup>328</sup> The *Julayinbul Statement on Indigenous Intellectual Property Rights and Declaration Reaffirming the Self-Determination and Intellectual Property Rights of the Indigenous Nations and Peoples of the Wet Tropics Rainforest Area* (Jingarra/Daintree, Australia, November 25-27, 1993), reproduced in Terri Janke, *Our Culture: Our Future – Report on Australian Indigenous Cultural and Intellectual Property Rights* (Report commissioned by AIATSIS and ATSIC, Michael Frankel & Company, 1998) 311.

<sup>329</sup> Terri Janke, 'Indigenous Ecological Knowledge and Natural Resources in the Northern Territory: Report on the Current Status of Indigenous Intellectual Property' (Report commissioned by the National Resources Management Board NT, April 2009b) <[http://media.wix.com/ugd/7bf9b4\\_af38431b79494d18bf4d8937fe4dbc11.pdf](http://media.wix.com/ugd/7bf9b4_af38431b79494d18bf4d8937fe4dbc11.pdf)>.

the use of their 'Aboriginal Intellectual Property, within 'Aboriginal Common Law'.<sup>330</sup> The document alerts the world that any unauthorised use of Indigenous intellectual property is strictly prohibited'.<sup>331</sup> Quiggin and Janke note that the *Julayinbal Statement* located Indigenous environmental knowledge and heritage within the framework of Aboriginal customary laws.<sup>332</sup> Furthermore, the *Julayinbal Statement* called on Federal and State Governments to review work on world heritage management to recognise the intellectual property rights of Indigenous peoples.<sup>333</sup> With the advocacy of Henrietta Marrie, the statement has influenced government environmental inquiries relating to access of biological resources.<sup>334</sup>

### 2.2.9 Convention on Biological Diversity

The UN *Convention on Biological Diversity* (CBD) of 1992 is an international legally-binding treaty to protect the knowledge, innovations and practices of indigenous and local communities and promote their wider application with the approval and involvement of the knowledge holders.<sup>335</sup> The supplementary *Nagoya Protocol*<sup>336</sup> implements the third objective of the CBD, which aims at sharing the benefits arising from the utilisation of Indigenous genetic resources in a fair and equitable way. It provides a strong basis for greater legal certainty and transparency for both providers and users of genetic resources<sup>337</sup> and has resulted in different approaches and

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<sup>330</sup> The Julayinbul Statement on Indigenous Intellectual Property Rights and Declaration Reaffirming the Self-Determination and Intellectual Property Rights of the Indigenous Nations and Peoples of the Wet Tropics Rainforest Area (Jingarra/Daintree, Australia, November 25–27, 1993), reproduced in Terri Janke, *Our Culture: Our Future – Report on Australian Indigenous Cultural and Intellectual Property Rights* (Report commissioned by AIATSIS and ATSIC, Michael Frankel & Company, 1998) 311.

<sup>331</sup> Terri Janke, *Our Culture: Our Future – Report on Australian Indigenous Cultural and Intellectual Property Rights* (Report commissioned by AIATSIS and ATSIC, Michael Frankel & Company, 1998) 312.

<sup>332</sup> Robynne Quiggin and Terri Janke, 'How Do We Treat Our Treasures? Indigenous Heritage Rights in a Treaty' in *Treaty: Let's Get it Right!* (Aboriginal Studies Press, 2003) 60.

<sup>333</sup> *Ibid* 313.

<sup>334</sup> The statement is acknowledged in John Voumard (Chair), Commonwealth Public Enquiry, *Access to Biological Resources in Commonwealth Areas*, Commonwealth of Australia, July 2000.

<sup>335</sup> *Convention on Biological Diversity*, opened for signature 5 June 1992, 1760 UNTS 79 (entered into force 29 December 1993) art 8(j).

<sup>336</sup> Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization to the Convention on Biological Diversity, opened for signature 2 February 2011 (entered into force 12 October 2014).

<sup>337</sup> *Ibid* 1.



requirements depending on the location of the genetic resources and the nature of the relevant land tenure. In compliance with the requirements of the CBD, Australian legislation was introduced at a national level with the *Environment Protection and Biodiversity Conservation Act 1999* (Cth), and in two states, the Northern Territory and Queensland. The problem is that there is no clarity on processes.

### **2.2.10 WIPO IGC on Traditional Knowledge**

The WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (IGC) was established in 2000 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. A key focus of the IGC's work has been to draft and negotiate draft texts on Traditional Cultural Expression and Traditional Knowledge respectively.<sup>338</sup> The debate around the draft Articles on Traditional Cultural Expression and Traditional Knowledge concerns the nature and scope of protection; who should be the beneficiaries; the role of the state; special protection of sacred material; levels of protection depending on whether the Traditional Cultural Expression or Traditional Knowledge has been widely dispersed; and special treatment for sacred Traditional Cultural Expression<sup>339</sup>.

Ruth Okediji, US Law Professor and WIPO IGC adviser, writes that differing views on the public domain have hampered the progress of the IGC:

Safeguarding the public domain is unquestionably an important consideration in the optimal design of property rules. In seeking a multilateral instrument at WIPO, the countries that seek property-type entitlements for GRs and TK have tacitly acknowledged that the public domain must feature in any new regime. Similarly,

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<sup>338</sup> See Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore, Joint Recommendation on Genetic Resources and Associated Traditional Knowledge, WIPO/GRTKF/IC/28/7 (May 9, 2014); Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore, The Protection of Traditional Knowledge: Draft Articles WIPO/GRTKF/IC/39/4 (December 20, 2018); Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore, The Protection of Traditional Culture Expressions: Draft Articles WIPO/GRTKF/IC/39/5 (December 20, 2018).

<sup>339</sup> For detailed discussion see Daniel F Robinson, Ahmed Abdel-Latif, Pedro Roffe (eds), *Protecting Traditional Knowledge* (Earthscan from Routledge, 2017).

non-demandeurs, by championing ‘the’ public domain, also have (perhaps unintentionally) signalled recognition of entitlement protection since the public domain exists directly in relation to property rights. To the extent that recognition of some version of a public domain is required (and I believe it is) in any prospective IGC framework, its role might be quite different from what the public domain usually represents in intellectual property law.<sup>340</sup>

In relation to genetic resources and traditional knowledge, a key discussion centres around the inclusion of provisions that require patent applicants to disclose the origin of genetic resources and associated TK used in developing a claimed invention. This would enable transparency and trigger access and benefit sharing arrangements, thereby reducing biopiracy. The issue is hotly debated and the complexities of this disclosure of origin discussion are discussed by Margaret Bagley, US Law Professor who also attends the WIPO IGC regularly.<sup>341</sup>

These draft documents continue to be negotiated in plenary with member states negotiating the text. As a result, the finalisation of drafts is moving at a snail’s pace. The work of the IGC has been criticised as slow and political.<sup>342</sup> Australia attends IGC meetings, which are held twice a year. Currently, IP Australia represents Australia at meetings. The current Chair of the IGC is an Australian, Ian Goss, a former IP Australia staff member. A great concern is the lack of consultation between Australian government representatives and Australian Indigenous communities. Whilst some Indigenous Australians have attended meetings<sup>343</sup>, IP Australia has no formal

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<sup>340</sup> Ruth Okediji, ‘Negotiating the public domain in an international framework for genetic resources, traditional knowledge and traditional cultural expressions’ in Daniel F Robinson, Ahmed Abdel-Latif, Pedro Roffe (eds), *Protecting Traditional Knowledge* (Earthscan from Routledge, 2017) 140, 141. Note: Okediji uses the term ‘Demandeurs’ to refer to countries demanding or supporting protection for GRs and TK, whereas ‘Non-Demandeurs’ are countries that are being asked for their IP regimes to recognise protection, these are the developed countries.

<sup>341</sup> Margo A Bagley, ‘Of disclosure “straws” and IP system “camels”, Patents, innovation, and the disclosure of origin requirement’, in Daniel F Robinson, Ahmed Abdel-Latif, Pedro Roffe (eds), *Protecting Traditional Knowledge*, Earthscan from Routledge, 2017, 86 – 105, 86.

<sup>342</sup> Robyn Ayres, ‘Slow Progress: Report from Geneva on WIPO IGC meeting 15–24 July 2013’ *Arts Law Centre of Australia* (1 October 2013) <<https://www.artslaw.com.au/articles/entry/slow-progress-report-from-geneva-on-wipo-igc-meeting-15-24-july-2013/>>.

<sup>343</sup> Patricia Adjei, Indigenous lawyer (former WIPO Indigenous Fellow); Bibi Barba (Indigenous Artist) have attended WIPO Meetings. I have attended these meetings only once as a representative of ATSIC, attending as an independent Indigenous non-government organisation (NGO) in 2003. However, in 2014 and 2016 I was invited to present at the IGC seminars on Traditional Cultural Expression. I was also commissioned by WIPO to prepare a set of case studies, *Minding Culture*, to

consultation with Indigenous Australian communities, or the wider Australian community, about what is said at meetings. If such an international regime were established this would set standards for the Australian law on protection and help deal with misappropriation occurring outside of Australia.<sup>344</sup> Therefore Indigenous engagement is imperative.

### 2.2.11 Pacific Regional Framework

After many conferences and workshop held in the Pacific in the late 1990s – early 2000s, in 2002, the Pacific Regional Framework jointly created by the South Pacific Commission, the Pacific Island Forum Secretariat, the Council of Pacific Arts with support from WIPO and UNESCO.<sup>345</sup> Indigenous Australians, including myself, participated in the conferences leading up to the creation of the framework.

The framework includes a draft model law for Pacific Island countries wishing to enact legislation for protecting Traditional Cultural Expression and TK. The model law establishes traditional cultural rights and requires users of traditional knowledge and cultural expressions to obtain informed consent from traditional owners. The law establishes a consultation process and requires authorised user agreements to be signed. Further, the model law proposes the establishment of a cultural authority.

A regional Traditional Knowledge Action Plan assisted seven countries develop legislation.<sup>346</sup> However, only the Cook Islands law has come into force with its *Traditional Knowledge Act 2013*. According to Miranda Forsyth and Sue Farran, a challenge for Pacific countries in implementing laws is:

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assist the IGC's work. See Terri Janke, *Minding Culture: Case Studies on Intellectual Property and Traditional Cultural Expressions* (WIPO, 2003).

<sup>344</sup> Terri Janke and Maiko Sentina, 'Indigenous Knowledge: Issues for protection and management' (Discussion paper, IP Australia & the Department of Industry, Innovation and Science, 2018) 44.

<sup>345</sup> Secretariat of the Pacific Community, 'Pacific Regional Framework for the Protection of Traditional Knowledge and Expressions of Culture', Secretariat of the Pacific Community, Pacific Islands Forum Secretariat and UNESCO Pacific Regional Office (2002) viewed on WIPO website, <<https://www.wipo.int/edocs/lexdocs/laws/en/spc/spc002en.pdf>>.

<sup>346</sup> Fiji, Cook Islands, Vanuatu, Marshall Islands, Federal States of Micronesia, and Samoa. Miranda Forsyth, 'The Traditional Knowledge Movement in the Pacific Island Countries: The Challenge of Localism' (2001) 29(3) *Prometheus* 269; Miranda Forsyth, 'How can Traditional Knowledge best be Regulated? Comparing a Proprietary Rights Approach with a Regulatory Toolbox Approach' (2013) 25(1) *The Contemporary Pacific* 1.

ensuring that these regimes sufficiently recognise and accommodate the rights or communities in rural areas, and that the processes of obtaining informed consent are realistic and properly understood and observed.<sup>347</sup>

The Pacific Model Law has been influential in the development of my model of the National Indigenous Cultural Authority which is outlined in Chapters 9 and 10.

### **2.2.12 UN Declaration on the Rights of Indigenous peoples**

The UNDRIP has been ground breaking in its consideration of issues related to Indigenous ICIP rights and is of significance, particularly Article 31 which relates to Traditional Cultural Expression and TK. It clearly sets forth that Indigenous people must control and maintain their Indigenous IP and that nation states should assist them by introducing necessary measures. This is an extremely important document in influencing the debate and potential for change, although the status of the document has not led to any national legislation in Australia to assist with formal legal rights. Whilst governments have been slow to introduce laws to empower the UNDRIP, in 2013 the UN Business Compact released a Business Reference Guide to the UNDRIP with practical advice for corporations to consider. This includes getting free prior informed consent before commercialising Indigenous cultural expression.<sup>348</sup>

### **2.2.13 ARIPO Model provisions for protection of TK**

There has been much debate about Indigenous Knowledge and IP in African countries who are active in the international forums. Michael Blakeney notes that the African group of countries attending WIPO were concerned for the slow progress of deliberations towards an international instrument.<sup>349</sup> Hence, the African countries looked for a regional response.

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<sup>347</sup> Miranda Forsyth and Sue Farran, *Weaving Intellectual Property Policy in Small Island Developing States* (Intersentia, 2015) 258.

<sup>348</sup> United Nations Global Compact, *A Business Reference Guide: United Nations Declaration on the Rights of Indigenous Peoples* (2013).

<sup>349</sup> Michael Blakeney, 'Protecting the Knowledge and Cultural Expressions of Aboriginal Peoples' (2015) 32(2) *University of Western Australia Law Review* 180.

In 2010, the African Regional Intellectual Property Organization (ARIPO) adopted the Swankopmund Protocol on the Protection of Traditional Knowledge and Expression of Folklore. The protocol aims to protect traditional knowledge and cultural expression of the 10 African members states, requiring national laws.<sup>350</sup>

### **2.2.14 WAI 262 in Aotearoa (New Zealand)**

Closer to home, New Zealand's Waitangi Tribunal released the *WAI 262 Report*<sup>351</sup> in 2011 concerning the nature of Māori Cultural and Intellectual Property Rights. The *WAI 262 Report*, over 1000 pages, found that the New Zealand Crown has failed to protect Māori taonga in accordance with the *Treaty of Waitangi 1940*.<sup>352</sup> The Report recommended a range of recommended law reforms and policies relating to Māori culture in more than 20 New Zealand government departments and agencies.<sup>353</sup> However, Aroha Mead at the Ngā Taonga Tuku Iho Conference on Māori Cultural and Intellectual Property Rights in Nelson, New Zealand in 2018 expressed Māori frustration that the New Zealand Government has not yet responded.<sup>354</sup> She called for government action.

The *WAI 262 Report* further addresses issues directly relevant to Australia, although there is no treaty between government and Indigenous peoples, such as the commercialisation of Māori artistic, scientific and cultural works without free prior informed consent, and calling for a system for objecting to the misappropriation of *taonga* (treasure/heritage) and TK. Relevant to this thesis, the Report recommended the development of ethical guidelines and codes of conduct for those using or wishing

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<sup>350</sup> David Price, Colin Bodkin, Bruce Arnold and Patricia Adjei, *Intellectual Property, Commentary and Materials* (Law Book Co, 2012) 837.

<sup>351</sup> Waitangi Tribunal, *Ko Aotearoa Tēnei: A Report into Claims Concerning New Zealand Law and Policy Affecting Māori Culture and Identity* (Legislation Direct, 2011).

<sup>352</sup> Fleur Adcock, 'Diluted Control: A Critical Analysis of the WAI 262 Report on Maori Traditional Knowledge and Culture', in Matthew Rimmer (ed) *Indigenous Intellectual Property: A Handbook of Contemporary Research* (Edward Elgar, 2015) 497, 498.

<sup>353</sup> 'Ko Aotearoa Tēnei: Report on the Wai 262 Claim Released', *Waitangi Tribunal News* (online), 2 July 2011 <<https://waitangitribunal.govt.nz/news/ko-aotearoa-tenei-report-on-the-wai-262-claim-released/>>.

<sup>354</sup> Aroha Te Pareake Mead, 'Mataatua Declaration: The Challenges Ahead', Paper presented at Ngā Taonga Tuku Iho Conference on Maori Cultural and Intellectual Property Rights in Nelson, New Zealand, 18 September 2018

to use Mātauranga Māori.<sup>355</sup> Towards this objective, the Royal Society Te Apārangi (New Zealand) has implemented a Code of Professional Standards and Ethics effective from 1 January 2019.<sup>356</sup> The preliminary provisions of the Code state, that ‘The Code gives effect to the Treaty of Waitangi through a foundation of bi-cultural ethical principles from which the standards of the Code have been developed.’<sup>357</sup> For instance, the Code provides guidelines for respecting Māori IP and collected materials and data.<sup>358</sup> Scientists who are members of the Royal Society will need to comply. Doug Calhoun, New Zealand IP mentor notes, government-funded research would be bound to follow.<sup>359</sup>

### **2.2.15 Concluding summary of international developments**

The key international developments in the protection of ICIP are the CBD and the UNDRIP. The UNDRIP has been instrumental in setting standards for recognition of ICIP rights and expounding the principle of free prior informed consent. The CBD and the Nagoya Protocol provide a strong basis for access and benefit sharing with Indigenous peoples, when using their genetic materials and traditional knowledge. The problem, however, is the slowness of how these developments are recognised domestically.

UNESCO’s work has been to encourage the recording and safeguarding of expressions of culture, which is important for its continued practice.

The key area for international influence is the work of WIPO. It will be extremely important in bringing together an international regime. Given that many transgressions of ICIP occur outside Australia, and by non-Australian companies, an international

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<sup>355</sup> Fleur Adcock, ‘Diluted Control: A Critical Analysis of the WAI 262 Report on Maori Traditional Knowledge and Culture’, in Matthew Rimmer (ed), *Indigenous Intellectual Property: A Handbook of Contemporary Research* (Edward Elgar, 2015) 497, 508.

<sup>356</sup> Royal Society Te Apārangi (New Zealand) Code of Ethics and Professional Standards, 2019, <<https://royalsociety.org.nz/who-we-are/our-rules-and-codes/code-of-professional-standards-and-ethics/>>.

<sup>357</sup> Ibid clause 1.1.4.

<sup>358</sup> Ibid.

<sup>359</sup> Doug Calhoun, ‘WAI 262, The Long White Cloud over New Zealand IP Law’, (December 2018) 114 *Intellectual Property Forum* 8, 16.

system should recognise and protection traditional knowledge and traditional expression. Australia plays an important role in the debate.

The slowness of the WIPO IGC is an issue. Some countries have developed their own laws, such as South Africa<sup>360</sup> and Peru<sup>361</sup>. Others, like Africa and the Pacific, established regional approaches.

There is a need for more Indigenous involvement in the WIPO IGC. This involves comprehensive, prior consultation with Indigenous people as well as increased Indigenous representation at meetings.

## **2.3 Scholarship and literature**

There is a wealth of writing on the topic of Indigenous arts and ICIP which crosses several disciplines including law, arts and science, both national and international. This is referred to through the following chapters and also in the historical developments section of this chapter. This section provides an overview of the key literature in order to situate the context of this thesis. For the purposes of this paper, the literature has been categorised into two major areas: legal analysis and commentary; and proposals and solutions including both legal and non-legal measures. In doing so, several key concepts and terms used throughout this thesis are discussed.

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<sup>360</sup> South Africa's intellectual property protection of TK is covered in the Policy Framework for the Protection of Indigenous Traditional Knowledge through the Intellectual Property System and the Intellectual Property Laws Amendment Act 2008 (South Africa); Caroline Ncude, 'Intellectual Property protection of traditional knowledge and access to knowledge in South Africa', in Matthew Rimmer (ed), *Indigenous Intellectual Property: A Handbook of Contemporary Research* (Edward Elgar, 2015) 543.

<sup>361</sup> Peru adopted Law 17811 in the early 1990s, establishing a comprehensive regime for recognition of the communal rights of Indigenous people in Peru over their TK relating to biodiversity. Brendan Tobin, 'Traditional knowledge sovereignty: The fundamental role of customary law in the protection of traditional knowledge', in Matthew Rimmer (ed), *Indigenous Intellectual Property: A Handbook of Contemporary Research* (Edward Elgar, 2015) 565, 580.

## 2.3.1 Legal analysis

### 2.3.1.1 Folklore

In the 1970s and 1980s, the debate in this area used the terminology 'folklore'. The Working Party on the Protection of Aboriginal Folklore enquired into the protection of Aboriginal Folklore in Australia in the early 1980s, releasing a report that explored the issues and recommended the enactment of the Aboriginal Folklore Act and the appointment of an Aboriginal Folklore Commissioner.<sup>362</sup> These recommendations, discussed further at 2.1.3, were not implemented.

Robin Bell, then a member of the Working Party, had written on how the use of the term 'folklore' recognises that the traditions which underlie the Aboriginal arts are tightly integrated within the totality of Aboriginal culture.<sup>363</sup> In his description, expressions, in a variety of art forms, comprise the folklore traditions built up in a community and evolving continuously.<sup>364</sup>

Vivien Johnson, Australian academic and Indigenous arts writer, stated that the use of term 'folklore' during the 1970s and 80s was problematic leading to the failure to recognise Indigenous artists rights:

The problem was that the legal and anthropological experts they had working on the issue Wandjuk [Marika] raised were looking for solutions in the wrong place. They were still looking for ways to protect Aboriginal art as authentic Aboriginal 'folklore' unable to recognise the copyright protection that already existed for all works of art as applying to works of Aboriginal Art because they did not perceive them as Art.<sup>365</sup>

The term 'folklore' was used internationally in the 1980s and in WIPO-UNESCO's *Model Provisions for National Laws on the Protection of Expressions of Folklore Against Illicit Exploitation and other Prejudicial Actions* to describe productions

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<sup>362</sup> Department of Home Affairs and Environment, Report of the Working Party on the Protection of Aboriginal Folklore (Department of Home Affairs and Environment, 4 December 1981).

<sup>363</sup> Robin Bell, 'Protection of Aboriginal Folklore: Or Do They Dust Reports?' (1985) 1(17) *Aboriginal Law Bulletin* 8.

<sup>364</sup> *Ibid* 8.

<sup>365</sup> Vivien Johnson, *Copyrites: Aboriginal Art in the Age of Reproductive Technologies* (National Indigenous Arts Advocacy Association and Macquarie University, 1996) 4.



consisting of the traditional artistic heritage developed and maintained by a community or by individuals reflecting the traditional artistic expectations of such a community.<sup>366</sup>

Kamal Puri, Professor of law, has written a number of papers on copyright and its ability to protect 'folklore' which he described as a living heritage. Puri's articles were influential in highlighting the shortfalls of protection.<sup>367</sup>

From WIPO's perspective, 'expressions of folklore' are a subset of and included within TK.<sup>368</sup> Hence, the term is used today in the WIPO IGC. However, the term 'folklore' is not favoured by Australian Aboriginal and Torres Strait Islanders,<sup>369</sup> and for similar reasons the term 'traditional' is often contested as it can imply that culture is locked in time.<sup>370</sup>

### 2.3.1.2 *Gaps in the law*

Several writers address the gaps in IP laws, particularly copyright, in protecting Indigenous knowledge. Kenneth Maddock, the late Australian anthropologist, was one of the first to point out the copyright 'dilemma'; namely, that while legislative recognition of the already existent Aboriginal customary laws is ideal, this could be difficult to achieve when they mingle and conflict with the western body of law.<sup>371</sup> If rights are instead created, says Maddock, they must reflect the internal realities of the cultural milieu that is to benefit by their creation.<sup>372</sup>

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<sup>366</sup> WIPO-UNESCO, Model Provisions for National Laws on the Protection of Expressions of Folklore Against Illicit Exploitation and other Prejudicial Actions (1985) s 2.

<sup>367</sup> Kamal Puri, *Australian Aboriginal People and their Folklore*, NGULAIG Monograph 9 (University of Queensland, 1992a); Kamal Puri, 'Aboriginal Folklore' (1992b) 7 *Australian Folklore* 125; Kamal Puri, 'Copyright Protection for Australian Aborigines in the Light of Mabo' in M A Stephenson and Suri Ratnapala (eds), *Mabo: A Judicial Revolution. The Aboriginal Land Rights Decision and Its Impact on Australian Law* (University of Queensland Press, 1993) 132.

<sup>368</sup> WIPO, 'Intellectual Property Needs and Expectations of Traditional Knowledge Holders: WIPO Report on Fact-Finding Missions on Intellectual Property and Traditional Knowledge' (Report, April 2001) 26.

<sup>369</sup> Terri Janke, *Our Culture: Our Future – Report on Australian Indigenous Cultural and Intellectual Property Rights* (Report commissioned by AIATSIS and ATSIC, Michael Frankel & Company, 1998).

<sup>370</sup> Terri Janke and Maiko Sentina, 'Indigenous Knowledge: Issues for protection and management' (Discussion Paper, IP Australia & Department of Industry, Innovation and Science, 2018) 17.

<sup>371</sup> Kenneth Maddock, 'Copyright and Traditional Designs – An Aboriginal Dilemma' (1988) 1(34) *Aboriginal Law Bulletin* 8.

<sup>372</sup> *Ibid* 8.

Dean Ellinson, Australian lawyer, proposes that the difficulties associated with introducing legislation to prevent the unauthorised reproduction of Indigenous art concerns the internal dynamics of the Aboriginal community and the interrelationship between the proposed legislative protection and the *Copyright Act 1968*.<sup>373</sup> This involves the lack of homogeneity in traditional Aboriginal customary laws of various communities and the contrast between collective rights in customary laws and the individualistic focus in western laws.<sup>374</sup>

The *Our Culture: Our Future* Report recommends that the law must recognise the right of Indigenous people to transmit and share their heritage in accordance with their customary laws in its evolving form.<sup>375</sup> Customary laws are based on the premise of responsibility and custodianship of cultural knowledge, and the need to ensure its protection for transmission to future generations.<sup>376</sup> These cultural systems are threatened by the commercialisation of Indigenous IP which is often done without Indigenous control, consent or benefit sharing with the relevant communities.

Ellinson states that a lack of familiarity with the role that innovation and interpretation play in Aboriginal art practices has led to doubt as to whether traditional Aboriginal artistic work based upon a pre-existing design can satisfy the copyright requirement of 'originality'.<sup>377</sup> Similarly, Peter Drahos, Australian legal academic and prolific writer on IP, has addressed the disjuncture between Indigenous forms of innovation and those that are encouraged by IP laws. He states that Indigenous innovation takes the form of services to country with clear public good benefits in terms of biodiversity, environmental and climate values that have difficulty translating into income streams.<sup>378</sup> Thus, IP rights have little relevance to Indigenous innovators who seek to

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<sup>373</sup> Dean Ellinson, 'Unauthorised Reproduction of Traditional Aboriginal Art' (1994) 17(2) *University of New South Wales Law Journal* 327, 328.

<sup>374</sup> *Ibid* 335, 336.

<sup>375</sup> Terri Janke, *Our Culture: Our Future – Report on Australian Indigenous Cultural and Intellectual Property Rights* (Report commissioned by AIATSIS and ATSIC, Michael Frankel & Company, 1998) 275.

<sup>376</sup> Terri Janke, 'Respecting Indigenous Cultural and Intellectual Property Rights' (1999) 22(2) *University of New South Wales Law Journal* 631, 633.

<sup>377</sup> *Ibid* 332.

<sup>378</sup> Peter Drahos, 'When Cosmology Meets Property: Indigenous People's Innovation and Intellectual Property' (2011) 29(3) *Prometheus* 233.

innovate at the level of systems, such as ecological systems, rather than commodities.<sup>379</sup> I tend to agree with this premise, particularly regarding patent law.

### 2.3.1.3 *Public Domain*

There is difference between western concepts of the public domain, where works that are out of the copyright period are free to use, and the Indigenous concept of continued connection so that cultures continue to be practiced across generations within communities.<sup>380</sup> Indigenous works do not become free for all to use in the western sense of the public domain.<sup>381</sup>

A 2018 paper by Ruth Okediji, professor at Harvard Law School and international adviser on international IP negotiations including for the WIPO IGC, canvasses traditional knowledge and the public domain, advancing the idea that there is no international public domain and that there is a distinct public domain associated with each category of IP.<sup>382</sup> She argues that

deploying the construct of the public domain to constrain the capacity of Indigenous groups to govern their knowledge, practices and cultural goods vital to the identity and sustainability of their community is consistent with neither the justifications for IP (including its various public domains), nor the global public interest.<sup>383</sup>

This remains a highly relevant and as yet unresolved debate for ICIP in Australia.

### 2.3.1.4 *Indigenous copyright cases*

Many of the articles report on and analyse the Indigenous arts copyright cases. Colin Golvan, the barrister in the Australian Aboriginal art copyright cases (discussed above in 2.1.1 and 2.1.12), has written extensively on the judgments, including on how the common law has developed to take into account Aboriginal customary law in the

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<sup>379</sup> Ibid 246.

<sup>380</sup> Colin Golvan, 'Aboriginal Art and the Public Domain' (1998) 9(1) *Journal of Law, Information and Science* 122.

<sup>381</sup> Sue Bunting, 'Limitations of Australian Copyright Law in the Protection of Indigenous Music and Culture' (2000) 18 *Context: Journal of Music Research* 15.

<sup>382</sup> Ruth Okediji, 'Traditional Knowledge and the Public Domain' (Centre for International Governance Innovation Papers 176, 2018) 1.

<sup>383</sup> Ibid 16.

assessment of damages and the court's finding on substantial parts.<sup>384</sup> Golvan made five key observations concerning the Aboriginal art copyright cases. Firstly, that there is much to be done for the legal system to be meaningful to Aboriginal people. Secondly, he pointed to the large language divides in giving evidence in the western legal process that require translators and advisors to be a part of legal action. Thirdly, he noted that the cases are case studies to guide artists of the copyright issues and to illustrate points for potential commercial users to take into account. Fourthly, the cases strengthen the market, and provide financial benefits for Aboriginal artists to participate. Fifthly, the cases show how Aboriginal people had led the way in Australian arts practice by strengthening their artistic traditions through copyright cases, which Golvan says, 'sets a basis for establishing a meaningful link for white and black law and custom.'<sup>385</sup>

Following on from the cases, Golvan proposes a legislative path which advocates for the protection of claims of communal ownership as in Aboriginal culture.<sup>386</sup> He clearly positions this discussion within the broader picture of reconciliation, respect and the protection of Indigenous culture at large, and the need to incorporate these value systems into the Australian Government's policy and legislative regimes.<sup>387</sup>

With reference to Indigenous copyright cases, Stephen Gray, like Golvan, argues that the concerns and perspectives of Aboriginal law regarding communal rights and the protection of sacred designs are not accounted for in the requirements of Australian copyright law.<sup>388</sup> Gray proposes that the most appropriate basis for recognition of Aboriginal interests in sacred designs lies instead in property, as this accords more closely with Aboriginal conceptions than other legal categories.<sup>389</sup>

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<sup>384</sup> Colin Golvan, 'Aboriginal Art and Copyright – An Overview and Commentary Concerning Recent Developments' (1996) 1 *Media and Arts Law Review* 151; Colin Golvan, 'Aboriginal Art and the Protection of Indigenous Cultural Rights' (1992) 7 *European Intellectual Property Review* 227.

<sup>385</sup> Colin Golvan, 'Aboriginal Art and Copyright – An Overview and Commentary Concerning Recent Developments' (1996) 1 *Media and Arts Law Review* 151, 154.

<sup>386</sup> Colin Golvan, 'Aboriginal Art and Copyright: The Case for Johnny Bulun Bulun' (1989) 10 *European Intellectual Property Review* 346; Colin Golvan, 'Copyright, Guns and Money: Copyright and Culture in the Digital Age' (2005) *Australian Book Review* 24.

<sup>387</sup> *Ibid.*

<sup>388</sup> Stephen Gray, 'Aboriginal Designs and Copyright: Can the Australian Common Law Expand to Meet Aboriginal Demands?' (1992) 9(4) *Copyright Reporter* 81, 82.

<sup>389</sup> *Ibid.* 92.

Sue Bunting, Australian academic, notes that in the successful cases in the 1980s and 1990s, the facts were able to be manipulated into the western copyright system easily due to shifting the focus on other indicia of copyright such as material form and individual creators.<sup>390</sup> It was thus easy for the court to interpret the circumstances of the cases to adapt them to the copyright regime.<sup>391</sup> The element of originality is thus magnified to entitle Aboriginal art to be protected by copyright, yet, as Coleman points out, it is the continuation of traditional relationships that is of primary importance to Indigenous people.<sup>392</sup> Similarly, lawyer Sally McCausland, considers how copyright law obscures communal rights behind the work of 'celebrity' artists.<sup>393</sup>

Martin Hardie, solicitor representing the applicants in *Bulun Bulun v R & T Textiles*, has noted that the Aboriginal copyright cases show that strategic litigation and dialogue with the Courts is more likely to yield results than waiting for a solution to be granted from above.<sup>394</sup> He argues that Aboriginal artists have access to mechanisms by which the Australian law will recognise and provide remedies relevant to the wider social, political and religious concepts underpinning the production of artwork in Indigenous contexts.<sup>395</sup> He argues that the law does adequately protect the rights of the artist and the community concerned, and as such law reform focus is unnecessary.<sup>396</sup> For instance, Hardie considers that the fiduciary duty relating to ritual knowledge embodied in artwork can be used to stop the use of this knowledge in a work outside of the copyright period.

Stephen Gray, from Monash University has written extensively on Aboriginal art and copyright. He argues that decision makers under any legislative framework should be required to consider the interests and views of non-traditional or urban Indigenous artists, who are often left out of legal and policy discussions regarding how the

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<sup>390</sup> Sue Bunting, 'Limitations of Australian Copyright Law in the Protection of Indigenous Music and Culture' (2000) 18 *Context: Journal of Music Research* 15.

<sup>391</sup> *Ibid* 15.

<sup>392</sup> Elizabeth Burns Coleman, *Aboriginal Art, Identity and Appropriation* (Routledge, 2016) §4.2.

<sup>393</sup> Sally McCausland, *Protecting Aboriginal Cultural Heritage in Australia: Looking for Solutions in the Canadian Experience* (LLM Thesis, University of British Columbia, 1997) 61.

<sup>394</sup> Martin Hardie, 'What Wandjuk wanted?' in Matthew Rimmer (ed), *Indigenous Intellectual Property: A Handbook of Contemporary Research* (Edward Elgar Publishing, 2015) 155, 157.

<sup>395</sup> Martin Hardie, 'Aboriginal Artwork, Copyright Law and the Protection of Ritual Knowledge' (1999) 18(1) *Communications Law Bulletin* 9, 12.

<sup>396</sup> *Ibid* 12.

traditional arts and cultural expressions of Indigenous artists should be protected in the Australian legal system.<sup>397</sup> In this respect Gray warns against seeing all Indigenous artists in the same way, and that law and policy should take into account urban and non-traditional Aboriginal artists. Gray's analysis is significant in that it foreshadows complexities of identity that should be dealt with culturally rather than in the courts. The historical plight of Indigenous people, and the impact of past Australian government policies has led to situations where many Indigenous people live outside their communities, and further, may not know their cultural heritage. There is however a reclamation of culture and revitalisation of practice occurring. Indigenous people are reconnecting with their communities, and communities whose cultures have been devastated, are reinstating protocols for their arts and cultural practice. This thesis puts forward protocols as a way of enabling this process. The ICIP principles are flexible to cover the complexities discussed here as their use is not dependant on any preconditions about whether the artist is working individually, for example as an Indigenous person making art in an urban context, or an artist or artist/s working in a community context with traditional and collective methodologies.

#### 2.3.1.5 *Communal rights*

The issue of communal rights when it comes to individual and collective dealings in ICIP has been much debated and is relevant to many of the Indigenous copyright cases. Scholars Jill McKeough and Andrew Stewart consider the present regimes to be ill suited for the protection of the intellectual and cultural heritage of Indigenous peoples or any collective rights.<sup>398</sup> Duncan Miller explains that, in regard to communal rights, the approaches to the protection of artistic works in Aboriginal customary law and Australian municipal law are fundamentally incompatible.<sup>399</sup> He also points out that the damage suffered by Indigenous peoples as a result of unauthorised

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<sup>397</sup> Stephen Gray, 'Black Enough? Urban and Non-traditional Aboriginal Art and Proposed Legislative Protection for Aboriginal Art' (1996) 7(3) *Culture and Policy* 29.

<sup>398</sup> Jill McKeough and Andrew Stewart, *Intellectual Property in Australia* (Butterworth–Heinemann, 1991) 9–10.

<sup>399</sup> Duncan Miller, '*Milpurruru v. Indofurn Pty Ltd* – Collective Ownership of the Copyright in Spiritually Sensitive Works' (1995) 6 *Journal of Intellectual Property Law* 185.

reproductions of Indigenous artworks is not felt in a commercial sense, but by the artists and their wider community in a personal and spiritual sense.<sup>400</sup>

### 2.3.1.6 *Land rights and native title*

The interconnections between ICIP and Indigenous legal rights in respect to their lands and waters remains largely unexplored and unresolved in Australia.

Land rights legislation exists in some States and Territories in Australia which establishes land councils that have a say about acquisitions issues, and the protection of Aboriginal objects, places and sites. In New South Wales, for instance, the *Aboriginal Land Rights Act 1983* established the NSW Aboriginal Land Councils. There are provisions under the Act which also relate to hunting and fishing rights and require a register of Aboriginal Owners<sup>401</sup> to be kept. There is similar legislation in the Northern Territory, the *Aboriginal Land Rights (Northern Territory) Act 1976 (Cth)*.<sup>402</sup>

Janke and Sentina note that traditional owner groups and land councils provide a structure for clearances of uses of Indigenous knowledge and cultural expression. These groups tend to work on country, and therefore often include traditional knowledge holders and rangers. These groups are used for consent and consultation where research is occurring on land, and for knowledge related to sites and places.<sup>403</sup> It should be noted that in the Northern Territory under the *Aboriginal Land Rights Act (Northern Territory) Act 1976 (Cth)* consent from land councils may be required when accessing land and researching and interviewing people, and taking resources from country. There is a nexus with land councils and Access and Benefit Sharing laws. Another example is the Kimberley Land Council in Western Australia, that is a point of

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<sup>400</sup> Ibid.

<sup>401</sup> The *Aboriginal Land Rights Act 1983* NSW defines 'Aboriginal owners' of land to mean the Aboriginal persons whose names are entered on the Register of Aboriginal Owners because of the persons' cultural association with particular land: s 4.

<sup>402</sup> Terri Janke, *Our Culture: Our Future – Report on Australian Indigenous Cultural and Intellectual Property Rights* (Report commissioned by AIATSIS and ATSIC, Michael Frankel & Company, 1998) 92.

<sup>403</sup> Terri Janke and Maiko Sentina, 'Indigenous Knowledge: Issues for Protection and Management' (Discussion Paper, IP Australia & Department of Industry, Innovation and Science, 2018) 23.

contact for its member organisations to encourage consistency of consultation approaches across the region.<sup>404</sup>

Some commentators have explored the extent to which the legal recognition of native title in Australia might apply to ICIP given that stories, songs and TK are deeply interconnected with Indigenous land and seas. Shortly after the Mabo case in 1993, a number of commentators suggested that the case might be broadened to IP rights.<sup>405</sup> Gray argues that the Mabo case opens the possibility of legal protection of traditional Aboriginal interests in art on the same conceptual basis that it provides protection to traditional interests in land<sup>406</sup>. This argument could also be made in respect of land rights and the *Aboriginal Land Rights (Northern Territory) Act 1976*.

Kamal Puri similarly considered how the Mabo case<sup>407</sup> could lead to the further expansion of rights beyond land to relate to objects, ceremonies or customs, provided that customary laws remained intact.<sup>408</sup>

Matthew Rimmer, Australian legal academic, has provided a significant commentary on native title in relation to its limitations in protecting cultural knowledge, supporting the need for legislators to adopt a more expansive view of the relationship between native title rights, customary law and spiritual custodianship.<sup>409</sup>

### 2.3.1.7 Sacred images

Duncan Miller addresses the need for special treatment of sacred cultural material and have drawn links with religious and spiritual material requiring laws similar to blasphemy.<sup>410</sup> Christoph Graber, Professor of Law at the University of Zurich, has also

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<sup>404</sup> Ibid 28.

<sup>405</sup> Kamal Puri, 'Copyright Protection for Australian Aborigines in Light of Mabo' in M.A. Stephenson and Suri Ratnapala (eds), *Mabo: Judicial Revolution. The Aboriginal Land Rights Decision and Its Impact on Australian Law* (University of Queensland Press, 1993) 156.

<sup>406</sup> Stephen Gray, 'Wheeling, Dealing and Deconstruction: Aboriginal Art and the Land Post-Mabo' (1993) 3(63) *Aboriginal Law Bulletin* 10–12.

<sup>407</sup> *Mabo v Queensland* (1992) 175 CLR 1.

<sup>408</sup> Kamal Puri, 'Copyright Protection for Australian Aborigines in Light of Mabo' in M A Stephenson and Suri Ratnapala (eds), *Mabo: Judicial Revolution. The Aboriginal Land Rights Decision and Its Impact on Australian Law* (University of Queensland Press, 1993) 157–158.

<sup>409</sup> Matthew Rimmer, 'Blame it on Rio: Biodiscovery, Native Title, and Traditional Knowledge' (2003b) 7 *Southern Cross University Law Review* 1, 27.

<sup>410</sup> Duncan Miller, 'Collective Ownership of the Copyright in Spiritually-Sensitive Works: Milpurruru v Indofurn Pty Ltd' (1995) 6(4) *Australian Intellectual Property Journal* 202.



discussed the difficulties that modern Australian law experiences in coping with the complex connection between Traditional Cultural Expressions and the land, pointing out that this can result in limitations in effectively protecting secret and sacred material against desecration and misappropriation.<sup>411</sup> Graber focusses on protection of the *Wandjina* due to the many unauthorised and culturally inappropriate reproductions of this sacred image from rock art sites.<sup>412</sup>

#### 2.3.1.8 *International IP*

Much of the literature that is international in scope inevitably leads to a discussion on the relationship between broader global regimes and local contexts. A number of these issues resonate with those being raised by Indigenous Australians. Darrell Posey, an American anthropologist advocate for Indigenous traditional knowledge rights, is concerned with the way IP rights threaten local Indigenous economies, cultures and biodiversity.<sup>413</sup> This is related to the focus in IP rights on the individual rather than the collective; historic acts of 'discovery' and market economic values; and their inability to accommodate complex non-western systems of ownership, tenure and access.<sup>414</sup> Posey argues that IP rights have become a tool for unethical and unsustainable exploitation of local communities and their resources.<sup>415</sup> This is arguably the case for Australia, where patents laws allow the vesting of rights in genetic resources in companies that can undertake research and development, and can translate the traditional knowledge into scientific analysis which enables it to be a patentable invention. Indigenous owners of land where resources are accessed, or custodians of knowledge, are not recognised as rights holders unless they meet the complex requirements of the law. This is why at an international level, the international indigenous and TK community are calling for disclosure provisions which would require patent applicants to disclose whether they used TK as a source for their

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<sup>411</sup> Christoph B Graber, 'Aboriginal Self-determination vs the Propertisation of Traditional Culture: The Case of Sacred Wandjina Sites' (2009) 13(2) *Australian Indigenous Law Review* 18.

<sup>412</sup> *Ibid.*

<sup>413</sup> Darrell Posey, 'Indigenous Peoples and Traditional Resource Rights: A Basis for Equitable Relationships?' (Paper presented at a Workshop on Indigenous Peoples and Traditional Resource Rights, University of Oxford, 28 June 1995) 2.

<sup>414</sup> *Ibid* 12.

<sup>415</sup> *Ibid* 21.

invention. In Australia, we have not yet considered this point, however, it is raised in IP Australia discussion paper, Indigenous Knowledge Protection, as a potential model for Australia to consider.<sup>416</sup>

Professor Ruth Okediji, adviser on international IP negotiations, highlights that in the international context, assertions of the public domain have not addressed the intersectionality of tangible and intangible property interests that is a core feature of the traditional knowledge claims of Indigenous communities.<sup>417</sup> Aroha Mead, Māori Indigenous rights advocate, similarly considers the nature of IP laws to be unable to deliver all that Indigenous people are seeking.<sup>418</sup> It was evident that existing IP laws at a national level were not providing adequate legal protection to prevent the misappropriation of TK, so Māori looked to the international community.<sup>419</sup> Therefore, the formation of the WIPO IGC in 2000<sup>420</sup> was beheld as an inclusive and constructive process, creating a sense of optimism for improving the protection of Indigenous knowledge, culture and genetic resources.<sup>421</sup> However, as Wendland (WIPO's Traditional Knowledge Division Director) has stated, many are impatient with the slower than anticipated progress being made by this body.<sup>422</sup> Similar frustrations are evident in Australia.

Daniel Robinson, researcher at the University of New South Wales and international policy advisor, comments that taking on the issue of developing a *sui generis* system for the protection of traditional knowledge in a top-down approach, as through

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<sup>416</sup> Terri Janke and Maiko Sentina, 'Indigenous Knowledge: Issues for protection and management' (Discussion Paper, commissioned by IP Australia & Department of Industry, Innovation and Science, Terri Janke and Company, 29 March 2018) 109.

<sup>417</sup> Ruth Okediji, 'Traditional Knowledge and the Public Domain' (Centre for International Governance Innovation Papers 176, 2018) 12.

<sup>418</sup> Aroha Te Pareake Mead, 'Intellectual Property, Genetic Resources and Associated Traditional Knowledge: Sharing Indigenous and Local Community Experiences and Perspectives' (WIPO-IGC 30<sup>th</sup>, 30 May 2016) 2.

<sup>419</sup> Ibid 2.

<sup>420</sup> WIPO, *No.2 Background Brief* (2015) <[http://www.wipo.int/edocs/pubdocs/en/wipo\\_pub\\_tk\\_2.pdf](http://www.wipo.int/edocs/pubdocs/en/wipo_pub_tk_2.pdf)>.

<sup>421</sup> Aroha Te Pareake Mead, 'Intellectual Property, Genetic Resources and Associated Traditional Knowledge: Sharing Indigenous and Local Community Experiences and Perspectives' (WIPO-IGC 30<sup>th</sup>, 30 May 2016) 5.

<sup>422</sup> Wend B Wendland, 'It's A Small World (After All): Some Reflections on Intellectual Property and Traditional Cultural Expressions' in Christoph Beat Graber and Mira Burri-Nenova (eds), *Intellectual Property and Traditional Cultural Expression in a Digital Environment* (Edward Elgar, 2008) 150, 162.

international forums such as WIPO and the UN, is a colossal task.<sup>423</sup> He points towards bottom–up research and local community capacity building on a country-by-country, case-by-case basis to help inform the debate, especially in relation to customary protocols and laws.<sup>424</sup>

Canadian Aboriginal Indigenous rights advocates, Marie Battiste and James Henderson consider the overarching challenge in protecting Indigenous knowledge and heritage to be negotiating with the modern concept of property.<sup>425</sup> Battiste and Henderson point out the difficulties Eurocentric lawyers and policy makers face in reconciling the different legal systems of Indigenous customary law and Eurocentric law.<sup>426</sup> Antony Taubman, Director of the IP division at the WTO, addresses what is perhaps underlying these issues.<sup>427</sup> He argues that a set of commonly held assumptions surrounding IP systems manifest in a predominant set of practices that may overlook its essence and core principles.<sup>428</sup> He believes that this has led to the fixation on private rights for individuals and commercial firms, and short-term commodity cycles.<sup>429</sup> It is these that act as unwitting impediments to new avenues for protecting Indigenous traditional knowledge.<sup>430</sup>

Michael Dodson, former Special Rapporteur of the Permanent Forum on Indigenous Issues, reinforces the communal ownership of Indigenous knowledge and advocate a strong role for customary law in decision-making.<sup>431</sup> Finally, Wend Wendland, IP

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<sup>423</sup> Daniel F Robinson, *Confronting Biopiracy: Challenges, Cases and International Databases* (Earthscan, 2010a) 133.

<sup>424</sup> Ibid 133.

<sup>425</sup> Marie Ann Battiste and James (Sakej) Youngblood Henderson, *Protecting Indigenous Knowledge and Heritage: A Global Challenge* (Purich Publishing, 2000) 145.

<sup>426</sup> Ibid 150.

<sup>427</sup> Antony Taubman, 'Preface: Indigenous Innovation: New Dialogues, New Pathways' in Peter Drahos and Susy Frankel (eds), *Indigenous Peoples' Innovation: Intellectual Property Pathways to Development* (ANU E Press, 2012) xv.

<sup>428</sup> Ibid xvi.

<sup>429</sup> Ibid.

<sup>430</sup> Ibid.

<sup>431</sup> Michael Dodson, Report of the Secretariat on Indigenous Traditional Knowledge, UN Doc E/C 19/2007/10 (20 March 2007) 11–12.

lawyer, acknowledges that Indigenous aspirations are more profound and expansive than the remedies offered by conventional IP systems alone.<sup>432</sup>

This literature clearly indicates that a broader menu of options drawn from several policy and legal fields is likely to offer a more comprehensive response for indigenous peoples, including those in Australia.<sup>433</sup> At the moment, this broad menu of options is largely lacking in Australia.

### 2.3.1.9 *Biodiversity*

In early writings, Michael Davis, a policy specialist, addressed the challenge to law and policy of developing ways to harmonise or integrate Indigenous biological and environmental knowledge and practices with western scientific knowledge. He calls for the integration of the complementary characteristics of each system in order to pursue strategies that address mutual goals such as ecosystem and land management.<sup>434</sup> Indigenous Australian rights activist and academic, Henrietta Fourmile, Indigenous Australian academic and rights activist, recommends that universities associated with Co-operative Research Centres working in natural resources incorporate course units that inform students on the role that traditional knowledge can and should play in sustainability and land management, as well as Australia's international obligations to Indigenous people under treaties such as the CBD.<sup>435</sup> In reconciling Indigenous traditional knowledge systems and Western science, she calls for these centres to undertake partnership projects with Indigenous communities within conservation issues that affect the entirety of the nation.<sup>436</sup>

In light of the CBD, Rimmer considers the relative merits of the inter-locking regimes of contract law, environmental law, and IP law in protecting traditional knowledge of

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<sup>432</sup> Wend B Wendland, 'It's a Small World (After All): Some Reflects on Intellectual Property and Traditional Cultural Expressions' in Christoph Beat Graber and Mira Burri-Nenova (eds), *Intellectual Property and Traditional Cultural Expression in a Digital Environment* (Edward Elgar, 2008) 150, 157.

<sup>433</sup> *Ibid* 157.

<sup>434</sup> Michael Davis, 'Biological Diversity and Indigenous Knowledge' (Research Paper 17, Parliamentary Library, Parliament of Australia, 1998) 19.

<sup>435</sup> Henrietta Fourmile, 'Respecting our Knowledge: National Research Institutions and their Obligations to Indigenous and Local Communities under Article 8(j) and Related Provisions of the Convention on Biological Diversity' (2000) 1 *Humanities Research Journal Series* 41, 51 <[http://press-files.anu.edu.au/downloads/press/p12311/pdf/7\\_chapter2\\_hr1\\_2000.pdf](http://press-files.anu.edu.au/downloads/press/p12311/pdf/7_chapter2_hr1_2000.pdf)>.

<sup>436</sup> *Ibid*.

biodiversity.<sup>437</sup> Others argue that the effectiveness of the abundance of new policies to control access to genetic resources and ensure fair benefit sharing has been questionable.<sup>438</sup> This argument considers how policy has lagged behind the practice of bioprospecting due to the complexity and diversity of its activities and commercial players.<sup>439</sup> Daniel Robinson's, prolific author and researcher at University of New South Wales) commentary on the challenges and debates surrounding bioprospecting is of international significance, including the Kakadu Plum patent case studies which have influenced trade mark examiner in the consideration of the prior art in the Mary Kay patent that included Kakadu Plum.<sup>440</sup> The case study on Kakadu Plum is as an example of how the IP system, and access and benefit sharing laws are not working.

Vandana Shiva, Indian scholar and environmental activist, argues that biopiracy – 'the use of IP systems to legitimise the exclusive ownership and control over biological resources and biological products and processes that have been used over centuries in non-industrialised cultures'<sup>441</sup> – occurs because of the inadequacy of western patent systems coupled with the western bias against other cultures, and that *terra nullius* has its contemporary equivalent in 'Bio-Nullius'.<sup>442</sup> This connects to Australian political commentator Susan Hawthorn's notion of 'molecular colonization'<sup>443</sup> in discussing the Human Genome Project and its sister the Human Genome Diversity Project, both of which came under severe criticism.<sup>444</sup> The challenges arising in this area of ICIP protection are growing in intensity and scrutiny in Australia.

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<sup>437</sup> Matthew Rimmer, 'Blame it on Rio: Biodiscovery, Native Title, and Traditional Knowledge' (2003b) 7 *Southern Cross University Law Review* 1, 7.

<sup>438</sup> Rachel Wynberg and Sarah Laird, 'Bioprospecting, Access and Benefit Sharing: Revisiting the 'Grand Bargain' in R Wynberg, D Schroeder and R Chennells (eds), *Indigenous Peoples, Consent and Benefit Sharing: Lessons from the San-Hoodia Case* (Springer, 2009) 69.

<sup>439</sup> *Ibid* 69.

<sup>440</sup> Daniel F Robinson, *Confronting Biopiracy: Challenges, Cases and International Databases* (Earthscan, 2010a) 75. The Kakadu plum (*Terminalia ferdinandiana*) has been used for food and medicine for centuries by Indigenous Australians in the northern and north-western regions of Australia, and has been utilised for its high levels of ascorbic acid and vitamin C, believed to be among the highest of any fruit in the world.

<sup>441</sup> Vandana Shiva, *Protect or Plunder: Understanding Intellectual Property Rights* (Zed Books, 2001) 49.

<sup>442</sup> *Ibid* 49.

<sup>443</sup> Susan Hawthorne, 'Land, Bodies, and Knowledge: Biocolonialism of Plants, Indigenous Peoples, Women, and People with Disabilities' (2007) 32(2) *Signs: Journal of Women in Culture and Society* 314, 318.

<sup>444</sup> *Ibid* 317.

### 2.3.1.10 Patents

The early articles in the literature about patents and Indigenous knowledge surround the inapplicability of patent laws to protect Indigenous medical knowledge.<sup>445</sup> Where patent laws do offer protection, Henrietta Marrie has pointed out that the cost of applying for and defending a patent are beyond the means and resources of most Indigenous communities. Henrietta Marrie pinpoints that fees represent insurmountable obstacles for Indigenous traditional knowledge holders in Australia.<sup>446</sup>

Since the WIPO IGC's formation, academics have explored the ability of disclosure provisions in the patent process, where new inventions make use of traditional knowledge.<sup>447</sup> Since 2010, we have seen more writing about Indigenous co-owned patents, or patents that have occurred with benefit sharing arrangements for Indigenous Australians.<sup>448</sup> Clearly there is an important economy surrounding the whole field of ICIP; and bring into question issues related to Indigenous peoples' financial ability to protect their rights, and to gain a sustained economic return on their ownership rights.

### 2.3.2 Proposals and solutions

Due to the complex issues in protecting ICIP in Australia and around the world, much of the literature focuses on the challenges and obstacles for the legal system to recognise Indigenous peoples' cultural rights. However, several commentators have

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<sup>445</sup> Michael Blakeney, 'Bioprospecting and the Protection of Traditional Medical Knowledge of Indigenous Peoples: An Australian Perspective' (1997) *European Intellectual Property Reporter* 298.

<sup>446</sup> Henrietta Marrie cited in John Voumard, 'Access to Biological Resources in Commonwealth Areas' (Commonwealth Public Inquiry, July 2000) 222.

<sup>447</sup> Thomas Henninger, 'Disclosure Requirements in Patent Law and Related Measures: A Comparative overview of existing national and regional legislation on IP and Biodiversity' (Paper presented at the Central American Dialogue on measures related to biodiversity and the IP system, Costa Rica, 17–19 November 2009) <<https://www.ictsd.org/sites/default/files/event/2009/11/henninger-biodiversity-ip-think-piece-final.pdf>>.

<sup>448</sup> Virginia Marshall, Terri Janke and Anthony Watson, 'Community Economic Development in Patenting Traditional Knowledge: A Case Study of the Mudjala TK Project in the Kimberley Region of Western Australia' (2013) 8(6) *Indigenous Law Bulletin* 17. David J Claudie et al, 'Ancient but New: Developing Locally Driven Enterprises Based on Traditional Medicines in Kuuku l'yu Northern Kaanju Homelands, Cape York, Queensland, Australia' in Peter Drahos and Suzy Frankel (eds), *Indigenous Peoples' Innovation, Intellectual Property Pathways to Development* (ANU E press, 2012) 29.

put forward recommendations for new laws and other model approaches. Some key proposals and solutions are considered below.

### 2.3.2.1 *Sui generis* laws

The options for *sui generis* laws are canvassed in much of the literature. Darrell Posey, the American anthropologist, recommended combining systems from a wide-range of international agreements to identify 'bundles of rights'<sup>449</sup>, which could in turn establish Traditional Resource Rights within a new system of national and international law.<sup>450</sup> The *Our Culture: Our Future* Report, recommends a *sui generis* legislative framework, providing a breakdown of what the law might include.<sup>451</sup> Further, Quiggin and Janke present an extensive list of the main issues likely to be encountered by Indigenous artists and the art industry, as well as outlining some of the instruments and interventions which could be considered in respect to addressing these issues.<sup>452</sup>

Graham Dutfield, Professor of International Governance at the University of Leeds, believes that policy solutions regarding the protection of TK in IP rights law, which has become a mainstream issue on the international stage, requires a common and realistic understanding about how such knowledge is produced, acquired and controlled in traditional societies. He proposes that such a solution may be sought in terms of 'positive protection' (acquisition of IP rights by TK holders provided in *sui generis* system) and 'defensive protection' (preventative legal provisions).<sup>453</sup>

Legal academics Natalie Stoianoff (UTS) and Alpana Roy (Western Sydney University) provide a comprehensive outline that supports the case for a *sui generis*

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<sup>449</sup> Darrell Posey, 'Indigenous Peoples and Traditional Resource Rights: A Basis for Equitable Relationships?' (Paper presented at a Workshop on Indigenous Peoples and Traditional Resource Rights, University of Oxford, 28 June 1995) 36.

<sup>450</sup> Ibid 2.

<sup>451</sup> Terri Janke, *Our Culture: Our Future – Report on Australian Indigenous Cultural and Intellectual Property Rights* (Report commissioned by AIATSIS and ATSIC, Michael Frankel & Company, 1998) 194–195.

<sup>452</sup> Terri Janke and Robynne Quiggin, 'Indigenous Cultural and Intellectual Property: The Main Issues for the Indigenous Arts Industry in 2006' (Discussion Paper prepared for the Aboriginal and Torres Strait Islander Arts Board, Australia Council for the Arts, 10 May 2006).

<sup>453</sup> Graham Dutfield, 'Protecting Traditional Knowledge and Folklore: A Review of Progress in Diplomacy and Policy Formation' (Issues Paper No 1, UNCTAD-ICTSD, 2003) 27.

legislation regime.<sup>454</sup> The downside of the recommendations is the clear reluctance of Australian governments to enact such legislative regimes to date. Wright, Cahill and Stoianoff have also made a case for *sui generis* legislation that has application across Australia but with a primary purpose of protecting traditional knowledge.<sup>455</sup>

### 2.3.2.2 Trade Marks, labelling and geographic indications

Trade marks are a well-established IP system, nationally and internationally. They can be used as identifiers for the source and authenticity of traditional knowledge and cultural expressions. Several articles examine the use of trade marks and their ability to adequately protect ICIP, including case studies I have written.<sup>456</sup>

In the late 1990s, the Australian Government's proposal of the use of certification trade marks represented a shift in emphasis from the protection of Indigenous creators under copyright law to the protection of consumers under trade mark law.<sup>457</sup> Leanne Wiseman, law professor, supported the use of the NIAAA national labelling system, but considered its success to depend on how well they are implemented, regulated and policed. She argued that it is unlikely that the labels alone would be able to stop the production, importing or exporting of forgeries.<sup>458</sup> Wiseman considered it necessary for additional strategies to be employed to strengthen the position of Indigenous artists. This could include an accreditation system for shops and galleries that sell Indigenous works or the formation of a peak body to regulate the industry.

According to Rimmer, in setting up the labelling system, the NIAAA failed to adequately address questions of Indigenous identity and authenticity and, as a result, the national authenticity label lacked widespread community acceptance and support,

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<sup>454</sup> Natalie Stoianoff and Alpana Roy, 'Indigenous Knowledge and Culture in Australia – The Case for Sui Generis Legislation' (2015) 41(3) *Monash University Law Review* 745.

<sup>455</sup> Evana Wright, Ann Cahill, and Natalie Stoianoff, 'Australia and Indigenous traditional knowledge' (2017) 6 *UTSLRS* 39.

<sup>456</sup> Terri Janke, *Minding Culture: Case Studies on Intellectual Property and Traditional Cultural Expressions* (WIPO, 2003).

<sup>457</sup> Matthew Rimmer, 'Australian Icons: Authenticity Marks and Identity Politics' (2004) 3 *Indigenous Law Journal* 139, 153.

<sup>458</sup> Leanne Wiseman, 'The Protection of Indigenous Art and Culture in Australia: The Labels of Authenticity' (2001) 23(1) *European Intellectual Property Preview* 14.



particularly amongst rural and regional Indigenous communities.<sup>459</sup> Further, in focusing on art and craft, the scheme had little regard for the issue of cultural appropriation in other forms of ICIP such as literature, storytelling, music and dance.<sup>460</sup>

In examining the structural reasons for the failure of the Australian system, some commentators present the case for why a globally recognised scheme might be the way forward,<sup>461</sup> considering the success of the Fairtrade label to be striking in comparison with the failure of the Australian Authenticity mark.<sup>462</sup> The Fairtrade Labelling Organizations International (FLO) was established in 1997 in Bonn, Germany. FLO launched the international Fairtrade Certification Mark in 2002, which gradually replaced the former variety of individual national marks.<sup>463</sup> Whereas the NIAAA lacked consultation with many Indigenous communities, meaning most artists never felt that the mark was theirs, the Fairtrade system had a bottom-up, collaborative and open approach.<sup>464</sup>

As Indigenous knowledges and cultural expressions are place-based and collectively owned, a system involving the use of geographical indications (GIs) has been suggested as a solution regulation and protection.<sup>465</sup> These are, in effect, brands or trade marks used to promote the value of the goods and services that are used by a collective of producers. The public law nature of GIs enables Indigenous governance

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<sup>459</sup> Matthew Rimmer, 'Australian Icons: Authenticity Marks and Identity Politics' (2004) 3 *Indigenous Law Journal* 139, 160.

<sup>460</sup> Ibid 160.

<sup>461</sup> Peter Drahos and Susy Frankel (eds), *Indigenous Peoples' Innovation: Intellectual Property Pathways to Development* (ANU E Press, 2012) 27.

<sup>462</sup> Christoph B Graber and Jessica C Lai, 'Indigenous Cultural Heritage and Fair Trade: Voluntary Certification Standards in the Light of WIPO and WTO Law and Policymaking' in Peter Drahos and Susy Frankel (eds), *Indigenous Peoples' Innovation: Intellectual Property Pathways to Development* (ANU E Press, 2012) 105.

<sup>463</sup> Fairtrade International, *About* <<https://www.fairtrade.net/>>.

<sup>464</sup> Christoph B Graber and Jessica C Lai, 'Indigenous Cultural Heritage and Fair Trade: Voluntary Certification Standards in the Light of WIPO and WTO Law and Policymaking' in Peter Drahos and Susy Frankel (eds), *Indigenous Peoples' Innovation: Intellectual Property Pathways to Development* (ANU E Press, 2012) 106.

<sup>465</sup> William van Caenegem, 'Geographical Indications and Indigenous Intellectual Property' in Matthew Rimmer (ed), *Indigenous Intellectual Property: A Handbook of Contemporary Research* (Edward Elgar, 2015) 289, 309; Michael Leslie Blakeney, 'Protection of Traditional Knowledge by Geographical Indications' (2009) 3(4) *International Journal of Intellectual Property Management* 357

and self-determination in that communities may determine for themselves what the rules will be.

Trade marks, GIs, and similar *sui generis* models, could be valuable tools for Indigenous communities to gain economic benefits from their traditional knowledge and to prevent commercial misuse by outsiders.<sup>466</sup> They suggest the value of Indigenous peoples having access to a broad toolkit of resources, mechanisms and procedures that are firmly based in their local Indigenous realities and values.

### 2.3.2.3 *Fiduciary Duty*

Writers such as Kathy Bowrey and Sally McCausland speculated the extension of legal premise in the *Bulun Bulun Case* – that the Indigenous art as a copyright owner owed a fiduciary duty to the clan when dealing with copyright. Bowrey recommends extension of fiduciary duty to non-Indigenous agents in Aboriginal art:

The notion of trust that creates fiduciary obligations in ‘traditional’ contexts should be extended to include the non-Indigenous agents that facilitate the Indigenous art trade.<sup>467</sup>

Sally McCausland, lawyer and former Arts Law solicitor, postulates that ‘any person who has acquired copyright in a work embodying traditional ritual knowledge with notice is a fiduciary under Australian law.’<sup>468</sup> This includes filmmakers who record Indigenous traditional ritual knowledge. She recommends that Indigenous communities include traditional custodian’s notice on their published material in order to put people on notice.<sup>469</sup>

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<sup>466</sup> David R Downes, ‘How Intellectual Property could be a tool to protect Traditional Knowledge’ (2000) 25 *Columbia Journal Environmental Law* 253, 268.

<sup>467</sup> Kathy Bowrey, ‘Economic Rights, Culture Claims and a Culture of Piracy in the Indigenous Art Market: What Should We Expect from the Western Legal System?’ (2009) 13(2) *Australian Indigenous Law Review* 35, 53.

<sup>468</sup> Sally McCausland, ‘Protecting Communal Interests in Indigenous Artworks after the *Bulun Bulun Case*’ (1999) *Indigenous Law Bulletin* 4–6, 5.

<sup>469</sup> *Ibid.*

#### 2.3.2.4 *Protocols*

Protocols have gained recognition as a major way of protecting Indigenous Knowledge in Australia, especially where legal mechanisms do not offer enough protection.<sup>470</sup> They are widely used to increase awareness of issues, understand consultation and consent concepts, and set minimum benchmarks for acceptable behaviour when dealing with Indigenous Knowledge and address issues such as recognition and respect of Indigenous culture and rights, self-determination, and free prior and informed consent.<sup>471</sup>

Protocols are not legally enforceable unless included or referred to in a contract. However, protocols are flexible to reflect Indigenous values and customary laws. In this way, they can provide an example of best practice when dealing with Indigenous people and knowledge.

Kathy Bowrey has discussed the curious role of protocols in the protection of traditional knowledge:

Protocols are prescriptive – in that they prescribe particular types of behaviour.

They also have the capacity to convey a mode of behaviour that institutions and individuals are presumed to follow. Protocols prescribe modes of conduct through emphasizing or normalizing particular forms of cultural engagement. Whilst this effect is not assured, over time protocols do have the capacity to influence change in ways that differ to stringent bureaucratic or legislative programs. Protocols are part and parcel of repositioning certain agendas. They are ostensibly based in choice and therefore less than law as command. It is true that

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<sup>470</sup> See for example Orr M, Kenny P, Gorey IN, Mir A, Cox E, Wilson J. 2009. Desert Knowledge Cooperative Research Centre Aboriginal Knowledge and Intellectual Property Protocol: Community Guide. Desert Knowledge Cooperative Research Centre, Alice Springs.; DKCRC Desert Knowledge CRC Protocol for Aboriginal Knowledge and Intellectual Property, <<http://www.desertknowledgecrc.com.au/resource/DKCRC-Aboriginal-Intellectual-Property-Protocol.pdf>>

<sup>471</sup> Australia Council for the Arts, Indigenous Artform Protocols; Terri Janke, Pathways & Protocols: A Filmmaker's Guide to Working with Indigenous People, Culture and Concepts (Screen Australia, 2009d)..

an individual, or even an institution either chooses to follow them or not. But this is also true of positive law...<sup>472</sup>

She concludes:

The challenge is of allowing for productive “private” negotiations that can present as alternative and distinctive, without allowing the formal legal order to presume that the indigenous case always falls outside of its categories and power.<sup>473</sup>

Nakata’s work on the cultural interface is the nexus in which I place the value of such a toolkit of ICIP resources, and in particular, the usefulness of protocols.<sup>474</sup> As discussed in Chapter 1, the concept of a cultural interface refers to the intersection between the Indigenous and western domains, which Nakata and many other Indigenous commentators believe represents an alternative way of thinking. Nakata sees this as a space where we live and learn, which conditions our lives and shapes our future as Indigenous peoples, whether remote or urban.<sup>475</sup>

I have written influential protocol documents for the Australia Council for the Arts,<sup>476</sup> Screen Australia<sup>477</sup> and Kimberley Land Council<sup>478</sup> that are practical and informative, proving their usefulness within the art, film and research sector and beyond. Drawing on the examples provided in the publications, Chapter 10 substantially expands this discussion on protocols.

### 2.3.2.5 *Contracts promoting ICIP rights*

While Indigenous-specific solutions have received attention, others have noted the usefulness of employing standard contractual mechanisms. There has been

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<sup>472</sup> Kathy Bowrey, ‘Alternative Intellectual Property? Indigenous Protocols, Copyleft and New Juridifications of Customary Practices’ (2006) 6 *Macquarie Law Journal* 65, 84.

<sup>473</sup> Ibid 95.

<sup>474</sup> Martin Nakata, ‘Indigenous Knowledge and the Cultural Interface: underlying issues at the intersection of knowledge and information systems’ (2002) 28(5-6) *IFLA Journal* 281.

<sup>475</sup> Ibid 284.

<sup>476</sup> Terri Janke and Company, *Protocols for Producing Indigenous Australian Arts* (Australia Council for the Arts, 2007).

<sup>477</sup> Terri Janke, *Pathways & Protocols: A Filmmaker’s Guide to Working with Indigenous People, Culture and Concepts* (Screen Australia, 2009d).

<sup>478</sup> Pauline Foster & Terri Janke, ‘Keeping Cultural Knowledge with Indigenous Research Protocols: A Case Study of the Kimberley Land Council’s Intellectual Property and Traditional Knowledge Policy’ (2015) 8(18) *Indigenous Law Bulletin* 17.

Terri Janke, *Intellectual Property and Traditional Knowledge Policy* (Kimberley Land Council, 2011).

discussion on the use of contracts to enforce ICIP rights in the Ngarrindjeri approach.<sup>479</sup> This involves examples of drafting clauses into funding agreements with governments to recognise ICIP and therefore deliver Indigenous self-determination.

Mary Wyburn, Sydney University, examines the Indigenous Art Code and resale royalty, stating that while codes or protocols are ethical in nature, incorporating them into contractual obligations can increase their impact, for example in grant funding contracts that ensure the recipient abides by the protocol.<sup>480</sup>

Bangarra Dance Theatre supported the call for new and specific legislation to protect ICIP rights as outlined in the *Our Culture: Our Future* Report.<sup>481</sup> Bangarra has expressed concerns that copyright law does not recognise the collective ownership of Indigenous art and culture to allow for the safeguarding of cultural expressions.<sup>482</sup> Bangarra was also concerned that the economic interests and moral rights of Indigenous communities are not comprehensively protected.<sup>483</sup> As a result, Bangarra developed a legal model to circumvent these shortfalls by engaging with other legal regimes such as contract law, equity law and fiduciary relationships.<sup>484</sup> However this still has limitations in that a contract developed through this model would not prevent a third party from misappropriating Indigenous culture.

#### 2.3.2.6 *Resource rights*

Henrietta Fourmile has analysed certain provisions in the *Convention on Biological Diversity* (CBD), focusing on the close relationship between the customary use of biological resources and cultural maintenance in Indigenous communities.<sup>485</sup> Although the CBD employs the term 'intellectual property rights', other writers have focused on

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<sup>479</sup> Steve Hemming, Daryle Rigney, Shaun Berg, 'Researching on Ngarrindjeri Ruwe/Ruwar: Methodologies for Positive Transformation' (2010) 2 *Australian Aboriginal Studies* 92.

<sup>480</sup> Mary Wyburn, 'Protecting the Works of Indigenous Artists Under Copyright Law and at its Borders' (2012) 86 *Australian Law Journal* 829, 839.

<sup>481</sup> *Ibid* 302.

<sup>482</sup> Matthew Rimmer, 'Bangarra Dance Theatre: Copyright Law and Indigenous Culture' (2000) 9(2) *Griffith Law Review* 274, 276.

<sup>483</sup> *Ibid* 279.

<sup>484</sup> *Ibid* 281.

<sup>485</sup> Henrietta Fourmile, 'Respecting our Knowledge: National Research Institutions and their Obligations to Indigenous and Local Communities under Article 8(j) and Related Provisions of the Convention on Biological Diversity' (2000) 1 *Humanities Research Journal Series* 41, 42 <[http://press-files.anu.edu.au/downloads/press/p12311/pdf/7\\_chapter2\\_hr1\\_2000.pdf](http://press-files.anu.edu.au/downloads/press/p12311/pdf/7_chapter2_hr1_2000.pdf)>.

‘resource rights’ as a position for acknowledging this relationship and advancing the recognition of benefit sharing. For example, Posey moves from the term ‘intellectual property rights’ to ‘traditional resource rights’, considering this concept a catalyst for alternative concepts of property, ownership and value that are more in line with the interests of Indigenous communities.<sup>486</sup>

This is an integrated rights concept that recognises the inextricable link between cultural and biological diversity<sup>487</sup> and the right to safeguard culture in its broadest sense.<sup>488</sup> It is defined as more of a process than a product, to more accurately reflect Indigenous peoples’ views and concerns in their struggle for self-determination.<sup>489</sup> More recently, Johanna Gibson, University of London, instead favours the term ‘community resources’ to more definitively move away from IP models and recognise that obligations to community resources continues to be of intrinsic importance to Indigenous and traditional peoples.<sup>490</sup> Clearly, such ongoing debates about concepts and terms for even discussing ICIP, demonstrate there is still considerable work to be done in laying out a clear, integrated framework or model to better assist the design of solutions and reforms in this field.

### 2.3.2.7 *Licensing*

Some writers promote licensing as a method for Indigenous people and traditional knowledge holders to control uses of their traditional knowledge and traditional cultural expression. Danielle Conway, USA legal academic, states:

licensing promotes the desired rights-based approach to the recognition and protection of article 31 Indigenous assets and resources, which in turn supports

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<sup>486</sup> Darrell Posey, ‘Indigenous Peoples and Traditional Resource Rights: A Basis for Equitable Relationships?’ (Paper presented at a Workshop on Indigenous Peoples and Traditional Resource Rights, University of Oxford, 28 June 1995) 36.

<sup>487</sup> Darrell A Posey and Graham Dutfield, *Beyond Intellectual Property: Toward Traditional Resource Rights for Indigenous Peoples and Local Communities* (International Development Research Centre, 1996) 95.

<sup>488</sup> Darrell Posey ‘Indigenous Peoples and Traditional Resource Rights: A Basis for Equitable Relationships?’ (Paper presented at a Workshop on Indigenous Peoples and Traditional Resource Rights, University of Oxford, 28 June 1995) 21.

<sup>489</sup> *Ibid* 20.

<sup>490</sup> Johanna Gibson, *Community Resources: Intellectual Property, International Trade and Protection of Traditional Knowledge* (Ashgate, 2005) 1.

the Declaration's principles of securing self-determination for Indigenous peoples and groups by providing the subject matter and the platform for indigenous-focused and indigenous-driven innovation, economic development, and entrepreneurship.<sup>491</sup>

Miriam Sahlfeld, a lawyer, examines the potential for licensing Traditional Cultural Expressions as a type of revenue generation which could arise from trading IP rights.<sup>492</sup> Sahlfeld suggests that licensing to business partners for payment of royalties can create an income for developing countries. I see this also for Indigenous people. The challenge for potential partners is finding out the licensing terms if they exist. Sahlfeld says that even if this problem can be managed by copyright collecting societies who can do the administrative work of collecting royalties for custodian communities, there will be a deeper issue of whether the royalties are distributed fairly.<sup>493</sup>

#### 2.3.2.8 *Databases and disclosure*

Due to the increasing reliance on technological processes in the contemporary era, there has been a growing movement both worldwide and in Australia for Indigenous data sovereignty or data governance. Digitisation and holding ICIP in databases are significant and complex issues for Indigenous people, many of whom increasingly argue for governance and greater control over information about and by them.

Posey and Dutfield have asserted that the control of collections, herbariums, museums and databases by the community is important to help restrict visitors' access and ensure that the main beneficiaries are local Indigenous people.<sup>494</sup>

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<sup>491</sup> Danielle Conway, 'Promoting Indigenous Innovation, Enterprise and Entrepreneurship through the licensing of Article 31 Assets and Resources' (2011) 64 *SMU Law Review* 1095.

<sup>492</sup> Miriam Sahlfeld, 'Commercialising Cultural Heritage? Criteria for a Balanced Instrumentalization of Traditional Cultural Expressions for Development in a Globalized Digital Environment,' in Christoph Beat Graber and Mira Burri-Nenova (eds), *Intellectual Property and Traditional Cultural Expression in a Digital Environment* (Edward Elgar, 2008).

<sup>493</sup> Sahlfeld quotes Sibylle Schlatter, 'Copyright Collecting Societies in Developing Countries – Possibilities and Dangers' in Christopher Heath and Anselm Kamperman Sanders (eds), *New Frontiers of Intellectual Property* (Oxford: Hart Publishing, 2005) 53.

<sup>494</sup> Darrell A Posey and Graham Dutfield, *Beyond Intellectual Property: Toward Traditional Resource Rights for Indigenous Peoples and Local Communities* (International Development Research Centre, 1996) 30.

To deal with the management of local and regional digital resources online, several database tools have been developed. The Mukurtu CMS digital archive is an online platform developed from work by Kim Christen in the Warumungu community. The project created a community archive that held stories, knowledge and cultural materials. It also allowed for the community to use their own protocols and look after their cultural heritage on their own terms.<sup>495</sup> The State Library of NSW, and the UTS have established the first Australian Mukurtu hub. Jane Anderson has been involved in the development of a TK and Traditional Cultural Expressions labelling program with Kim Christen, 'Local Contexts'.<sup>496</sup> Such technology will only increase in applicability and relevance in the digital environment of the 21st Century.

Furthermore, academics have focused on how databases can assist with prior art searches in order to defeat claims of novelty in patent applications.<sup>497</sup> The Indian Database, Traditional Knowledge Digital Library, discussed above at 2.2.7, is a world-renowned example. This electronic database provides comprehensive inventories of traditional Indian healing practices and plant medicines, intended to increase scrutiny of researchers in the developed world who register patent claims that exploit traditional Indian medical knowledge.<sup>498</sup>

Tahu Kukuthai and John Taylor have explored these issues, what data sovereignty means for indigenous peoples, and its relationship with the pursuit of self-determination in a 2016 publication that includes contributions that detail global Indigenous perspectives.<sup>499</sup> Megan Davis notes that Indigenous people are concerned that statistics could be applied for the benefit but also the detriment of Indigenous people. Davis states that UNDRIP provides a guiding framework to understanding the

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<sup>495</sup> Jane Anderson and Kim Christen, "Check a Copyright on It": Dilemmas of Digital Return and the Possibilities for Traditional Knowledge Licenses and Labels', (Spring/Fall 2013) 7(1-2) *Museum Anthropology Review* 106; Mukurtu, *Our Mission* <<http://mukurtu.org/about/>>.

<sup>496</sup> Jane E Anderson, 'Options for the Future Protection of GRTKCEs: The Traditional Knowledge Licenses and Labels Initiative' (2012) 4(1) *WIPO Journal* 66.

<sup>497</sup> Vikram Singh, Kajal Chakraborty and Lavina Vincent, 'Patent Database: Their Importance in Prior Art Documentation and Patent Search' (2016) 21 *Journal of Intellectual Property Rights* 42.

<sup>498</sup> Michael F Brown, *Who Owns Native Culture?* (Harvard University Press, 2003) 3.

<sup>499</sup> Tahu Kukutai and John Taylor (eds), *Indigenous Data Sovereignty: Toward an Agenda* (ANU Press, 2016).



issues of data sovereignty.<sup>500</sup> The UN Permanent Forum on Indigenous Issues continues to focus on data collection, calling for the need to ensure that the indigenous peoples' rights and priorities are reflected in data collection and management.<sup>501</sup>

#### 2.3.2.9 *Collections and archives – libraries and museums*

In 1995, the Australian Library and Information Association released the *Aboriginal and Torres Strait Islander Protocols for Libraries, Archives and Information Services*.<sup>502</sup> Martin Nakata, Alex Byrne, Vicky Nakata and Gabrielle Gardiner have considered these protocols to be a key outcome of Indigenous and professional concern about the state of Indigenous relationships with libraries, archives and information services.<sup>503</sup>

The Aboriginal and Torres Strait Islander Library and Research Network has library protocols which have been influential to lead libraries in protecting ICIP. The more recent work of Kirsten Thorpe, Indigenous librarian, is significant in leading to National and State Libraries Australia developing an ICIP policy.<sup>504</sup> Thorpe has also focused on the role of libraries and archives in revitalisation of languages.

#### 2.3.2.10 *Research ethics*

A wide area covered in the literature concerns the research ethics when Indigenous knowledge is recorded, captured and published for the purposes of research. The *Guidelines for Ethical Research in Australian Indigenous Studies* is the leading document that includes the 14 principles, including consultation, negotiation and free,

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<sup>500</sup> Megan Davis, 'Data and the United Nations Declaration on the Rights of Indigenous Peoples,' in Tahu Kukutai and John Taylor (eds), *Indigenous Data Sovereignty: Toward an Agenda* (ANU Press, 2016), 25, 32.

<sup>501</sup> Ibid 36.

<sup>502</sup> Alex Byrne et al, Aboriginal and Torres Strait Islander Library and Information Resource Network, *Aboriginal and Torres Strait Islander Protocols for Libraries, Archives And Information Services* (Australian Library and Information Association, 1995).

<sup>503</sup> Martin Nakata et al, 'Libraries, Indigenous Australians and a Developing Protocols Strategy for the Library and Information Sector' (2005) 36(2) *Australian Academic & Research Libraries* 185.

<sup>504</sup> Kirsten Thorpe, 'Protocols for libraries and archives in Australia: Incorporating Indigenous perspectives in the information field' (Paper presented at the International Federation of Library Associations and Institutions (IFLA) World Library and Information Congress, Singapore, 12 June 2013) <<https://www.sl.nsw.gov.au/sites/default/files/ThorpeKirsten-Indigenousprotocols.pdf>>.

prior and informed consent.<sup>505</sup> The guidelines also state that ICIP rights must be recognised, respected, protected and maintained.<sup>506</sup>

Ambelin Kwaymullina, Aboriginal law academic, has written on the limitations of Eurocentric research paradigms in examining three threshold considerations relevant to non-Indigenous scholars who seek to enter respectful research relationships with Indigenous peoples or knowledges.<sup>507</sup> These are, firstly, whether or not the research should be conducted at all; secondly, the need to interrogate positionality, privilege and their effects on research; and thirdly, the need for scholars to be deeply informed about ethical research principles related to free prior informed consent and ICIP.<sup>508</sup>

#### 2.3.2.11 *Gene Research*

Commentators have written about the dangers of genetic research in light of projects such as the Human Genome Diversity Project. Concerns centre around exploitation and the potential risks in genetic research in Indigenous health by non-Indigenous researchers. This includes issues around benefit sharing and the potential this has to reinforce old racial stereotypes that may portray Indigenous health problems as biologically foretold, rather than considering the complex interaction of genes and the environment.<sup>509</sup>

Moreover, Emma Kowal, an Australian cultural and medical anthropologist, has pointed out that mistrust is a significant but not insurmountable barrier to the acceptance of genomics by Indigenous people.<sup>510</sup> There is a need for relationships to be built that is based on self-determination and honesty. Ethical guidelines and protocols in Indigenous genetic research are crucial. As Kowal says, ‘Without clear

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<sup>505</sup> Australian Institute of Aboriginal and Torres Strait Islander Studies, *Guidelines for Ethical Research in Australian Indigenous Studies* (AIATSIS, 2012) 9.

<sup>506</sup> *Ibid* 5–6.

<sup>507</sup> Ambelin Kwaymullina, ‘Research, Ethics and Indigenous Peoples: An Australian Indigenous Perspective on Three Threshold Considerations for Respectful Engagement’ (2016) 12(4) *AlterNative: An International Journal of Indigenous Peoples* 437.

<sup>508</sup> *Ibid* 437.

<sup>509</sup> *Ibid*.

<sup>510</sup> Emma E Kowal, ‘Genetic research in Indigenous health: significant progress, substantial challenges’ (2012) 197(1) *Medical Journal of Australia* 19–20. See also Emma Kowal, Simon Easteal and Mick Gooda, ‘Indigenous Genomics’ (2016) 37(7) *Australasian Science* <<https://www.australasianscience.com.au/article/issue-september-2016/indigenous-genomics.html>>.

guidelines, declining to participate in genetic research may be the only 'safe' option for Aboriginal ethics committees and local community representatives'.<sup>511</sup> Indigenous and non-Indigenous researchers and scientists alike must be culturally competent for effective dialogue to be feasible.

### 2.3.2.12 *Bushfoods*

Henrietta Fourmile has outlined cultural concerns in light of the key issues of the emerging bushfoods industry, such as commercial exploitation of Indigenous biodiversity knowledge, the negligent granting of plant breeder's rights (PBRs) certificates in Australia and the IP system generally.<sup>512</sup> She reiterates Indigenous rights, values and the longstanding nature of traditional practices, highlighting the critical need for Indigenous peoples to secure a stake in the industry as a source of economic benefit for their communities before it is monopolised by non-Indigenous interests.<sup>513</sup>

The legal aspects of bushfood are covered in depth by Kylie Lingard, University of Wollongong, who has presented comprehensive writings on the application of plant breeders' rights, patents and other regulatory compliance necessary for bushfood commercialisation.<sup>514</sup> Furthermore, many industry-led papers, such as the one by Desert Knowledge Cooperative Research Centre, articulate bushfood protocols.<sup>515</sup>

### 2.3.3 **ICIP rights and recognition: Identified gaps and issues**

This review of the scholarly literature, national and international developments, conventions and declarations, cases and model laws, along with other political, legal and historical developments, highlights the gaps and issues in relation to ICIP.

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<sup>511</sup> Emma E Kowal, *ibid*, 20.

<sup>512</sup> Henrietta Fourmile, 'Bushtucker: Some Food for Thought' (1999) 19(4) *Artlink Magazine* 35.

<sup>513</sup> *Ibid* 36.

<sup>514</sup> Kylie Lingard, 'Legal Support for the Interests of Aboriginal and Torres Strait Islander Peoples in the Commercial Development of New Native Plant Varieties: Current Status and Future Options' (2015) 26 *Australian Intellectual Property Journal* 39.

<sup>515</sup> Desert Knowledge Cooperative Research Centre, Desert Knowledge CRC Protocol for Aboriginal Knowledge and Intellectual Property (2008) <<http://www.desertknowledgecrc.com.au/resource/DKCRC-Aboriginal-Intellectual-Property-Protocol.pdf>>.

The gaps in Australian law across IP – copyright, designs, trade marks, patents, PBRs and confidential information; consumer, native title, heritage and environment are outlined in Table A1 in Appendix A, together with the most notable related issues.

In summary, there is a lack of any specific measures that can enable Indigenous people to control their ICIP and prevent inappropriate use. Intellectual property laws like copyright, focus on material form, oral and performance based culture is not protected. IP laws render a lot of ICIP in the public domain, that is, not meeting the requirements of copyright. With patents, novelty and invention preferences scientific discovery. This does not fit with Indigenous knowledge systems which are holistic. Plant breeders' rights protect new plants or varieties of an existing plant that can demonstrate distinctness, uniformity and stability. The legacy of Indigenous horticulture through generations of nurturing a species is not recognised. Designs are about protecting industrial designs and not the iconography that comes from country. Trade marks focus on protecting brands and have some ability to enable Indigenous businesses to protect the use of cultural material such as words and logos, in trade. Confidential information only protects information that is secret whereas a lot of ICIP has been researched and published, and therefore will need to meet this requirement.

IP laws do not recognise the communal rights of Indigenous people easily. Even if IP is available for Indigenous people, the costs can be prohibitive – for example, high costs of patenting, and with copyright, expensive litigation to stop infringement.

Consumer laws do not stop fake arts that do not expressly make a false representation that the work is either made by an Indigenous person, or made in Australia. Native title rights focus on land and seas. They do not cover associated knowledge. Heritage has mostly focused on protecting tangible objects and sites from destruction in the face of development. The recent Intangible Cultural Heritage inclusions focus on protecting registered traditional intangible cultural heritage, which has not been widely publicly known. The patchwork of environment laws fails to adequately recognise access and benefit sharing opportunities for Indigenous people.

Furthermore, there is a big gap in the philosophical underpinnings of IP and ICIP, which have lead to the above gaps. In this respect, the IP and other laws need to be adapted to enable Article 31 recognition. Or, as Jane Anderson noted above, the IP law highlights the problem, the solutions lie not just in the law but the other spaces

that interlace with it. For this reason, protocols enable greater understanding by providing a framework of respecting ICIP which allows negotiation of use of ICIP.

## **2.4 Conclusion on history of ICIP developments**

In reviewing the past four decades of relevant academic writing, inquires, case law and legislative developments, significant challenges emerge with respect to adequately recognising and protecting ICIP. These challenges play out both nationally and internationally. The review indicates critical gaps in several areas of the law emerge in relation to ICIP, including the lack of recognition of Indigenous customary laws and the limited scope of protection within IP laws. As indicated previously in Table 2.2, there are compelling gaps in Australian law across copyright, design, trade marks, patents, PBRs, environment, consumer, heritage and contracts. Many other issues present themselves in relation to these gaps including lack of Indigenous awareness when it comes to registration of content; unequal access to resources; and other limitations that influence the ability for action to be taken effectively, if at all. Some of these issues connect to the way in which Indigenous communities in Australia are diverse and have various and differing needs, customary laws and obligations.

As discussed in the scholarship, there are also systemic differences in understanding and valuing Indigenous knowledge and ICIP which underlie critical gaps and related issues. Differing cultural values systems create epistemological disjuncture wherein non-Indigenous values, as the underpinnings of Australian law, fail to recognise and incorporate Indigenous views and values.

The publications presented in this thesis examine particular domains of ICIP against the backdrop of this historical development of, and gaps in, ICIP protection across Australia and internationally. In particular, the following chapters highlight the challenges experienced by Indigenous Australians owing to the fact that Australian laws and standard continue to lag behind international best practice, and so remain out of line with cultural principles that involve the rights Indigenous people seek. The various examples provide an in-depth insight into intersections of ICIP and the Australian law, and this thesis extends this discussion by focusing on self-determining models that Indigenous people can use to establish their protection.

This thesis draws on the legal analysis literature to find the gaps in the law. There is a wealth of papers that discuss new laws, that are useful to provide the thinking behind rights recognition. My analysis, however, builds a framework based on protocols to bring a collaborative approach which can be applied without legal reform. There has been over 40 years of calling for rights and legislative changes. My approach is to work from the good will that exists in those who want to do the right thing. Use protocols and contracts to build a framework that can be used to show that meaningful negotiation and collaboration can take place. The protocols will form a model that can be used to inform future legislation.

## Chapter 3: The recognition of Indigenous Cultural Expressions in the Australian IP legal framework

**Paper 1:** Terri Janke, 'Indigenous cultural expression and intellectual property' in Elliott Johnston, Martin Hinton and Daryle Rigney (eds), *Indigenous Australians and the Law* (Routledge-Cavendish, 2<sup>nd</sup> ed, 2008) 61–83.

### 3.1 Context

This chapter was published in April 2008 for the second edition of the academic publication *Indigenous Australians and the Law*. Since the first edition in 1997, there have been many changes in Indigenous legal issues. I was pleased to contribute in order to promote the issues of ICIP and protecting traditional cultural expression and knowledge.

This article has been chosen as it provides an introductory coverage of what the issues are and the need for protection of ICIP. A particularly important contribution of the article is to analyse IP, a commercial law, and its application to Indigenous cultural expression. It highlights how the economic objectives of IP laws face challenges in covering cultural rights related to communally owned heritage.

This publication was produced for the teaching of Indigenous legal studies at law schools. The paper summarises the key findings of my report, *Our Culture: Our Future* and provides a commentary on the main shortfalls in the intellectual property laws including copyright, designs, patents and trade marks.

Another important contribution is the promotion of the understanding of ICIP in the legal profession and amongst law students. Before this article, there was a marked absence of references to the ICIP in legal texts. I also published a chapter in another

legal teaching resource, *Indigenous Legal Issues*, in 2009.<sup>516</sup> Together, these publications articulated the need for developing a space in legal discourse for the protection of Indigenous cultural heritage. In this respect, this publication consolidated the legal and policy reform work I had started with *Our Culture: Our Future* in 1998 and brought it into the legal classrooms where it might incubate change despite the fact that the recommendation in the latter report for a *sui generis* law was not supported by the Australian Government of the day.

It should be noted that since this paper was published, the *Trade Practices Act 1974* (Cth) has been replaced by the *Competition and Consumer Act 2010* (Cth). Then in February 2017, the Competition and Consumer Amendment (Exploitation of Indigenous Culture) Bill 2017 (Cth) was introduced. It seeks to prohibit the sale of fake Indigenous art and souvenirs by non-Indigenous Australians and foreigners unless it is supplied by, or in arrangement with, an Indigenous community or artist.<sup>517</sup>

*ACCC v Birubi Art Pty Ltd* is also an important 2018 case that can be considered in relation to the points raised in this paper. In this case, Justice Perry found that the collection of fake boomerangs, didgeridoos and message stones sold by the wholesaler Birubi Art infringed the misleading and deceptive provisions of the Australian Consumer Law. The ACCC focused on the impact the products in question have upon purchaser and prospective purchasers, rather than the retailers who purchased these products from Birubi for resale.<sup>518</sup> The court determined that Birubi engaged in conduct that was misleading or deceptive (or likely to be), including misleading the public as to the nature, manufacturing process or characteristics of the products.<sup>519</sup> This includes false or misleading representations that the products were of a particular style history or origin.

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<sup>516</sup> Terri Janke, 'Indigenous Intellectual Property and Indigenous Cultural Heritage,' in Heather Mcrae and Garth Nettheim (eds), *Indigenous Legal Issues: Commentary and materials* (Thomson Reuters (Professional) Australia, 4<sup>th</sup> ed, 2009c) 391.

<sup>517</sup> Competition and Consumer Amendment (Exploitation of Indigenous Culture) Bill 2017 (Cth), proposed s 50A(1).

<sup>518</sup> *ACCC v Birubi Art Pty Ltd* [2018] FCA 1595, 1.1(3).

<sup>519</sup> *Ibid* 1.1(4).



The Birubi case, however, does not capture products that are not making positive claims of 'handmade' or 'Australian' and for this reason it is expected that Indigenous fake art will continue. There is a need for a new law which can deal with this issue. The law could require the ACCC and the Indigenous Art Code to work together towards combating fake arts.

## **3.2 Indigenous cultural expression and intellectual property**

### **3.2.1 Introduction**

Indigenous Australians<sup>520</sup> express their cultural identity through many ways including songs, stories, dance and art. This intangible cultural heritage is interconnected with land, seas, places and objects. Despite this, the debate regarding the protection of Indigenous cultural heritage has focused on the land, seas, places and objects. The non-Indigenous laws relating to Native Title, land rights and cultural heritage have developed to protect tangible culture. However, for Indigenous people, cultural heritage is holistic in that the tangible is interconnected with the intangible. Consequently, in recent years, Indigenous people have called for recognition of their rights to their intangible cultural heritage. They seek protection of their expressions of culture and traditional knowledge from exploitation from outsiders.

This chapter will examine intellectual property laws and their impact on Indigenous cultural expression and traditional knowledge.

### **3.2.2 Indigenous cultural expression and traditional knowledge**

In 1999, *Our Culture: Our Future: A Report on Australian Indigenous Cultural and Intellectual Property Rights*<sup>521</sup> examined the scope of 'Indigenous cultural and

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<sup>520</sup> 'Indigenous' refers to the Aboriginal and Torres Strait Islander people, the original inhabitants of Australia. An Aboriginal or Torres Strait Islander is a person of Aboriginal or Torres Strait Islander descent who identifies as an Aboriginal or Torres Strait Islander and is accepted as such by the community in which he or she lives

<sup>521</sup> Terri Janke, *Our Culture: Our Future – Report on Australian Indigenous Cultural and Intellectual Property Rights* (Report commissioned by AIATSIS and ATSIC, Michael Frankel & Company, 1998) 43–47.

intellectual property'. In that report, 'Indigenous cultural and intellectual property' referred to Indigenous people's rights to their heritage. Heritage comprises both tangible and intangible aspects of the whole body of cultural practices, resources and knowledge systems that are developed, nurtured and refined by Indigenous people, and passed on as a living expression of their cultural identity. The heritage of Indigenous people is a living and evolving heritage, and includes items that may be created in the future. The notion of heritage for Indigenous Australians includes:

- literary, performance and artistic works (including music, dance, songs, ceremonies, symbols and designs, narratives and poetry);
- documentation of Indigenous people's heritage in all forms of media (including scientific and ethnographic research reports, papers and books, films and sound recordings);
- languages;
- scientific, agricultural, technical and ecological knowledge (including cultigens<sup>522</sup>, medicines and the sustainable use of flora and fauna);
- spiritual knowledge;
- movable cultural property (including burial artefacts);
- immovable cultural property (including Indigenous sites of significance, sacred sites and burials);
- Indigenous ancestral remains;
- cultural environment resources (including minerals and species).

The 2006 amended version of the draft Declaration of World Indigenous People produced by the World Intellectual Property Organization stated:

1. Indigenous peoples have the right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions, as well as the manifestations of their sciences, technologies and cultures, including human and genetic resources, seeds, medicines, knowledge of the properties

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<sup>522</sup> Cultigens are plant species that have been artificially cultivated for so long that they are unable to replicate without human intervention.

of fauna and flora, oral traditions, literatures, designs, sports and traditional games and visual and performing arts. They also have the right to maintain, control, protect and develop their intellectual property over such cultural heritage, traditional knowledge, and traditional cultural expressions.

2. In conjunction with Indigenous peoples, States shall take effective measures to recognise and protect the exercise of these rights.<sup>523</sup>

This chapter will focus on:

- Indigenous cultural expression – including songs, stories, ceremonies, rituals, dance and art including rock art, face and body painting, sand sculptures, and bark paintings;
- traditional knowledge – including knowledge of plants and animals, biodiversity knowledge, medicinal knowledge, environmental management knowledge, cultural and spiritual knowledge and practices, use of biological resources, foods, architecture and agriculture.

### **3.2.3 The nature of Indigenous cultural expression**

There are many different Indigenous Australian groups. Each particular group has ownership of rights over its particular cultural heritage. There may also be overlap between groups, and groups may share certain cultural stories and traditions. Further, many generations contribute to the creation of Indigenous cultural expression and traditional knowledge. In this respect, it is collectively owned, socially based and continuously evolving.

Cultural laws that govern rights to authorise use of Indigenous cultural and intellectual property are common to all Indigenous groups. These laws are based on responsibility for cultural heritage, to ensure that it is maintained and protected, and passed on to future generations. To this end, there is often an individual or group who is the custodian or caretaker of a particular item of heritage, although in some groups, there

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<sup>523</sup> United Nations General Assembly, *Draft Declaration on the Rights of Indigenous Peoples*, UN Doc A/HRC/11/3, Human Rights Council (23 June 2006).

may not be due to the disruption of cultural practices since colonisation. The traditional custodians are empowered to protect a particular item only to the extent that their actions harmonise with the best interests of the community as a whole. The role of the custodian was noted in the case of *Milpurrurru v Indofurn*,<sup>524</sup> in which the Court observed that the artist Banduk Marika had the authority to depict a traditional, pre-existing design in her artwork by virtue of her birthright. While she held this right, she holds the knowledge embodied in the work on trust for the rest of the clan.

The nature of this custodian relationship was explored more recently in the case of *Bulun Bulun & Anor v R & T Textiles Pty Ltd*.<sup>525</sup> In that case, Mr Bulun Bulun was the artist and copyright owner, but in certain paintings, which incorporated collectively-owned designs of the Ganalbingu people, he was also a cultural custodian. Mr Bulun Bulun's use of ritual knowledge to produce the artworks was given to him under Ganalbingu customary law, based on the trust and confidence that those giving permission had in the artist. The Court found that the relationship between Mr Bulun Bulun and the Ganalbingu people gave rise to a fiduciary relationship between them. This relationship imposed the obligation on Mr Bulun Bulun not to:

...exploit the artistic work in a way that is contrary to the law and customs of the Ganalbingu people, and, in the event of infringement by a third party, to take reasonable and appropriate action to restrain and remedy infringement of the copyright in the artistic work.<sup>526</sup>

Similarly, the collective, or persons on behalf of the collective, must consent to use of Indigenous cultural and intellectual property. Such consent is given through specific decision-making procedures, which can vary from group to group and may depend on the nature of the particular cultural item. Some communities may have formal procedures, which make use of organisations such as land councils or community councils. In others, decision-making processes will be less formal and may require a person to meet with relevant people, to clear consent.

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<sup>524</sup> *Milpurrurru v Indofurn* (1995) 30 IPR 209.

<sup>525</sup> *Bulun Bulun v R & T Textiles* (1998) 41 IPR 513.

<sup>526</sup> *Ibid* 531.

In the *Bulun Bulun* case, evidence given by Djardie Ashley discussed how the Ganabingu laws deal with consent procedures. Mr Ashley noted that, in some circumstances, such as the reproduction of a painting in an art book, the artist might not need to consult with the group widely. In other circumstances, such as its mass reproduction as merchandise, Mr Bulun Bulun may be required to consult widely. Mr Ashley further noted that Mr Bulun Bulun ‘could not act alone to permit the reproduction of “At the waterhole” in the manner that it was done’.<sup>527</sup>

Non-Indigenous laws and customary law deal with the reproduction and use of traditional knowledge and material in different ways. Indigenous communities need to consider customary obligations regarding ownership of intellectual property, dissemination, reproduction, consent and attribution. Knowledge of intellectual property laws will enable Indigenous people to consider how non-Indigenous law will protect their cultural material and, in this way, make informed decisions about providing wide access to the material.

### **3.2.4 What rights do Indigenous people want to their cultures?**

*Our Culture: Our Future* reported that there are fundamental rights that Indigenous people need in order to protect and maintain their cultures, including the right to own and control Indigenous cultural and intellectual property.<sup>528</sup> Based on the submissions received, the rights fell into the following categories.

#### **3.2.4.1 Cultural custodianship and self-determination**

The right to own and control cultural heritage and to define what constitutes heritage is a fundamental right for Indigenous people. So too is the right to ensure that any means of protecting Indigenous heritage is based on the principle of self-determination. In this way, Indigenous people can maintain and develop their own cultures and knowledge systems, as well as their own forms of social organisation.

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<sup>527</sup> Ibid 520. ‘Traditional owners’ refers to the group, clan, community of people in whom the custody and protection of cultural heritage is entrusted in accordance with the customary law and practices.

<sup>528</sup> T. Janke, *Our Culture: Our Future – Report on Australian Indigenous Cultural and Intellectual Property Rights* (Report commissioned by AIATSIS and ATSIC, Michael Frankel and Company, 1999) 47.

To continue to practice their cultures, Indigenous people must be able to preserve, care for, protect, manage and control Indigenous cultural objects, Indigenous ancestral remains and Indigenous cultural resources such as food resources, ochres, stones, plants and animals – and Indigenous cultural expressions such as dances, stories and designs.

Indigenous people seek the right to protect their cultural expression and knowledge of sites from exploitation. Maintaining access to Indigenous sites of significance, sacred sites and burials sites for cultural and ceremonial purposes is important for Indigenous people. The unauthorised and inappropriate use of sites and land, and the dissemination of secret information about them, is a concern for them. Sites of cultural importance, and cultural knowledge and stories associated with these sites, are consistently used for tourism purposes (e.g. rock paintings that are photographed for tourism and advertising purposes). Indigenous people also feel that sites uncovered in the interests of tourism have, in some instances, lead to the physical destruction of sites and the theft of associated objects.<sup>529</sup>

Indigenous people require the rights to control management of Indigenous land and sea areas, and to protect Indigenous sites, including sacred sites.

#### 3.2.4.2 *Interpretation and integrity*

Keeping the cultural integrity of heritage is also important to Indigenous people who wish to be recognised as the primary guardians and interpreters of their cultures, arts and sciences, whether created in the past, or developed by them in the future. The right to prevent derogatory treatment of Indigenous cultural material, as well as to prevent distortion and mutilation, is critical.

The rise in demand for Indigenous visual arts is obvious and has led to the inappropriate use of art-based themes, icons and images. Indigenous peoples are concerned that many non-Indigenous individuals and corporations are copying Indigenous designs, motifs, symbols and artworks for commercial gain. For example, Indigenous art has been copied onto carpets, dresses, fabric and T-shirts without the

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<sup>529</sup> Ibid 30.

knowledge or permission of the Indigenous artists, or the artist's community. In many instances, the designs are altered. Indigenous Australians complain that such use is inappropriate, derogatory and culturally offensive. The moral rights provisions of the *Copyright Act 1968* (Cth) provide rights to artists to protect their works against derogatory treatment – but the work must be a protected copyright work and an individual artist must assert these rights.

#### 3.2.4.3 *Attribution and recognition of collective ownership*

Indigenous peoples require full and proper attribution. That is the right to apply for protection of Indigenous cultural and intellectual property rights, which, where collectively owned, should be granted in the name of the relevant Indigenous community. Intellectual property laws tend to focus on individual ownership.

#### 3.2.4.4 *Consent and consultation*

Indigenous people must have the right to authorise or refuse to authorise the commercial use of Indigenous cultural and intellectual property according to Indigenous customary law. For example, it should not just be assumed that access or use of material is granted. A story or ceremony may be closed to wider access and only allowed to be seen by the initiated. The right to maintain the secrecy of Indigenous knowledge and other cultural practices is also important.

Furthermore, Indigenous people seek the right of prior informed consent for access, use and application of Indigenous cultural and intellectual property, including Indigenous cultural knowledge and cultural environment resources.

Indigenous people's traditional stories are often reproduced in books, theatre and film without their prior informed consent. Indigenous people have been concerned when non-Indigenous authors have written creation or 'traditional stories' – ones that have never been published but have been orally transmitted – and then that person claims copyright in the version published without proper recognition of the source of the story.

Consequently, Indigenous people should also be in control of where their cultural expression and traditional knowledge is made publicly available, recorded, reproduced and disseminated. The recording and transfixing of cultural expression and knowledge removes control over this material from Indigenous communities. For this reason, Indigenous people need to be able to control the recording of cultural customs and

expressions. The language, the particular cultural expression and traditional knowledge is essential to cultural identity, and the teaching of culture.

#### 3.2.4.5 *Sharing of benefits*

The primary interest of Indigenous people in maintaining and preserving their culture has always been established in intrinsic spiritual considerations that are linked to the fabric of Indigenous society. However, in recent years, there has been economic focus on cultural expression and traditional knowledge, which also require consideration. The Aboriginal art market, for example, has considerable economic value. The worth of traditional knowledge if applied to patents system can amount to the billions. This has created incentive for increased production and dissemination of Indigenous cultural expression and Indigenous knowledge. Hence, Indigenous people require the right to benefit commercially from the authorised use of Indigenous cultural and intellectual property, including the right to negotiate terms of such usage.

### 3.2.5 **Intellectual property laws in Australia**

'Intellectual property' is the term used to refer to the 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.

Intellectual property rights are designed to inspire creative innovation 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>530</sup> intellectual property rights are enforced internationally in countries that are signatories to such treaties.

Australian intellectual property laws provide some protection for Indigenous cultural expression where Indigenous people can meet the criteria for protection. This has usually been for individual Indigenous artists and for their economic rights.

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<sup>530</sup> ATS 1978 No 5, Paris, 24 July 1971 (came into force 1 March 1978).



The Australian Constitution gives the Commonwealth power to make special laws regulating 'copyright, patents of inventions and designs, and trade marks'.<sup>531</sup> There are also common law-based actions that relate to breach of confidential information, passing off and trade practices that loosely fall into the term 'intellectual property.'

### 3.2.6 Copyright

Copyright is a bundle of rights granted by statute to creators of artistic and cultural material. *The Copyright Act 1968* (Cth) protects literary, dramatic, artistic and musical works from unauthorised use and dissemination.<sup>532</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>533</sup> cinematograph films, television and sound broadcasts, and published editions.

Copyright law has been used by Indigenous artists to take action against infringers of their works, included works that incorporate pre-existing communally owned clan designs. However, copyright is limited in the protection it affords Indigenous cultural expression and traditional knowledge.

#### 3.2.6.1 Requirements of copyright

Copyright protection does not require registration: it exists in a work or film as soon as it is made. However, for copyright to protect a work, it must meet the following requirements.

##### 3.2.6.1.1 Originality

For copyright to subsist in a work, the work must be original.<sup>534</sup> This means that it cannot be copied from another work. The creator must put into the work the necessary degree of labour, skill and judgment to produce the work, giving it some quality or character that the raw material did not possess. As a continuing expression of culture,

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<sup>531</sup> Australian Constitution s 51(xviii).

<sup>532</sup> While the *Copyright Act 1968* (Cth) does not define these terms, s 10 provides guidance on what these categories include.

<sup>533</sup> *Copyright Act 1968* (Cth) s 10 defines a sound recording as 'the aggregate of the sounds embodied in a record'.

<sup>534</sup> *Copyright Act 1968* (Cth) s 32.

many Indigenous people draw from the wealth of their cultural heritage by painting pre-existing clan designs, dancing ceremonies and telling stories that have been handed down from their ancestors. It is this nature of Indigenous cultural expression that has led to speculation of whether an artist who reproduces a traditional or pre-existing design or story is producing original work. This is because the cultural requirement of 'painting' iconic themes in accordance with traditional designs limits the scope for interpretation and individuality.<sup>535</sup> While the issue depends on the particular facts at hand, von Doussa J in *Milpurrurru 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>536</sup>

#### 3.2.6.1.2 *Material form*

Copyright law provides protection for the form of expression of ideas rather than the ideas themselves.<sup>537</sup> Indigenous cultural expression such as songs, dances and stories, must be written down or recorded in some permanent tangible form. Non-permanent forms of cultural expression such as oral stories, songs and dances that are ceremonially performed and never before recorded are not protected because they are not produced in a permanent tangible form.

Many Indigenous forms of cultural expression are oral. Traditional songs and stories told and passed on through the generations were not recorded in material form. Some forms of visual art are transient, such as body painting. These do not meet the material form requirement of copyright and are therefore not protected.

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

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<sup>535</sup> See Department of Home Affairs and the Environment, *Report of the Working Party on the Protection of Aboriginal Folklore* (Department of Home Affairs and Environment, 4 December 1981) para 1403; P. Banki, 'Protection of Expressions of Folklore' (Paper presented at *WIPO Australian Copyright Program for Asia and the Pacific*, Canberra, 2–13 November 1987) 222.

<sup>536</sup> *Milpurrurru v Indofurn* (1995) 30 IPR 209, 216.

<sup>537</sup> *Walter v Lane* [1900] AC 539.

traditional owner writes down an oral story, that individual is recognised as the copyright owner.

### 3.2.6.1.3 *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>538</sup> 'Published' means supplied or made available to the public.<sup>539</sup>

### 3.2.6.2 *The right to exploit copyright*

The copyright owner, who in the first instance will be the author, has the exclusive right to exploit the copyright in the work or subject matter. This includes the right to reproduce and authorise reproduction of the work or subject matter, and to deal with the copyright in a number of ways, depending on the nature of the work or subject matter, such as performing the work in public,<sup>540</sup> communicating the work to the public<sup>541</sup> and making an adaptation of the work.<sup>542</sup>

### 3.2.6.3 *Duration of copyright*

Copyright protects works and subject matter for only a limited period. For example, protection lasts generally 70 years after the death of the artist for works. After the period elapses, the work, film or sound recording can be used without the need for consent, or payment of royalties.<sup>543</sup>

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<sup>538</sup> *Copyright Act 1968* (Cth) s 32(4).

<sup>539</sup> *Ibid* s 29(1)(a).

<sup>540</sup> *Ibid* s 31(1)(a)(iii). A public performance refers to any form of presentation to the public, whether visual and aural, or merely 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. The right to make a public performance of material protected by copyright is a separate right to the right to communicate to the public.

<sup>541</sup> *Ibid* 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.

<sup>542</sup> *Ibid* s 31(1)(a)(v).

<sup>543</sup> In accordance with the US Free Trade Agreement, Australian copyright protection was extended from 50 years to 70 years to be consistent with US Copyright laws. The 70 years' duration period applies to non-government produced works and materials after 1 January 2005, and works and material still in copyright on 1 January 2005. The duration of copyright protection for published literary, dramatic, musical and artistic works (not photographs) is 70 years after the author's death: *Copyright Act 1968* (Cth) s 33(2). Further, copyright in a literary, dramatic, musical or artistic work continues to

This is problematic for Indigenous people. The system does not take into account Indigenous artistic and cultural expression, which is created as part of an ongoing process of passing cultural knowledge to future generations. Indigenous rights to cultural works are in perpetuity and therefore cultural consent to use is always necessary, even if a work is no longer copyright protected.

#### 3.2.6.4 *Enforcement, agreements and payment for authorised use*

Copyright is infringed whenever a work or subject matter is reproduced, published, broadcast, sold, imported (or any other exploitation rights are exercised) without the permission of the copyright owner. Issues for Indigenous people are that it requires Indigenous people to know and take action against infringements. Many worthy cases will go unchecked because Indigenous people cannot take action to enforce their rights because they cannot afford the legal fees.

#### 3.2.6.5 *Moral rights*

Moral rights are recognised at law by virtue of the *Copyright Act 1968*. Moral rights are:

- the right of attribution of authorship;
- the right not to have authorship falsely attributed; and
- the right of integrity of authorship.<sup>544</sup>

Only individuals have moral rights.<sup>545</sup> Companies do not have moral rights. Further, moral rights cannot generally be asserted collectively by an Indigenous clan group or

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subsist until the expiration 50 years after the end of the calendar year in which the author dies. For photographs, the duration of protection is 70 years from the death of the creator, but 70 years from publication if published anonymously or under a pseudonym: *Copyright Act 1968* (Cth) ss 33(2), 34(1). Unpublished, literary, musical and dramatic works, not previously broadcast or performed in public or records offered for public sale, such as works published, performed or broadcast after the death of the artist – 70 years from the first date of publication, performance or broadcast (whichever occurs first): *Copyright Act 1968* (Cth) s 33(2). Importantly, protection is indefinite if not published. With subject matter other than works, films (after 1 May 1968), and sound recordings, copyright is protected for 70 years from the date of production. It is important to note that the copyright duration rules for government copyright did not change after 1 January 2005. Material under the direction and control of the Government is protected by copyright, generally, for 50 years from the date of publication. See the Australian Copyright Council's 'copyright duration' sheet G23 <[www.copyright.org.au](http://www.copyright.org.au)>.

<sup>544</sup> Copyright Act 1968 (Cth) s 189.

<sup>545</sup> Ibid s 190.

community. The rights apply to creators of artistic, literary, dramatic or musical works, and directors, producers and screenwriters of films.

Unlike copyright, moral rights are not economic rights, although monetary damages may be granted for infringement.<sup>546</sup> Moral rights cannot be assigned or sold on. Moral rights are in addition to other rights under copyright.<sup>547</sup> Therefore, they remain with the author where the copyright does not belong to the author. For instance, employees hold moral rights in created work, even if copyright vests with the employer.

The author of a work has a right of attribution of authorship in respect of his or her work.<sup>548</sup> The author is entitled to be attributed where his or her work has been used in certain way. For instance, the author of an artistic work is entitled to be attributed where his or her work is reproduced on a website or transmitted by digital means.<sup>549</sup> Similarly, the author of a film is entitled to be attributed for transmission of his or her work.<sup>550</sup>

This right is seen as important to Indigenous people who claim their artwork, images and knowledge as being linked to their belonging to land.

The right of integrity provides that an artist may bring an action if their work is subjected to derogatory treatment. 'Derogatory treatment' refers to anything that results in the material distortion of, mutilation of, or material alteration to, the work<sup>551</sup> or film<sup>552</sup> that is 'prejudicial to the author's honour or reputation' or '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>553</sup> It also includes doing anything else in relation to the work<sup>554</sup> or film, which is prejudicial to the author's reputation.

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<sup>546</sup> Ibid s 195AZA.

<sup>547</sup> Ibid s 192.

<sup>548</sup> Ibid s 193.

<sup>549</sup> Ibid s 194(2).

<sup>550</sup> Ibid s 194.

<sup>551</sup> Ibid ss 195AJ(a) and 195AK(a).

<sup>552</sup> Ibid s 195AL.

<sup>553</sup> Ibid s 195AK(b).

<sup>554</sup> Ibid ss 195AJ(c), 195AK(c) and 195AL(b).

The right of integrity is not infringed if it is subjected to derogatory treatment that is proven to be reasonable in all the circumstances,<sup>555</sup> or if the author consented to the treatment.<sup>556</sup> Indigenous creators should be cautious when considering commercial agreements and contracts of employment that seek broad consent to their moral rights. However, even if consent were not given, the fact of employment<sup>557</sup> and industry practice may be taken into account when deciding whether the derogatory treatment was reasonable in all the circumstances.<sup>558</sup>

The right of integrity is important for Indigenous artists. 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. Greater access to work, once it is in digital form, increases the ways in which artistic works and films can be distorted, mutilated and altered. The right of integrity, including the right to bring an action for infringement, is an important development in protecting the integrity of Indigenous work.

One of the deficiencies in the moral rights provisions is that, like copyright protection, the protection is not provided in perpetuity. The right of integrity in a film lasts until the death of the author.<sup>559</sup> The right of integrity in works other than film continues for the duration of the copyright: that is, 70 years after the death of the author.<sup>560</sup> For works of important cultural significance, Indigenous peoples assert cultural rights, including attribution and reproduction of cultural material in perpetuity.

A second deficiency with the current moral right regime is that it applies only to individuals and not to communities. The Commonwealth has drafted proposed amendments of the *Copyright Act 1968* (Cth) that acknowledge Indigenous communal moral rights (ICMR) as existing alongside individual moral rights. It is proposed that

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<sup>555</sup> Ibid 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 (3) for films.

<sup>556</sup> Ibid s 195AW (film or work included in a film) and s 195AWA (work that is not a film or included in a film).

<sup>557</sup> Ibid s 195AS(2)(e), (f), (g) for literary, dramatic, musical or artistic works and s195AS(3)(f), (g), (h) for films.

<sup>558</sup> Ibid s 195AS.

<sup>559</sup> Ibid s 195AM(1).

<sup>560</sup> Ibid s 195AM(2).

the ICMRs will be exercisable independently of the individual author's moral rights. ICMRs will exist in works and films drawn from a traditional base,<sup>561</sup> if before the first dealing of the work or film, there is a voluntary agreement between the creator of the work or film, and the Indigenous community.<sup>562</sup> There must also be acknowledgement of the Indigenous community's association with the work.<sup>563</sup> Further, all interest holders in the work (i.e. copyright owners) need to have consented to the ICMRs existing in the work or film.

#### 3.2.6.6 *ICMRs would exist for the term of the copyright period*

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.<sup>564</sup>

The Bill is not yet law; however, the government intends to introduce it for consideration shortly.

#### 3.2.7 **Designs**

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>565</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:

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<sup>561</sup> Drawn from a traditional base means that the work or film must be drawn from the 'particular body of traditions, observances, customs and beliefs held in common by the Indigenous community'.

<sup>562</sup> A community is defined loosely and can include an individual, family, clan or community group.

<sup>563</sup> Draft Copyright Amendment (Indigenous Communal Moral Rights) Bill 2003, cll 195AZZL and 195AZZM.

<sup>564</sup> Terri Janke, 'The Moral of the Story: Indigenous Communal Moral Rights' (2005) 3 *Bulletin* 1, 2, 7, 8.

<sup>565</sup> *Designs Act 1906* (Cth) s 4(1).

'Design' in relation to a product, means the overall appearance of the product resulting from one or more visual features of the product.<sup>566</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>567</sup> There is a commercial focus. Indigenous designs such as *Wandjinas* and other clan insignia may not be commercially applied to a product. They are not registrable, therefore, as a design under the *Designs Act 2003* (Cth).

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 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 Australian Law Reform Commission (ALRC) looked at the issue of protecting Indigenous designs as part of the overall review of the Act. The Issues Paper, *Designs*, noted that existing copyright and designs law is not adequately equipped to deal with the ownership rights recognised under Aboriginal customary law.<sup>568</sup> The ALRC Review considered that the issue should be dealt with in a broad-based approach rather than including them as part of the Designs law review.<sup>569</sup> There is no special protection for Indigenous designs 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.

To apply for registration of a design, a standard application form is completed and submitted to Designs Office of IP Australia. There are costs and fees payable to IP Australia associated with the registration of a design and the examination process. To

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<sup>566</sup> Designs Act 2003 (Cth) s 5.

<sup>567</sup> Ibid s 6.

<sup>568</sup> Australian Law Reform Commission, 'Designs' (Issues Paper 11, 1993) 58.

<sup>569</sup> Australian Law Reform Commission, 'Designs' (Final Report No 74, 1995)



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.

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 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, such as, for example, jewellery or toys.

### **3.2.8 Patents**

The *Patents Act 1990* (Cth) grants patent rights to scientific inventions and new methods of manufacture. 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 with the Patents Office of IP Australia, for the grant of a patent.

There are two types of patent in Australia:

- a standard patent, which provides long-term protection and control over an invention for up to 20 years; and
- an innovation patent, which is a relatively fast, inexpensive protection option, lasting a maximum of eight years.<sup>570</sup>

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<sup>570</sup> 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.

To be patentable, an invention must be a manner of manufacture.<sup>571</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>572</sup> Indigenous people cannot claim intellectual property rights in genetic resources just because they are found on land owned or previously owned by Indigenous people. For patent protection, or to prevent others from asserting a patent over this material, the Indigenous people would have to 'discover' the resources and put them to a new use with commercial significance.<sup>573</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.

An invention must be novel and involve an inventive step.<sup>574</sup> An invention is generally considered novel and involving an inventive step when it is compared with the prior art base.<sup>575</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>576</sup> The *Patents Act 1990* (Cth) also allows any person, with information that may show a patent should not have

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<sup>571</sup> Within the meaning of the Statute of Monopolies 1623, s 6 (England).

<sup>572</sup> *National Research Development Corporation v Commissioner of Patents* (1990) 102 CLR 252.

<sup>573</sup> S Gray, 'Vampires Round the Campfire' (1997) 22(2) *Alternative Law Journal* 61.

<sup>574</sup> *Patents Act 1990* (Cth) s 18(1).

<sup>575</sup> *Ibid* s 7(1).

<sup>576</sup> Australian Government, IP Australia.

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.

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>577</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>578</sup> This process requires great technical knowledge and resources that Indigenous communities do not have readily available. The cost of patenting an invention in Australia reach into the thousands and these expensive set-up costs and the high costs of enforcing patent rights often preclude 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 such as by ethnobotanists and ethnopharmacologists publishing accounts of the uses of plants by Indigenous people.<sup>579</sup> This is because, once published, such information becomes public knowledge and therefore part of the prior art base. By publishing information

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<sup>577</sup> Gray [1997 *ibid.*] 62.

<sup>578</sup> P A Power, 'Interaction Between Biotechnology and the Patent System' (1992) 3 *Australian Intellectual Property Journal* 214, 217.

<sup>579</sup> *Ibid.*

themselves about the traditional uses of plants in leaflets and books, Indigenous people also risk being unable to patent their traditional medicinal knowledge.<sup>580</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 such as the Convention of Biological Diversity 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.

### **3.2.9 Trade Marks Act 1995 (Cth)**

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>581</sup> A sign includes 'any letter, word, name, signature, numeral, device, brand, heading, label, ticket, aspect of packaging, shape, colour, sound or scent'.<sup>582</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>583</sup> They can, therefore, be licensed, assigned and transmitted.

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

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<sup>580</sup> While communities may own copyright in such publications, their rights to the information contained in the book does not amount to patent rights.

<sup>581</sup> *Trade Marks Act 1995* (Cth) s 17.

<sup>582</sup> *Ibid* s 6.

<sup>583</sup> *Ibid* s 21(1).

specified classes of goods and services.<sup>584</sup> Applicants must apply and pay 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 prohibit many Indigenous groups from using the trade mark laws to protect Indigenous cultural material.

The person who claims to be the owner of the mark and who is using, or intends to use, the trade mark may apply to register the mark with the Trade Marks Office at IP Australia.<sup>585</sup> This includes any intention to license the 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 that 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 registered as trade marks Indigenous words without prior informed consent and without observance of Aboriginal customs or laws.<sup>586</sup>

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 under 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 the following.

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<sup>584</sup> For a list of classification of goods and services in Australia see <<http://xeno.ipaustralia.gov.au/tmgns/facelets/tmgoods.xhtml>>

<sup>585</sup> Trade Marks Act 1995 (Cth) s 27(1).

<sup>586</sup> T. Janke, *Minding Cultures: Case Studies on Intellectual Property and Traditional Cultural Expressions* (WIPO, Geneva, 2003).

#### 3.2.9.1.1 *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>587</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>588</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>589</sup>

#### 3.2.9.1.2 *Likely to deceive or cause confusion*

A trade mark can be rejected if it is likely to deceive or cause confusion,<sup>590</sup> or if it is substantially identical, or deceptively similar, to the trade mark of another person who has an earlier priority date for registration.<sup>591</sup>

#### 3.2.9.1.3 *Scandalous and contrary to law*

A trade mark or part of the trade mark that comprises scandalous matter or is contrary to law may be rejected by the registrar.<sup>592</sup> This provision is not often used, but may provide scope for Indigenous people to challenge registration of culturally offensive marks.

#### 3.2.9.2 *Opposition to registration*

The *Trade Marks Act 1995* (Cth) allows third parties to oppose the registration of a trade mark.<sup>593</sup> Grounds for opposition are similar to those that the registrar can use to

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<sup>587</sup> *Trade Marks Act 1995* (Cth) s 41.

<sup>588</sup> *Registrar of Trade Marks v W & G DuCros Ltd* [1913] AC 624.

<sup>589</sup> *Re registered Trade Mark 'Yanx'; Ex parte Amalgamated Tobacco Corp Ltd* (1951) 82 CLR 199.

<sup>590</sup> *Trade Marks Act 1995* (Cth) s 43.

<sup>591</sup> *Ibid* s 44.

<sup>592</sup> *Ibid* s 42.

<sup>593</sup> *Ibid* s 52(1).

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>594</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. 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.

In New Zealand, there are provisions in the *Trade Mark Act 2002* that provide grounds for refusing to register a trade mark that incorporates Māori names and signs.<sup>595</sup> Specifically, the Trade Mark Commissioner must not register a trade mark if 'the Commissioner considers that its use or registration would be likely to offend a significant section of the community, including Māori'. A Māori Trade Mark Advisory Committee has been established to advise the Trade Mark Commissioner whether the proposed use or registration of a trade mark is likely to be offensive to Māori.<sup>596</sup> A similar process was recommended for adoption in the Australian Trade Marks Office.<sup>597</sup> However, there have been no legislative moves towards this by IP Australia.

Issues of offensive trade marks have come up in other parts of the work. In the well-known Washington Redskins football case, a coalition of American Indian artists, activists, and attorneys petitioned<sup>598</sup> in 1992 to the Trademarks Trial Appeal Board to revoke the registration of six trademarks owned by Pro-Football, which include the word 'Redskins'.<sup>599</sup> They claimed the racist term and associated images violated the

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<sup>594</sup> Ibid s 43.

<sup>595</sup> *Trade Marks Act 2002* (NZ) s 17(i)(b)(ii).

<sup>596</sup> Ibid s 198.

<sup>597</sup> Terri Janke, *Our Culture: Our Future – Report on Australian Indigenous Cultural and Intellectual Property Rights* (Report commissioned by AIATSIS and ATSIC, Michael Frankel and Company, 1999) recommends the establishment of an Indigenous Staffing Unit and an Indigenous Trade Mark Focus Group.

<sup>598</sup> Under the Lanham Trademark Act, 'A petition to cancel a registration of a mark' can be submitted and 'any person who believes that he is or will be damaged by the registration' can petition for cancellation of the mark. See generally 15 USC §1,064.

<sup>599</sup> *Pro-Football, Inc. v Suzan S Harjo et al*, 284 F. Supp. 2d 96, 139 [United States District Court for the District Court of Columbia, 2003] 2.

US *Lanham Trademark Act 1946*, which provided that certain types of mark, including those that 'may disparage or falsely suggest a connection with persons, living or dead, institutions, beliefs, or national symbols, or bring them into contempt, or disrepute', must be denied by the Patent and Trademark Office. In 1999, the Trademark Trials and Appeal Board ruled in favour of the petitioners to cancel the federal trademark on these grounds. In September 2003, Pro-Football successfully appealed, with the result that the decision was reversed on the basis that the petitioners had not demonstrated that the trademarks were 'disparaging to a substantial composite of Native Americans' at the time the marks were originally registered in 1967.<sup>600</sup>

#### 3.2.9.2.1 *Certification marks*

The *Trade Marks Act 1995* has provisions that allow for registration of certification marks. Certification marks are signs or devices used to distinguish goods and services which possess a certain quality, accuracy or characteristic. The distinguishing characteristics may include geographic origin, quality of material used, or the mode of manufacture.<sup>601</sup> Use of the mark is certified by the registered owner of the certification mark, or by representative organisations approved by the registered owner in accordance with the rules for use.

In 2000, the National Indigenous Arts Advocacy Association (NIAAA) registered the 'label of authenticity' as a certification mark. This mark was designed to denote that a work of art was authentically produced by an Indigenous artist. The label has been applied to goods and services that are of Aboriginal and Torres Strait Islander origin, with the aim of making it more difficult for non-Aboriginal people to pass their works off as if they were authentically Aboriginal. However, although the label is still registered, it is not being used because NIAAA lost its funding in 2003 and is no longer operating.

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<sup>600</sup> T Biolsi (ed), *A Companion to the Anthropology of American Indians* (Blackwell Publications, 2004) 388.

<sup>601</sup> Trade Marks Act 1995 (Cth) s 169(b).



### 3.2.9.3 *Breach of confidence*

Breach of confidence or trade secrets laws have also been used to protect Indigenous arts and cultural expression.<sup>602</sup> To establish an action, the applicant must show that:

- the information has the necessary quality of confidence about it;
- the information was imparted in circumstances where there was an obligation of confidence;
- there was an unauthorised use of that information to the detriment of the party communicating it.<sup>603</sup>

This area of law has been used to protect Indigenous sacred and secret material. In *Foster v Mountford*,<sup>604</sup> the Court granted an injunction in favour of members of the Pitjantjatjara Council, who took the action 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. Tribal sites and items of deep cultural and religious significance were revealed to the anthropologist by the Pitjantjatjara people. Mountford recorded the information and later wrote a book, *Nomads of the Australian Desert*, which was distributed for sale in the Northern Territory.

The book contained information that was of deep religious and cultural significance to the Pitjantjatjara people. The information was shown to have been given to Mountford in confidence. The Pitjantjatjara people were concerned that continued publication of the book in the Northern Territory could cause serious disruption to their culture and society should the book come into the hands of the uninitiated.

This case illustrates how breach-of-confidence laws have been applied to protect Indigenous arts and cultural expression. To bring a breach-of-confidence action, it is necessary to show that the relationship of confidence existed at the time the information was relayed. However, under Indigenous law, it is not relevant whether

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<sup>602</sup> S Gray, 'Aboriginal Designs and Copyright', (1991) 9(4) *Copyright Reporter* 8.

<sup>603</sup> *Coco v AN Clark (Engineers) Ltd* (1969) RPC 41.

<sup>604</sup> (1977) 14 ALR 71.

such 'secrecy' exists. If sacred material has been disseminated among people not authorised to receive it, then it follows that a breach of Indigenous law has occurred.

#### 3.2.9.4 *Passing off and trade practices*

A trader can protect his or her business, goodwill and reputation in an action over 'passing off'.<sup>605</sup> The classic passing-off situation is where one trader represents his or her goods or services as those of another. Passing off may be an avenue for Indigenous interests if the following principles of passing off are met:

- the goods have, or the business has acquired, a certain goodwill and reputation;
- the actions of the defendant have caused, or in all probability will cause, the ordinary purchasers of the plaintiff's goods or ordinary customers of the plaintiff's business to believe that the defendant's goods are those, or that the defendant's business is that, of the plaintiff;
- as a consequence, the plaintiff has suffered or is likely to suffer injury in his or her trade or business.<sup>606</sup>

Indigenous interest groups are today gaining reputations as producers from specific regional areas and may therefore be able to show that they have an established goodwill or reputation as Indigenous art and cultural material producers. Consumers are purchasing Indigenous arts and cultural products on the strength of this reputation. Perhaps the main limitation for Indigenous interest groups is showing that the damage, or likely damage, to their goodwill and reputation was brought about by the deception caused by the defendant's conduct.

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<sup>605</sup> *Reddaway v Banham* [1896] AC 199 per Lord Halsbury LC at 204.

<sup>606</sup> *Fletcher Challenge Ltd v Fletcher Challenge Pty Ltd* [1981] 1 NSWLR 196 per Powell J at 204.

### 3.2.10 Trade Practices Act 1974 (Cth)

Under the *Trade Practices Act 1974* (Cth), there are remedies for misleading and deceptive conduct.<sup>607</sup> However, these focus on consumer protection and are limited in providing protection for Indigenous artists.

Many products reproducing stylised designs that imitate *rarrk* and other Indigenous designs are marketed as 'Aboriginal', 'Aboriginal-style' or 'Aboriginal inspired'. Indigenous people are concerned that many of these products and designs are not produced by Indigenous people. Further, Indigenous people complain that the use of 'Aboriginal' and 'Indigenous' in the names of products and services by non-Indigenous companies is misleading and deceptive to consumers who are lead to believe that the company's products may be produced by Aboriginal and Torres Strait Islander people.

The *Trade Practices Act 1974* (Cth) may provide protection against some types of 'rip-off' behaviour. In the *Carpets* case, von Doussa J found that labelling attached to carpets incorrectly stated that the carpets were produced with the permission of the artists and that royalties were being paid to them. This labelling was also attached to other carpets that had no Indigenous Australian association at all.<sup>608</sup> By using such labelling, the carpet distributors were misleading consumers into believing that copyright in the artworks belonged to the company, or was licensed to it, or that the carpets were approved or made under the licence and approval of the Aboriginal artists. In von Doussa J's judgment, such false and misleading conduct amounted to an infringement of ss 52 and 53.

## 3.3 Conclusion

The main focus of non-Indigenous Australian intellectual property laws is to provide incentives for the production of intellectual and creative effort. The introduction of moral rights laws into Australia in 2000 has allowed for the protection of the integrity of a copyright work, as well as the right of attribution, but these rights belong to

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<sup>607</sup> *Trade Practices Act 1974* (Cth) s 52.

<sup>608</sup> *Milpurrurru v Indofurn* (1995) 30 IPR 209, 248.

individual creators. There are proposals to recognise Indigenous communal moral rights by amending the *Copyright Act 1968*, but this is not yet law.

There is a developing Indigenous cultural business industry where traditional knowledge and arts and culture are applied to tourism, retail and advertising. The use of trade marks can assist Indigenous businesses in this regard, however, as a system to protect Indigenous traditional cultural expression or traditional knowledge generally, this system has limits.

Trade practices laws are relevant to stop the false and misleading practices such as those that occur in the arts and craft market. These, however, are consumer laws and fall short of recognising rights to Indigenous Australians over ownership of cultural material.

These laws focus on protecting economic rights. So far as Indigenous people seek rights to preserve and protect their culture as envisaged by the draft Declaration on the Rights of Indigenous People, and the rights outlined in *Our Culture: Our Future*, the laws require re-focusing. Perhaps a stand-alone law is necessary, or a cultural heritage preservation-based law, to preserve and protect Indigenous Australians' intangible heritage.

Internationally, the World Intellectual Property Organisation (WIPO) has established an Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (IGC) to discuss intellectual property issues that arise in the context of:

- access to genetic resources and benefit-sharing;
- protection of traditional knowledge, innovations and creativity; and
- protection of expressions of folklore.<sup>609</sup>

The WIPO IGC has developed two important documents: draft provisions for the protection of traditional cultural expressions and draft provisions for the protection of

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<sup>609</sup> See <[www.wipo.int/globalissues](http://www.wipo.int/globalissues)>.

traditional knowledge. It is expected that the draft guidelines will shape future laws and policies relating to Indigenous traditional cultural expressions and knowledge.

## Chapter 4: Indigenous Intangible Cultural Heritage

**Paper 2:** Terri Janke 'Indigenous Intangible Cultural Heritage and Ownership of Copyright' in Toshiyuki Kono (ed), *Intangible Cultural Heritage and Intellectual Property* (Intersentia, 2009) 159–188.

### 4.1 Context

This paper was published in 2009 after Professor Toshiyuki Kono invited me to contribute an article to the academic publication *Intangible Cultural Heritage and Intellectual Property* that was developed in response to an international conference he convened in March 2007 in New Delhi, India.

The conference, *Intangible Cultural Heritage and Intellectual Property under the 2003 Convention: Seeking a Collaborative Interface between ICH and IP*, concerned the international issues and solutions around the safeguarding of intangible cultural heritage, including the *Convention for the Safeguarding of Intangible Cultural Heritage*<sup>610</sup> and various other legal regimes. It was convened by the Asia-Pacific Cultural Centre for UNESCO (ACCU).

My paper is included within Part Three of that book, which focuses on the theme 'Conceptualization of Community', arguing for notions of community within the context of protecting intangible cultural heritage.

The paper was selected for this thesis as it addresses the key issues in protecting Indigenous intangible cultural heritage, focusing on Traditional Cultural Expressions (songs, stories, ceremonies, rituals, dance and art) and the Indigenous rights and customary laws that come with this. This is discussed from the perspective of Australian IP law and with respect to various case studies and Australian organisations involved in these areas. This is positioned within the broader international context. The

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<sup>610</sup> *Convention for the Safeguarding of Intangible Cultural Heritage*, UN Doc MISC/2003/CLT/CH/14 (17 October 2003) <<http://unesdoc.unesco.org/images/0013/001325/132540e.pdf>>.

significance of protocols and ethical codes of conduct are included in the paper, and this discussion contributes to the overall focus on the importance of protocols within this thesis.

Professor Toshiyuki Kono is currently the President of the International Council on Monuments and Sites (ICOMOS), an international NGO formed in 1965 as an advisory body to UNESCO. Conferences and debates around protecting cultural heritage occurs within this body rather than WIPO. For example, the International Committee on Rock Art was developed through ICOMOS to provide advice to UNESCO and states regarding knowledge, protection and rehabilitation in field of rock art.<sup>611</sup>

In October 2017, the Australia ICOMOS National Scientific Committee on Rock Art Australia (NSCRAA) was established to support the International Committee on Rock Art and provide advice regarding rock art heritage in Australia.<sup>612</sup> The NSCRAA aims to further protection and conservation, alongside supporting Indigenous custodians in the interpretation, management and use of sites. Some of the central issues and Australian case studies around protecting rock art are discussed in this paper.

It should be noted that important legislative developments around the protection of Indigenous intangible cultural heritage in Australia have occurred since this paper was published. This involves the *Aboriginal Heritage Amendment Act 2016* (VIC) which establishes new provisions and changes to the *Aboriginal Heritage Act 2006* (VIC). It introduces a system in Victoria for Aboriginal groups to register ICH that is not publicly available.<sup>613</sup> It states that consent from the registered traditional owner group must be obtained before the registered Aboriginal intangible cultural heritage is used for commercial purposes.<sup>614</sup> Chapter 8 of this thesis also includes a discussion around these amendments relevant to the possibilities for registering and protecting intangible cultural heritage related to plant knowledge.

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<sup>611</sup> Australia ICOMOS, *NSC – Rock Art* <<https://australia.icomos.org/get-involved/national-scientific-committees/>>.

<sup>612</sup> Ibid.

<sup>613</sup> Terri Janke and Maiko Sentina, 'Indigenous Knowledge: Issues for protection and management' (Discussion Paper, commissioned by IP Australia & Department of Industry, Innovation and Science, Terri Janke and Company, 29 March 2018) 44.

<sup>614</sup> *Aboriginal Heritage Amendment Act 2016* (VIC) s 79G(1).

Additionally, there have been changes in the law regarding the duration of copyright.<sup>615</sup> There are also changes to anonymous or pseudonymous work where the author is unknown (so called orphan works). From 1 January 2019, under the *Copyright Amendment (Disability Access and Other Measures) Act 2017*, there are new copyright protection terms that will affect unpublished works, sound recordings and films that are not made public by this date. This means that copyright in unpublished works that were created over 70 years ago will expire by 1 January 2019. Such works would have previously had unlimited copyright protection.<sup>616</sup> With works of unknown authors that have been made public, the copyright period will protect from 70 years from when they were made public. Thus, the part in this paper stating that protection is indefinite if the work is not published is no longer valid. Works that contain Indigenous content but have no known author will fall out of copyright 70 years from the date of publication.

This paper however remains an important contribution to the protection of Indigenous ICH in the Australian legal system, and the call for sui generis protection. It also indicates how Indigenous Australians are faced with a complex range of legislative procedures and conditions in order to secure recognition and exercise rights to their ICIP.

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<sup>615</sup> Australian Copyright Council, *Duration of Copyright* <[https://www.copyright.org.au/ACC\\_Prod/ACC/Information\\_Sheets/Duration\\_of\\_Copyright.aspx?Web siteKey=8a471e74-3f78-4994-9023-316f0ecef4ef](https://www.copyright.org.au/ACC_Prod/ACC/Information_Sheets/Duration_of_Copyright.aspx?Web siteKey=8a471e74-3f78-4994-9023-316f0ecef4ef)>.

<sup>616</sup> Department of Communications and the Arts, *Changes to copyright duration* <<https://www.arts.gov.au/departmental-news/changes-copyright-duration>>.



## 4.2 Indigenous intangible cultural heritage and ownership of copyright

Terri Janke<sup>617</sup>

### 4.3 Introduction

In 2003, the United Nations Educational, Scientific and Cultural Organization (UNESCO) adopted the *Convention for the Safeguarding of Intangible Cultural Heritage* (ICH Convention).<sup>618</sup> The ICH Convention asks each signatory country to 'identify and define the various elements of the intangible cultural heritage present in its territory, with the participation of communities, groups and relevant non-governmental organizations.'<sup>619</sup> In this way, the ICH Convention requires countries to develop inventories of their traditional cultural expressions and traditional knowledge. There is therefore an emphasis on community inventory-making. The ICH Convention, however, also states that its text cannot be interpreted as 'affecting the rights and obligations of State Parties deriving from any other international instrument relating to intellectual property rights...to which they are parties.'<sup>620</sup> This means that in the recording, collation and development of databases and inventories of intangible cultural heritage, the state members will need to consider how intellectual property law impacts on the ownership of Indigenous cultural heritage. They will have to adopt appropriate measures for recognising 'ownership' of intangible cultural heritage by its traditional custodians.

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<sup>617</sup> Terri Janke is an Indigenous lawyer who specializes in Indigenous heritage, copyright and intellectual property. She is an expert in her field and is a world renowned legal expert on Indigenous cultural and intellectual property issues. She is Solicitor/Director of her own law firm Terri Janke and Company Pty Ltd located in Sydney, Australia. Terri Janke would like to acknowledge the assistance of Sonia Cooper, paralegal, and Anastasia Charles, admin assistant. She would also like to thank the editor for comments and feedback on the paper.

<sup>618</sup> *Convention for the Safeguarding of Intangible Cultural Heritage*, UN Doc MISC/2003/CLT/CH/14 (17 October 2003) <<http://unesdoc.unesco.org/images//0013/001325/132540e.pdf>>.

<sup>619</sup> *Ibid*, art 11(b).

<sup>620</sup> *Ibid*, art3 (b).

This chapter explores the ownership of intangible cultural heritage from the perspective of Australian intellectual property law, an area in which I have practiced and developed an expertise. While Australia is not a signatory to the ICH Convention, the recording, dissemination, digitisation and commercial use of intangible cultural heritage raises issues relevant to Indigenous Australians. One of their concerns is that the intellectual property which is generated as a result of such processes is often not owned by them. In the past 15 years there have been a number of important cases, as well as the development of new protocols and policy, that may provide some insight for other countries.

In this chapter I will examine Indigenous cultural heritage and ownership of copyright provisions, referring to Australian law. Recording intangible cultural heritage means that copyright will be created in oral traditions and expressions that are the heritage of a people. Section 2 looks at the content and nature of Intangible cultural heritage and intellectual property. Section 3 examines how copyright laws recognise ownership of the expressed form in individuals. Section 4 provides case studies to exemplify the issues. Section 5 concludes that there are shortfalls in the copyright law and how Indigenous people seek to control and manage their intangible cultural heritage. This leads to the overall conclusion that there is a need for frameworks beyond copyright and intellectual property to deal with the protection of intangible cultural heritage.

## **4.4 Intangible cultural heritage and intellectual property**

### **4.4.1 What is intangible cultural heritage?**

Intangible cultural heritage, as defined by the ICH Convention, consists of non-physical characteristics, practices, representations, expressions as well as knowledge and skills that identify and define a group or civilisation.<sup>621</sup> This category includes the following cultural manifestations:

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<sup>621</sup> See UNESCO, *Intangible Cultural Heritage* <[www.unesco.org/activities/culture/general/258.php](http://www.unesco.org/activities/culture/general/258.php)>.

- (a) oral traditions and expressions, including language as a vehicle of the intangible cultural heritage;
- (b) music, dance, drama and other performing arts;
- (c) social practices, rituals and festive events;
- (d) knowledge and practices concerning nature and the universe;
- (e) foods and clothing; and
- (f) traditional craftsmanship.<sup>622</sup>

According to UNESCO, 'Intangible Cultural Heritage is transmitted from generation to generation, and is constantly recreated by communities and groups, in response to their environment, their interaction with nature and their historical conditions of existence. It provides people with a sense of identity and continuity. Its safeguarding promotes, sustains and develops cultural diversity and human creativity.

Through the existence and transmission of this intangible cultural heritage, a group or community is able to associate itself with a communal identity.'<sup>623</sup>

'Folklore' or 'traditional cultural expressions' are intangible cultural heritage. It is described as being socially based. Its ownership or custodianship is often collective. This is enshrined in the *Recommendation on the Safeguarding of Traditional Culture and Folklore*: 'Folklore, as a form of cultural expression, must be safeguarded by and for the group (familial, occupational, national, regional, religious, ethnic, etc.) whose identity it expresses.'<sup>624</sup>

#### **4.4.2 What is intellectual property?**

'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

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<sup>622</sup> Ibid.

<sup>623</sup> Ibid.

<sup>624</sup> UNESCO, *Recommendation on the Safeguarding of Traditional Culture and Folklore*, 15 November 1989 <[http://portal.unesco.org/en/ev.php-URL\\_ID=13141&URL\\_DO=DO\\_PRINTPAGE&URL\\_SECTION=201.html](http://portal.unesco.org/en/ev.php-URL_ID=13141&URL_DO=DO_PRINTPAGE&URL_SECTION=201.html)>.

(expressed in a material or immaterial form) and inventions. The *Convention Establishing the World Intellectual Property Organization* 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>625</sup>

Intellectual property rights are designed to inspire creative innovation 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* (Berne Convention)<sup>626</sup>, intellectual property rights are enforced internationally in countries that are signatories to such treaties.

In Australia, copyright protects Indigenous traditional cultural expressions where Indigenous people meet the requirements set out in the *Copyright Act 1968* (Cwlth).<sup>627</sup> The ability of copyright law to protect Indigenous traditional cultural expressions will be explored in Section 3.

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<sup>625</sup> *Convention Establishing the World Intellectual Property Organization*, 828 UNTS 3 (14 July 1967) art 2(viii) <[www.wipo.int/treaties/en/convention/trtdocs\\_wo029.html](http://www.wipo.int/treaties/en/convention/trtdocs_wo029.html)>.

<sup>626</sup> *Berne Convention for the Protection of Literary and Artistic Works*, 828 UNTS 222 (9 September 1886) as amended on 28 September 1979.

<sup>627</sup> *Copyright Act 1968* (Cth).

#### 4.4.3 WIPO draft provisions

Since 2000, the World Intellectual Property Organization (WIPO) has convened the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (Intergovernmental Committee).<sup>628</sup> The Intergovernmental Committee has developed two documents:

- (a) *Revised Draft Provisions for the Protection of Traditional Cultural Expressions: Policy Objectives and Core Principles*<sup>629</sup>; and
- (b) *Revised Draft Provisions for the Protection of Traditional Knowledge: Policy Objectives and Core Principles*.<sup>630</sup>

It is expected that the draft guidelines will shape future laws and policies relating to traditional cultural expressions and traditional knowledge. This paper focuses on traditional cultural expressions. Traditional cultural expression incorporates songs, stories, ceremonies, rituals, dance and art. The latter category includes rock art, face and body painting, sand sculptures and bark paintings.

#### 4.5 Copyright and traditional cultural expressions

In Australia, the *Copyright Act 1968* provides copyright owners with the right to control the use and dissemination of literary, dramatic, artistic and musical works,<sup>631</sup> as well as certain listed subject matter including sound recordings<sup>632</sup>, cinematograph films,

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<sup>628</sup> See WIPO, *Intergovernmental Committee* <[www.wipo.int/tk/en/igc/](http://www.wipo.int/tk/en/igc/)>.

<sup>629</sup> See WIPO, Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore, *The Protection of Traditional Cultural Expressions/Expressions of Folklore: Draft Objectives and Principles*, WIPO/GRTKF/IC/10/4 (2 Oct. 2006) <[www.wipo.int/edocs/mdocs/tk/en/wipo\\_grtkf\\_ic\\_10/wipo\\_grtkf\\_ic\\_10\\_4.pdf](http://www.wipo.int/edocs/mdocs/tk/en/wipo_grtkf_ic_10/wipo_grtkf_ic_10_4.pdf)>.

<sup>630</sup> See WIPO, Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore, *The Protection of Traditional Knowledge: Draft Objectives and Principles*, WIPO/GRTKF/IC/10/5 (2 Oct. 2006) <[www.wipo.int/edocs/mdocs/tk/en/wipo\\_grtkf\\_ic\\_10/wipo\\_grtkf\\_ic\\_10\\_5.pdf](http://www.wipo.int/edocs/mdocs/tk/en/wipo_grtkf_ic_10/wipo_grtkf_ic_10_5.pdf)>.

<sup>631</sup> While the *Copyright Act 1968* (Cth) does not define these terms, s 10 provides guidance on what these categories include.

<sup>632</sup> *Copyright Act 1968* (Cth) s 10(1) (defining a “sound recording” as “the aggregate of the sounds embodied in a record”).

television and sound broadcasts, and published editions. There are certain requirements that must be met before protection is granted.

#### **4.5.1 The requirement of a material form**

Copyright protection does not require registration. It exists automatically if a work or subject matter is created in a material form.<sup>633</sup> Copyright law protects the form in which ideas are expressed rather than the ideas themselves.<sup>634</sup>

Many generations contribute to the creation of traditional cultural expression. A song, dance, story or traditional design may have been created many generations ago. When traditional cultural expression is first reduced to a material form – an oral story is put in writing; a ‘creation being’ is etched on paper; body paintings are shifted on to canvas; an initiation song is recorded on tape or a sacred ceremony is filmed – copyright is created. This means that ephemeral and performance forms of traditional cultural expressions, such as oral stories, songs and dances that are performed at ceremonies and have never been recorded will not be protected under Australian copyright law.

Some commentators state that the recording of traditional cultural expressions has the effect of freezing or stifling a living traditional culture. In some Indigenous communities, there are songs or stories that have so far been considered too sacred to be committed to a written form. Culture is continuously evolving. The ephemeral nature of traditional cultural expression is fundamental to the manner in which the next generation of cultural practitioners will interact with it, re-interpret it and revitalise it within their context and contemporary situation.

Many Indigenous Australian forms of cultural expression are oral. Traditional songs and stories told and passed on through the generations were not recorded in material form. Some forms of art are transient such as body painting and sand sculptures.

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<sup>633</sup> *Copyright Act 1968* (Cth) s 10(1) (defining ‘material form’ in relation to a work or an adaptation of a work, as including ‘any form (whether visible or not) of storage’ from which the work or adaptation, or a substantial part of the work or adaptation, can be reproduced).

<sup>634</sup> See *Walter v Lane* (1900) AC 539.

These do not meet the material form requirement of copyright, unless they are photographed or filmed.<sup>635</sup>

The traditional stories of Indigenous peoples have been written up in books, theatre and film without their prior informed consent. Indigenous people have been concerned about incidents where non-Indigenous authors have written down previously unpublished 'traditional stories' and then claimed a copyright without giving proper recognition to the source of the story.

The requirement that there be a material form places considerable limitations on any attempt to protect oral works. Much Indigenous and other non-fixed forms of intangible cultural heritage will fall outside of this copyright protection requirement. The Berne Convention states that the 'expression literary and artistic works' includes 'every production in the literary, scientific and artistic domain, whatever may be the mode or form of its expression'.<sup>636</sup> It is, however, up to each country to decide whether to prescribe within its copyright laws the requirement that a work be fixed in some material form.<sup>637</sup> In France, works do not have to be fixed in a material form to be copyright protected. The criterion for protection of a work under French copyright law is that it be an *œuvre d'esprit*, a work of the mind (Article L112-1). Article L111-2 of *le Code de la propriété intellectuelle* (Intellectual Property Code) states 'a work shall be deemed to have been created, irrespective of any public disclosure, by the mere fact of realisation of the author's concept, even if incomplete.'<sup>638</sup> It must be 'fixed' in a certain way. There is no restriction under the Berne Convention to the protection of intangible and unfixed forms of expression. Legislators have enough scope to extend copyright protection to intangible cultural heritage.

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<sup>635</sup> See Ian McDonald, *Protecting Indigenous Intellectual Property: A Copyright Perspective* (Australian Copyright Council, 1997).

<sup>636</sup> Berne Convention art 2(1).

<sup>637</sup> Berne Convention art 2(2).

<sup>638</sup> *Code de la propriété intellectuelle* [Intellectual Property Code] (France) art L111-2 ('L'oeuvre est réputée créée, indépendamment de toute divulgation publique, du seul fait de la réalisation, même inachevée, de la conception de l'auteur.').

#### 4.5.2 Protection for a limited time

Copyright protects works and other subject matter only for a limited time period.<sup>639</sup> After this, the work, film or sound recording can be used without the need to obtain consent or the payment of royalties.

In Australia, published literary, dramatic, musical and artistic works are protected for 70 years after the author's death.<sup>640</sup> As for unpublished literary, musical and dramatic works, not previously broadcast or publicly performed works, as well as records of work that have not been offered or exposed for sale to the public (such as those released after the death of the artist), they are protected for 70 years from the first date of publication, performance or broadcast, whichever occurs first.<sup>641</sup> Importantly, protection is indefinite if the work is not published. Finally, subject matter other than works, films<sup>642</sup> and sound recordings are copyright protected for 70 years from the date of production.<sup>643</sup>

When the period of copyright protection ends, anyone can copy or make use of the work, film or sound recording without seeking permission from the copyright owner.

Traditional cultural expressions have a long history, often stretching over many generations. Despite their antiquity, Indigenous people have a continuing cultural

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<sup>639</sup> In accordance with the Australia–US Free Trade Agreement signed at Washington, DC, on 18 May 2004, Australian copyright protection was extended from 50 years to 70 years to be consistent with US Copyright laws. The 70 years duration period applies to non-government produced works and materials produced after 1 January 2005, as well as works and materials still under copyright on 1 January 2005; see Australia-US Free Trade Agreement, art 17.4(4). The period of '70 years *post mortem auctoris*' originally stems from the German copyright law; see *Urheberrechtsgesetz (UrhG)* (Germany) 9 September 1965, FLG, 1965, 1273, art 64. This standard was taken from the German law for the European Union harmonization. In the U.S., the *Copyright Term Extension Act 1998* (also referred to as Sony Bono Act) adopted the 70 year period. Currently, similar discussions for extending the term to 70 years are occurring in Japan.

<sup>640</sup> Pursuant to the *Copyright Act 1968* (Cth) s 33(2), copyright in a literary, dramatic, musical or artistic work continues to subsist until the expiration of seventy years after the end of the calendar year in which the author dies.

<sup>641</sup> Copyright Act 1968 (Cth) s 33(3).

<sup>642</sup> After 1 May 1968.

<sup>643</sup> It is important to note that the copyright duration rules for Government copyright did not change after 1 January 2005. Material made under the direction and control of the Government is generally protected for 50 years from the date of publication.

See Australian Copyright Council, *Information Sheet G023v18* <[https://www.copyright.org.au/ACC\\_Prod/ACC/Information\\_Sheets/Duration\\_of\\_Copyright.aspx?Web\\_siteKey=8a471e74-3f78-4994-9023-316f0ecef4ef](https://www.copyright.org.au/ACC_Prod/ACC/Information_Sheets/Duration_of_Copyright.aspx?Web_siteKey=8a471e74-3f78-4994-9023-316f0ecef4ef)>.



connection to these forms of expression. This connection may have been severed or threatened in the past as a result of colonisation or disenfranchisement. Therefore, reclaiming, revitalising and strengthening traditional cultural expression is important for the identity of Indigenous people.

Indigenous people argue that the right to culturally practice their traditional cultural expressions should last forever and should not stop with the end of the copyright.<sup>644</sup> The limited time frame of copyright protection does *not* adequately reflect the nature of traditional cultural expressions, which are created as part of an ongoing process of passing cultural knowledge to future generations. Indigenous rights to cultural works are recreated in perpetuity and therefore cultural consent to their use should always be necessary, even if a work is no longer copyright protected.

#### **4.5.3 Original works from the old and ancient**

Another rule of copyright law is that a work must be original.<sup>645</sup> It cannot be copied from another work. The creator needs to have put into the work the necessary degree of labour, skill and judgment to give it some quality or character which the original raw materials did not possess. However, it is in the very nature of traditional cultural expressions and practices that the cultural group uses pre-existing designs to create its art. Members imitate ceremonies and retell stories as best as they can recollect them, in the manner handed down from their forebears. The copying or mimicking of styles and performance is a necessary means of learning cultural practices.

This mode of transmission has led to speculation as to whether an artist who reproduces a traditional or pre-existing design or story is in fact creating an original work. The cultural requirement of 'painting' iconic themes in accordance with tradition limits the scope for interpretation and individuality.<sup>646</sup> While the issue depends on the particular facts at hand, Justice von Doussa in *Milpurrurru v Indofurn (Carpets Case)*<sup>647</sup>

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<sup>644</sup> Terri Janke, *Our Culture: Our Future – Report on Australian Indigenous Cultural and Intellectual Property Rights* (Report commissioned by AIATSIS and ATSIC, Michael Frankel and Company, 1999) 59.

<sup>645</sup> Copyright Act 1968 (Cth) s 32.

<sup>646</sup> Department of Home Affairs and Environment, *Report of the Working Party on the Protection of Aboriginal Folklore* (1981) [1403].

<sup>647</sup> *Milpurrurru v Indofurn Pty Ltd* (1995) 30 IPR 209.

stated that '[a]lthough 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>648</sup> Based on the specific facts of the case, Justice von Doussa considered that there was sufficient scope for individual artistic interpretation, notwithstanding that the Indigenous artworks in question followed pre-existing traditional designs.

One of the works discussed in the *Carpets Case* was a linocut by the Aboriginal artist Banduk Marika, entitled *Djanda and the Sacred Waterhole*. This work depicted two sand goannas, representing the creation place of Marika's clan. According to the ruling, she had the right to depict this scene by virtue of her birth into her family and clan. Before her, her brother was entitled to depict the image and, before that, one of her ancestors. Every generation painted and depicted the story, each bringing it greater clarity and development.

#### **4.5.4 Creators are individuals**

Under copyright law, the individual person or persons recording or writing down the form of the traditional cultural expression will be recognised as the author and copyright owner. Unless there is some joint authorship by way of collaboration, the law does not recognise the trans-generational development of traditional cultural expressions. According to Anthony Seeger, the individual nature of rights in Western copyright laws has its origins in the Enlightenment, where the focus of philosophy shifted from the group to the individual as the basic element of society.<sup>649</sup> Michael Dodson, an Australian Indigenous member of the UN Permanent Forum on Indigenous Issues, noted that this was the main difficulty in using intellectual property laws to protect Indigenous knowledge. According to Dodson, 'Western constructs of

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<sup>648</sup> Ibid 216.

<sup>649</sup> A Seeger, 'Intellectual Property and Audiovisual Archives and Collections', in Council on Library and Information Resources (ed), *Folk Heritage Collections in Crisis* (2001) 32, 37.

intellectual property focus on individual knowledge and creativity, rather than on communal trans-generational knowledge.<sup>650</sup>

#### 4.5.5 Spiritual beings are not ‘authors’ of copyright works

Art, stories, songs and other traditional cultural expressions are manifestations of religious and spiritual beliefs. Chants from ceremonies and sacred images on rock walls are believed by Indigenous people to have been created by ancestral or spiritual beings. The spiritual creators of rock art would not be considered ‘authors’ under copyright because they are no longer living. According to an Indigenous custodian from Warradjan Aboriginal Cultural Centre:

Rock Art shows our life

Rock art is an important part of Aboriginal people’s lives. Mimi<sup>[651]</sup> spirits were the first of the Creation Ancestors to paint on rock. They taught some Aboriginal people how to paint and other Aboriginal people learned by copying Mimi art.

At the end of their journeys, some Creation Ancestors put themselves on rock walls as paintings and became djang (Dreaming places). Some of these paintings are andjamun (sacred and dangerous) and can be seen only by senior men or women; others can be seen by all people.<sup>652</sup>

Some rock art sites can only be painted or depicted by certain people with the relevant ritual knowledge and the right to do so under customary law. Archaeologist George Chaloupka notes that in the language of Indigenous clans of Arnhem Land, an area world famous for its rock art, there is no special category for those who paint. It is the act of creation that is considered as most important:

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<sup>650</sup> United Nations Economic and Social Council, Permanent Forum on Indigenous Issues, Indigenous Forum Discusses Implementation of Fourth Session’s Recommendations: Possible Study on Proper Protection of Traditional Knowledge (30 May 2007).

<sup>651</sup> D Horton, *The encyclopaedia of Aboriginal Australia; Volume 2 M-Z* (1994) 698 (‘Mimi is the name given to an art style found in the Arnhem Land plateau. They are human figures and are small, usually less than 50cm high and rarely exceeding one metre.’).

<sup>652</sup> The Australian Government Department of the Environment and Energy, *Aboriginal Art* <<http://www.environment.gov.au/topics/national-parks/kakadu-national-park/culture-and-history/rock-art>> (quoting Warradjan Aboriginal Cultural Centre).

everybody is aware that the person carrying it out is only an agent of the Dreamings, which institutes all the aspects of their cultures. Creativity of one kind or another is expected of every person throughout his or her life. 'Art' is an integral part of the Aborigines' social and religious life, in which individual artists share and interpret the traditions of the group.<sup>653</sup>

This contrasts with Western forms of contemporary art where the individual rather than the group experience is the underlying philosophy. For rock art figures or images, there may be no identifiable individual creator. Therefore, copyright is never asserted by any individual.

Rock art is being reproduced in an increasing variety of ways. It is being photographed or redrawn. It is finding its way onto postcards, websites and books. Some of its uses, especially where the rock art images are altered or shown to wider audiences than allowable under customary laws, are inappropriate and cause offence to the Indigenous custodians.

#### **4.5.6 Films and sound recordings**

Copyright also subsists in cinematograph films. The maker of the film is usually recognised as the owner of the copyright in the film, after its completion for the production of the first copy.<sup>654</sup> There is also a separate type of copyright recognised in sound recordings.<sup>655</sup> Before 1 January 2005 the maker of a sound recording was the recognised owner of copyright. This had an effect on Indigenous cultures, because the owner of the tape could freely say how the tape was used. If the performed song, was out of copyright, or a traditional Indigenous song, there was no copyright recognised in the content, and no rights recognised in the performers, or traditional song owners.

In Australia, there is no such thing as a performer's copyright and performers do not have a proprietary right over their performance. Under the Copyright Act 1968, certain provisions do relate to performers rights, such as the ability to prevent certain

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<sup>653</sup> G Chaloupka, *Journey in Time: The World's Longest Continuing Art Tradition: The 50,000 year Story of the Australian Aboriginal Rock Art of Arnhem Land* (1993) 45.

<sup>654</sup> See *Copyright Act 1968* (Cth) s 90.

<sup>655</sup> *Ibid* s 89.

unauthorised uses of recordings of their performances. Also, since 1 January 2005, performers share with the recording company part of the copyright in a sound recording of a live performance, if they were not paid for it.<sup>656</sup> Changes to the law were also made to include 'folklore' in the definition of a 'live performance'.<sup>657</sup> Depending on the facts, an Aboriginal who performs 'folklore' (without a fee) and is recorded by another person will have a partial copyright interest in the recording of their performance.<sup>658</sup>

#### **4.5.7 Authors have exclusive rights**

Once the requirements for a copyright are met, the copyright owner has exclusive permission to exploit the copyright in the work or subject matter. This includes the right to reproduce and authorise reproduction of the work or subject matter, as well as to deal with the copyright in a number of ways, depending on the nature of the work or subject matter, such as performing the work in public,<sup>659</sup> communicating the work to the public<sup>660</sup> and making an adaptation of the work.<sup>661</sup>

In the case of traditional cultural expressions that have been recorded by outsiders, the copyright owners of these recordings are freely able to exploit and control their documents, books, tapes, films and other copyright materials, without observing any cultural restrictions.<sup>662</sup>

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<sup>656</sup> Australian Copyright Council, *Information Sheet G22: Performers' Rights* (February 2008) 4 <[https://www.copyright.org.au/ACC\\_Prod/ACC/Information\\_Sheets/Performers\\_\\_Rights.aspx?WebsiteKey=8a471e74-3f78-4994-9023-316f0ecef4ef](https://www.copyright.org.au/ACC_Prod/ACC/Information_Sheets/Performers__Rights.aspx?WebsiteKey=8a471e74-3f78-4994-9023-316f0ecef4ef)>.

<sup>657</sup> Copyright Act 1968 (Cth) s 84.

<sup>658</sup> This would depend on the circumstances of the case. It should also be noted that there are 'exempt recordings' with regard to this provision. They include indirect film and sound recordings of performances, made for private and domestic use only or for the purposes of research or study; see *Ibid* s 248A.

<sup>659</sup> *Ibid* s 31(1)(a)(iii). A public performance refers to any form of presentation to the public, whether visual and aural, or even merely 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 of material protected by copyright is separate from the right to communicate to the public.

<sup>660</sup> *Ibid* s 31(1)(a)(iv).

<sup>661</sup> Copyright Act 1968 s 31(1)(a)(v).

<sup>662</sup> See Janke, *supra* note 27, 54.

In the *Copyright Act 1968*, the creator is referred to as ‘the author’. The general rule is that the author of a work is the first owner of the copyright in that work.<sup>663</sup> However, there are circumstances that where this will not be the case and it is not unusual for the author and the owner of the copyright to be different entities. These exceptions include the following situations:

- (a) where a work is produced by an employee under a contract of employment (the employer will own the copyright);<sup>664</sup>
- (b) where the work is produced under the direction and control of the Crown (that is state or commonwealth government);
- (c) where the work is produced under commission and there may be a contract assigning copyright in the work to the commissioning body;
- (d) where a copyright has been assigned or exclusively licensed in writing.<sup>665</sup>

#### **4.5.8 Moral rights for individuals not communities**

Since 2000, Australian creators have enjoyed moral rights in their works and films. Sound recordings, however, are not included in the moral rights regime. The *Copyright Act 1968* provides creators the following unalienable rights:

- (a) the right of attribution of authorship;
- (b) the right not to have authorship falsely attributed; and
- (c) the right of integrity of authorship.<sup>666</sup>

These rights, like copyright itself, belong to the individual creators who ‘create’ the work or film, by making it, or fixing it in a material form.<sup>667</sup> In this respect, moral rights do not extend collectively to an Indigenous clan group or community.

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<sup>663</sup> Copyright Act 1968 s 35(2).

<sup>664</sup> Ibid s 35(6).

<sup>665</sup> Ibid s 96.

<sup>666</sup> Ibid s 189.

<sup>667</sup> Ibid s 190.

Moral rights cannot be assigned or sold and remain with the author even when the latter does not own the copyright. For instance, employees hold moral rights in created work, even if the copyright is vested with the employer. An important thing to note, however, is that it is possible for a creator to consent to the infringement of his moral rights. In some industries, contracts are presented to creators that include a wide-ranging consent to such infringement.

#### 4.5.8.1 *Rights of attribution/against false attribution*

The Indigenous artist of a painting has the right to be named as the author<sup>668</sup> of the work. This is the author's right of attribution of authorship in respect of his or her work.<sup>669</sup> The right to be recognised as the community or source of clan imagery is important for cultural works. Information, images and knowledge incorporated in the painting may be linked to identity, land ownership and kinship. One interesting question is whether the use of a form of traditional cultural expression in a painting by an outsider should create rights of attribution for the clan. This danger of false attribution through the misuse of traditional cultural expression also exists in relation to artistic works and cinematograph films.<sup>670</sup>

#### 4.5.8.2 *Rights of integrity*

The moral right of integrity provides creators with a right to bring an action if their work is subjected to derogatory treatment. 'Derogatory treatment' refers to anything that results in a material distortion, mutilation or alteration of the work<sup>671</sup> or film<sup>672</sup> that is prejudicial to the author's honour or reputation. It also applied to '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>673</sup> Additionally, it includes doing anything else in relation to the work<sup>674</sup> or film which is prejudicial to the author's reputation.

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<sup>668</sup> The term 'author' used here refers to creator, as the term is defined in the *Copyright Act 1968*.

<sup>669</sup> Ibid s 193.

<sup>670</sup> Ibid ss 195AE and 195AF.

<sup>671</sup> Ibid ss 195AJ(a) and 195AK(a).

<sup>672</sup> Ibid s 195AL.

<sup>673</sup> Ibid s 195AK(b).

<sup>674</sup> Ibid ss 195AJ(c), 195AK(c), 195AL(b).

The right of integrity is important for Indigenous artists. Preserving the overall integrity of the work and the underlying story or ritual knowledge is crucial to the proper representation of Indigenous art and film. Greater access to artistic works and films, once they are in digital form, increases the ways in which they can be distorted, mutilated and altered. The right of integrity, including the right to bring an action for infringement, is useful to protect the integrity of Indigenous works.

The right of integrity is not infringed if the alleged derogatory treatment can be proved to have been reasonable in view of the particular circumstances,<sup>675</sup> or if the author consented to the treatment.<sup>676</sup> Indigenous creators should be cautious when considering commercial agreements and contracts of employment. They must seek wide consent to their moral rights. However, even if consent was not given, the fact of employment<sup>677</sup> and industry practice may be taken into account when deciding whether the derogatory treatment was reasonable.<sup>678</sup>

One of the deficiencies in the provisions dealing with moral rights is that like copyright protection their duration is limited.<sup>679</sup> For works of important cultural significance, Indigenous peoples assert cultural rights, including those of attribution and reproduction, which will last in perpetuity.

Indigenous people are intent upon keeping the cultural integrity of their heritage. They collectively wish to be recognised as the primary guardians and interpreters of their cultures, arts and sciences, both those created in the past and developed in the future. The right for all members of the group to prevent derogatory treatment of Indigenous traditional cultural expression is critical.

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<sup>675</sup> Ibid 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 in s 195AS(3) for films.

<sup>676</sup> Ibid s 195AW (film or work included in a film) and s 195AWA (work that is not a film or included in a film).

<sup>677</sup> Ibid s 195AS(2)(e)(f)(g) (for literary, dramatic, musical or artistic works) and s 195AS(3)(f)(g)(h) (for films).

<sup>678</sup> Ibid s 195AS.

<sup>679</sup> The right of integrity in a film lasts until the death of the author; see Ibid s 195AM(1). The right of integrity in works other than film continues for the duration of the copyright, which is fifty years after the death of the author; see Ibid s 195AM(2).



The rising demand for Indigenous visual arts has led to wide-scale copying of Indigenous designs, motifs, symbols and artworks for commercial gain. Indigenous art has been copied onto carpets,<sup>680</sup> dresses, fabrics<sup>681</sup> and t-shirts<sup>682</sup> without the knowledge or permission of the Indigenous artists or their community. In many instances, the designs are altered. Indigenous Australians complain that such uses are inappropriate, derogatory and culturally offensive. The Australian laws with regard to moral rights entitle individual artists to protect their works against derogatory treatment, but the works must be protected by a copyright and artists must seek to assert their rights.

#### 4.5.8.3 *Proposals for Indigenous Communal Moral Rights*

The Commonwealth Government has drafted amendments of the *Copyright Act 1968* for Indigenous communal moral rights. These amendments are not published but were circulated on a confidential basis to a number of Indigenous arts and community organisations. The current proposed model introduces the concept of Indigenous communal moral rights to exist alongside individual moral rights. It is proposed that the Indigenous communal moral rights will be exercisable independently of the individual author's moral rights. Indigenous communal moral rights will exist in works and films drawn from a traditional base.<sup>683</sup> They will apply if, before the first dealing of the work or film, there is a voluntary agreement between the creator and the Indigenous community.<sup>684</sup> There must also be acknowledgement of the community's association with the work.<sup>685</sup> Furthermore, all interest holders in the work (*i.e.* copyright owners) need to have consented to the Indigenous communal moral rights existing in the work or film.

An Indigenous community that has communal moral rights in respect of a work may exercise those rights only through an individual who is the authorised representative

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<sup>680</sup> See eg, *Milpurrurru v Indofurn* (1995) 30 IPR 209.

<sup>681</sup> See eg, *John Bulun Bulun v R & T Textiles Pty Ltd* [1998] 1082 FCA (3 Sep. 1998).

<sup>682</sup> See eg, *Bulun Bulun v Nejam Pty Ltd* (unreported, settled) (1989) ('Flash T-Shirts Case').

<sup>683</sup> 'Drawn from a traditional base' means that the work or film must be drawn from the 'particular body of traditions, observances, customs or beliefs held in common by the Indigenous community.'

<sup>684</sup> A 'community' is defined loosely and can include an individual, family, clan or community group.

<sup>685</sup> Draft Copyright Amendment (Indigenous Communal Moral Rights) Bill 2003 ss 195AZZL–195AZZM.

in respect of the work. This authorised representative may be designated by the community according to its cultural practices, or may be appointed according to decision making processes.<sup>686</sup>

Another limitation of the proposed Bill is that Indigenous communal moral rights would only exist for the term of the copyright period. As discussed above, Indigenous people see their rights to traditional cultural expression as extending in perpetuity for the sake of their continuing cultural practice.

The Bill is not yet law, however, the government intends to introduce it for consideration shortly. The draft has been criticised as being ineffective. 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 knowledge and its use'.<sup>687</sup> Jane Anderson says there is a glaring difference between the Government's stated objective and its current draft, adding that it is difficult to see where a remedy might arise for infringement.

The Arts Law Centre of Australia also considered that the Bill required further work, in respect of the voluntary agreement requirement for Indigenous communal moral rights to exist. Their opinion is that ICMR should arise automatically when the work is made, and when it draws from a community's traditions, customs or beliefs.<sup>688</sup>

Another perturbing issue is the government's limited consultation 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 introducing the Bill was to benefit Indigenous communities. Robynne Quiggin criticises the Bill as predominantly protecting third parties in their dealing with Indigenous art rather than recognising the nature of

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<sup>686</sup> Terri Janke, 'The Moral of the Story: Indigenous Communal Moral Rights' (2005) 3 *Bulletin* 1, 2, 7–8.

<sup>687</sup> Jane Anderson, 'Indigenous Communal Moral Rights, The Utility of an Ineffective Law' (2004) 5(30) *Indigenous Law Bulletin* 8.

<sup>688</sup> Arts Law Centre of Australia, *Indigenous communal moral rights* <<http://www.artslaw.com.au/documents/files/ICMRLetterAndExecutiveSummary2006.pdf>>.

communal ownership and protecting its content.<sup>689</sup> Unless an Indigenous community's moral rights can be established in a work or film prior to the first dealing (which is limited as discussed above), then a person who deals with the work or film, such as a publisher or film maker is not legally obliged to recognise any Indigenous cultural sensitivities in dealing with the work or film.

#### **4.5.9 Copyright and the responsibility of the traditional cultural expression artist**

The exclusive rights granted to copyright owners to use, adapt and reproduce their works without conditions are at odds with Indigenous cultural heritage material. In many Indigenous clans, strict rules are applied to the responsibility for cultural heritage in order to ensure that it is maintained, protected and passed on to future generations. An individual or group of individuals may be empowered to act as the caretaker of a particular item of heritage.<sup>690</sup> However, these traditional custodians may only make decisions that are in harmony with the best interests of the community as a whole.

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

The Federal Court case of *Bulun Bulun v R & T Textiles*<sup>691</sup> examined the issue of custodianship. Johnny Bulun Bulun was the artist and copyright owner of the bark painting *At the Waterhole*. The painting embodied traditional ritual knowledge of the Ganalbingu people. Johnny Bulun Bulun's right to use ritual knowledge to produce the artworks was given to him under Ganalbingu customary law. This right was based on the trust and confidence of the clan in the artist personally. R & T Textiles Pty Ltd. had imported and sold within Australia fabric which copied parts of *At the Waterhole*. When issued with a statement of claim from the artist, the textile company was quick to negotiate a settlement. However, the case still went to court to consider the issues relating to the clan's interests in the copyright work.

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<sup>689</sup>R Quiggin, 'The Contribution of Protocols and Moral Rights' (paper delivered at Snapshot 2, AMAG, Melbourne, 5 August 2004).

<sup>690</sup>In some groups, this may not be the case, due to the disruption of cultural practices and customary laws since colonisation.

<sup>691</sup>*Bulun Bulun v R & T Textiles* [1998] 1082 FCA.

Justice von Doussa, the same judge who presided over the *Carpets Case*, found that there was no native title right to the painting. He also considered that there was no equitable interest in the work, nor was this a case of joint ownership because there was no evidence that anyone other than Johnny Bulun Bulun had created the bark painting.<sup>692</sup> Von Doussa also considered that the artist had not created the work as part of an implied legal trust, which would have made his clan an equal owner. The witnesses and affidavit evidence showed that 'on many occasions paintings which incorporate to a greater or lesser degree parts of the ritual knowledge of the Ganalbingu people are produced by Ganalbingu artists for commercial sale for the benefit of the artist concerned.'<sup>693</sup>

Justice von Doussa found that there was a fiduciary relationship between the artist and the clan. Customary laws impacted on the rights of the artist to deal with the work embodying the ritual knowledge. He had to discuss and negotiate the use of the traditional knowledge with relevant persons in authority within his clan. Evidence given by Djardie Ashley discussed how the Ganalbingu laws dealt with the consent procedures. Ashley noted that in some circumstances, such as the reproduction of a painting in an art book, the artist might not need to consult widely with the group. In other circumstances, such as the mass-reproduction of a painting as merchandise, Bulun Bulun could be required to consult extensively. Ashley further noted that:

the question in each case depends on the use and the manner or the mode of production. But in the case of a use which is one that requires direct consultation, rather than one for which approval has been already given for a class of uses, all of the traditional Aboriginal owners<sup>[694]</sup> must agree. There must be total consensus. Bulun Bulun could not act alone to permit the reproduction of 'at the Waterhole' in the manner as was done.<sup>695</sup>

The relationship between the artist and the clan imposed the obligation on Johnny Bulun Bulun 'not to exploit the artistic work in a way that is contrary to the laws and

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<sup>692</sup> M F Brown, *Who Owns Native Culture?* (2003) 64.

<sup>693</sup> *Bulun Bulun v R & T Textiles* [1998] 1082 FCA.

<sup>694</sup> The notion 'traditional owners' refers to the group, clan, community of people in whom the custody and protection of cultural heritage is entrusted in accordance with the customary law and practices.

<sup>695</sup> *Bulun Bulun v R & T Textiles* [1998] 1082 FCA.

custom of the Ganalbingu people, and, in the event of infringement by a third party, to take reasonable and appropriate action to restrain and remedy infringement of the copyright in the artistic work.<sup>696</sup> If the artist had been unable or unwilling to take copyright action, equity would have allowed the clan leader to take action to stop the infringement.

#### 4.5.9.2 *Fiduciary duty and its potential extent*

The fiduciary obligation imposed on the copyright owner artist has sparked much interest among Indigenous people. The question is whether the clan can use this legal principle to bring an action based in equity to stop the unauthorised use by a third party of an image or an aspect of traditional ritual knowledge embodied in a copyright work.

Sally McCausland has considered the potential repercussions of the decision in *Bulun Bulun v R & T Textiles* and whether the fiduciary obligation may extend in certain circumstances where notice of the 'Bulun Bulun equity' is given by the clan to outsiders. For example, a third party licensee of an Indigenous artwork, who is notified of the custodial interest of an Indigenous clan, may be open to claims by the latter that it has a fiduciary duty to safeguard the integrity of the work when using its copyright.<sup>697</sup> McCausland further enquires into whether the Bulun Bulun equity applies to other copyright works incorporating 'traditional ritual knowledge':

It is possible that any person who has acquired copyright in a work embodying traditional ritual knowledge with notice is a fiduciary under Australian law. If so, the person would be bound to act in accordance with the fiduciary duty (that is, respect customary law concerning reproduction and adaptation of the work.) If a person breaches the fiduciary duty, the situation might be analogous to the breach of confidence case of *Foster v Mountford*, in which the Federal Court granted an order to stay sales of a book containing traditional knowledge of the Pitjantjatjara people.<sup>698</sup>

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<sup>696</sup> Ibid.

<sup>697</sup> S McCausland, 'Protecting Communal Interests in Indigenous Artworks after the Bulun Bulun Case' (1999) *Indigenous Law Bulletin* 4–6.

<sup>698</sup> Ibid 5.

McCausland speculates that a third party fiduciary duty might arise where traditional custodians allow access to a filmmaker to interview community members. If the filmmaker is given notice of the custodians' interest in the traditional ritual knowledge communicated in the interviews, he may owe a fiduciary duty to the custodians when dealing with copyright in the filmed interviews. She says that a notice of the custodians' interest incorporated in the access permit would help to establish this duty.<sup>699</sup> In other areas too, where outsiders come into communities to record traditional cultural expression, an Indigenous community could use written agreements to state the fiduciary obligations of third parties when they access traditional ritual knowledge. For example, where a researcher wants access to traditional ritual knowledge for a particular project, the community could enter into a written agreement with that person, requiring her to consult on an ongoing basis about the project. It could also require her to display a custodians' interest notice on any copyright material created. McCausland further states, 'the community could even require copyright in the project to be jointly owned or held on trust for its benefit.'<sup>700</sup>

In my opinion, this line of thought has implication for scholars, authors, filmmakers, people who record sound, compilers, researchers and other documenters of Aboriginal traditional knowledge and traditional cultural expression where copyright is created.

Michael F. Brown notes the legal potential for this precedent to be applicable to other traditionally based, non-Indigenous groups, and the potential for claims against urban based Indigenous artists. He states: 'Beyond enthusiasm for communal rights in art, then, lie unexplored legal paths, some of which hint at troubling possibilities.'<sup>701</sup>

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<sup>699</sup> Ibid.

<sup>700</sup> Ibid.

<sup>701</sup> M F Brown, *supra* note 75, 65.

## 4.6 Case studies dealing with copyright forms of traditional cultural expressions

### 4.6.1 Rock art on t-shirts case study

Copyright rewards the person who imparts skill and labour into existing material to create an original work. When the raw material is traditional cultural expression or work in the public domain, this can result in a new copyright vesting in the diligent author. In the *Unauthorized Reproduction of Indigenous Rock Art* case study in *Minding Culture*,<sup>702</sup> it was determined that, under the law, the skill and labour of a researcher in redrawing rock art images was arguably enough to create a new original copyright work in the resulting photographs and illustrations.<sup>703</sup> This matter was settled before the commencement of court action. However, it provides a good basis to examine the ownership of copyright over intangible cultural heritage.

In 1997, Riptide Churinga, a Sydney based t-shirt manufacturer, produced a range of t-shirts with *Mimi* rock art figures. The t-shirts were discovered on sale to the surprise of a descendant of the Badmardi clan and Vivien Johnson, an Aboriginal art lecturer. The use of the *Mimi* figures is guarded carefully under customary law and they are still significant to Indigenous cultural beliefs. For cultural heritage purposes, stories and information surrounding the sites, the sites themselves and the right to touch up or depict images like those embodied in rock form should, in theory, belong to the owners of the cultural images that are depicted. The rock art is estimated to be about 4,000 years old and therefore not the subject of copyright.<sup>704</sup> How could the clan stop the t-shirt maker from transgressing their laws?

In the 1970s, Eric Brandl was funded by the Australian Institute of Aboriginal Studies (now the Australian Institute of Aboriginal and Torres Strait Islander Studies or AIATSIS) to visit and record certain rock art sites in the Northern Territory. His methods of recording involved photographing the various rock art sites, which were in almost

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<sup>702</sup> T Janke, *Minding Culture: Case Studies on Intellectual Property and Traditional Cultural Expressions* (WIPO, 2003).

<sup>703</sup> *Ibid* 100-13.

<sup>704</sup> *Ibid* 106.

inaccessible places in the Deaf Adder Creek region. He then returned to his office, where he projected the images onto a wall and traced the works out with his hand in Indian ink.

These drawings and photographs of the *Mimi* rock art were published by the Australian Institute of Studies in 1973.<sup>705</sup> There was copyright in the book, the photographs and the drawings. In line with the originality principles of copyright, the skill and labour applied by Brandl to the original rock art created a copyright interest in the derived sketches. It was obvious that Riptide Churinga had taken images directly from the book to produce its t-shirts.

The Australian Institute of Aboriginal and Torres Strait Islander Studies, the Brandl Estate and the Badmardi clan were able to demand that the t-shirt company stop production. They entered into a settlement which included damages and the delivery up of unsold items. There was also a public apology posted in *The Australian*, a national newspaper.

The case illustrates that copyright owners had the right to take legal action. The 'cultural owners' were able to enlist the holders of the copyright to commence action, even though the 'cultural owners' had no copyright ownership rights. Anderson notes that 'had the images of the *Mimi* reproduced on tee-shirts been copied straight from the rock-art itself, there would have been no grounds for complaint by [the Australian Institute of Aboriginal and Torres Strait Islander Studies], the Brandl Estate or the Badmardi clan, for the material would be classified as being in the public domain and therefore open to use. The problem of protecting rock art has existed as a pertinent complaint about the biases of copyright in relation to Indigenous knowledge.'<sup>706</sup>

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<sup>705</sup> E J Brandl, *Australian Aboriginal Paintings in Western and Central Arnhem Land: Temporal Sequences and Elements of Style in Cadell River and Deaf Adder Creek Art* (1973).

<sup>706</sup> J Anderson, *Access and Control of Indigenous Knowledge in Libraries and Archives: Ownership and Future Use* (paper presented at the conference *Correcting Course: Rebalancing Copyright for Libraries in the National and International Arena*, Columbia University, New York, 5–7 May 2005) 24 <<http://conservationcommons.org/media/document/docu-i64cij.pdf>>.



#### 4.6.2 Writing traditional stories

Under copyright laws, if an individual storyteller writes down an oral story, the individual is recognised as the owner of at least that version of the story. What if that story is sacred and not suitable for wide circulation? A story or ceremony may be unsuited to wider access and limited to the initiated, as was the case in *Foster v Mountford*.<sup>707</sup> The right to maintain the secrecy of Indigenous knowledge and other cultural practices is important.

What if the storyteller is not from the traditional owner group? What are the rights of the story owners to stop publication? This is a big issue for Indigenous groups where traditional cultural expressions are recorded by outsiders. In many instances where outsiders have come to research or record oral stories, the recorder became the owner of the copyright in that written form. A large amount of recorded traditional cultural expressions is in written reports, books, field notes and language dictionaries compiled by a range of outsiders including linguists, anthropologists and university researchers.

The Australia Council for the Arts<sup>708</sup> has developed protocols for writing Indigenous Australian literature, which aim to recognise Indigenous ownership of traditional stories. The protocols state that if writing up traditional stories involves the verbatim transcription of an oral story from specific informants, then permission, attribution and ownership of the material should always be recognised.<sup>709</sup> There are also protocols for other artforms – music, drama/dance, visual arts and media art. These protocols promote ethical conduct, and respect for Indigenous cultural heritage. Whilst they are

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<sup>707</sup> *Foster v Mountford & Rigby Ltd* (1976) 14 ALR 71.

<sup>708</sup> The Australia Council is the Australian Government's arts funding and advisory body. It directly supports young, emerging and established artists, as well as new and established organisations. The Council provides over 1700 grants each year to artists and arts organisations across the country in the fields of Aboriginal and Torres Strait Islander arts, community cultural development, dance, literature, music, new media arts, theatre and visual arts/craft. Aboriginal and Torres Strait Islander Arts (ATSIA) supports the Aboriginal and Torres Strait Islander Arts Board, which is the leading authority for Indigenous arts. The division manages the established grant assessment process, together with devising strategies and policies to assist Indigenous artform development. See <<http://www.ozco.gov.au>>.

<sup>709</sup> See T Janke, *Writing Cultures: Protocols for Producing Indigenous Australian Literature* (Australia Council for the Arts, 2002).

recommended use for all projects involving Indigenous cultural heritage, it is a condition of Council funding that the protocols be met for council funded projects.

#### 4.6.3 Music

When traditional cultural expressions are recorded on tape or compact disc (CD) by outsiders such as researchers and ethnomusicologists, there is a copyright in the sound recording that is created. This copyright will generally belong to the maker of the recording. In the past, sound recordings of oral stories and performances have been taken by outsiders to the cultural group. These tapes and recordings are taken away from the cultural setting and their use is controlled by the outsider. Who can use, reproduce or adapt the content contained in the recordings? Who has the right to stop the unauthorised use of a 'traditional song'?

In his article *pygmy POP: A Genealogy of Schizophonic Mimesis*<sup>710</sup>, Steven Feld notes that the music of the group Deep Forest was based on several ethnographic recordings of traditional music from Africa and a CD entitled *Polyphony of the Deep Rain Forest*.<sup>711</sup> Deep Forest gained use of the recordings with permission from the relevant archives and copyright owners, but did not obtain the consent of the traditional song performers or owners. In fact, the latter were not recognised as copyright holders. In a Western legal sense, the originality of the traditional song may have been questionable because, presumably, the performers did not write the song. However, the rights of the song performers, who are the traditional people from which the traditional cultural expression originates, remain vital for their cultural identity.

The Australia Council for the Arts has developed protocols for the development of Indigenous music, in an effort to recognise Indigenous cultural rights. The protocols include protecting the secrecy of Indigenous cultural material that is not suitable for wide dissemination, such as the use of the bullroarer, an Indigenous ceremonial instrument. The bullroarer has been reproduced in a number of sound recordings. The

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<sup>710</sup> S Feld, 'pygmy POP: A Genealogy of Schizophonic Mimesis' (1996) 28 *Yearbook for Traditional Music* 1.

<sup>711</sup> Ibid 24.

protocols advise musicians 'to exercise extra vigilance when it comes to consultation and consent for any proposed use.'<sup>712</sup>

#### 4.6.4 Films

In a report on film and Indigenous people, Michael Leigh and Walter Saunders states that the first film about Indigenous Australians was made by Alfred C. Haddon, a visiting academic from England. It was made on Mer (Murray) Island in the Torres Strait in 1898.<sup>713</sup> Since then, the cameras have captured a lot of Indigenous content. This includes ethnographic accounts of culture, sacred ceremonial practices, personal histories and Indigenous knowledge about land, animals, plants and events.<sup>714</sup>

As a result, the film archives have inherited a lot of films that are of significant Indigenous content. Issues now confront the archives about how to manage this material and to whom it should be made available. Often the depositors or the copyright owners are not the Indigenous people, even though they are the owners of the cultural expression embodied in the film. This is because the filmmaker is recognised as the owner of the copyright in the film.<sup>715</sup> Or, where films are made for another person and fees are paid, the copyright belongs to the person who commissioned it.<sup>716</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.<sup>717</sup>

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<sup>712</sup> R Quiggin, *Song Cultures: Protocols for Producing Indigenous Australian Music* (Australia Council for the Arts, 2002).

<sup>713</sup> See M Leigh and W Saunders, *Hidden Pictures: Colonial Camera* (1995) 7; University of Cambridge, *View First Ever Cambridge Film* <<http://www.screenmedia.group.cam.ac.uk/film.html>>.

<sup>714</sup> T Janke, 'Captured Images: Film Archives and Indigenous Cultural and Intellectual Property Rights' (Paper presented at *Culture & Ethics: Who decides?*, a forum hosted by Film Australia, Lindfield, 27 February 2003).

<sup>715</sup> Copyright Act 1968 (Cth) s 98(2).

<sup>716</sup> *Ibid* s 98(3).

<sup>717</sup> T Janke and R Quiggin, 'Indigenous Cultural and Intellectual Property and Customary Law' in Law Reform Commission of Western Australia (ed), *Aboriginal Customary Laws: Background Papers* (January 2006) 451, 460.

An interesting story told by Anderson exemplifies the sort of issues that may arise. Anderson accompanied her friend Joe, an Indigenous man from the Gupapyngu clan, on a visit to the National Film and Sound Archives in Canberra. They came across a film which recorded Joe's father teaching the *Djawa*<sup>718</sup> in the 1950s. Now 50 years on, Joe was able to view the film, his father and, for the first time, himself as a child. Joe, like other Indigenous Australians, is reclaiming this material, taking it back to his community so that it can establish its own archive.<sup>719</sup> For Indigenous Australians, there are concerns about the uses of film footage of such ceremonies. From a legal standpoint, the copyright owners and depositors have the right to control access, but the Indigenous cultural owners do not. Indigenous people seek to have a say over how these important materials are used, and who gets access to them.

Archives like the National Film and Sound Archive (NFSA) have developed policies and protocols for the access and reproduction of its Indigenous film materials. The NFSA holds a large collection of Indigenous content in the form of films, photographs, videotapes, audio tapes and other forms of media. According to the NFSA Collection Policy (September 2006), there are an estimate 15,000 or 3.5% of films, recordings and programs held at NFSA that include depictions of Indigenous peoples, cultures, and experiences from a range of perspectives and historical attitudes.<sup>720</sup>

The NFSA's *Indigenous Collection Policy* set out good professional practice procedures for the access and use of Indigenous materials, including for description and classification, staffing, education, and training for professional practice.<sup>721</sup>

The collection comprises sensitive materials that depict traditional cultural ceremonies or practices. The policy notes:

In relation to Indigenous subject matter, sensitivities have greater force when the works and other materials accessed include recordings and/or depictions of secret and/or sacred events recorded with or without permission. In the past,

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<sup>718</sup> *Djawa* is a clan dancing ceremony from Arnhem Land; see Anderson [2005 *ibid*] 3.

<sup>719</sup> *Ibid*.

<sup>720</sup> National Film and Sound Archive, *Collection Policy and Statement of Cultural Values* (2006) 31-36 <<http://www.nfsa.afc.gov.au/docs/collectionpolicy.pdf>>.

<sup>721</sup> *Ibid*.

some Aboriginal peoples have given secret information to respected researchers, not realising this information would be published and made available to the general public. In such circumstances, an item need not be readily available to everyone simply by virtue of its prior publication, and may require specific permission from the relevant peoples of association.<sup>722</sup>

The Australian Institute of Aboriginal and Torres Strait Islander Studies Audiovisual Archives (AIATSIS Audiovisual Archives) also developed a Code of Ethics in 2005, the *Collections Management Policy Manual*.<sup>723</sup> The Code is a statement of professional conduct and values which seek to clarify mandatory standards of practice within the AIATSIS Audiovisual Archive.<sup>724</sup> The Code addresses personal conduct relating to archived materials, the standard of care for the collections and the access to secret and sacred materials. It also recognises the rights of Indigenous communities and individuals by requiring that they consent to publication of archival material. For example, the Australian Institute of Aboriginal and Torres Strait Islander Studies' Audiovisual Code of Ethics states that '[c]opies of material will only be provided for publication purposes if the requestor has consulted with the relevant Indigenous community or individual(s) and has received written permission to proceed, even in such cases where the copyright owner has approved publication.'<sup>725</sup>

#### **4.6.5 Indigenous languages**

The past work of non-Indigenous linguists has generated a large amount of materials dealing with Indigenous languages, including sound recordings, films, field notes and dictionaries. The question of who owns a language becomes a problem when you consider the issues that are being raised in Australia with regard to the revival of languages with only a limited number of speakers. Linguists may, by virtue of their own skills, labour and effort become the copyright owners of dictionaries and tapes

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<sup>722</sup> Ibid 34.

<sup>723</sup> The Australian Institute of Aboriginal and Torres Strait Islander Studies Audiovisual Archive's Code of Ethics was examined and endorsed by the AIATSIS Council in August, 2005; see AIATSIS, *Code of Ethics*.

<[http://www.aiatsis.gov.au/audiovisual\\_archives/audiovisual\\_archives\\_collection\\_management\\_policy\\_manual/code\\_of\\_ethics](http://www.aiatsis.gov.au/audiovisual_archives/audiovisual_archives_collection_management_policy_manual/code_of_ethics)>.

<sup>724</sup> Ibid s 10.3.2(b).

<sup>725</sup> Ibid s 10.3.2 (Access to the collections).

that become important after the death of the living speakers they consulted to gain their information.

Aboriginal Language Centres and Organisations<sup>726</sup>, which are responsible for language maintenance and revitalisation, have to negotiate the right to use and adapt the dictionaries which were produced by past linguists on the basis of the oral information provided to them by the speakers of now extinct languages. The living speakers have currently passed on but the dictionary has copyright which belongs to the linguist. In some cases, these linguists live overseas and are retired. Others have passed on and Aboriginal Language Centres now have to engage with the linguist's descendants, or the relevant universities, just to get copies of the materials and to reproduce them for the purposes of language maintenance.<sup>727</sup>

In light of the lessons from the past and the growing knowledge Indigenous people have of copyright laws, Aboriginal Language Centres are now employing their own linguists. The copyright of any resulting works are owned by the Aboriginal Language Centres by virtue of the employee/employer ownership provisions of copyright law. They are also entering into written contracts which assign copyright to organisations owned and operated on behalf of the speaker community. This approach makes use of Section 196 of the *Copyright Act 1968*, which provides that copyright can be assigned in writing.

#### **4.7 Conclusion: Redressing the imbalance**

In conclusion, the focus of Western intellectual property laws is to provide economic incentives for the production of intellectual and creative effort. These objectives stand in contrast to customary laws and the rights of Indigenous peoples to promote cultural maintenance, claim custodial rights and protect the integrity and the sources of their traditional cultural expressions and intangible cultural heritage. There are some

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<sup>726</sup> These centres are community based organisations established to run language programs to assist with the recording and maintenance of Indigenous languages. They rely on government funding to undertake this important work.

<sup>727</sup> See Janke, *supra* note 27, 22 (quoting concerns raised by Wangka Maya Pilbara Aboriginal Language Centre in its submission to the report).

fundamental shortfalls to be found in the use of copyright to protect Indigenous peoples' traditional cultural expressions. These are summarised in the table below:

**Table 4. 1 Comparison of IP rights and ICIP rights for protecting Indigenous Material**

Intellectual Property	ICIP
▪ <b>Emphasis on material form.</b>	▪ Generally orally transmitted.
▪ <b>Limited in time eg: copyright for 70 years after the death of the artist; patent rights are 20 years.</b>	▪ Emphasis on preservation and maintenance of culture.
▪ <b>Individually based – created by individuals.</b>	▪ Socially based – created through the generations via the transmission process.
▪ <b>Intellectual property rights are owned by individual creators or their employers and research companies.</b>	▪ Communally owned but often custodians are authorised to use and disseminate.
▪ <b>Intellectual property can be freely transmitted and assigned - usually for economic returns - for a set time, in any medium and in any territory.</b>	▪ Generally not transferable but transmission, if allowed, is based on a series of cultural qualifications.
▪ <b>Intellectual property rights holders can decide how or by whom the information can be transmitted, transferred or assigned.</b>	▪ There are often restrictions on how transmission can occur, particularly in relation to sacred or secret material.
▪ <b>Intellectual property rights are generally compartmentalised into categories such as tangible, intangible, arts and cultural expression.</b>	▪ A holistic approach, by which all aspects of cultural heritage are inter-related.
▪ <b>Emphasis on economic rights.</b>	▪ Emphasis on preservation and maintenance of culture.
▪ <b>No special protection of sacred secret material or gender restrictions.</b>	▪ Specific laws on gender and sacred secret material.

**Source:** Terri Janke, *Looking Out for Culture*, Workshop Materials (2003).

The introduction of moral rights law into Australia in 2000 has allowed the protection of the integrity of a copyright work, as well as the right of attribution. These rights, however, belong to individual creators. There are proposals to recognise Indigenous communal moral rights by amending the *Copyright Act 1968* but there is a requirement

that there be a voluntary agreement between the copyright owner and the Indigenous community before these rights arise. This will therefore have limited application.

In Australia, Indigenous people are making use of three main legal tools:

- (a) use of contracts to ensure that the ownership of the copyright vests with Indigenous people, or that some rights relating to traditional cultural expression protection are provided for;
- (b) conditions of access to archives – putting requirements that users of content must get the consent of traditional cultural expression owners;
- (c) protocols for respecting Indigenous people's rights to culture. A range of protocols has been developed in visual arts, song, music, writing, new media and film.

Despite the widespread use of the above measures, Indigenous people still call for the Australian law to recognise their rights to traditional cultural expressions, in the same way that recognition is given to the rights of copyright owners, by requiring that their prior informed consent be obtained before use.

The WIPO's *Revised Draft Provisions on Traditional Cultural Expressions/Folklore and Traditional Knowledge* developed by the WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, traditional knowledge and Folklore illustrate some perspectives and approaches for dealing with traditional cultural expressions. Its objects include preventing the misappropriation of traditional cultural expressions/expressions of folklore, and supporting customary practices and community cooperation.<sup>728</sup> Wend B. Wendland notes that '[i]n line with the views of many indigenous and traditional communities, the draft provisions do not require the assertion of new exclusive property rights over...[traditional cultural expressions], but accommodate this option should communities wish to take it up.'<sup>729</sup>

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<sup>728</sup> WIPO, *Intellectual property and genetic resources, traditional knowledge and traditional cultural expressions/folklore, Information resources*, WIPO/GRTKF/INF/1. WIPO, Geneva, 2006, 3.

<sup>729</sup> Wend Wendland, 'Safeguarding Intangible Heritage and Protecting Creativity: Practical Mechanisms for Complementarity' (paper presented at the Sub-Regional Experts Meeting in Asia on Intangible Cultural Heritage: Safeguarding and Inventory-Making Methodologies, Bangkok, Thailand, 13–16 December 2005).



The *Pacific Regional Framework for the Protection of Traditional Knowledge and Expressions of Culture* proposes a framework for 'traditional cultural rights' for owners of traditional knowledge and cultural expressions.<sup>730</sup> The prior and informed consent of the traditional owners is required to reproduce, publish, perform, display, make available on line and electronically transmit traditional knowledge or expressions of culture.

Using this model as a guide, Palau has drafted a *Bill for the Protection and Promotion of Traditional Knowledge and Expressions of Culture*.<sup>731</sup> The Bill aims to establish a new form of intellectual property identified as 'traditional knowledge and expressions of culture' and to vest ownership of this new property in the appropriate traditional groups, clans, and communities. 'Ownership' is defined as 'the manner of collective property control recognised in traditional law and does not create or imply non-traditional property interests for individual members of the owner.'<sup>732</sup> The Palauan proposed law requires prior and informed consent for all non-customary uses of traditional knowledge and expressions of culture.

Whilst these models are being explored by our neighbours in the Pacific, it is unlikely that we will see such laws in Australia for some time.

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<sup>730</sup> South Pacific Community, *Model Law for the Protection of Traditional Knowledge and Expressions of Culture*, (drafted by Kamal Puri and Clark Peturu, July 2002) s 6  
<[http://www.wipo.int/tk/en/laws/pdf/spc\\_framework.pdf](http://www.wipo.int/tk/en/laws/pdf/spc_framework.pdf)>.

<sup>731</sup> Reprinted in Asia/Pacific Cultural Centre for UNESCO (ACCU), '2004 Workshop on Inventory-Making for Intangible Cultural Heritage Management: Final Report' (2005) 143  
<[http://accu.or.jp/ich/en/pdf/2004\\_Tokyo.pdf](http://accu.or.jp/ich/en/pdf/2004_Tokyo.pdf)>.

<sup>732</sup> 'Owner' is defined as, depending on the context: (i) the Republic of Palau; (ii) the Palauan group, clan, or community determined by Palauan tradition and provisions of this Act to be the unique source or sole custodian of a particular item of traditional knowledge or expression of culture; and (iii) the individual officially recognised as the representative of the Palauan group, clan or community for the purposes of taking actions under this Act.

## Chapter 5: Case Study A – The Indigenous Performing Arts: Protocols creating standards for creative practice

**Paper 3:** Terri Janke, 'Copyright, Connections and Culture: Is there a place in the Australian arts industry for a National Indigenous Cultural Authority?' in *Courageous Conversations* (Wilin Centre for Indigenous Arts and Cultural Development, 2010) 11–16.

### 5.1 Context

This paper was written after the adoption of the *UN Declaration on the Rights of Indigenous Peoples* (UNDRIP) by the Australian Government under then Prime Minister Kevin Rudd in 2009, almost a year after most of the world. UNDRIP sought to encapsulate the individual and collective rights of Indigenous peoples. It outlines the cultural and intellectual property rights of Indigenous peoples, specifically around the maintenance, control, protection and development of cultural heritage, traditional knowledge and traditional cultural expressions.

I delivered this paper for the Wilin Centre's 'Courageous Conversations National Talking Circle' that was held in April 2009. Each of the speeches were published in the 2010 publication *Courageous Conversations*, forming a bold collection of essays that address some of the key issues faced by Indigenous creative practitioners, educators, students and academics in the Indigenous performing arts sector

This paper has inspired discussion and recognition for the vision of a National Indigenous Cultural Authority (NICA), relating the value and potential of such infrastructure to the protection of ICIP within the Australian performing arts sector. It builds on the arguments surrounding the need for a NICA put forward in *Our Culture: Our Future* (1998).

There has been vast exploitation of Indigenous peoples around the world concerning the use and commercialisation of their traditional dances and songs without recognition of clan ownership and without integrity. This paper was selected for this

thesis because it addresses the relevance of ICIP in the performing arts sector where dance, theatre and music. It presents the idea of a NICA as a solution to the problems faced in the sector when it comes to protecting ICIP, putting forward the importance of cultural protocols. Although protocols documents currently exist in this area, such as the Australia Council for the Arts protocols for working with Indigenous artists, these are not enforceable under national and international law, leaving room for the exploitation and subsequent deterioration of Indigenous cultural expressions.

Since this paper, there have been more calls for a body like that of a NICA to be put in place, which in turn has led to the development of the proposal for a National Indigenous Arts and Cultural Authority (NIACA) headed by the Australia Council for the Arts in 2018. Consultations by the Australia Council throughout 2018 addressed questions and issues raised by participants from Indigenous communities in the arts sector and elsewhere. These included discussion around who NIACA will represent and serve, how will it operate, what governance structure will it have, and how will it interact with the existing cultural landscape.

## 5.2 Copyright, Connections and Culture: Is there a place in the Australian arts industry for a National Indigenous Cultural Authority?

My courageous conversation is about the establishment of a National Indigenous Cultural Authority (NICA) to be the peak advisory body on Indigenous Cultural and Intellectual Property Rights. Here I examine what this might mean for the Indigenous performing arts sector.

Australia recently adopted the *Declaration on the rights of Indigenous people*.<sup>733</sup> The Rudd government's decision to support this United Nations standard-setting document came after it was adopted by most of the world, over a year before. The document is groundbreaking in that it encapsulates Indigenous cultural rights by stating, in Article 31, that Indigenous people have the right to maintain, control, protect and develop cultural heritage, traditional knowledge and traditional cultural expressions including oral traditions, literature, designs, visual and performing arts. Included within this article, too, is the right to maintain, control, protect and develop their intellectual property over such cultural heritage, traditional knowledge and traditional cultural expressions.

I have been following the debate for greater cultural rights protection for some years now. I wrote a report 10 years ago called *Our Culture: Our Future*<sup>734</sup> which reached the conclusion that Australia needed a new law for protection of Indigenous cultural and intellectual property. This recommendation has never been seriously considered.

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<sup>733</sup> United Nations General Assembly, *United Nations Declaration on the Rights of Indigenous Peoples*, United Nations Permanent Forum on Indigenous Issues, 2007. <<http://www.un.org/esa/socdev/unpfii/en/declaration.html>>.

<sup>734</sup> Terri Janke, *Our Culture: Our Future – Report on Australian Indigenous Cultural and Intellectual Property Rights* (Report commissioned by AIATSIS and ATSIC, Michael Frankel and Company, 1999).

But the report also included 114 other legislative and policy recommendations. Other than an unsuccessful attempt to introduce Indigenous communal moral rights, most of the initiatives have involved the development of protocols, and the use of contracts by Indigenous people, and supporting industry organisations. Of course, legislative change requires a long-term commitment and with rights-recognition comes the need for rights management infrastructure. In consideration of this, the *Our culture: our future* report included the recommendation for a National Indigenous Cultural Authority to act as a leader organisation for the promotion and administration of Indigenous cultural and intellectual property (ICIP) rights. I took this idea to the 2020 Summit in Canberra in 2008. It received some attention, and most notably the Australia Council's Aboriginal and Torres Strait Islander Arts Board (ATSIAB) examined the idea with 'keen interest and much discussion.'<sup>735</sup> This is an indication that national infrastructure is seen as an important consideration in the advancement of Indigenous arts industry. Now before I focus on promoting the need for good cultural infrastructure, I need to present you with the background.

### **5.2.1 Connections**

Indigenous cultural expression is about connections, which for Indigenous people run deep into the heart of Indigenous life. I would like to focus on Indigenous performing arts. What makes Indigenous performing arts different to other Indigenous arts practices? Indigenous dance and songs are connected to the place and to people. Traditional dance and songs come from the land, the seas, and the performers. They come from ceremony. They hold knowledge passed on through the generations. Some are sacred or secret. They are integral to the identity of an Indigenous clan – a manifestation of Indigenous heritage, past and future.

Culture is not static, it evolves and adapts, and Indigenous people must be recognised as the primary custodians of their culture.

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<sup>735</sup> Aboriginal and Torres Strait Islander Arts Board, 'Aboriginal and Torres Strait Islander arts news' *Australia Council for the Arts* (Sydney), 7 July 2008.

In contemporary times, Indigenous dance and songs can be recorded, adapted, digitised and used in many ways. Indigenous people worldwide have complained that their traditional dances and songs have been used and commercialised without recognition of clan ownership, and without integrity. Whilst there may be customary laws or protocols that say who can dance, or perform a song, or adapt a song, the international copyright laws that give rights to creators do not recognise them. Hence, there is an imbalance in the system, one that allows Indigenous cultural expressions to be exploited.

### **5.2.2 Copyright**

Copyright protects individual creator's rights and the rights of the owners of recordings in sound and film. It also only protects works for a limited time.<sup>736</sup> For example, the composer of a song is recognised as the copyright owner of the musical work. As such, he or she can control how that song is reproduced, recorded and adapted. The maker of the recording is recognised as the copyright owner of the recordings. As copyright owner of the recording, the maker can make copies and authorise others to make copies of that recording. But what if a traditional song is used to create the new song? The intellectual property system doesn't acknowledge Indigenous communal ownership of cultural expressions and knowledge passed down through the generations, and nurtured by Indigenous cultural practice. Sacred knowledge is also not protected.

By way of background, copyright laws grant exclusive rights to authors to use, adapt and reproduce their works without conditions. This is at odds with the Indigenous cultural heritage material. In many Indigenous clans, there are laws that are based on responsibility for cultural heritage, to ensure that it is maintained and protected, and passed on to future generations. An individual or group of individuals may be empowered to act as the caretaker of a particular item of heritage.<sup>737</sup> The traditional

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<sup>736</sup> Terri Janke, *Our Culture: Our Future – Report on Australian Indigenous Cultural and Intellectual Property Rights* (Report commissioned by AIATSIS and ATSIC, Michael Frankel and Company, 1999) 51.

<sup>737</sup> Although in some groups, where customary laws are less intact, there may not be, due to the disruption of cultural practices since colonisation.

custodians are empowered to protect a particular item only to the extent that their actions harmonise with the best interests of the community as a whole.

This scenario was played out in the composition of the hit song *Sweet Lullaby*. The French composers from the musical group Deep Forest used recordings of a lullaby entitled *Rorogwela* from the Solomon Islands taken in 1970 by an ethnomusicologist, Hugo Zemp. The recording was published by UNESCO in a collection entitled *Solomon Islands: Tatekla and Baegu Music from Malaita*. It was this recording that Deep Forest sampled on their track. There is contested ground between UNESCO, the ethnomusicologist, and Deep Forest's record company concerning who (if anyone) gave rights to Deep Forest to embed the track within the new song. What is clear is that no permission was obtained from the performer or the clan for the use of the traditional song in the new song. According to an article in the *Island Sun*,<sup>738</sup> the original recording was sourced from Malaita in 1970. No one from Malaita saw any money from this case.

Oral songs and performances are not protected by copyright, and ironically the owner of the recording has rights as the maker of that recording.

Copyright law protects individual rights to a certain extent. In the past 20 years, Indigenous Australians have actively fought for their rights to their art, dances, songs, performances and visual arts. Most notably, cases have been taken to the Federal Court of Australia to do with visual arts appropriated and reproduced on carpets and fabric. These cases have extended the application of copyright but they still operate within the framework of IP laws.

Copyright laws apply to the performing arts, including contemporary and traditional dance, song, storytelling, theatre, poetry and film. As well as many of these works being protected by copyright laws, the people who perform them are also given certain rights in relation to their performances, including moral rights, the right of consent, and copyright in certain sound recordings. In many instances these rights may be given

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<sup>738</sup> Dionysia Tabureguci, 'The Pacific's Stolen Identity', *Island Sun*, 25 September 2008, 6.

away or not recognised, so I think there is a need for a more concerted rights approach.

### 5.2.3 Culture

It is Indigenous cultural protocol to seek permission and to give recognition of the source of a song or dance. The Australia Council for the Arts has published protocols for the development of Indigenous music, which advise that when performing or recording communally-owned musical works it is important to seek permission from the relevant community owners of the music. Robynne Quiggin, author of the *Music protocols for producing Indigenous Australian music* states:

Observing customary law means finding out who can speak for that music, so the right people are asked for permission to use the music. For instance, if a musician wanted to use a rhythm or phrase from music belonging to a Torres Strait Island language group or family, it is essential to locate the correct language group or family group from the particular island owning that song or music.<sup>739</sup>

But recognition of these protocols is ethical or contractual-based. Should the law go further? Should Indigenous clans have the right to control who can perform their songs and dances? What about making adaptations of traditional songs for new songs or changes to traditional dance steps to create fusion dance? These are all rights that would be controlled by copyright owners if the traditional dance was recognised as a copyright work, but because these dances are old, out of copyright, or oral and performance transmitted, there are no rights for clans to set up consent structures.

Thus the fusion of laws. For example: Can I dance a 'traditional dance' in the style of Mornington Island if I've been taught how to do a ceremonial dance at an Indigenous dance school by Indigenous elders? What rights do I get as having learned it? Can I blend my own styles and techniques? Can I innovate? Do I have the right to do this if I come from another Indigenous culture? Who do I speak to get clearance on whether 1) I can reproduce the dance? and 2) If I can adapt it, to ensure the cultural moral

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<sup>739</sup> Robynne Quiggin, *Protocols for Producing Indigenous Australian Music* (Australia Council for the Arts, Sydney, 2007) 14.



rights are intact? If I do get clearances, how do I share benefits, and how do I keep in contact with the relevant consent-granters?

If someone uses an old recording (like the *Rorogwela* recording in the Deep Forest scenario) but got the recording from the Australian Institute of Aboriginal and Torres Strait Islander Studies (AIATSIS) or the National Film and Sound Archive, which depicts an Aboriginal song from ceremony, who do they speak with to get consent to adapt it, or make some new copyright material out of the old material, or bring copyright back into the derivative work? I think we should be asking the cultural custodians, the living people who are the inheritors of that culture. Perhaps, like the woman from Solomon Islands, they are still alive and can be contacted. We need to have some sort of infrastructure to allow these people to record their interests, to record the cultural expression rights.

#### **5.2.4 Getting Consent**

A National Indigenous Cultural Authority could facilitate consent by being a central place to locate relevant owners of culture. It could then also assist with payment of royalties between users and owners; to develop standards of appropriate use to guard cultural integrity, and to enforce rights.

It could also manage any disputes between owner groups. For instance, many people wanting to do the right thing culture-wise many not know who is the right group to speak to – a family, a performance group, a land council or a native title representative body. One way is to have the proposed use advertised and invite all interested parties. But one group, the source group, should be consulted and be given attribution for their ‘version’ or ‘source’. So it is not the inspired or pastiche style that you seek consent to, but the expression by the community or clan. For example, it may not be possible to get clearance for the use of a didgeridoo – but a didgeridoo track by the Gamatj clan, performed by a known person, is possible to get clearance for. The use of the authentically sourced material should have greater value than the former. Ways to enhance this authenticity and correct context can be reinforced through education, protocols and use of a trademark.

### **5.2.5 Wangatunga Strong Women's Group – Sharing the Benefits**

Indigenous people who record their cultural heritage are often faced with the dilemmas of copyright law and traditional cultural expression. If I interact with this cultural song, I may own copyright or have some right to share in it, but what about my roles and responsibilities to the collective? How do these get recognised?

In the course of my work, Indigenous people and non-Indigenous people working within the protocols environment have examined ways to share the benefits. Rob Collins, the Indigenous Music Officer at the Australian Performing Rights Association (APRA) said that this was his experience too.<sup>740</sup> Whilst APRA has Indigenous composers as its members and pays when a new work is created from an old work, the question often arises, says Rob, is how do we recognise or share the benefits with the owners of the cultural heritage embodied in this work? Rob spoke of a recent example in which the Wangatunga Strong Women's Group from the Tiwi Islands collaborated with Sydney-based musicians to record and release an album under the name of Ngarukuruwala. The musical works were the women singing traditional songs but with contemporary additions, drawn in from the musical arrangements of the musicians. This new skill, labour and effort drawing on the old for the new, creates a new copyright work that would belong, under conventional copyright laws, with the Indigenous singers perhaps, and the musicians. They would all be entitled to payment of royalties from album sales, and also from the collection of public performance rights by APRA. To reflect the cultural and collective ownership of the traditional cultural expressions, the project team has arranged for a portion of the royalties to go towards a Tiwi Islander community cultural fund.

### **5.2.6 Why we need a national authority for Indigenous culture**

There are two main arguments that I want to put forward as to why we need a national authority for Indigenous culture.

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<sup>740</sup> Personal communication, Rob Collins, Indigenous Music Officer, Australasian Performing Rights Association, 28 April 2009.

#### 5.2.6.1 *It makes administrative sense*

A National Indigenous Cultural Authority could administer, either directly or by establishing a distribution framework, ICIP rights. Another important function of the National Indigenous Cultural Authority would be to lobby for these rights holders. Experience has shown that industries develop more effectively with the support of a leader authority. Internationally, IP rights themselves could be managed collectively because it makes more sense commercially, and this would allow for the collection of royalties to be done in a structured way.

This deals with the economies of scale but there are also the cultural maintenance reasons – caring for culture. We need to make sure it is appropriately used, properly recompensed, that our Indigenous creators are valued and attributed, and also that our culture is not derogatorily used.

#### 5.2.6.2 *It empowers cultural output and this is about cultural maintenance*

The idea behind intellectual property rights laws is that giving creators rights to exclusively exploit their cultural output for commercial gain gives them the incentive to create more works. Could rights for Indigenous cultural expression do the same in the Indigenous arts arena? An important role of the National Indigenous Cultural Authority would be to administer the framework for prior informed consent rights to cultural material. Currently, Indigenous cultural expression and knowledge is supplied and used without a fee. If we charged a royalty on use, just like copyright and other intellectual property, the resulting income could be distributed, through NICA, to the traditional owners and communities, which in turn would support community development, and artistic and cultural development and maintenance. Does it make sense that if we perform a song by an American rap band that royalties are collected and paid to the copyright owners of that song, but when we perform a traditional song, no royalties are payable at all? What is this saying about whose culture is more valuable? By recognising and paying royalties to traditional owners, you are encouraging both the performers and the traditional owners to work within the process of acknowledging rights on the part of the performer and asserting and guarding rights for the traditional owners. I believe that this could foster a process of cultural development which is, by its very nature, Indigenous.

I often get approached by young artists who are proud to be Indigenous and want to work and interact with cultural heritage, make it more relevant to their lives, interpret it and be part of the cultural continuum, but they are unsure of the processes. Can they adapt a song or theatre piece? Have they contacted the right person? What do they put on the cover of their album when they publish it to stop other people from thinking it's fair game – terra nullius?

If a national system was to be established with a National Indigenous Cultural Authority as a point of contact for rights clearances and payment for uses, corporations would give back to Indigenous communities what they now take for free. More art and culture would be performed and encouraged. Indigenous people would find employment opportunities in not only arts and culture but in management, business, investment and as professional advisers to these industries as lawyers and accountants. This system could promote the practice of culture and the business of culture at the same time.<sup>741</sup>

Other models to draw on include the statutory licensing schemes set up by APRA. These collective copyright management agencies have developed large industries, and are leading cultural organisations which turn over millions of dollars per annum, which they distribute to their membership of copyright owners. Consider the role that these collecting societies play in developing and enhancing Australian creative industries. The roots for this invigoration are based on prior consent models – copyright exploitation rights and the collection of fees. Surely we could make use of these types of models to develop a culturally appropriate organisation to promote Indigenous arts and cultural expression?

### 5.2.6.3 *Connecting consent with culture*

Do we believe that our Indigenous arts and culture is part of a wider ecology that includes all levels of arts and cultural protection, from training to customary practice and to excelling professionally, like the Bangarra Dance Theatre and Geoffrey

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<sup>741</sup> Terri Janke, *Guarding Ground: A Vision for a National Indigenous Cultural Authority*, Wentworth Lecture 2008 (Terri Janke and Company, 2008).

Yunupingu? There are three main connections for NICA to deliver that are currently not being addressed by conventional IP systems:

1. connecting prior informed consent networks between users and owners for Traditional Culture Expression (TCE);
2. recognising the cultural attribution of the source community; and
3. respecting the cultural integrity of the work.

Could a National Indigenous Cultural Authority operate to facilitate consent and payment of royalties; to develop standards of appropriate use to guard cultural integrity and support rights holders in enforcing their rights? What effect might this have on our practice? It could help educate, make our jobs easier, promote cultural value and show young Indigenous kids that they have inherited a great wealth of cultural capital that can be made useful.

There are international developments which are leaning towards recognition of traditional knowledge and traditional cultural expression rights. In February 2009, the New Zealand Government and the three groups of Iwi agreed to a \$299 million compensation package for the Iwi's historical Treaty of Waitangi claims. The package included designation of ICIP rights in the Ka Mate Haka to one of the Iwi groups, the Ngati Toa. The rights are aimed at cultural redress rather than financial gain, and it is not expected the Ngati Toa will be able to claim royalties under them. They include the rights of acknowledgment of authorship of the Haka, and to negotiate with the Crown to protect the Haka, especially in terms of inappropriate commercial use.<sup>742</sup>

The World Intellectual Property Organisation (WIPO) is the international agency that administers the world's IP laws through treaties. Since 2000, it has been examining traditional knowledge and TCE protection within the IP framework. WIPO has developed a set of draft provisions on TCE including compliance with the "free, prior and informed consent" principle and the recognition of customary laws and practices.' Under the WIPO provisions the prior consent of the traditional owners of cultural expressions would be required prior to recording, publication and communication to

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<sup>742</sup> Letter of agreement between the Crown and Ngati Tao, Tikarohia Te Marama, February 2009.

the public. There would also be moral rights for communities but these would be automatic and not just voluntary.<sup>743</sup>

Six countries in the Pacific are looking at adopting the Pacific Model Law for the protection of cultural expression. The *Pacific Regional Framework for the Protection of Traditional Knowledge and Expression of Culture*<sup>744</sup> establishes 'traditional cultural rights' for traditional owners of traditional knowledge and expression of culture.<sup>745</sup> The prior and informed consent of the traditional owners is required to reproduce, publish, perform, display, make available online and electronically transmit, traditional knowledge or expressions of culture. The Pacific Model Law for the Protection of Traditional Knowledge and Expressions of Culture recognises the pivotal role of a cultural authority in administering prior informed consent rights.

Should Australia be examining the possibility of new laws? I consider that this model law would be a great reference point for those seeking the introduction of a National Indigenous Cultural Authority, and such a model may not need legislation but could be established to facilitate negotiated agreements for the use of ICIP, where both parties are willing to recognise ICIP rights, and where there are certain incentives for commercial interest groups to do so; for instance, where use of a branded trade mark or authentication label is given as part of the licensed user rights.

### **5.2.7 Conclusion**

Should there be infrastructure to support Indigenous cultural and intellectual property rights? To undertake its functions, NICA would need to make use of a range of tools which are IP-based. It would need a strong trademark and branding system that promotes cultural authority. In the same way the National Heart Foundation mark is applied to goods that meet criteria for healthy food, the NICA trade mark would appeal to consumers who are looking for authentic products and services that are made with

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<sup>743</sup> World Intellectual Property Organization, viewed 7 May 2009, <<http://www.wipo.int/portal/index.html.en>>.

<sup>744</sup> South Pacific Forum, *Pacific Regional Framework for the Protection of Traditional Knowledge and Expression of Culture* (2002).

<sup>745</sup> Secretariat of the Pacific Committee, *WIPO/UNESCO, Section 6 of the Model Law for the Protection of Traditional Knowledge and Expressions of Culture*, South Pacific Community, Noumea, 2002.

fair trade through the sharing of benefits with Indigenous custodians of culture. The mark could be used under licence with the processes of prior informed consent. It would also need contractual copyright management systems established, such as copyright licensing agreements. It would also use other measures such as protocols, benchmarking and Indigenous mediation for dispute resolution.

Keeping track of who owns rights, and who has made use of them, is an important feature of a rights access and management system. A National Indigenous Cultural Authority could manage rights clearances by keeping a comprehensive database of intangible cultural material and list rights holders, so that those who want to negotiate or seek appropriate use can do so by contacting the relevant parties.

The National Indigenous Cultural Authority could develop protocols that set standards for consent procedures, attribution and integrity. Consultation with Indigenous communities will be necessary to develop these protocols. Already a strong framework for protocols has been developed and whilst these are largely ethical in nature, or enforced in funding agreements for projects, protocols provide scope to examine how things might be implemented by a national coordination body, such as the National Indigenous Cultural Authority.

I have put this idea out to the Australian Indigenous arts and cultural sector for further debate. I am undertaking my PHD at ANU's National Centre for Indigenous Studies on these issues. It needs more thought, but we should engage in this discussion. We should really look at the cultural capital we have in our Indigenous cultural and intellectual property and develop systems that empower Indigenous people. The vision for a National Indigenous Cultural Authority is to set the state of play, on terms where Indigenous people are able to administrate consent and receive payment of royalties, to develop standards of appropriate use to guard cultural integrity, and to enforce rights. I believe that it will recognise source, give power to safeguard cultural integrity and unlock a range of economic and social benefits, as well as maintain culture, by allowing Indigenous people to interact with it and grow culture.

## Chapter 6: Case Study B – Indigenous Arts and Records Management

**Paper 4:** Terri Janke, 'Ensuring Ethical Collaborations in Indigenous Arts and Records Management' (2017) 91(5) *Australian Law Journal* 375–380.

### 6.1 Context

This article was written following the WIPO Seminar on 'Intellectual Property and Traditional Cultural Expressions' in June 2017. At that seminar I presented a discussion on issues in fake art and the importance of developing infrastructure that sets national standards and processes for prior informed consent, including protocols.

In my presentation regarding the issues that arise around IP and Traditional Cultural Expressions, the public domain and fake art were at the forefront. I discussed the lack of protection of Traditional Cultural Expressions in the public domain where creative materials not protected by IP laws can be used and copied without permission from the original creator, and highlighted how this inevitably leads to misappropriation without control. This occurrence is commonly known as fake art, and unfortunately has been common practice for many opportunistic businesses, designers and artists. It reflects a lack of ethical collaboration with Indigenous owners and creators, which became apparent throughout a large number of Indigenous art case studies, such as those examined in this paper.

The 'Fake Art Harms Culture' campaign began with the aim of avoiding misappropriation of Indigenous cultural expressions and preventing the production of fake Indigenous art. As a move to achieve this, an approach put forward is that of encouraging ethical collaborations between design companies and Indigenous artists and communities to allow them to express their own culture. These positive partnerships with Indigenous people can be achieved through the use of protocols and licensing and consent agreements, as well as the use of trade marks to better protect art.



In writing this article, I hoped to stress the importance of respectful and ethical collaborations, with regard to both Indigenous arts and record management, by examining case studies and possible mechanisms for success.

I chose this article for the thesis because it provides a case study into the value and availability of ICIP protocols as a means of encouraging positive, respectful and ethical relationships between Indigenous peoples and artists and non-Indigenous counterparts when collaborating in the particular field of Indigenous arts and records management.

## 6.2 Ensuring Ethical Collaborations in Indigenous Arts and Records Management

Traditional cultural expression and traditional knowledge and its interface with intellectual property laws raise many challenges for law and policy makers, and are viewed as incongruent with conventional intellectual property laws. However, the case studies in this article examine how the law and protocols have dealt with this meeting place of culture and law to consider what lessons can be gleaned. The author makes some concluding comments about her vision for a National Indigenous Cultural Authority.

### 6.2.1 Tribute to the Carpets Case

Twenty years ago, when I just finished law school, I worked at the National Indigenous Arts Advocacy Association and I got to help out on a case the team was running which established a legal precedent for the recognition of Indigenous cultural rights in artistic works using copyright law – *Milpururru v Indofurn*, known widely as ‘the Carpets Case’.<sup>746</sup> I recently came across an old photograph of the artists and the advisers taken at that time. At the centre of the photograph was Colin Golvan, the barrister in the case and a mentor to me, who cleverly ran the legal argument that saw the first legal win for Aboriginal artists in copyright. The photograph was taken by Michael McMahon, then CEO and lawyer at the National Indigenous Arts Advocacy Association,<sup>747</sup> who co-ordinated the case with assistance from Northern Aboriginal Legal Aid Services Ltd and Martin Hardie.<sup>748</sup>

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<sup>746</sup> *Milpururru v Indofurn Pty Ltd* (1994) 54 FCR 240. I was a recent graduate and helped the legal team working on the appeal case, co-ordinated by the National Indigenous Arts Advocacy Association: See Terri Janke, *Minding Culture: Case Studies on Intellectual Property and Traditional Cultural Expressions* (World Intellectual Property Organization, 2003).

<sup>747</sup> Then known as the Aboriginal Artists Management Association, an organisation established to provide advocacy services for Aboriginal and Torres Strait Islander Artists, now defunct.

<sup>748</sup> Richard Crane, Northern Aboriginal Legal Aid Services Ltd, Solicitor for applicants.

Some of the Aboriginal artists came from Bulabula Arts, an arts centre in Arnhemland, and others came from Central Australia. There was also Banduk Marika from Yirrkala, the home of Buku Larnngay Arts Centre. Banduk Marika, a member of the Rirratingu clan, is the only remaining living artist of the eight who took the case. Her artwork *Djanda and the Sacred Waterhole* was copied from a portfolio produced by the National Gallery of Australia. Her right to depict the iconic sand goanna from the creation story of her people was her birthright. She had the responsibility to care for its use in public. The carpet that reproduced her artwork put her at risk of losing this cultural right. Her ability to take the case and stop the unauthorised and offensive copying redeemed her status with her community. It was the first time the Federal Court of Australia recognised that Indigenous artists were entitled to use copyright to stop the unauthorised copying of their works on imported carpets, made in Vietnam.

The respondent had argued from the outset that Aboriginal art was in the public domain and that the artworks were not original. Justice von Doussa hearing the case, made a clear key point that even though the artists may have followed pre-existing cultural designs, copyright did apply to the artworks because each artist had imparted skill, labour and effort to meet the criteria of copyright. In this way, they were entitled to control the copying of whole or part of their works. It was a landmark judgment in Australia, celebrated as a win. This was because the case represented a meeting place between conventional copyright law and cultural laws. The individual artists were recognised as copyright creators, however, the community space in which they operated their arts and cultural practice was recognised in the giving of evidence and also in the judgment. For instance, cultural damages were awarded to living artists for the anguish suffered in being held responsible for the derogatory manner on the reproduction of an important cultural story where it would be walked upon.

The case set a pathway for many Indigenous artists to control their art and cultural expression and make a living out of moneys derived from copyright. Viscopy, which is the Australian copyright collecting society, has over 11,000 members, and half of those

are Aboriginal and Torres Strait Islander artists, many working in art centres across remote communities.<sup>749</sup>

### 6.2.2 Bibi Barba and the Hotel Eclipse

In 2012, Bibi Barba, Aboriginal Artist from Mandandanji country, googled her own name in preparation for a website she was establishing for her art. She discovered that her name came up linked to the Hotel Eclipse in Domaslaw, Poland. The carpet pattern in the hotel rooms looked very much like her works, *Desert Flowers* and *Flowers of the Desert*. She saw the prominent features of her artwork also reproduced in wood panelling, glass dividers, the table tops and the art panels in the foyer. Obviously Bibi was ‘absolutely gutted’ in seeing her works used in this way.<sup>750</sup> In Bibi’s words, the artwork was a connection to spirituality and country that should not be corrupted. The artworks were displayed, with permission, on a website of the Sydney Gallery. Now, across the world, the works were used by a Polish designer, commissioned by the Hotel Eclipse.

The designer alleges that this is not a copyright infringement but merely the designer drawing inspiration. The designer argues that she ‘re-designed’ the artwork.<sup>751</sup> In Australian law, the test is a substantial reproduction. However, the case must be taken in Poland. Bibi Barba continues to pursue her copyright case against the hotel and the designer. In a recent email to me she wrote:

Why is copyright so important to me? In essence, it is someone’s intellectual property, their thoughts, feelings and emotions, expressed visually. Particularly being an Indigenous artist, it is my connection to spirituality and country that should not be corrupted. This is my passion and livelihood.<sup>752</sup>

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<sup>749</sup> Email from Patricia Adjei (Indigenous Communications Coordinator, Copyright Agency–Viscopy) to Terri Janke, 24 March 2015; see <<https://viscopy.net.au/indigenous/>>.

<sup>750</sup> Andrew Taylor, ‘Hotel Designer denies copying Aboriginal paintings’, *Sydney Morning Herald* (online), 17 February 2013 <<http://www.smh.com.au/entertainment/art-and-design/hotel-designer-denies-copying-aboriginal-paintings-20130216-2ejo7.html>>.

<sup>751</sup> Ibid.

<sup>752</sup> Email from Bibi Barba to Terri Janke, 19 March 2015.

### 6.2.3 Art Protocols

In Australia, non-Indigenous artists who copy Indigenous art design and themes are acting inconsistently with nationally recognised cultural protocols. The peak agency for arts in Australia is the Australia Council for the Arts. The Australia Council's Aboriginal and Torres Strait Islander Arts Board developed a set of cultural protocols, which advocate for the proper respect of arts practice.<sup>753</sup> The protocols are based on key principles which include Indigenous control and communication, consultation and consent. The visual arts protocols state that consent is necessary for the reproduction of Indigenous visual arts, and if traditional communal designs are included, consent may be required from traditional owners.<sup>754</sup> These protocols have set standards, and are also made legally binding, to those who receive grant funding from the Australia Council.

### 6.2.4 Musée du Quai Branly: Australian Indigenous Art Commission

A different story concerns the Musée du Quai Branly, a museum in Paris, which commissioned eight Indigenous Australian artists to produce works that were incorporated into the architectural skin of the administration building.<sup>755</sup> The French architect, Jean Nouvel, had the idea of including the Aboriginal art in the building and to go about this task the Musée worked with the Australia Council for the Arts on the Australian Indigenous Art Commission. Two highly experienced Australian Indigenous curators were chosen to select and work with the artists – Brenda Croft and Hetti Perkins. They worked with Australian Installation Architect firm Cracknell & Lonergan, to select the artists and to consult with the artists about the creation of the installation works. This was an important process to ensure that the artist could control any community owned cultural material included in the works, and ensure that they complied with any customary obligations. The artists included Lena Nyadbi of Warmun

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<sup>753</sup> Terri Janke & Co wrote a set of five booklets for the Australia Council on Indigenous Artform Protocols, Visual Arts, Writing, Music, Media and Performing Arts, 2003 and 2007: see <http://www.australiacouncil.gov.au/about/protocols-for-working-with-indigenous-artists/>

<sup>754</sup> Terri Janke & Co, Visual Arts: Protocols for Producing Indigenous Australian Visual Arts (Australia Council for the Arts, 2007).

<sup>755</sup> Musée du Quai Branly and the Australia Council for the Arts, *Australian Indigenous Art Commission* <http://www.quaibrantly.fr/en/public-areas/aboriginal-works-on-the-roof-and-ceilings/>.

Arts, whose work is featured on the façade and the rooftop; and Judy Watson, whose work is in the foyer of the building. To secure the rights, contracts in French and English covered the rights to install the artworks in to the building and to grant the non-commercial uses that the Musée would need.<sup>756</sup> The artists were paid a fee, and also attended the launch. The contract included attribution clauses; community recognition clauses; annual reporting provisions; and the Indigenous visual arts protocols guide was translated in French and attached in an appendix. A curatorial guide was created for the Musée so that the care of the works could be properly managed.

### **6.2.5 Lessons Learnt from Art Case Study**

Copyright has been used by Indigenous artists in Australia to stop infringements of their cultural works. The Australian case of *Milpurrurru v Indofurn* is an example of this, where it was shown that there was direct and substantial copying of existing work. However, the protection of styles and themes can fall through the cracks. Further, copyright only protects traditional cultural expression that is expressed in a material form, and protection is only for the term of the copyright, which in Australia is 70 years after the death of the creators. Bibi Barba's case shows the difficulty that Indigenous artists have in controlling how their works are used internationally. Bibi's works appear to have been used towards the development of the Hotel Eclipse's interior design, but she was never contacted or consulted. Whilst clearly she is copyright owner of her works, there are limitations for Indigenous artists in using copyright to protect their works when international use is alleged. It is up to foreign jurisdictions to consider whether the work has been copied or if it is inspiration. A better approach is to work with a living artist, as was the case with the Musée du Quai Branly. The individual artists granted copyright rights to the Musée and worked within community cultural protocols to ensure an acceptable installation of the artworks in the building.<sup>757</sup> For those wanting to make use of Indigenous or traditional cultural expression styles, it is best to commission the work of an Indigenous artist rather than use Indigenous

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<sup>756</sup> Terri Janke & Co worked on the project with assistance from French Lawyer, Alexia Moissonie.

<sup>757</sup> The Australia case of *Bulun Bulun v R & T Textiles* (1998) 157 ALR 193 recognised that the Aboriginal artist has a fiduciary duty to the community to deal with his or her copyright consistently with their cultural obligations.

traditional cultural expression as 'inspiration'. The Musée du Quai Branly project provides an example of successful engagement with Indigenous artists and the community. There were also long term benefits such as Indigenous curatorial fellowships.

### **6.2.6 Records**

Another significant issue for Indigenous people is around copyright of anthropological records that contain images and words of family members, traditional knowledge and traditional cultural expression. Henrietta Fourmile Marrie, Yidinji woman, has been an inspiration to me throughout my career. Her 1989 article, 'Who owns the Past? Aborigines as Captives of the Archives'<sup>758</sup> highlighted the fundamental issue for Indigenous people, that is, we do not own the records taken of us. She pointed out the oral stories and cultural expression and knowledge is captured in sound recordings, film and in the records taken by researchers. Indigenous people have no stake in the ownership. Access and use to these materials often vests legally in the researcher as the author of the material form and the maker of the recording and the film. But traditional knowledge, traditional cultural expression and those who own it are not protected. Indigenous people are concerned that they cannot access records or use and publish them without permission of a copyright owner. Another issue is that Indigenous people cannot control who gets to access to material, for example, they cannot control who sees films of sacred ceremony. Furthermore, they cannot control out of context and derogatory use of the materials.

### **6.2.7 Deepening Histories of Place**

In 2013, my company worked with the National Film and Sound Archive and the Australian National University on a research project, Deepening Histories of Place. Deepening Histories of Place was a multi-partner project for the collection, recording, storage and use of Indigenous knowledge about place/location. The project included interviewing Indigenous people, filming interviews (video and sound), recording notes,

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<sup>758</sup> Henrietta Fourmile, 'Who owns the Past? Aborigines as Captives of the Archives' (1989) 13 *Aboriginal History* 1.

filming Indigenous land and places. It also used existing copyright and archival material. Each partner organisation anticipated using the materials for their own purposes. For instance, the funding body wanted access to final products; the PhD researchers publish a thesis; the film company makes a documentary for distribution and sale and the government departments and universities collect information and knowledge. For example, national parks use materials to create an app for tourism. Archives, including the Australian Institute of Aboriginal and Torres Strait Islander Studies (AIATSIS) Archives, want to collect the 'histories' for preservation.

We created protocols to clearly set out the values of the project and purposes, and set up a framework for the interplay of information and processes for filming on Indigenous lands and national parks; regulating the use of images of deceased people, cultural protocols, copyright and ethics. The most interesting feature about this project was that the ownership of the recordings are vested in the knowledge-holders even though the recordings are made by filmmakers and researchers. To cover this, all rights are assigned to the knowledge-holder in writing. To ensure transparency, the protocols are published on the project website along with the clearance forms so that full information is given to the participants. Copies of the materials are given to the individuals who participate and the community. Specific licenses and permissions are sought for the projects.

The Deepening History Protocol and clearance forms are now a publically available resource of Indigenous knowledge. The Australian Law Reform Commission has recognised it as best practice in its 2014 Digital Economy and Copyright Review. All resources described in this presentation are free to access and use.<sup>759</sup> Deepening Histories of Place<sup>760</sup> is a successful model to deal with traditional knowledge and traditional cultural expression when recording cultural stories in film and sound, because copyright in the recordings were assigned back to the knowledge-holder, so they are in control of how the information is used. The involvement of the National Film and Sound Archive and the Australian Institute of Aboriginal and Torres Strait Islander

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<sup>759</sup> See <<http://www.deepeninghistories.anu.edu.au/>>.

<sup>760</sup> National Film and Sound Archive and Australian National University <<http://www.deepeninghistories.anu.edu.au/ethical-protocols/>>.



Studies means that copies will be held at these leading Australian cultural institutions, and that the access and use are controlled in accordance with the protocols.

### **6.2.8 Australian Institute of Aboriginal and Torres Strait Islander Studies**

AIATSIS maintains and preserved a world unique collection of Indigenous items many collected as a result of research, field work and film production including 40,000 hours of recordings, 650,000 photographs and 12,000 manuscripts. The Institute holds a lot of unpublished materials. The challenge for the Institute is to manage access and use processes in accordance with the obligations to under its establishing law that state that it must not disclose information that 'would be inconsistent with the views or sensitivities of relevant Aboriginal persons or Torres Strait Islanders'. The Institute must also abide by deposit terms, which may restrict access and publication to sacred and secret material or personal material. The Institute's Access and Use Policy manages these obligations. For instance, the Institute manages access to Indigenous Australians who have a demonstrated connection with the materials. Clients wishing to access or use unpublished sensitive materials owned or controlled by AIATSIS, including orphan works, must first obtain permission from the relevant Aboriginal or Torres Strait Islander community, or in the case of personal material, the relevant individual.

There is developing practice within Australia of cultural institutions developing such protocols and practices including the National Museum of Australia and the National Film and Sound Archive. Internationally, work is being undertaken at cultural institutions.<sup>761</sup> There is also the WIPO Creative Heritage Training Program which can assist institutions develop policies and practices aimed at dealing with the management of traditional cultural expression and traditional knowledge.

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<sup>761</sup> For more information see IP and the Safeguarding of Traditional Cultures: Legal Issues and Practical Options for Museums, Libraries and Archive which provide a comprehensive guide for cultural institutions.

### **6.2.9 Key Lessons in Records Practice and Intellectual Property Protection**

From this case study on creating records of traditional knowledge and traditional cultural expression I have illustrated the role that copyright and contracts can play in providing positive protection measures. The requirement of material form disfavours Indigenous cultural knowledge-holders who orally transfer traditional knowledge and traditional cultural expression. Using written agreements which transfer ownership to the individual knowledge holder, and also seeking clearance from communities sets up a framework that uses copyright, contracts and protocols as tools to favour Indigenous knowledge-holders.

There are still shortfalls in protection of copyright. The still limited time protection of copyright would mean after 70 years of the death of the artist, the work will fall into the public domain. The use of contracts has limitations in that the parties are bound to meet obligations under the contract. It does not cover rights against third parties. Indigenous people want protection of their traditional cultural expression in perpetuity. Furthermore, Indigenous communities can develop their own traditional cultural expression recording policies and protocols. For example, the Kimberly Land Council developed IP and traditional knowledge policies in regards to their Aboriginal community.<sup>762</sup> These policies are intended to cover intellectual property, confidential information, traditional knowledge and cultural expression. They enable them to feel secure that their IP and traditional knowledge will not be used in demeaning or inappropriate ways.

### **6.2.10 Conclusion: National Indigenous Cultural Authority**

Using existing laws, protocols and contracts provide ways to protect traditional cultural expression. However there are gaps which will require legislation. Indigenous Australians call for laws that recognise their rights to cultural knowledge and expression. However, being only 2% of the population, there is no political will for changes to law. We need to now act to fix this problem by bringing in structures and

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<sup>762</sup> Terri Janke & Co, *Intellectual Property and Traditional Knowledge Policy* (Kimberley Land Council, 2011) <<https://www.klc.org.au/research-facilitation-nts/?rq=intellectual%20property%20and%20traditional%20knowledge%20policy%5C>>.

processes that assist the management of these rights. The solution should include laws and processes which recognise the authority of the group to 'maintain, control and protect'<sup>763</sup> what can be shared, and provide assistance to identified custodians.

I have written about a proposal for a consistent national framework – National Indigenous Cultural Authority in *Beyond Guarding Ground*.<sup>764</sup> The NICA model proposes the creation of an independent organisation that can support the facilitation of Indigenous Cultural and Intellectual Property (ICIP) rights by providing tools, contracts, monitoring and codes/protocols, as well as implementation of a certification process using a registered trade mark, to allow consumer identification of NICA endorsed cultural products and services. The model for a NICA recognises the rights of Aboriginal and Torres Strait Islander Peoples to manage their ICIP, through free, prior and informed consent, and on mutually agreed terms, consistent with the UN *Declaration on the Rights of Indigenous Peoples*. This is a suggested solution jurisdictions in all countries should consider. I believe that a 'National Indigenous Cultural Authority' can achieve a balance between protecting traditional cultural expression rights and allow sharing on agreed terms. Furthermore, it is a framework that can empower Indigenous people both culturally and economically. In this way, Indigenous people can benefit from systems of IP protection which incentivise and reward their sharing, continual innovation and practice of their cultures.

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<sup>763</sup> *United Nations Declaration on the Rights on Indigenous Peoples*, art 31  
<<https://www.humanrights.gov.au/publications/un-declaration-rights-indigenous-peoples-1>>.

<sup>764</sup> Terri Janke, *Beyond Guarding Ground: A Vision for a National Indigenous Cultural Authority* (Terri Janke & Co, 2009a) <<http://www.terrijanke.com.au/beyond-guarding-ground>>.

## Chapter 7: Case Study C – Film Protocols

**Paper 5:** Terri Janke, 'Avatar dreaming: Indigenous cultural protocols and making films using Indigenous content' in Matthew Rimmer (ed), *Indigenous Intellectual Property: A Handbook of Contemporary Research* (Edward Edgar Publishing, 2015) 177–199.

### 7.1 Context

This paper was published in 2015 in *Indigenous Intellectual Property: A Handbook of Contemporary Research*, a research book edited by Matthew Rimmer, Professor of Intellectual Property and Innovation Law, Queensland University of Technology. It appears in the book in *Part Two: Copyright Law and Related Rights*.

The importance of using Indigenous protocols in the film industry is explored alongside issues of historical appropriation and copyright in films that engage with Indigenous content. In light of these issues, the paper explores the significance of the film *Avatar* (2009), including its plotline, thematic content, use of language, and the various claims that were made against director James Cameron following its release.

It highlights, by way of comparison, the best-practice standards that were upheld in the making of *Ten Canoes*<sup>765</sup> to demonstrate what can be achieved when genuine collaboration and consultation with Indigenous communities takes place. Discussion of the Screen Australia document I wrote, *Pathways & Protocols: A filmmaker's guide to working with Indigenous people, culture and concepts*<sup>766</sup> is included, as well as the argument for a NICA to help regulate the use of Indigenous concepts and material in the film industry.

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<sup>765</sup> *Ten Canoes* (Directed by Rolf de Heer and Peter Djigirr, Palace Films, 2006).

<sup>766</sup> Terri Janke, *Pathways and Protocols: A Filmmaker's Guide to Working with Indigenous People, culture and Concepts* (Screen Australia, 2009d).

Although not included in this paper, projects that work within the emerging arena of Virtual Reality technologies (VR) will similarly require standards of practice and protocols for Indigenous engagement. Lynette Wallworth and Curtis Taylor's *Collisions* (2017) is an award winning project that utilises VR in a film documentary about the Martu tribe of Western Australia, with a focus on the perspective of Indigenous elder Nyarri Morgan. Like *Avatar* it engages with themes involving Indigenous land rights, the environment and resource management, although through the mode of documentary rather than fiction. It is significant because in exploring this subject matter and using VR and drone technology, which, due to their emerging status, lack structural frameworks around rights and benefit sharing, Wallworth understood and carried out the necessity of responding to community protocols to prevent exploitation:

VR will soon hit in a big way, very possibly to become ubiquitous. In the window of time that exists before then I wanted to make a work that has protocols of meeting at its core...The agency in *Collisions* belongs to Nyarri.<sup>767</sup>

My firm assisted by drafting a contract that protected Nyarri Morgan's ICIP rights, and to ensure that protocols for caring for the story were followed throughout the making of the work.<sup>768</sup> Walworth was also guided by *Pathways & Protocols*.<sup>769</sup> Here, the relevance and usefulness of cultural protocols extends even to the field of emerging technologies such as VR and drones. Film protocols can thus be adapted and employed by those who lead projects that are cross disciplinary and experimental in nature.

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<sup>767</sup> Lynette Wallworth, *The Film* <<http://www.collisionsvr.com/about-the-film>>.

<sup>768</sup> Lynette Wallworth and Curtis Taylor, 'Interview about *Collisions*' in Josh Harle, Angie Abdilla and Andrew Newman (eds), *Decolonising the Digital: Technology as Cultural Practice* (Tactical Space Lab, 2018) 93.

<sup>769</sup> *Ibid* 94.

## 7.2 Avatar dreaming: Indigenous cultural protocols and making films using Indigenous content

In November 2009, my ten-year-old son put a yellow post-it note on the fridge door. It said 30 days until *Avatar*. The next day, the post-it note was replaced with another. This continued each day, as he counted down the days until *Avatar* the movie was to be released in Australian cinemas. I must admit I had no idea about the movie until my son's communications. Further, I had no knowledge of the movie's theme until I saw the movie. I watched it and was entertained, yet identified a strong parallel of the movie's plot to the plight of indigenous people worldwide. The film's plot reflected the dispossession of Indigenous people's land and resources at the hands of colonisers. It also drew on common cultural practices of international Indigenous people for characterisation and the identity of the Na'vi people. As an Indigenous person, my reaction was one of emotion and pride for Indigenous resilience. The Indigenous themes were obvious to me and reflective of a plight that continues today.

*Avatar* made \$2.7 billion worldwide at the box office.<sup>770</sup> It was considered a leader in 3D technology. There were blue ray release, extended cuts, books and merchandising. Two years later, I read of several claims against the filmmaker James Cameron's company, which alleged copying. The claims have ranged from copying artistic works of blue people,<sup>771</sup> to taking the theme of a book about a paraplegic transcending the wheelchair to walk in another dimension, using an avatar.<sup>772</sup> The

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<sup>770</sup> *Avatar* (James Cameron, Twentieth Century Fox Film Corporation, Dune Entertainment, Ingenious Film Partners and Lightstorm Entertainment, 2009) <<http://www.imdb.com/title/tt0499549>>.

<sup>771</sup> In 2010, I came across a blog by the artist Christine Sherry, a young Canadian artist who claimed that James Cameron had appropriated her artworks of blue people which she had posted on her website. Sherry's figures are blue but do not look like the Na'vi people. I noticed that the blog was taken down shortly after. Cameron has said that the idea of tall blue people came from a dream his mother had. It is unlikely that a person could claim copying of the idea to make the people blue. The smurfs are blue and Hindu deities have blue skin.

<sup>772</sup> The paraplegic theme was alleged to have been taken from a Poul Anderson 1957 short story *Call me Joe* and 1978 novella, *The Avatar*. The 1957 has a paraplegic as its main character who can telepathically connect with an artificially created life form in order to explore Jupiter. Max Kennerly, 'Does Copyright Law Care if James Cameron's *Avatar* Ripped off Parts of "Call Me Joe"', on *Litigation and Trial* (2 November 2009) <<http://www.litigationandtrial.com/2009/11/articles/the-law/for->

most recent judgment, handed down in January 2013 in *Morawski v Lightstorm*, concerned a claim by a visual effects consultant who claimed that Cameron had breached a non-disclosure agreement and copied his screenplay, *Guardians of Eden*.

James Cameron, the director, presented his film at the United Nations Permanent Forum and has been praised by Indigenous groups as an advocate. The film is considered to be aligned to environmental and Indigenous rights movements. The film has been labelled anti-mining and anti-American and criticised as pushing a left-wing anti-American agenda.<sup>773</sup> Protestors for environmental rights painted themselves blue. In addition, jumping on its pro-environment reputation, eco-friendly tourism experiences also make connections to the film.

*Avatar* does not copy one Indigenous cultural group but takes the concepts of Indigenous languages, cultural expressions and traditional knowledge, and adapts them to create an anthropology of the Na'vi and their environment in Pandora. However, some commentators slammed the film for perpetuating stereotypes of Indigenous people because it creates a mishmash fictional 'faux Indigenous world' drawn from commonalities of world Indigenous cultures.

In 2009 I was commissioned by Screen Australia to develop an Indigenous film protocol guide, *Pathways & Protocols: A Filmmaker's Guide to Working with Indigenous People, Culture and Concepts*.<sup>774</sup> The protocol guide was commissioned in response to Indigenous Australian criticism of appropriation and misrepresentation of Indigenous content in Australian films. *Pathways & Protocols* promotes consultation and involvement of Indigenous people for the use of Indigenous stories and cultural beliefs in films. It also asks filmmakers to consider at the outset how their films might impact on Indigenous people; how the cultural material will be respectfully presented

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people/does-copyright-law-care-if-james-camerons-avatar-ripped-off-parts-of-call-me-joe/>. The cover of the short story was also reported to have a blue alien figure on the cover. Whilst several film websites allege similarities between Anderson's works and *Avatar*, as far as I could ascertain, there has been no legal action commenced by Poul Anderson. Anderson died in 2001 and no action appears to have been taken by his estate. Vince Mancini, 'James Cameron Stole Avatar?', *Film drunk*, 27 October 2009 <<http://filmdrunk.uproxx.com/2009/10/james-cameron-stole-avatar-question-mark>>.

<sup>773</sup> Miranda Devine, 'Hit by the Leftie Sledgehammer', *Sydney Morning Herald* (online), 2 January 2010 <<http://www.smh.com.au/opinion/hit-by-the-leftie-sledgehammer-20100101-llpp.html>>.

<sup>774</sup> Terri Janke, *Pathways & Protocols: A Filmmaker's Guide to Working with Indigenous People, Culture and Concepts* (Screen Australia, 2009d) <<http://www.screenaustralia.gov.au>>.

and to also consider benefit sharing. Screen Australia and film funding agencies require filmmakers to comply with the Protocols.

Film is a highly collaborative process and expensive to make. The current economic model, supported by copyright and contract, serves to vest copyright ownership in the 'maker' who needs all the rights to exploit the film. The filmmaker relies on investment but must negotiate the underlying rights to the film, and all other exploitations. Protocols about use of Indigenous content can easily get lost in the many rights negotiations.

In this chapter, I wish to suggest that films that make wide use of Indigenous cultural expression should follow Indigenous protocols. It doesn't matter if no one cultural group's heritage is the focus, but attempts should be made by the filmmaker to take cultural protocols into account when using cultural heritage like languages, cultural beliefs, costumes and Indigenous histories.

Section 1 will introduce the issues for film and copyright law. Specifically I will examine how, whilst film is a collaborative project, the law gives rights to the maker. Section 2 will analyse the claims of copyright infringement against the film and specifically the judgment of *Morawski v Lightstorm*<sup>775</sup> in terms of its commentary on the Indigenous themes of *Avatar*. Section 3 will examine the approaches taken by the filmmaker James Cameron and analyse this with reference to the developing Indigenous cultural protocols framework. In conclusion, I will discuss what role a National Indigenous Cultural Authority might play in managing use of Indigenous cultural expression.

## **7.2.1 Copyright and Films: Many Hands, One Boss**

### *7.2.1.1 Australian position: 'Cinematographic film'*

Many sources are drawn together to create a film. The film producer engages a range of creators to develop a work, including screenwriters, directors, actors, technicians, set and costume designers and visual effects advisers. Films may also incorporate a

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<sup>775</sup> *Gerald Morawski v Lightstorm Entertainment Inc.* (United States District Court Central District of California, 31 January 2013).



variety of existing content including songs, books or plays and artistic works. Further, films can draw on past ideas such as historical events, universal themes, works out of copyright and life stories. Films may also engage advisors or cultural consultants. Films are collaborative projects that require the input of many people.

However, in terms of Australian copyright law, a film is recognised as ‘a cinematograph film’<sup>776</sup> in the category ‘subject matter other than works’.<sup>777</sup> Michael Handler points out that copyright protects the ‘resultant subject matter’, and the film is not recognised as a creative work.<sup>778</sup> The copyright owner is the ‘maker’ of the film.<sup>779</sup> This means that the maker, the producer or the director, have the entire rights to negotiate with investors and production houses for the making of the film, and the rights to economically exploit it.

Michael Handler highlights that the Australian copyright law, and that of the United Kingdom, fails to recognise that film is the product of an interdependent relationship between collaborative artistic creation and economic investment. Rather the focus of the current copyright law is to protect the ‘film fixation’. Handler gives a historical overview of the developments of film copyright in Australia, detailing the shift in the law’s approach from protecting films as ‘original works’ to understanding ‘cinematograph film’ as a separate category of copyright subject matter, a move which occurred 60 years ago. He notes that the 1952 Gregory Committee considered that it was impracticable to recognise film as joint authorship works. He quotes the Report of the Copyright Committee:

If no single author or group of authors is to be designated as the owner of the ‘film copyright’, then it seems to me that the obvious and logical owner of the copyright in the film is the person responsible for making it...what we have in

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<sup>776</sup> A ‘cinematograph film’ means the complete and final version of a cinematograph film in which copyright subsists: *Copyright Act 1968* (Cth) s 189.

<sup>777</sup> In Australia, film rights are covered in the ‘subject matter other than works’ part of the *Copyright Act*.

<sup>778</sup> Michael Handler, ‘Continuing Problems with Film Copyright’ (2008) *UNSWLRS* 51 <<http://www.austlii.edu.au/au/journals/UNSWLRS/2008/51.html>>.

<sup>779</sup> Under s 98(2) and (3) of the *Copyright Act 1968* (Cth), the maker of the film is the copyright owner of it, and where a person makes, for valuable consideration, an agreement with another person to make a film, that first person will be the owner.

mind is the entrepreneur...under whose care the labours of many contributors are brought to successful issue.<sup>780</sup>

It is standard film industry practice for the producer to contractually acquire all the rights they need to make and exploit the film. For example, production and investment agreements and directors agreements grant rights to the Producer.

Despite the Australian copyright law's approach of vesting the economic copyright rights in the producer as the entrepreneur, the Australian moral rights regime delivered rights to the creators – the individual directors, screenwriters and producers.<sup>781</sup> Handler says it is inconsistent 'to grant moral rights to subject matter long excluded from the realm of authorial works', but the result of heavy lobbying from film creative groups convinced the government that they were making key creative decisions which were deserving of moral rights protection.<sup>782</sup>

Handler challenges the view that films should not be treated as authorial works. He states that the lawmakers and policymakers need to consider whether specific protection should be given to human 'authors' of 'cinematographic works'.<sup>783</sup> Matthew Rimmer also considers the point using *Shine* starring Geoffrey Rush, based on the pianist, David Helfgott, as a case study.<sup>784</sup> Rimmer reviews the legal battles and lobbying pushes surrounding the film. In the context of competing interests between

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<sup>780</sup> As cited in Michael Handler and the Gregory Copyright Committee, 'Report of the Copyright Committee' (Cmnd 8662, 1952) para 99–100.

<sup>781</sup> A company cannot hold moral rights. The moral right of integrity in respect of a cinematographic film lasts for the lifetime of the filmmaker. By contrast, the term of protection for moral rights in respect of other works last for life plus 70 years. Moral rights have been part of the *Copyright Act 1968* (Cth) since 2000. The copyright term extension to life plus 70 years took place with the *Australia-United States Free Trade Agreement 2004 (AUSFTA)*, signed 14 May 2014, [2015] ATS 1 (entered into force 1 January 2005).

<sup>782</sup> Michael Handler, 'Continuing Problems with Film Copyright' (2008) *UNSWLRS* 51, 7 <<http://www.austlii.edu.au/au/journals/UNSWLRS/2008/51.html>>.

<sup>783</sup> *Ibid* 7.

<sup>784</sup> Matthew Rimmer, 'Shine, Copyright Law and Film' (2001) 12(3) *Australian Intellectual Property Journal* 129.

the screenwriter,<sup>785</sup> the director<sup>786</sup> and the producer,<sup>787</sup> I wondered whether David Helfgott's family had any moral or economic rights for the adaptation of his life story as a film. In any case, the point Rimmer makes supports Handler's view that the authorship of films does not easily translate to solely favouring the producer at the expense of other creative contributors. It appears to be viewed as a practical measure to deliver rights to the producer to exploit the film rights. Whilst a large number of contributions go into making a film, the transaction of contributions are usually handled by contract, which assigns rights from the creative contractors to the producer, so they can own the full rights.

The issue of whether the event organiser of a filmed Kokoda Track expedition had a copyright interest in the resulting film footage was judicially considered in *Seven Network (Operations) Ltd v TCN Channel Nine Pty Ltd*.<sup>788</sup> The film footage in question was taken by the Seven Network of a group of troubled schoolboys. The Event Organiser, Mr Murray, was held to be a 'maker' of the film and hence, a joint copyright owner of the film. This was because Mr Murray had part paid for the expenses of an accompanying cameraman, sound engineer and equipment. He had provided 'valuable consideration' in terms of Section 98 of the *Copyright Act 1968* (Cth).<sup>789</sup> The arrangement had been an oral agreement. There was no written contract about each party's rights to use the film. The court decided that the co-ownership of copyright in the film footage meant that the Mr Murray could not licence broadcast rights to another television station without Seven Network's consent. Whilst Seven Network had given a copy of the tapes to Mr Murray, he only had a non-assignable licence to use the film.

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<sup>785</sup> Jan Sardi, the screenwriter of *Shine*, asserted recognition as an author, arguing that scriptwriters have a personal connection to the film.

<sup>786</sup> Scott Hicks, the director, advocated on behalf of the Australian Screen Directors Association for directors to gain recognition as copyright owners, both in terms of economic rights and moral rights. Rimmer notes they argue that 'the director is the principal creative contributor to a cinematographic film because directors control what appears in the frame: sets, lighting, costume, acting, music, the behaviour of the figures, and the staging of the scenes', Matthew Rimmer, 'Shine, Copyright Law and Film' (2001) 12(3) *Australian Intellectual Property Journal* 129-142, 135.

<sup>787</sup> Jane Scott, the producer, took legal action against the foreign film distribution company, arguing successfully and taking them to task, regarding the amounts to be paid in royalties.

<sup>788</sup> *Seven Network (Operations) Ltd v. TCN Channel Nine Pty Ltd* [2005] FCAFC 144 (8 August 2005) <<http://www.austlii.edu.au/au/cases/cth/FCAFC/2005/144.html>>.

<sup>789</sup> Under s 98(2) and (3) of the *Copyright Act 1968* (Cth), the maker of the film is the copyright owner of it, and where a person makes, for valuable consideration, an agreement with another person to make a film, that first person will be the owner.

Mr Murray would require their prior consent to allow Channel Nine to use the raw footage to make a competing documentary. A question to consider is whether Seven Network would need permission from Mr Murray to use the film footage for any other purpose and not just for the agreed documentary. Presumably they would. This case highlights a shift away from the legal underpinnings of the law that structure film copyright as the property of film producers.<sup>790</sup> The option of joint ownership opens up opportunities for Indigenous communities to control the future uses of films embodying cultural content. Further it allows them to share in the economic benefits. A shift away from the economic hard line that the producer must have unencumbered rights to exploit the film 'in all media now known and yet to be devised' can also take into account cultural protocols and provide scope for collaborative film projects.

#### 7.2.1.2 *Ten Canoes – A Shift to Sharing*

The feature film, *Ten Canoes*...shows that it is possible, with the patience and commitment of all those involved, to negotiate a way of presenting an Aboriginal story, incorporating an Aboriginal 'way of knowing' and 'way of telling' a story. (Kathy Bowrey)<sup>791</sup>

A good example of a collaborative film project is the film by Rolf de Heer and Peter Djigirr – *Ten Canoes*.<sup>792</sup> The idea for the film sprung out of connections between Rolf de Heer and David Gulpilil,<sup>793</sup> whom he met whilst making *The Tracker* in 2000. David invited Rolf to Ramingining where they spent time and decided to make a film together.

The story focuses on ten men from Ramingining, who make their canoes, and then go on a goose egg hunt. The group's leader and elder, Minyngululu has three wives. The young Dayindi, the main character, covets Minyngululu's youngest wife. Minyngululu deals with it by telling him an ancestor story with a similar scenario. The film includes many cultural issues including payback (makaratta), canoe making and ceremony. It

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<sup>790</sup> Michael Handler, 'Continuing Problems with Film Copyright' (2008) *UNSWLRS* 51, 11 <<http://www.austlii.edu.au/au/journals/UNSWLRS/2008/51.html>>.

<sup>791</sup> Kathy Bowrey, 'Alternative Intellectual Property? Indigenous Protocols, Copyleft and New Juridifications of Customary Practices' (2006) *Macquarie Law Journal* 65.

<sup>792</sup> *Ten Canoes* (Rolf de Heer and Peter Djigirr, 2006) <<http://www.imdb.com/title/tt0466399>>.

<sup>793</sup> David Gulpilil is the narrator in *Ten Canoes* and an internationally acclaimed Indigenous actor.

is set both in the past (centuries ago, before the coming of white people to Australia) and in the Ganalbingu mythical past.<sup>794</sup>

The film is the result of close collaboration during which the Aboriginal community worked with Rolf de Heer regarding the key creative decisions, including the story line, casting choices,<sup>795</sup> use of languages and obligations to family.<sup>796</sup>

Peter Djiggirr, a senior Aboriginal clan representative, is the co-director. The Ramingining community is also attributed. The film depicts significant cultural expression and traditional knowledge. The film is in the Aboriginal language of Ganalbingu.

The film was inspired by a photograph of ten canoeists taken by Donald Thomson,<sup>797</sup> an anthropologist who spent time working in Ramingining in the 1930s. Thomson's work includes 2,500 photographs and documents recording Yolngu customs, ceremonies, hunting and daily survival.<sup>798</sup> According to the study guide, Thomson's field notes, photography and the research were sourced.<sup>799</sup> The access to this material and its interpretation in the film was closely monitored by senior culture people.

Through consultation with the relevant Indigenous people on issues to do with casting and storyline, the filmmakers were able to discuss the resolution of certain conflicts. In the SBS Independent documentary, *The Making of Ten Canoes* there is an example of a time when the director had to work out how he had caused offence to members of the community and how he had to sort the matter out by consultation with the elders. The documentary shows how the filmmakers worked with the Indigenous

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<sup>794</sup> *Ten Canoes Study Guide* (Vertigo Films, 2006)

<<http://metromagazine.com.au/tencanoes/guide.htm>>.

<sup>795</sup> The 10 men in Thomson's canoes photograph have been identified over the years, and many people in Ramingining are related in some way to at least one of them. Those with the strongest claims to heritage chose themselves to play their ancestor, as they saw it, and that was the end of that. The women were chosen because of their kinship relationships to the main men.

<sup>796</sup> Kathy Bowrey, 'Alternative Intellectual Property? Indigenous Protocols, Copyleft and New Juridifications of Customary Practices' (2006) *Macquarie Law Journal* 65-95.

<sup>797</sup> D F Thomson, Goose Egg Hunters Poling Themselves through the Arafura Swamp, April 1937.

<sup>798</sup> Susan Jenkins, 'Colliding Worlds at Tandanya 13 Canoes at the South Australian Museum' (2008) *Art Monthly Australia* 16-21.

<sup>799</sup> Libby Tudball and Robert Lewis, *Ten Canoes: A Film by Rolf de Heer and the People of Ramingining* (Metro Magazine) <<http://www.metromagazine.com.au/shop/downloads/sg310.pdf>>.

community<sup>800</sup> and the subtleties of cultural interchange and the consultation process.<sup>801</sup> The Ramingining Community were the first audience for the film.<sup>802</sup>

Costume design and props were created in collaboration with the Ramingining Women's Centre who made the mosquito huts, woven bags and waist strings. The spears and woomeras used in the film were made by local Aboriginal men. Usually the practice in film finance arrangements is for the investors to own these items.<sup>803</sup> It was agreed that these items were to be owned by the community and not the investors. After the filming, the artworks, canoes and props were included in an exhibition at Bula'bula Arts. Vesting ownership in the community allowed them to develop some spin-off projects: *11 Canoes* was a project that taught older teens from the community how make their own mini documentaries; *12 Canoes* was a multi-media project and cinema presentation of 12 linked short subjects; *13 Canoes* was an exhibition of the props and art toured to South Australian Museum for the 2006 Adelaide Fringe Festival; and *14 Canoes* was a book featuring some of the original Thomson photographs and matching contemporary photographs of the people of Ramingining.

Rolf de Heer described the film as a 'product of Aboriginal law'.<sup>804</sup> By this, he meant that the creative process followed traditional artistic practices: 'It is the telling of the law/lore, of a story that 'did not exist' until the collaboration.'<sup>805</sup>

In terms of the western law and copyright, the approach to filmmaking breaks new ground for Indigenous film collaborations, with copyright being shared between the filmmaker and the community.<sup>806</sup> Further, applying the legal principle in *Bulun Bulun v*

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<sup>800</sup> The local Aboriginal arts centre, Bula'bula Arts played a facilitating role in the film production and associated projects.

<sup>801</sup> Molly Reynolds, Tania Nehme and Rolf de Heer, *The Making of Ten Canoes*, SBS Independent, July 2006.

<sup>802</sup> The filmmakers had the first public screening in Ramingining – in December 2005. It was a chance for the community to see the film before it was widely released. Twenty-one Ramingining community members were flown to Adelaide to attend the world premiere of the film. At the Adelaide Festival, it screened to two sell-out sessions and was highly applauded.

<sup>803</sup> Rolf de Heer, 'Address to the Sydney Film Festival', 2006.

<sup>804</sup> Kathy Bowrey, 'Alternative Intellectual Property? Indigenous Protocols, Copyleft and New Juridifications of Customary Practices' (2006) *Macquarie Law Journal* 65.

<sup>805</sup> *Ibid.*

<sup>806</sup> However, see the Bell's case as a comparative of where copyright was claimed by the American director, but the court found that Bell was the sole copyright owner: *Bell v Steele (No. 2)* [2012] FCA 62 (7 February 2012).

*R & T Textiles*, where the artist owed a fiduciary duty to the clan to exercise copyright consistently with customary law, the filmmakers have a fiduciary duty to respect the cultural material embodied in the film. As Bowrey points out, by their conduct, the filmmakers have a fiduciary obligation to 'protect the stories and ensure that the film, as both a resource and product, was presented and used appropriately.'<sup>807</sup>

If directors, screenwriters and producers should have rights to a film because they make key creative decisions, then Indigenous cultural contributors should be recognised. *Ten Canoes* sets a strong standard. The collaboration and observation of protocols was made possible because community organisations, like the Arts Centre, were able to provide the administrative support and structure, and therefore they could negotiate and manage the process. This would not be the case for all Indigenous communities, and a need for capacity building and advocating cultural protocols to the filmmakers is a role that a National Indigenous Cultural Authority could have.

### 7.2.1.3 *American Position: 'Works for Hire' Doctrine*

In America, the *Copyright Act 1976* (US) treats films as 'joint works', being works 'prepared by two or more authors with the intention that their contributions be merged into inseparable or interdependent parts of a unitary whole'.<sup>808</sup> Creators who write or contribute to the film do so as employees or contracted persons, which in the United States, is considered to be a 'work for hire'. In this way, the copyright of the collaborative efforts of the creators belongs to the producer as the employer, and the contractors such as the screenwriter, music composer, consultant and the costume designer. The 'work for hire' contributor has no copyright interest according United States copyright law.

There is a strong reliance on written contracts to make sure the relationship is 'work for hire'. Without a written contract, there is scope for misunderstanding. This is what Spike Lee discovered when he was taken to court by Jefri Aalmuhammed, who had

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<sup>807</sup> Kathy Bowrey, 'Alternative Intellectual Property? Indigenous Protocols, Copyleft and New Juridifications of Customary Practices' (2006) *Macquarie Law Journal* 65-95.

<sup>808</sup> Uta Melzer, 'Who Owns the Copyright in a Movie, and Who has the Right to Exploit it Economically' (2008) <[http://kb-law.info/wt\\_dev/kbc.php?article=139&land=US&lang=EN&view=text&mode=1](http://kb-law.info/wt_dev/kbc.php?article=139&land=US&lang=EN&view=text&mode=1)>.

been orally engaged by Denzel Washington to assist the actor prepare for his role in *Malcolm X*.<sup>809</sup> Aalmuhammed had extensive knowledge of Islam, and had previously produced a documentary film about Malcolm X. Aalmuhammed argued he had creative input in that he had directed scenes, adding information to the existing script to make it more authentic, and that he had played a key role in gaining the trust of Muslim organisations regarding the film's depiction of Muslim faith.<sup>810</sup> There was no written contract between Aalmuhammed and the film company. In 1992, after most of the work had been completed but prior to release, Aalmuhammed asked for a credit as a co-writer. Spike Lee turned this down but gave Aalmuhammed a credit as 'Islamic Technical Consultant'. He later sued alleging that the film was a 'joint work' and that he was a co-author.

In examining the issue of whether the film was a 'joint work', the court looked at the intention of the contributors as a united whole. Whilst acknowledging that there were significant contributions made, the court said that for *Malcolm X* to be joint work, both Lee and Aalmuhammed would have to agree that they were both authors. Because there was no agreement, the court looked at who was the mastermind or controller of the film.<sup>811</sup> The absence of control for Aalmuhammed was fatal. His role was only an adviser and a 'work for hire'. He had no right to authorship.<sup>812</sup> The US case law clearly finds that the parties have to agree for copyright in the film to be shared as a 'joint work'.<sup>813</sup>

Another interesting set of claims that question the producer as the 'controller' of the story are the biographical film cases. Subjects have challenged the right of the producer to re-licence films for spin-offs in other contexts. For example, Maureen Marder, the steel worker turned ballet dancer (*Flashdance*) took action for a share of the income that the film company made in commercially licensing rights to use scenes

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<sup>809</sup> *Aalumuhammed v Lee*, 202 F 3d 1227 (9<sup>th</sup> Cir, 2000).

<sup>810</sup> Even Denzel Washington admitted that Aalmuhammed assisted with rewriting and had made the film 'more authentic'.

<sup>811</sup> An author is the person 'who has actually formed the picture by putting the persons in position, and arranging the place', *Burrow-Giles Lithographic Co. v Sarony* 111 US 53 (1884).

<sup>812</sup> *Aalumuhammed v Lee*, 202 F 3d 1227 (9<sup>th</sup> Cir 2000).

<sup>813</sup> A 1998 copyright claim relating to the musical *Rent*, brought by a commissioned dramaturg against the playwright Larsen's estate, proved unsuccessful on the same grounds: *Thomson v. Larson*, 147 F 3d 195 (2nd Cir 1998).



from the movie *Flashdance* in a JLo film clip. Marder had been paid for the life rights and signed a release giving over all rights.<sup>814</sup>

#### 7.2.1.4 Indigenous Cultural Protocols

At this juncture, and in order to set the scene for the next section, it is necessary to consider how the legal framework examined above deals with the rights Indigenous people assert to 'control, maintain and protect' their Indigenous intellectual property over cultural content embodied in a film.<sup>815</sup> Most Indigenous filmed content relates to cultural expression or cultural knowledge or depicts actual life experiences of Indigenous people and historical events.<sup>816</sup>

There are cabinets full of films taken of Indigenous people pre-protocols, including ethnographic films, documentaries and dramas that project derogatory and out-dated views.<sup>817</sup> These issues are not the subject of this chapter but have been drawn attention to by Eric Michaels,<sup>818</sup> Marcia Langton,<sup>819</sup> and Felicity Collins and Therese Davis.<sup>820</sup> There is also the issue of whether Indigenous people were filmed with prior informed consent and with understanding of how their images were to be edited and adapted for film.<sup>821</sup>

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<sup>814</sup> *Flashdance* had been highly successful, earning over \$150 million. Marder argued that the release was obtained fraudulently and with undue influence and therefore did not stop her from claiming fees from Jennifer Lopez for reproducing famous scenes from the movie in her clip. The court disagreed. Marder was not entitled to claim any monies from Lopez for using parts based on the film in the music clip: *Marder v. Lopez*, 450 F 3d 445 (9<sup>th</sup> Cir 2006).

<sup>815</sup> United Nations Declaration on the Rights of Indigenous Peoples, GA Res 61/295 (13 September 2007) art 31.

<sup>816</sup> For example *Mabo*, the Telemovie was based on the life of the Torres Strait Islander native title advocate, Edward Mabo.

<sup>817</sup> In the 1980s media studies writers focused on racism and stereotyping in works like *Jedda*, *Boney* and *Walkabout*, pointing out the absence of Indigenous filmmakers, actors and Indigenous points of view. Catriona Moore and Stephen Muecke, 'Racism and the Representation of Aborigines in Film' (1984) 2(1) *Australian Journal of Cultural Studies* 36-53.

<sup>818</sup> The late Eric Michaels, an American filmmaker, highlighted the gaze of the camera lens. Robert Hodge, 'Aboriginal Truth and White Media: Eric Michaels Meets the Spirit of Aboriginalism' (2001) 3(2) *Continuum: Journal of Media and Cultural Studies* 201-225.

<sup>819</sup> Marcia Langton, 'Well, I Heard it on the Radio and I Saw it on the Television' An Essay for the Australian Film Commission on the Politics and Aesthetics of Filmmaking by and about Aboriginal People and Things (Australian Film Commission, 1993).

<sup>820</sup> Felicity Collins and Therese Davis, *Australian Cinema After Mabo* (Cambridge University Press, 2004). Collins and Davis write about Indigenous representation in Australian feature films since the landmark native title judgment.

<sup>821</sup> Terri Janke and Livia Iacovino, 'Keeping Cultures Alice: Archives and Indigenous Cultural and Intellectual Property Rights' (2012) 12 *Archival Science* 151-171.

Since the 1990s, Indigenous filmmakers have risen to prominence in the Australian film industry, telling Indigenous stories and giving their Indigenous perspective through the camera lens.<sup>822</sup> They have served to change the landscape in the representation of culture, consent to use materials, and engagement with the Indigenous community. Lester Bostock wrote about Indigenous filmmaking protocols in his 1992 guide *The Greater Perspective* when working with the SBS. His short guide was written primarily as a guide for television crews going into Aboriginal communities. In 1997, *Aboriginal Nations*, an animated series of Aboriginal Dreaming Stories, devised protocols for the recognition of community ownership of stories.<sup>823</sup> Darlene Johnson, the Indigenous director, wrote about Indigenous protocols for SBS Independent.<sup>824</sup>

*Pathways & Protocols* builds on this work and sets up a framework for collaboration and greater recognition of Indigenous rights in the film industry. Film funding agreements require adherence to Indigenous protocols if there is Indigenous content in a film. A filmmaker wanting to work with Indigenous communities must consider how they will engage and broach these cultural protocols. There will be meetings; written contracts for community consent; permit applications; specific film protocols, discussions about using deceased representations and discussions about where the film will be archived, and any access terms, once the film is completed.

### **7.2.2 *Avatar*: 'I See You' in Court**

The film *Avatar* would have involved complex commercial negotiations about the rights to the content in the film. All copyright content required to make the film, including script-writers, designers, cast, crew, any props or drawings, are cleared in favour of the producer. However, there have been a number of copying claims, with a number of people saying that Cameron had used their creative content as the building blocks of the *Avatar* story, and not just for inspiration. For instance, cinema audiences in Russia have noted that *Avatar* has elements in common with the 1960's *Noon Universe* science fiction book series written in the Soviet Union by co-authors Arkady

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<sup>822</sup> There are also more Aboriginal and Torres Strait Islander actors.

<sup>823</sup> Paul Kalina, 'Aboriginal Nations' 10-Step Programme', *Cinema Papers* (1997).

<sup>824</sup> Darlene Johnson, *Indigenous Protocols* (SBS Independent, 2000). At the time, Darlene Johnson was working on a documentary about the Stolen Generations.

and Boris Strugatsky.<sup>825</sup> Similarities were noted by critics to the *Dances with Wolves*, *Fern Gully*, Rudyard Kipling's *Jungle book*, Edgar Rice Burroughs's works and Poul Anderson's book *The Avatar*.<sup>826</sup> Four court actions have been taken. Before going into these it is necessary to outline the plot of the movie.

#### 7.2.2.1 Overview of Avatar plot

The movie *Avatar* is about Jake Sully, a paraplegic ex-marine, who volunteers to take the place of his deceased twin brother in the Avatar experiment. The research is being conducted by Dr Grace Augustine on the distant planet of Pandora. The mission is to investigate the humanoid life forms, known as Na'vi. Jake transcends his physical form and enters an avatar with a Na'vi alter ego. The avatar's role is to observe the Na'vi people, mix in, and learn their ways of life.<sup>827</sup>

However, Jake gets lost on his first field trip in the rainforest. Separated from the group, he is rescued by Neytiri a Na'vi princess, and daughter of the tribal leader. She is ready to kill him with a 'woodsprite' when a swarm of floating jellyfish surround him. Neytiri is convinced that Jake is sent from the gods. She takes him back to the Na'vi community, Hometree. Whilst the tribal leader is suspicious of Jake, he orders Neytiri to teach Jake the ways of Na'vi life like hunting, which she does. She also teaches him how to navigate the environment. The two fall in love.

The rich businessman who funded Dr Augustine's scientific experiment then reveals his ulterior motive which is to mine Pandora for its rare mineral deposits of Unobtainium. Jake's acceptance in the Na'vi community assists this objective and he reports to Colonel Quaritch. For a while Jake leads a double life, before taking the side of the Na'vi.

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<sup>825</sup> There are some key similarities reported by the Guardian Newspaper. For instance, Noon Universe is set in the 22nd Century on a forested world called Pandora with an Indigenous species called the Nave (very close to Na'vi). The Strugatsky brother still alive is in his late seventies, and apparently is not intending to take legal action. Luke Harding, 'James Cameron Rejects Claims Avatar Epic Borrows from Russians' Sci-Fi Novels', *The Guardian* (online), 14 January 2010 <<http://www.guardian.co.uk/film/2010/jan/13/james-cameron-avatar-plagiarism-claim>>.

<sup>826</sup> Lauren Davis, 'Did James Cameron Rip Off Poul Anderson's Novella?' on *IO9* (26 October 2009) <<http://io9.com/5390226/did-james-cameron-rip-off-poul-andersons-novella>>.

<sup>827</sup> See judgment, 7–8.

Parker gives the go-ahead to launch a full force offensive to destroy Hometree and annihilate the Na'vi people. In the battle, Jake leads Nav'i warriors to defeat the mercenaries. Jake kills Colonel Miles Quaritch, and saves the Na'vi people from defeat. At the end of the movie, he permanently transfers to Na'vi form.

#### 7.2.2.2 *Kelly Van: Sheila the Warrior*

Kelly Van, the author of a book entitled *Sheila the Warrior: The Damned* filed a suit against James Cameron in 2010.<sup>828</sup> She claimed that the plot and characters of her book were copied, including powers and rituals. It is not clear if Cameron had read or had access to her work, but copyright infringement can be direct or indirect.<sup>829</sup> In her case, Van was unable to show a substantial similarity between the original and the copy, or prove that Cameron had access to the original book. In the summary judgment, the judge held that there was no case to answer because the 'plot similarities are abstract ideas that are not protected by copyright'. Further, it was said that 'the themes of both works had 'important differences', the dialogue lacked similarity in vocabulary and meaning, and the characters are 'general ideas'.<sup>830</sup>

#### 7.2.2.3 *Zhou Shaomou: Tale of the Blue Crows*

In 2010, there was another copyright infringement lawsuit by Zhou Shaomou, a Chinese science fiction writer who claimed the copying of a planet of blue-skinned creatures from his 1997 internet published work, *Tale of the Blue Crows*.<sup>831</sup> This claim was thrown out of the People's Court of Beijing because of insufficient evidence.<sup>832</sup>

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<sup>828</sup> Eriq Gardener, 'Know Your "Avatar" Lawsuits: Meet Three Plaintiffs Who Hope to Win Billions', *The Hollywood Reporter* (online), 20 December 2011 <<http://www.hollywoodreporter.com/thr-esq/avatar-lawsuits-james-cameron-new-plaintiffs-275707>>.

<sup>829</sup> Kamika Dunlap, 'Copyright Infringement Lawsuit Filed over James Cameron Film Avatar', on *Celebrity Justice* (20 May 2010) <[http://blogs.findlaw.com/celebrity\\_justice/2010/05/copyright-infringement-lawsuit-filed-against-james-cameron-film-avatar.html](http://blogs.findlaw.com/celebrity_justice/2010/05/copyright-infringement-lawsuit-filed-against-james-cameron-film-avatar.html)>.

<sup>830</sup> *Kelly Van v James Cameron*, 12-55416, United States Court of Appeals (9<sup>th</sup> Cir, 5 March 2012).

<sup>831</sup> Zhou Shaomou made a claim of USD\$147 million. Sinapse, 'Avatar Sued for Copyright Infringement by Various Writers', on *Sinapse Blog* (9 March 2010) <<http://indianipinfo.blogspot.com/2010/03/avatar-sued-for-copyright-infringement.html>>.

<sup>832</sup> China Business News, 'China Court Throws Out "Avatar" Plagiarism Case', *China Business News* <<http://www.chinanetrix.com/ja/taxonomy/term/2256496/0>>.

#### 7.2.2.4 *Emil Malak: Terra Incognita*

Emil Malak, a Canadian cafe owner, filed a claim of copyright infringement against Cameron in March 2012.<sup>833</sup> Malak complained that *Avatar* 'was built using the essential building blocks from *Terra Incognita*',<sup>834</sup> which Malak sent to a number of movie production companies including Cameron's.<sup>835</sup> Malak claims that *Avatar* took 'the story premise, characters and coloration of the characters'<sup>836</sup> from *Terra Incognita*, in which humans go to another planet to mine precious minerals and clash with the Indigenous people.<sup>837</sup> In Malak's work, the Indigenous people also have spiritual connections with mother earth, the environment and plants and animals.<sup>838</sup> On Malak's website there are documents which detail comparisons in the plot, characters and themes. For instance, the spiritual tree containing memories of Indigenous ancestors, which he calls the 'Life Tree', is a main theme of Malak's novel. In *Avatar*, the tree is called the 'Tree of Souls'. Cameron claims to have completed the *Avatar* screenplay in 1996, two years before Malak's work and therefore could not have copied it. The case has not progressed to court.

#### 7.2.2.5 *Gerald Morawski: Guardians of Eden*

In 2012, Gerald Morawski, a visual effects consultant, claimed that James Cameron had unlawfully used his original ideas for the film *Avatar*. The judgment, in favour of Cameron provides a good overview of the source of Cameron's creative ideas, which is useful in considering the protocols he followed.

Morawski's main claim was that Cameron had breached a Confidentiality and Non-Disclosure Agreement (the NDA). The NDA was signed on 4 December 1991 prior to Morawski meeting with Cameron to pitch for script development for his film titled *Guardians of Eden*. Cameron's company did not take a development option on

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<sup>833</sup> *Malak v Lightstorm Entertainment Inc et al.*, filed 1 March 2012 9 (T-461-12), Canadian Federal Court.

<sup>834</sup> Affidavit of Emil Malak <[www.tiuniverse.com](http://www.tiuniverse.com)> [this content and website has been removed].

<sup>835</sup> Sinapse, 'Avatar Sued for Copyright Infringement by Various Writers', on *Sinapse Blog* (9 March 2010) <<http://indianipinfo.blogspot.com/2010/03/avatar-sued-for-copyright-infringement.html>>.

<sup>836</sup> Affidavit of Emil Malak <[www.tiuniverse.com](http://www.tiuniverse.com)> [this content and website has been removed].

<sup>837</sup> Malak's Indigenous characters are aliens with spotted faces, long braided hair, flat noses and yellow eyes.

<sup>838</sup> Affidavit of Emil Malak <[www.tiuniverse.com](http://www.tiuniverse.com)> [this content and website has been removed].

*Guardians of Eden*, and the film was never made. In 1994, Cameron wrote the 'scriptment' for *Avatar* and sent it to Twentieth Century Fox. The film did not go into production until 2005 because Cameron says he had to wait until the technology necessary to make the film was developed.<sup>839</sup>

Morawski argued that Cameron was in breach of contract because he stole original elements of *Guardians of Eden*. There were 19 similarities noted in Morawski's claim.<sup>840</sup> However, Cameron successfully defended that *Avatar* was independently created. The main similarities that Morawski argued as copied without consent were the Indigenous themes, 'coming from history, or themes commonly used in stories'.<sup>841</sup> Ironically, within the claim, there is no recognition of Indigenous rights of cultural expression and cultural knowledge, or that Indigenous people should have a right to be consulted about their history and traditions.

#### 7.2.2.6 *Colonisation and Mining*

Morawski alleged that Cameron had taken the plot involving 'an epic struggle' between 'evil mining interests that will destroy the planet to satisfy their greed, and an Indigenous tribe that lives at one with, and protects, its rainforest environment'.<sup>842</sup> Cameron was able to prove this allegation baseless by firstly showing that the Indigenous colonisation theme was derived from *Wind Warriors*, his previous unproduced work completed in 1988, where mercenaries battle Indigenous warriors, to exploit a valuable metal found in the Brazilian rainforest.<sup>843</sup> Cameron asserts in his evidentiary declaration:

European destruction of native peoples, using military force, in order to acquire their land and resources, is the obvious basis for the *Avatar* story.' It is derived

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<sup>839</sup> Ibid 6.

<sup>840</sup> *Gerald Morawski v Lightstorm Entertainment Inc*, US District Court Central District of California (31 January 2013) 8–9.

<sup>841</sup> Ibid 17.

<sup>842</sup> Ibid 9.

<sup>843</sup> Ibid 16.

from the story of European colonisation and is deliberate and obvious. It's not meant to be subtle.<sup>844</sup> ...It is a story 'well known to all of us'.<sup>845</sup>

The humans want the Na'vi to hand over the precious resources on Pandora. To get unobtainium, the humans destroy the sacred home tree. The year in *Avatar* is 2154, but the theme is common for Indigenous people, today and for the past 400 years. Unobtainium is diamonds in Africa, uranium in Australia, or biodiversity in the Amazon. In Australia, for most of the past 225 years, mining has had a direct impact on Indigenous people through the removal of people from the land, the destruction of sacred sites and the decline of Indigenous cultural life.<sup>846</sup> The legal doctrine of terra nullius, used to legitimate colonisation, was overturned in the *Mabo Case*.<sup>847</sup> Today, mining on Indigenous land involves impact assessments including cultural impact and negotiation of native title rights. Marcia Langton writes that the mining boom offers economic opportunities for Indigenous people for employment and business.<sup>848</sup> In summary, it cannot be claimed by Morawski that he had ownership over a historical theme that is often portrayed in literature and film.<sup>849</sup>

#### 7.2.2.7 *Pocahontas – White Hero/Native Woman Love Story*

Morawski also claimed that the love story between the white hero and the daughter of the Indigenous tribal leader was copied. Cameron's successful defence argued that the love story between two warring groups is universal, like *Romeo and Juliet*.<sup>850</sup> Cameron also states that the love plot between Jake Sully and Neytiri the Na'vi princess is based on the famous story of Pocahontas and John Smith who fell in love despite their belonging to opposing sides on the US frontier.<sup>851</sup> The similarities

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<sup>844</sup> Ibid 25.

<sup>845</sup> Ibid 25.

<sup>846</sup> Henry Reynolds, *The Law of the Land: The New Edition*, (Penguin Books, 2003).

<sup>847</sup> *Mabo v Queensland (No 2)* (1992) 175 CLR 1.

<sup>848</sup> Marcia Langton, *The Quiet Revolution: Indigenous People and the Resources Boom* (ABC, Boyer Lectures, 2012) <<http://www.abc.net.au/radionational/programs/boyerlectures/>>

<sup>849</sup> The colonisation of Indigenous lands plot was also covered in the film *Fern Gully*. Similarities between this film and *Avatar* have also been noted.

<sup>850</sup> William Shakespeare, *Romeo and Juliet* (1597).

<sup>851</sup> Neil Young wrote a song called Pocahontas just after Marlon Brando declined to accept an Academy Award in protest of the offensive representations of Native Americans in Hollywood movies. It's one of my favourite Neil Young songs. Neil Young, 'Pocahontas', 1979 <<http://www.youtube.com/watch?v=0ihBRiHTaMQ>>.

between *Avatar* and *Pocahontas* are pointed out on internet websites.<sup>852</sup> One film critic called *Avatar* 'Pocahontas in Space'.<sup>853</sup>

This love theme was also depicted in the film *Dances with Wolves*.<sup>854</sup> Like *Dances with Wolves*, *Avatar* tells the story of a white man becoming the hero and leading the native group. The Indigenous activist Vicky Tauli-Corpuz of the Kankanaey Igorot people of the Philippines, liked the film overall, but was critical of the story that 'the white man was made the messiah, after learning and becoming initiated in the Na'vi culture'.<sup>855</sup> However, Cameron says that this was a device to ensure that many non-Indigenous people could empathise with the story. But why is it always the non-Indigenous person who is the hero? Are historical 'noble savage' love stories partnered with the theme 'white man to the rescue' reflecting underlying racist beliefs that Indigenous people cannot 'save' themselves?

The outcome of the Morawski case was that the court concluded that Cameron had independently created *Avatar* and did not use Morawski's ideas.

#### 7.2.2.8 Summary of Legal Cases: Strong Focus on Indigenous Themes

In summary, this section has explored the claims by unconnected creators in the themes, storyline and plot of *Avatar*. As illustrated, the claims by Morowski and to some extent Malak, relate to the Indigenous historical and cultural themes within the story. In the *Morowski* case, the universality of Indigenous histories and stories was noted by Cameron as being well known to us all, and so he could not be copying from

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<sup>852</sup> The 'Avatar = Pocahontas' by Boris graphic, shows a Disney script of Pocahontas with the names of the Pocahontas hero and the native woman crossed out for the Avatar characters. Of course, at the front of the script, Disney is crossed out and replaced with James Cameron's name. The Next Web, 'Pocahontas = Avatar', on *The Next Web* (5 January 2010)

<<http://thenextweb.com/shareables/2010/01/05/pocahontas-avatar/>>

<sup>853</sup> "'Avatar' = 'Pocahontas in Space'", *The Huffington Post*, 18 March 2010,

<[http://www.huffingtonpost.com/2010/01/04/avatar-pocahontas-in-spac\\_n\\_410538](http://www.huffingtonpost.com/2010/01/04/avatar-pocahontas-in-spac_n_410538)>. A number of mashups on You Tube also point to the similarities: <http://www.youtube.com/watch?v=n2IF5xD-K94>.

<sup>854</sup> *Dances with Wolves* (Directed by Kevin Costner, Orion Pictures, 1990). In *Dances with Wolves*, Dunbar, a battered soldier falls in love with the native woman from a culture he was initially fighting against, and becomes a hero warrior.

<sup>855</sup> Adam Phillips, 'Native People See Themselves in Avatar', *Voice of America*, 25 April 2010

<<http://www.voanews.com/content/native-peoples-see-themselves-in-the-film-avatar-92107984/161870.html>>.



Morowski. There are strong themes to do with colonisation for Indigenous land and resources, and the spirituality of Indigenous people.

A number of the other legal actions against James Cameron's *Avatar* have been dismissed. Malak's complaint of copyright infringement in British Columbia was rejected in 2014.<sup>856</sup>

In the next section, I will examine ICIP rights or protocols Indigenous people have when their historical, factual and cultural information is adapted for feature films.

### **7.2.3 Pathways & Protocols: Consultation and Consent**

James Cameron's film draws on Indigenous themes, re-uses aspects of Indigenous land and cosmology connections and covers the invasion or colonisation of Indigenous people. In my opinion, his approach to the filmmaking process shows consideration of cultural sensitivities and protocols.

Indigenous cultural protocols can be defined as guides to fair and respectful negotiations between an Indigenous community and outsiders who wish to access Indigenous Cultural and Intellectual Property (ICIP). ICIP is defined by Indigenous people as rights to their heritage, part of their common identity, and linked to place. It is constantly evolving. It includes visual designs, performances, cultural beliefs, signs, sacred places and traditional knowledge of the environment. Sally McCausland notes that Indigenous cultural protocols are increasingly gaining legal status in film production via incorporation into contracts.<sup>857</sup>

In 2009 Screen Australia commissioned me to write and then published *Pathways & Protocols: A Filmmaker's Guide to Working with Indigenous People, Culture and*

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<sup>856</sup> CBC News, 'James Cameron's Avatar Faces B.C. Copyright Lawsuit: Emil Malak says the 2009 Blockbuster Used Material from his Own Screenplay Terra Incognita', *CBC News*, 19 March 2014 <<http://www.cbc.ca/news/canada/british-columbia/james-cameron-s-avatar-faces-b-c-copyright-lawsuit-1.2578764>>; and CBC, 'Emil Malak's Avatar Screenplay Copyright Lawsuit Dismissed', *Huffington Post British Columbia*, 9 May 2014 <[https://www.huffingtonpost.ca/2014/03/20/emil-malaks-avatar-copyright-lawsuit-dismissed\\_n\\_5003389.html](https://www.huffingtonpost.ca/2014/03/20/emil-malaks-avatar-copyright-lawsuit-dismissed_n_5003389.html)>.

<sup>857</sup> Sally McCausland, 'Indigenous Cultural Protocols as Legal Obligations in Film-making' (2006) 18(10) *Australian Intellectual Property Law Bulletin* 157.

*Concepts*,<sup>858</sup> which provides a framework for the development and implementation of protocols used for film production. It is a reference guide which deals with legal and ethical issues related to the observation of Indigenous content such as images and stories, and provides protocols for interaction with Indigenous people, their communities and their land.

The protocols are a response to what was considered in the past to be the unfair and inaccurate depiction of Indigenous people in film by non-Indigenous filmmakers.

Indigenous Australians have been depicted poorly in arts and culture, science and history, as sub-human and culturally backward. These representations were used to justify the taking of land through the legal fiction of terra nullius. Further myths and stereotypes from the savage hunter gatherer, to 'noble savage', and on to the drunk and the lazy, are images which cause stereotypes to perpetuate that deny Indigenous people some very fundamental human rights – the right against racism, the right to equality and the right to enjoy culture.

*Pathways & Protocols: A Filmmaker's Guide to Working with Indigenous People, Culture and Concepts* highlights the need for protocols that promote recognition and respect of ICIP, beliefs and heritage. The guide is intended to encourage the development and adoption of protocols, ethical practices and industry standards to effectively maintain the integrity of Indigenous peoples and their culture. Consultation with Indigenous people when they or their culture is filmed is encouraged.

Consent for filming Indigenous people and their culture is not unique to Australia. In *Even the Rain*, a Spanish film on the Bolivian Water Crisis, the filmmakers Bollaín and Laverty, aware of the sensitive content, consulted with the relevant community and workers involved in the crisis.<sup>859</sup> The feature film involved a nine-week shoot in Cochabamba. The filmmakers employed Indigenous cast and crew. For the filmmakers, it was essential to seek the support and involvement of the Water War

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<sup>858</sup> Terri Janke, *Pathways & Protocols: A Filmmaker's Guide to Working with Indigenous People, Culture and Concepts* (Screen Australia, 2009d).

<sup>859</sup> Maria Garcia, 'Conquests & protests: Cinema Partners Bollaín & Laverty Explore Legacy Of Colonization In *Even The Rain*' (2011) 114 (2) *Film Journal International* 1 <[http://www.filmjournal.com/filmjournal/content\\_display/news-and-features/features/movies/e3i8ca187a9af2b2817c94cefc05f661149](http://www.filmjournal.com/filmjournal/content_display/news-and-features/features/movies/e3i8ca187a9af2b2817c94cefc05f661149)>.

activists and the Indigenous communities. They provided information to the community prior to filming, and then left the community to debate their proposal. A community screening of the finished film was highlighted in an article by Garcia as an instance of where acceptance from the community would be better than any awards.<sup>860</sup>

In the *Pathways & Protocols* ICIP principles framework, consent is recommended where there is use being made by 'a drama containing identifiable Indigenous traditions, beliefs, songs and stories'.<sup>861</sup> The film *Avatar* makes use of ICIP, albeit, not from one tribal group, but from holistic Indigenous groups. In this respect, the animation and merging of bits and pieces from different Indigenous groups skirts around the need for consent. In this section, I will examine to what extent the filmmaker's approach aims to be culturally sensitive to the subject matter being adapted for *Avatar*.

#### 7.2.3.1 *Indigenous Environment: The Land Is Our Mother*

The fictional environment of the Na'vi which James Cameron created for *Avatar* is a complete ecosystem of plants and creatures. The Indigenous clan lives in spiritual harmony with the environment, enjoying a rich culture and language. The Na'vi have an interconnected relationship with everything and everyone. The Na'vi lifestyle is one where people are in tune with the natural world. The Na'vi worship an earth mother 'Ey'wa', the deity of the Na'vi people.

This is a common Indigenous world view where an Indigenous person's relationship to one's community and humanity overall defines one as Indigenous.<sup>862</sup> The Karioca Statement highlights this connection:

Mother Earth is the source of life which needs to be protected, not a resource to be exploited and commodified as a 'natural capital.' We have our place and our responsibilities within Creation's sacred order. We feel the sustaining joy as things

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<sup>860</sup> Ibid.

<sup>861</sup> Terri Janke, *Pathways & Protocols: A Filmmaker's Guide to Working with Indigenous People, Culture and Concepts* (Screen Australia, 2009d) <[http://www.screenaustralia.gov.au/getmedia/e601f1b9-0394-4c83-9a62-c20939d9ab30/Indig\\_Protocols.pdf](http://www.screenaustralia.gov.au/getmedia/e601f1b9-0394-4c83-9a62-c20939d9ab30/Indig_Protocols.pdf)>.

<sup>862</sup> See the *Karioca Statement* <<http://indigenous4motherearthrioplus20.org/kari-oca-2-declaration/>>.

occur in harmony with the Earth and with all life that it creates and sustains. We feel the pain of disharmony when we witness the dishonor of the natural order of Creation and the continued economic colonisation and degradation of Mother Earth and all life upon her. Until Indigenous Peoples rights are observed and respected, sustainable development and the eradication of poverty will not be achieved.’<sup>863</sup>

The destruction of the sacred site and the plundering of biodiversity and resources is a key theme of the movie, and these are at the heart of the real concerns of world Indigenous people.

The preamble of the *United Nations Declaration of the Rights of Indigenous Peoples* 2007, a document setting out the inherent rights of world Indigenous people to continue their cultural survival, sets out the spiritual relationships Indigenous people have to their land and territories.<sup>864</sup> Indigenous people share a number of spiritual beliefs that link them closely with the land and other people in the past and the present. The belief in reincarnation, guarding against wastefulness, and the respect for the cosmological connection between plants, animals and people is a theme that comes straight from worldwide Indigenous anthropological texts into the scripted character traits of the blue Na’vi. Although there is not one actual tribal group whose spiritual beliefs are copied, the theme is ‘copied’, or used as a building block or inspirational device, to authenticate the Na’vi people.

The supporters of Indigenous people are also mirrored in the movie. Dr Grace Augustine, the character played by Sigourney Weaver, is similar to the expert ethnobotanist or anthropologist who studies and writes Indigenous traditional knowledge. She is sympathetic to the plight of the Indigenous tribes of Pandora. The land is the earth mother, and all energy is connected. Mining is a threat to the cultural environment for many Indigenous people, a theme clearly reproduced in the movie. This ‘environmental protest’ theme of the plot has struck a chord with environmental groups. Protestors dress up as the blue natives from Pandora to protest against

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<sup>863</sup> Ibid.

<sup>864</sup> United Nations Declaration on the Rights of Indigenous Peoples, GA Res 61/295 (13 September 2007).

mining.<sup>865</sup> This theme draws on Indigenous worldviews of the environment. According to a fan website, James Cameron took the cast and crew to the jungles of Hawai'i to prepare for their roles for *Avatar*. They spent days 'trekking and living in tribes' in order to get a sense of what it was like to live in the jungle.<sup>866</sup> They built campfires, went fishing and learned how Indigenous people might live. Though, it is not known whether he had any Indigenous people advising him on this. The *Pathways & Protocols* framework would recommend that a film using ICIP engage Indigenous people as filmmakers, advisers or writers. Perhaps the difference here is that *Avatar* takes the cultural expression of world Indigenous people, collectively taking common themes, and applies it to the blue people, the Na'vi people. There is not one culture that is drawn upon – there are many. In some ways this is stereotypical; however, Cameron has managed to link in with environmental themes and gain favour with the World Indigenous People's Forum.

### 7.2.3.2 Cultural Costume

The cultural costumes form another aspect of the film that has drawn heavily from Indigenous people. The Na'vi have braids in their hair and bones through their noses. It is arguably based on African or native North and South American Indigenous people mostly, but the theme draws on common depictions of Western views of what Indigenous people look like. Tattoos,<sup>867</sup> piercing and neck beads in representations of Indigenous people from all over the world. These cultural costumes draw on the types of the traditional adornment of world Indigenous people. What was the inspiration of

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<sup>865</sup> Hasan Suroor, "'Avatar' Actors Join Protest in Support Of Orissa Tribals', *The Hindu*, 28 July 2010 <<http://www.thehindu.com/news/national/article538594.ece>>. Some protestors dressed up as blue Na'vi at the AGM of the mining company Vedanta in protest of its plans to mine the sacred land of the Dongria Kondh tribe.

<sup>866</sup> IMDB, *Avatar: Trivia* <<http://www.imdb.com/title/tt0499549/trivia>>.

<sup>867</sup> Compare the recent case where *Hangover 2* was taken to task about using Mike Tyson's facial tattoo in its movie, reproduced on another actor. The tattooist, S Victor Whitmill claimed copyright infringement against the film studio releasing 'The Hangover Part 2'. Professor Ngahuia Te Awete-ku stated that the tattooist had never consulted Maori. 'Tyson's Moko Draws Fire From Maori', *The New Zealand Herald*, 25 May 2011

<[http://www.nzherald.co.nz/nz/news/article.cfm?c\\_id=1&objectid=10727836](http://www.nzherald.co.nz/nz/news/article.cfm?c_id=1&objectid=10727836)>.

The copyright claim was privately settled. Noam Cohen, 'Tattoo Artist Settles Tyson Dispute with "Hangover 2"', *The New York Times*, 21 June 2011

<<http://mediadecoder.blogs.nytimes.com/2011/06/21/tattoo-artist-settles-tyson-dispute-with-hangover-2/>>.

the costume designers? Again, there is no evidence that Indigenous designers were engaged.

### 7.2.3.3 *Language*

The language of the Na'vi was specifically constructed by linguist Paul R Frommer, according to the credit at the end of the film. As stated on the movie's website, the brief from Cameron was to construct a language that the actors could pronounce easily, but did not resemble any single human language. Frommer created about 1000 words building on some original 30 words James Cameron had provided as a brief.<sup>868</sup> Since the movie, fans can learn Na'vi via the fan-created website learnnavi.org.

There are apparent inspirations from Indigenous languages as Frommer explains:

the most exotic thing I added were ejectives, which are these sorts of popping sounds that are found in different languages from around the world. It's found in Native American languages and in parts of Africa and in Central Asia, the Caucasus.<sup>869</sup>

Frommer inputs skills and linguistic expertise to develop the Na'vi language. From a copyright point of view, this constitutes independent intellectual efforts to produce a new copyright work. It would be difficult for Indigenous language groups to claim that the substantial part of any Indigenous language is copied under copyright laws. It is clearly an inspiration but it is not a building block or substantial copy of any existing words that would support a copyright claim by Indigenous people.

### 7.2.3.4 *Location*

The traditional lands of the Nav'i are the rainforests of Pandora. They are not real, and therefore filming would not require a permit, as required by the Protocols when filming on Aboriginal land.<sup>870</sup> However, there also would be no need for location agreements to be negotiated with Aboriginal land owners in Los Angeles and Wellington, New

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<sup>868</sup> Geoff Boucher, 'USC Professor Creates an Entire Alien Language for "Avatar"', *Los Angeles Times*, 21 November 2009 <<http://herocomplex.latimes.com/uncategorized/usc-professor-creates-alien-language-for-avatar/>>.

<sup>869</sup> Ibid.

<sup>870</sup> Terri Janke, *Pathways & Protocols: A Filmmaker's Guide to Working with Indigenous People, Culture and Concepts* (Screen Australia, 2009d).

Zealand, where the film was shot. Permits are required to film on Aboriginal land in Australia, and special purpose permit agreements from the Central Land Council require filmmakers to provide details of the film and to also limit future use of the film in other contexts.<sup>871</sup>

#### 7.2.3.5 *The Sacred*

The Protocols recommend that if there are themes that refer to the sacred or sacred material, consultation with Indigenous people is recommended.<sup>872</sup> Themes in *Avatar* draw on the sacred, including the reference to Ey'wa and to Mo'at (the shaman). Healing powers and links to the natural and spiritual world are often considered sacred or taboo. Consultation for films about Indigenous healers like the Nungkaris was part of the process. The adaptation of the sacred theme to a fictionalised group minimises the risk of offending a particular group. However, consultation would have been best practice.

#### 7.2.3.6 *Actors*

In the past non-Indigenous actors were often cast to play Indigenous roles, such as Kamahl playing Boney. The main four Nav'i characters are black.<sup>873</sup> In Australia casting non-Indigenous people for Indigenous roles would be considered culturally inappropriate.

#### 7.2.3.7 *James Cameron at the UN Permanent Forum*

At the 9th session of the UN Permanent Forum on Indigenous Issues in New York in 2010, a special screening of *Avatar* was held. It was opened by the playing of the didgeridoo. James Cameron, the director attended and spoke to the audience saying:

Through my art as a filmmaker, I decided to finally to say something to express my moral outrage about what was happening on this planet to the natural world and to the indigenous people who are the best stewards of that natural

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<sup>871</sup> Central Land Council, *Special Purpose Permits* <<http://www.clc.org.au/articles/info/special-purpose-permits>>.

<sup>872</sup> Terri Janke, *Pathways & Protocols: A Filmmaker's Guide to Working with Indigenous People, Culture and Concepts* (Screen Australia, 2009d).

<sup>873</sup> Anita Singh, 'Avatar Hit by Claims of Racism', *The Telegraph*, 11 January 2010 <<http://www.telegraph.co.uk/culture/film/film-news/6968020/Avatar-hit-by-claims-of-racism.html>>.

world...But unfortunately there are still resources in the ground that are yet to be dug up and, plundered if you will, it is so critical that we deal with these issues now. I think time is running out for our civilisation to shift its set of values, this is what I was trying to say with *Avatar*.<sup>874</sup>

Indigenous people praised Cameron for sharing the Indigenous message of the world. The Native American Willy Littlechild of the Treaty Six Territories in Northern Canada after seeing the film identified with this theme in the film saying that mining is a 'serious violation of Mother Earth'.<sup>875</sup> John Scott, an Aboriginal colleague who then worked for the UN Permanent Forum, MCed the event and described James Cameron's film as 'refreshingly honest'.<sup>876</sup> John Scott said that there were no issues raised by the Indigenous people present about appropriation. Many seemed honoured to have James Cameron there, and pleased that Indigenous issues of the devastation of their natural worlds was being paralleled in the film, hence bringing it to the attention of the world.

James Cameron visited the Amazon to learn more about the plight of Indigenous people in the face of the Belo Monte dam planned by the Brazilian government on the Xingu River. The dam could flood the lands of the local Indigenous peoples, devastating Indigenous communities living alongside the river. Taking on a role as advocate for the real Pandoras of the world, he wrote to the Brazilian President asking that the dam be reconsidered. He also no doubt will use much of what he learnt as inspiration and 'building blocks' for any sequels or subsequent films.<sup>877</sup>

Activism for the environment appears to be shared by the movie production house. In recognition of the link between Indigenous peoples and the environment, the Earth Day Network and Twentieth Century Fox Home Entertainment partnered for the Home

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<sup>874</sup>James Cameron's speech to the Permanent Forum as cited in Jessica Lee, "'Avatar' Activism: James Cameron Joins Indigenous Struggles Worldwide' on IndyBlog, *Independent* (26 April 2010) <<http://www.independent.org/2010/04/26/avatar-activism-james-cameron-joins-indigenous-struggles-worldwide>>.

<sup>875</sup> 'Native Peoples See Themselves in "Avatar"' <<http://www1.voanews.com/english/news/american-life/Native-Peoples-See-Themselves-in-the-Film-Avatar-92107984.html>>.

<sup>876</sup> Email from John Scott to Terri Janke, 6 July 2010.

<sup>877</sup> Alexei Barrionuevo, 'Tribes of Amazon Find an Ally Out of "Avatar"', *The New York Times*, 10 April 2010 <[http://www.nytimes.com/2010/04/11/world/americas/11brazil.html?\\_r=0](http://www.nytimes.com/2010/04/11/world/americas/11brazil.html?_r=0)>.



Tree Initiative to plant native trees in 15 countries in 2010. This initiative interestingly coincided with the debut of *Avatar* on Blu-ray and DVD on Earth Day, April 22nd.

#### 7.2.3.8 *Summary of Protocols*

There is a growing practice within the film industry for filmmakers to show they are consulting on content. There are also restrictions on the use of culturally sensitive or offensive and sacred material, and there are requirements to correctly attribute Indigenous people and places and obtain permits for filming on Aboriginal land. The use of Indigenous cultures for a fictional feature film like *Avatar* which doesn't copy one particular culture but many, makes it difficult to consider whether there was a requirement for consultation with particular groups or tribes.

Some creators consider Indigenous cultural protocols as onerous and the process of consent and negotiation lengthy in terms of the film and creative industries, whose projects often work to a tight schedule. The submission of a draft to a community and long negotiations, they say, take the end-date out of the publisher's or author's control. Is it a form of censorship or, as Phillip Gwynne, the author of *Deadly Unna* claimed in the light of Indigenous criticism about the lack of consultation for the movie, *Australian Rules*, an infringement of their creative freedom of expression?<sup>878</sup> However, Baz Luhrmann took a different approach when filming the movie *Australia* and hired an Indigenous cultural advisor, though the film was shot on Aboriginal lands, involved Aboriginal actors and was a historical account of the Stolen Generations.

James Cameron's *Avatar* is fictional though no doubt 'inspired' or 'built' on the building blocks of real cultural expression. For this reason, consent may not have been required. From whom would consent have been obtained?

However, consultation on the respectful depiction of culture may have been a good move. It is interesting that James Cameron had not hired an Indigenous cultural adviser nor does he appear to have conducted consultations with Indigenous people before or during the making of the film, but has still managed to receive great support

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<sup>878</sup> Phillip Gwynne as cited by Peter Ellingsen, 'Australian Rules', *The Age*, 12 August 2002 <<http://theage.com.au/articles/2002/08/12/1028158065808.html>>.

from Indigenous people post film. In my opinion, this is because the film is animated and because the message of the film strikes a chord with many Indigenous people. The fact that Cameron is 'Hollywood royalty' also cannot be overstated. He is influential in using film as a medium to convey Indigenous messages to the world. If he were obliged by law<sup>879</sup> or ethics to consult on Indigenous questions that may arise, in this scenario a National Indigenous Cultural Authority could assist.

#### **7.2.4 Conclusion**

*Avatar* is the highest grossing movie of all time, and there are three more movies planned. Whilst there have been several actions for copyright infringement taken against the filmmaker, the argument about copying relates to Indigenous people and the impact of colonisation. These were held to be 'universal stories', but significant were the contributions of Indigenous histories, costumes, languages, weapons, cosmology and other traditional knowledge and traditional cultural expression drawn on to make the film. These would not be copyright law claims; although, as discussed in Section 2, copyright ownership models for films where the rights all belong to the film producer are being questioned at law.

Article 31 in the *United Nations Declaration on the Rights of Indigenous People 2007* provides rights to Indigenous people over their traditional knowledge, traditional cultural expression and cultural heritage.<sup>880</sup> An action for copying or appropriation by indigenous people could be argued on this basis.<sup>881</sup> But no one Indigenous group appears to be able to claim, or want to claim that a substantial part of their culture was copied. In fact, there appears to be a lot of support for the film by Indigenous people, especially in the peak representative body, the United Nations Permanent Forum of Indigenous Peoples.

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<sup>879</sup> The WIPO Draft Provisions on Traditional Cultural Expression (TCE), depending on international negotiations, could require users of TCE to get prior informed consent before fixate or publishing TCE <[www.wipo.int](http://www.wipo.int)>.

<sup>880</sup> United Nations Declaration on the Rights of Indigenous Peoples, GA Res 61/295 (13 September 2007).

<sup>881</sup> Danielle Conway, 'Promoting Indigenous Innovation, Enterprise, And Entrepreneurship Through the Licensing of Article 31 Assets and Resource' (2011) 64 *Southern Methodist University Law Review* 1095.

It has become accepted film practice to follow Indigenous cultural protocols, though who to consult with will be a main issue for non-Indigenous filmmakers or those not familiar with Indigenous decision-making structures. A National Indigenous Cultural Authority could assist the filmmaker to meet the principles of the respecting cultural value and guard their integrity of Indigenous people's cultural expression. A National Indigenous Cultural Authority could be a gateway through which users be assisted to identify Indigenous rights holders to negotiate uses of cultural material and discuss benefit sharing. My paper, 'Beyond Guarding Ground',<sup>882</sup> notes three aims of a NICA. Firstly, to connect users with knowledge holders allowing for consent to be given at local, regional levels, but drawing on a national support base. Secondly, to set standards for negotiations and contracts – a range of terms could be included from use through to moral rights and dispute resolution. Thirdly, to promote authorised use by way of a brand via a trade mark for consumer identification tools. This is about wider recognition of the cultural value. In this way Indigenous people could work with filmmakers and derive benefits both in terms of activism for their plight, but also economically. It could also ensure better films are made that depict values that represent living Indigenous people.

Now back to my son: since seeing the film *Avatar*, he has told me he wants to be a filmmaker.

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<sup>882</sup> Terri Janke, *Beyond Guarding Ground: A Vision for a National Indigenous Cultural Authority* (Terri Janke and Company, 2009a) < <http://www.terrijanke.com.au/beyond-guarding-ground>>.

## Chapter 8: Case Study D – Traditional Knowledge and Biological Materials

**Paper 6:** Terri Janke, 'From smokebush to spinifex: Towards recognition of Indigenous knowledge in the commercialisation of plants' (2018) 1 *International Journal of Rural Law and Policy* 1-27.

### 8.1 Context

There are many national and international issues involving the use and misuse of Indigenous traditional knowledge, biological materials and resources which have a long history within Indigenous communities. Some of these issues involve western practices of bioprospecting and in some cases, biopiracy. The following paper forms the final case study of this thesis. It was published in 2018 for an occasional papers issue of the *International Journal of Rural Law and Policy*. It explores Indigenous plant knowledge and examines how private and public Western organisations may research, collect and control this knowledge within scientific and commercial contexts.

There is a critical need for the increased recognition of Indigenous voices and rights in this area. The thesis publication was one of several pieces of research I conducted in this field. At my law firm, Terri Janke and Company, there is a growing demand from Indigenous people for advice about how they can commercialise their plant knowledge but protect their cultural knowledge from exploitation by others.

In 2010, Jeremy Morse, then Solicitor at Terri Janke and Company wrote *Know your rights to your Aboriginal plant knowledge: A guide for Aboriginal knowledge holders on recording and commercialising Aboriginal plant knowledge*.<sup>883</sup> This was developed as a legal guide for Aboriginal people in the Northern Territory regarding the

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<sup>883</sup>Jeremy Morse, *Know Your Rights to Your Aboriginal Plant Knowledge: A Guide for Aboriginal Knowledge Holders on Recording and Commercialising Aboriginal Plant Knowledge* (Terri Janke and Company, prepared for Australian Bush Traders, 2010).

commercialisation of their knowledge of plants and plant materials. It covers various processes such as identifying knowledge holders, research and product development, relating these to IP laws and useful documents that outline protocols, guidelines and codes of ethics.

In 2008, the National Resources Management Board (NT) commissioned the National Centre for Indigenous Studies (NCIS) at ANU to undertake a project on Indigenous Ecological Knowledge (IEK), ICIP and natural resource management in the Northern Territory. I was subcontracted to work in collaboration with the NCIS at (Sarah Holcombe) and Jumbunna Indigenous House of Learning at UTS (Michael Davis). This involved writing a report that contains three components, of which I wrote Part Three that canvasses approaches to IEK rights.<sup>884</sup> The project resulted in practical guidelines for those working in natural resource management to follow when collecting, using and archiving IEK. Some of the findings from this report were included in a paper I co-wrote with Sarah Holcombe, social anthropologist researcher, entitled, 'Patenting the Kakadu Plum and the Marjarla Tree: Biodiscovery, intellectual Property and Indigenous Knowledge'.<sup>885</sup> It was included in a 2012 academic publication exploring IP and emerging technologies related to bioscience.

In March 2016, I chaired an important panel discussion of Indigenous perspectives on Traditional Knowledge and Seed Banking for the 'National Seed Science Forum' in March 2016. My attendance was coordinated by Ninti One with support from the Australian Centre for Agriculture and Law with the aim of highlighting the need for the seed industry to consider Indigenous knowledge and resource rights.

Three important Indigenous plant patent case studies are included in this chapter. They explore the challenges and opportunities for Indigenous Australians around the

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<sup>884</sup> Terri Janke, 'Indigenous Ecological Knowledge and Natural Resources in the Northern Territory: Report on the Current Status of Indigenous Intellectual Property' (Report commissioned by the Natural Resources Management Board (NT), April 2009)

<[http://media.wix.com/ugd/7bf9b4\\_af38431b79494d18bf4d8937fe4dbc11.pdf](http://media.wix.com/ugd/7bf9b4_af38431b79494d18bf4d8937fe4dbc11.pdf)>.

<sup>885</sup> Terri Janke and Sarah Holcombe, 'Patenting the Kakadu Plum and the Marjarla Tree: Biodiscovery, intellectual Property and Indigenous Knowledge' in Matthew Rimmer and Alison McLennan (eds), *Intellectual Property and Emerging Technologies: The New Biology* (Edward Elgar, 2012) 293.

commercialisation of plants and associated knowledge. They point out the importance of having a collaboration agreement setting out the mutual benefits of the parties.

The use of Indigenous protocols and the possibilities for flexible approaches to patents in recognising Indigenous science and knowledge holders is discussed in relation to a project involving David Claudie, Indigenous knowledge holder and CEO of the Chuulangun Aboriginal Corporation, Cape York Peninsula in north Queensland.

The Mudjala patent case study illustrates the cultural governance issues which are further explored in the paper I co-wrote with Anthony Watson from the Jarlmadangah community and Virginia Marshall, Indigenous lawyer, entitled 'Community Economic Development in Patenting Traditional Knowledge: A Case Study of the Mudjala TK Project in the Kimberley Region of Western Australia'.<sup>886</sup>

In respect of the Spinifex arrangement, a patent application for the Materials containing cellulose nanofibers was filed in 2018 jointly owned by the Dugalunji Aboriginal Corporation and the University of Queensland.<sup>887</sup> This relationship appears to be going from strength to strength.

The paper includes an extensive overview of Australian and international legal frameworks that span many areas of law: environmental, biodiversity, IP, land, heritage, and Indigenous rights. These laws are written out in relation to the issues in protecting and regulating the use of traditional knowledge.

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<sup>886</sup> Virginia Marshall, Terri Janke and Anthony Watson, 'Community Economic Development in Patenting Traditional Knowledge: A Case Study of the Mudjala TK Project in the Kimberley Region of Western Australia' (2013) 8(6) *Indigenous Law Bulletin* 17.

<sup>887</sup> Application lodged in 2018, Patent 2018902088.

## 8.2 From smokebush to spinifex: Towards recognition of Indigenous knowledge in the commercialisation of plants

### 8.2.1 Introduction

Indigenous<sup>888</sup> Australians, Aboriginal and Torres Strait Islanders, have diverse relationships with plants and their seeds. This cultural knowledge has been passed on through the generations, creating a deep history that has produced sophisticated fields of knowledge intimately linked to both diverse cultural geographies and the natural environment. Western scientific, government and private sector commercial institutions have been collecting Australian plant material for over 200 years. Sometimes, such ‘collectors’ simultaneously obtain the Indigenous knowledge with the plant material. On occasions, the culturally-based Indigenous ownership of that knowledge is acknowledged by collectors; however, this is not the norm.

There are many different approaches to the collection, management and use of Australian plant material and associated Indigenous plant knowledge. A particular challenge is the lack of a shared understanding of Indigenous knowledge and intellectual property issues. But there is a gathering momentum, from diverse quarters, to face the challenge. This paper considers the issues involved in order to promote more robust inclusion of Indigenous rights, interests and concerns.

In 2016, I chaired a special panel on Indigenous perspectives at the ‘National Seed Science Forum’, held at Mt Annan in Sydney. The panel was the first of its kind to address the seed industry and Indigenous knowledge rights. The panellists were brought together by Ninti One<sup>889</sup> with support from the Australian Centre for Agriculture and Law with the aim of highlighting the need for the seed industry to consider Indigenous knowledge and resource rights, particularly considering the *Convention on*

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<sup>888</sup> ‘Indigenous’ means pertaining to Aboriginal or Torres Strait Islander people, from the mainland and islands of Australia. When using the term with a capital I will refer collectively to Aboriginal and Torres Strait Islander peoples however these groups have distinct cultures. When using the word ‘indigenous’ with a lowercase, I refer to world indigenous peoples.

<sup>889</sup> Ninti One is an Australian not-for-profit company that builds opportunities for people in remote areas. See <[www.nintione.com.au](http://www.nintione.com.au)>. The Australian Centre of Agricultural Law at University of New England.

*Biological Diversity* and the *Nagoya Protocol*, which set standards for access and benefit sharing with Indigenous peoples when accessing resources from Aboriginal lands.

Over 130 people attended the forum, including researchers, scientists and technical officers working in universities, agriculture and biodiversity conservation institutions; and in conservation seed banks.<sup>890</sup> The Australian Plant Bank in Mt Annam holds a collection of Australian native seeds for conservation, research, propagation and supply to registered organisations for research. Some of that material has been collected from Indigenous lands and makes use of Indigenous knowledge. The Indigenous Panel at the Seed Forum gave a voice to Indigenous people to advocate their interests in this arena, and marked a significant change to how plant scientists and Indigenous people interact. I presented the story of the Australian ‘smokebush’ plant to raise a series of critical issues that need to be better understood and addressed if the Indigenous voice is to be more effectively recognised and supported.

### **8.2.2 The smokebush story**

I first heard the story of the ‘smokebush’<sup>891</sup> in 1996. I was attending a symposium on ‘Intellectual Property Protection for the arts and cultural expression of Aboriginal and Torres Strait Islander People’, in Brisbane. Two speakers referred to smokebush: Henrietta Marrie<sup>892</sup> a Yidinji woman and Indigenous environmental rights advocate, and Professor Michael Blakeney, then an intellectual property lecturer with the University of Western Australia.

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<sup>890</sup> A ‘seed bank’ stores seeds as a source for planting, to protect vulnerable stock and in case seed reserves elsewhere are destroyed. It is a type of gene bank. The seeds stored may be food crops, or those of rare species to protect biodiversity. Seed banks hold the plants which can be accessed by third parties for commercialisation purposes.

<sup>891</sup> Margaret Corrick and Bruce Fuhrer, *Wildflowers of Southern Western Australia* (Rosenberg Publishing, 3<sup>rd</sup> ed, 2009) 159.

<sup>892</sup> Henrietta Marrie (Fourmile) writes on the protection of Indigenous cultural heritage, traditional knowledge and intellectual property. In 1997, Henrietta commenced work with the United Nations Secretariat for the Convention on Biological Diversity (SCBD), an international environmental treaty under the UN Environment Program. She has also worked as Program Manager for North Australia with The Christensen Fund. Henrietta Marrie is currently based in Cairns at Central Queensland University.



The smokebush plant is predominant to the coastal areas between Geraldton and Esperance in Western Australia (WA). The plant is traditionally used by Aboriginal people as medicine.<sup>893</sup> Since the 1960s, specimens had been collected by the US National Cancer Institute (NCI) for cancer research. In 1981, the NCI tested 17 specimens of the smokebush plant for cancer application. The tests were negative. In the late 1980s, the US Government screened the stored specimens again for treating the AIDS virus. This time the screening of the plants struck gold. Out of 7 000 plants screened internationally, the smokebush was one of only four plants found to contain the active property, conocurovone. Laboratory tests showed that conocurovone could destroy the HIV virus in low concentrations. The US Government's Department of Health and Human Services subsequently filed for a US patent in 1993<sup>894</sup> and for an Australian patent in 1994.<sup>895</sup> The patents gave the US Government the exclusive rights to use the compounds from the smokebush for treatment against AIDS, and to licence it to others for terms they saw fit.

The WA Government, under its own legislation, has powers to licence access to the species<sup>896</sup> and so negotiated a commercial deal with the NCI whereby the rights were licensed to AMRAD, an Australian pharmaceutical company based in Victoria, as an exclusive worldwide licence to develop the patent. According to Blakeney, Amrad paid \$1.65 million to the WA Government for research and access rights to the plant.<sup>897</sup> Michael Blakeney estimated that if conocurovone was successfully commercialised, the WA Government would recoup royalties of up to \$100 million per year by 2002.<sup>898</sup>

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<sup>893</sup> Phillip Kerr, 'Bioprospecting in Australia: Sound Biopractice or Biopiracy?' (2010) 29(3) *Social Alternatives* 44; Ellen Reid and T.J. Betts, *The Records of Western Australian Plants Used by Aboriginals as Medicinal Agents* (1979) 36 *Planta Medica* 164-173.

<sup>894</sup> The US patent 5672607, granted in September 1997, pertains to the novel antiviral naphthoquinone compounds, which may be isolated from plants of the genus *Conospermum* or synthesized chemically <<https://www.google.com/patents/US5672607>>.

<sup>895</sup> Australia patent 680,872 was granted in 1997.

<sup>896</sup> Under the *Conservation and Land Management Act 1984* (WA) and the *National Parks and Wildlife Act* (WA), the WA Minister of the Environment has the power to grant exclusive rights to flora and forest species for research purposes in that state.

<sup>897</sup> WA Government, 'Withdrawal of Australian company from AIDS treatment project' (Media Statement, March 1995) <<https://www.mediastatements.wa.gov.au/Pages/Court/1995/03/Withdrawal-of-Australian-company-from-AIDS-treatment-project.aspx>>.

<sup>898</sup> Michael Blakeney, 'Bioprospecting and the Protection of Traditional Medical Knowledge' (Paper presented at the Symposium on Intellectual Property Protection for the Arts and Cultural Expression of Aboriginal and Torres Strait Islander People, Brisbane, 28 September 1996) 196.

No royalties or other compensation or even acknowledgement were targeted as forthcoming for Aboriginal people of WA, highlighting the shortfalls in patent law in protecting traditional knowledge.<sup>899</sup> This in spite of the fact that their intergenerational nurturing of the plant had resulted in knowledge of its current potency as a healing plant. Moreover, the Aboriginal people of WA noted that ‘multinational drug companies could be sold exclusive rights to entire species of flora, preventing anyone from using those species for any other purpose without the consent of the companies and...Aboriginal people would be prevented from using any plants which are the subject of the exclusive agreement’.<sup>900</sup>

The smokebush story has been referred to by commentators worldwide in articles, books and conference papers including Gray,<sup>901</sup> Janke,<sup>902</sup> Davis<sup>903</sup> and Drahos.<sup>904</sup> The story is, sadly, a common one told by other world Indigenous peoples. For instance, the ‘hoodia’ story, from South Africa, is widely discussed in the literature and at international conferences.<sup>905</sup> The hoodia plant is a succulent found in the Kalahari Desert which the San peoples of South Africa historically consumed to stave off hunger on their long journeys. The plant was the basis of an appetite suppressant patent, claimed by the South African Council for Scientific and Industrial Research (CSIR). In the 1990s, the CSIR had plans to commercialise a hoodia pharmaceutical product without any sharing of the benefits with Sans people. After much media attention and calls by the Sans and their supporters for rights recognition, a memorandum of understanding was signed between the Sans and the CSIR and a

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<sup>899</sup> Henrietta Fourmile (Marrie) (Paper presented at the Symposium on Intellectual Property Protection for the Arts and Cultural Expression of Aboriginal and Torres Strait Islander Peoples', Brisbane, September 1996).

<sup>900</sup> Centre of Indigenous History and the Arts, cited in Terri Janke, *Our Culture: Our Future – Report on Australian Indigenous Cultural and Intellectual Property Rights* (Report commissioned by AIATSIS and ATSIC, Michael Frankel and Company, 1999).

<sup>901</sup> Stephen Gray, ‘Vampires Round the Campfire’ (1997) 22(2) *Alternative Law Journal* 60.

<sup>902</sup> Terri Janke, *Our Culture: Our Future – Report on Australian Indigenous Cultural and Intellectual Property Rights* (Report commissioned by AIATSIS and ATSIC, Michael Frankel and Company, 1999) 24.

<sup>903</sup> Michael Davis, ‘Biological Diversity and Indigenous Knowledge’ (Research Paper No 17, Parliamentary Library, Parliament of Australia, 1998).

<sup>904</sup> Peter Drahos, *Intellectual Property, Indigenous People and their Knowledge* (Cambridge University Press, 2014) 111.

<sup>905</sup> Rachel Wynberg, Doris Schroeder and Roger Chennels (eds), *Indigenous Peoples, Consent and Benefit Sharing, Lesson from the San-Hoodia Case* (Springer Netherlands, 2009).

Trust was established.<sup>906</sup> However, Robinson reports on the problems with licensing and free riding which has resulted in a less than satisfactory outcome for the Sans.<sup>907</sup>

The neem plant, native to India where it had been used as a pesticide for hundreds of years by Indian farmers, harbours a similar story. The plant is now exploited by multi-national companies who have patented its properties and thereby monopolise its pesticidal outputs.<sup>908</sup>

In combination, cases such as these highlight not only Indigenous people's role in the nurturing of native plants and the depth of their traditional knowledge of plant resources, but also that such expertise continues to be ignored by intellectual property and environmental laws and the parties who commercialise these resources.

### **8.2.3 The focus of this paper**

It is against this background that this paper explores the context of how private and public-sector Western institutions go about researching, collecting and controlling Indigenous plant materials and related Indigenous knowledges for their own scientific and commercial purposes. The paper discusses the (in)effectiveness of Western laws for protecting Indigenous rights and interests in this context, especially with regard to Indigenous Australians' traditional knowledge rights in plant materials.

I first briefly introduce to the concept of Indigenous knowledge of plants then examine the national and international legal framework in environmental law, intellectual property and Indigenous rights. I follow the introduction by discussing a number of Australian case studies in which Indigenous people are co-owners of patents and are commercialising their knowledge and resources. The complex interplay between the practical challenges and implications facing Indigenous groups and individuals in protecting their traditional plant knowledge at the same time as progressing their own interests in commercialisation is a focus of the discussion. The aim is to identify factors

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<sup>906</sup> Graham Dutfield, *Intellectual Property, Biogenic Resources and Traditional Knowledge* (Earthscan, 2004).

<sup>907</sup> Daniel F Robinson, *Confronting Biopiracy: Challenges, Cases and International Debates* (Earthscan from Routledge, 2010a) 61–63.

<sup>908</sup> Vandana Shiva and Radha Holla-Bhar, 'Intellectual Piracy and the Neem Tree' (1993) 23(6) *The Ecologist* 223.

that could be conducive to more equitable outcomes by encompassing a recognition of Indigenous rights and interests, including in commercialisation and scientific inquiry.

#### **8.2.4 Indigenous knowledge of plants**

Many Indigenous clans and groups live in Australia's biodiverse rich environment, including coastal, marine, wetlands, desert and rainforest environments. Each group has interacted with its particular environment, developing the natural resources<sup>909</sup> and the knowledge associated with those resources, including for food, clothing, medicine, tools and ceremonial practices. Much of this knowledge has been decimated since colonisation, however, many Indigenous clans and groups still practice culture and others are in the process of revitalising cultural knowledge.

The term 'Indigenous Knowledge'<sup>910</sup> refers to the beliefs and understandings that Indigenous Australians have acquired and nurtured through long-term association with a place. It is knowledge based on the social, cultural, physical and spiritual understandings which have informed Indigenous people's survival for over 65 000 years and contributed to their sense of being in the world and knowing the world.

Indigenous Knowledge is also referred to as 'traditional knowledge' because the formation, understandings, beliefs, traditions and so forth have been transmitted from generation to generation. As each generation interacts with the content and underlying values, Indigenous Knowledge is added to and reinterpreted by indigenous people. Through the existence and transmission of this intangible cultural heritage, indigenous people can associate with and reproduce a collective identity.<sup>911</sup>

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<sup>909</sup> Bruce Pascoe, *Dark Emu: Black Seeds: Agriculture or Accident?* (Magabala Books, 2016).

<sup>910</sup> 'Indigenous Ecological Knowledge' is also used in Australia to define Indigenous knowledge of the ecology. It is considered a subset of 'Indigenous Cultural and Intellectual Property'; Terri Janke, 'Indigenous Ecological Knowledge and Natural Resources in the Northern Territory: Report on the Current Status of Indigenous Intellectual Property' (Report commissioned by the National Resources Management Board NT, April 2009b)

<[http://media.wix.com/ugd/7bf9b4\\_af38431b79494d18bf4d8937fe4dbc11.pdf](http://media.wix.com/ugd/7bf9b4_af38431b79494d18bf4d8937fe4dbc11.pdf)>.

<sup>911</sup> World Intellectual Property Organization, *Traditional Knowledge* <<http://www.wipo.int/tk/en/tk/>>. The World Intellectual Property Organization defines 'Traditional Knowledge' as 'knowledge, know-how, skills and practices that are developed, sustained and passed on from generation to generation within a community, often forming part of its cultural or spiritual identity'.

Indigenous Knowledge has three key characteristics. First, it has a social and cultural base, linked to people, land and seas, and identity. Indigenous Knowledge is holistic, linked to a belief system, a cosmology, which is sometimes called *dreamings* or *dreamtime*. Indigenous Knowledge is an integral part of Indigenous cultural heritage. Knowledge about land, seas and places are entwined with associated songs, stories, social practice, and oral traditions. Indigenous Knowledge is an expression of cultural and spiritual practices.

Second, Indigenous Knowledge belongs to a community. Ownership involves roles and responsibilities to look after the knowledge and pass it on. There may be complex rules about who can use, know and continue to use the Indigenous Knowledge as a cultural practice. For instance, Indigenous Knowledge may be gender and age-specific knowledge which may mean that knowledge can only be known and used by Indigenous people with authority. Some information like sacred knowledge should not be made public. These inter-related cultural characteristics mean that sensitive negotiation, broad consultation and ongoing engagement is a prerequisite in order for the commercialisation of knowledge. Indigenous Knowledge is managed according to customary laws and community shared values.<sup>912</sup> There may be sacred or secret knowledge that is not to be published. Indigenous Knowledge is put at risk by being placed in the public domain. As Ambelin Kwamullina, Indigenous lawyer, describes it: 'Once [Indigenous] knowledge is released, there is little chance of Indigenous peoples from who the knowledge comes being able to control how it (or the plants it is associated with) are used, especially given the limited control Indigenous peoples now have over their homelands.'<sup>913</sup>

Third, Indigenous Knowledge is constantly evolving. This means that the knowledge has been developed nurtured and refined (and continuously developed, nurtured and refined) by Indigenous people and passed on by Indigenous people as part of expressing their cultural identity. Indigenous Knowledge is not static. Indigenous

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<sup>912</sup> Johanna Gibson, *Community Resources: Intellectual Property, International Trade and protection of Traditional Knowledge* (Ashgate, 2005) 49.

<sup>913</sup> Ambelin Kwaymullina, 'Research, Ethics and Indigenous Peoples: An Australian Indigenous Perspective on Three Threshold Considerations for Respectful Engagement' (2016) 12(4) *AlterNative: An International Journal of Indigenous People* 437, 446.

knowledge is being created by individuals, so new Indigenous Knowledge challenges the individual ownership paradigm that underpins the intellectual property system.

Indigenous Knowledge of plants, therefore, is a socially and culturally constructed field that draws on particular kinds of relationships, roles, responsibilities and purposes.

Ithkechi Mgbeoji, law professor and author of the book *Global Piracy*, uses the term traditional knowledge on the use of plants' (TKUP) to refer to the,

[D]iverse range of traditional-based innovations and creations arising from intellectual activity in the industrial, literary, or artistic fields of indigenous and traditional peoples. Its range includes agricultural products, the medicinal use of plants, and spiritual worldview.<sup>914</sup>

Australia has a diverse biota of plant species and, through their long association, Indigenous people have developed a wealth of knowledge about these. As Clarke notes, the traditional 'Aboriginal pharmacopeia is vast'. Indigenous Australians have different bodies of knowledge, including horticulture and preparations which involve the seed, the bark, the fruit and the leaves.<sup>915</sup> This knowledge is also connected spiritually and holistically to clan groups. Plants also figure heavily in Indigenous Australian mythology, ceremony and ritual and sacred sites.<sup>916</sup> Particular plants are central to many dreaming stories and Indigenous people have totemic connections to species from their clan lands. They have responsibilities to these species to nurture and respect them, and to hand on knowledge about them to the next generations. Indigenous groups also traded knowledge and plant resources amongst each other

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<sup>914</sup> Ithkechi Mgbeoji, *Global Biopiracy, Patents, Plants and Indigenous Knowledge* (Cornell University Press, 2006) 9.

<sup>915</sup> Evidence of Aboriginal fire stick farming has been written about by Pascoe [2016 *ibid*] 121; A K Chase, 'Domestication and Agriculture in Northern Australia: A Social Perspective' in D R Harris and G C Hillman (Eds), *Foraging and Farming: The Evolution of Plant Exploitation* (Routledge, 2015); T Denham, M Donohue and S Booth, 'Horticultural Experimentation in Northern Australia Reconsidered' (2009) 83 *Antiquity* 634; R A Hynes and A K Chase, 'Plants, Sites and Domiculture: Aboriginal Influence Upon Plant Communities in Cape York Peninsula' (1982) 17(1) *Archaeology in Oceania*; L S Lee and K Courtenay, 'Enrichment Plantings as a Means of Enhanced Bush Food and Bush Medicine Plant Production in Remote Arid Regions: A Review and Status Report' (2016) 19 *Learning Communities: International Journal of Learning in Social Contexts* 64, 66.

<sup>916</sup> Philip Clarke, 'Aboriginal Healing Practices and Australian bush medicine' (2008) 33 *Journal of Anthropology Society of South Australia* <<http://www.friendsofglenthorne.org.au/wp-content/uploads/Clarke-Vol-33-2008.pdf>>.

for many thousands of years. This trading was, itself, subject to social rules and relationships and so reinforced inter-group networks and mutual responsibilities. In such ways, plant knowledge has become intrinsic to Indigenous identity and the legacy of tradition.

### **8.2.5 Colonising Indigenous Knowledge of plants**

The impact of sustained colonisation has meant that, as with the land, Indigenous people came to be seen as not owning their plant resources and plant knowledge. The early settlers did not see the value in Indigenous plant applications, and it wasn't until the 1960s that research started to take place in this field. Mgbeoji argues that, since the early days of Australian colonial settlement, Indigenous Knowledge was seen by non-Indigenous settlers as mere 'folk' knowledge. In the past, scientists ignored Indigenous people's role in identifying genetic resources and providing related information. Indigenous people were seen as primitive and not living cultures. Mgeogi says that this, inevitably, led to biopiracy, where Indigenous people's knowledge of plants has been taken without their consent.<sup>917</sup>

Plant knowledge contributes to a range of industries, including food, agriculture building, clothing, medicine and cosmetics. The pharmaceutical industry is lucrative, with global spending on medicines estimated to reach \$1.4 trillion in 2020.<sup>918</sup> The Australian pharmaceuticals industry sells over \$11 billion worth of medicines domestically.<sup>919</sup> In 1993, Reid et al estimated that a quarter of the pharmaceutical drugs in the US are extracted or derived from plants.<sup>920</sup> There is little Australian data about the numbers of plant-derived medicines. Oddie, however, notes that advances in biotechnology and genetic engineering have encouraged a renewed interest in Indigenous knowledge of plants. According to Oddie, Indigenous Knowledge has been

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<sup>917</sup> Robinson [2010a *ibid*].

<sup>918</sup> IMS Institute for Healthcare Informatics, 'Global Medicines Use in 2020' (November 2015) 1 <<https://s3.amazonaws.com/assets.fiercemarkets.net/public/005-LifeSciences/imsglobalreport.pdf>>.

<sup>919</sup> Medicines Australia, *The Australian Pharmaceuticals Industry: Winds of Change Report of the 2009 Medicines Australia member Economic Survey*, 1 <<https://medicinesaustralia.com.au/files/2011/03/20100603-pub-MedicinesAustralia-winds-of-Change.pdf>>.

<sup>920</sup> Walter Reid et al, *Biodiversity Prospecting* (World Resources Institute, 1993).

the source of various drugs 'discoveries', such as the rosie periwinkle, traditionally used for diabetes and discovered to also have properties beneficial for dealing with childhood leukaemia.<sup>921</sup> Moreover, Lingard points to the growing demand for Indigenous plants and bushfoods knowledge in the hospitality and health industries, specifically for bush tomato, quandong and bush limes.<sup>922</sup>

As researchers, universities, companies and scientists seek to experiment and innovate using plants, the search takes them into examining Indigenous traditional knowledge. Today, this knowledge can be tapped into from archives, museums and other records that have been collected about Indigenous peoples and their systems of knowledge; often without having to directly negotiate with Indigenous people themselves. A well cited example is the *Duboisia pituri* plant, which is traditionally used by Australian Aboriginal people. European scientists found that there were similarities between *pituri* and tobacco. Aboriginal Australians had been collecting, preparing and trading the plant for generations. Despite this, there was little acknowledgement of Aboriginal horticulture or Indigenous Knowledge of *Duboisia* by the scientific or medical fraternity.<sup>923</sup>

Davis states that companies search for useful plant related substances that can be developed into marketable commodities such as pharmaceuticals, pesticides and cosmetics.<sup>924</sup> Tapping into Indigenous Knowledge and indigenous-used resources saves companies time and costs in screening and testing. Once identified, the Indigenous genetic resources and knowledge can be dealt with using biotechnological

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<sup>921</sup> Carolyn Oddie, 'Bioprospecting' (1998) 9 *Australian Intellectual Property Journal* 6, 9.

<sup>922</sup> Kylie Lingard, Legal and Institutional Strategies to Support the Interests of Aboriginal and Torres Strait Islander Peoples in Bush Food Commercialisation (Doctoral Thesis, University of New England, 2015) 2.

<sup>923</sup>In the 1870s, Dr Joseph Bancroft used the knowledge of the Aboriginal peoples about the *Duboisia* species and unlocked its properties. *Duboisia* is a shrub found growing in Eastern Australia. In 1879, Dr Joseph Bancroft identified that the active ingredient in the *Duboisia hopwoodii* was nicotine. Aboriginals used the plant to make 'pituri', a kind of chewing tobacco. According to the pharmacist/anthropologist Pamela Watson, Aboriginal people understood the *Duboisia's* properties as a drug. Pituri was consumed in ceremonial life, and Aboriginals were also most likely cultivating *Duboisia hopwoodii*, possibly by fire-stick farming; Joseph Bancroft, *Pituri and Tobacco* (Philosophical Society of Queensland, 1879); Pamela Watson, *This Precious Foliage: A Study of the Aboriginal Psycho-Active Drug Pituri* (Sydney, 1983); Luke Keogh, 'Duboisia Pituri: a natural history?' (2011) 22(2) *Historical Records of Australian Science* 199; Clarke [2008 *ibid*].

<sup>924</sup> Davis [1998 *ibid*] 5.



techniques which transform them into 'acquired' and 'newly' discovered knowledge that is constructed in terms of Western science where it can be patented and owned. Hence the biotechnology industry has a substantial interest in Indigenous Knowledge and natural resources.<sup>925</sup>

Within the context of environmental and intellectual property laws, Indigenous people's rights are often marginalised and ignored in such ways that effectively serve to alienate Indigenous groups from their own knowledge and natural resources. In this context, the contemporary quest of Indigenous people is to seek legal rights to their resources and knowledge. The question arises: To what extent do Australian and international frameworks facilitate or impede that Indigenous goal?

## **8.2.6 Australian frameworks**

In Australia, the framework for access to genetic resources is developing in halting steps, with little coordination. The three frameworks of most relevance are environmental laws, intellectual property laws and land and heritage laws.

## **8.2.7 Environmental laws**

Currently, only the Commonwealth, Northern Territory (NT) and Queensland governments have legislation in place, although other states are considering legal frameworks.

### *8.2.7.1 Environment Protection and Biodiversity Conservation Act 1999 (Cth)*

Indigenous people can use the processes in the *Environment Protection and Biodiversity Conservation Act 1999 (Cth)* ('EPBC Act') and the associated *Regulations 2000 (EPBC Regulations)* to control access to resources on Commonwealth land.

A permit is required to access biological resources on Commonwealth areas.<sup>926</sup> Applicants for access must enter into a benefit-sharing arrangement with all access

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<sup>925</sup> Monica Michelle Sieni, *Bioprospecting and Access to Indigenous Flora: Policy Implications of Consented Ways of 'Knowing' and 'Owning'* (Griffith University, 2003) 48.

<sup>926</sup> The permit must be in force under pt 17 of the *Regulations*. If there is no permit, a 50-unit penalty may be imposed. Reg 8A.05 of the *Environment Protection and Biodiversity Conservation Regulations 2000 (Cth)* ('EPBC Regulations').

providers.<sup>927</sup> Under the *EPBC Regulations*, Indigenous people are regarded as access providers where the land is held under lease by the Commonwealth, where the land is Aboriginal land<sup>928</sup> or where they are recognised as native title holders.<sup>929</sup> A benefit sharing arrangement can include an Indigenous land use agreement,<sup>930</sup> or an access and benefit. Benefit-sharing agreements must provide for reasonable benefit-sharing arrangements, including protection for, recognition and valuing of any Indigenous knowledge given by the access provider.<sup>931</sup>

The regulations provide that where the access provider is an Indigenous owner, the access provider must provide informed consent to the benefit sharing agreement.<sup>932</sup> The matters the relevant Australian Government Minister must consider in determining whether informed consent has been 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>933</sup>

The *EPBC Act* establishes an Indigenous Advisory Committee to advise the Minister for the Environment and Heritage on the operation of the *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* provides a framework for Indigenous people to manage access to their land and their traditional knowledge in Commonwealth areas. This can allow Indigenous people to control access to their traditional knowledge, and negotiate intellectual property rights as well as benefits from commercialisation. Unfortunately, this mechanism is not readily used because people do not know about it, and there has been little support from industry to work within this framework. Further, there is

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<sup>927</sup> EPBC Regulation reg 8A.06(1).

<sup>928</sup> Ibid reg 8A.03(1)(c).

<sup>929</sup> Ibid reg 8A.03(1)(j).

<sup>930</sup> Within the meaning of the *Native Title Act 1993* (Cth), reg 8A.06(3) of the *EPBC Regulations 2000* (Cth).

<sup>931</sup> EPBC Regulations reg 8A.08.

<sup>932</sup> Ibid reg 8A.09.

<sup>933</sup> Ibid reg 8A.09(2).

more to be done by government to ensure the *EPBC Act* provisions are working effectively. The process provides that an applicant must negotiate, with the holder (or owner) of the biological resources, a benefit-sharing contract which covers the commercial and other aspects of the agreement. The Commonwealth Government has developed a model contract developed and agreed to by Governments, industry, Indigenous organisations and other stakeholders.

The Commonwealth scheme fails to secure a robust right of free, prior informed consent and the scheme is designed with over-reliance on native title Indigenous land use agreements for benefit sharing. Furthermore, the *EPBC Act* fails to create Indigenous rights to traditional biological knowledge as intellectual property or resource rights, and there is no provisions for infrastructure arrangements for administering benefits of Aboriginal access providers to distribute or implement benefit sharing.<sup>934</sup> Another limitation is that the *EPBC Act* only requires an access and benefit sharing agreement when the use of the materials is for commercial purposes. Rimmer, an Australian Intellectual Property academic, notes that the regime draws a false distinction between research and commerce in the field of natural drug discovery.<sup>935</sup> To date, the majority of uses are for non-commercial purposes and, accordingly, do not require a benefit-sharing agreement.<sup>936</sup>

#### 8.2.7.2 *Biological Resources Act 2006 (NT)*

The *Biological Resources Act 2006 (NT)* promotes the conservation of biological resources in the NT in addition to establishing a framework to manage the conduct and interactions of 'bioprospectors'. This *Act* recognises the special knowledge held by Indigenous people about biological resources<sup>937</sup> and seeks to ensure that any

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<sup>934</sup> Marcia Langton and Zane Ma Rhea with Margaret Ayre and Juanita Pope, 'Composite Report of the Status and Trends Regarding Knowledge, Innovations and Practices of Indigenous Local Communities' (UNEP/CBD/WG8J/3/INF/4, 8 September 2003) 80

<<https://www.cbd.int/doc/meetings/tk/wg8jrwap-01/other/wg8jrwap-01-wg8j-03-inf-04-en.pdf>>.

<sup>935</sup> Matthew Rimmer, 'Blame it on Rio: Biodiscovery, Native Title and Traditional Knowledge' (2003b) 7(1) *Southern Cross University Law Review* 1, 12.

<sup>936</sup> Natalie Stoianoff and Alpana Roy, 'Indigenous Knowledge and Culture in Australia: The Case for Sui Generis Legislation' (2015) 41(3) *Monash University Law Review* 745.

<sup>937</sup> *Biological Resources Act 2006 (NT)* s 3(2)(d).

benefits that arise through the biodiscovery process are shared equitably amongst stakeholders.

Within the Act, 'bioprospecting' is defined as the taking of samples of biological resources for research in relation to any genetic resources or biochemical compounds comprising of and contained in the biological resources.<sup>938</sup> There are some exclusions in relation to what conduct amounts to bioprospecting; one of them being where the resources are collected by Indigenous people from their traditional land and water areas in accordance with their traditions.

A permit is required to take biological resources. The process involves a four-step procedure: initial application, review by permit authority provider, review by the departmental CEO, and confirmation of a benefit-sharing agreement. Failure to obtain an access benefit sharing agreement means the application will be rejected.<sup>939</sup> The Act is silent on the required form of an access and benefit sharing agreement. However, as a condition to the agreements' validity, the CEO of the responsible Department must be satisfied that the resources' access provider has given free prior informed consent to the terms of the benefit-sharing agreement.

### 8.2.7.3 *Biodiversity Act 2004 (QLD)*

The *Biodiscovery Act 2004 (QLD)* ('QLD Act') does not contain any provision for the protection of Indigenous Knowledge. However, the QLD Government provides the *Queensland Biotechnology Code of Ethics* ('*The Code*') which is mandatory for all QLD government agencies, research centres, public hospitals that conduct biotechnology activities, and any organisation or institution that receives financial assistance from the QLD government.<sup>940</sup> *The Code* requires biotechnology organisations to negotiate benefit sharing arrangements with Indigenous people, where traditional knowledge is obtained from Indigenous people in the course of biodiscovery.<sup>941</sup> *The Code* provides no guidance on how prior informed consent should be obtained. However, if the

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<sup>938</sup> Ibid s 5.

<sup>939</sup> Ibid s 18.

<sup>940</sup> Queensland Government, *Biotechnology Code of Ethics* ('*The Code*') (Office of Biotechnology, 2006) 4.

<sup>941</sup> Ibid cl 11, 8.

collection of biological materials is on Aboriginal owned land, the biotechnology organisation would need to enter into a benefit sharing agreement. Furthermore, *The Code* requires compliance with the *Native Title Act 1993* (Cth) and the organisation must not conduct biopiracy. In summary, while *The Code* has general provisions on prior informed consent being required when collecting samples from privately owned land,<sup>942</sup> it does not have any specific requirements for consultation and consent where Indigenous Knowledge is involved.

#### 8.2.7.4 *Intellectual property laws*

In Australia, the intellectual property laws relevant to the protection of plant based traditional knowledge are copyright, patents, plant breeder's rights, confidential information, and trade marks and geographical indications.

#### 8.2.7.5 *Copyright Act 1968 (Cth)*

Copyright provides automatic protection over original works, sound recordings and films as soon as they are created. Indigenous Knowledge that is written down or recorded will be protected if it meets the requirements of these copyright categories.<sup>943</sup> However, the author of that knowledge is the person who writes down the information or who makes the recording or film. Given that Indigenous Knowledge is often orally transferred, and may be nurtured and handed down through many generations, it may not meet the requirements of copyright protection. In any case, copyright does not protect the underlying idea, only the expression.<sup>944</sup> This means Indigenous Knowledge about plants written in books and recorded in oral histories can be used by others without the need for people to obtain consent to apply that knowledge.

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<sup>942</sup> Ibid 8.

<sup>943</sup> *Copyright Act 1968* (Cth): literary, dramatic, musical or artistic works (s 32), sound recordings (s 89) Cinematograph films (s 90).

<sup>944</sup> Janke provides an overview of the application of copyright laws to traditional cultural expression in Terri Janke, 'Indigenous Intangible Heritage and Ownership of Copyright' in Toshiyuki Kono (ed), *Intangible Cultural Heritage and Intellectual Property, Communities, Cultural Diversity and Sustainable Development* (Intersentia, 2009) 159.

A further issue is that copyright only lasts for a limited time.<sup>945</sup> For instance, the copyright in a book written about Indigenous Knowledge of plants is protected as a literary work and would last for 70 years after the death of the author of the book. The problem for Indigenous people is that they are often not the author or copyright owners of the books that incorporate their Indigenous Knowledge.<sup>946</sup> This means that the cultural protocols relating to how communally owned Indigenous Knowledge can be disseminated are displaced by the general rules of copyright. In the Australian Knowledge economy, the copyright owner is the one who has the exclusive right to control the reproduction and use of the work, sound recording or film. There is, however, the case of *Bulun Bulun v R & T Textiles* ('*Bulun Bulun case*'),<sup>947</sup> which recognised that an Aboriginal artist, Mr Bulun Bulun, owed a fiduciary duty to the Ganalbingu clan to deal with the copyright in his artistic work consistent with his customary law obligations. The artistic work in question incorporated Ganalbingu ritual knowledge of the clan. The artist taking action to stop the infringement of his work by a fabric importer met that obligation. Would this fiduciary duty also apply to books, reports and recordings taken by researchers and scientists? It is arguable that the principles of the *Bulun Bulun case* apply to works, sound recordings and films that incorporate traditional ritual knowledge of plants.<sup>948</sup>

#### 8.2.7.6 *Patents Act 1990 (Cth)*

Patents protect invented products and methods of manufacture which are novel and include an inventive step.<sup>949</sup> The *Patents Act 1990* (Cth) aims to protect the intellectual property of an inventor by allowing them a commercial monopoly over the use of their invention. It gives the patentee exclusive rights over their patented material to exploit

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<sup>945</sup> *Copyright Act 1968* (Cth) for works with identified author (s 33), for works with an anonymous or pseudonymous author (s 34), for sound recordings (s 93), for films (s 94), for broadcast (s 95), and for published editions of works (s 96).

<sup>946</sup> Terri Janke, *Writing up Indigenous Research: Authorship, Copyright and Indigenous Knowledge Systems* (Terri Janke and Company, 2009e).

<sup>947</sup> *Bulun Bulun v R & T Textiles Pty Ltd* ('*Bulun Bulun case*') (1998) FCA 1082.

<sup>948</sup> Eamon Ritchie and Terri Janke, 'Who Owns Native Title Connection Reports?' (2015) 8(20) *Indigenous Law Bulletin* 8.

<sup>949</sup> *Patents Act 1990* (Cth) s 18.

the invention, or to authorise another to exploit the invention, for the term of the patent.<sup>950</sup>

A plant existing in nature or a mere discovery is not patentable. To have a patent application approved, an inventor or organisation needs to demonstrate that the invention is new and involves an inventive step.<sup>951</sup> This could include a newly invented method of using the genetic material, or a new adaption of it that serves a new purpose.<sup>952</sup> Assessments of the subject matter are made against the background of knowledge in the professional field, known as the 'prior art base'.<sup>953</sup> Biotechnology, pharmaceutical and research companies undertake the scientific research and technical processes which may then meet the inventive step requirements for the purposes of a patent.

However, Indigenous people across the world complain that researchers, scientists and global companies are patenting inventions that are derived from traditional knowledge such as medicinal remedies of plants, sourced from Indigenous people either directly or from published accounts of traditional knowledge in text books, guides or databases.<sup>954</sup> Two questions arise: whether there has been inventive step, because the traditional knowledge should be considered part of the prior art base; and whether, ethically, the Indigenous people who have nurtured the plant, and known of its properties for many years, should share in the benefits.<sup>955</sup>

To file an application, a specification outlining the technical details of the patent inventiveness and the monopoly claimed must be prepared. Patents are filed in each country, so an international patent will need filing in every country in which the patent is likely to be marketed. It is a complex and expensive process. These all serve to put patents law out of reach of many Indigenous innovators. However, biotech companies have deeper pockets and universities can access research funding to afford the patent

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<sup>950</sup> Ibid s 13.

<sup>951</sup> Ibid s 18(1).

<sup>952</sup> National Research Development Corporation v Commissioner of Patents (1990) 102 CLR 252.

<sup>953</sup> *Patents Act 1990* (Cth) s 7(1).

<sup>954</sup> Michael Blakeney, 'Bioprospecting and the Protection of Traditional Medical Knowledge' (1997) 6 *European Intellectual Property Reports* 298, 300.

<sup>955</sup> Terri Janke, 'Biodiversity, Patent and Indigenous Peoples' (1999) XLVI(2) *Media Development*.

filing fees. The patenting of biotech inventions derived from genetic resources is a continuing concern for Indigenous communities, whose knowledge about biological products informs and sustains the industry. Despite these challenges, the patent system has been used by three Indigenous patent projects and I will discuss this later in this article.

#### 8.2.7.7 *Plant Breeders Rights Act 1994 (Cth)*

The *Plant Breeders Rights Act 1994 (Cth)* gives plant breeders the exclusive commercial rights to market a new plant variety or its reproductive material.<sup>956</sup> Such rights allow the plant breeder to produce, reproduce, sell and distribute the new plant variety, receive royalties from the sale of plants, or sell the rights to do so.<sup>957</sup> Plant breeder rights holders can prevent others from selling seeds of that variety. Exceptions are that other breeders can use the protected seeds to develop new seed varieties; and growers do not have to pay royalties on the crop produced and may save the seeds for replanting.<sup>958</sup>

To be eligible for protection, plant breeds must illustrate that a new variety is distinct, uniform and stable. It must also be demonstrated by comparative trial that the new variety is different from the most similar varieties of common knowledge. Protection lasts up to 25 years for trees or vines, and 20 years for other species.<sup>959</sup> Simpson and the Forest Peoples' Program note that this

[R]equires that Indigenous peoples conduct comprehensive propagation trials to conclusively demonstrate that the criteria are satisfied; submit a written description of the variety; and deposit samples in the form of seeds, a dried plant or a live plant. Clearly these requirements demand a considerable degree of legal and scientific expertise, as well as the labour and expense of plant breeders.<sup>960</sup>

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<sup>956</sup> The *Plant Breeder's Rights Act 1994 (Cth)* meets Australia's obligations under the International Convention for the Protection of New Varieties of Plant 1961 (UPOV).

<sup>957</sup> *Plant Breeder's Rights Act 1994 (Cth)* s 11.

<sup>958</sup> *Ibid* s 17.

<sup>959</sup> *Ibid* s 22(2).

<sup>960</sup> Tony Simpson, *Forest People's Program, Indigenous Heritage and Self-Determination, The Cultural and Intellectual Property Rights of Indigenous Peoples (International Working Group for Indigenous Affairs, June 1996)* 88.



Like other intellectual property laws, the ability of plant breeders' rights laws to protect Indigenous plant breeders' rights is limited in that protection is restricted to a set period and usually vests in individuals and companies, while Indigenous Cultural and intellectual property rights last in perpetuity and are collective. Plant breeders' rights laws, like patent law, are about commercialisation and allowing licensing. This could be useful when Indigenous people wish to take part in industry. It does not, however, give Indigenous people the right to be recognised as plant breeders over inter-generationally developed and nurtured plants. Aboriginal and Torres Strait Islander people can object to plant breeder rights applications on the basis that the variety is not distinctive from a variety known to them.<sup>961</sup> However, Lingard notes that to make an opposition to a plant breeders rights application requires Indigenous people to know about the application in the first place.<sup>962</sup> Furthermore, scientific and legal resources are needed to prove lack of distinctiveness.

#### **8.2.8 Confidential Information**

The law of confidential information and trade secrets protects knowledge that is deemed confidential in nature, where the publication of it would cause detriment to the owner of the knowledge. In 1976, the case of *Foster v Mountford*,<sup>963</sup> traditional knowledge was treated as 'confidential information'. Mountford tried to publish a book he had written containing information of religious and sacred significance to the Pitjantjatjara people. The court issued an injunction stopping the book from being published in the NT, because the anthropologist was found to have breached his duty to keep that information secret.

Although yet to be tested, there is an argument that Indigenous holders of plant knowledge may be able to control access to their knowledge of plant materials and other biological resources if the Indigenous Knowledge is secret and confidential. However, any material that has been previously published will not qualify for

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<sup>961</sup> Plant Breeder's Rights Act 1994 (Cth) s 35(1)(b).

<sup>962</sup> Kylie Lingard, 'Legal Support for the Interests of Aboriginal and Torres Strait Islander Peoples in the Commercial Development of New Native Plant Varieties: Current Status and Future Options' (2015) 26 *Australian Intellectual Property Journal* 39, 46.

<sup>963</sup> *Foster v Mountford* (1977) 14 ALR 71.

protection. If the Indigenous Knowledge has not previously been published, the law of confidential information can be used by Indigenous people when they are approached by researchers regarding the use of Indigenous Knowledge for commercial purposes. Indigenous people can keep Indigenous plant knowledge secret by using confidentiality agreements or non-disclosure agreements. The point of using a confidentiality agreement is to ensure that the researcher or scientist that is accessing the Indigenous Knowledge will not use that knowledge for purposes other than contained in the agreement without permission or further negotiations.<sup>964</sup>

### **8.2.9 Trade marks and geographic indications**

A trade mark identifies the maker of products and services. Certification mark is a sign used to distinguish goods and services which possess a certain quality or characteristic. Under the *Trade Marks Act 1995* (Cth) the registered owner of a trade mark is granted a right to use that trade mark in relation to the class of goods and services of which the trade mark is registered.<sup>965</sup> I canvassed the applicability of trade marks for protecting Indigenous knowledge in *Our Culture, Our Future*<sup>966</sup> and have written two case studies about trade marks and their applicability to Indigenous cultural expression.<sup>967</sup> There is an opportunity for trade marks and certification marks to be used as identifiers for the source of Indigenous Knowledge including as geographic indications. Labelling and marks can be useful to denote a product's Indigenous origin and to distinguish Indigenous sourced products from non-Indigenous ones.

A geographical indication (GI) is a name or sign used on products to indicate the particular place the product comes from. A GI is an intellectual property tool used to identify that a product has certain qualities or a reputation, due to its geographic origin.

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<sup>964</sup> Jeremy Morse, *Know Your Rights to Your Aboriginal Plant Knowledge: A Guide for Aboriginal Knowledge Holders on Recording and Commercialising Aboriginal Plant Knowledge* (Terri Janke and Company, prepared for Australian Bush Traders, 2010)

<sup>965</sup> Trade Marks Act 1995 (Cth) s 20.

<sup>966</sup> Janke [1999 *ibid*] 68–72.

<sup>967</sup> Terri Janke, *Minding Culture: Case Studies on Intellectual Property and Traditional Cultural Expressions* (WIPO, 2003). *Minding Culture* has two case studies on trade marks, one on trade marks use by Indigenous people and another on the Label of Authenticity, a certification mark for Indigenous art.

The GI protects the name by preventing the generic uses of the name and preserving it for use of products made in the traditional manner.

Given that Indigenous Knowledge is place-based, GIs may be useful for Indigenous communities as a way of registering a product in terms of its origin.<sup>968</sup> For instance, the use of the language words for plants that are commercially applied may assist Indigenous people to develop a niche market and protect traditional knowledge practices of harvesting.<sup>969</sup> However, in Australia, the GI application is mostly used for wine, such as 'Champagne', and cheese, such as 'Roquefort'.

Many individual Indigenous producers use trade marks and labelling for their products, such as 'Indigiearth', the bushfood product range created by Sharon Winsor, an Indigenous entrepreneur.<sup>970</sup> The trade marks system does allow for collective ownership of marks and certification marks which can be applied to form a national or regional system for protection of Indigenous Knowledge. However, as evidenced by the failed Label of Authenticity in 2000<sup>971</sup>, establishing labelling and certification systems require a high level of administration and marketing. There are also complexities as to who should authorise that a producer is 'Indigenous'.<sup>972</sup> These issues have proved to be a significant barrier for Indigenous people making use of labelling in a coordinated and national level.

## 8.2.10 Land and heritage laws

### 8.2.10.1 *Native Title Act 1993 (Cth)*

Since the landmark judgment of *Mabo v Queensland*<sup>973</sup> in 1992, Indigenous people have native title rights to land and seas where they can show a continuity of

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<sup>968</sup> William Van Caenegem, Jen A Cleary and Peter Drahos, 'Pride and Profit: Geographical Indications as Regional Development Tools in Australia' (2014) 16(1) *Journal of Economic and Social Policy*.

<sup>969</sup> Janke [2009 *ibid*] 58.

<sup>970</sup> Indigiearth is a 100% award winning Aboriginal owned and operated company based in Mudgee New South Wales founded by Sharon Winsor, a Ngemba Weilwan woman <<https://indigiearth.com.au/>>.

<sup>971</sup> Janke [2003 *ibid*] 134–158.

<sup>972</sup> Matthew Rimmer, 'Australian Icons: Authenticity Marks and Identity Politics' (2004) 3 (Autumn) *Indigenous Law Journal* 139.

<sup>973</sup> *Mabo v Queensland* [1992] HCA 23.

connection. Section 223(1) of the *Native Title Act 1993* (Cth) provides that ‘the expression native title or native title rights and interests means the communal, group or individual rights and interests of Aboriginal peoples or Torres Strait Islanders *in relation to land or waters*, where...(b) the Aboriginal peoples or Torres Strait Islanders, by those laws and customs, have a connection with the land or waters’.<sup>974</sup> It is important to note that the legislation does not provide specific protection for customs or cultural knowledge. Details of customs including knowledge practices such as bushfood preparations, songs, stories and knowledge of land and sites are recognised as evidence of an applicant’s connection to the land and waters to which they are claiming rights (either co-existing or exclusive).<sup>975</sup>

Given that knowledge is linked to land and seas, it is often suggested that rights to knowledge should be part of the bundle of rights that make up native title. Lotz, for instance, argues that native title rights and interests should extend to rights over plant resources and traditional knowledge because such rights flow out of rights to land.<sup>976</sup> The development of native title case law supports this approach.

In 2002, the High Court in *Western Australia v Ward*<sup>977</sup> held that native title rights are rights in relation to land and waters and, as such, native title may only protect cultural knowledge in so far as it relates to land and waters and do not extend to the recognition of rights to protect cultural knowledge.<sup>978</sup> The High Court considered that if claims to protect cultural knowledge ‘go beyond denial or control of access to land or waters’, they are not rights protected by the *Native Title Act*.<sup>979</sup> The High Court further suggested that recognition of such a right would amount to something akin to a new kind of intellectual property right.<sup>980</sup> They were not prepared to create such a new right

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<sup>974</sup> Native Title Act 1993 (Cth) s 223.

<sup>975</sup> Terri Janke, *Follow the Stars: Indigenous Culture, Knowledge and Intellectual Property Rights* (The Mabo Oration, Anti-Discrimination Commission Queensland, 2011) 18.

<sup>976</sup> Marianne Lotz, ‘Colliding Worlds: Indigenous Rights, Traditional Knowledge and Plant Intellectual Property’ (2002) 31(3-4) *Business and Professional Ethics Journal* 71.

<sup>977</sup> (2002) 213 CLR 1.

<sup>978</sup> *Ibid* [468].

<sup>979</sup> *Ibid*.

<sup>980</sup> *Ibid* [59].

and considered that the existing intellectual property rights system was sufficient. Justice Kirby dissented from the majority. Kirby states:

If cultural knowledge, as exhibited in ceremony, performance, artistic creation and narrative, is inherently related to the land according to Aboriginal beliefs, it follows logically that the right to protect such knowledge is therefore related to the land for the purposes of the *Native Title Act 1993* (Cth).<sup>981</sup>

The High Court in the *Croker Island Case*<sup>982</sup> acknowledged that the claimants held a non-exclusive native title right to access the sea and sea bed for the purpose of safeguarding their cultural and spiritual knowledge. Although such a right is based on access, the case demonstrated some capacity of the common law to protect Indigenous Knowledge.

In 2013, *Akiba on behalf of the Torres Strait Regional Seas Claim Group v Commonwealth*<sup>983</sup> ('*Akiba*'), the High Court held that native title rights and interests could comprise a right to access resources in the native title claim area, and to take such resources for any purpose. Although the decision focused upon whether the native title holders could take resources for commercial purposes, and not on rights to traditional knowledge, *Akiba* raise questions as to whether native title rights should be broadly defined.

#### 8.2.10.2 *The Aboriginal Land Rights Act 1976 (NT)*

There may be opportunities for NT Aboriginal 'traditional owner' groups who have inalienable freehold land rights to control the access and use of their cultural resources and associated traditional knowledge. In the NT, the *Aboriginal Land Rights 1976 (NT) Act* ('*ALRA*') establishes a permit system to allow NT Aboriginal Land Councils to manage, on behalf of traditional owners, issues of access to land controlled and owned by them. This provides a potentially strong basis for traditional owner groups to require

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<sup>981</sup> Ibid 161–162 (Kirby J).

<sup>982</sup> *Commonwealth v Yarmirr* (2001) 208 CLR 1.

<sup>983</sup> *Akiba on behalf of the Torres Strait Regional Seas Claim Group v Commonwealth* (2013) 300 ALR 1.

researchers, scientists and biopharmaceutical companies to respect customary laws; but within the constraint of *ALRA*.

The *ALRA* allows for the maintenance of cultural practises and knowledge through customary law. Section 71 of the *ALRA* grants Aboriginal people the right to enter Aboriginal land and use or occupy that land where the entry, occupation or use is 'in accordance with Aboriginal tradition governing the rights...with respect to that land'.<sup>984</sup> By granting legal title to land, the Act allows Aboriginal groups in the NT who can prove their traditional relationship to the land, to maintain their cultural identity through the practise and transmission of Indigenous Knowledge.

The *ALRA* also establishes a system of regulated access to Aboriginal land. People who wish to enter Aboriginal land require a written permit to do so.<sup>985</sup> Permits are issued only if the traditional owners or the Land Council grant approval, and they have the legal right to grant or refuse permission. People who propose to conduct research, environmental activities, filming or commercial projects on Aboriginal land or with Aboriginal communities first require a permit to enter the land, and also require a permit to undertake such activities. By making such permits conditional upon the observance of cultural protocols, Aboriginal landowners can ensure that they have continuing legal rights to their Indigenous Knowledge and biological resources.

#### 8.2.10.3 *Aboriginal Land Rights Act 1983 (NSW)*

The *Aboriginal Land Rights Act 1983 (NSW)* provides land rights for Aboriginal people in NSW.<sup>986</sup> Given the inter-connectivity of land to Indigenous Knowledge, a question is to what extent land councils can have control over intangible heritage such as traditional knowledge about plants. There is a growing economic agenda through land councils and the commercialisation of plant-based businesses and associated traditional knowledge can offer great potential. NSW Local Aboriginal Land Councils are generally under-resourced. However, there may be opportunities to collaborate, especially where the plant is accessed from Aboriginal controlled land. For example,

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<sup>984</sup> *Aboriginal Land Rights 1976 (NT)* s 71(1).

<sup>985</sup> *Ibid* s 48H.

<sup>986</sup> *Aboriginal Land Rights Act 1983 (NSW)* s 3.

the Yaegl Local Aboriginal Land Council has a contract with Macquarie University to record Indigenous plant knowledge and to identify medicinal remedies. The contract provides for benefit sharing of any commercialisation outcomes. The collaboration has resulted in the identification of antimicrobial potential of plants used in the topical treatment of skin infections, wounds and sores.<sup>987</sup>

#### 8.2.10.4 *Ngarrindjeri Regional Authority in SA*

In South Australia (SA), the Ngarrindjeri traditional owners, have pursued recognition and protection of their rights through negotiation and contracts rather than reliance on statutory protection.<sup>988</sup> This has been significant in the areas of Natural Resource Management and protection of cultural heritage. In 2009, Ngarrindjeri negotiated a whole of government Kungun Ngarrindjeri Yunnan agreement with the South Australian Government which provide the legal framework for consultations and negotiations between the State and the Ngarrindjeri over issues to do with Ngarrindjeri Ruwe/Ruwar (country, body, spirit).<sup>989</sup>

Overarching research agreements underpin research between universities and the Ngarrindjeri and include Indigenous Cultural and Intellectual Property clauses. Hemming and colleagues note that 'The creation of contractual rights between Indigenous groups and third parties provide certainty in relation to ownership and enforcement of ICIP rights not already explicit in the Australian law.'<sup>990</sup>

This arrangement provides scope for collaborations with universities and other research and commercial entities which could include plant traditional knowledge. For instance, the Ngarrindjeri people operate a native nursery where they grow native

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<sup>987</sup> Joanne Packer, Tarannum Naz, Yaegl Community Elders, David Harrington, Joanne F Jamie and Subramanyam R Vemulpad, 'Antimicrobial Activity of Customary Medicinal Plants of the Yaegl Aboriginal Community of Northern New South Wales, Australia: A Preliminary Study' (Research Paper, BMC Research Notes, 2015).

<sup>988</sup> Steve Hemming, Daryle Rigney, Shaun Berg, 'Researching on Ngarrindjeri Ruwe/Ruwar: Methodologies for Positive Transformation' (2010) 2 *Australian Aboriginal Studies* 92, 94.

<sup>989</sup> Ibid 95.

<sup>990</sup> Ibid 98.

flowers and bushfoods. They have entered into a commercial supply arrangement with a large commercial supplier of native flowers.<sup>991</sup>

#### 8.2.10.5 *Aboriginal Heritage Act 2006 (Vic)*

The formation of native title groups under the *Traditional Owner Settlement Act 2010* (Vic) allows traditional owners to make decisions about their land, heritage and resources.<sup>992</sup> In 2016, amendments to the *Aboriginal Heritage Act 2006* (Vic) provided a framework for traditional owner groups to register their intangible heritage including Indigenous knowledge.<sup>993</sup> Part 5A of the *Aboriginal Heritage Act 2006* establishes a process by which Aboriginal intangible heritage can be registered on the Victorian Aboriginal Heritage Register. Once registered, Traditional Owners may make Aboriginal intangible heritage agreements that outline whether and how their traditional knowledge is used and for what purpose.

The *Act* makes it an offence to ‘knowingly’ exploit registered Aboriginal intangible heritage for commercial purposes without the consent of traditional owners. ‘Reckless’ use of registered intangible heritage is also prohibited. This would mean that anyone commercialising knowledge that is registered as intangible heritage would need to enter into an agreement with the relevant traditional owners to commercialise that knowledge, and to conduct research as well. As yet, there has been no registration of knowledge, but it is possible that plant knowledge could be registered and therefore be protected from exploitation.

The *Act* defines Aboriginal intangible heritage as ‘any knowledge of or expression of Aboriginal tradition, other than Aboriginal cultural heritage’<sup>994</sup> and includes oral traditions, performing arts, stories, rituals, festivals, social practices, crafts and visual arts. It also includes environmental and ecological knowledge and ‘knowledge of medicinal and other properties of flora and fauna, minerals and other elements of the

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<sup>991</sup> The Ngarrindjeri Regional Authority is the peak regional organisation of the Ngarrindjeri. They have established a commercial company to develop a native plant and bushfoods business <<http://www.ngarrindjeri.org.au/ngarrindjeri-ruwe-contracting>>.

<sup>992</sup> Traditional Owner Settlement Act 2010 (Vic).

<sup>993</sup> Aboriginal Heritage Act 2006 (Vic).

<sup>994</sup> Ibid s 79B (1).



environment'.<sup>995</sup> However, Aboriginal intangible heritage does not include anything that is widely known to the public.<sup>996</sup> This means that protection over plant knowledge would only be eligible over registered knowledge that is not publicly known.

## 8.2.11 International legal framework

There are several international conventions and declarations that exhort countries to improve their sovereign laws and policies in this regard. However responses have been tardy and erratic, including by Australia.

### 8.2.11.1 *Convention on Biological Diversity*

The international *Convention on Biological Diversity* ('CBD') 1992, which Australia is signatory to, focuses on the conservation of biological diversity, sustainable use of its components, and fair and equitable sharing of benefits arising from genetic resources.<sup>997</sup> The *Convention* grew out of the global recognition of the value of genetic resources, the need for sustainability and for the fair and equitable sharing of benefits between developed and developing states. Article 8(j) states that each contracting country must

[R]espect, 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.<sup>998</sup>

The 2002 Bonn Guidelines on Access to Genetic Resources and Fair and Equitable Sharing of the Benefits Arising out of their Utilization created by the CBD aim to guide users, and providers of genetic resources, standards in access and benefit sharing

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<sup>995</sup> Ibid s 4(1).

<sup>996</sup> Ibid s 79B (1).

<sup>997</sup> *Convention on Biological Diversity*, opened for signature 5 June 1992 [1996] UNTS 29 (entered into force 23 December 1993).

<sup>998</sup> Ibid art 8(j).

strategies.<sup>999</sup> The Guidelines also aim to bring a high level of responsibility and transparency to parties dealing with providers of biological resources. The Guidelines did not specifically raise the issues of Indigenous Knowledge protection; however, they do provide standards and processes when dealing with indigenous peoples, resources and traditional knowledge.

The Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilisation to the Convention on Biological Diversity<sup>1000</sup> ('Nagoya Protocol') was adopted in 2010, thereby creating a binding process. Its objective is the fair and equitable sharing of benefits arising from the use of genetic resources which contributes to the conservation and sustainable use of biodiversity. Countries that sign the Nagoya Protocol are required to take measures in order to ensure that where Indigenous Knowledge associated with genetic resources is used in research and development, the resulting benefits will be shared in a fair and equitable way with the Indigenous holders of that knowledge.<sup>1001</sup> Each party to the Protocol will also be required to take measures to ensure that traditional knowledge associated with genetic resources are only accessed with the knowledge holders prior informed consent, on mutually agreed terms.<sup>1002</sup>

Consent must be obtained from the providing government, and/or any Indigenous peoples authorised under national law to grant access to the resource or knowledge. The *Protocol* further requires resource users to share the benefits of genetic research with resource and knowledge providers.<sup>1003</sup>

The *Protocol* encourages each country to take legislative, administrative or policy measures, as appropriate, and to ensure that the benefits that arise from the utilisation of genetic resources are shared with the indigenous and local communities.

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<sup>999</sup> Bonn Guidelines on Access to Genetic Resources and Fair and Equitable Sharing of the Benefits Arising out of their Utilization (2002) p IV <<https://www.cbd.int/doc/publications/cbd-bonn-gdls-en.pdf>>.

<sup>1000</sup> Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization (ABS) to the Convention on Biological Diversity, opened for signature 2 February 2011 (entered into force 12 October 2014) art 6(1) ('Nagoya Protocol').

<sup>1001</sup> Ibid art 7.

<sup>1002</sup> Ibid art 12(1).

<sup>1003</sup> Lingard [2015 *ibid*] 41.

Indigenous and local communities must also receive free prior informed consent or approval and involvement for access to genetic resources where they have the established right to grant access to such resources.

For Indigenous Australians, the *Protocol* opens the door for access and benefit sharing arrangements by requiring prior informed consent when Indigenous resources are being utilised. The critical issue then becomes how the process of free prior informed consent will be undertaken, and how the system will work together with the intellectual property system and the international system, including international trade laws.<sup>1004</sup>

In 2015, the CBD Secretariat developed draft guidelines on free, prior informed consent and approval; involvement and fair and equitable benefit sharing for Indigenous people and local communities.<sup>1005</sup> Prior informed consent (PIC) was clarified as being 'a *continual* process building mutually beneficial, *ongoing* arrangements between users of traditional knowledge and indigenous peoples and local communities.'<sup>1006</sup> The guidelines set out desirable elements of consent and approval processes and establishment of mutually agreed terms, which may include:

- (a) A competent authority at the level of indigenous peoples and local communities with official recognition by the relevant Government, as competent authorities of indigenous and local communities;
- (b) Elements of a consent or approval process including:
  - (i) Written application in a manner and language comprehensible to the traditional knowledge holder;

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<sup>1004</sup> Anthony Taubman, 'Preface: Indigenous Innovation: New Dialogues, New Pathways' in Peter Drahos and Suzy Frankel (eds), *Indigenous Peoples Innovation*, xix <<http://press-files.anu.edu.au/downloads/press/p154251/pdf/preface.pdf>>.

<sup>1005</sup> Secretariat of Convention on Biological Diversity, Proposed Guidelines for the Development of Mechanisms, Legislation or Other Appropriate Initiatives to Ensure the Prior Informed Consent or Approval and Involvement of Indigenous Peoples and Local Communities for Accessing Their Knowledge, Innovations and Practices, the Fair and Equitable Sharing of Benefits Arising from the Use and Application of Such Knowledge, Innovations and Practices and for Reporting and Preventing Unauthorized Access to Such Knowledge, Innovations and Practices, UNEP/CBD/WG8J/9/2, 24 September 2015.

<sup>1006</sup> Elise Morgera, 'Towards International Guidelines on Prior Informed Consent and Fair and Equitable Benefit Sharing from the Use of Traditional Knowledge' on *The Benelex Project* (2015) <<http://www.benelexblog.law.ed.ac.uk/2015/12/09/towards-international-guidelines-on-prior-informed-consent-and-fair-and-equitable-benefit-sharing-from-the-use-of-traditional-knowledge/>>.

- (ii) Legitimate and culturally appropriate process and decision-making including possible social, cultural and economic impacts;
  - (iii) Adequate information, timing and deadlines;
  - (iv) Specification of use with clause to address change of use and transfer to third parties;
  - (v) Implementation and monitoring;
- (c) A template for applicants taking into account the possible actions required by potential users of traditional knowledge;
  - (d) Prior informed consent or approval and involvement granted/established on the basis of mutually agreed terms ensuring the equitable sharing of benefits;
  - (e) Consultation process with indigenous and local communities;
  - (f) Procedures consistent with customary practices.<sup>1007</sup>

Morse considers that the *Protocol* promises to establish a more useful and comprehensive regime which access and benefit Sharing laws may finally deliver a real solution to the issues of biopiracy.<sup>1008</sup> Australia signed the *Nagoya Protocol* in January 2012 but has been slow to develop a national approach to implementation and is yet to clearly establish how Indigenous people can make use of the law to negotiate access and benefit sharing arrangement for their resource and knowledge.

#### 8.2.11.2 *Declaration on the Rights of Indigenous Peoples*

Mick Gooda, former Aboriginal and Torres Strait Islander Social Justice Commissioner, describes the United Nations' *Declaration on the Rights of Indigenous People* ('*The Declaration*') as:

[A]n international instrument, the Declaration provides a blueprint for Indigenous peoples and governments around the world, based on the principles of self-determination and participation, to respect the rights and roles of Indigenous peoples within society. It is the instrument that contains the minimum standards

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<sup>1007</sup> Secretariat of Convention on Biological Diversity [2015 *ibid*] 22–23.

<sup>1008</sup> Morse [2010 *ibid*] 6.

for the survival, dignity and well-being of Indigenous peoples all over the world.<sup>1009</sup>

There are two articles that specifically reference culture and Indigenous Knowledge. Article 11 provides rights to culture and traditions and to maintain and protect all manifestations of their culture.<sup>1010</sup> Article 31 relates to world indigenous people's right to maintain protect and control their cultural heritage, Traditional Knowledge and traditional cultural expressions as intellectual property. This includes genetic resources, seeds, and traditional knowledge about plants.<sup>1011</sup>

*The Declaration* is important for policy and law makers and Indigenous people alike as it provides a strong basis for recognition of Indigenous people managing and controlling their traditional knowledge and cultural expressions as intellectual property.

*The Declaration* has ramifications, Conway emphasises that article 31 'recognizes that the value of indigenous assets and resources extends to intangible commodities resulting from the creativity of the indigenous mind and the evolution of indigenous knowledge informed by indigenous cosmogony'. Hence, potential users of Indigenous Knowledge are put on notice that they may be subject to 'traditional intellectual property laws as well as indigenous customary laws or protocols in respect to the appropriate use of indigenous assets or resources.'<sup>1012</sup>

Both nationally and internationally, Indigenous people are using it to set their intention in protocols and contracts. The international business community represented by the UN Business Global Compact have developed a guide on free, prior informed consent which includes references to dealing with Indigenous Knowledge.<sup>1013</sup> Australia acceded to the *Declaration on the Rights of Indigenous Peoples* in 2009 and has an

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<sup>1009</sup>Australian Human Rights Commission, *The Community Guide to the UN Declaration on the Rights of Indigenous Peoples* (2010) 4.

<sup>1010</sup> *United Nations Declaration on the Rights on Indigenous Peoples*, GA Res 61/295, UN GAOR, 61<sup>st</sup> sess, 107<sup>th</sup> plen mtg, Supp No 49, Doc A/RES/61/295 (13 September 2007) art 11.

<sup>1011</sup> *Ibid* art 31.

<sup>1012</sup> Danielle M Conway, 'Promoting Indigenous Innovation, Enterprise and Entrepreneurship Through the Licensing of Article 31 Assets and Resources' (2011) 64 *SMU Law Rev* 1107.

<sup>1013</sup> UN Global Compact, *A Business Reference Guide to the UN Declaration on the Rights of Indigenous Peoples* (2013).

obligation to explore ways to bring effect to the articles relating to Indigenous Knowledge.

### 8.2.11.3 *World Intellectual Property Organization*

Since 2000, The World Intellectual Property Organization (WIPO) has convened an Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (IGC). The interface between traditional knowledge and genetic resources and other intellectual property rights is the challenge for the IGC. Progress has been slow. The IGC's draft articles for the Protection of Traditional Knowledge for discussion includes options for a provision for disclosure requirements.<sup>1014</sup> There are four alternatives. One option is to require, by national law, that users of Traditional Knowledge shall comply with requirements concerning the disclosure of source and/or origin of Traditional Knowledge. The second option is that IP applications that concern use Traditional Knowledge shall include information on the country from which the applicant collected or received the knowledge and state whether prior informed consent or approval has been obtained. The third alternative requires disclosure only when 'protected traditional knowledge' meet the eligibility requirements yet to be agreed upon. The fourth alternative is to have disclosure requirements.

Disclosure requirements will aid transparency, helping Indigenous Knowledge owners to know when their plant material is being used for patents and so provide a trigger for researchers and potential patent owners of plant-based inventions to work out an access and benefit sharing agreement with the relevant Indigenous people. Already there are several countries, such as the Andean Community<sup>1015</sup> and Switzerland<sup>1016</sup> that have disclosure provisions.

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<sup>1014</sup> Intergovernmental Committee on Intellectual Property and Genetic Resources, *Traditional Knowledge and Folklore, The Protection of Traditional Knowledge: Draft Articles, Facilitators' rev 2* (WIPO/GRTKF/IC/28/5 December 2, 2016) art 7.

<sup>1015</sup> WIPO, *Resources and Traditional Knowledge* (2017) art 26 of decision No 486 (2000) Establishing the Common Industrial Property Regime, 26.

<sup>1016</sup> Federal Act of June 25, 1954 (Switzerland), on patents for Inventions (status as of January 1, 2012), art 49(2).

## 8.2.12 Case studies: Australian Indigenous patent projects

So how are Indigenous Australians dealing with this highly fractured, uneven set of national and international frameworks? This section briefly examines three Australian case studies where Indigenous groups are the co-owners of a patent to explore the related challenges and opportunities for Indigenous Australians who might want to initiate commercialised projects around plants and plant knowledge. An important aim in describing these case studies is to identify any broadly relevant factors that may better enable success; not just in commercialisation and entrepreneurship, but also in balancing business with cultural imperatives.

### 8.2.12.1 *Mudjala Plant Patent*

In the 1986, Senior Nyinkina Mangala Lawman John Watson had half his finger bitten off by a crocodile when hunting on his country. He was hours away from a hospital and wrapped his finger in the bark of the 'nyardoo maja' tree to deal with the pain before making it to the hospital. The nyardoo majala tree has always been known to the Nyardoo Mangala community in this region. It holds cultural significance both in its healing powers and pain relief and features in the creation story of the Fitzroy River.<sup>1017</sup>

The elders wanted to explore the commercial potential for the plant and, with the help of adviser, Paul Marshall, met with Professor Ron Quinn of Griffith University, who is a research leader in natural product discovery and commercialisation. This led to a ground-breaking research partnership, which resulted in the isolation and identification of the active analgesic compounds in the plant.

The Jarlmadangah community and Griffith University became joint patent holders of the Indigenous biotechnology patent, and additional patents were registered in other countries.

In 2008, the co-owners licenced the IP technology to Avexis to develop commercial opportunities but, due to the global financial crisis, the obstacles to securing sufficient

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<sup>1017</sup> Sarah Holcombe and Terri Janke, 'Patenting the Kakadu Plum and the Marjarla Tree: Biodiscovery, Intellectual Property and Indigenous Knowledge' in Matthew Rimmer and Alison McLennan (eds), *Intellectual Property and Emerging Technologies, the New Biology* (Edward Elgar, 2012) 293, 331.

substantial investment capital meant that nothing became of it. The Jarlmadangah Buru community still hope to commercialise the patent. In 2013, it was reported that the community intended to participate in harvesting and monitoring trials and wild harvest management to ensure that wider Aboriginal communities' benefits will come out of any opportunity.<sup>1018</sup> As yet, no such trial has commenced and the community are still looking for opportunities for partners to licence and exploit the patent's rights.

Several difficulties can be identified in this case study. Critical challenges were the high costs of patenting and the very bureaucratic process. The community had to incorporate to hold the IP assets. The most challenging aspect was the commercial partnership agreement between the community and Griffith University. The community was represented by a pro-bono lawyer. Some cultural issues also had to be managed. This required a review of the benefits and risks so that members of the community understood the ramifications. The act of patenting Indigenous traditional knowledge was contentious because it requires exposing knowledge of traditional plant use in the public domain. In Indigenous Knowledge systems, knowledge of plants may be secret or only for use by members of the clan group. To gain patent protection, the details of the invention must be written in specifications which are published. Patent rights give the rightsholder the ability to exclusively commercialise the invention, but rights only last for 25 years. Once this period ends, the patent information can be used by anyone. This is problematic for protecting Indigenous Knowledge as rights in perpetuity.

#### *8.2.12.2 University of South Australia and Chuulangun Aboriginal Corporation*

The Chuulangun Aboriginal Corporation in North Queensland represents the Kuuku l'yu people, who are located on the upper Wenlock and Pascoe Rivers in Central Cape York Peninsula, Queensland. David Claudie, the CEO of the Chuulangun Aboriginal Corporation is an Indigenous knowledge holder of plants on

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<sup>1018</sup> Virginia Marshall, Terri Janke and Anthony Watson, 'Community Economic Development in Patenting Traditional Knowledge: A Case Study of the Mudjala TK Project in the Kimberley Region of Western Australia', (2013) 8(6) *Indigenous Law Bulletin*.



his country. Claudie and the Corporation approached the University of South Australia to collaborate on a medicinal plant project.<sup>1019</sup>

Claudie's role in the project was to identify the plant knowledge and to collaborate with the scientists. The Chuulangun Aboriginal Corporation developed guidelines and protocols which promoted the involvement of traditional owners.

*Dodonaea polyandra*, also known as 'Uncha' is a shrub primarily found in the north and east of the Cape York Peninsula, in Queensland. Claudie identified the plant's traditional use is for the relief of pain and discomfort associated with infected teeth and toothache. The University of South Australia worked with the Chuulangun Aboriginal Corporation to patent the Uncha for research. Claudie is recognised as a co-inventor of the patent. He is a knowledge holder and worked with Susan Semple.<sup>1020</sup> The patent is owned jointly by the University and the Chuulangun Aboriginal Corporation. Having the Aboriginal Corporation as the owner recognises the collective Indigenous intellectual property rights so that the patent rights can be managed according to customary laws. This shows the more useful flexibility in the approach to 'inventorship' to recognise the holders of Indigenous science knowledge. In the past, Western science took priority.

### 8.2.12.3 *Spinifex Case Study*

In 2015, I attended the Ochre, Spinifex, Foil Symposium convened by the University of Sydney. Dr Paul Memmott presented a paper about a collaborative project involving the University of Queensland and the Indjalandji-Dhidhanu people of the Camooweal/Upper Georgina River area to develop commercial applications for a locally grown species of spinifex.<sup>1021</sup> Spinifex is an endemic native Australian grass. The spinifex grasses grow in abundance through the interior of the country.

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<sup>1019</sup> 'Medicinal Plants Project Impresses Business and Higher Education Round Table', *University of South Australia* (online), 2013 <<http://w3.unisa.edu.au/unisanews/2013/December/story8.asp>>.

<sup>1020</sup> David J Claudie et al, 'Ancient but New: Developing Locally Driven Enterprises Based on Traditional Medicines in Kuuku l'yu Northern Kaanju Homelands, Cape York, Queensland, Australia' in Peter Drahos and Suzy Frankel (eds), *Indigenous Peoples' Innovation, Intellectual Property Pathways to Development* (ANU E press, 2012) 29.

<sup>1021</sup> Paul Memmott (paper presented to Ochre, Spinifex, Foil, Symposium, University of Sydney, 24 September 2013).

Traditionally, Aboriginal Australians widely used spinifex as waterproof roof-thatching as well as adhesive gum produced from a carefully controlled heating technique.<sup>1022</sup> However, in the latter half of the 20<sup>th</sup> century, the traditional practices declined. This knowledge is being revitalised as part of a collaborative research project. The project has proven spinifex to be a strong and flexible material which has potential for a number of application including building technology.

The university and the Dugalunji Aboriginal Corporation's commercial entity, Myuma Pty Ltd, representing the relevant traditional owner groups, are working together. The university brings the scientific researchers, skill and equipment and the Aboriginal people bring the land, natural resources on them and the traditional knowledge. Myuma operates the Dugalunji Camp, which operates as a cultural heritage survey business, keeping place and training centre for Aboriginal people. In this way, the collaboration aims to find new technical solutions.<sup>1023</sup>

The collaboration allows for the Aboriginal people to gain skills in research and science. For instance, the Dungalunji Corporation established an Arid Zone Field Station with the support of the University of Queensland. In turn, the researchers gain insight into Indigenous knowledge. Memmott et al discuss the usefulness of Indigenous knowledge in the project explaining that 'oral histories from Indigenous people were not only insightful of ecological processes but also presented sensitivity to the ways these processes can be harnessed wisely'.<sup>1024</sup>

In 2015, a patent was registered over a composite material comprising an elastomer and nanocellulose derived from spinifex plants.<sup>1025</sup> The patent is owned solely by University of Queensland and not co-owned with the Indigenous partner as was the case in the other two case studies. However, reports state that benefits will be shared

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<sup>1022</sup> Paul Memmott, Richard Hyde and Tim O'Rourke, 'Biomimetic Theory and Building Technology: Use of Aboriginal and Scientific Knowledge of Spinifex Grass' (2009) 52(2) *Architectural Science Review* 117, 118.

<sup>1023</sup> Paul Memmott 'Bio-Architectural Technology and the Dreamtime Knowledge of Spinifex Grass' in Stephen Kajewski, Karen Manley and Keith Hampson (eds), *Proceedings of the 19th CIB World Building Congress Construction and Society* (CIB, 2013).

<sup>1024</sup> Memmott, Hyde and O'Rourke [2009 *ibid*] 125.

<sup>1025</sup> International patent application PCT/AU2015/050773, filed 7 December 2015.

with the community as negotiated in the research and collaboration agreement.<sup>1026</sup> There is also the fact that the Dugalunji Aboriginal Corporation has the right to veto commercialisation. The benefits for both the Indigenous community and the university include employment for Aboriginal youth, research on efficacy of regular spinifex burns, positive publicity for the university and respect for Indigenous cultural rights. This enables the Aboriginal groups to exercise control over the research and set the agenda for how they want to benefit. In this way, the project recognised Indigenous self-determination.

In 2016, scientists involved in the project announced successful results which included the development of a condom that would be as thin as a human hair.<sup>1027</sup>

#### 8.2.12.4 Case Study: Kakadu Plum

The 'Kakadu plum' (*Terminalia ferdinandiana*) is a small fruit-bearing tree found in the north of Australia, in the NT and WA. It is variously known by Indigenous people as 'Billy goat plum'<sup>1028</sup> and 'gubinge'.<sup>1029</sup> The fruit has long been used by NT and WA Indigenous clans for food and medicine, including as an antiseptic.

The plum has recently come under the spotlight because of its remarkably high concentration of vitamin C. The plum has been used in a range of products, particularly food products such as jams and teas but also health drinks. The commercial benefits for Indigenous communities was recognised in the 2006 report *Small-scale Commercial Plant Harvests by Indigenous Communities*, where the demand for the fruit was calculated at 10-12 tonnes per annum, with an estimated return of roughly \$10 per kilo.<sup>1030</sup>

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<sup>1026</sup> Hailey Renault, 'Indigenous Community Signs Landmark Agreement with University of Queensland to Develop Spinifex 'Nanofibre' Industry', *ABC News* (online), 29 April 2015 <<http://www.abc.net.au/news/rural/2015-04-29/spinifex-discoveries-drive-industry/6429716>>.

<sup>1027</sup> 'Native Grass Could be Key to Super-Thin Condoms', *University of Queensland*, 10 February 2016 <<https://www.uq.edu.au/news/article/2016/02/native-grass-could-be-key-super-thin-condoms>>.

<sup>1028</sup> Lorraine Williams, Larrakia woman with plant knowledge, as cited in Janke [2009 *ibid*] 151.

<sup>1029</sup> 'Gubinge' is a word from the Nyul Nyul language name for the Kimberley version of the Kakadu Plum which is also called the 'Billygoat Plum' or 'Murunga'.

<sup>1030</sup> Julian Gorman and Peter Whitehead, *Small-scale Commercial Plant Harvests by Indigenous Communities* (Rural Industries Research and Development Corporation, 2006) 17.

In 2007, the US cosmetics company Mary Kay Inc, applied for an international patent with WIPO under the Patent Cooperation Treaty for 'compositions comprising Kakadu plum extract or acai berry extract'.<sup>1031</sup> The international application status report prepared in July 2008 considered that a great deal of the patents' claims was obvious,<sup>1032</sup> and arguably lacked an 'inventive step'. The applicant was asked to come back with further clarifications; and now each country patent office (listed in the world patent application) is considering the obviousness of the patent.

That application was examined by the Australian Patents Office in 2010,<sup>1033</sup> including with respect to its novelty and an inventive step. To assess this question, the patent examiner had to determine whether the application of the plum extract to cosmetics is obvious. According to an article in *The Sydney Morning Herald*, a spokesperson of Mary Kay advised that the Kakadu plum has never been used for cosmetic formulation before.<sup>1034</sup> Robinson, who has written extensively on biopiracy, contested this. According to Robinson's research, Kakadu plum has been used in cosmetics since the 1990s, but these products are not the subject of a patent.<sup>1035</sup> Robinson filed a Section 27 submission to the Patents Office, which allows third parties to make statements regarding a patent's obviousness claim. Further, the Gundjeihmi Aboriginal Corporation, representative organisation of the Mirrar people of West Arnhem Land, protested in the media against the patent application. The Mirrar people claimed that the Kakadu plum has been used by the Mirrar as a food and medicine for 'as long as people can remember'.<sup>1036</sup> During examination of the patent, the Australian patent office raised concerns about the novelty of the patent and, shortly after, Mary Kay withdrew the patent application.

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<sup>1031</sup> WIPO PCT patent application number WO/2007/084998 filed on 19 January 2009.

<sup>1032</sup> Obviousness is a rebuttal to inventive step. An invention will not be patentable if the inventive step claimed is obvious, and the reasonable person skilled in the prior art would have been able to reach the same conclusion.

<sup>1033</sup> Patent application number 2007205838.

<sup>1034</sup> Robin Powell and Lindsay Murdoch, 'Patent fight erupts over Kakadu plum', *The Sydney Morning Herald*, 4 December 2010 <<http://www.smh.com.au/national/patent-fight-erupts-over-kakadu-plum-20101203-18jud.html>>.

<sup>1035</sup> Daniel F Robinson, 'Traditional Knowledge and Biological Product Derivative Patents: Benefit Sharing and Patent Issues relating to Camu Camu, Kakadu Plum and Acai Plant Extracts' (United Nations University, 2010b) 4.

<sup>1036</sup> Powell and Murdoch [2010 *ibid*].

However, it should be noted that Mary Kay holds US patents which include properties taken from the Kakadu plum. A year after the withdrawal of the Australian patent, Mary Kay filed US patents, which have since been examined and approved. The source of the genetic material is listed on the US patent as being a commercial supplier, Southern Cross Botanicals. There appears to have been no direct discussion between Mary Kay and any northern Aboriginal community that is supplying the Kakadu plum. This highlights the issues for international patents which are examined by offices that have no knowledge of the Australian plant. Indigenous Australians are less likely to know about the US patent going through and then, once approved, it is difficult to seek a re-examination or revocation of the patent.

Since 2009, the NT has had bioprospecting laws which requires biosprospectors to enter into a benefit sharing agreements with owners of the land they want to access to get the natural resources. But despite the law, as far as is known, there are no applications made by Mary Kay. The plum was allegedly not 'accessed' from NT land and this would mean that the access and benefit sharing (ABS) procedure in the NT law may not apply. As Robinson notes, Mary Kay may have obtained samples of the Kakadu Plum on a commercial basis through a nursery, in which case it would be under no obligation to share benefits with Indigenous communities for access to the genetic resources in question. Furthermore, even if the genetic resources had been accessed from Indigenous lands, but before the *Nagoya Protocol* has come into effect, it is unlikely that its provisions will apply unless they are made retrospective.

There is a strong and growing demand for the Kakadu fruit and extract. Yet there are considerable supply issues already impacting upon the emerging Kakadu Plum industry. There is a significant missed opportunity in Kakadu plum for Indigenous people. Robinson and Raven's study on Indigenous plants in patents identified 19 patents and applications internationally that relate to *Terminalia ferdinandiana*, several assigned to Mary Kay Inc.<sup>1037</sup> These overseas patents limit the ability of the Kakadu plum producing communities of the region to export their products.

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<sup>1037</sup> Daniel F Robinson and Margaret Raven, 'Identifying and Preventing Biopiracy in Australia: patent landscapes and legal geographies for plants with Indigenous Australian uses' (2017) 28(3) *Australian Geographer* 311, 320.

One way to deal with this issue is to establish a process for negotiating an Access and Benefit Sharing Agreement. Before access would be allowed for the research and development of plant species to commence, the parties are to negotiate the Access and Benefit Sharing Agreement which clearly sets out all information to be provided and confirmed that the Indigenous groups will have control over the project and the intellectual property involved in commercialisation. This could form that basis of a best practice model for prior informed consent and by which to engage Indigenous people and use their knowledge.

### **8.2.13 Conclusion**

Australia has many plants that are endemic to Australia, and there is a rich Indigenous knowledge base of their uses and applications, hence Indigenous people could benefit and move towards self-determination if there were changes in the legal landscape. The national and international intellectual property-based frameworks have potential but do little to practically recognise and support Indigenous ownership and/or commercial engagement with their own body of traditional plant knowledge. Indigenous people do not have the same opportunity to take part in industries that commercialise their knowledge in plants.

The *CBD* and the *Nagoya Protocol* has introduced an international framework for Indigenous people to assert rights to their plant knowledge, however the national legal framework for Australian Indigenous knowledge is yet to be consistently developed to define and practically protect Indigenous rights, ownership and interests in Indigenous plants and related knowledge. The development of an effective national consent access and benefit sharing framework must be given priority.<sup>1038</sup>

Providing Indigenous people with the mechanisms to look after their own interests will enable self-determination. Posey and Dutfield, both leading authors and researchers in the international debate about the protection of traditional knowledge, promote the recognition of traditional resource rights. They state that 'knowledge and traditional resources are central to maintenance of identify for Indigenous peoples. Therefore,

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<sup>1038</sup> Ibid 326.

control over these resources is of central concern in their struggle for self-determination.<sup>1039</sup> Traditional resource rights build on intellectual property rights protection while recognising that traditional resources, both tangible and intangible, are also covered under international agreements and could form the basis for *sui generis* systems.

The aims of *sui generis* laws could be to control access to, disclosure and use of traditional knowledge; exercise their prior informed consent for any access to or disclosure and use of traditional knowledge; ensure that they derive fair and equitable benefits from the wider application of their traditional knowledge, innovations and practices; and ensure continued customary use of traditional knowledge, innovations and practices and avoid negative effects thereon.<sup>1040</sup> Stoianoff and Roy make the case for *sui generis* legislation as being one of substantive equality and social justice:

Given that the wrongs endured by Indigenous Australians have led to intergenerational loss of knowledge and culture through displacement from the land of their ancestors and separation from family and community, it would be a positive first step to establish a *sui generis* regime that would recognise and protect their unique knowledge and culture - and hopefully provide a platform to rebuild it. This would also signal a strong move towards genuine reconciliation in contemporary Australia.<sup>1041</sup>

However, as things stand, the current legal frameworks do not deliver self-determination.

Terri Janke called for infrastructure to provide Indigenous communities with the capacity, skills and tools to licence Indigenous Cultural and Intellectual Property rights to authorised third parties.<sup>1042</sup> Janke argues that a National Indigenous Cultural Authority (NICA) could be established as an alliance organisation to enable negotiation of rights, contracts and protocols together with IP tools such as a distinctive trade

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<sup>1039</sup> Darrell A Posey and Graham Dutfield, *Beyond Intellectual Property: Toward Traditional Resource Rights for Indigenous Peoples and Local Communities* (International Development Research Centre, 1996) 94.

<sup>1040</sup> Janke [2009 *ibid*] 79.

<sup>1041</sup> Stoianoff and Roy [2015 *ibid*] 783.

<sup>1042</sup> Terri Janke, 'Guarding Ground: A Vision for a National Indigenous Cultural Authority' in Robert Tonkinson (ed), *Wentworth Lecture 50 years of AIATSIS* (Aboriginal Studies Press, 2015).

mark. It is essentially a licensing model which can serve to empower Indigenous people to negotiate authorised uses of their traditional knowledge and traditional cultural expression. Through authorised and negotiated use, Indigenous people can licence these assets to approved users. In this way, they can control uses according to their cultural protocols, and economic interests.<sup>1043</sup>

There are also measures that can be introduced by seed banks. Seed banking involves the collection, storage and sustainable use of seeds for plant conservation and research. The main use of these collections has been non-commercial research, threatened species recovery programs, botanical gardens for education and awareness and safeguarding seeds for future use.<sup>1044</sup> Seed banks have obligations to manage genetic resources and Indigenous Knowledge according to the *CBD* and the *Nagoya Protocol*.<sup>1045</sup> In this way, seed banks must develop relationships between Indigenous people and ex-situ seed collectors. Shephard advocates for recognising Indigenous Knowledge stewardship of seeds.<sup>1046</sup> This means recognising and respecting that Indigenous peoples have an interest in seeds because they bring valuable traditional knowledge. Hence, this means recognising that Indigenous people have a relationship with seed collections. Shephard says that the importance of this relationship is realised when it is used as the basis for a process to define the boundaries of accountability for Indigenous knowledge stewardship in seedbank systems.

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<sup>1043</sup> Terri Janke, *Beyond Guarding Ground: A Vision for a National Indigenous Cultural Authority* (Terri Janke and Company, 2009a) <<http://www.terrijanke.com.au/beyond-guarding-ground>> 258–280.

<sup>1044</sup> Lucy Sutherland and Mark L Shephard, 'Implementing Access and Benefit sharing for Seed Banking' (2017) 102(2) *Annals of the Missouri Botanical Garden* 86, 386.

<sup>1045</sup> *Ibid.*

<sup>1046</sup> Mark Shephard, 'Indigenous knowledge stewardship and accountability of seed bank institutions' (2015) 2 *International Journal of Rural Law and Policy*.



Protocols have become common ground for Indigenous research<sup>1047</sup> as well as the production of Indigenous art,<sup>1048</sup> film<sup>1049</sup> and museums.<sup>1050</sup> Seed banks, as collectors and manager of plant materials and Indigenous knowledge, must develop Indigenous protocols. Seed and plant collection entities need to build relationships and establish practices of prior informed consent and protocols for the access and use relating to collection of seeds on Indigenous land, and the collection of Indigenous Knowledge as part of the collection.

Sutherland and Shepherd report that the Council of Heads of Australian Botanic Gardens Incorporated, through its Australian Seed Bank Partnership, is collaborating with the University of New England to define clear processes and develop protocols for Indigenous knowledge stewardship. The protocols aim to reduce the risks of compromising the cultural integrity of collected data. The protocol will provide practical steps for institutions to collaborate with Indigenous traditional owners and 'on country' to develop mutual benefits.<sup>1051</sup> This leadership is an important step towards building long-term collaborative relationships between Indigenous people, scientists and seed institutions. However, Indigenous people's contribution should be valued. Indigenous people must be recognised as collaborators and not 'native informants', and this involves recognising Indigenous authorship and Indigenous Knowledge rights.<sup>1052</sup>

Finally, in moving towards Indigenous self-determination, there must also be opportunities for Indigenous people to establish their own seed banks,<sup>1053</sup> with plant materials and Indigenous Knowledge, so that they can continue the caring of plants in

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<sup>1047</sup> Australian Institute of Aboriginal and Torres Strait Islander Studies, *Guidelines for Ethical Research in Australian Indigenous Studies* (AIATSIS, 2012)

<<https://aiatsis.gov.au/sites/default/files/docs/research-and-guides/ethics/gerais.pdf>>.

<sup>1048</sup> *Protocols for Working with Indigenous Artists* (Australia Council for the Arts, 2<sup>nd</sup> ed, 2007)

<<http://www.australiacouncil.gov.au/about/protocols-for-working-with-indigenous-artists/>>.

<sup>1049</sup> Terri Janke, *Pathways and Protocols: A Filmmaker's Guide to Working with Indigenous People, culture and Concepts* (Screen Australia, 2009d).

<sup>1050</sup> National Museum of Australia, *Indigenous Cultural Rights and Engagement Policy* (2015)

<[http://www.nma.gov.au/about\\_us/ips/policies/indigenous\\_cultural\\_rights\\_and\\_engagement\\_policy](http://www.nma.gov.au/about_us/ips/policies/indigenous_cultural_rights_and_engagement_policy)>.

<sup>1051</sup> Sutherland and Shepherd [2017 *ibid*] 386.

<sup>1052</sup> Kwaymullina [2016 *ibid*] 445.

<sup>1053</sup> Natalie Jones, 'Kimberley seed bank: Traditional knowledge used to protect biodiversity', *ABC News* (online), 27 March 2016 <<http://www.abc.net.au/news/2016-03-27/kimberley-seedbank-project-to-protect-biodiversity/7275344>>.

accordance with their cultural practices while also being able to make informed decisions about commercialisation opportunities.

## Chapter 9: Governing ICIP – Developing Systems of Authority and Supporting Infrastructure

**Paper 7:** Terri Janke, 'Guarding ground: A vision for a national Indigenous cultural authority' in Robert Tonkinson (ed), *The Wentworth Lectures: Honouring Fifty years of Australian Indigenous Studies* (Aboriginal Studies Press, 2015) 258–280.

### 9.1 Context

This paper was first published for the delivery of the 2008 Wentworth Lecture convened by AIATSIS. It discusses how ICIP rights and protocols might be enforced by providing infrastructure for consent processes. The vision is for a National Indigenous Cultural Authority (NICA), a peak advisory body that acts as a collective voice to promote ICIP rights and standards of practice involving royalties, attribution and cultural integrity.

This paper follows on from the recommendations for cultural infrastructure made in *Our Culture: Our Future*<sup>1054</sup> which has since been the topic of in-depth discussions and influence within my own work and others. The paper reaffirms the importance of this infrastructure, building on a set of recommendations by drawing from lessons learned in a large range of bodies and sources. It outlines the important considerations and decisions to be considered when determining how to best set up and operate an authority of this kind.

An authority or body such as NICA has been seen as a viable solution on a domestic and possibly international stage, having the potential to develop standards for appropriate use to guard cultural integrity.<sup>1055</sup> Although many have voiced their support

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<sup>1054</sup> Terri Janke, *Our Culture: Our Future – Report on Australian Indigenous Cultural and Intellectual Property Rights* (Report commissioned by AIATSIS and ATSIC, Michael Frankel and Company, 1998) 226.

<sup>1055</sup> Erin Mackay, 'Regulating Rights: The Case of Indigenous Traditional Knowledge' (2010) 7(21) *Indigenous Law Bulletin* 12.

and endorsement, there is yet to be such an authority established in Australia. Among those who have supported the calls and heeded the recommendations for an authority like that outlined here is the Australia Council for the Arts, who are now spearheading a proposal for a National Indigenous Arts and Cultural Authority (NIACA).

The current proposal for a NIACA would essentially mirror the NICA. The goal for this projected NIACA is to be a completely independent peak-industry body, with the Australia Council for the Arts acting as an interim secretariat to support the consultation process. NIACA would function as a collective voice from and for Aboriginal and Torres Strait Islander peoples, working towards self-determination and cultural responsibility.

In 2018, the Australia Council has been running consultations across Australia, engaging with Indigenous organisations, communities, artists and professionals to gather ideas and feedback on the role, scope and value of an authority of this kind: its purposes, operational and governance structure, and the short-term and long-term visions. Additionally, a national summit will be held in 2019. The forums address many of the questions put forward in this paper, such as legal structure, funding and protocols, databases and membership. Furthermore, questions are being asked regarding what sectors it will represent and how it will intersect and interact with the pre-existing cultural landscape and infrastructures.

## **9.2 Guarding Ground: A vision for a national Indigenous cultural authority 2008 Wentworth Lecture**

### **9.2.1 Prelude**

In the past 20 years, Indigenous Australians have called for greater recognition of Indigenous cultural and intellectual property rights. The intellectual property system does not acknowledge Indigenous communal ownership of cultural expressions and knowledge passed down through the generations, and nurtured by Indigenous cultural practice. Sacred knowledge is also at risk. In a 1999 report, *Our Culture: Our Future: Report on Australian Indigenous cultural and intellectual property rights*, I made 115 legislative and policy recommendations. Today, Indigenous cultural and intellectual property rights remain largely unprotected in Australia and are a hotly debated international issue. Now is the time for us to reassess the current framework.

In this lecture, I sketch out the ground covered by Indigenous copyright cases and examine international model laws and draft provisions, arguing for greater infrastructure to support and defend Indigenous cultural and intellectual property rights. My vision is for a national Indigenous cultural authority to facilitate consent and payment of royalties, develop standards of appropriate use to guard cultural integrity, and enforce rights.

### **9.2.2 Introduction**

I acknowledge the Ngunnawal people on whose traditional lands we gather today. I also thank the Chairman, Professor Mick Dodson, and the Australian Institute of Aboriginal and Torres Strait Islander Studies for inviting me to present the 2008 Wentworth Lecture. I am honoured to join the esteemed list of presenters.

This biennial lecture is in honour of Bill Wentworth. I acknowledge his family and thank them for their continuing support of this lecture series. Bill Wentworth was an extraordinary Australian with great passion and persistence who brought the idea of a national Australian institute for the promotion of Aboriginal and Torres Strait Islander studies into fruition. This wonderful institution, and its books, documents, films, photographs, sound recordings, and its knowledgeable staff owe a great debt to Bill Wentworth's energy, determination and influence.

Bill's visionary nature has influenced my lecture today. He was the first Minister of Aboriginal Affairs, appointed after the 1967 Referendum, which delivered powers to the Commonwealth to legislate with respect to Aboriginal people. He was Minister in 1968, for the passing of the current Copyright Act, and remained in office through its subsequent enactment on 1 January 1969. My working career has been focused on Indigenous intellectual property, mostly copyright, and the advancement of Indigenous cultural and intellectual property rights.

I discovered a link between Bill Wentworth's time in office and the focus of my paper when I was reading a book written by a colleague, Michael Davis, entitled *Writing heritage*. In 1969, Bill Wentworth was involved in the early stages of exploring the need for Indigenous traditional cultural property protection. The Chair of the newly established Council of Aboriginal Affairs, Dr Nugget Coombs, outlined a proposal for legislation to protect 'traditional Aboriginal property' and 'establish property rights in certain works of art, designs, areas of religious, ceremonial, ritual, artistic and tribal significance' to Aboriginal people.

The proposed Traditional Aboriginal Property Act would serve to vest traditional Aboriginal property rights in a Trustee and by his (*sic*) delegation to corporate bodies, and to provide for the protection, development and, where appropriate, economic exploitation of these property rights in the interests of Aboriginal people. It further aimed to protect the work of Aboriginal people from 'imitation and unreasonable commercial practice, and to also provide effective marketing of their products' (Davis 2007, p. 283).

This proposal more than likely influenced the moves of the Whitlam Government in the early 1970s to establish a Working Party on the protection of Aboriginal folklore. The Working Party took several years to complete its findings, which were finally released in 1981 (Department of Home Affairs and Environment 1981).<sup>1056</sup> Generally, the Working Party recommended the enactment of an Aboriginal Folklore Act which would

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<sup>1056</sup> The Australian Working Party into the Protection of Aboriginal Folklore 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' (Department of Home Affairs and Environment 1981).

provide safeguards 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. These proposed Australian laws did not take shape as law, but the fact that such discussions took place in the early stages of Aboriginal affairs highlight the fact that there was a debate about Indigenous cultural and intellectual property rights.

In the last four decades there has been a remarkable growth in the value and demand for Indigenous arts, cultural expression and knowledge. The Aboriginal art market is currently valued at \$300 million per annum, and traditional knowledge has applications in industries that range from tourism and entertainment through to the biotechnology industry. The increase in demand also meant the rise of a rip-off industry, where Indigenous arts and knowledge have been taken without consent or acknowledgment. In 40 years of calling for legal protection, most of the measures have been instigated by Indigenous advocates guarding their ground by asserting cultural rights, bringing test cases, devising protocols and enforcing rights under agreement – hence my call for a national Indigenous cultural authority for Indigenous people to continue the advancement of rights.

My paper is in four parts: forty years of Indigenous cultural rights advocacy; *Our culture: Our future* – what happened to that big report?; Proposal for a national Indigenous cultural authority; and Prior informed consent models: learning from international experience.

### **9.2.3 Forty years of Indigenous cultural rights advocacy**

Indigenous arts and cultural expression are interconnected with land and seas, handed down through the generations as part of cultural heritage. Painting, dances, stories, songs, and knowledge come from the land, and are passed on from generation to generation as Indigenous cultural heritage. Culture is not static, it evolves and adapts, and Indigenous people must be recognised as the primary custodians of their culture.

Since the 1970s, Indigenous artists have been calling for recognition of their creative rights on the same level as that of other Australian artists. In Australia, the *Copyright Act 1968* (Cth) provides rights for copyright owners to control the use and

dissemination of literary, dramatic, artistic and musical works, and also certain listed subject matter including sound recordings, cinematograph films, television and sound broadcasts, and published editions. There are certain requirements that must be met before protection is granted. Yet if a work, film or sound recording meets these requirements, then the law makes it the subject of copyright, without the need for registration.

This feature of the law has two significant impacts for Indigenous people: first, Indigenous arts and culture are orally and performance based, and therefore do not meet requirements of copyright, at least in the old days of the 1960s and 1970s. Prior to the recent case law, Aboriginal arts was seen as folklore and considered unoriginal in that copying artistic traditions did not amount to innovation and interpretation. Secondly and importantly, copyright was recognised, however, in the written interpretations and recordings made of Indigenous knowledge, arts, dances, music and stories. Copyright protected the films and tapes that recorded Indigenous people and their cultural knowledge. However, that copyright was recognised in the material form created in many cases by non-Indigenous people, and the ownership vested in the recorder as the 'author' of these works. So songs, dances, customs, knowledge about bush foods and medicines have been, and continue to be, recorded – but not by the Indigenous knowledge holders or their communities.

#### **9.2.4 Cases involving appropriation of Indigenous images**

In 1966, when Australia switched to decimal currency, the one-dollar note depicted 'ancient Aboriginal art' by artist David Malangi. The selection of this art for the note involved no consultation with the artist. The original bark painting was purchased by an international art collector three years before, and had subsequently been donated to the Paris Museum of Arts of Africa and Oceania. The collector gave a photocopy of the art to an officer of the Reserve Bank of Australia who then gave it to the designer of the one-dollar note. Nugget Coombs, Governor of the Reserve Bank, was deeply embarrassed by the incident, since he was a great advocate for Indigenous artists' rights. The Reserve Bank had not consulted anyone, assuming the design was the work of an 'anonymous and probably long dead artist'. It was, of course, a copyright work. David Malangi was given \$1,000, a fishing kit and a silver medallion.



In 1975, Wandjuk Marika, the first Chair of the Aboriginal Arts Board, called for greater protection after seeing his important sacred works reproduced on a tea towel. He said, 'This was one of the stories that my father had given to me and no one else amongst my people would have painted it without permission. I was deeply upset and for many years I have been unable to paint. It was then that I realised that I and my fellow artists needed some sort of protection' (Johnson, 1997, p. 11). He pointed out that copyright did not cover Indigenous arts and craft, which was referred to as 'folklore' and dealt with as if it were in the public domain and, like *terra nullius*, free for all to exploit.

These early cases reflect a *terra nullius* notion of Indigenous arts where much of the artwork was labelled 'artists unknown' and collected for its value as an object of curiosity rather than its cultural significance. Wandjuk Marika's call set the ground for action by Indigenous people over the following years.

Another case involving currency occurred when the ten-dollar note commemorating Australia's bicentennial reproduced a morning star pole, with rights granted under licence by the Aboriginal Artists Agency to the Reserve Bank. Morning star poles are made for the sacred morning star ceremony. This one, by Terry Yumbulul, was made and sold to the Australian Museum. Yumbulul had entered into a licence agreement that had allowed his agent, the Aboriginal Artists Agency, to license the work to the bank. Yumbulul came under considerable criticism from members of his clan when they found out that the morning star pole had been reproduced on the ten-dollar note. He took action against the Agency and the Bank but was unsuccessful. Justice French recognised that customary and copyright law have divergent interest when he said, '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' (*Yumbulul v Reserve Bank of Australia* 1991).

In 1989, the Ganalbingu artist John Bulun Bulun commenced action in the Darwin Federal Court against a T-shirt manufacturer who had copied his ceremonial artwork, *Magpie geese and waterlilies at the waterhole*. The clever Melbourne barrister, Colin Golvan, had heard the then Chair of the Aboriginal Arts Board, Lin Onus, on radio, discussing the case, and had then called Lin to offer his services on the case. Thirteen other Aboriginal artists were joined to the proceedings, because other artistic works were copied. The Court granted an interlocutory injunction to stop the manufacture

and sale of the T-shirts. Before the trial, the parties settled. The defendant T-shirt company agreed to halt sales, and pay \$150,000 in damages to the artists; the money was shared between the artists and their families (for the deceased ones). It became known as the '*Flash T-shirts*' Case, and articles in legal journals began to appear all over the world, speculating on how the case may have been decided.

In 1994, *Milpururru v Indofurn* (1993) became the first Federal Court judgment recognising that Indigenous artist's works, which depicted pre-existing clan owned designs, were original copyright works. At that time, I was working for the National Indigenous Arts Advocacy Association as a junior legal information officer. I remember watching the fax machine curl out over 100 pages. The artists had met this requirement because of the skill and interpretation they had expended. In this matter, Justice von Doussa considered a claim that carpets with Indigenous designs amounted to copyright infringement. Justice von Doussa made a collective award to the artists rather than individual awards so that the artists could distribute it according to their custom. The court's finding that the company directors were also liable for copyright infringement was overturned on appeal. Still, the case set an important precedent and one media article likened it to the *Mabo* case.

The judgment of *Bulun Bulun & Anor v R & T Textiles Pty Ltd* was reported in 1998. This case concerned the artist Johnny Bulun Bulun once again. The potential reach of this case in copyright law is, in my opinion, yet to be determined. It builds upon previous cases by making some important statements about the copyright and the relationships between individual Indigenous artists and their community, when the artwork incorporates communally owned ritual knowledge.

By way of background, copyright laws grant exclusive rights to authors to use, adapt and reproduce their works without conditions. This is at odds with the Indigenous cultural heritage material. In many Indigenous clans, there are laws, based on responsibility for cultural heritage, to ensure that it is maintained and protected, and passed on to future generations. An individual or group of individuals may be

empowered to act as the caretaker of a particular item of heritage.<sup>1057</sup> Traditional custodians are empowered to protect a particular item only to the extent that their actions harmonise with the best interests of the community as a whole.

Johnny Bulun Bulun was the artist and copyright owner of the bark painting, *At the waterhole*. The painting embodied traditional ritual knowledge of the Ganalbingu people. Johnny Bulun Bulun's use of ritual knowledge to produce the artworks was given to him under Ganalbingu customary law, based on the trust and confidence that those granting permission had in the artist. R & T Textiles Ltd had imported and sold within Australia fabric which copied parts of *At the waterhole*. Once issued with the statement of claim, the textile company was quick to negotiate a settlement. However, the case still went to court to consider issues relating to clan interests in the copyright work (*Bulun Bulun v R & T Textiles Pty Ltd* 1998).

Justice von Doussa, the same judge who presided on the *Carpets Case*, found that there was no Native Title right to the painting. He also considered that there was no equitable interest in the work. The court found that there was no evidence that the artist had created the work as part of an implied legal trust that would make his clan equal owners of the copyright. The witnesses and affidavit evidence showed that 'on many occasions paintings which incorporate to a greater or lesser degree parts of ritual knowledge of the Ganalbingu people are reproduced by Ganalbingu artists for commercial sale for the benefit of the artists concerned'. Nor was the copyright in the work jointly owned by the artist and the clan, because there was no evidence that anyone other than Johnny Bulun Bulun had created the bark painting (Brown 2003, p 64).

Justice von Doussa found that there was a fiduciary relationship between the artist and the clan. Customary laws affected the rights of the artist to deal with the work embodying the ritual knowledge in a way that he had to discuss and negotiate use of the traditional knowledge with relevant persons in authority within his clan. In his evidence, Djardie Ashley discussed how the Ganalbingu laws dealt with the consent

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<sup>1057</sup> Although in some groups, where customary laws are less intact, this may not be the case, owing to the disruption of cultural practices since colonisation.

procedures. Mr Ashley noted that in some circumstances, such as the reproduction of a painting in an art book, the artist might not need to consult with the group widely. In other circumstances, such as its mass-reproduction as merchandise, Mr Bulun Bulun may be required to consult widely. Mr Ashley further noted that:

the question in each case depends on the use and the manner or the mode of production. Yet in the case of a use which is one that requires direct consultation, rather than one for which approval has already been given for a class of uses, all of the traditional owners must agree; there must be total consensus.

Bulun Bulun could not act alone to permit the reproduction of 'At the waterhole' in the manner that it was done. (McCausland 1999, pp. 4–6)

This relationship imposed the obligation on Johnny Bulun Bulun not to exploit the artistic work in any way that is contrary to the law and customs of the Ganalbingu people, and, in the event of infringement by a third party, to take reasonable and appropriate action to restrain and remedy infringement of the copyright in the artistic work. (McCausland 1999, pp. 4–6)

If the artist had been unable or unwilling to take copyright action, equity would have allowed the clan leader to take action to stop the infringement.

### **9.2.5 The potential extent of fiduciary duty**

This fiduciary obligation, which is imposed on the artist owning the copyright, has much potential for Indigenous people. The potential repercussions of the judgment pertain to whether this type of obligation may extend in certain circumstances where notice of the 'Bulun Bulun equity' is given to outsiders. For example, a third party licensee of an Indigenous artwork who is on notice of a custodian's interest may be open to claims by an Indigenous clan to whom they owe a fiduciary duty to safeguard the integrity of the work when dealing with the copyright work. Perhaps the Bulun Bulun equity applies to other copyright works that incorporate traditional ritual knowledge. A non-Indigenous third party fiduciary duty might arise where traditional custodians allow access to a filmmaker to interview community members. If the filmmaker is given notice of the custodians' interest in traditional ritual knowledge communicated in the interviews, the filmmaker may owe a fiduciary duty to the custodians when dealing with copyright in the filmed interviews. A custodians' interest notice incorporated in the access permit would help to establish this duty.

In other areas, too, where outsiders enter communities to record traditional cultural expression, an Indigenous community could use written agreements to impose the fiduciary obligations of third parties when they access, record and publish traditional ritual knowledge. For example, where a researcher wants access to traditional ritual knowledge for a particular project or film and record it, the community could enter into a written agreement with that person, requiring her to consult on an ongoing basis about the future use of that material. It could also require her to display a custodians' interest notice on any copyright material created. The community could even require copyright in the project to be jointly owned or held on trust for its benefit. This line of thought has implications for scholars, authors, filmmakers, sound recorder, compilers, researchers and other recorders of Indigenous traditional knowledge and cultural expression, where copyright is created. Since the *Bulun Bulun* case, there has been a growing trend for a traditional custodian's notice to be affixed to reproductions of art, and inside the cover of publications that incorporate Indigenous cultural expression.<sup>1058</sup>

#### **9.2.6 Brandl rock art: A case study**

In 1997, Riptide Churinga, a Sydney based T-shirt manufacturer, produced a range of T-shirts with Mimi rock art figures. The T-shirts were discovered on sale, to the surprise of a descendant of the Badmardi clan and Dr Vivien Johnson, an Aboriginal art lecturer. The use of the Mimi figures was guarded carefully under customary law, and they are still significant to Indigenous cultural beliefs. Stories, and information surrounding the sites, the sites themselves, and the right to touch up or depict images like those embodied in rock form should, for cultural heritage purposes, belong in theory to the owners of the cultural images therein. The rock art is estimated to be about 4,000 years old and therefore not the subject of copyright (Janke 2003, p. 106).

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<sup>1058</sup> The Arts Law Centre recommends that, following traditional custodian notice in artworks with traditional knowledge: 'The images in this artwork embody traditional ritual knowledge of the (name) community. It was created with the consent of the custodians of the community. Dealing with any part of the images for any purpose that has not been authorised by the custodians is a serious breach of the customary law of the (name) community, and may also breach the *Copyright Act 1968* (Cth). For enquiries about permitted reproduction of these images contact (community name)' <<http://artslaw.com.au>>.

The problem for the Badmardi clan was how to stop the T-shirt maker from transgressing their laws. Some rock art sites can only be painted or depicted by certain people with the relevant ritual knowledge and the right to do so under customary law (Environment Australia 2006).

In the 1970s, Eric Brandl received grant funding from the Australian Institute of Aboriginal Studies (now the Australian Institute of Aboriginal and Torres Strait Islander Studies – AIATSIS) to visit and record rock art sites in the Northern Territory. His methods of recording involved photographing the various rock art sites in the Deaf Adder Creek region, in very difficult place to access. Back in his office, Brandl projected the images onto a wall on which he had affixed sheets of paper, and then traced the works in Indian ink.

These drawings and photographs of the Mimi Rock Art were published by the Australian Institute of Aboriginal Studies in 1973 (Brandl 1973). There was copyright in the book, the photograph and the drawings. In line with the originality principles of copyright, that such skill and labour applied to the original rock art, would give a copyright interest in the derived sketches. It was obvious that Riptide Churinga had taken designs directly from the book to produce its T-shirts. AIATSIS, the Brandl Estate and the Badmardi clan demanded that the company stop production of the T-shirt. They entered into a settlement in which damage to, and delivery of, unsold items were included. There was also a national public apology posted in *The Australian*, a national newspaper.

The Brandl case illustrates that copyright owners can work with ‘cultural owners’ to commence action, even though the ‘cultural owners’ have no copyright. This case, which occurred prior to the *Bulun Bulun* fiduciary duty, was commenced by AIATSIS in observation of their cultural custodial status as a national keeping place for Indigenous studies. AIATSIS was not legally obliged to do so. But consider if the researcher Brandl had been on notice of the traditional custodian interest in the rock art, and had published a notice at the front of the publication. Then it may be open for speculation that the issue of whether the clan could compel the copyright owner to take action, or if the copyright owner was unwilling or unable to take such action against the copyright infringer, then equity may allow them to commence and seek an appropriate remedy.

In summary, these cases changed the copyright landscape, so that now Indigenous cultural and intellectual property rights are seen as important rights for Indigenous people to be managed and administered. The questions now remain about the shortfalls, the areas that are not protected: namely, communal rights, the longer term protection, and issues for secret–sacred works.

### **9.2.7      *Our culture: Our future* — what happened to that big report?**

Ten years ago, I worked on a project, coordinated by the Australian Institute of Aboriginal and Torres Strait Islander Studies, for the then ATSIC. It was to review and report on Indigenous cultural and intellectual property (ICIP) rights. In 1994, the government released an issues paper entitled *Stopping the Ripoffs* (Janke & National Indigenous Arts Advocacy Association 1995), which examined shortfalls in the law in protecting Indigenous arts and cultural expression. Significant work was also undertaken as part of the Social Justice Package, which advocated for greater cultural rights.

ICIP rights had been a significant inclusion in the then draft Declaration on the Rights of Indigenous Peoples. These rights still remain in the final draft, passed by the Council of the United Nations last year. Australia was one of the four countries that voted against it. The *United Nations Declaration on the Rights of Indigenous Peoples*, was passed. Article 31 states:

1. Indigenous peoples have the right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions, as well as the manifestations of their sciences, technologies and cultures, including human and genetic resources, seeds, medicines, knowledge of the properties of fauna and flora, oral traditions, literatures, designs, sports and traditional games and visual and performing arts. They also have the right to maintain, control, protect and develop their intellectual property over such cultural heritage, traditional knowledge, and traditional cultural expressions.
2. In conjunction with Indigenous peoples, States shall take effective measures to recognise and protect the exercise of these rights. (United Nations 2008)

In 1999, the report *Our culture: Our future* was released, with 115 legislative and policy recommendations (Janke 1999). The Indigenous reference group of some fifteen

Indigenous people was clear in setting its priority for *sui generis* legislation. The group wanted legal foundations for the protection of Indigenous cultural and intellectual property rights. The report took a view that such legislation would be long term and recommended a range of potential legal and non-legal measures, including changes to copyright, patent, trademarks and cultural heritage laws. It also introduced practices within government departments such as including an Indigenous advisory committee or unit within IP Australia, the responsible government agency for trademarks, patents and design registration. My favourite recommendation was for the establishment of a national Indigenous cultural authority to act as a leading organisation for the promotion and administration of ICIP rights. The following recommendation appears in the report:

#### 22.1 National Indigenous Cultural Authority

A National Indigenous Cultural Authority should be established as an organisation made up of various Indigenous organisations to:

- Develop policies and protocols with various industries.
- Authorise uses of Indigenous cultural material through a permission system which seeks prior consent from relevant Indigenous groups.
- Monitor exploitation of cultures.
- Undertake public education and awareness strategies.
- Advance Indigenous Cultural and Intellectual Property Rights nationally and internationally.

The National Indigenous Cultural Authority should be the peak advisory body on Indigenous Cultural and Intellectual Property Rights. Representation on the Authority should aim to cover all areas of Indigenous Cultural and Intellectual Property. The National Indigenous Cultural Authority should be funded by both industry and government. (Janke 1999, p. 237)

Very few of the measures were considered, not even a draft of a *sui generis* law, and nor were there moves to establish a national Indigenous cultural authority. Most of the initiatives have involved the development of protocols, and the use of contracts by Indigenous people and supporting industry organisations. There was, however, a proposal to amend the Copyright Act to include Indigenous communal moral rights.



In 2000, when the moral rights amendments were being discussed in the Senate, the then Senator Aden Ridgeway drew attention to the fact that the moral rights proposals did not take account of Indigenous communal interests. The Howard government said that it would consider this and in 2003 drafted proposed amendments of the *Copyright Act 1968* (Cth) for Indigenous Communal Moral Rights (Copyright Amendment (Indigenous Communal Moral Rights) Bill 2003). If the draft Bill becomes law, Indigenous communal moral rights (ICMR) will exist alongside an individual author's moral rights.<sup>1059</sup> ICMRs will exist in works and films that draw from a traditional base.<sup>1060</sup>

Under the ICMR model, an authorised representative of an Indigenous community can take action against infringements of the communal moral rights of attribution and integrity. These are two important rights for custodians of culture: first, the right to be acknowledged as the source of the cultural material, thus identifying the people who are responsible for the cultural continuum of the work; and second, the right of integrity, which addresses cultural obligations to guard against derogatory treatment and the need for Indigenous people to be recognised as the primary guardians and interpreters of their cultures, arts and sciences, whether created in the past or developed by them in the future. The proposed ICMR model has an important limitation. For a work or film to have ICMR, there must be a voluntary agreement between the creator of the work or the film and the Indigenous community that ICMR exists, before the first dealing of the work or film.<sup>1061</sup> Another limitation of the proposed Bill is that ICMRs would exist for the term of the copyright period. As discussed above, Indigenous people see ICIP rights as extending much longer, in perpetuity, for continuing cultural practice.

The Bill has never seen the inside of the houses of Parliament and its current status is uncertain. Perhaps this is for best, in light of international advances. I say this

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<sup>1059</sup> The *Copyright Act 1968* (Cth) provides creators the unalienable rights: (i) The right of attribution and authorship, (ii) The right not to have authorship falsely attributed, and (iii) The right of integrity of authorship.

<sup>1060</sup> 'Drawn from a traditional base' means that the work or film must be drawn from the 'particular body of traditions, observances, customs and beliefs held in common by the Indigenous community'.

<sup>1061</sup> A 'community' is defined loosely and can include an individual, family, clan or community group. (Janke nd, pp. 1, 2, 7 & 8). [Janke T nd, 'The moral of the story: Indigenous communal moral rights', (nd) 3(5) *Arts Law Centre of Queensland Inc Bulletin*, viewed 20 February 2105 at [http://www.terrijanke.com.au/img/publications/pdf/19.ICMR\\_Article.pdf](http://www.terrijanke.com.au/img/publications/pdf/19.ICMR_Article.pdf)].

because we should be developing a bigger vision in which we need to re-examine some of the recommendations of *Our culture: Our future*. The change in government at the Federal level and developments in international law offer a chance to rethink whether an Indigenous-managed entity, with a clear mandate to promote cultural and intellectual property rights, has a place in the Australian cultural landscape.

### **9.2.8 Proposal for a National Indigenous Cultural Authority**

In April 2008, I was invited to attend the Australia 2020 Summit. For my one big idea, I suggested the establishment of a national Indigenous cultural authority. In the lead-up to the Summit, web pollster 'GetUp' solicited the public for ideas. An on-line submission from the Australian Lawyers for Human Rights (ALHR) stated:

ALHR is of the opinion that Intellectual Property protections in Australia need to be considered in respect of the unique significance arts and culture holds for Indigenous peoples. In particular, ALHR recognises that there are various protections that could be afforded to Indigenous cultural heritage, including: the protection of the underlying ideas or information that is put into a work; a style or method of art; some performances such as dance and music regardless of whether they have been recorded; and a community's rights in an artwork. (ALHR 2008)

The participants in Options for the Future of Indigenous Australians had many ideas, ranging from education, business, health, constitutional reform, a treaty, a new dialogue to a national representative organisation. Indigenous cultural and intellectual property rights were referred to in the initial report:

There was a strong sense that Indigenous culture represents a real economic opportunity, and among the suggestions was a formalised structure for promoting Indigenous cultural and intellectual property rights and developing standards for appropriate use, attribution and royalties for such works. (Department Prime Minister and Cabinet 2008)

It was the Creative Arts stream that gave the strongest support for Indigenous culture.<sup>1062</sup> The Australia 2020's initial report captured their idea as follows:

Creativity is central to Australian life and Indigenous culture is the core to this. To measure, document and leverage the strengths of this culture, to articulate our role and improve protection of indigenous culture, language and heritage through a National Indigenous Cultural Authority. (Department Prime Minister and Cabinet 2008, p. 29)

The final Summit report, released in May 2008, expanded the idea in the Indigenous stream to a recommendation under the heading of 'Culture, art, symbols'. Idea 7.40 states: 'Establish a national cultural authority for the protection of Aboriginal and Torres Strait Islander intellectual property'. Also of interest was the idea at 7.43: 'Consideration should be given to whether people with cultural knowledge should be accredited' (Department Prime Minister and Cabinet 2008, p. 229).

The Final Report elaborated further on the Arts Stream's National Indigenous Cultural Authority in Recommendation 8.70:

Establish a National Indigenous Cultural Authority; measure, document and leverage the strengths of Indigenous culture; and articulate the role and improve protection of Indigenous cultures, languages and heritage. (Department Prime Minister and Cabinet 2008, p. 273)

Since the Australia 2020 Summit, the Aboriginal and Torres Strait Islander Arts Board of the Australia Council articulated an interest in the establishment of a National Indigenous Cultural Authority. In May 2008, the Aboriginal and Torres Strait Islander Arts Board and the National Indigenous Arts Reference Group discussed the Australia 2020 results. Reporting back from the meetings, the first edition of *Aboriginal and Torres Strait Islander Arts News* stated that there

was keen interest and much discussion about calls from the Australia 2020 Summit for a national cultural authority for the protection of Aboriginal and Torres Strait Islander intellectual property. (Australia Council, 2008)

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<sup>1062</sup> This stream included Indigenous participants Rachel Perkins, Larissa Behrendt and Wesley Enoch.

This is an indication that national infrastructure is seen as an important consideration in the advance of Indigenous cultural and intellectual property rights.

This option is a self-determining model which could best address the comprehensive nature of Indigenous cultural and intellectual property. It could also be a way to overcome the problems associated with customary laws being enshrined in legislation.

A national Indigenous cultural authority is needed to provide leadership and to administer rights either directly or by establishing a distribution framework, for Indigenous cultural and intellectual property rights. Another important function of the national Indigenous cultural authority is to lobby for these rights holders. Experience has shown that industries have developed through the support of a leader authority. Intellectual property rights themselves are managed collectively internationally because it makes more sense commercially and in time for collection of royalties to be collected and distributed in a structured way.

This deals with the economies of scale but there are also the cultural maintenance reasons – caring for culture. We need to make sure it is appropriately used, properly recompensed, that our Indigenous creators are valued and attributed, and also that our culture is not derogatorily used.

There is no national independent organisation that represents Indigenous artists and creators. Since the demise of the National Indigenous Arts Advocacy Association in 2003, legal advice has been provided by the Arts Law Centre of Australia through its Artists in the Black program (Arts Law Centre 2005). Further, there has been some important work in Indigenous visual arts conducted by the National Association for the Visual Arts (NAVA) including the development of protocols *Valuing Art, Respecting Culture* (Mellor 2001) and *Indigenous Australian Art Commercial Code of Conduct* (Australia Council 2009). These two organisations have done well to advance the rights of Indigenous artists; however, there is a need for an Indigenous managed and controlled agency to take the lead on these important issues, and to provide a collective voice and meaningful representation. A national Indigenous cultural authority will give a collective voice for Indigenous culture that to date has been absent.

I note the Australian government's response to the Senate Standing Committee on the Environment, Communications, Information Technology and the Arts Committee Report – Indigenous art – *Securing the Future*, the report on the Inquiry into Australia's

Indigenous visual arts and craft sector (Senate Standing Committee 2007). The Committee recommended that the Indigenous Art Commercial Code of Conduct be developed and that the Commonwealth undertake a project examining and making recommendations regarding further initiatives to enhance the integrity of the Indigenous arts market (Senate Standing Committee 2007, Recommendation 23). The report also recommended resale royalty rights – another administration and management issue for Indigenous artists. Perhaps the national Indigenous cultural authority could perform some of these functions.

The other important role of the national Indigenous cultural authority would be to administer the framework for prior informed consent rights to cultural material. Currently, Indigenous cultural expression and knowledge are supplied and used without a fee. If we charged a royalty on use, as for copyright and other intellectual property, the resulting income could be distributed, through such an authority, to the traditional owners and communities, which in turn would support community development, artistic and cultural development and maintenance.

This body could also monitor Indigenous cultural and intellectual property protection nationally. A national approach to protecting Indigenous people's rights is required. It also has an important networking role. Decision makers in all States and Territories need to be aware of developments in other areas and communities of Australia, as well as internationally.

Under this system, corporations would give back to Indigenous communities what they now take for free. More art and culture would be performed and encouraged. Indigenous people would find employment opportunities in not only arts and culture but in management, business, investment and as professional advisers to these industries including as lawyers and accountants. This system could promote the practice of culture and the business of culture at the same time.

### **9.2.9 Setting up a National Indigenous Cultural Authority**

The Australian Society of Authors (ASA) lobbied government for the establishment of Public Lending Rights (PLR) in 1975 and Educational Lending Rights (ELR) in

2000.<sup>1063</sup> These rights are about the number of books writers have in public libraries; authors receive a certain amount of money for the books they have in the libraries because the loan of books reduces their income through the loss of sale of books. What about Indigenous oral recordings that are held in libraries and made available to the public? The national Indigenous cultural authority could lobby for payments like PLR and ELR for Indigenous storytellers, as they are the authors of orally transmitted cultural expressions. Other models to draw on include the statutory licensing schemes set up Copyright Agency Limited (CAL) and Australasian Performing Rights Association (APRA). These collective copyright management agencies have developed large industries, and are leading cultural organisations that turn over millions of dollars per annum, which they distribute to their membership of copyright owners. Consider the role played by these collecting societies in developing and enhancing Australian creative industries. The root for this invigoration is prior consent models: copyright exploitation rights and the collection of fees. Surely we could make use of these types of models to develop a culturally appropriate organisation to promote Indigenous arts and cultural expression?

How should the national Indigenous cultural authority be legally structured? Will it be a government agency or statutory authority or should it be independent from government? One option is to establish a statutory authority like the Australian Institute of Aboriginal and Torres Strait Islander Studies. Bodies such as AIATSIS have their own establishing legislation: a statute passed by the Commonwealth Parliament.<sup>1064</sup> It could be a government company like the Australian Securities Commission. It could be a company limited by guarantee, a not-for-profit company. It must have the power to raise money and invest. An example of this type of structure is the National Indigenous Television Inc. (NITV) which is funded by government but is an independent legal entity. However, it relies on government funding to operate, and the

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<sup>1063</sup> See Australian Society of Authors website <<https://www.asauthors.org/campaigns/digital-lending-right/digital-lending-right>>. PLR was introduced in 1975 and ELR in 2000.

<sup>1064</sup> The Australian Institute of Aboriginal and Torres Strait Islander Studies is established under the *Australian Institute of Aboriginal and Torres Strait Islander Studies Act 1989* (Cth) and Tourism Australia is established under the *Tourism Australia Act 2004* (Cth).

funding agreement imposes a means for government to monitor the organisation's work, ensuring that it meets important agreed criteria.

For a cultural organisation to thrive, the national Indigenous cultural authority should be underpinned by strong membership that is open to Indigenous cultural practitioners with voting rights to effectively elect a representative board. The membership base should be made up of Indigenous stakeholders, the owners of Indigenous culture. The board could be formed from a range of traditional owner representatives, and industry and legal experts. The national Indigenous cultural authority should be accountable to its membership to continue its charter, and implement good governance. The National Indigenous Arts Advocacy Association, which shut its doors in 2002, failed to do this. According to the NIAAA Review Report, the leadership of the organisation was highly volatile and unstable (Rimmer 2004, p. 161).

In setting up the new agency, there are lessons to be learned from the previous models that, although sometimes classed as 'failures', have some successful aspects. In the 1990s, the National Indigenous Arts Advocacy Association (NIAAA) received funding from the Australia Council's Aboriginal and Torres Strait Islander Arts Board and the Aboriginal and Torres Strait Islander Commission (ATSIC). Its functions included advancing Indigenous artists' rights, which it did quite well in the first five years, through coordinating cases such as the *Carpets Case* (referred to above). Another important function of NIAAA was to develop the National Label of Authenticity project – a certification trade mark to denote authentic Indigenous arts products and to ensure fair returns to Indigenous artists, while also promoting greater understanding of Indigenous heritage and art (NIAAA 1998). The Label of Authenticity project faced many challenges and within two years of its launch, in 2000, the Australia Council suspended funding to NIAAA, and commissioned a review (Rimmer 2004, pp. 139–79). The Final Report of the NIAAA Review (Australia Council, 2002) noted that NIAAA was lacking in governance and structure. Although it was a national body, it did not invite membership generally and did not have representation on its governing committee from states other than NSW.

The members were not elected by their community. NIAAA had failed to win stakeholders' support, and respondents to the reviewer's survey noted that they had lost contact with NIAAA over the two years. Despite the downfall, NIAAA had many

positive contributions, including the cases it coordinated and the development of a model for certification. This model inspired the New Zealand Toi Iho trademark, now into its sixth year. Fiji is also considering a model based along the original NIAAA model.

Such an agency would require government funding, at least initially. The board and management should be required to report to government and meet certain threshold performance criteria in the same way that the collecting societies are kept in check by reporting to government and tabling their annual report in Parliament. Collecting societies must also comply with developed codes of conduct.

To undertake its functions, the national Indigenous cultural authority would need to make use of a range of tools which are intellectual property (IP) based, such as trademarks, and copyright licensing agreements. It would also use other measures such as protocols, benchmarking and Indigenous mediation services.

The authority would need to develop a strong trademark and branding system – once developed the trademark should be registered, and should operate to endorse projects, goods and services which are facilitated by the authority processes of prior informed consent. Like the National Heart Foundation mark is applied to goods that meet criteria for healthy food, the authority's trademark would appeal to consumers who are looking for authentic products and services that are made with fair trade through the sharing of benefits with Indigenous custodians of culture.

Keeping track of who owns rights, and who has made use of them, is an important feature of a rights access and management system. A national Indigenous cultural authority could manage rights clearances by keeping a comprehensive database of intangible cultural material and list rights holders, so that those who want to negotiate or seek appropriate use can do so, by contacting the relevant parties. A register would be a fundamental implementation tool for the national authority. It should be made clear, however, that the database is not a rights registration system, which infers rights once registered, like the trademark registration system, but the database would be an identifier of who owns the rights to a particular item of cultural heritage. The United Nations University's report on *The role of registers and databases in the protection of traditional knowledge* will be useful to consider in developing a model for the national Indigenous cultural authority (Alexander & Institute of Advanced Studies 2004).



Databases can also be used as a measure to inform other rights based systems and assert Indigenous rights to material by preventing others from registering rights in Indigenous traditional knowledge or cultural expression. Also of note is the Database of Official Insignia of Native American Tribes, which stops others from registering Native American insignia as trademarks in the United States of America (United States Patent and Trademark Officer 2001).

The national Indigenous cultural authority would be responsible for developing standard terms for licence agreements entered into for the use of material, as well as the branding to use the its trademark. Collective organisation models have long known the benefits of using standard agreements to limit administration costs, as well as set appropriate terms of use. See, for example, the Australian Society of Authors Model Contract of publishing agreements.<sup>1065</sup>

The national Indigenous cultural authority could develop protocols which set standards for consent procedures, attribution and integrity, but consultation with Indigenous communities will be necessary to develop them. Already a strong protocol framework has developed and although largely ethical in nature, or enforced in funding agreements for projects, protocols provide scope to examine how things might be implemented by a national coordination body such as the national Indigenous cultural authority.

The Australia Council for the Arts has published protocols for the development of Indigenous music. These advise that when performing or recording communally owned musical works, it is important to seek permission from the relevant community owners of the music. Robynne Quiggin, author of the *Music protocols for producing Indigenous Australian music*, states:

Observing customary law means finding out who can speak for that music, so the right people are asked for permission to use the music. For instance, if a musician wanted to use a rhythm or phrase from music belonging to a Torres Strait Island

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<sup>1065</sup> Australian Society of Authors (ASA) 'Model publishing agreement template' (Australian Society of Authors, nd) <<https://www.asauthors.org/contracts-papers/model-publishing-agreement-template>>.

language group or family, it is essential to locate the correct language group or family group from the particular Island owning that song or music.<sup>1066</sup>

In this respect, the model can be used to enhance the preservation of traditional knowledge and expression of culture. It acknowledges the role of community ownership and control within that culture.

An authority and rights regime of this nature will almost certainly require thought about how competing interests and overlapping knowledge are dealt with. Mediation is a flexible method to resolve disputes. Although the World Intellectual Property Organization (WIPO) has a dispute resolution program, I am in favour of the use of alternative dispute resolution services in Indigenous disputes generally.<sup>1067</sup> However, I consider that the application of alternative dispute resolution, especially mediation, by the national Indigenous cultural authority would be useful. Such a rights administration body would need to develop skills in resolving 'IP disputes' and negotiating rights between Indigenous individuals, and communities (clan groups), Indigenous and non-Indigenous commercial entities, and between Indigenous and non-Indigenous groups.

This approach is used in Native Title and lessons learned in that arena can be shared. Also, see the WIPO mediation of international disputes concerning domain name registration. An approach for Indigenous mediation services is recommended. The Arts Law Centre of Australia has mediation guidelines and convenes a mediation service to deal with arts disputes. In my opinion, there are benefits in this approach.

#### **9.2.10 Prior informed consent models: learning from international experience**

I would now like to examine some international prior informed consent models. Since 2000, the World Intellectual Property Organization (WIPO) has convened an

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<sup>1066</sup> Robynne Quiggin, *Protocols for producing Indigenous Australian music* (Australia Council for the Arts, 2007) 14.

<sup>1067</sup> I also note the recommendation of Toni Bauman, a participant at Australia 2020. Toni is working on the project, Indigenous facilitation and Mediation Project, at the Australian Institute of Aboriginal and Torres Strait Islander Studies. Her one big idea for Australia 2020 was a recommendation for a National Indigenous Mediation Centre.

Intergovernmental Committee on intellectual property and genetic resources, traditional knowledge and folklore.<sup>1068</sup> The WIPO Committee has developed two documents: 'Draft provisions for the protection of traditional cultural expressions', and 'Draft provisions for the protection of traditional knowledge'<sup>1069</sup>

It is expected that the draft guidelines will shape future laws and policies relating to traditional cultural expressions and traditional knowledge. The 'Draft provisions on traditional cultural expressions' cover 'traditional cultural expressions', which include songs, stories, ceremonies, rituals, dance and art, including rock art, face and body painting, sand sculptures and bark paintings.

WIPO provisions on traditional cultural expressions include compliance with the 'free, prior and informed consent' principle and the 'recognition of customary laws and practices.' Under the WIPO provisions, prior consent of the traditional owners of cultural expressions would be required before recording, publication or communication to the public. There would also be moral rights for communities but these would be automatic and not just voluntary.

The *Pacific Regional Framework for the Protection of Traditional Knowledge and Expression of Culture* establishes 'traditional cultural rights' for traditional owners of traditional knowledge and expression of culture.<sup>1070</sup> The prior and informed consent of the traditional owners is required to reproduce, publish, perform, display, make available on line and electronically transmit, traditional knowledge or expressions of culture. The Pacific Model Law for the Protection of Traditional Knowledge and Expressions of Culture recognises the pivotal role of a cultural authority in

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<sup>1068</sup> See the World Intellectual Property Organization's website <<http://www.wipo.int/tk/en/igc>>. Our government is represented on that Intergovernmental Committee, but there has been limited input from Indigenous communities. The Australian Francis Gurry is the nominee for the position of Director General of WIPO. [Editor's note: Gurry was appointed in October 2008, and for a further term in May 2014: viewed 12 May 2015 at [http://www.wipo.int/pressroom/en/articles/2014/articles\\_0006.html](http://www.wipo.int/pressroom/en/articles/2014/articles_0006.html)].

<sup>1069</sup> Ibid.

<sup>1070</sup> Secretariat of the Pacific Committee, drafted by legal experts in July 2002, WIPO/UNESCO, s 6 of the Model of Law for the Protection of Traditional Knowledge and Expressions of Culture, South Pacific Community, Noumea, 2002 <<http://www.forumsec.org/resources/uploads/attachments/documents/PacificModelLaw,ProtectionofTKandExprssnofCulture20021.pdf>>.

administering prior informed consent rights. The explanatory memorandum of the Pacific Model law states:

The model law provides two avenues by which a prospective user of traditional knowledge or expressions of culture for non-customary purposes can seek the prior and informed consent of the traditional owners for the use of the traditional knowledge or expressions of culture. The two avenues are: applying to a 'Cultural Authority' which has functions in relation to identifying traditional owners and acting as a liaison between prospective users and traditional owners; or dealing directly with the traditional owners.

In both cases, the prior and informed consent of the traditional owners is to be evidenced by an 'authorised user agreement'. And in both cases, the Cultural Authority has a role in providing advice to traditional owners about the terms and conditions of authorised user agreements and maintaining a record of finalised authorised user agreements.<sup>1071</sup>

I consider that this model law would be a great reference point for those seeking the introduction of a national Indigenous cultural authority, and such a model may not need legislation but could be established to facilitate negotiated agreements for use of Indigenous cultural and intellectual property, where both parties are willing to recognise Indigenous cultural and intellectual property rights, and where there are certain incentives for commercial interest groups to do so, for instance, where use of a branded trade mark or authentication label is given, as part of the licensed user rights.

Using this model as a guide, five Pacific countries are lined up to introduce Traditional Cultural Expression law: Fiji, Palau, Cook Islands, Papua New Guinea and Vanuatu. Palau has drafted a *Bill for the Protection and Promotion of Traditional Knowledge and Expressions of Culture*. The Bill aims to establish a new form of Intellectual property identified as 'traditional knowledge and expressions of culture' and to vest ownership of this new property in the appropriate traditional groups, clans, and communities.

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<sup>1071</sup> Explanatory Memorandum for the Model Law for the Protection of Traditional Knowledge and Expressions of Culture, South Pacific Community with legal expert teams from UNESCO, WIPO, 2003.

'Ownership' is defined as 'the manner of collective property control recognised in traditional law and does not create or imply non-traditional property interests for individual members of the owner'. The Palau proposed law requires prior and informed consent for all non-customary uses of traditional knowledge and expressions of culture.

In South Africa, an *African Traditional Knowledge* Bill proposes to provide for the recognition and protection of traditional performances having an indigenous origin and a traditional character, and to provide for the recognition and protection of copyright works of a traditional character. In this way, the Bill confers copyright on a traditional work if: (a) the work was created (i) on or after the date of commencement of the Intellectual Property Laws Amendment Act, 2007; or (ii) within a period of fifty years preceding the date contemplated in subparagraph (i); and (b) the community from which the work or a substantial part thereof originated is or was an indigenous community when the work was created.<sup>1072</sup>

The drafters of this proposed law have also provided for the establishment of a national council in respect of traditional intellectual property and a national database for the recording to traditional intellectual property. There is the establishment of a national trust fund which indigenous clans can access for cultural purposes. Amendments to the Trademark Laws are also included which provides protection for geographical indications, recognising that art and culture comes from specific areas. The Bill is being reviewed after submissions and public consultation revealed that the majority of stakeholders present thought that amending the current laws may be unworkable. The general feeling is that a new law – a *sui generis* law, would be better to deal with traditional knowledge issues. The South African Department of Trade and Industry plans to redraft the Bill and present it to the Parliament later this year. The SA developments will inform our own framework.

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<sup>1072</sup> Republic of South Africa, Department of Trade and Industry, Intellectual Property Laws Amendment Bill 2007 <[www.pmg.org.za/files/gazettes/080505trade-propertybill\\_0.pdf](http://www.pmg.org.za/files/gazettes/080505trade-propertybill_0.pdf)>.

### **9.2.11 Conclusion**

In summary, the establishment of a national Indigenous cultural authority would set up an appropriate structure to advance the rights of Indigenous artists and creators and to allow them to share in the benefits from the appropriate use of the culture. A national Indigenous cultural authority will set a new dialogue that would enrich the artistic, social and economic lives of Indigenous artists.

The national Indigenous cultural authority model aims to be flexible to allow Indigenous Australian communities to implement a practical strategy for protecting and managing their Indigenous cultural and intellectual property.

It is important for the right infrastructure to be in place to manage rights and to provide good sound policy for service delivery. This is where my vision for a national Indigenous cultural authority comes in. This peak Indigenous cultural agency will have multiple functions relating to the promotion and protection of Indigenous arts and culture. It has a role to assist users make contact and identify relevant Indigenous owners. For there to be effective and efficient management of Indigenous cultural and intellectual property rights, there needs to be infrastructure to assist rights holders. I propose the establishment of a national Indigenous cultural authority to promote Indigenous cultural and intellectual property rights and to develop standards for appropriate use including royalties, cultural integrity and attribution.

To conclude, I thank Bill Wentworth for giving me the courage to put the vision of a national Indigenous cultural authority on the table. It needs to be debated and considered at length. I also thank AIATSIS for giving me this opportunity to set the parameters for this debate. I would also like to encourage Indigenous artists and Indigenous people to front up and take action: it's time to guard ground.

# Chapter 10: Conclusion: True Tracks – Towards a Conceptual and Theoretical Framework

## 10.1 Introduction

A thesis by compilation is distinctive for the way in which it brings together a body of work that is based on a set of published papers that, in this instance, themselves bring together decades of scholarship and research. In this respect, this PhD differs from a thesis submitted after an average of four years engagement. The thesis Introduction set out an overview of key research issues, scope and questions. The research content of each publication has been supplemented with a contextual summary that demonstrates the context in which each paper was written and how it contributes to an integrated, coherent and evolving research theme. This body of work now provides a solid foundation upon which to draw conclusions about the kind of broader conceptual model, related strategies and practical changes that best elucidate, and would assist the protection and recognition of ICIP.

As discussed in Chapter 2, ICIP rights are fundamentally about Indigenous peoples' rights to their heritage. A strong conclusion of this chapter and the thesis overall is that ICIP is not a bundle of separate rights and interests that can be fragmented and so undermined. Nor is it static. Rather it is holistic; an integrated institutional system connected to place and linked to people, land and identity. It is collectively owned and constantly evolving. ICIP systems are part of living cultures, entailing stewardship roles and responsibilities for those who share and practice a cultural identity; who 'look after' knowledge and pass it on. There are rules or customary laws about consultation, consent, access, practice and gendered expertise, and fields of sacred or secret knowledge. ICIP is ongoing, bringing the past into the present and future. From this standpoint, IP is a cultural connection for collective personhood and grouphood; it remains forever.

I have detailed in this thesis, in Chapters 1 and 2, the inadequacies of national and international IP, heritage laws and native title legislation to provide ICIP rights for Indigenous Australians, despite their consistent calls for reform. My earlier work in *Our*

*Culture: Our Future* (1998) examined the nature of ICIP and the rights that Indigenous people want recognised.<sup>1073</sup> I reported 17 ICIP rights which aim to enable Indigenous people to own and control their cultural heritage. They include the right to prevent misappropriation and to protect cultural integrity, to have collective attribution and to benefit share. Despite *Our Culture: Our Future*'s recommendation that *sui generis* ICIP laws be adopted, almost two decades later these rights are still not legally enshrined in Australian law. The publications included in this thesis document the ongoing challenges and issues for Indigenous Australians that have arisen since the 1998 report (published in 1999) and, in combination, suggest a way of understanding ICIP that might more effectively enable robust and innovative approaches to its protection and exercise at the intercultural interface.

My role as a practising lawyer has enabled me to develop practical new methods and approaches to protect and promote the ICIP rights of my Aboriginal and Torres Strait Islander clients, particularly through the design and application of protocols. In the absence of clear domestic legal obligations regarding ICIP, I have been able to develop a protocol framework, which I call the True Tracks Principles. This framework appeals to the ethics and self-interests of all user groups, at the same time as enabling Indigenous groups to exercise self-determination and assert their right to control how their cultural expression and knowledge is being accessed and used. The publications comprising this thesis further advance that protocol framework, by demonstrating it actually constitutes an evidence-based model; a theoretical and conceptually based construct that not only elucidates the intersecting cultural characteristics of ICIP amongst Indigenous Australians, but also identifies best-practice intercultural standards for dealing with ICIP. The thesis argues that this model is in fact broadly relevant and transferrable, and so can be used by a wide range of parties in various contexts, as well as to an emerging new arena in which ICIP might play a part.

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<sup>1073</sup> Terri Janke, *Our Culture: Our Future – Report on Australian Indigenous Cultural and Intellectual Property Rights* (Report commissioned by AIATSIS and ATSIC, Michael Frankel & Company, 1998).



The thesis reinforces that the strongest legal basis for ICIP rights is found in an international human rights declaration, in Article 31 of the UNDRIP.<sup>1074</sup> Article 31 recognises the right of Indigenous peoples to maintain, protect and control their heritage, traditional knowledge and traditional cultural expression. UNDRIP provides a strong policy guide for ICIP rights but has not been actively translated into law by the Australian Government. It is against this backdrop that the True Tracks ICIP protocols can now be drawn together more fully in this Conclusion, as a model both for understanding and action. But first, some component conclusions can be made in regard to the UNDRIP in respect to its areas of key relevance for ICIP in Australia based on the case study chapters in the thesis.

## **10.2 Rationale for ICIP protection and recognition**

Article 31 of the UNDRIP recognises the right of Indigenous peoples not only to maintain and protect their traditional cultural expression, cultural heritage and traditional knowledge, but also to *control* it as IP. In other words, to govern their own ICIP. This constitutes an articulation of specific rationales that are also the premise for the introduction of ICIP measures. The first of these is to recognise that Indigenous people have the right of self-determination as First Nations to continue their culture and nations; the second is to stop misappropriation of ICIP; and the third is to enable Indigenous peoples' economic self-determination over their intangible assets.

### **10.2.1 Indigenous rights to self-determination**

Fundamentally, entrenched in the UNDRIP is the key principle of free, prior and informed consent which provides the right for Indigenous people to own, manage and control their Indigenous knowledge and to make self-determined decisions about the use of their ICIP. The rights enshrined in Article 31 of the UNDRIP, therefore, provide a strong platform for Indigenous self-determination and governance in this arena.

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<sup>1074</sup> *Declaration on the Rights of Indigenous Peoples*, GA Res 61, UN GAOR, 61<sup>st</sup> session, 107<sup>th</sup> plenary meeting, UN Doc A/295 (2 October 2007) art 11.

### **10.2.2 Do no harm – stop misappropriation**

The case study chapters presented in this thesis demonstrate why measures for protection should ensure that there is no harm done to ICIP. The act of misappropriation and desecration of ICIP has a perpetuating collective impact on Indigenous people being able to practice and transmit culture intergenerationally. The ‘bastardisation’ of culturally significant expression and knowledge demeans the integrity of cultural practice and diminishes connection to the cultural source of creativity and the collective legitimacy for such IP creation. Indigenous Australians have customary laws and protocols within their own community regarding the use of ICIP, however as discussed in Chapters 1 and 2, these are largely unknown to the public.

A conceptual modelling of, and practical measures for, Indigenous ICIP must move beyond an ethnographic and static preservationist approach, to a self-determining framework which empowers Indigenous people to make decisions about their ICIP and how it is used into the future. This arguably includes the right to govern and exercise ICIP in ways that might be considered by others to be ‘new’. From this perspective, policy objectives, guidelines and laws that might be developed by governments and other stakeholders should arguably include measures to:

- (i) protect culture from debasement and derogatory treatment;
- (ii) stop misappropriation of Indigenous knowledge;
- (iii) maintain the cultural integrity of Indigenous knowledge as a system;
- (iv) recognise Indigenous responsibility for the interpretation of Indigenous knowledge;
- (v) protect sacred and secret material; and
- (vi) recognise collective group attribution for the use of their ICIP.

### **10.2.3 Enabling economic opportunities for Indigenous peoples**

Indigenous culture, arts and knowledge contributes enormously to the Australian economy including through tourism, film, arts, pharmaceutical, bushfoods and research. In the past much of the monies are made by non-Indigenous people. The dollars involved in Indigenous arts are an example. Another is the use Indigenous knowledge of plants such as the Kakadu plum and the tea-tree industries. Whilst

Indigenous knowledge underpins these resources, Indigenous people and their communities do not benefit. In this respect, the lack of ICIP rights awareness means that Indigenous people are taking a very significant financial 'hit' when their knowledge, arts and cultures are appropriated. The unjust enrichment that others have generated from ICIP is loss of income to Indigenous peoples. There is a need for the law and policies to redress ICIP appropriation to recognise the economic losses Indigenous people suffer, and to enable them to receive financial returns, where and as appropriate.

Indigenous cultures are living cultures, and Indigenous people are innovating and nurturing their cultural systems in response to contemporary life. There is growing potential for Indigenous people to engage in various kinds of 'value-adding' in relation to their ICIP, which can lead to innovation, collaboration and commercialisation. For example, in the arts, film, health, food, technology, information, environmental, education and cultural industries, Indigenous knowledge and cultural expression is highly sought after for new products, initiatives and services. It is also highly sought after to promote and give content to standards of cultural proficiency that are being increasingly integrated into diverse industry practice.

Just as general IP laws aim to promote economic incentives for creators and to prevent unfair competition and unjust enrichment, ICIP rights should include the Indigenous right to participate in self-determined economic and other forms of development of their ICIP.

Any future laws and regulations must ensure Indigenous people are recompensed for lost income from the appropriation of their ICIP and enable them to receive benefits from the authorised use of ICIP; encourage collaborations within education, science and industry; and promote Indigenous economic development and entrepreneurship. But to have effect in ways that promote Indigenous self-determination of the kind discussed here, there needs to be agreed standards and practice. The thesis chapters demonstrate how these may be constituted and suggests a protocol model as the unifying, organising framework under which these are promulgated.

### 10.3 The role of protocols within an intercultural context

Within an intercultural context, protocols can be defined as the specific ethics, guidelines, rules and standards of behaviour adopted when interacting with peoples and parties from another culture. From an Indigenous perspective, they imply preferred ways of interacting with Indigenous people that respect their cultural ownership, values and practices. As primary guardians, reproducers and interpreters of their cultures, Indigenous people have their own well-established protocols for dealing with cultural knowledge and material; protocols that are based on an ancient jurisdiction of laws and governance. For example, in Indigenous Australian societies, the artist or ceremony leader is a custodian of culture, with obligations as well as privileges. This thesis concludes that a protocol model, such as the True Tracks Principles, has considerable advantage in enabling us to better understand and hence address the common intercultural challenges of mutual understanding, decision-making authority and negotiation that frequently occur in the ICIP arena.

For example, protocols can constitute agreed procedures for appropriate interactions; a basis for the way dealings should occur within a situation, community, culture or industry. Complying with the accepted protocols of other cultural groups arguably promotes ethical conduct, and interaction based on good faith and mutual respect. To achieve that standard of conduct and interaction, protocols need not only to be well informed by culturally credible processes, the processes must also be workable and acceptable to all stakeholders involved. That is a challenging combination to achieve.

The thesis chapters demonstrate a series of circumstances where this has not happened: where poor process and practice have undermined Indigenous rights, benefit sharing, and outcomes for all parties. At the same time, the chapters also indicate several critical ways in which a *particular kind* of protocol model – in this case embodying the True Tracks Principles – can provide invaluable practical advantages for addressing the ICIP rights in projects and collaborations.

Although the actual content of Indigenous ICIP protocols will need to differ between communities and groups, the thesis case studies demonstrate that the True Tracks Principles present an overarching conceptual and practice model to provide a flexible framework within which to design locally-relevant content for a wide range of transactions, industries and situations. Furthermore, the model can be used by

individual Indigenous artists and/or the collective community, as well as the external entity that is seeking consent to engage with and use ICIP. These are significant advantages.

In this way, the model also becomes a tool that can structure negotiation of the finer details of an intercultural ICIP transaction. Indeed, it can also be used as a planning, management and evaluation tool. For instance, the '10 step' principles that form the parameters of the model arguably can assist in:

- (i) preparing the groundwork for consultation;
- (ii) communicating and negotiating with Indigenous communities for better understanding on the project;
- (iii) appropriately managing material, they collect and store; evaluating how an ICIP transaction is being implemented; and
- (iv) providing for long-term maintenance of identified Indigenous cultural practices.

The 2006 Australia Council for the Arts' 'Australian Indigenous Art Commission' project for the Musée du Quai Branly outlined in Chapter 4 is just such an example of how the protocols model enabled careful planning of a major international collaboration.<sup>1075</sup>

Due to the shortfalls in the national and international laws systematically documented in this thesis, protocols have increasingly become the most effective way of addressing the lack of protection for ICIP. This has been especially so in the arts, film and research arenas. But as evidenced by the case studies in the thesis chapters, the True Tracks protocol model forms an important conceptual refinement of the protocol approach in that it can be applied as being broadly relevant to new industries and situations, and to Indigenous *and* non-Indigenous parties. In other words, it offers an intercultural model. Furthermore, the thesis chapters demonstrate that the process of designing and implementing a protocol model based around the principles identified across the chapters, can itself be seen as an act of Indigenous ICIP self-determination, cultural resilience and innovation. The following section draws together the core attributes and

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<sup>1075</sup> See also Terri Janke, 'Ensuring Ethical Collaborations in Indigenous Arts and Records Management' (2017) 91(5) *Australian Law Journal* 375.

principles of the model, some of the new challenges arising, and areas where such a model could assist.

#### **10.4 True Tracks Principles: A model for protocols**

The evidence and analyses provided in the thesis chapters collectively enable me to now propose a set of overarching principles or standards which arguably constitute a model for dealing with ICIP that is both culturally credible and practically effective. The standards are referred to as the 'True Tracks Principles' and together form the backbone of conceptual modelling of an ICIP protocol. The Principles address what my research has identified as being the key cultural conditions, issues and gaps for recognition and protection of ICIP.<sup>1076</sup> The Principles are based on over 20 years of personal experience, research, legal practice and advocacy in the area. Together they constitute the basis of a model for understanding the cultural and transactional dimensions of Indigenous ICIP, as well as standards for negotiating and enacting best-practice standards for dealing with ICIP.

The 10 True Track Principles are:

1. Respect
2. Self-determination
3. Consent & consultation
4. Interpretation
5. Cultural integrity
6. Secrecy and privacy
7. Attribution
8. Benefit sharing
9. Maintaining Indigenous culture

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<sup>1076</sup> Terri Janke, 'Indigenous cultural expression and intellectual property' in Elliot Johnston, Martin Hinton and Daryle Rigney (eds), *Indigenous Australians and the Law* (Routledge-Cavendish, 2<sup>nd</sup> ed, 2008) 61, 23. Terri Janke, *Our Culture: Our Future – Report on Australian Indigenous Cultural and Intellectual Property Rights* (Report commissioned by AIATSIS and ATSIC, Michael Frankel & Company, 1998).

## 10. Recognition & protection.

The following sections draw together the evidence presented in the thesis, to further explicate each of the True Tracks Principles, including how they relate to existing issues and gaps in the law, and constitute components of a larger, integrated conceptual construct I call the protocol model. Below, I elucidate the key features of each principle and outline how it can be used in practice. In the subsequent section, I illustrate how these principles, when understood in combination and deployed as a cohesive model, can significantly assist with the current gaps in ICIP recognition and protection.

### 10.4.1 Respect

Respect is about recognising that Indigenous people have rights to their cultural expression and knowledge, and that this is deeply interlinked with their territorial lands and seas. Indigenous people are the first peoples of Australia with an ancient jurisdiction of cultural laws and geographies and have the right to own and control their cultural heritage. Indigenous peoples' knowledge has developed over 65,000 years of connections with land, sea and the environment. It is used today in diverse industries including the arts, film, tourism, biotechnology, health, education, architecture and design. Particular systems of knowledge continue to be connected to particular groups of Indigenous people and their countries and waters. These people as individuals and communities, seek tangible respect for rights to their cultural expression and knowledge so they can continue to reproduce their culture and share in the benefits of their cultural legacy. However, as noted throughout the thesis case studies, the Australian IP laws currently do not protect this depth of knowledge.

In this context, respect is not about simple etiquette. The respect principle is about recognising Indigenous Australians' inherent right and related legal interests. In 1992, the High Court of Australia held in the *Mabo* case that *terra nullius* – the notion of 'land belonging to no one' – was a legal fiction.<sup>1077</sup> Edward Koiki Mabo's fight for justice was as much about intangible cultural heritage as it was about land. The influential *Mabo*

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<sup>1077</sup> *Mabo v Queensland (No 2)* [1992] HCA 23.

decision – and its predecessors in various land rights legislation – highlights the continuous importance of recognising Indigenous people’s rights in their heritage as a form of property; whether this be tangible, cultural or intellectual property.

In general, there has been considerable research and legal focus on land and seas, but knowledge itself is systemic and interconnected, and so requires consideration as a form of property for protection. Indigenous knowledge is not *terra nullius*. It is not ‘up for grabs’ or ‘free for the taking’. This principle acknowledges the need to overturn the concept that Indigenous knowledge is *terra nullius*, and rather advocates a robust respect for the long history of Indigenous knowledge practice and reproduction in Australia. Respect is therefore the first Principle, recognising Indigenous people’s ongoing rights to connection to their ICIP. From this pre-eminent Principle, all other principles follow.

#### **10.4.2 Self-Determination**

Under UNDRIP and the Australian Government’s signed assent to it, Indigenous Australians have the right to self-determination in respect to their cultural heritage. In the context of ICIP, self-determination refers to having genuine decision-making authority and meaningful control and responsibility in processes about projects that affect their cultural heritage. In this way, practical self-determination is also mark of respect. Indigenous self-determination includes the right to authorise or refuse to authorise the commercial use of ICIP. Consequently, permissions of access and use need to be approved according to Indigenous agreed ways of enacting customary law and collective decision making.

The manner in which the right of Indigenous people to control commercial use of their ICIP is exercised will depend on the nature of the proposed item for commercialisation. For example, if the Indigenous person or group owns the copyright in a cultural item such as song, then they have the rights to control the commercial ‘exploitation’ of the copyright. However, because of settler colonialism in Australia, large areas of copyright in much of ICIP recorded material does not ‘legally’ belong to the Indigenous people. The adverse impact is that ownership of IP vests in researchers and recorders of culture.



The Australian Research Council funded project *Deepening Histories of Place*<sup>1078</sup> with partners including the ANU, AIATSIS and NFSA outlined in Chapter 4, illustrates how vesting ownership of recordings, films and research outcomes in Indigenous participants enables them to be actively empowered ‘partners’ in research rather than the ‘subjects’ of research.

### **10.4.3 Consent & Consultation**

Free, prior informed consent and its constituent process of consultation is a core principle for ICIP self-determination. It involves providing the accurate relevant information to Indigenous people on all proposed uses of ICIP, and advising about the implications of consent. It also directs that Indigenous people should be consulted in a timely manner and given the opportunity to negotiate and decide upon the access to and use of their ICIP.

This Principle gives a substantive content to the form and content of consultation and respect, beyond the more familiar process of rubber-stamping that has occurred to date. It requires that Indigenous communities actively be informed about projects well in advance of their commencement, so they can have an opportunity to consider the issues and approve or reject the proposed use, access or application.

In the past, Indigenous cultural expression and knowledge was plundered without any involvement with Indigenous custodians, let alone their consent. This Principle builds upon the consequence of self-determination rights, stating that Indigenous people must be informed and enabled to freely enter agreements that allow access and use of ICIP. If copyright applies to protect a song, dance or other Indigenous cultural expression, then consent is required. However, in many cases copyright is not owned by the collective Indigenous entity, or does not apply to the oral form of expression.

The protocol model addresses this gap by supporting free, prior and informed consent processes and, when used along with legal contracts, provides an enforceable right at least to those who are party to the agreement. In this respect, funding agencies such

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<sup>1078</sup> Australian National University, *Deepening Histories of Place*  
<<http://www.deepeninghistories.anu.edu.au/>>.

as the Australia Council for the Arts have made it conditional of grant funding that such protocols are followed in government-funded projects.

In terms of consent for use of traditional knowledge there is yet to be standards of prior informed consent yet to be set in science and plant knowledge. The Kimberley Land Council's Intellectual Property and Traditional Knowledge Policy,<sup>1079</sup> based on the True Tracks Principles, is an example of an Indigenous response which establishes the prior informed consent processes that a representative Aboriginal organisation seeks to implement for the region.

The access and use of genetic resources are important issues for Indigenous people, and an area in which there is a history of failure of consultation. There are procedures set out in the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) and *Regulations 2000* (Cth) which give Indigenous owners (most often this will be Indigenous community organisations, land councils or some other form of mandated representative entity) and native title owners certain procedural rights of informed consent in relation to genetic resources, where the ownership or native title rights are held on Commonwealth land.

#### **10.4.4 Interpretation**

Interpretation refers to how content and material are understood, discussed and referenced. Indigenous people are responsible for reproducing their culture and the ongoing interpretation of their cultural heritage. This protocol Principle would enable Indigenous people to carry out that responsibility in an evolving way. In order for Indigenous knowledge not to be reified as something static and locked in the past, it must involve Indigenous people in reproducing, interacting and nurturing it. Indigenous people also have the right and ability to change their interpretations of their own heritage and knowledge systems – just as every society does. Interpretations may

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<sup>1079</sup> Pauline Foster and Terri Janke, 'Keeping Cultural Knowledge with Indigenous Research Protocols: A Case Study of the Kimberley Land Council's Intellectual Property and Traditional Knowledge Policy' (2015) 8(18) *Indigenous Law Bulletin* 17.

include new media and digital technologies. This does not mean it is not a *cultural* expression; it may simply involve a new transmission method.

Because Indigenous knowledge is often reproduced in the immediate context of the daily livelihoods of people, it is as much about processes of communication, and interpretation and reframing of knowledge, as it is about content. It is therefore a dynamic entity that can undergo culturally legitimised modification as the needs of Indigenous groups change. This Principle recognises the right of Indigenous peoples to be the primary guardians and interpreters of their cultural heritage. The consequence of 250 years of settler colonialism in Australia has been that written papers and records of Indigenous knowledge have been interpreted by others. This issue was explored in Chapter 4 which emphasised the importance of Indigenous control of recordings and oral information. This is why initiatives such as the *Deepening Histories of Place* project and institutional control as to who is able to access records like archived language recordings and old books are important, as discussed in Chapter 6. They enable the perspectives of Indigenous people to be told from an Indigenous standpoint, when in the past Indigenous people were only seen as subject matter.

#### **10.4.5 Cultural Integrity**

Maintaining the cultural integrity of ICIP is important to Indigenous peoples so that the cultural significance or sacredness of the material remains vital and intact. This means recognising and addressing the fact that cultures are systems, not bundles of institutions or separate creations that can be isolated and extracted. It also acknowledges that ICIP is embedded in, and emerges out of, the ongoing relationship between people and their own country.

The integrity Principle recognises that Indigenous people have the right to stop the derogatory treatment of ICIP and to prevent what are considered to be distortions of ICIP. In the past, their stories have been labelled ‘myths’; their traditional knowledge as ‘folklore’, and their art has been copied and imitated in fake arts for souvenirs.

As outlined in several of the thesis chapters, this type of behaviour undermines cultural behaviour and is offensive and harmful to Indigenous peoples. However, the Australian legal system provides little recourse for the damage. For example, whilst

there are moral rights provisions in the *Copyright Act 1968* (Cth) which grant the right of integrity to creators of copyright works and films, these rights are given to individual authors to stop derogatory treatment of their creations. There is no moral right of attribution for Indigenous communities to be applied when their cultural works are taken out of their context or used in a way that is harmful of their reputation or culture. Take, for example, the image of the *Wandjina*, the sacred creator from the Kimberley, which is often copied by others for commercial benefit, or in ways that detract from the connection and sacredness of these ancestral beings, as described in Chapter 3.<sup>1080</sup>

Therefore, a key Principle identified here is to consider the integrity of the representation of ICIP and to make sure that there is no debasement of the work. This may occur where there is a new unauthorised context, where the original work is altered or adapted. Under this Principle, there is a prominent role for securing the support of group and building community legitimacy, as a pre-eminent source of expertise in the field to ensure that the cultural integrity of ICIP is properly considered in transactions about its access and use.

#### **10.4.6 Secrecy & Privacy**

The thesis chapters demonstrate that Indigenous cultural heritage, including knowledge, is conceptualised as collectively assimilated and reproduced information, with associated understandings of how to use and transmit it. ICIP is thus as much about performance and practice as it is about information or things. It is embedded in particular social and geographic environments. Consequently, within Indigenous groups certain forms of ICIP are structured according to robust laws and restrictions as to who can access, use and transmit it.

Indigenous people have the right to keep restricted their secret/sacred and ritual knowledge in accordance with these customary laws. Privacy and confidentiality concerning aspects of Indigenous people's personal and cultural affairs should be

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<sup>1080</sup> Terri Janke and Peter Dawson, 'New tracks: Indigenous knowledge and cultural expression and the Australian intellectual property system' (Submission to *Finding the Way: A Conversation with Aboriginal and Torres Strait Islander Peoples*, conducted by IP Australia and Office for the Arts, Terri Janke and Company, 31 May 2012) 30.

respected, particularly where they seek to maintain the secrecy of particular areas of Indigenous knowledge. The inability of Indigenous people to control the secrecy of their beliefs, practices and ceremonial objects can weaken the society and undermine its social fabric and systems of authority. Secrecy laws in traditional cultural practices uphold and protect the ceremonial nature of much ICIP. In the case of *Foster v Mountford*,<sup>1081</sup> a breach of confidence law covered the issue of published secret ceremonial information. The sale of sacred items is also an offence under some Australian State and Territory cultural heritage laws, although there is no national restriction on the sale of sacred items. In New South Wales, for instance, sacred Aboriginal objects can still legally be traded.

#### **10.4.7 Attribution**

This Principle indicates that an aspect of respect and integrity is to acknowledge Indigenous people as custodians of Indigenous cultural knowledge by giving them attribution. Indigenous cultural material has often been exploited without any respect, benefit or recognition that the material originates from a distinct cultural group. Where possible, the source of Indigenous music, songs and any traditional knowledge should be acknowledged by stating the name of the performer and if applicable, the relevant Indigenous group or community.

Copyright law includes the moral right of attribution for the author of the work, film or for performers. These rights are for the individual creators and performers and not the clan groups who are the source communities. Therefore, when considering ICIP attribution, it is important to acknowledge Indigenous culture and people. In this way, the tracks can always be traced back to the person, family or clan, when information is considered for use and interpretation in the future.

#### **10.4.8 Benefit Sharing**

Indigenous peoples have the right to share in the benefits from the use of their ICIP, especially if it is being commercially applied or used in culture-based businesses. This

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<sup>1081</sup> *Foster v Mountford* (1976) 14 ALR 71.

Principle advocates that economic benefits from the use of Indigenous peoples' cultural heritage should flow back to the source communities and groups. Benefit-sharing requires users of ICIP to negotiate terms of use and commercial arrangements with the Indigenous peoples concerned, particularly regarding the sharing of fees and the involvement of Indigenous people in the work's creation and promotion.

Article 5 of the *International Covenant on Economic, Cultural and Social Rights* recognises the rights of individuals to participate in cultural life, to benefit from scientific progress and to benefit from their intellectual property.<sup>1082</sup> The principle of benefit sharing is also included in article 8(j) of the *Convention on Biological Diversity*.<sup>1083</sup> The *Environment Protection and Biodiversity Conservation Act 1999* (Cth) and the *Regulations 2000* (Cth), require that if a person wishes to obtain access to biological resources on Commonwealth land, for commercial or potentially commercial purposes, then they will need to enter into a benefit-sharing agreement with the access provider. However, the benefit-sharing agreement will have effect only if a permit is issued by the Minister for the Environment and Water Resources.

For Indigenous cultural expression, copyright owners have the right to receive royalties for the use of their copyrighted material, if they meet the requirements of copyright. For cultural expression that does not meet the copyright requirements, there is a need for protocols that address the principle of 'sharing of benefits'.

#### **10.4.9 Maintaining Indigenous Culture**

Indigenous cultural heritage is maintained and reproduced across generations and has always adapted and evolved to respond to changing internal and external circumstances. Indigenous knowledge holders commonly think of their cultural heritage as a 'way of knowing' and a 'way of doing and being'; that is, as a context specific process that is directly connected to the reproduction of valued cultural institutions, art forms and traditions. The maintenance and rights of ongoing

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<sup>1082</sup> *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3 (entered into force in Australia 10 March 1976).

<sup>1083</sup> *Convention on Biological Diversity*, opened for signature 5 June 1992, [1996] UNTS 29 (entered into force 23 December 1993).

transmission of ICIP are thus intimately entwined and need to be in the hands of Indigenous peoples and their own self-determined choices. In maintaining Indigenous cultures, it is important to consider how a proposed use might affect future use by others who are entitled to inherit the cultural heritage. This Principle recognises the importance and respect that should be given to Indigenous cultural practices, including those dealing with initiation rites, deceased people and sensitive information.

#### **10.4.10 Recognition & Protection**

This Principle advocates that Australian policy, regulations, program guidelines and law can be used strategically to recognise and protect ICIP rights. This should include reform of existing IP laws and regimes, such as copyright, but also the adoption of new laws and policies to recognise the unique nature of ICIP rights. Gaps in the law can be covered by employing contracts, protocols, and other tools, which may also be valuable supplements to new laws should they be adopted.

Until recently, Indigenous peoples and stakeholders have been hampered by being put in a position of trying to negotiate many different matters at different times; sometimes with different people. The result has often been confusion and consequently, the derogation of Indigenous rights and heritage itself.

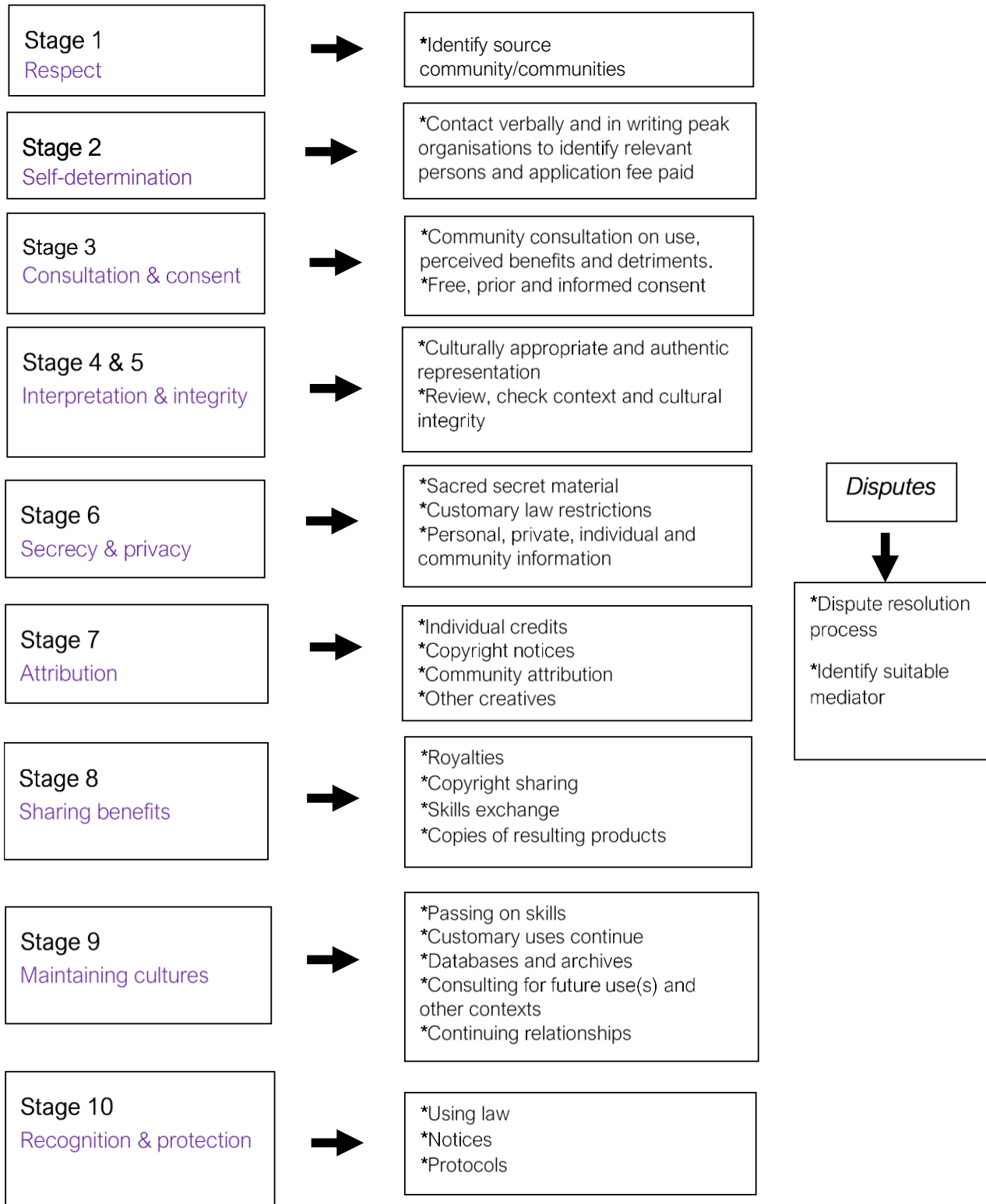
Importantly, the True Track Principles discussed above are not a bundle where each can be separated from the other. Their force and effectiveness lie in their combination and interconnections. This is what the protocol model provides: an organising framework that enables the Principles to work in tandem and have componential effect (as set out in Fig. 10.1 and Fig.10.2 below):



**Fig 10. 1 True Tracks Principles Diagram**



The additional advantage of the model is that the True Tracks Principles can be used sequentially in stages to ensure an ICIP protocol model is developed in a methodical and comprehensive manner:



**Fig 10. 2 True Tracks Principles Flowchart**

#### 10.4.11 Protocols using the True Tracks Principles

In developing a protocol model founded on the True Tracks Principles, I have identified the basic structure and standards with correlated processes required for ICIP protection to produce a framework that is broadly relevant in any context. The model addresses all the gaps identified in the thesis chapters, including: the lack of free, prior and informed consent; issues of integrity; the need for local flexibility; and the lack of robust information about how Indigenous knowledges are being accessed and used by others.

The question of legal enforceability remains important, as governments still need to develop policy mechanisms and laws, but the thesis concludes that this model can also assist in how policy and legal solutions are formulated and implemented. The True Tracks Principles can be used for example in repatriation, research, genomics, commerce, arts, science and education sectors and a wide range of emerging areas.

There is already a wide range of uses of protocols based on this approach. For example, the model of True Tracks Principles has been used in industries such as design,<sup>1084</sup> writing<sup>1085</sup>, the arts<sup>1086</sup>, film and archives.<sup>1087</sup> The protocols have been flexible to enable Indigenous groups like the Kimberley Land Council to develop a relevant regional model of Indigenous ICIP self-determination. Also, NGO groups like Oxfam have used the framework to set standards for their practice.<sup>1088</sup> Collecting institutions such as the National Museum of Australia and Museum of Applied Arts and

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<sup>1084</sup> UTS Design School, *Cultural Principles & Protocols Working with Indigenous Communities and Materials* <[http://www.utsdesignindex.com/wp-content/uploads/2017/04/IPP\\_Brochure.pdf](http://www.utsdesignindex.com/wp-content/uploads/2017/04/IPP_Brochure.pdf)>.

<sup>1085</sup> Jared Thomas, *The Process and Importance of Writing Aboriginal Fiction for Young Adult Readers* (PhD Thesis, University of Adelaide, 2010).

<sup>1086</sup> Terri Janke and Sarah Grant, *Indigenous Cultural Protocols and the Arts* (Terri Janke and Company, 2016).

<sup>1087</sup> Terri Janke, 'Captured Images: Film Archives and Indigenous Cultural and Intellectual Property Rights' (2006) 6 *Journal of Indigenous Policy* 78.

<sup>1088</sup> Oxfam Australia, *Aboriginal and Torres Strait Islander Cultural Protocols* <[https://www.oxfam.org.au/wp-content/uploads/2015/11/2015-74-atsi-cultural-protocols-update\\_web.pdf](https://www.oxfam.org.au/wp-content/uploads/2015/11/2015-74-atsi-cultural-protocols-update_web.pdf)>.

Sciences<sup>1089</sup> have led best practice in protocols so that they become the foundation of all museum policies.

Importantly, this is a model that offers, above all, flexibility as to content and customisation given the specific nature of Indigenous knowledges and how they are used, will vary from group to group. But as importantly, the model proposes a set of foundational design principles; common threads that will address experiences relevant to all forms of ICIP and diverse potential uses.

Accordingly, the significant contribution of this model to our general knowledge and practice is that these principles will enable the design of different, locally valid and credible solutions for ICIP protection and use, at the same time as reinforcing and implementing overarching standards. For example, Indigenous peoples continue to maintain complex knowledge systems regarding the use and management of waterways. While each group's particular approach will be different, the True Tracks Principles enable them to develop common standards for the protection of this important field of knowledge, which could then be used to work out different practical solutions and respond to different priorities and contexts.

In the next section, the thesis presents conclusions for several important issues regarding the relevance of the model for enforceability in practice.

## **10.5 Enforceability of protocols**

### **10.5.1 Issues with protocols**

One of the key issues with many other ICIP protocols is that their enforceability rests with the contractual party to action, which in some cases may not be the relevant Indigenous group. For example, the Australia Council *Protocols for Working with*

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<sup>1089</sup> Museum of Applied Arts & Sciences, *MAAS Australian Indigenous Cultural and Intellectual Property Protocol* (21 July 2016) <<https://maas.museum/app/uploads/2016/08/Australian-Indigenous-Cultural-and-Intellectual-Cultural-Property-Protocol-v1.0.pdf>>.

*Indigenous Artists*<sup>1090</sup> states that the funding recipient has a contractual obligation to follow ICIP protocols. If they do not, the actionable right to take issue rests with the Australia Council as the party to the funding agreement. In other words, it is not the relevant clan or community as owners of the ICIP who have the governing agency.

The Principles underlying the True Tracks model aim to overcome this problem by embedding Indigenous self-determination and informed consent throughout the model to ensure that it is Indigenous peoples themselves who determine when their ICIP rights have been breached and when to act, even if another party ultimately brings the action.

As ethical principles, protocols are often seen as a guide rather than a mandatory practice. So, the critical aspect of a more robust protocol model is how to design it so that it is workable and enforceable over time, and amongst a diverse range of parties. The thesis chapters highlight several ways this can be done through standard setting and by including adherence to the protocols in contract, and through licensing contracts. These aspects of the proposed protocol model are briefly considered below.

### **10.5.2 The role of contracts to enforce private legal rights**

Combined with contracts and made conditional with funding, protocols can form a system for greater protection of ICIP. This is what is being done with Screen Australia and Australia Council for the Arts Indigenous protocols; however, as stated above, the Indigenous groups are not parties to the agreements.

A better approach is to ensure that Indigenous people are the parties to agreements. Licensing contracts are one way that Indigenous people can ensure that parties to the contract are on the same page in terms of dealing with their ICIP. It is common for such contracts to specify that as a condition of licensing, the licensor agrees to abide by the relevant protocols. In this way, contract and protocols interact to create a potentially powerful tool for protecting traditional knowledge and ICIP. However, one

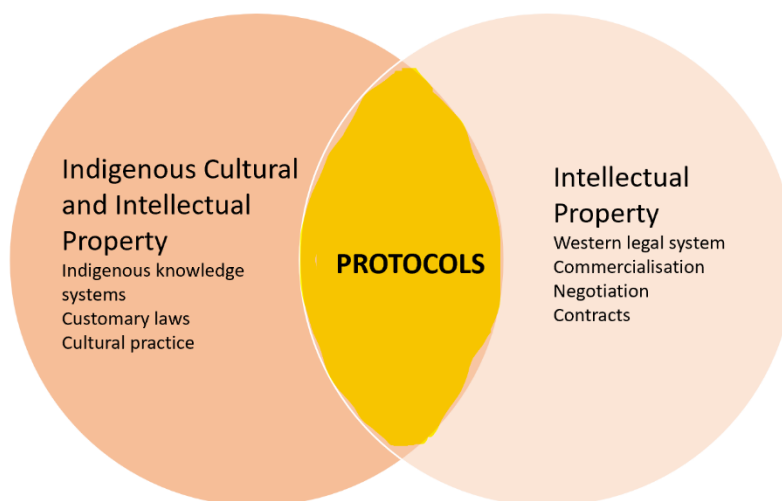
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<sup>1090</sup> Terri Janke and Company, *Protocols for Working with Indigenous Artists* (Australia Council for the Arts, 2<sup>nd</sup> ed, 2007) <<http://www.australiacouncil.gov.au/about/protocols-for-working-with-indigenous-artists/>>.

of the key issues with contracts is that only the parties to the contract are bound by its terms – meaning that parties are only protected on a case-by-case basis.

Whilst the parties are only bound to the contract, there is flexibility to cover issues that the law does not embrace. Licensing contracts can be a useful model. Danielle Conway, for example, espouses the opportunities for licensing the rights contained in Article 31 of the UNDRIP using contracts as a basis for transaction.<sup>1091</sup> Furthermore, Kathy Bowrey explores the Free and Open Software licensing model which has built a new framework of private law rights arising out of contractual obligations to provide resolution for Indigenous parties.<sup>1092</sup>

## Protocols assist negotiating the interface between ICIP and IP



**Fig 10. 3 The pivotal role of the protocol model in the Intercultural Field**

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<sup>1091</sup> Danielle M Conway, 'Promoting Indigenous Innovation, Enterprise, and Entrepreneurship through the Licensing of Article 31 Indigenous Assets and Resources' (2011) 64 *SMU Law Review* 1095.

<sup>1092</sup> Kathy Bowrey, 'Alternative Intellectual Property? Indigenous Protocols, Copyleft and New Juridifications of Customary Practices' (2006) 6 *Macquarie Law Journal* 65.

Indigenous people can use written agreements to enforce rights and to licence rights, alongside using IP, for example vesting IP in Aboriginal and Torres Strait Islander people, while using protocols to set the rules and conditions of use. The Arts Law Centre of Australia note that ‘a number of Indigenous organisations use a clause asserting rights to their cultural heritage material, called “an ICIP clause” in their funding agreements, project agreements and licences.’<sup>1093</sup> Furthermore, Indigenous community organisations and land councils are also entering into research agreements with universities that have included clauses that protect Indigenous interests, including cultural knowledge and IP.<sup>1094</sup> Film funding and production agreements have included ICIP clauses.<sup>1095</sup>

### 10.5.3 Make protocols enforceable

One way of making the protocols enforceable has been to make adherence to their conditions and principles a condition of government funding. For example, the Australia Council for the Arts’ Indigenous Artform Protocols<sup>1096</sup> and Screen Australia’s protocols<sup>1097</sup> are made conditional of funding projects. Applicants must provide details on their funding applications as to how they will implement the protocols within their project.

The problem here is that the contract is with the government funding agency and the arts production company or the filmmaker. If they do not respect the ICIP of the third-

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<sup>1093</sup> Artists in the Black, *Introduction to Intellectual Property* <<https://www.aitb.com.au/information-sheets/entry/solid-arts-introduction-to-intellectual-property>>.

<sup>1094</sup> Steve Hemming, Daryle Rigney and Shaun Berg, ‘Researching on Ngarrindjeri Ruwe/Ruwar: Methodologies for Positive Transformation’ (2010) 2 *Australian Aboriginal Studies* 92.

<sup>1095</sup> Terri Janke, *Pathways & Protocols: A Filmmaker’s Guide to Working with Indigenous People, Culture and Concepts* (Screen Australia, 2009d) 112.

<sup>1096</sup> Terri Janke and Company, *Protocols for Working with Indigenous Artists* (Australia Council for the Arts, 2007) <<http://www.australiacouncil.gov.au/about/protocols-for-working-with-indigenous-artists/>>. ‘Applicants working with Indigenous Australian artists, who are funded by the grant assessment panels of the Australia Council, are required to adhere to the Indigenous Cultural protocol guides published by the Council as a condition funding’.

<sup>1097</sup> Screen Australia, *Indigenous Content or Participations: Doing Business With Us* <<https://www.screenaustralia.gov.au/about-us/doing-business-with-us/indigenous-content>>.

‘Where there is Aboriginal and/or Torres Strait Islander community participation or Indigenous content involved in the project, written confirmation of the willingness of both the subject(s) and the community to be involved in the project is essential’.

party Indigenous community, the funding agency would be the ones to take action as party to the contract. This has not yet eventuated in order to see what would happen.

Enforceability is still a major issue however, especially where a funding recipient of government grants disregards the protocols, in areas where there is no government funding for projects, or where people simply do not know about the protocols.

The thesis chapters suggest that an enabling policy solution would be to develop a national standard for Indigenous knowledge protection and for the Australian Government to play a more active role in reinforcing the protocol model proposed in this thesis.<sup>1098</sup> A national standard protocol could be created by harmonising existing industry-standard protocols,<sup>1099</sup> or using the proposed protocol model discussed in this Conclusion to develop new national standards. This would include having regard to existing international protocol frameworks such as the WIPO Draft Articles on traditional knowledge and traditional cultural expression protection,<sup>1100</sup> the Business Reference Guide to the UNDRIP<sup>1101</sup> and the Bonn Guidelines.<sup>1102</sup> The principles that underpin protocols should cover the gaps in the law – namely, respect, consultation and consent, communal attribution, benefit sharing and continued maintenance.

National protocols should be visible and accessible. This could be through a central online hub or website; supporting protocols with educational material and workshops; and a centralised point of contact for questions and further information. As discussed in several of the thesis chapters and summarised below, a National Indigenous

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<sup>1098</sup> Terri Janke and Maiko Sentina, 'Indigenous Knowledge: Issues for Protection and Management' (Discussion Paper, IP Australia & Department of Industry, Innovation and Science, 2018) 17.

<sup>1099</sup> Such as the AIATSIS Guidelines for Ethical Research in Australian Indigenous Studies; National Health and Medical Research Council's Ethical Conduct in Research with Aboriginal and Torres Strait Islander Peoples and Communities: Guidelines for Researchers and Stakeholders; the Australia Council's Protocols for Working with Indigenous Artists; Screen Australia's Pathways & Protocols and the Desert Knowledge CRC Protocol for Aboriginal Knowledge and Intellectual Property; and the Kimberley Land Council Research Protocol.

<sup>1100</sup> World Intellectual Property Organization, Draft Provisions/Articles for the Protection of Traditional Knowledge and Traditional Cultural Expressions, and IP & Genetic Resources  
<[http://www.wipo.int/tk/en/igc/draft\\_provisions.html](http://www.wipo.int/tk/en/igc/draft_provisions.html)>.

<sup>1101</sup> United Nations Global Compact, A Business Reference Guide: United Nations Declaration on the Rights of Indigenous Peoples (2013).

<sup>1102</sup> Secretariat of the Convention on Biological Diversity, Bonn Guidelines on Access to Genetic Resources and Fair and Equitable Sharing of the Benefits Arising out of their Utilization (2002)  
<<https://www.cbd.int/doc/publications/cbd-bonn-gdls-en.pdf>>.

Cultural Authority (NICA) would be well placed to take on such a role. Incorporating protocols into government policies and making protocols a requirement across all government-funded initiatives are other ways the Australian Government could make protocols enforceable. For example, contracts in funding agreements should not seek to attain copyright in works that arise out of funding projects, but a licence only taken by the Government. All government-funded projects should ensure that the principles informing the protocol model being described here are followed. Where possible the copyright of project materials should vest in Indigenous people.

#### **10.5.4 Standardising research protocols and guidelines**

Already in Australia, protocols are increasingly being recognised as an effective way of protecting Indigenous knowledge. However as indicated in this thesis, much work needs to be done to make the model of ICIP protocols widely used and accepted. The model proposed in this thesis has advantages in systematising complex matters and promoting workability and monitoring of standards; issues that have been problematic in the past. The policy option advocated here is to develop a national standard for diverse sets of protocols for Indigenous knowledge protection.

A challenge in doing so is that this could disrupt the business of Indigenous and non-Indigenous stakeholders who are already operating under their own existing protocols. So, developing an applied national protocol model should involve engaging and consulting with Indigenous representatives.<sup>1103</sup> Protocols should empower Indigenous knowledge holders and support their capabilities to make decisions on use and management of their knowledge in a self-determining way.

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<sup>1103</sup> Terri Janke and Peter Dawson, 'New tracks: Indigenous knowledge and cultural expression and the Australian intellectual property system' (Submission to *Finding the Way: A Conversation with Aboriginal and Torres Strait Islander Peoples*, conducted by IP Australia and Office for the Arts, Terri Janke and Company, 31 May 2012) 24.



## 10.6 ICIP Governance infrastructure

To enable Indigenous peoples to manage their ICIP, the thesis analysis supports the establishment of NICA.<sup>1104</sup> As an Indigenous alliance organisation governed by Indigenous people, NICA has several potential benefits. It could provide a centralised point from which interactions concerning ICIP could be negotiated. NICA could be used where it is unclear who has custodianship of Indigenous cultural material or knowledge. It could also promote the accepted processes. NICA could promulgate a set of national protocols, monitor compliance and manage disputes. Businesses who use the NICA ICIP protocols could be authorised to use a NICA trade mark which, like the green labelling systems or the 100% wool mark, can be used to show that the ICIP standards are met. Arguably, the NICA system could increase opportunities for collaboration on terms that are acceptable and culturally informed.

A common challenge identified in this thesis is that of identifying the right Indigenous people with authority to speak in relation to a specific item of ICIP. If ICIP is communal, how can the user be certain that they are consulting with the right people in authority? Some community groups may share cultural items. For example, a songline, or dreaming track, running across country may connect similar stories, dances and artistic design, and be practiced by several neighbouring clans. This would make the process of securing consent and speaking to the right people difficult. The thesis considers this issue in regard to the role of NICA in depth in two papers: Paper 3 'Copyright, Connections and Culture: Is there a place in the Australian arts industry for a National Indigenous Cultural Authority?' (Chapter 5); and Paper 7 'Guarding ground: A vision for a national Indigenous cultural authority' (Chapter 9). These papers raise the question of whether there is a need for infrastructure to enable Indigenous communities with the capacity, skills and tools to licence their ICIP rights to third parties. I argue that NICA could facilitate the use of negotiated rights, contracts and protocols together with intellectual property tools such as a distinctive trade mark.

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<sup>1104</sup> Terri Janke, *Beyond Guarding Ground: A Vision for a National Indigenous Cultural Authority* (Terri Janke and Company, 2009a) <<http://www.terrijanke.com.au/beyond-guarding-ground>>.

## **10.7 NICA commercial consent and approval process**

The NICA protocols address identification of rights holders, free prior informed consent, negotiation, contract, and enforcement (see Fig. 10.4). Below is an example of how that can be done, including:

### (1) Information of use disclosed

The applicant is required to provide details and how the ICIP will be used:

- What type of material is being made use of?
- What is the project or proposed use?
- Have you spoken to people about your project?
- Will you alter and/or add to the ICIP material?
- What are the perceived benefits and risks of the project?

### (2) Identify rightsholders

NICA would work with Indigenous people to identify whether there are copyright owners, other clans or third parties who will need to be consulted. Consider what methods are appropriate to disseminate information to clan – e.g. via officer, newspaper, or on-line platform, notice to members of organisation, website notices.

### (3) Consent or no consent

Clearance through NICA for wide dissemination – consultation process with arts representatives, community representatives.

### (4) Terms and Conditions

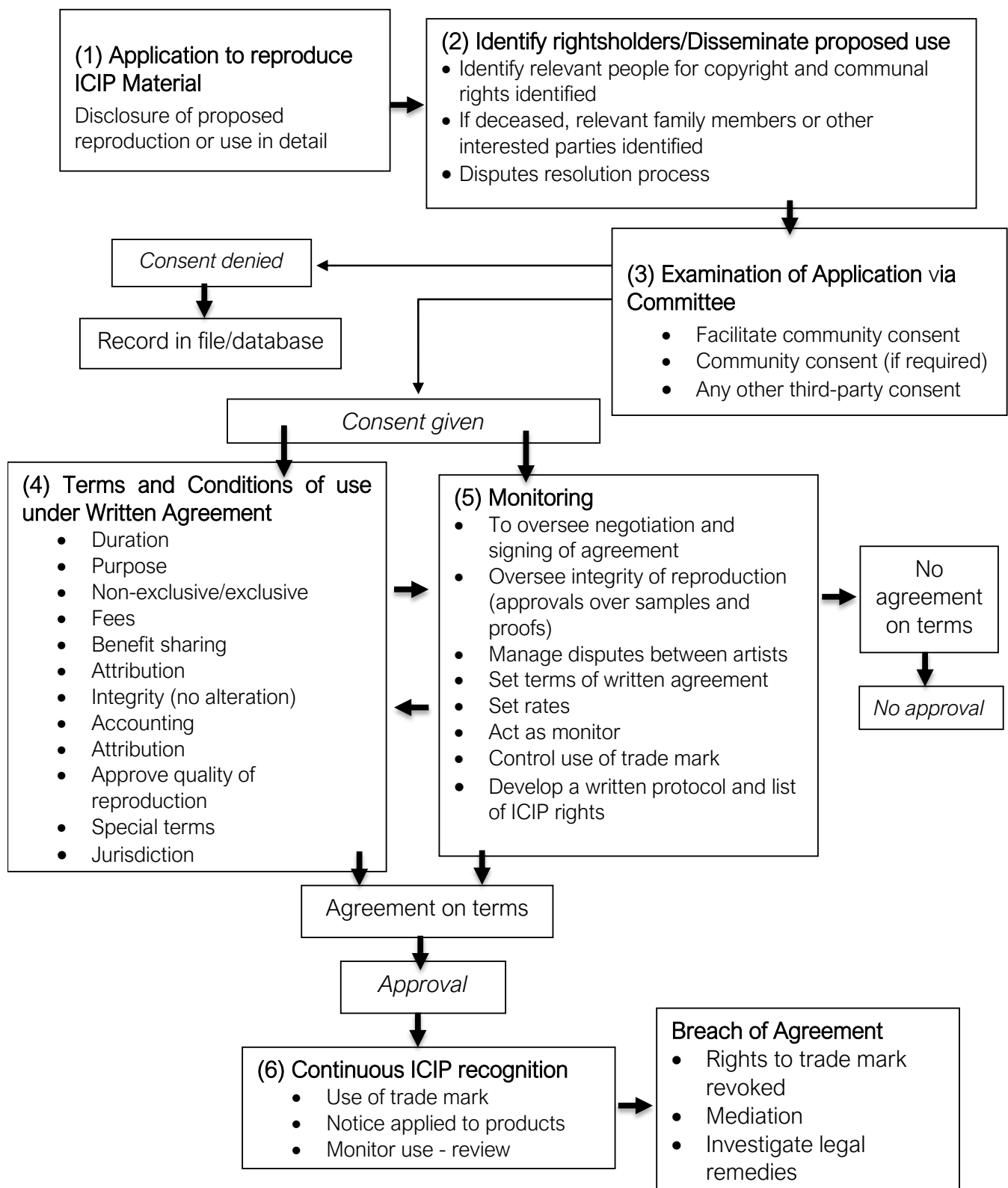
Once approved, the user must enter into a written agreement with the community for use of the ICIP.

### (5) Monitoring/Enforcement

NICA continues the process of monitoring use of the approved ICIP material.

### (6) Continuous ICIP Recognition

The trade mark is to be used with reproductions and approved uses of ICIP material. Notices also to be included.



**Fig 10. 4 NICA commercial consent and approval process**

### **10.7.1 How the NICA can assist Indigenous and non-Indigenous collaboration**

NICA has the potential to be important infrastructure for ensuring Indigenous people have management and control over their ICIP. There is a need for infrastructure to facilitate and monitor the protection of ICIP, and NICA could also support existing Indigenous bodies. In the following example of how NICA might assist Indigenous and non-Indigenous collaboration, the True Tracks Principles overlap and connect across the various stages of the project. It would work like this:

A non-Indigenous organisation wanting to use ICIP in a project would contact NICA for contacts for Indigenous communities to work with. They would then be directed to the local or regional organisation that represents the relevant traditional owners of the song, story, art, knowledge. For instance, if a computer tech company wanted to develop an interactive audio-visual experience of a cultural tourism site, the company would apply to NICA and disclose their proposal. NICA would then examine the application. By going to NICA, the company is recognising that Indigenous people own their ICIP. They could go to a book or search the internet for it and take that information without permission, but this act of going to NICA is the first step in the protocol – *respect*.

Through its rights access and management system, NICA could then advise the company on the cultural protocols to be followed and assist the company in identifying Indigenous people and communities with whom to collaborate. This step might include identifying Indigenous storytellers, artists, businesses and digital tech companies to ensure that the project is Indigenous led. There might also be a steering committee or advisory committee established to guide the project. This process upholds the *self-determination* Principle.

The next step is *consent and consultation*. This is the stage where the company prepares a consultation plan for all the relevant interested parties. The company will then consult with the relevant Indigenous rightsholders, who were identified by NICA, about how to engage and consult, and how to obtain consent to use ICIP. If there is any dispute about who is the rightful Indigenous group to work with, or if there are competing interests and overlapping knowledge, there could be an option to go to

mediation to resolve this. In this case, NICA would provide Indigenous mediation services to negotiate rights.

If consent is obtained, the company must enter into a written agreement with the community for use of the ICIP to go through with the project. NICA supports this prior and informed consent process by facilitating the use of legal contracts that are developed between the parties to provide enforceable rights. These are developed through NICA's standard terms and conditions and involve written agreements surrounding use such as duration, purpose, exclusivity, fees, jurisdiction and special terms. In this example, terms and conditions would be written around how Indigenous people are involved, and how information about the cultural site is recorded and translated into audio-visual content. NICA oversees the process negotiation; however, decisions are made by the identified Indigenous rightsholder group. The agreement is signed off between the Indigenous rightsholder group and the company. NICA acts as a facilitator to set a fair state of play by setting best practice.

In recognising that Indigenous people are the primary guardians and interpreters of their knowledge and cultural heritage, NICA promotes that the Indigenous people must have a key role in the interpretation of the ICIP that is involved in the project. This means that the use of the material and how it is shown to a viewer is decided upon in close collaboration with the Indigenous owners. The contracts that have been developed reflect this. This Principle – *interpretation* – builds on previous ones as it reflects respect and self-determination, ensuring the content is delivered from an Indigenous perspective to empower the community.

This ties into the next stage that involves maintaining the *cultural integrity* of the ICIP to respect how it is interconnected with relationships between people, communities, cultural practices and country. Here, integrity of representation is key – how the cultural site is represented in the context of tourism and through audio-visual technologies. Under this Principle, the Indigenous rightsholders must be empowered to steer this as they are the foremost source of expertise that ensures the ICIP is accessed and used appropriated. This is especially relevant for a site or content that is yet to be authorised by the rightsholder, and this leads on to the principle of *secrecy and privacy*. The process thus far ensures the company is informed about whether the project may breach customary laws that involve secret and/or sacred knowledge as

there may be restrictions around access, use and transmission. This is considered and dealt with through the written agreement.

Further building on respect and integrity, *attribution* is given to the custodians of the ICIP – the relevant Indigenous groups and source communities are acknowledged. This ensures viewers of the content are aware of the cultural significance of the source and importantly allow the information to be traced for future use and interpretation. Along with attribution, NICA monitors *benefit sharing*, including the payment of royalties. NICA could also ensure that re-consultation occurs, if there is use of the ICIP outside of what was agreed in the agreement.

It would be the responsibility of the parties to meet the agreed content of the principle of *maintaining Indigenous cultures*. This enables long-term relationships which foster benefits for the community; for example, the technology company could give copies of film footage to the Indigenous group to put in their own digital archive.

After the agreement is implemented, NICA would then authorise the company to use the NICA trade mark to promote its success in complying with the process. Consumers are then aware that the right ICIP consents were obtained and that Indigenous people are benefitting from this use of the ICIP. This step acknowledges the Principle of *recognition and protection* using trademark laws, notices and agreements to bring effect to ICP rights. If at any point that the company does not meet its contractual obligations, NICA can revoke the trade mark license, and may assist the Indigenous party take action for breach of contract.

This hypothetical shows how the protocols could put into a process to work on a national level. However, it is also noted that it is flexible enough for application at a local and regional level. Furthermore, the process could be implemented on a project basis, or even by an organisation.

## **10.8 Conclusion**

This thesis by compilation has addressed the developments and scholarship in ICIP and discussed the gaps and issues by examining a series of case studies and examples. The thesis considered solutions to the gap in the law in protecting ICIP from an Indigenous standpoint, drawing on the strong Indigenous scholarship of Smith,

Nakata, Rigney and Martin in respect of Indigenous knowledge. Knowledge production is the way that ideas circulate. ICIP Protocols are ways that the IP legal framework can be modified to deliver a different form of governance through principles which enables control to shift from non-Indigenous users to Indigenous creators. The power of ICIP has been that its Indigenous people's modifications of IP laws, it has enabled artists and people to push the limits of the law.

Each of the papers is a response to IP frameworks through a western lens. The thesis identifies the limits of the IP law and shows how an Indigenous response through protocols has developed to deal with the demands and interactions, and to enable Indigenous people to maintain themselves as distinct people, and to control their Indigenous Cultural and Intellectual Property.

Indigenous Cultural and Intellectual Property has developed as a distinct space in IP law within the dominant legal system. Through advocacy, case law, certification marks and protocols, Indigenous people have pushed the boundaries of the law to address the gaps. This has occurred because IP law could not alone do the work that it was never designed to do. As identified by Jane Anderson's work<sup>1105</sup>, ICIP is an Indigenous space that has developed around the law to deliver culturally appropriate outcomes. The ICIP Protocols discussed here enable understanding and the working through of the different values. The ICIP Principles Model, like the way that the theorists in Indigenous knowledge have developed their Indigenist methodologies, is an Indigenous approach which highlights Indigenous values. Protocols based on the ICIP Principles have become systemised, a modality in which innovation with Indigenous knowledge and cultural expression can take place.

The thesis identifies a set of True Tracks ICIP Principles that can form part of a new model for informing intercultural interactions and negotiations about ICIP. The model can be adapted to many situations, different projects, industries and subject matter. The model sets the parameters for working with Indigenous peoples and for dealing

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<sup>1105</sup> Anderson, Jane, *The Production of Indigenous Knowledge in Intellectual Property Law* (PhD Thesis, University of New South Wales, 2003); Anderson, Jane, *Law, Knowledge, Culture: The Production of Indigenous Knowledge in Intellectual Property Law* (Edward Elgar Publishing, 2009)

with Indigenous cultural material based on standards including integrity, attribution and respecting cultural practices and benefit sharing.

The thesis highlights that the control of ICIP and its use for innovation have the potential to make a great impact on the cultural and economic well-being of Indigenous people, and leading Indigenous Australians towards self-determination. Through authorised and negotiated use, Indigenous people can licence their non-sacred ICIP assets to approved users, where appropriate. In this way, they can control uses according to their cultural protocols and economic interests. ICIP protocols not only address the gaps in the law and support Indigenous rights to self-representation and interpretation but are a powerful means of establishing normative market behaviour that can have a powerful impact on regulating how Indigenous knowledge and culture is protected. They allow for Indigenous-led processes of consultation, consent and protection to prevent cultural appropriation and the distortion of Indigenous knowledge. They allow individuals and organisations to rise above the conventional power structures that have previously governed engagement with non-European cultures and epistemologies.

Further, protocols start with ethical principles but can be legally enforceable if their compliance is made a condition of a contract. For example, if protocols are a condition of a funding agreement or access conditions, then they would be legally enforceable against the parties. Indigenous people have consistently called on the Australian Government to enact new laws to protect their ICIP. Yet, successive national governments have not established any laws for the recognition of ICIP rights despite participation in international forums<sup>1106</sup> and the recommendations of numerous enquiries and reports.<sup>1107</sup> In the absence of specific enabling legislation, Indigenous people are left to assert their rights using a wide range of legal strategies and non-legal measures. Protocols have especially been useful in enabling Indigenous people

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<sup>1106</sup> UNESCO and WIPOIGC and WTO Forums.

<sup>1107</sup> See the Standing Committee on Environment, Communications, Information Technology and the Arts, *Inquiry into Australia's Indigenous visual arts and craft sector, Indigenous Art – Securing the Future* (Commonwealth of Australia, June 2007) and; *Stopping the Rip-offs: Intellectual Property Protection for Aboriginal and Torres Strait Islander Peoples* (Issue Paper submission for the inquiry into the presence of inauthentic Indigenous style art and craft products, 1994).



to provide a culturally informed and credible solution.<sup>1108</sup> Moreover, when used with agreements, the protocols become enforceable in contract. Over time, these protocols form a body of practice evidence for future legal change.

In using the ICIP protocol model, it is important to be aware of its limitations and address any issues where possible. Protocols rely on those who work with or deal with Indigenous cultural subject matter, to be willing to comply with them. However, even where ICIP protocols are enforceable by contract, compliance can only be enforced by parties to the contract. This may leave other parties like traditional custodian groups, unable to take action. While it is encouraging to see several ICIP protocols developing in different industries, it is important that they be guided by a framework of standard principles and also able to account for practical differences between types of ICIP and their uses. This can cause complexity for the users of ICIP and Indigenous communities. To assist with this complexity, the thesis suggests the establishment of infrastructure to assist Indigenous groups assert their ICIP rights, through a National Indigenous Cultural Authority.

Collaboration, dialogue and deeper engagement between Indigenous and non-Indigenous knowledge is what we need to bring us -Indigenous and non-Indigenous people closer to solving some of the world's most pressing issues. We could work together to create artistic creations in fashion and design. We could collaborate to identify plants to heal disease and provide nutrition. The future generations of Australia can benefit from working together using the ICIP True Tracks Principles, to make a better world for future generations to come.

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<sup>1108</sup> Protocols such as the Australia Council for the Arts and Screen Australia. See Kathy Bowrey, 'Alternative Intellectual Property? Indigenous Protocols, Copyleft and New Juridifications of Customary Practices' (2006) 6 *Macquarie Law Journal* 65.

## Appendix A: ICIP rights and recognition gaps

Table A: 1: Gaps in the laws for protection ICIP

Legal field	Overview of Gaps	Related Issues
<b>Copyright laws</b>	<p>The <i>Copyright Act 1968</i> protects artistic works that are original, in material form, and produced by known artists, for 70 years after their death.</p> <p>Authorship focuses on the individual creator; communal ownership is not recognised.</p> <p>Ephemeral, oral and performance based ICIP is not protected. Styles and themes are not protected.</p> <p>Authorship and copyright ownership is given to the recorders of culture and not the informants. Copyright in recordings, films and research on TK and traditional cultural expression are not owned by Indigenous people.</p> <p>There are no communal moral rights to protect sacred materials deemed in the public domain (e.g. rock art images). Significant ICIP materials can be reproduced without the control of Indigenous clan groups. This does not work for ICIP recorded in copyright materials because Indigenous people want to control the knowledge beyond the 70-year period.</p>	<p>Performers rights exist but consent can be implied by conduct – once consent given, performer has no control over recording unless in writing. There are no proper records of signed consents.</p> <p>The Carpets Case<sup>1109</sup> recognised that Indigenous artists have copyright in works that follow pre-existing clan themes and design if the artist imparts their own skill, labour and effort.</p> <p>The Bulun Bulun<sup>1110</sup> equity recognises that copyright owners may have fiduciary obligations to use their copyright works in accordance with customary law obligations. However, this principle is not widely known.</p> <p>There is limited access to legal advice and legal advocacy.</p> <p>International infringements must be taken under laws of country where infringement occurs, and often the high costs and practicalities prohibit Indigenous people from taking necessary actions.</p>
<b>Designs laws</b>	<p>The <i>Designs Act 2003</i> protects registered designs, focusing on industrial designs and commercial production.</p>	<p>Registered industrial design rights can provide limited commercial rights for independent creative designs that may draw on cultural imagery.</p>

<sup>1109</sup> Milpurrurru v Indofurn (1995) 30 IPR 209.

<sup>1110</sup> Bulun Bulun v R & T Textiles Pty Ltd (1998) FCA 1082.

	<p>To be registrable, the design must be 'new' or 'original' at the priority date, and it must be applied to an article.</p> <p>Design laws do not protect Indigenous cultural and clan owned designs and insignia in the way that Indigenous people seek to have them protected.</p>	<p>Design copyright overlap is complex.</p> <p>'New' requirement may not fit with recurring clan icons.</p> <p>Registration incurs costs and requires legal services, and protection only lasts for 5–10 years.</p> <p>With some rare exceptions, Indigenous people do not use or have knowledge of the designs registration system.</p>
<b>Trade mark laws</b>	<p>Indigenous people can use the <i>Trade Marks Act 1995</i> to establish brands used in the course of trade.</p> <p>The Trade mark examination process has no consent provision for trade mark applications that contain Indigenous words, images and other cultural content.</p> <p>Sacred words, images, and respected Indigenous peoples' or clan group names are thus not protected from registration.</p> <p>Protection limited to the registered mark and substantially similar marks.</p>	<p>The use of certification marks and collective marks are a good opportunity; however, these are costly for Indigenous groups and there is a lack of awareness about them.</p> <p>Indigenous people can oppose trade mark registrations that are cultural words, logos and symbols of significance.</p> <p>There is no Indigenous advisory committee to review each application, so these applications containing Indigenous content are examined without cultural guidance.</p>
<b>Patent laws</b>	<p>The <i>Patents Act 1990</i> does not protect TK as the inventorship element is not met by Indigenous TK holder if it is old knowledge or in the public domain.</p> <p>To fulfil the inventive step, the patent application must disclose the information in written specification and this may be counter to customary laws relating to secrecy of knowledge.</p> <p>Patents involving Indigenous Knowledge and resources have been registered as there are no Indigenous Knowledge disclosure provisions during the examination process.</p> <p>There is no requirement for benefit sharing.</p> <p>No correlation with environment laws on ABS.</p>	<p>'Inventorship' is often given to scientists and not Indigenous groups or knowledge holders.</p> <p>The protection of patents is for a limited time of 20 years and then the invention is publicly available.</p> <p>Lack of Indigenous peoples' awareness of the patent opposition processes.</p> <p>International patents of Indigenous Knowledge and resources occur because Indigenous people do not know about the patent applications and are not able to meet the costs of opposing patent applications.</p>

		An international debated solution is to require applicants to disclose if TK was involved in the patent invention, however, not yet considered in Australia.
<b>PBR laws</b>	<p>The <i>Plant Breeder's Rights Act 1994</i> protects plant breeders to encourage plant breeding and innovation. This creates a large pool of new plant varieties.</p> <p>Indigenous people's horticulture is not recognised</p> <p>Protection of PBR for limited time of 20–25 years.</p>	Indigenous people are not aware of the PBR systems and opposition processes, increasing the chances of people claiming PBR over plants related to Indigenous Knowledge and that have been nurtured over many years by Indigenous people.
<b>Confidential information</b>	<p>Confidential information protects confidential information that is not generic or publicly known from being disclosed, if confidentiality was known to disclosure, and disclosure causes detriment.</p> <p>To use confidential information the ICIP must not be public, and must be confidential, however, a lot of ICIP is published by researchers.</p>	In <i>Foster v Mountford</i> <sup>1111</sup> , Aboriginal men stopped the publication of their sacred stories using confidential information law.
<b>Environmental laws (Access and benefit sharing)</b>	<p>Genetic resources are controlled by states.</p> <p>Genetic resources and Indigenous Knowledge can be used without free prior informed consent or ABS.</p> <p>Genetic resources taken out of country from Indigenous lands (e.g. Kakadu Plum).</p> <p>The access and benefit sharing regime (Nagoya Protocol) is not implemented throughout Australia.</p>	<p>Only the Commonwealth, NT and Qld have ABS systems, however, there are inconsistencies in the law and a lack of enforcement.</p> <p>There is poor administration by government departments in Cth, NT and Qld, and no coordination with Commonwealth border services.</p> <p>Indigenous people do not know about the ABS laws. Non-Indigenous companies either are unaware of the laws or circumvent them.</p>
<b>Consumer laws</b>	The <i>Competition and Consumer Act 2010</i> (Cth) makes it an offence to engage in misleading and deceptive	When international appropriation occurs, actions need to be taken in other

<sup>1111</sup> *Foster v Mountford & Rigby Limited* (1976) 14 ALR 71.

	<p>marketing, providing some scope to restrict the sale and marketing of Indigenous works and services that are not authentic.</p> <p>Those who falsely market products as 'Aboriginal-made' can be prosecuted, however, there are limitations when the misleading or deceptive test is not met, and labels of origin such as 'Made in China' are attached.</p> <p>Action can be taken by complainants and the ACCC, which is useful as Indigenous groups may lack resources.</p>	<p>countries under the laws of the country where the appropriation occurs.</p> <p>In <i>ACCC v Birubi</i><sup>1112</sup>, the Court found that fake Aboriginal products labelled handmade and Made in Australia were misleading and deceptive.</p> <p>Getting orders from court can take years.</p> <p>Enforcement outside Australia is limited.</p>
<b>Heritage laws</b>	<p>Heritage laws focus on physical places and objects, sacred and secret objects and items of Indigenous cultural significance.</p> <p>Indigenous intangible cultural heritage is not protected.</p> <p>The <i>Victorian Aboriginal Heritage Act 2006</i> was amended in 2018 to include a registration system to protect intangible cultural heritage against commercialisation, however, it only applies to intangible cultural heritage that is not widely known to the public.</p>	<p>Protects actual objects and sites and does not enable Indigenous groups to stop people copying.</p> <p>Heritage laws empower the Ministers to act, although in some jurisdictions have Indigenous Advisory Committees.</p>
<b>Contract laws</b>	<p>Without the backing of law, the recognition of cultural rights and consulting community can be overlooked in commercial agreements.</p> <p>Using contracts to enforce ICIP rights has potential, however they only bind parties to the agreement. People who use cultural content without permission cannot be stopped by Indigenous people who are not copyright owners.</p>	<p>Contracts can address community consultation; clan attribution and consent for future uses; and benefit sharing.</p> <p>There is a lack of Indigenous legal representation to draft and negotiate contracts; project manage; and to enforce rights.</p> <p>Unequal bargaining position leads to unfair positions.</p>

<sup>1112</sup> *Australian Competition Consumer Commission v Birubi Art Pty Ltd* [2018] FCA 1595.

**Table A: 2: Gaps in Customary law and ICIP**

Non-Legal		
<b>Customary laws</b>	<p>Indigenous customary laws for controlling knowledge and protecting cultural beliefs are not comprehensively recognised or understood.</p> <p>Customary laws about Indigenous knowledge ownership are not recognised under western law.</p>	<p>Customary laws and practices relating to who can provide cultural authority may differ from group to group, and different communities have different cultural authority infrastructure, which is tested when dealing with new contexts of ICIP use.</p> <p>No national customary law framework and no national Indigenous decision making body.</p>
<b>ICIP Protocols</b>	<p>ICIP protocols are generally not enforceable at law. They are not widely known in certain sectors; or across the entirety of an organisation that has implemented them; and there is a lack of consistency between disciplines and industries.</p> <p>There are gaps in understanding the nature of ICIP, including the collective and individual aspects of ICIP.</p> <p>There are gaps in understanding the exact points where ICIP and western law intersect.</p>	<p>A perception that protocols are too time intensive and difficult and this can act as a barrier to compliance. There is a lack of research.</p> <p>Public ignorance about cultural appropriation. The principles of free, prior informed consent are not widely known.</p> <p>Those seeking access to ICIP are not clear on processes of consultation and consent.</p> <p>Identifying people in authority can be complex, especially in communities where there is a lack of cultural organisations and infrastructure.</p> <p>Lack of agreement between Indigenous people about what can speak for culture.</p>

## Appendix B: Curriculum Vitae, Terri Janke

<p><i>Current Professional Status</i></p>	<p><i>Solicitor Director</i></p> <p><i>Terri Janke and Company Pty Ltd</i></p> <p><i>Terri Janke is an international authority on Indigenous Cultural and Intellectual Property (ICIP) and the Solicitor Director of Terri Janke and Company, an Indigenous owned law firm based in Sydney, Australia. Founded in 2000 by Janke, TJC specialises in Commercial Law, Intellectual Property and ICIP, working nationally and internationally with Indigenous organisations, entrepreneurs, corporations and government organisations.</i></p> <p><i>Key projects:</i></p> <p><i>Museums Galleries Australia, Indigenous Roadmap project (2017).</i></p> <p><i>Museum of Applied Arts and Sciences, MAAS Australian Indigenous Cultural and Intellectual Property Protocol (2016).</i></p> <p><i>Screen Australia, Pathways &amp; Protocols (2009).</i></p> <p><i>Australia Council for the Arts, Protocols for Working with Indigenous Artists (2003 and 2007).</i></p> <p><i>Bangarra Dance Theatre, drafting ICIP protocols and contracts for creatives to reflect ICIP rights.</i></p> <p><i>Musée du quai Branly, Australian Indigenous Art Commission at the. Acted for the Australia Council in negotiating and drafting agreements and framework of rights for eight Aboriginal artists whose works were incorporated into the architecture of the Museum building (2005).</i></p>
<p><i>Qualifications</i></p>	<p>1995</p> <p>Arts Law Degree</p>

	<p>University of New South Wales College of Law Admitted to practice in the Supreme Court of NSW and High Court of Australia Practicing certificate of the Law Society of NSW 2009 Graduate of the Australian Institute of Company Directors Trained Mediator, LEADR</p>
<i>Professional Employment</i>	<p>1996 – 2000 Solicitor Michael Frankel and Company</p> <p>Advised a range of clients in arts, film and business. In 1998, completed ‘Our Culture: Our Future – Report on Australian Indigenous Cultural and Intellectual Property Rights’.</p>
	<p>1994 - 1995 Copyright Information Officer National Indigenous Arts Advocacy Association</p> <p>Assisted legal team in the leading case <i>Milpurruru v Indofurn</i>. Wrote a submission for the 1994 inquiry into the presence of inauthentic Indigenous style art and craft products, <i>Stopping the Rip-offs: Intellectual Property Protection for Aboriginal and Torres Strait Islander Peoples</i>.</p>
	<p>1992 - 1994 Legal Clerk/Paralegal Phillips Fox (now DLA Piper)</p> <p>Assisted legal team in the intellectual property, commercial litigation and private practice departments.</p>
	<p>1989 – 1992 Secretary Australia Council for the Arts</p>



	<p>Administrator and Program Officer Aboriginal and Torres Strait Islander Arts Board, Australia Council</p>
<i>Governance</i>	<p><u>Current Board Positions</u></p> <p>Council Member State Library of New South Wales</p> <p>Indigenous Advisory Committee Telstra</p> <p>Indigenous Sub-Committee Member National Film and Sound Archive</p> <p><u>Previous Board Positions</u></p> <p>Deputy Chair, Member of Governance Committee and Audit &amp; Risk Committee, National Centre of Indigenous Excellence</p> <p>Council member, Australian Institute of Aboriginal and Torres Strait Islander Studies</p> <p>Director, Jawun Indigenous Corporate Partnerships</p> <p>Chair, National Indigenous Television</p> <p>President (2000-2004) Ngalaya Indigenous Lawyers Association</p> <p>Director, Tourism Australia</p> <p>Director, Collections Council of Australia</p> <p>Director, Bangarra Dance Theatre</p> <p>Indigenous Advisory Group, National Australia Bank</p>
<i>Training</i>	<p>Graduate Diploma Australian Institute of Company Directors</p> <p>Trained Mediator LEADR Dispute Resolvers</p> <p>Native Title Business Masterclass (2015)</p>

	<p>Melbourne Business School</p> <p>Cinergy Conflict Coaching</p>
<i>Panels</i>	<p>Attorney-General's Department Legal Services Multi-Use List (LSMUL) appointed May 2013.</p> <p>Legal Panel, NSW Aboriginal Land Council, appointed 2015.</p> <p>Panel Business Support Services, Torres Strait Regional Authority.</p>
<i>Professional Associations</i>	<p>Supply Nation (Registered Supplier)</p> <p>AIATSIS</p> <p>Law Society of New South Wales</p> <p>Copyright Society of Australia</p> <p>LEADR Dispute Resolvers</p> <p>NSW Indigenous Chamber of Commerce</p>
<i>Awards</i>	<p>2018</p> <p>Finalist</p> <p>NSW Regional Business Awards, City of Sydney</p> <p>2017</p> <p>Finalist</p> <p>Indigenous Businesswoman of the Year, Supply Nation,</p> <p>2015</p> <p>Finalist</p> <p>NSW Telstra Business Women's Awards (Entrepreneur category)</p> <p>2015</p> <p>Finalist</p> <p>NSW Women Lawyer of the Year</p> <p>2015</p>

Finalist

Ethnic Business Awards (Indigenous in Business category)

2014

Special Recognition Award

Supply Nation

2013

Westpac AFR Woman of Influence

(Business Entrepreneurs category)

2012

Commonwealth Attorney-General's National Indigenous Legal Professional of the Year

2011

National NAIDOC Person of the Year

2007

Aboriginal Justice Award (Highly Commended)

Law and Justice Foundation of NSW Award

2005

NSW Women's Honour Roll 2005

2001

Emerging Indigenous Business Award

NSW Government

## Papers, Reports and Protocols

2018	<p>Janke, Terri and Maiko Sentina, 'Indigenous Knowledge: Issues for protection and management' (Discussion Paper, IP Australia &amp; Department of Industry, Innovation and Science, 2018)</p> <p>Janke, Terri and Maiko Sentina, <i>Indigenous Joint Ventures Information Guide</i> (Indigenous Business Australia, 6 April 2018)</p> <p>Janke, Terri, 'True Tracks: Indigenous Cultural and intellectual Property Protocols' (Paper presented at the CSIRO and Atlas of Living Australia seminar, Indigenous Knowledge and Digital Infrastructure Futures, AIATSIS, 27 March 2018) &lt;<a href="https://www.ala.org.au/wp-content/uploads/2018/05/Terri-Janke-ICIP-Presentation-27March2018.pdf">https://www.ala.org.au/wp-content/uploads/2018/05/Terri-Janke-ICIP-Presentation-27March2018.pdf</a>&gt;</p>
2017	<p><i>Terri Janke: Cultural Crusader</i>, SBS, Living Black, Season 2017, Episode 4 &lt;<a href="https://www.sbs.com.au/nitv/family/living-black/article/2017/03/14/leader-cultural-crusader-terri-janke-intellectual-property">https://www.sbs.com.au/nitv/family/living-black/article/2017/03/14/leader-cultural-crusader-terri-janke-intellectual-property</a>&gt;</p> <p>Janke, Terri, <i>Mabo: The Shining Star</i>, 3<sup>rd</sup> MAAS Mabo Day Address, Sydney Observatory, 3 June 2017</p> <p>Janke, Terri, 'Key Policy Issues on Intellectual Property and Traditional Cultural Expressions' (Paper presented at the Seminar on Intellectual Property and Traditional Cultural Expressions, WIPO, Geneva, June 8 – 9 2017)</p> <p>Submission to the Parliamentary Inquiry – Proliferation of Inauthentic Aboriginal and Torres Strait Islander 'Style' Art (Terri Janke and Company, 2017)</p>
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2013	<p>Terri Janke and Company, <i>Law Way: Indigenous Business and the Law</i> (2013).</p> <p>Lecture Block, 'Indigenous arts, protocols, policy and the Law, September 2013, Wilin Centre for Indigenous Arts and Cultural Development, University of Melbourne.</p> <p>Guest Lecture, 'Indigenous cultural and intellectual property and the call for a National Indigenous Cultural Authority', UNSW Nura Gili, Aboriginal Social Policy Development, 19 October 2013</p> <p>Nura Gili Mabo Lecture, 'The Missing Message of Mabo: Indigenous Cultural and Intellectual Property Rights', UNSW, 3 June 2013</p>
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2006	<p><i>Australian Indigenous Art Commission</i>, Musée du quai Branly, I acted for the artists rights, as negotiated by the Australia Council for the Arts</p> <p>Janke, Terri, 'Safeguarding Indigenous materials' (Paper presented at Aboriginal and Torres Strait Islander Librarians and Research Network Conference, Jumbunna House of Learning, University of Technology, 2006) &lt;<a href="http://atsilirn.aiatsis.gov.au/conferences/conf06/papers/Terri%20Janke%20Final.pdf">http://atsilirn.aiatsis.gov.au/conferences/conf06/papers/Terri%20Janke%20Final.pdf</a>&gt;</p> <p>Janke, Terri and Robynne Quiggin, 'Indigenous Cultural and Intellectual Property: The Main Issues for the Indigenous Arts Industry in 2006' (Discussion Paper prepared for the Aboriginal and Torres Strait Islander Arts Board, Australia Council for the Arts, 10 May 2006)</p> <p>Janke, T., and R. Quiggin, 'Indigenous Cultural and Intellectual Property and Customary Law' in Law Reform Commission of Western Australia (ed), <i>Aboriginal Customary Laws: Background Papers</i> (January 2006) 451</p> <p>Janke, Terri, 'What is Indigenous cultural and intellectual property (ICIP)?' (Paper presented at Batchelor Institute of Indigenous Tertiary Education, 25 October 2006)</p> <p>Janke, Terri and Nancia Guivarra, 'Listen, Learn and Respect: Indigenous cultural protocols and radio' (Australian Film, Television and Radio School, Terri Janke and Company, 2006)</p>
2005	<p>ICIP Workshop in Coffs Harbour, commissioned by Department of Aboriginal Affairs NSW, 21 – 22 February 2002.</p> <p>Present on Writing and Indigenous Protocols at Sydney Writers Festival, May 2005.</p>
2004	<p>Commissioned by Arts Tasmania to conduct workshops towards the development of Tasmanian Aboriginal Cultural Protocols – the resulting publication included the Australia Council protocols framework:</p> <p>Everett, Jim, <i>Respecting Cultures: working with the Tasmanian Aboriginal Community and Aboriginal Artists</i> (Arts Tasmania, 2004)</p> <p>&lt;<a href="https://www.arts.tas.gov.au/_data/assets/pdf_file/0017/91232/Respecting_Cultures_October_2009_Revised_2014.pdf">https://www.arts.tas.gov.au/_data/assets/pdf_file/0017/91232/Respecting_Cultures_October_2009_Revised_2014.pdf</a>&gt;</p>

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2000	<p>Janke, Terri, 'Addressing intellectual and cultural property' (Paper presented at National Indigenous Tourism Forum: Tourism: The Indigenous Opportunity, Sydney, 3–4 June 2000) 96</p> <p>Consultations for Case Studies for the World Intellectual Property Organisation which led to the publication <i>Minding Cultures</i>.</p>
1999	<p>Attended and presented at Symposium on the Legal Protection of the Expressions of the Pacific Indigenous Cultures, Noumea, New Caledonia, 15 - 19 February 1999</p>
1998	<p>Janke, Terri 'Our Culture: Our Future – Report on Australian Indigenous Cultural and Intellectual Property Rights' (Report commissioned by the Australian Institute of Aboriginal and Torres Strait Islander Studies, Michael Frankel &amp; Company, 1998)</p>



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2018	<p>Janke, Terri, 'Protecting Indigenous Cultural Expressions in Australia and New Zealand: Two Decades After the <i>Mataatua Declaration</i> and <i>Our Culture, Our Future</i>' (2018) 114 <i>Intellectual Property Forum, Journal of The Intellectual Property Society of Australia and New Zealand</i>, 21–30</p> <p>*Janke, Terri, 'From smokebush to spinifex: Towards recognition of Indigenous knowledge in the commercialisation of plants' (2018) 1 <i>International Journal of Rural Law and Policy</i> 1-27</p> <p>Janke, Terri, 'The streets of my youth' in Anita Heiss (ed), <i>Growing up Aboriginal in Australia</i> (Black Inc., 2018)</p>
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1995	<p>Janke, Terri, 'Law and Language' (1995/1996) 177 <i>Australian Book Review</i> 24</p> <p>Janke, Terri and Nathan Tyson, 'The carpets case: Aboriginal culture acknowledged in landmark decision' (1995) 22 <i>Periphery</i> 4</p> <p>Janke, Terri, 'The carpets case' (1995) 20(1) <i>Alternative Law Journal</i> 36</p>

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