



# Indigenous Knowledge: Issues for protection and management

Discussion Paper



Terri Janke and Company  
Commissioned by IP Australia & the Department of Industry,  
Innovation and Science



# Indigenous Knowledge: Issues for protection and management

## Discussion Paper

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This discussion paper is complemented by two supplementary papers:

***Supplementary Paper 1: Legal protection of Indigenous Knowledge in Australia,***

Written by: Maiko Sentina, Elizabeth Mason and Terri Janke, Terri Janke and Company

***Supplementary Paper 2: International Laws and Developments relating to Indigenous Knowledge in Australia***

Written by: Maiko Sentina, Elizabeth Mason, Terri Janke and David Wenitong, Terri Janke and Company.



## Indigenous Knowledge: Issues for protection and management Discussion Paper

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Supplementary papers:

1. Maiko Sentina, Elizabeth Mason and Terri Janke, Legal Protection of Indigenous Knowledge in Australia.
2. Maiko Sentina, Elizabeth Mason, Terri Janke and David Wenitong.

Commissioned by:

IP Australia and the Department of Industry, Innovation and Science

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Citation: Terri Janke and Maiko Sentina, *Indigenous Knowledge: Issues for Protection and Management*, IP Australia, Commonwealth of Australia, 2018

Cover art: Terri Janke, *Coming together to protect Indigenous Knowledge*, 2018. ©Terri Janke, 2018.

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### **Acknowledgements:**

Terri Janke and Company would like to acknowledge the input of the Steering Committee chaired by Brendan Bourke of IP Australia; and special thanks to Will Nixon, IP Australia in guiding the drafting of the document. The feedback from the stakeholder roundtable held in July 2017 is also acknowledged in helping to shape the content on the discussion paper.

### **WARNING**

The document contains names of deceased persons of Aboriginal and Torres Strait Islander. It also contains some language that might be considered offensive.

### **Important legal notice**

The laws and policies cited in this book are current as at August 2017. They are generally discussed for the purposes of providing this report. No person should rely on the contents of this report for a specific legal matter but should obtain professional legal advice from a qualified legal practitioner.





## Executive Summary

This Discussion Paper presents the issues faced in Australia for the protection and management of Indigenous Knowledge.

Problems first arise in understanding the nature of Indigenous Knowledge. Whilst many definitions of Indigenous Knowledge are offered in both international and Australian laws and literature, little is known about its composition, characteristics and its inextricable links to culture. There is also limited data and understanding about the economic value of Indigenous Knowledge. Yet, it is so widely being used commercially without the consent of Indigenous people and without benefits being shared with the community.

A recurring feature raised in this Discussion Paper is the fundamental principle of 'free prior and informed consent'. Free prior and informed consent confers on Indigenous people the right to participate in decisions that affect them, and is considered integral to the exercise of the right to self-determination. Indigenous people must provide their free prior and informed consent for use of their knowledge, but there are challenges with this. Often, those who wish to use Indigenous Knowledge are challenged about how to meet the free prior and informed consent requirements. This results in Indigenous consultation and consent efforts that are, while extensive, largely fragmented, ad hoc and implemented on an individual, case-by-case basis.

Many strategies have been implemented to address these problems within the existing Australian legal framework to protect Indigenous Knowledge in Australia. Protocols, codes, guidelines, the use of Indigenous authority systems, contracts, policy responses by the Australian government through Indigenous funding and assistance programs, and education and awareness programs, offer different levels of protection for Indigenous Knowledge. Protocols in particular have gained recognition as a major way of protecting Indigenous Knowledge in Australia, especially where legal mechanisms do not offer enough protection. 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.

The Discussion Paper identifies six overarching issues for consideration in the protection and management of Indigenous Knowledge and case studies are used to present what mechanisms have worked (and haven't worked) in the past. It is, however, clear that the issues are complex and often interrelate and overlap.

**Misappropriation of Indigenous arts and crafts** is the first issue explored. Examples have included copying of artistic work, reproduction of fake Indigenous arts and craft products such as backpacker painted didgeridoos. Whilst copyright laws were used in this case to stop the copying and importation of Indigenous artistic works, there are still examples of exploitation and appropriation occurring overseas.





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This problem extends to the **misuse of Indigenous languages and clan names**, which are being used commercially without the consent of their traditional custodians. There are existing mechanisms in trade marks laws like disclaimers or oppositions that can help, but Indigenous people may lack the resources or the knowledge about them to be able to use those mechanisms to their benefit. This lack of knowledge and awareness of Indigenous issues should also be addressed within IP Australia, as trade marks examiners could play a much bigger role in protecting Indigenous languages from unwanted exploitation.

**Recording and digitisation of Indigenous Knowledge** also poses problems for Indigenous people. While copyright affords certain indirect mechanisms by controlling access to and use of the recorded form of the Indigenous Knowledge (such as the written document, sound recording or film) and requiring third parties to obtain legal consent for the use of the works, those rights are owned by the legal owner – the author or creator of the recording, who is often not the Indigenous person who is the subject of the recording. Once Indigenous Knowledge is recorded, controlling access, use and interpretation of underlying Indigenous Knowledge contained in those works is often beyond the control of the Indigenous Knowledge rights owners. Third parties are free to use the underlying Indigenous Knowledge so long as they do not infringe any Intellectual Property rights that subsist in the manner in which Indigenous Knowledge is expressed in the work.

**The Traditional Knowledge of Indigenous people is being commercially exploited without benefits flowing to communities.** Benefit sharing is the next logical step following consultation and consent. However, there are limited requirements under law to share benefits with communities who provide access to their Indigenous Knowledge. Not sharing the benefits of a community's Indigenous Knowledge with that community can be offensive and propagates dispossession.

A related, but distinct, issue is the **use of Indigenous Knowledge relating to genetic resources**. Indigenous skills, techniques and other knowledge relating to bush foods, medicinal plants and other genetic resources remain largely unprotected. More and more, this knowledge is used and commercialised for scientific research and development. Within the access and benefit sharing framework of Australia's biodiversity laws, patent laws, research funding initiatives and protocols, positive scientific collaborations have emerged for Indigenous people. More and more, Indigenous people are asserting their rights to Indigenous Knowledge and pushing for recognition of their meaningful contributions. However, much can still be done to safeguard Indigenous Knowledge in research and from unauthorised use and commercialisation.

Further issues arise surrounding the **misuse of particularly sensitive sacred secret knowledge**. Indigenous communities have customary laws that dictate whether Indigenous Knowledge is considered sacred or secret. Such laws restrict, for spiritual reasons, the use and availability of that knowledge. This knowledge needs to be protected from harm, and while there are no special laws for protecting sacred secret knowledge specifically, already some protections are available for example through the laws of confidential information. Sacred secret knowledge is also recognised in heritage and environmental legislation, which have special provisions to allow sensitive information or sacred sites to be protected.



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No single solution could possibly solve the issues presented in this Discussion Paper. As such, a suite of options are suggested to address the issues in a comprehensive way. An indicative range of these options is summarised below, but by no means are they exhaustive. Further economic research on the potential value of Indigenous Knowledge to Indigenous communities and Australia more broadly will assist to promote the value of its effective protection and management. This Discussion Paper is just the starting point, recommending a holistic approach not only in addressing the issues, but also in understanding the breadth and complexities of the concerns and problems expressed in the Paper. In this way, readers are armed with knowledge that will help foster further conversations and consultations about protecting and managing Indigenous Knowledge in Australia.

### **Summary of potential solutions**

#### **Issue 1: Misappropriation of Indigenous arts and crafts**

- Provide enhanced access to legal and business advice for Indigenous producers
- Promote greater use of branding and trade marks by Indigenous producers
- Conduct an education and awareness campaign on the harms of cultural misappropriation
- Make existing cultural protocols legally enforceable
- Establish a network of cultural authorities via a National Indigenous Cultural Authority
- Legislate a prohibition on the misappropriation of Indigenous Traditional Cultural Expressions

#### **Issue 2: Misuse of Indigenous languages, words and clan names**

- Develop and promote protocols for the appropriate use of Indigenous languages, names and words
- Develop Indigenous Knowledge tools and training for IP Australia trade mark examiners, including language databases
- Amend the IP Australia Trade Mark Examiners' Manual to better support Indigenous Knowledge protection
- Establish an Indigenous Advisory Committee within IP Australia
- Legislate specific Indigenous language protection legislation

#### **Issue 3: Recording and digitisation of Indigenous Knowledge**

- Develop and promote practical resources to assist with Indigenous Knowledge protection in recording and digitisation projects
- Develop a standard policy for collections and archive practice in the management of Indigenous material
- Legislate specific Indigenous Knowledge laws relating to collections and archives



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#### **Issue 4: Misappropriation and misuse of Traditional Knowledge**

- Standardise research sector protocols and guidelines for Traditional Knowledge
- Develop and promote standard research, funding and commercialisation agreements which effectively vest Indigenous Knowledge rights with traditional owners
- Require that free, prior and informed consent be a requirement for all government-funded programs which involve Traditional Knowledge, including research programs
- Enhance government procurement policies to address Traditional Knowledge issues
- Develop a national database for Traditional Knowledge
- Require that Indigenous communities be involved in environmental decisions which impact on Traditional Knowledge practices on country

#### **Issue 5: Use of Indigenous genetic resources and associated Traditional Knowledge**

- Develop and promote Indigenous-specific access and benefit sharing model agreements and guidelines
- Provide access and benefit sharing training and legal support to Indigenous communities
- Develop a database/register of genetic resources and associated Traditional Knowledge
- Support the establishment of Indigenous certification marks to promote Indigenous-produced bush foods and medicinal products
- Legislate to require that patent applications disclose the source or origin of genetic resources used in an invention
- Ratify and implement the *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*

#### **Issue 6: Misuse and derogatory treatment of secret or sacred knowledge**

- Conduct an education and awareness campaign on the harms of misuse and derogatory treatment of Indigenous peoples' sacred or secret knowledge
- Legislate specific legislation to protect sacred/secret material from debasement



## Glossary

### Abbreviations

AAS	Australian Anthropological Society
ABS	Access and Benefit Sharing
ATSIAB	Aboriginal and Torres Strait Islander Arts Board
ACCC	Australian Competition & Consumer Commission
AIATSIS	Australian Institute of Aboriginal and Torres Strait Islander Studies
ALA	Atlas of Living Australia
CALL	Centre for Australian Languages and Linguistics
CBD	United Nations Convention on Biological Resources
CRC	Cooperative Research Centre
CSIRO	Commonwealth Scientific and Industrial Research Organisation
Cth	Commonwealth
EPBC	Environment Protection and Biodiversity Conservation Act 2000
FATSIL	Federation of Aboriginal and Torres Strait Islander Languages
FPIC	Free prior informed consent
GERAIS	Guidelines for Ethical Research in Australian Indigenous Studies
IGC	Inter-Government Committee (IGC) on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore
IK	Indigenous Knowledge
ILUA	Indigenous Land Use Agreement
NAIDOC	National Aboriginal and Islander Day Observance Committee (NAIDOC celebrates Indigenous achievement)
NAILSMA	North Australian Indigenous Land and Sea Management Association
NHMRC	National Health and Medical Research Centre
NIACA	National Indigenous Arts Cultural Authority
NICA	National Indigenous Cultural Authority
NIAAA	National Indigenous Arts Advocacy Association (no longer operating)
NNTT	National Native Title Tribunal
NRM	Natural Resource Management
TCE	Traditional Cultural Expression
TK	Traditional Knowledge
TO	Traditional Owners
UWA	University of Western Australia



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WIPO	World Intellectual Property Organisation
IP	Intellectual Property

#### Terms

**Aboriginal 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>1</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>2</sup> The term is currently used by WIPO IGC and is still commonly used in African countries.

**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>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) 213 CLR 1 and the Australian Law Reform Commission review of the *Native Title Act 1993* (Cth), *Connection to Country*. It is also used by the ALRC review as an umbrella term to cover all types of Indigenous knowledge, and is defined as an 'intense affiliation with land and waters'<sup>5</sup> and includes forms of expression like 'dance, art, stories and ceremonies, to knowledge of the medicinal properties of plants and genetic resources'.<sup>6</sup>

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>7</sup>

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<sup>1</sup> Terri Janke, *Our Culture: Our Future – Report on Australian Indigenous Cultural and Intellectual Property Rights* (Final Report, Michael Frankel and Company, 1999), commissioned by the Aboriginal and Torres Strait Islander Commission and the Australian Institute of Aboriginal and Torres Strait Islander Studies.

<sup>2</sup> *Copyright Act 1968* (Cth) s 84(f). The definition of live performance includes a performance of an expression of folklore.

<sup>3</sup> *Convention on Biological Diversity*, opened for signature 5 June 1992, 1760 UNTS 79 (entered into force 29 December 1993) art 2.

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

<sup>5</sup> Australian Law Reform Commission, *Connection to Country: Review of the Native Title Act 1993* (Cth) Report 126 (2015), vol.1, 262, [8.169].

<sup>6</sup> *Ibid.*

<sup>7</sup> *Western Australia v Ward* (2002) 213 CLR 1, [58].





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**Defensive Protection** refers to a set of strategies to ensure that third parties do not gain illegitimate or unfounded IP rights over Indigenous Knowledge subject matter and related genetic resources.

**Indigenous Cultural and Intellectual Property** or 'ICIP' is widely used in Australia following the report *Our Culture: Our Future*. It followed the terminology used in the Draft Declaration in the mid-1990s and used in the pivotal international study conducted by Madam Erica-Irene Daes.<sup>8</sup> ICIP includes intangible and tangible aspects of cultural heritage from cultural property, cultural sites to languages, human remains and documentation of Indigenous peoples. The scope of ICIP is constantly evolving.

**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**<sup>9</sup> is traditional ecological knowledge that comes from Indigenous people. It is 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>10</sup> IEK has been predominantly used in land management<sup>11</sup> and natural resource management sector.<sup>12</sup>

**Indigenous Intellectual Property**<sup>13</sup> has a broad scope as defined by Article 31 of the United National Declaration on the Rights of Indigenous people. It covers 'cultural heritage'; 'traditional cultural expression' and 'traditional knowledge'.<sup>14</sup>

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<sup>8</sup> Terri Janke, *Our Culture: Our Future*, n 1, 2.

<sup>9</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) <http://caepr.anu.edu.au/sites/default/files/Publications/WP/CAEPRWP62.pdf>.

<sup>10</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>11</sup> Central Land Council, *Indigenous Ecological Knowledge*, <http://www.clc.org.au/articles/info/indigenous-ecological-knowledge>.

<sup>12</sup> Terri Janke, *Report on the Current Status of Indigenous Intellectual Property*, 8 April 2009, report commissioned by Natural Resources Management Board NT, [http://media.wix.com/ugd/7bf9b4\\_af38431b79494d18bf4d8937fe4dbc11.pdf](http://media.wix.com/ugd/7bf9b4_af38431b79494d18bf4d8937fe4dbc11.pdf).

<sup>13</sup> Matthew Rimmer, *Indigenous Intellectual Property, A Handbook of Contemporary Research* (Edward Elgar, 2015).

<sup>14</sup> Matthew Rimmer, *Indigenous Intellectual Property, A Handbook of Contemporary Research* (Edward Elgar, 2015) 1-44.







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**Indigenous Knowledge as defined under the Biological Resources Act 2006 (NT)** Section 29(2) of the Biological Resources Act 2006 (NT) defines ‘indigenous knowledge’ as knowledge obtained from an Indigenous person, and not including knowledge obtained from scientific or other public documents, or otherwise from the public domain.<sup>15</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>16</sup>

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

**Royalties** are fees paid to a creator for the sale of their work.

**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** means stand alone or ‘specific legislation.

**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. This definition recognises that Traditional Ecological Knowledge is an attribute of societies with historical continuity in resource use practice.’<sup>17</sup>

**WIPO** refers to World Intellectual Property Organization – a United Nation’s organ created in 1967 to encourage creative activity by promoting the protection of intellectual property internationally. Since 2000, WIPO has convened an Inter-Government Committee (IGC) on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore to discuss issues relating to access to genetic resources and benefit sharing; the protection of traditional knowledge, innovations and creativity; and the protection of expressions of folklore.

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<sup>15</sup> *Biological Resources Act 2006 (NT)* s 29(2).

<sup>16</sup> DLA Phillips Fox, *Statutory Review of the Biodiscovery Act 2004 (Queensland)*, (commissioned by the Queensland Government, 2009), 32.

<sup>17</sup> Fikret Berkes et al, ‘Rediscovery of Traditional Ecological Knowledge as adaptive management’ (2002), 10(5) *Ecological Applications*, 1251–62.





## Introduction

For many years, Indigenous<sup>18</sup> Australians have been calling for stronger ways to protect their Indigenous Knowledge. The problem is that Indigenous arts, songs, designs, stories and knowledge has been and continues to be exploited outside of Indigenous peoples' communities by people not entitled to do so. Such exploitation occurs without recognition of any Indigenous connection and without benefits accruing back to Indigenous people. Even more demeaning, this important collective heritage is displaced and debased.

Indigenous Knowledge is the heart of Indigenous identity. It connects Indigenous people to the lands and seas that they have lived in, and around, for over 65,000 years. The hundreds of 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 traditions the world's oldest 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 their practice of their culture; and to stop misappropriation of their knowledge without consultation or consent, and to stop debasement and loss of cultural practice. The problem is that they cannot readily do this using Australian laws.

There have been many reports and enquiries about the issues and the shortfalls in the law, particularly intellectual property laws. Solutions have included legal and regulatory changes as well as education and awareness. There have also been developments to the law and policy which have in part provided some pathways for protection.<sup>19</sup> However, the problem remains – Indigenous people's cultural expression, knowledge and heritage remain exploitable and the continuing misappropriation threatens the integrity and survival of cultural traditions.<sup>20</sup>

Internationally, the World Intellectual Property Organisation (WIPO) has been considering how the international intellectual property system should recognise and protection traditional knowledge and traditional expression. Australia plays an important role in the debate. It is therefore timely that there be consultation and discussion with key stakeholders on the next steps for protection.

In 2012, IP Australia and the Office for the Arts (Cth) released an information brochure, *Finding the Way: a conversation with Aboriginal and Torres Strait Islander People*. The brochure asked Indigenous people to share stories and insights on future directions about Indigenous knowledge and intellectual property. A number of submissions were received. Then in 2016, IP Australia invited submissions from key stakeholders. 8 submissions were received.

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<sup>18</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>19</sup> See Appendix 1 for an overview of the legal protection under Australian law.

<sup>20</sup> Article 31 of the United Nations, Declaration on the Rights of Indigenous people asserts the right of Indigenous people to protect their traditional knowledge and traditional cultural expression as intellectual property.





## Indigenous Knowledge: Issues for protection and management Discussion Paper

IP Australia<sup>21</sup> and the Department of Industry, Innovation and Science have jointly commissioned Terri Janke and Company,<sup>22</sup> an Indigenous owned legal firm, to write this discussion paper. The discussion paper identifies six key issues and puts forward a range of options to deal with the protection and management of Indigenous Knowledge – including Traditional Knowledge and Traditional Cultural Expressions. In this way, it aims be a useful guide for Indigenous peoples; policy and law makers and those who are working in government, the arts and cultural sector, science, research and industry.

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<sup>21</sup> IP Australia is the Commonwealth agency responsible for the registration of intellectual property rights such as trade marks, patents, designs, and plant breeders' rights.

<sup>22</sup> Terri Janke and Company is an Indigenous owned legal firm, with experience in working with Indigenous people to advise on ways to protect and manage Indigenous cultural and intellectual property. [www.terrijanke.com.au](http://www.terrijanke.com.au)





## 1. What is Indigenous Knowledge?

Indigenous Knowledge refers to the knowledge of Aboriginal and Torres Strait Islander people, the original inhabitants of the land and seas in Australia. It includes traditional cultural expression such as the songs, dances, stories and languages; and the traditional knowledge including ecological knowledge of biodiversity, medicinal knowledge, environmental management knowledge and cultural and spiritual knowledge and practices. Indigenous Knowledge is the intangible cultural heritage of Indigenous people. It should be emphasised that Indigenous people see their knowledge as intrinsically linked to the tangible heritage of Indigenous people.

In considering the options for protection, it is firstly important to understand the scope and nature of 'Indigenous Knowledge'.

### 1.1 Terminology

The term 'Indigenous Knowledge' (IK) is knowledge that comes from Indigenous Australians.

'Indigenous' refers to people of Aboriginal and Torres Strait Islander descent; who identify as Aboriginal or Torres Strait Islander and are accepted as an Aboriginal or Torres Strait Islander person in the community in which they live, or have lived. The terms 'Aboriginal and Torres Strait Islander' and 'Indigenous' are used interchangeably in this Discussion Paper.

'Indigenous Knowledge' has two distinct categories:

**Traditional Knowledge (TK)** refers to the knowledge resulting from intellectual activity in a traditional context, and includes know-how, practices, skills and innovations. Traditional knowledge can be found in a wide variety of contexts, including: agricultural knowledge; scientific knowledge; technical knowledge; ecological knowledge; medicinal knowledge, including related medicines and remedies; cosmology; and biodiversity-related knowledge. This includes knowledge about genetic resources.

**Traditional Cultural Expressions (TCE)**, 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 and crafts and architecture.

The terms 'traditional knowledge' and 'traditional cultural expression' are used in the *UN Declaration on the Rights of Indigenous People* and by the World Intellectual Property Organization's Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (WIPO IGC). However, within Australian Indigenous communities, the use of the word 'traditional' tends not to be preferred as it implies that Indigenous culture is locked in time. For the purposes of this paper, we use the terms used by the WIPO IGC, but recognise that Traditional Knowledge and Traditional Cultural Expressions includes knowledge and expressions which is evolving and not locked in time.



**Fig 1: Indigenous Knowledge categories**

Indigenous Knowledge	
Traditional Knowledge	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>

## 1.2 Characteristics of Indigenous Knowledge

'Indigenous peoples and Nations share a unique spiritual and cultural relationship with Mother Earth, which recognises the interdependence of the total environment and is governed by the natural laws which determine our perceptions of intellectual property.'

- *Julayinbul Statement on Indigenous Intellectual Property Rights*, 1993, Jingarrba, Australia.<sup>23</sup>

To develop law and policy on Indigenous Knowledge, it is fundamental to gain a clear understanding of its characteristics. The nature of Indigenous Knowledge is linked to the nature of the people and the communities, and their underlying value systems.<sup>24</sup> The following main characteristics of Indigenous Knowledge:

### 1.2.1 Identity and Value Systems

Traditional Cultural Expression and Traditional Knowledge reflect and identify a community's history, cultural and social identity and its values.<sup>25</sup> Individual people express culture to show a connection and belonging. To sever this connection is akin to cultural genocide. The Torres Strait Islander artist, Laurie Nona, describes it well when he commented to the impact of copyright infringements and fake arts on Indigenous culture:

<sup>23</sup> Julayinbul Statement on Indigenous Intellectual Property Rights, 1993, Jingarrba, Australia, full citation in T Janke, *Our Culture, Our Future: Report on Australian Indigenous Cultural and Intellectual Property Rights*, Michael Frankel and Company, Sydney, 1999, 310–313.

<sup>24</sup> Michael Dunn, *Defining Indigenous Knowledge* (26 September 2014) Theory of Knowledge <<http://www.theoryofknowledge.net/areas-of-knowledge/indigenous-knowledge-systems/defining-indigenous-knowledge/>>.

<sup>25</sup> Wend Wendland, 'It's a small world (after all): some reflects on intellectual property and traditional



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Art is our story, it's our identity, it's who we are, it's a living culture.

It really takes the core from inside you, it just 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.

It really gets under your skin that some fake-arse is taking something they have no connection to, they have no idea what it means.<sup>26</sup>

It is even more offensive or hurtful then when a work of Indigenous cultural expression is debased, and used with proper attribution. Banduk Marika explains this in respect of her work *Djanda and the Sacred Waterhole* that was reproduced on carpets without her permission. Banduk was proud to share her artwork with the public where it could be shared with people on the wall of the National Gallery, however, seeing her clan's creation story reproduced on carpets where it would be walked upon was culturally inappropriate and offensive, 'like having someone walk on her backbone'.<sup>27</sup>

TCEs may be produced for aesthetic purposes but often TCEs carry spiritual or religious meanings and have social, cultural and spiritual purposes. For example:

- a boomerang may be used for hunting and not just as an ornamental craft object;
- a story may depict the Dreaming story;
- a dance may be linked to an important ceremony; and
- burial poles are not purely decorative but are central to death rites and rituals.<sup>28</sup>

TK is embodied in the TCE. The entirety is connected to land and is reflective of a culture that has at its heart, connections with the land, seas and the universe, and its peoples.

Given this, an important aspect of Indigenous Knowledge is that it has a cultural context and place within a community that is guarded against debasement. Indigenous people may wish to prevent particular knowledge and cultural expressions from being published or commercialised at all.

The notion of communal identity can vary significantly from one locality to another, and policy options seeking to address these issues should recognise that strategies that might be effective with one Indigenous community of Australia can often not be applicable or inappropriate for another community.<sup>29</sup>

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cultural expressions' in Christoph Beat Graber and Mira Burri-Nenova, *Intellectual Property and Traditional Cultural Expression in a Digital Environment* (Edward Elgar, 2008) 150-181, 167.

<sup>26</sup> Laurie Nona quote in Neda Vanovac, 'Indigenous artists battle mass-produced fakes, call for protection for their intellectual property,' ABC News, 9 August 2017, <<http://www.abc.net.au/news/2017-08-09/indigenous-artists-battle-fakes-urge-consumers-to-buy-ethically/8788116>>.

<sup>27</sup> Terri Janke, *Minding Cultures: Case Studies on Intellectual Property and Traditional Cultural Expression*, (World Intellectual Property Organisation, 2003), 15.

<sup>28</sup> Ibid.

<sup>29</sup> Jane Anderson, "The Politics of Indigenous Knowledge: Australia's Proposed Communal Moral Rights Bill" (2004) 27(3) *University of New South Wales Law Journal* 585, 592.





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#### 1.2.2 Traditional

Indigenous Knowledge has a traditional base. By 'traditional', the focus is on the method and transmission of culture – because the knowledge is handed down to the next generation. Traditional creativity is often marked by fluid social and communal creative influences. Indigenous culture is an oral and performance based culture. Important information was recorded in storytelling, art and dance, then elders taught the younger ones, when the time was right.

Indigenous Knowledge is constantly evolving and is dynamic not static. Indigenous cultural expressions may refer to ancient designs, stories and songs created by authors unknown, brought into existence by the ancestral beings or developed communally. The communal nature of Indigenous Knowledge means that the responsibility rests with one of a small number of people for the benefit of the whole community.

As Indigenous cultures evolve, Indigenous people and communities continue to express themselves in new and adapted ways.

#### 1.2.3 Customary laws

Each generation learns and innovates to pass on knowledge to the next. Responsibility for holding certain parts of knowledge is linked to rights and obligations associated with land and seas, and the things on them. The rights and responsibilities of passing on Indigenous Knowledge was traditionally guided by customary laws. 'Indigenous customary laws' in Australia is the body of rules, values and traditions that are accepted by the members of an Indigenous community as establishing standards or procedures to be upheld in that community.<sup>30</sup>

Customary laws are the social and cultural norms and customs by which Indigenous communities operate and inform the ways in which Indigenous Knowledge is created and managed within communities. Indigenous customary laws play a fundamental role in the protection of Indigenous Knowledge.<sup>31</sup> They are, however, often not understood and overlooked by those who are not bound by it.<sup>32</sup> Customary laws are not codified or written down. Different clans have different customary laws. However, generally, the different Aboriginal and Torres Strait Islander clans will maintain customary laws that relate to Indigenous Knowledge.<sup>33</sup>

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<sup>30</sup> Terri Janke and Robynne Quiggin, 'Indigenous cultural and intellectual property and customary law,' *Background Paper 12, Aboriginal Customary Laws*, (WA Law Reform Commission, January 2006).

<sup>31</sup> Patricia Adjei, Submission to *Finding the Way*, IP Australia Indigenous Knowledge Consultation, 2016, <[https://www.ipaustralia.gov.au/sites/g/files/net856/f/submission\\_-\\_patricia\\_adjei.pdf](https://www.ipaustralia.gov.au/sites/g/files/net856/f/submission_-_patricia_adjei.pdf)>.

<sup>32</sup> Robyn Ayres and Delwyn Everard, Submission to *Finding the Way*, IP Australia Indigenous Knowledge Consultation, 2016, <[https://www.ipaustralia.gov.au/sites/g/files/net856/f/submission\\_-\\_arts\\_law\\_centre\\_of\\_australia.pdf](https://www.ipaustralia.gov.au/sites/g/files/net856/f/submission_-_arts_law_centre_of_australia.pdf)>.

<sup>33</sup> Australian Law Reform Commission, *The Recognition of Aboriginal Customary Laws*, (Report No 31, Canberra, 1986).





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Some knowledge may be secret or sacred, meaning that it has special ceremonial use and context, which cannot be shared or known by those who are not entitled to know under customary law. This includes men and women's knowledge, and practices related to bereavement and funerary practices.

A useful outline of the role of Indigenous Knowledge and customary law was provided by Professor Mick Dodson in an address to the Permanent Forum on Indigenous issues:

The role of customary law in providing guidance and protection to Indigenous peoples' traditional knowledge and the nature of the owners of traditional knowledge necessarily locates the Indigenous community as a central component of these issues. It is generally the Indigenous community collectively, as distinct from the individual that owns the rights to traditional knowledge. It may be a section of the community or, in certain instances, a particular person sanctioned by the community that is able to speak for or make decisions in relation to a particular instance of traditional knowledge. Hence, the role of the community is central. In addition, the operation of customary law occurs at a community level. The operation of customary law within an Indigenous community is significant in shifting the focus of protection away from dominant legal systems, such as intellectual property, to a system based in or upon Indigenous legal systems.<sup>34</sup>

The recognition of these customary laws may vary from community to community and may be practised at different levels of operation depending on the impact of western influence upon Aboriginal cultures, traditions and lifestyles. Indigenous decision-making practices that are based on customary laws have also developed.

#### 1.2.4 Getting consent: authority systems

There are authority systems within Indigenous communities for clearing rights to use of their Indigenous knowledge. Under customary laws, the relevant people for clearing consent will depend on the knowledge or cultural expression, and the proposed use, and the relationships of the person who is seeking to use the material. It may be different for Aboriginal and Torres Strait Islander people who have a connection to country to clear consent, as opposed to a non-Indigenous researcher who has no relationship with the people, or country. The methods of clearing consent can range from oral permission to written contracts, letters of support and or exchange of emails of consent. Outsiders complain that this can potential lead to uncertainty and requires greater consideration by Indigenous communities. Who do you go to get consent? Generally, there are a number of people and organisations users of Indigenous Knowledge might go to for consultation and consent.

Depending on the content and its proposed use, there is evidence of practices where consent and consultation for Indigenous Knowledge is obtained from individuals who are people in authority under customary laws. In the case of *Bulun Bulun v R & T Textiles*, evidence given by Djardie Ashley discussed how the Ganalbingu 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 may not need to consult with the group widely. In other circumstances, such as its mass-production as merchandise, Mr Bulun Bulun may be required to consult widely.

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<sup>34</sup> Mick Dodson, Special Rapporteur, Permanent Forum on Indigenous Issues, *Report of the Secretariat on Indigenous traditional knowledge*, E/C.19/2007/10, 6th session, New York, (14-25 May 2007), 11–12.





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Mr Ashley further noted:

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 already been given for a class of uses, all of the traditional owners<sup>35</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 that it was done.<sup>36</sup>

There is a network of Indigenous Arts Centre throughout the north of Australia, and key Indigenous art organisations including in theatre, visual arts and performing arts. These organisations are Aboriginal and Torres Strait Islander community controlled, and are therefore in a position to identify the right people, or consult their membership on behalf of a clearance request. The organisations, particularly arts centres, are connected to communities and are aware of the processes to consult relevant decision makers and people in authority under cultural protocols and customary laws. Contacting these arts organisations is a position advocated in the Australia Council for the Arts' *Indigenous Arts Protocols*.<sup>37</sup>

Aboriginal and Torres Strait Islander language centres that record and revitalise Indigenous languages are well placed to manage uses of language. These organisations are community controlled by a board of Indigenous people, and have networks with language and cultural experts. Many people using Indigenous languages contact these organisations and consult with them about the appropriate use of language. These organisations also assist with consent processes and are often asked to provide letters of support or for proper linguist orthography for words. A growing number are formalising the processes and include administration and licence fees for language services. See for example Kurna Warra Pintyanthi in South Australia, who have developed a process for Kurna language requests.<sup>38</sup> Others, like Victorian Aboriginal Corporation for Languages, can assist to identify and consult with relevant Victorian language group elders and traditional owners.<sup>39</sup> These entities provide significant infrastructure in the facilitation of free prior informed consent for use of Indigenous languages, especially if the language is commercialised. Examples might include naming rooms in corporate building, geographic names clearances and business or product names.

Whilst Indigenous Knowledge is not recognised at law as part of the bundle of rights that make up native title, there is scope for Indigenous native title holders and prescribed body corporates to play a role in the consultation and consent for use of Indigenous Knowledge. However, not all Indigenous groups have native title, so there would need to be a range of authority organisations recognised. The collection of Traditional Knowledge is a key part of the native title claims process. The issues of who owns copyright in the connection report, and how these are managed and accessed after the claim is finalised, are important issues for native title claimants.<sup>40</sup> Following successful native title claims, these organisations are establishing

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<sup>35</sup> *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>36</sup> *Bulun Bulun & Anor v R & T Textiles Pty Ltd* [1998] 1082 FCA 1082.

<sup>37</sup> Australia Council for the Arts, *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>38</sup> The University of Adelaide, *Kurna Warra Pintyanthi*, <<https://www.adelaide.edu.au/kwp/>>.

<sup>39</sup> Victorian Aboriginal Corporation for Languages, <<http://www.vaclang.org.au/>>.

<sup>40</sup> Eamon Ritchie and Terri Janke, 'Who owns copyright in native title connection reports?', 2015,





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opportunities in tourism, arts, business, and environmental management. These groups are in a position to manage Traditional Knowledge and Traditional Cultural Expression authorisation. Already, these entities are playing a role in permissions and consultations for the use of such material. Examples include the Canning Stock Route project which involved native title groups and arts centres clearing rights for the publication of information about sites, artistic images and knowledge.<sup>41</sup>

Traditional owner groups and land councils also 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. It should be noted that consent for Land Councils in the Northern Territory may be required under the *Aboriginal Land Rights Act (Northern Territory Act 1976 (Cth))* when access land and researching and interviewing people, and taking resources from country. There is a nexus with land councils and ABS laws. Another example is the Kimberley Land Council in Western Australia, who are a point of contact for its member organisations to encourage consistency of consultation approaches across the region.

Elders hold a wealth of knowledge about language, history and culture. They are consulted on projects in local areas, and on specific historical topics on which the group may have expertise. For this reason, the elders groups are important to the consultation and consent framework for the use of Indigenous Knowledge.

It is important to note that consent procedures may differ from group to group. Some communities have formal procedures that make use of organisations such as native title representative bodies, land councils or community councils. In others, decision-making processes will be less formal, and may require a meeting with relevant people to clear consent.

#### 1.2.5 Summary of characteristics

In summary, Indigenous Knowledge has the following characteristics:

- A social and cultural base, linked to people, land and identity;
- Communal for the benefit of the clan or community. The 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;
- Constantly being created by individuals, so new Indigenous Knowledge that meets the requirements of IP laws may be protected with recognition of ownership in the individual;

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8(20) *Indigenous Law Bulletin* 8, 8.

<sup>41</sup> National Museum of Australia, *Yiwarra Kuju: The Canning Stock Route*, <[http://www.nma.gov.au/exhibitions/yiwarra\\_kuju/home](http://www.nma.gov.au/exhibitions/yiwarra_kuju/home)>.







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- Linked with identity of an Indigenous group – ownership and custodianship of people with entitled to use and know the heritage, even if people are living away from their lands continue to practice culture;
- Ownership involves roles and responsibilities to look after the knowledge and pass it on;
- Consultation and consent processes – there may be complex rules about who can use, know and continue to use the Indigenous Knowledge as a cultural practice. There may be sacred or secret knowledge that is not to be known;
- Linked to cosmology – the reasons why Indigenous people innovate are linked to cultural, religious and spiritual practices; and
- Non-material form transmission – focus on the practice and process and not just the product or object, spoken or taught by being with people on country.

### 1.3 Indigenous peoples' rights to Indigenous Knowledge

The rights of Indigenous people are described in the *United Nations Declaration on the Rights of Indigenous People* (UNDRIP).<sup>42</sup> Fundamentally, entrenched in the UNDRIP is the key principle of free, prior and informed consent.

In developing laws and policies that recognise and protect Indigenous Knowledge, the fundamental point of reference is Article 31 of the UNDRIP which recognises Indigenous peoples' rights to:

- Own, manage and control their Indigenous Knowledge;
- Be consulted about use of Indigenous Knowledge;
- Give or withhold consent around use of Indigenous Knowledge (the free, prior informed consent right); and
- Make self-determined decisions about Indigenous Knowledge.

Building on this, there are two overarching policy principles:

#### (a) Do No Harm

Policies and laws should ensure that there is no harm done to Indigenous Knowledge. This must go beyond an ethnographic and preservationist approach to an inclusive and cultural conservation approach which empowers Indigenous people to make decisions about the care of their cultures. In this way, the policy objectives include:

- Protecting and preserving culture from debasement and derogatory treatment;
- Stopping misappropriation of Indigenous Knowledge;

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<sup>42</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), Article 11.



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- Maintaining the cultural integrity of Indigenous Knowledge;
- Keeping responsibility for the interpretation of Indigenous Knowledge;
- Protecting sacred and secret Indigenous Knowledge; and
- Being given full and proper attribution for Indigenous Knowledge use.

### **(b) Promote Economic Opportunities for Indigenous peoples**

Indigenous cultures are living cultures, and Indigenous people are innovating and nurturing culture in response to contemporary life. Indigenous Knowledge is increasingly in demand and there is potential for Indigenous people to engage and commercialise their Indigenous Knowledge assets in health, food, arts and culture industries. Therefore, policies and laws should also aim to promote economic participation for Indigenous people, just as general intellectual property laws aim to promote economic incentives for creators and investors to:

- Prevent unfair competition and unjust enrichment;
- Share in the benefits of use of Indigenous Knowledge;
- Promote Indigenous Knowledge collaborations within education, science and industry; and
- Promote Indigenous economic development and entrepreneurship.

Indigenous Knowledge policies and laws may impact existing intellectual property and other legal frameworks. When considering these options, consideration should be given to the following:

- The potential for certain forms of protection to put a 'chilling effect' on industries which seek access to Indigenous Knowledge;
- The desire to promote and maintain a healthy public domain;
- Open source content;
- Fair use; and
- Government programs and public accessibility.

It should be stressed however, that the recognition of Indigenous Knowledge rights is a fundamental right for Indigenous people as the original inhabitants of Australia. Culture and land are connected. Unfortunately, Indigenous Australians' culture has endured significant pressure as a result of colonisation and subsequent policies of dispossession and disadvantage.<sup>43</sup> This remains unfinished business and a continuing matter of social justice for many Indigenous people.<sup>44</sup>

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<sup>43</sup> Mick Gooda and Katie Kiss, *The Declaration Dialogue Series: Paper No.4 - Ensuring the ongoing survival of the oldest living culture in the world*, Australian Human Rights Commission, July 2013. p. 8.

<sup>44</sup> Australian Human Rights Commission, *Aboriginal and Torres Strait Islander Social Justice Commission, Social Justice Report 2008*, 16 – 17.



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Based on the rights listed in the 1999 report, *Our Culture, Our Future*, the following list of rights for Indigenous people with respect to their Indigenous Knowledge is proposed for discussion, being the rights to:

- Own and control their Indigenous Knowledge;
- Define what constitutes Indigenous Knowledge and/or Indigenous heritage;
- Ensure that any means of protecting Indigenous Knowledge is based on the principle of self-determination, which includes the right and duty of Indigenous people to maintain and develop their own cultures and knowledge systems, and forms of social organisation;
- 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;
- Apply for protection of Indigenous Knowledge which, where collectively owned, should be granted in the name of the relevant Indigenous community;
- Authorise or refuse to authorise the commercial use of Indigenous Knowledge according to Indigenous customary law;
- Prior informed consent for access, use and application of Indigenous Knowledge, including Indigenous cultural knowledge and cultural environment resources;
- Maintain the secrecy of sacred secret knowledge and other cultural practices;
- Benefit commercially from the authorised use of Indigenous Knowledge, including the right to negotiate terms of such usage;
- Full and proper attribution;
- Protect Indigenous sites, including sacred sites;
- Control management of Indigenous areas on land and sea, conserved in whole or part because of their Indigenous cultural values;
- Prevent derogatory, offensive and deceptive uses of Indigenous Knowledge in all media including media representations;
- Prevent distortions and mutilations of Indigenous Knowledge;
- Preserve and care, protect, manage and control Indigenous cultural objects, Indigenous ancestral remains and Indigenous cultural resources such as food resources, ochres, stones, plants and animals – and Traditional Cultural Expressions such as dances, stories and designs;
- Control the disclosure, dissemination, reproduction and recording of Traditional Knowledge, ideas and innovations concerning medicinal plants, biodiversity and environmental management; and
- Control the recording of cultural customs and expressions, the particular language of which may be intrinsic to cultural identity, knowledge, skill and teaching of culture.<sup>45</sup>

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<sup>45</sup> Terri Janke, *Our Culture: Our Future – Report on Australian Indigenous Cultural and Intellectual Property Rights* (Final Report, Australian Institute of Aboriginal and Torres Strait Islander Studies, 1998) 47.





#### 1.4 Value of Indigenous Knowledge

Indigenous Knowledge is invaluable to Indigenous people to continue the practice of their culture. Indigenous Knowledge also contributes to Australia's economy to various sectors including arts and culture, fashion, building, tourism, rural, health care and pharmaceutical industries. The Director General of the World Intellectual Property Organisation (WIPO), Dr Francis Gurry reinforced this in his statement on International Indigenous people's day:

The traditional knowledge and traditional cultural expressions of Indigenous Peoples form part of their core identities and are essential to their well-being and social cohesion...The cultural heritage of Indigenous Peoples also embodies significant innovation and creativity and constitutes a valuable source and knowledge for society at large as well as for creators and inventors, from fashion designers to the pharmaceutical industry, from musicians to farmers.<sup>46</sup>

It is important to understand the economic value of Indigenous Knowledge, alongside its social, environmental and cultural values. In Australia, there is an increasing recognition of this, however there is limited data and research:

- In government procurement, the Indigenous Procurement Policy, has resulted in an increase in Indigenous entrepreneurialism, with \$284.2 million worth of contracts awarded to 493 Indigenous businesses between 2015 and 2016;<sup>47</sup>
- In the arts, there is a lot of research but there is great disparity in data.<sup>48</sup> The missing part of the research is the value of the contribution in performing arts, music and literature, including collaborations:
  - In 2007, a Senate Inquiry into Australia's Indigenous visual arts and craft sector, Indigenous Arts, *Securing the Future* reported a range of proposed estimates ranging from \$100 - \$500 per annum.<sup>49</sup>
  - In 2015, the Australia Council for the Arts report *Arts Nation* noted that art production is the main source of commercial income for many remote Aboriginal communities.<sup>50</sup> The report recorded \$53 million in arts sales with \$30

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<sup>46</sup> World Intellectual Property Organisation, *Message from WIPO DG Gurry on the International Day of the World's Indigenous People* (6 August 2015) World Intellectual Property Organisation <[http://www.wipo.int/tk/en/news/tk/2015/news\\_0006.html](http://www.wipo.int/tk/en/news/tk/2015/news_0006.html)>.

<sup>47</sup> Department of Prime Minister and Cabinet, *Indigenous Procurement Policy – Performance Snapshot 2015-16* (31 October 2016) Department of Prime Minister and Cabinet <<https://www.dpmc.gov.au/news-centre/indigenous-affairs/indigenous-procurement-policy-performance-snapshot-2015-16>>.

<sup>48</sup> Jeremy Eccles, 'Aboriginal Art Economics', *Aboriginal Art Directory*, 8 August 2017, <<http://news.aboriginalartdirectory.com/2017/08/aboriginal-art-economics.php>>.

<sup>49</sup> Senate Standing Committee on Environment, Communications, Information Technology and the Arts, *Inquiry into Australia's Indigenous visual arts and craft sector, Indigenous Arts, Securing the Future*, Commonwealth of Australia, June 2007, 9 – 10.

<sup>50</sup> Australia Council for the Arts, *Arts Nation: An Overview of Australian Arts* (March 2015), Commonwealth of Australia, p. 31. <<http://www.australiacouncil.gov.au/workspace/uploads/files/arts-nation-october-2015-5638269193891.pdf>>.



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million paid to artists,<sup>51</sup> and found that cultural knowledge leads to jobs and income based on artistic activity, connections to country and cultural experience.<sup>52</sup> The report also foreshadowed further opportunities, stating that 92 per cent of Australians see Indigenous arts as integral to Australia's culture.<sup>53</sup>

- In native and bush foods,:
  - The Rural Industries Research and Development Corporation reported in 2000 that the value of the Australian native foods industry is \$10-16 million per annum.<sup>54</sup>
  - In 2015, Ninti One considered that the market value of bush food products is unknown with Indigenous knowledge contributing 'to the commercial development of over 15 bush food species, including macadamias, desert raisins and Kakadu plums.'<sup>55</sup>
- In science and research, the Department of Innovation, Industry and Science acknowledged that while Indigenous Knowledge contributes significantly to research in Australia, it is evident that these contributions are not always acknowledged or valued appropriately.<sup>56</sup> The implementation of appropriate and effective Indigenous Knowledge policies has the potential to drive development, opportunities and entrepreneurship in this industry, while also protecting against inappropriate use of Indigenous Knowledge.

The 1999 *Our Culture: Our Future* report pointed to the shortfall in relevant data of the economic value and contributions of Indigenous Knowledge and recommended an independent economic evaluation and analysis.<sup>57</sup> This problem still continues.

Whilst there is a wealth of Indigenous Knowledge in Australia, little is still understood of its value, and the links between Indigenous Knowledge and the broader Australian economy.<sup>58</sup> There is a lack of information and qualitative research about the economic value of Indigenous

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<sup>51</sup> Alice Woodhead and Tim Acker, *The Art Economies Value Chain Report* (CRC-REP Research Report CR004, Ninti One Limited, 2014).

<sup>52</sup> *Ibid* 30.

<sup>53</sup> Australia Council for the Arts, *Arts Nation: An Overview of Australian Arts* (Commonwealth of Australia, March 2015) 31.

<sup>54</sup> Vic Cherikoff, *Marketing the Australian Native Food Industry* (Rural Industries Research & Development Corporation, May 2000) 1.

<sup>55</sup> Ninti One: CRC Remote Economic Participation, *An Inclusive Governance Framework for Bush Food Commercialisation*, <[https://www.ipaustralia.gov.au/sites/g/files/net856/f/submission\\_-\\_ninti\\_one.pdf](https://www.ipaustralia.gov.au/sites/g/files/net856/f/submission_-_ninti_one.pdf)>

<sup>56</sup> Expert Working Group Report, 'Indigenous Engagement with Science, towards Deeper Understanding, Inspiring Australia, August 2013, iv.

<sup>57</sup> Terri Janke, *Our Culture: Our Future – Report on Australian Indigenous Cultural and Intellectual Property Rights* (Final Report, Michael Frankel and Company, 1999), 18.

<sup>58</sup> Taylor, et al, *Collaborative Ideas for Igniting the Indigenous Economy* (KPMG, 12 October 2016), 21-23.





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Knowledge including Indigenous arts, tourism, natural resource management, health, bushfoods, and pharmaceutical and science industries. It is recommended the relevant agencies of government conduct research on the value of Indigenous Knowledge to Australian industry.

The adoption of effective Indigenous Knowledge policies could open up new economic opportunities for Indigenous people. Further research in this area is likely to assist in promoting Indigenous Knowledge as a valuable resource worthy of effective protection and management. Research should explore benefits associated with not just creation of profits from sales of new products and services, but should also aim to gauge the value in improving health and well-being, employment and managing country.<sup>59</sup>

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<sup>59</sup>Marina Farr, Natalie Stoeckl, Michele Esparon, Daniel Grainger, and Silva Larson, *Economic values and Indigenous protected areas across Northern Australia* (James Cook University, 2016) 35.



## 2. Misappropriation of Indigenous Arts and Crafts

Indigenous arts are an expression of Indigenous belonging and connection to country. Indigenous artistic traditional symbols may originate in ceremony or represent landscape features, bush foods, historical events and ways of knowing. Indigenous artists depict themes and symbols that are handed down through the generations within the artists' clan or group. Some Aboriginal and Torres Strait Islander art may embody sacred iconography that is not published or made known. Artists' works may include traditional ritual knowledge that belongs to clan groups. For example, the artwork by Mr Bulun Bulun, *Magpie Geese at the Waterhole* contained traditional ritual knowledge of his clan, the Ganalbingu clan.

Over the past 50 years, the Aboriginal and Torres Strait Islander Arts Industry has developed to support Indigenous artists and their communities. Aboriginal and Torres Strait Islander artists reproduce their arts and their Traditional Cultural Expressions not only for the purpose of expressing culture but to also make a living. However, there are various forms of copycat activities occurring that can be defined loosely as misappropriation.

### 2.1 Discussion

#### 2.1.1 Unauthorised copying and reproduction

Indigenous artists can use the *Copyright Act 1968 (Cth)* to stop the unauthorised copying of artistic works. The works must be original and in a material form. Actions can be taken by Indigenous artists against those who copy a substantial part their copyright works.

#### **Case Study: The Carpets Case**

The case of *Milpurrurru v Indofurn*<sup>60</sup>, the 'Carpets Case', illustrates how copyright was used by eight Aboriginal artists and their families, to stop the unauthorised copying of their artworks on imported carpets that were produced in Vietnam and sold in Australia by a Perth-based textile company.

Copyright laws recognised that the Indigenous artist is the copyright owner of the artistic work even if the work depicts pre-existing themes passed down through the artists' clan.

For example, Banduk Marika's artwork, *Djanda and the Sacred Waterhole*, depicted sand goannas from her Rirratingu clan's creation site. These images were depicted by other Rirratingu artists before her. On the significance of her painting, she said:

When the [creation ancestors] Djangkawu handed over this land to the [clan] Rirratjingu, they did so on the condition that we continued to perform the ceremonies, produce the paintings and the ceremonial objects that commemorate their acts and journeys. Yolgnu guard their rights in paintings and the land equally. Aboriginal art allows our relationship with the land to be encoded, and whether the production of artworks is for sale or ceremony, it is an assertion

<sup>60</sup> *Milpurrurru v Indofurn Pty Ltd* (1995) 30 IPR 209.





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of the rights that are held in the land ... Djanda is the sand goanna and the image relates to information about that country on a number of levels.<sup>61</sup>

The carpet importers argued that there was no copyright in Banduk's work because the works drew from pre-existing traditional designs, so it lacked 'originality' and did not meet the originality requirements of the *Copyright Act 1968* (Cth). Judge Von Doussa disagreed and decided that the works were original because the artist has imparted her own skill, labour, originality and effort to create a design with intricate detail and complexity, which was a copyright work. The carpets, although not identical to the artworks, reproduced parts of the original artworks that were centrally important to the particular artworks and were infringements of copyright.

The carpet manufacturers were also found guilty of trade practices because of the misleading labelling attached to the carpets which claimed that the carpets were designed by Aboriginal artists and that the artists were paid royalties.

The Court's decision about copyright damages was also significant. The Court awarded damages of about \$188,000 and ordered the importers to hand over the unsold carpets. The damages were partly awarded for the personal hurt and cultural harm caused to the artists in having their work reproduced in such a culturally inappropriate way. Under customary law, the artists were responsible for the violation that had occurred and were liable to be punished for such a breach. The court noted:

If permission has been given by the traditional owners to a particular artist to create a picture of the dreaming, and that artwork is inappropriately used or reproduced by a third party, the artist is held responsible for the breach which has occurred, even if the artist had no control over or no knowledge of what occurred.<sup>62</sup>

According to Banduk Marika, the consequences for misuse of an artwork are severe. Nowadays, the artist's right to reproduce designs and stories and to participate in ceremonies could be permanently removed. The artist could also be outcast from the community, required to financially recompense the community, or even speared. Any of these punishments, under customary law, would be devastating for the artists involved.

The Carpets Case shows that Indigenous artists can enforce copyright to their works that include communal-owned knowledge passed down through the generations. However, as noted in the section on requirements of copyright protection, many types of Indigenous Traditional Cultural Expressions will not meet the requirements for protection under the *Copyright Act 1968* (Cth).

For instance, clan symbols depicted on rock art that is created hundreds of years ago will not meet copyright requirements as they are ancient and outside of the time period for copyright protection. The risk then becomes that people with no clan affiliations or authority to depict clan images can copy rock art and make their own arts and designs based on the rock art, without seeking permission from the clan groups.

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<sup>61</sup> Banduk Marika, Affidavit, 1994.

<sup>62</sup> M\* (now deceased), *Marika & Others v Indofurn* (1994) 130 ALR 659 at 663.





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This is what happened in the case of the Wandjina sculpture as discussed in the case study below, and also in 1997, when images of rock art from East Arnhem land was copied on t-shirts from a book entitled *Australian Aboriginal Paintings in Western and Central Arnhem Land, Temporal Sequences and Elements of Style in Cadelle and Deaf Adder Creek Art* which was a copyright protected work by researcher Eric Joseph Brandl.<sup>63</sup> Mr Brandl's rights to reproduce the work were infringed and action was taken against the manufacturers on Mr Brandl's behalf, however the Indigenous custodians themselves had no remedy under copyright laws against the t-shirt manufacturers.

The question of whether there is communal ownership of copyright was canvassed in the case of *Bulun Bulun v R & T Textiles*.<sup>64</sup> The court held that the artist owned a fiduciary duty to the clan to only use his copyright in ways that were consistent with his customary law obligations. However, Indigenous clans did not have any direct copyright ownership in works that embodied their clan designs. There had to be some direct act in assisting the creation of the material form for co-ownership to vest under the general copyright rules.

Justice von Doussa did recognise in the *Bulun Bulun* case that the clan could potentially take action against infringers of copyright works that embody traditional ritual knowledge, if the artist was unwilling or unable to take action themselves to attain equitable remedies. This right was an enforceable equitable interest *in personam*. Since the case, there have been no legal cases taken by clan groups over works that embody ritual knowledge. Whilst this legal remedy exists, the practical implication of this right is limited and it does not confer on the community any direct proprietary interest in the copyright or the underlying traditional ritual knowledge.<sup>65</sup>

Indigenous artists have used copyright to stop infringements of their artistic works where they have access to legal advice or have the knowledge and skills to take action on their own. Rarely, these cases go to court but are mostly settled through negotiation or otherwise abandoned by the artist because they cannot afford to take legal action. The Arts Law Centre of Australia's Artists in the Black Service, provides advice to Aboriginal artists and access to pro bono lawyers to represent them. Other legal advice is obtained from independent law firms for either paid fees or for pro bono.

#### Case Study: *Bulun Bulun v R & T Textiles*

Mr John Bulun Bulun ("Mr Bulun Bulun") was the artist and copyright owner of a bark painting *Magpie Geese and Water Lilies at the Waterhole*, which depicted imagery sacred to his clan group, the Ganalbingu people. Mr Bulun Bulun created the work in accordance with traditional laws and customs of his clan group; he had continuing customary responsibilities in relation to the knowledge depicted in the painting. Mr. Bulun Bulun's painting was altered and copied onto fabric, imported into Australia and sold nationally by R & T Textiles (the "Company"). Mr Bulun Bulun commenced proceedings against the Company for copyright infringement.

<sup>63</sup> Terri Janke, *Minding Cultures: Case Studies on Intellectual Property and Traditional Cultural Expression*, (World Intellectual Property Organisation, 2003), 101.

<sup>64</sup> *Bulun Bulun v R & T Textiles Pty Ltd* (1998) FCA 1082.

<sup>65</sup> Jane Anderson, 'The Politics of Indigenous Knowledge: Australia's Proposed Communal Moral Rights Bill' (2004) 27(3) *University of New South Wales Law Journal* 585, 595.





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Justice Von Doussa deemed that because the painting contained ritual imagery that was of great significance to members of the Ganalbingu people, and Mr Bulun Bulun had obligations at customary law to the clan, a fiduciary relationship existed.

A fiduciary relationship is one where one person, in this case Mr Bulun Bulun, is bound by law to exercise rights and powers in good faith for the benefit of another, in this case the clan. This meant that Mr Bulun Bulun had an obligation to refrain from doing anything that might harm the communal interests of the clan in the artwork.

Although Mr Bulun Bulun had the right to exploit the artwork for his own benefit, he had an equitable obligation to his clan not to do so in a way that was contrary to their laws and customs. Additionally, Mr Bulun Bulun had a responsibility to take reasonable and appropriate action to restrain and remedy any infringement of the copyright by a third party. Mr Bulun Bulun had met his obligations at customary law and as a fiduciary by bringing court action against the infringer of copyright in his painting.

Finally, Justice Von Doussa noted that if Mr Bulun Bulun had not brought the action against the Company, the clan would have had the right to bring an action against him to enforce the fiduciary obligation. Before this case, remedies for Indigenous applicants under copyright law had focused on individual notions of ownership. However, the equitable obligations imposed in the case provides scope for recognition of Indigenous communal ownership under copyright law.

This case study highlights that notions of ownership in copyright law have developed to provide some recognition of Indigenous communal ownership. Other copyright owners, such as filmmakers of documentaries and authors of books which incorporate Indigenous ritual knowledge, must also consider the cultural obligations which might limit their rights to freely deal with their works and films.<sup>66</sup>

Whilst copyright can be used, there is the limitation that copyright only protects works created by living artists or those deceased in the past 70 years. This means that clan rock art images like the works of prominent Aboriginal leader and artist William Barak or depictions of the sacred spirits, the Wandjinas, are in the public domain, not protected by copyright and can be freely used and reproduced by people without getting consent.

### Case Study: Wandjina Sculpture

The Worrora, Wunumbal and Ngarinyin Aboriginal people from Western Australia have painted the sacred creator spirit 'Wandjina' for thousands of years. Under customary law, they are the only people entitled to produce the image. Unauthorised reproduction is believed to destabilise the natural balance of the world and undermine the culture, spirituality and identity of the local people.

A gallery in the Blue Mountains erected a sculpture for public display depicting a crudely

<sup>66</sup> Sally McCausland, 'Protecting communal interests in Indigenous artworks after the Bulun Bulun Case' (1999) 4 *Indigenous Law Bulletin* 22, 4.



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drawn Wandjina figure with a mouth, whereas the traditional Wandjina is considered too powerful to be depicted with mouths. Both the Kimberley Aboriginal communities and the local Darug people of the Blue Mountains were extremely offended by this unauthorised misappropriation.

The gallery also exhibited a number of other Wandjina paintings by non-Indigenous artists, published a book containing the images and a thesis which argued that Aboriginal people are a dying race suffering from spiritual atrophy.

Copyright law was unable to prevent the offensive reproduction of the Wandjina image for a number of reasons. The sculpture, while instantly recognisable as a Wandjina figure, was not a direct copy of an existing Wandjina artwork and therefore may have met the requirement of originality. Also, Wandjinas were first painted thousands of years ago, so there is no identifiable author and artworks that were created by artists who died more than 70 years ago do not attract copyright as it is considered part of the public domain.<sup>67</sup>

The Australian Competition and Consumer Commission (ACCC) also found that the reproduction did not constitute misleading and deceptive conduct.<sup>68</sup>

An unusual remedy was pursued when it was discovered that the sculpture required planning approval by the Blue Mountains City Council. After significant lobbying by a number of Indigenous and non-Indigenous groups, the Blue Mountains City Council refused to approve the sculpture and it was ordered to be removed. Their decision was upheld by the Land and Environment Court.

This incident highlights the need for robust legal protections for Indigenous cultural and intellectual property. Unfortunately, there is nothing to stop a similar situation from occurring again and no guaranteed remedy. Last chance pleas to a receptive local council do not constitute binding legal precedent or legislative protection.

One option to avoid this kind of incident may be to recognise under law the significance of important cultural designs which belong to clan groups, and act as insignia or cultural emblems, and have customary law obligations concerning their control.

So, despite the avenues in copyright to protect artistic works, copying still occurs of Aboriginal artists' works. It is either happening because of ignorance in that many users of works still think that Indigenous art is in the public domain; or the copiers think they can get away with it because the copyright owner is unlikely to firstly know about the infringement, and then secondly, will not be able to take action against the infringer.

Copying of deceased artists' works where there is uncertainty about copyright ownership is another issue. In some instances, succession management of works is undertaken by collective management systems such as Viscopy.

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<sup>67</sup> Copyright in works of art subsists for the life of the owner *plus* 70 years.

<sup>68</sup> Robyn Ayres, 'The Wandjina case demonstrates the lack of protection for Indigenous culture' (Arts Law of Australia website, 2010) <<http://www.artslaw.com.au/articles/entry/the-wandjina-case-demonstrates-the-lack-of-protection-for-indigenous-cultur/>>.



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Moral rights also protect Indigenous artists' works from being altered if the works can be shown to be subjected to derogatory treatment. These rights are related to existing copyright works and can be exercised by the artists who are the creators of the works.

Where Aboriginal works are only copied in part, and altered and out of context, there is often the defence raised that the work is 'inspired' only and therefore not copying. In order to show copying, the test at law is that a substantial part of the original work must be taken. It is not a quantity but quality.

Protocols have had a considerable impact in educating non-Indigenous creators about the cultural protocols around using Indigenous images and styles in their own work. The further development of guides can promote awareness.

The *Designs Act 2003* (Cth) also provides some avenues for protection, as it protects the overall appearance of registered designs that are industrially applied.<sup>69</sup> It has been used in the past by Indigenous creators, like the artists in Walkatjara Arts Centre.

#### 2.1.2 Non-Indigenous artists marketing works as 'Indigenous'

To get around copyright laws, non-Indigenous artists are creating their own Indigenous-style works, and marketing them as Indigenous. This activity is not an infringement of copyright because there is no existing copyright work that is being copied, but rather themes or styles are copied so as to give the overall impression that the work is Indigenous.

Under the Australian Consumer Law, it is illegal to engage in misleading and deceptive conduct. Consumer protection trade practices laws have been used to stop companies from promoting works produced by a non-Indigenous artist as 'Aboriginal' as in the cases of *Australian Competition and Consumer Commission v Australian Dreamtime Creations Pty Ltd (2009)*<sup>70</sup> and *Australian Competition and Consumer Commission v Nooravi (2008)*.<sup>71</sup>

#### Case Study: ACCC v Dreamtime Creations

Australian Dreamtime Creations Pty Ltd ('Dreamtime') is a company which sells Aboriginal artwork. In 2009, the Federal Court held that Dreamtime misled consumers by making misleading representations in the promotion and sale of artworks that used Indigenous art styles.

For a brief period in 1993, Dreamtime's sole director, Mr Antoniou, engaged Aboriginal artist Unaboo Brown to paint certain items. After this time, the director of Dreamtime use the artistic services of another artist, Mr Goodridge, who is not of Aboriginal descent. From 1993

<sup>69</sup> *Designs Act 2003* (Cth), s. 7(3)(a).

<sup>70</sup> *Australian Competition and Consumer Commission v Australian Dreamtime Creations Pty Ltd* (2009) 13(2) ALR 119.

<sup>71</sup> *Australian Competition and Consumer Commission v Nooravi* [2008] FCA 2021.



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to 2008, Mr Goodridge painted certain artworks for Dreamtime in the style of Aboriginal art, including the same style used by Unaboo Brown.<sup>72</sup> Dreamtime imported carved wooden items from Indonesia, and these two were painted by Mr Goodridge.

The artworks painted by Mr Goodridge had the words 'Unaboo Brown' written on them, and Dreamtime also supplied Certificates of Authenticity to consumers which claimed that the artworks were 'Authentic Aboriginal'. Dreamtime also affixed stamps to items painted by Mr Goodridge that stated they were traditional hand painted Aboriginal Art. Dreamtime advertised on its website and on eBay that certain works for sale were painted by a person of Aboriginal descent, or by Unaboo Brown. The website reinforced this representation as it included images depicting an Aboriginal artist at work. Customers were also offered 'Unaboo Brown's Dreamtime story' or a 'bush tucker dreaming' story in connection with some paintings.<sup>73</sup>

The Federal Court held that Dreamtime had engaged in misleading or deceptive conduct. Mr Antoniou argued that any representations about the artworks being 'Aboriginal' weren't misleading because 'Aboriginal art' describes a style of artwork, and a person did not have to be of Aboriginal descent to paint 'authentic' or 'genuine' Aboriginal art. He also claimed 'Unaboo Brown' was a pseudonym used to identify the style used. The Court disagreed. Justice Mansfield said that 'to describe an artwork as 'Aboriginal' is expressly to say that the artist is of Aboriginal descent'. Aboriginal art is multi-dimensional and varies with region, artist and over time, therefore it is impossible to label one particular style of art as Aboriginal. The Court also found that even if Unaboo Brown was a pseudonym, it was not Mr Goodridge's pseudonym. The Court made orders designed to prevent both Dreamtime and Mr Antoniou from engaging in similar conduct in the future.<sup>74</sup>

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<sup>72</sup> *Australian Competition and Consumer Commission v Australian Dreamtime Creations Pty Ltd* (2009) 13(2) ALR 119.

<sup>73</sup> *Australian Competition and Consumer Commission v Australian Dreamtime Creations Pty Ltd* (2009) 13(2) ALR 119, [41]-[45].

<sup>74</sup> Arts Law Centre of Australia, "Authentic' Aboriginal Art - ACCC v Australian Dreamtime Creations' (Arts Law Centre of Australia website, 31 March 2010) <<https://www.artslaw.com.au/articles/entry/authentic-aboriginal-art-accv-australian-dreamtime-creations/>>.



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Trade practices law was successfully used in this instance to stop a company from making misleading representations about the authenticity of artwork. However, Dreamtime's practices went on unchecked for over a decade before any resolution was reached.

#### Case Study: ACCC v Nooravi

In 2008, the Australian Competition and Consumer Commission (ACCC) commenced proceedings against Mr Farzad Nooravi and Mrs Homa Nooravi, the operators of Doongal Aboriginal Art and artefacts. Mr and Mrs Nooravi were declared to have engaged in misleading and deceptive conduct by representing certain products as 'Aboriginal' art or artefacts when they were in fact produced by people not of Aboriginal descent.<sup>75</sup>

They also affixed labels that read 'Certificate of Authenticity of Original Aboriginal Art' to artworks painted by persons who were not Aboriginal.

Authentic Indigenous artwork is artwork that has been produced by an Aboriginal or Torres Strait Islander person, and the ACCC will take action against those who mislead consumers about the authenticity of works.

Among other things, the Nooravis were ordered to write to every person who purchased the fake works and advise them of the court proceedings.<sup>76</sup>

As shown in these cases, the Australian Consumer Law is useful when there is some active misrepresentation or false labelling. However, if a cultural design is copied without copying a copyright protected work, or without applying a label which misleadingly conveys that the product is an Indigenous work, this activity will often not constitute misleading and deceptive conduct.

This issue manifests in the fashion industry as designers either copy Indigenous works from the public domain or use Indigenous styles and themes.

There is a growing number of collaborations between fashion houses and Aboriginal artists where new work is commissioned and copyright licences are secured for mutual benefit.

#### 2.1.3 Imitation Indigenous souvenirs and imported mass-produced craft

The Indigenous Art Code and the Arts Law Centre of Australia's Campaign, *Fake Art Harms Culture*, highlights that there are many mass-produced items sold in Australian tourism retail outlets that are not made by Indigenous artists, but are in fact inauthentic items made by non-Indigenous people, often from material that is sub-standard to authentically produced

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<sup>75</sup> *Australian Competition and Consumer Commission v Nooravi* [2008] FCA 2021.

<sup>76</sup> Australian Competition and Consumer Commission, 'Court finds Aboriginal art dealer misled public', Media Release MR 247/08, < <https://www.accc.gov.au/media-release/court-finds-aboriginal-art-dealer-misled-public>>.







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Indigenous craft.

This misappropriation and imitation is also occurring overseas, as demonstrated by the Carpets case, and also the experience of Aboriginal artist, Bibi Barba.

#### **Case Study: Bibi Barba and Hotel Eclipse**

In 2012, Bibi Barba, Aboriginal Artist from Mandandanji country, found out that her artwork, *Desert Flowers* was copied for the interior of the Hotel Eclipse in Poland.<sup>77</sup> Her artwork was reproduced on carpets, wood panelling, glass dividers, the table tops and the panels in the foyer. Bibi was devastated in discovering her work appropriated. In Bibi's words, the artwork was a connection to spirituality and country that should not be corrupted. It was her passion and livelihood. The icons used in the work defined stories she had inherited from her grandmother. The artwork was copied from the website of the Sydney Gallery that represented Bibi Barba. Across the world, the works were used by a Polish designer commissioned by the Hotel Eclipse.

In response to Bibi's attempts to reach a settlement outside of court, the designer alleged that she drew inspiration from Bibi's work and 're-designed' the artwork. The designer alleged that the geometric patterns were common in Aboriginal art, and were in public domain, free for anyone to use. It is important to note that the legal action is taken under Polish copyright laws which have a fair use style exception to infringement for where works are 'inspired'.

This case study illustrates that it is a challenge for Indigenous artists is dealing with international infringements, because international perceptions still consider Aboriginal art is public domain.

Other examples include boomerangs that are made from bamboo or plastic and painted in styled dots and Aboriginal iconography; and backpacker painted didgeridoos. These items take away legitimate opportunities from Aboriginal and Torres Strait Islander arts and crafts practitioners.<sup>78</sup>

Whilst these items are the bottom end of the market and might not be confused with the gallery

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<sup>77</sup> Andrew Taylor, 'Polish hotel tramples Aboriginal artist's work', *The Age* (online), 17 February 2013

<sup>78</sup> Terri Janke and Robynne Quiggin, 'Indigenous cultural and intellectual property: the main issues for the Indigenous arts industry in 2006' (Aboriginal and Torres Strait Islander Arts Board, Australia Council, 2006), 28.





sold artistic works, these imitations can significantly disrupt cultural markets and perpetuate stereotypes that limit the diversity of Indigenous art.

#### Case Study: Chanel Boomerang

Boomerangs have been around for at least 50,000 years and are a well-known and important icon of Indigenous culture. It is a traditional hunting tool, used in sports and entertainment, and a work of artistic craftsmanship made from Australian wood or tree roots.<sup>79</sup>

French designer label Chanel created a luxury branded boomerang made of wood and black resin as part of its spring-summer 2017 pre-collection for sale at approximately \$2,000 AUD.<sup>80</sup> This caused backlash and complaints from Indigenous communities in Australia being offended and humiliated by Chanel's use of the boomerang.<sup>81</sup>

It is unclear whether Indigenous artists or designers were involved in producing the boomerang;<sup>82</sup> however Chanel has since released an apology for offending and re-affirms its commitment to respecting all cultures.<sup>83</sup> The boomerang is no longer available for sale and has been removed from the Chanel website. This case study is yet another example of the rampant problem of Indigenous Knowledge appropriation, and commercial use of Indigenous Knowledge potentially without consultation, consent and benefit-sharing with Indigenous communities. This case also illustrates of the power of evolving social attitudes towards misappropriation of Traditional Cultural Expressions in Australia.

There is potential for trade marks to assist Indigenous producers promote authentic items. In this way, trade marks encourage consumers to buy legitimate products over the imported mass-produced items. A registered trade mark can be used by producers for their own products and services. Many Indigenous Islanders arts centres use unregistered trade marks to brand and identify their art. This includes Giringun Arts, Papunya Tula and Tjanpi Desert

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<sup>79</sup> Terri Janke, *Key Policy Issues on Intellectual Property and Traditional Cultural Expressions*, <[http://www.wipo.int/edocs/mdocs/tk/en/wipo\\_iptk\\_ge\\_17/wipo\\_iptk\\_ge\\_17\\_presentation\\_4janke.pdf](http://www.wipo.int/edocs/mdocs/tk/en/wipo_iptk_ge_17/wipo_iptk_ge_17_presentation_4janke.pdf)>

<sup>80</sup> Robert Burton-Bradley, 'Chanel is selling weaponised accessories like this V tasteful boomerang. Yes', *National Indigenous Television*, 16 May 2017 <<http://www.sbs.com.au/nitv/nitv-news/article/2017/05/15/chanel-selling-weaponised-accessories-v-tasteful-boomerang-yes>>.

<sup>81</sup> Arts Law Centre of Australia, *Chanel Should Apologise for 'Boomerang'* (19 May 2017) <<https://www.artslaw.com.au/news/entry/chanel-should-apologise-for-boomerang/>>.

<sup>82</sup> Robert Burton-Bradley, 'Chanel is selling weaponised accessories like this V tasteful boomerang. Yes', *National Indigenous Television*, 16 May 2017 <<http://www.sbs.com.au/nitv/nitv-news/article/2017/05/15/chanel-selling-weaponised-accessories-v-tasteful-boomerang-yes>>.

<sup>83</sup> Joseph Hincks, 'Chanel Has Been Accused of Cultural Appropriation Over a \$1,500 Boomerang', *TIME* (online), 16 May 2017 <<http://time.com/4780194/chanel-boomerang-aboriginal-heritage/>>.





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Weavers. A growing number of Indigenous entities are registering trade marks, including Saltwater Freshwater<sup>84</sup>, Balarinji<sup>85</sup>, Kirrikin<sup>86</sup>, and Gab Titui Cultural Centre.<sup>87</sup>

There is also the option for Indigenous groups to use collective trade marks or certification marks aimed at identifying authentically produced craft or works produced under legitimate licence. This is the approach that was taken in 2000 when the Label of Authenticity system was developed by the now defunct National Indigenous Arts Advocacy Association (NIAAA).

#### Case Study: NIAAA's Label of Authenticity

NIAAA's Label of Authenticity system made use of a registered trade mark and a certification mark. The Label of Authenticity was the certification mark attached works that were created by Aboriginal and Torres Strait Islander Artists from start to finish. A second level mark called the Collaboration Mark, was designed to be affixed to products that were produced under licence with Indigenous artists.

The authentication mark scheme fell out of use following the dissolution of the NIAAA, though the mark was not often used, due to the costs and complexity associated with Indigenous artists gaining certification under the mark, among other reasons. Under the certification mark's rules, an Indigenous artist had to prove their Aboriginality, resulting in more than 75 per cent of the applications received being rejected because of insufficient proof of Aboriginality.<sup>88</sup> The mark was also criticised for not taking into account region-specific styles of art and did not cater for dealing with potential misappropriation of styles between regions. For example, works by Indigenous artists in New South Wales using the dot work style were certified as authentic under the mark, even though the style is traditionally produced by Indigenous people in Central Australia.<sup>89</sup>

After only a few years, the Label of Authenticity's owner, the National Indigenous Arts Advocacy Association, was defunded. The model for the Label inspired the development of the similar *Toi Iho* Mark in New Zealand.

A lesson from the NIAAA labelling experience is that regionalised authentication schemes may enjoy greater legitimacy than national schemes amongst Indigenous producers.

Given that majority of these items are produced overseas, an option may also be to provide border controls for Australian Border Force to stop this material at the border, similar to powers to seize copyright or trade mark infringing material.<sup>90</sup> However, there are significant challenges

<sup>84</sup> Saltwater Freshwater, National Aboriginal Design Agency, Australian Registered Trade Mark 1476684.

<sup>85</sup> Balarinji, Australian Registered Trade Mark 837399.

<sup>86</sup> Kirrikin, Australian Registered Trade Mark 1753533.

<sup>87</sup> Australian Registered Trade Marks 1829671 and 1829672.

<sup>88</sup> Peter Chalk and Alexander Dunlop, 'Indigenous Trade Marks and Human Rights: An Australian and New Zealand Perspective' (2009) 99(4) *The Trade Mark Reporter: Law Journal of the International Trademark Association* 956, 969.

<sup>89</sup> Debra Jopson, 'Aboriginal seal of approval loses its seal of approval', *Sydney Morning Herald* (online), 14 December 2002 <<http://www.smh.com.au/articles/2002/12/13/1039656221205.html>>.

<sup>90</sup> *Copyright Act 1968 (Cth)* s 135(7); *Trade Marks Act 1995 (Cth)* s133.





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with implementing this approach. Border controls rely on assessable standards. In the absence of an easily identifiable domestic standard on what constitutes infringing fake art/inauthentic products, a border control may be impossible for border officers to enforce. Without a clear assessable standard, border officers will not be able to identify an inauthentic article from an authentic one – including goods produced overseas under licence. Even with extensive training on identifying the genuine article from the fakes, this could be very difficult to apply across the spectrum of possible items to which it might apply, amidst the sheer quantity of all goods entering the border each day.

Australian Border Force would also have to consider the time and resources it would take for a border officer to inspect and assess a suspected inauthentic article at the border. This becomes more difficult when considering Traditional Cultural Expressions shared across communities. If one community has licensed the overseas production of a product bearing a Traditional Cultural Expression for import, but another community objects to that production, how can this be reflected on the ground at the border?

By way of contrast, the existing Notice of Objection scheme for trade marks (and copyright) allows for a registered trade mark owner to notify border authorities of the specific trade mark(s) they seek to have enforced at the border. The notice provides the certainty of what may constitute an infringing article and involves identifiable owners in the enforcement process. There is no fee for lodging a Notice of Objection, but registered trade mark owners must undertake to reimburse border authorities for the costs of enforcing the notice on seized goods.<sup>91</sup>

#### 2.1.4 Unequal leverage of Aboriginal artists and unfair contracts

The 2007 Report of the Senate Committee report *Indigenous Art – Securing the Future: Australia's Indigenous visual arts craft sector* highlighted the unequal bargaining power Indigenous artists in the arts industry.

The Indigenous Art Code is a system established to preserve and promote ethical trading in Indigenous art. The Code was a significant outcome of the 2007 Senate Enquiry in that its aims are to support the rights of Indigenous artists to negotiate fair terms for their work and to give purchasers certainty about the work's origins. Dealers can sign up to the code and agree to comply with its ethical standards, and in return they may display the logo and apply the Code certificates to artworks they sell. The Code requires signatories to:

- Act fairly, honestly and professionally in dealings with Artists. The Code contains specific examples of unprofessional and illegal conduct which do not meet the required standard;
- Ensure that Artists clearly understand the terms on offer and that they enter into agreements with informed consent;
- Respect the cooling off period rights of the Artist;
- Be transparent and responsive in regard to payments;

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<sup>91</sup> Australian Government: Department of Home Affairs, *Intellectual Property Information Sheet*, See website <<https://www.homeaffairs.gov.au>>





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- Provide true information about the authenticity and provenance of the work;
- Supply a Code Certificate for any work that is received directly from the Artist;
- Respect Indigenous cultural practices and Artists' rights;
- Take proper care of artworks in their possession;
- Provide reports to the Artists on progress with sales and other details regarding their work; and
- Adhere to compliance and complaint handling procedures.

The Australian Government could make the Indigenous Art Code ('the Code') a compulsory code under the *Competition and Consumer Act 2010* (Cth). Making the Code compulsory would set minimum standards of behaviour towards Indigenous artists, prohibiting misconduct such as carpet-bagging, unfair contracts and the specific misleading, unfair and unconscionable conduct in the arts industry.<sup>92</sup>

It would also benefit consumers as the Code requires the issuing of certificates to authenticate genuine Indigenous artworks. Certificates contain information and details on the Indigenous artist to ensure its integrity and boost confidence of purchasers.<sup>93</sup> However, there are also concerns that a mandatory Code would encourage only baseline compliance and therefore not set best practice standards within the industry. A better approach may be to empower Indigenous artists with legal representation so that they understand the terms of the agreement and can negotiate their interests.

Another example of enforceable codes is the Codes of Practice provided by the Community Broadcasting Association of Australia. They provide specific guidance for community broadcasting stations when producing programs with Indigenous content. Broadcasters are legally obliged to follow the Codes of Practice under the *Broadcasting Services Act 1992* (Cth). For example, the Codes of Practice include specific provisions on respecting of Indigenous customs and culture, and consultation with Indigenous communities when reporting on Indigenous peoples and issues, for example when reporting on deceased Indigenous people.<sup>94</sup>

### 2.1.5 Alteration and debasement of works

Indigenous people are concerned that their art, signs and designs are altered and debased when they are copied. This can be the most offensive aspect of misappropriation activities for Indigenous people because the work and the connection to the artist, clan and place is debased and spiritually changed when taken out of context. An example is the ancestral being and rock art depictions of Wandjina.

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<sup>92</sup> Robert Merkel QC, *Towards a mandatory code* (22 April 2013) Indigenous Art Code <<http://www.indigenouartcode.org/index.php/2013/04/towards-a-mandatory-code/>>.

<sup>93</sup> Arts Law Centre of Australia, *Certificates of Authenticity* <<https://www.artslaw.com.au/info-sheets/info-sheet/certificates-of-authenticity-aitb/#headingh23>>.

<sup>94</sup> Community Broadcasting Association of Australia, *Community Radio Broadcasting Codes of Practice* (Community Broadcasting Association of Australia, 2008) Code 4.





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Individual artists have the moral right of integrity by virtue of the *Copyright Act 1968 (Cth)*. This right enables individual Indigenous artists to take action against infringements that subject their works to derogatory treatment. However, the moral rights provisions in the law do not expressly give rights to Indigenous clans whose traditional knowledge is embodied in copyright works.

In 1997, the *Bulun Bulun v R & T Textiles* case held that a clan could take action for infringement of copyright if the artist and copyright owners were unwilling and unable to take action.<sup>95</sup> This case was handed down prior to the enactment of moral rights in the *Copyright Act* in 2000. If an Indigenous artist today was taking action against an infringement that also debased the culture, the individual artist could claim for infringement of the moral rights of attribution and integrity. Moral rights last for 70 years after the death of the author. After the author dies, the rights are administered by the author's legal representative. If the legal representative is unwilling or unable to take action for moral rights infringement, then clan's representative could also step in.

In 2003, the *Copyright Amendment (Indigenous Communal Moral Rights) Bill* proposed changes to the Copyright Act so that Indigenous communities would have moral rights of integrity. The Bill was not well received by Indigenous interest groups and did not progress to law. A problem was its complexity and limited utility. In any case, moral rights would not apply to stop debasement of works and knowledge that is deemed in the public domain such as rock art images.

Protocols encouraging consultation with Indigenous groups about integrity and interpretation remain a significant way to deal with this issue. However, these are not enforceable at law.

#### 2.1.6 Aboriginal and Torres Strait Islander artists appropriating styles

Another issue that has been raised by Indigenous artists' forums is the incidence of Aboriginal and Torres Strait Islander artists appropriating the styles and art techniques from other Indigenous people's country, traditions and heritage.<sup>96</sup> This is akin to taking someone else's identity or claiming connections to country you do not have.

The increased number of Indigenous professionals teaching in Australian art schools in universities has had a positive influence on Indigenous arts students to enable them to understand protocols and Indigenous arts practice so they can connect to their own cultural heritage.

To respond to this issue in the past, Government arts funding agencies have created funding guidelines that encourage applicants not to copy styles and themes from other regions in government-funded arts projects.<sup>97</sup> This guides Indigenous artists how to find inspiration and to find their own creative expression.<sup>98</sup> The *Australia Council for the Arts' Indigenous Arts*

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<sup>95</sup> *Bulun Bulun v R & T Textiles* (1998) 41 IPR 513.

<sup>96</sup> Indigenous Arts and Copyright Panel chaired by Nancia Guivarra, Cairns Indigenous Arts Forum, NITV, July 2017.

<sup>97</sup> Australia Council's Aboriginal and Torres Strait Islander Arts Board published such guidelines in the Conditions of Grant booklets during the 1990s.

<sup>98</sup> In 2001, the NSW Indigenous Reference Group of the then NSW Ministry for the Arts developed the guide *Expressing your culture, your way*.



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*Protocols* are also well used to educate and draw awareness of protocols. Similar protocols need to be followed by Indigenous graphic design companies who provide design services to corporate clients.

## 2.2 Identified Gaps

### 2.2.1 Indigenous clan groups cannot control reproduction of Traditional Cultural Expressions

Indigenous clan groups and their representatives cannot control reproduction of Traditional Cultural Expressions that are considered to reside in the public domain – that is, where copyright does not protect a work. An exception is the Victorian *Aboriginal Heritage Act 2016* (VIC) which establishes a system for Aboriginal groups to register intangible cultural heritage that is not publicly available. If registered, consent must be obtained from the registered traditional owner group before the item can be commercialised or published. Although the requirement of registration may have issues in that it requires groups to register for protection, it does solve the problem of the potential user of Traditional Cultural Expressions not being able to contact the right person for permission.

The WIPO ICG is working on *Draft Provisions/Articles on Protection of Traditional Cultural Expressions* which aim to provide rights to beneficiaries to prevent misappropriation and control use over Traditional Cultural Expressions. If there is an international regime established, this would deal with the misappropriation that is occurring outside of Australia, as well as set standards for the Australian law on protection of Indigenous Knowledge.

While protocols educate potential users of cultural expression about the need to get free prior informed consent from Indigenous people, there is a lack of enforcement if things go wrong. This could be improved by encouraging the use of contracts to enforce rights against those who use Traditional Cultural Expressions. However, this would mean that there would need to be incentive for the user to approach and negotiate a contract with the clan group. If other people are not required to get consent and follow protocols, why would someone want to engage and consult Indigenous people? Funding from the government may be an incentive. This has been the impetus for the success of the Australia Council and Screen Australia protocols, as following the protocols is conditional on receiving grant funding.

### 2.2.2 Indigenous clan groups cannot stop derogatory treatment of Indigenous cultural expression

Indigenous people cannot use copyright laws to stop the debasement of Indigenous art and designs that in the public domain. The example of the Wandjina Whispering Stone highlights this gap. For rock art and sites, there are laws around filming on parks and heritage places that require people who film or record images commercially to seek permits from government regulators. For example, the *Uluru–Kata Tjuta National Park Guidelines for commercial image capture, use and commercial sound recording* control the capture of commercial images in the



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Uluru Kata Tjuta National Park.<sup>99</sup> These guidelines are focussed on physical images, photographs and filming of sites and do not cover associated stories and knowledge.

#### 2.2.3 Imitation mass-produced souvenir art from overseas without recourse

The imitation mass-produced arts products continue to proliferate the market and compete with legitimately produced and licensed Indigenous products. These products include fabrics, t-shirts, dot-painted boomerangs and other small craft items. The effect of these type of copycats is not only undermining culture, it also impacts legitimate created products, either produced by Indigenous people or under licence. The other important impact is for consumers who are hoodwinked. Copyright and trade practices law are of limited utility given the scope of the problem. There have been attempts to use trade marks, such as the Label of Authenticity, but these have had limited success to date.

#### 2.2.4 Misappropriation occurring overseas

As evidenced in the *Carpets Case* and the case of Bibi Barba, where copyright infringements are occurring overseas, there are difficulties for copyright owners in being able to enforce their rights. There will also be differences in the copyright laws and important, different social attitudes with respect to cultural appropriation. The cross-border element of this issue highlights the need for some degree of international cooperation, ideally through the WIPO IGC.

### 2.3 Options

#### 2.3.1 Enhanced access to legal and business advice

There is an opportunity for Indigenous artists and communities to collaborate with non-Indigenous fashion designers, architects, or souvenir manufacturers. Often the processes of doing this are not widely known to Indigenous artists and communities who are effectively establishing a licensing business model. Many Indigenous producers may benefit from legal and business advice in establishing businesses in the creative sector.

Whilst there are some private law firms that can provide this advice for a fee, and other larger law firms for pro-bono, there is potential for template agreements, standards of business terms and greater business advice on licensing.

Template or precedents could be developed. Already the Arts Law Centre of Australia provide

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<sup>99</sup> Director of National Parks, *Uluru–Kata Tjuta National Park Guidelines for commercial image capture, use and commercial sound recording*, (Environment Australia, 2009), <<http://www.environment.gov.au/system/files/resources/20100bbe-52ef-4d70-a785-0321871f7c33/files/imageguidelines.pdf>>; Under the *Environment Protection and Biodiversity Conservation Act 2000* (Cth), the Director of National Parks is the statutory officeholder, charged with helping to conserve Australia's biodiversity and cultural heritage, The Regulations empower the Director to develop guidelines to protect cultural heritage.





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standard clauses that address Indigenous Knowledge protection and cultural rights.<sup>100</sup> These clauses are accompanied by explanatory notes which contain step-by-step explanations for the user on how to use the agreement, and the purpose of including cultural and Indigenous Knowledge rights. While contracts may not operate to prevent third parties from misappropriating Indigenous Knowledge, they can serve a valuable role in defining ownership of Indigenous Knowledge in a supply chain.

### 2.3.2 Greater use of trade marks and branding

Another option is the greater use of trade marks by Indigenous producers to denote authentic arts and crafts.

Collective marks denote membership of an association and can be useful for Indigenous members of an association who are creating cultural products. Whilst a collective mark does not denote geographic source or the quality of a product, the association's rules about membership criteria on these points. Projects similar to the Kenya Taita Basket collective trade mark may be considered. The collective mark is owned by the Taita Baskets Association, comprised of over 400 women basket weavers from Kenya's Taita Taveta Country who make sisal baskets using traditional methods, techniques and materials based on knowledge passed down from generation to generation of Taita Taveta Country women.

WIPO funded the establishment of the Taita Basket collective trade mark for about \$18,000 AUD,<sup>101</sup> and also provided support over a year.<sup>102</sup> The work included:

- Meetings, workshops and discussions with communities on developing a regional brand and identity of sisal baskets;
- Establishing a regional association;
- Designing the logo of the proposed mark;
- Preparing the regulations for the use of the mark and acceptable quality standards. This included training sessions to standardise production and improve quality of the Taita baskets; and
- Applying and registering trade mark with Kenyan IP Institute.

Now, the Taita Basket mark signals to consumers that sisal baskets carrying the mark are produced by Taita Basket Association Members, who are women from the Taita Taveta Country and the baskets are made according to standards established by the Association's members.

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<sup>100</sup> Arts Law, Submission to *Finding the Way*, IP Australia Indigenous Knowledge Consultation, (2012).

<sup>101</sup>Including a cash grant to support and facilitate activities of the Taita Baskets Association; Taita Taveta County Government, *Taita Basket Weavers Acquire a Collective Trade Mark* (3 March 2016) <<http://taitataveta.go.ke/Taita%20Basket%20Weavers%20Acquire%20a%20Collective%20Trade%20Mark>>.

<sup>102</sup> World Intellectual Property Organisation, *Basket Weaving Project in Kenya Gains Momentum* (29 June 2016) <[http://www.wipo.int/cooperation/en/funds\\_in\\_trust/japan\\_fitip/news/2016/news\\_0002.html](http://www.wipo.int/cooperation/en/funds_in_trust/japan_fitip/news/2016/news_0002.html)>.





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A certification mark might also be useful and with lessons learnt from the previous NIAAA Label of Authenticity, it may be better focussed at the souvenir end of the market.

Certification marks can be licensed to a number of users. The process of authorisation needs to be devolved to regional and local organisations, as this was a problem with the mark. The development of ethical marks and branding is arguably more sophisticated now than was the case when the NIAAA mark was developed. Informed and discerning consumers are looking for products that are 'organic', 'environmentally friendly' and 'fair trade'.

The lesson from the NIAAA Label of Authenticity is that the success of such certification marks relies on effective promotion, endorsement and robust authentication processes. Any new scheme would need to demonstrate a sufficient value proposition to incentivise Indigenous producers to participate. An effective balance between regional authentication processes and a nationally recognisable mark would also need to be considered.

### 2.3.3 Education and awareness

Education and awareness raising initiatives in industries vulnerable to misappropriation can enable those who want to 'do the right thing' to find information about how to engage with, or collaborate with Indigenous creators while respecting the integrity of Indigenous Knowledge.

There is a need for broader education on the impact that misappropriation has on Indigenous culture. The *Fake Art Harms Culture* campaign is attempting to broaden awareness of these harms in the arts and crafts industry through the use of campaign flyers and social media to educate consumers<sup>103</sup>

The Australian Government could strengthen these awareness initiatives by proclaiming an official stance on the misappropriation of Indigenous arts and designs, and putting a government voice to the promotion of authentic works, which may assist in gaining broader media attention for the issue.

Such initiatives could take a similar approach to government tobacco control campaigns, which recognised that the issue needed to be elevated and more personally relevant to individuals.<sup>104</sup> Advertising materials could be developed and made accessible in multiple media and languages.

The Australian Government could build on the Australian Competition and Consumer Commission's awareness-raising video educating Indigenous artists on their rights against unscrupulous traders.<sup>105</sup>

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<sup>103</sup> Arts Law Centre of Australia, *Our Fake Art Harms Culture campaign will be on @NITV's The Point tonight as well as SBS world news #fakeartharms* (23 August 2016) Twitter <<https://twitter.com/ArtsLawOz/status/768334378476769280>>.

<sup>104</sup> Tom Carroll, PhD August 2007, updated by Trish Cotter September 2011 with assistance from Kate Purcell, August 2011, *Tobacco-control campaigns in Australia: experience* in in Scollo, MM and Winstanley, MH [editors]. *Tobacco in Australia: Facts and issues*. Melbourne, (Cancer Council Victoria, 2017) Available from <<http://www.tobaccoinaustralia.org.au/chapter-14-social-marketing/14-3-tobacco-control-campaigns-in-australia-experi>>.

<sup>105</sup> Australian Competition and Consumer Commission, *Good art, good deal*, (ACCC, 2016), <<https://www.accc.gov.au/media-release/accc-supporting-indigenous-artists-to-protect-themselves>>





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Taking more action to educate consumers would help increase consumer and public understanding of Indigenous Knowledge issues, protect consumers from fake Indigenous products and also provide a starting point for those wishing to use Indigenous Knowledge properly.

#### 2.3.4 Make protocols enforceable

A policy option is to develop a national standard protocol for Indigenous Knowledge protection and for the Australian Government to play a more active role in enforcing protocols.

A national standard protocol could be done by harmonising existing industry-standard protocols<sup>106</sup> or using the existing protocol frameworks to develop new national standards. This should include having regard to existing international protocol frameworks such as the WIPO Draft Articles on TK and TCE protection,<sup>107</sup> the Business Reference Guide to the UN Declaration on the Rights of Indigenous Peoples<sup>108</sup> and the Bonn Guidelines.<sup>109</sup> The principles that underpin protocols should cover the gaps in the law which are respect, consultation and consent, communal attribution, benefit sharing and continued maintenance.

National protocol harmonisation however, has its risks in that it could disrupt the business of Indigenous and non-Indigenous entities already operating under their own protocols, or within their own industries which require specific protocols. Developing national protocols should involve engaging and consulting with Indigenous representatives.<sup>110</sup> Protocols should empower Indigenous Knowledge people and support their capabilities to make decisions on use and management of their Indigenous Knowledge and self-determination. For example, the approach by Kimberley Land Council.

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.

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<sup>106</sup> Such as the AIATSIS *Guidelines for Ethical Research in Australian Indigenous Studies*, NHMRC *Guidelines for Ethical Conduct in Aboriginal and Torres Strait Islander Health Research*, the Australia Council Protocols for working with Indigenous artists, the Screen Australia *Pathways & Protocols* and the Desert Knowledge CRC Protocol for Aboriginal Knowledge and Intellectual Property and the KLC Research Protocol.

<sup>107</sup> World Intellectual Property, *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>108</sup> United Nations, *A Business Reference Guide: United Nations Declaration on the Rights of Indigenous Peoples* (2013) <[https://www.unglobalcompact.org/docs/issues\\_doc/human\\_rights/IndigenousPeoples/BusinessGuide.pdf](https://www.unglobalcompact.org/docs/issues_doc/human_rights/IndigenousPeoples/BusinessGuide.pdf)>.

<sup>109</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>>.

<sup>110</sup> Terri Janke, Submission to *Finding the Way*, IP Australia Indigenous Knowledge Consultation (31 May 2012), 24 <[https://www.ipaustralia.gov.au/sites/g/files/net856/f/submission\\_-\\_terri\\_janke\\_and\\_company\\_ip\\_lawyers.pdf](https://www.ipaustralia.gov.au/sites/g/files/net856/f/submission_-_terri_janke_and_company_ip_lawyers.pdf)>.





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The Indigenous Higher Education Advisory Committee has also recommended that a national governance structure and body should be set up to administer and protect rights, coordinate protocols and provide ongoing legal advice for IP queries, complaints and offer mediation and dispute resolution.<sup>111</sup>

Also, as major purchasers of Indigenous goods and services, the Australian Government could ensure that its procurement policies<sup>112</sup> include rules that recognise and encourage Indigenous Knowledge protection. For visual arts and craft related products and services, procurements should comply with the Indigenous Art Code. For other engagements, suppliers of goods and services should be required under the services agreement to comply with Indigenous Cultural and Intellectual Property protocols.

Incorporating protocols into government policies and making protocols a requirement across all government-funded initiatives are ways the Australian Government could make protocols enforceable.

### 2.3.5 Establishing Indigenous cultural authority organisations

There is a need for Indigenous controlled discussion making organisations to be established or strengthened. There has been some discussion about a National Indigenous Cultural Authority (NICA) which could help solve the issues of identifying the right people to get authorisation, as well as assist with providing the administration and standard-setting in contract terms. It could also be the owner of a certification mark denoting authentic products. However, the model could be regional, state based or even locally based.

A NICA would provide infrastructure and guidance to users who want to do the right thing and engage Indigenous people to obtain free prior and informed consent, and negotiate benefit sharing agreements. Characteristics of the NICA are discussed more in Part 8.1 of this paper.

Building on the idea of a National Indigenous Cultural Authority, the Australia Council for the Arts' Aboriginal and Torres Strait Islander Arts Board (ATSIAB) has backed a proposal from the Indigenous arts sector, to establish a National Indigenous Arts and Cultural Authority (NIACA). The ATSIAB, is currently developing a proposal to establish a National Indigenous Arts and Cultural Authority (NIACA) to provide leadership in arts protocols and to facilitate consultation in relation use of Traditional Cultural Expressions, in part fulfilling the role of NICA. The proposal has been discussed at a number of key Indigenous art forums<sup>113</sup> and it is expected that ATSIAB will release a discussion paper in 2018 on the formation of an independent not for profit organisation that is Indigenous owned and controlled.<sup>114</sup> If a NIACA is established, it would focus on arts and cultural expression, however, the wider subject matter of Indigenous Knowledge would still need infrastructure, and the NICA proposal covers this.

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<sup>111</sup> Indigenous Higher Education Advisory Council, Submission to *Finding the Way*, IP Australia Indigenous Knowledge Consultation  
<[https://www.ipaustralia.gov.au/sites/g/files/net856/f/submission\\_-\\_indigenous\\_higher\\_education\\_advisory\\_council.pdf](https://www.ipaustralia.gov.au/sites/g/files/net856/f/submission_-_indigenous_higher_education_advisory_council.pdf)>.

<sup>112</sup> This includes the Commonwealth Indigenous Procurement Policy, and the Commonwealth Procurement Rules, and state and territory Procurement Policy Frameworks.

<sup>113</sup> ArtsFront, *ArtsFront 2030*, <<http://artsfront.com/gatherings/arts-front-2030/>>.

<sup>114</sup> Meeting with Lydia Miller and Trish Adjei, ATSIAB, Australia Council for the Arts, July 2017.





#### 2.3.6 Legislative prohibition

The Australian Government could develop specific legislation to address the issue of imitation Indigenous arts and misappropriation. In February 2017, the *Competition and Consumer Amendment (Exploitation of Indigenous Culture) Bill 2017* (Cth) was introduced by parliamentarian Bob Katter to deal with sale of the fake Indigenous art and souvenirs by non-Indigenous people which deprive Indigenous people benefits from their culture.

The Bill would prohibit the sale of goods that include an 'indigenous cultural expression' unless it was supplied by, or in accordance, an arrangement with, each Indigenous community and Indigenous artists with whom the Indigenous cultural expression is connected; and it was made in Australia.<sup>115</sup> Maximum penalties would apply: for an individual \$25,000, and \$200,000 for a company.<sup>116</sup>

The Bill was supported by the Arts Law Centre of Australia and the Indigenous Art Code with the proviso that any proposed law should not harm legitimate business partnerships that are working for Indigenous artists. For example, an arrangement where an Indigenous community licenses an artwork to a design company that sells products in Australian shops, but manufactures products overseas would be precluded by the Bill in its current form.<sup>117</sup>

In the United States, the *Indian Arts and Crafts Act 1990* makes it illegal to market an arts and craft product as 'Indian' if it is not. Specifically, the Act makes it illegal to display or sell goods 'in a manner that falsely suggests it is Indian produced, an Indian product, or the product of a particular Indian or Indian tribe or Indian arts and crafts organisation'.<sup>118</sup> Under the Act, an 'Indian' is defined as a member of any federally or officially State recognised Indian Tribe, or an individual certified as an Indian artisan by an Indian Tribe. Penalties go as high as \$1,000,000 USD and imprisonment for up to 15 years. Several actions have been brought against businesses under the Act, such as Urban Outfitters for using cultural representations and the name of the Navajo tribe in its products. The case resulted in a licence agreement between Urban Outfitters and the Navajo Nation to work together to create and market authentic Navajo products.<sup>119</sup>

The difficulty with this option is that new laws take time and require significant political will and support. This has always been a hurdle for laws relating to Indigenous Knowledge. However, in light of the *United Nations Declaration on the Rights of Indigenous Peoples*, Australia should consider how specific legislation might address protection of Indigenous Knowledge.

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<sup>115</sup> *Competition and Consumer Amendment (Exploitation of Indigenous Culture) Bill 2017* (Cth), proposed s 50A(1).

<sup>116</sup> *Competition and Consumer Amendment (Exploitation of Indigenous Culture) Bill 2017* (Cth), proposed s168(A).

<sup>117</sup> Tom Lodewyke, 'Lawyers call for legislative protection for Indigenous artists', *Lawyers Weekly* (online), 23 June 2017 <<https://www.lawyersweekly.com.au/wig-chamber/21346-lawyers-call-for-legislative-protection-for-indigenous-artists>>.

<sup>118</sup> *Indian Arts and Crafts Act 1990* (USA), section 104 <<https://www.doi.gov/iacb/indian-arts-and-crafts-act-1990>>.

<sup>119</sup> Alys Landry, 'Navajo Nation and Urban Outfitters Reach Agreement on Appropriation' on *Indian Country Today* 22 November 2016 <<https://indiancountrymedianetwork.com/news/native-news/navajo-nation-and-urban-outfitters-reach-agreement-on-appropriation/>>.



### 3. Misuse of Indigenous languages and clan names

Indigenous languages are an integral part of Indigenous culture, spirituality and connection to country. Similarly, rights to Indigenous language are communal and based on customary laws of kinship and custodianship. On contact, there were approximately 250 Indigenous languages spoken in Australia and today, many of these languages are no longer spoken and are in a state of recovery. Access to recordings and materials created by researchers, linguists and record keepers become important for Indigenous people in reclaiming and revitalising languages.

The Indigenous living speakers of Indigenous languages are both language and culture specialists who are often asked to be recorded and filmed for the primary purpose of maintaining language. Copyright ownership of the recordings and films is an important right for Indigenous people to maintain and control culture.

The type of rights to language that Indigenous people want focus on representation and interpretation, especially when language is being revitalised. The continuing link to the language group is also important. Further, it is a right to be acknowledged as the source, given the importance of language to Indigenous identity.

There is no copyright in a word or a language itself. Whilst copyright can subsist in materials that write down or record Aboriginal and Torres Strait Islander languages, there is no right for Indigenous people to make decisions about how a language is managed, represented and interpreted. Further, there is no legal right for Indigenous people to keep a connection with the language, and neither is there a right to stop others from debasing the language.

For example, when the Tasmanian Aboriginal Centre asserted copyright ownership over Palawa Kani language and translations listed on a Wikipedia page and requested that Wikipedia take it down, Wikimedia claimed that it,

'refused to remove the article because copyright law simply cannot be used to stop people from using an entire language or to prevent general discussion about the language. Such a broad claim would have chilled free speech and negatively impacted research, education, and public discourse—activities that Wikimedia serves to promote.'<sup>120</sup>

The Tasmanian Aboriginal Centre cautions people about the information presented on the Wikipedia page and advises that it is incorrect, and copied from the Centre's language program resources without consent.<sup>121</sup>

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<sup>120</sup> Language Magazine, *Wikipedia Rejects Copyright Claims to palawa kani* (6 August 2014) <[http://languagemagazine.com/?page\\_id=88106](http://languagemagazine.com/?page_id=88106)>.

<sup>121</sup> Eduardo Avila, 'The Internet Presents Opportunities and Challenges for Revitalizing Tasmania's Aboriginal Language', (*Global Voices*, 5 July 2017), <<https://globalvoices.org/2017/07/05/the-internet-presents-opportunities-and-challenges-for-revitalizing-tasmanias-palawa-kani-language/>>.





## 3.1 Discussion

### 3.1.1 Indigenous language revitalisation

Many Indigenous languages are in a state of revitalisation. Recordings and language materials are created in language maintenance projects. There may be a handful of living speakers. Recording their interviews and transcribing their information linguistically creates copyright in the sound recordings, films and the expression of the language. However, the general copyright law recognises that the ownership of the sound recording and the film vests in the maker of the sound recording and film. For sound recordings, if the person providing the information on sound recording is not paid, they will co-own copyright with the maker.<sup>122</sup>

Language revitalisation projects are sometimes done in collaboration with academic institutions or universities through initiatives that are funded by the Australian Government. It is important to ensure that in these projects as well, custodians of the languages being revived retain control of the language and that there are protocols established for consultation and consent to maintain control over the use of those materials.

#### **Case Study: Kurna Warra Pintyanthi**

Kurna is an Aboriginal language from the Adelaide Plains in South Australia. The Kurna language stopped being spoken on a daily basis in the 19<sup>th</sup> century.<sup>123</sup> Some 150 years later, the Kurna elders and people worked with the University of Adelaide's linguists to reclaim and revive the language.<sup>124</sup> The program entitled Kurna Warra Pintyanthi (KWP) to continue to conduct research and develop resources about the Kurna language such as a Kurna dictionary, language learning guides, language courses and camps, and media on radio and TV. Efforts are funded through University of Adelaide funding under the Australian Government Indigenous Languages and Arts Program.

The University of Adelaide signed a Memorandum of Understanding with Kurna elders as representatives of KWP to affirm commitment to the project. The MOU recognises KWP's ownership and custodianship of the Kurna language on behalf of the Kurna people, allows for sacred and secret material to be kept as such.<sup>125</sup> The MOU also limits use of developed materials and resources for non-commercial research and teaching purposes only, and commercial uses require consultation with and consent of KWP.

Kurna Warra Karpnanthi was established as an Indigenous corporation to manage and control the language program.<sup>126</sup> People who want to use the language words to name streets, buildings, rooms and other things may apply to the KWK to get consent to use the

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<sup>122</sup> *Copyright Act 1968* (Cth) s 97.

<sup>123</sup> Kurna WarraPintyanthi, 'Kurna Language in the City of Adelaide' on *The University of Adelaide* 27 August 2017 <<https://www.adelaide.edu.au/kwp/projects/language/>>.

<sup>124</sup> Kurna WarraPintyanthi, 'Welcome to the Internet home of Kurna Warra, the language of the people of the Adelaide Plains' (The University of Adelaide, 27 August 2017) <<https://www.adelaide.edu.au/kwp/index/>>.

<sup>125</sup> The University of Adelaide, *Memorandum of Understanding* (2013) <[https://www.adelaide.edu.au/kwp/welcome/201310\\_MoU\\_KWP-UoA\\_signed.pdf](https://www.adelaide.edu.au/kwp/welcome/201310_MoU_KWP-UoA_signed.pdf)>.

<sup>126</sup> Department of Linguistics, 'Kurna Warra Pintyanthi' on *The University of Adelaide* 12 December 2016 <<https://arts.adelaide.edu.au/linguistics/kwp/>>.



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words. A fee is charged for the consultation process and also information about the words and how to properly pronounce them. These fees allow for more resources to be created.

Aboriginal and Torres Strait Islander Language Centres do important work in recording and restoring language. The Federation of Aboriginal and Torres Strait Islander Languages published a guide and template contracts for Indigenous language recording project which vested copyright in language materials in Indigenous language centres.<sup>127</sup> This resource is considered a useful tool.

However, using the template contracts may still require a certain level of understanding and guidance. Protocols and education workshops can be used to support template contracts, like what was done by the Tagai State College in the Torres Strait and the Batchelor Institute.

#### **Case Study: Tagai State College protocols and agreements**

The Tagai State College is a school in the Torres Strait that provides education and training. The college takes a holistic approach which reflects the academic, social, emotional and physical needs of children.<sup>128</sup> The Tagai State College and the Torres Strait Islander Regional Education Council created the Torres Strait Language and Culture protocol and contracts for its language and culture program. The program was to support the development of languages and culture for the use in cultural education.

By developing the protocol and template agreements they wanted to recognise that the ownership of the language and culture were the knowledge of individual language speakers. The protocol also ensured that correct attribution was given and that certain Torres Strait Islander customs were followed.

For example, when a Torres Strait Islander passes on there are certain death protocols and warnings that need to be in place. Benefit sharing is another protocol that ensures the Torres Strait Islander community/knowledge holder receives benefits for sharing knowledge.

#### **Case Study: CALL – Batchelor Institute Language Database**

The Centre for Australian Languages and Linguistics (CALL) is working on revitalising the Indigenous languages of Australia. CALL is managed by the Batchelor Institute. CALL is a collections database and website. The website is used for the collection and digitalisation of Aboriginal and Torres Strait Islander languages. On the website is material collected over 40 years from communities, students and staff. The archive includes text, audio, video and eBooks that include details about Aboriginal and Torres Strait Islander languages.<sup>129</sup>

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<sup>127</sup> The Federation of Aboriginal and Torres Strait Islander Languages and Culture, *FATSILC Guide to Community Protocols for Indigenous Language Projects 2004* <<http://www.fatsilc.org.au/languages/fatsilc-protocols-guide/community-protocols-for-indigenous-language-projects-2004/fatsilc-guide-to-community-protocols-for-indigenous-language-projects-2004>>.

<sup>128</sup> Tagai State College, *Tagai State College* (2017) <<https://tagaisc.eq.edu.au/Pages/default.aspx>>.

<sup>129</sup> Centre for Australian Languages and Linguistics, 'CALL Collection' 29 June 2017 <<https://call.batchelor.edu.au/project/call-collection/>>.







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Terri Janke and Company presented workshops on Indigenous Cultural and Intellectual Property at Bachelor. After these workshops, Batchelor contacted Terri Janke and Company to confirm the correct approach. When working with Indigenous communities and collecting Indigenous cultural and intellectual property preparing licences and developing protocols ensures that an ethical approach is taken. Licence agreements, Collection Cultural Protocols and community/creator consent forms were created to ensure that international standards for best practice were maintained. Each form was created to ensure that Indigenous cultural and intellectual property was protected.

#### 3.1.2 Place names with Indigenous words

Indigenous people seek the right to be consulted on how their language is used to name sites and place. This is so that the context and suitability of the name can be considered and to provide advice on the correct meaning and pronunciation.

There are state laws and policies relating to geographical names, the use of Indigenous words and dual naming in English and Indigenous languages. There are also *National Guidelines for the Use of Aboriginal and Torres Strait Islander Place Names*<sup>130</sup> which have been developed in recognition of the continuing close relationship between Aboriginal and Torres Strait Islander peoples and the land. These Guidelines aim to recognise Indigenous self-determination, taking into account the differences in each state and territory laws, community structures and physical circumstances.

For instance, most states require consultation with Indigenous communities and traditional owners for naming places with Indigenous words. In New South Wales for example, dual naming of sites must be supported by local Aboriginal communities and the local Aboriginal Land Councils. In Tasmania, Aboriginal language words used in for place naming must be in Palawa Kani language.

These laws and policies are about ensuring appropriate and relevant names are given the sites and places, but they also aim to promote consistency in interpretation and address potential spelling issues.

However, the guidelines also provide that authorisation is to be obtained from the relevant community for the use of an Aboriginal or Torres Strait Islander name or word, and states that questions of copyright/ownership of information collected during any fieldwork or investigation must be resolved prior to the survey or other activity being conducted.<sup>131</sup>

#### 3.1.3 Commercial use of Indigenous words

Indigenous words are often used for business and product names and brands. Legally, traders can use names commercially without consulting with Indigenous language groups and can register business names and trade marks without the need for consent.

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<sup>130</sup> Permanent Committee on Place Names, *Guidelines for the Consistent Use of Place Names* (December 2015) <[http://www.icsm.gov.au/cgna/consistent\\_place\\_names\\_guidelines.pdf](http://www.icsm.gov.au/cgna/consistent_place_names_guidelines.pdf)>.

<sup>131</sup> Ibid, 15.





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Under the *Trade Marks Act 1995* (Cth) there are no requirements for trade marks examiners to inquire about whether owners seeking registration of an Indigenous word as a trade mark are associated with the country or clan from which the word originates. On the application for trade mark there is a question about whether the word is a foreign language and asks for a translation. Many Indigenous applicants simply note that the word is 'Indigenous'.

In New Zealand, trade marks legislation provides that a trade mark that is culturally offensive to Maori people can be rejected. In the past, the New Zealand Trade Mark Office has rejected the word 'mana', which means power, for a brand of a beer.

#### Case Study: New Zealand Trade Marks Act and Maori trade marks

Under section 177 of the Trade Marks Act 2002 (NZ), the New Zealand Intellectual Property Office has Maori Advisory Committees appointed by the Commissioner for trade marks, designs and patent applications, with members being sought from the public and also relevant agencies and sectors.

If trade mark applications contain a Maori element, applications are referred to the Committees for assessment on offensiveness to Maori communities.<sup>132</sup> Where the examiner is unsure, the application is referred to the Maori Trade Marks Advisory Committee to determine whether Maori elements are contained in the application. The Committee provides advice to NZ IP Office on whether or not the elements are considered offensive. The Maori Trade Marks Advisory Committee also provides advice in relation to design applications with Maori elements.

The IPONZ has specific guidelines for trade marks examiners in examining applications containing Maori elements.<sup>133</sup> All trade marks received by IPONZ are assessed to determine whether they contain a Maori sign, or are derived from a Maori sign. Maori trade marks are identified on the NZ Trade Marks database.

To identify Maori elements in applications, the Practice Guidelines provide extensive guidance to examiners on Maori culture, customary concepts, language, translations and a list of additional resources.<sup>134</sup> Even if the applicant does not mean to use a Maori word, if the word is recognised in the examination process as Maori, then it must be assessed for offensiveness in accordance with s178 of the Trade Marks Act (NZ).<sup>135</sup>

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<sup>132</sup> New Zealand Intellectual Property Office, *Terms of Reference for the Māori Trade Marks Advisory Committee* <<https://www.iponz.govt.nz/assets/pdf/maori-ip/terms-of-reference-maori-advisory-committee.pdf>>.

<sup>133</sup> New Zealand Intellectual Property Office, *Māori advisory committee and Māori trade marks* <<https://www.iponz.govt.nz/about-ip/trade-marks/practice-guidelines/current/maori-advisory-committee-and-maori-trade-marks/>>.

<sup>134</sup> New Zealand Intellectual Property Office, *Māori advisory committee and Māori trade marks* <<https://www.iponz.govt.nz/about-ip/trade-marks/practice-guidelines/current/maori-advisory-committee-and-maori-trade-marks/>>.

<sup>135</sup> *White Cloud Dairy Innovation Limited* [2017] NZIPOTM 3.





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Australian Trade Mark legislation does not contain a similar provision for Indigenous Australians. Whilst there is a provision that allows scandalous trade marks to be rejected, the test for what is 'scandalous' is subjective and may not extend to the use of Aboriginal words that are used in ways that are culturally offensive.<sup>136</sup>

Indigenous peoples' main concern with commercial use is that the particular use does not undermine culture by giving the word an inappropriate meaning. Indigenous people could potentially be offended when Indigenous words that have significant meaning are used in commercial contexts without any connection or consent.<sup>137</sup> For example, using 'Biame' which means 'creator' for a wine company may be culturally offensive to Aboriginal people.

Commercial use does not just mean registration of trade marks but can include uses like Indigenous language to name rooms or buildings, or using Indigenous languages in songs.

#### **Case Study– Telstra Muru-D**

Telstra consulted with a well-respected Sydney Aboriginal community leader to name its digital start up incubator Muru-D. Telstra originally wanted to name of their new start up incubator to reflect that traditional language of the land that it was built on. They connected and engaged Shane Phillips, a Sydney Aboriginal elder. Shane was to select the word and acted as an ambassador and a cultural consultant.<sup>138</sup>

As a cultural consultant, Shane worked with the Aboriginal community, elders and language experts to determine whether the use of the work was culturally appropriate. Letters of support were also sought from Aboriginal community organisations. This demonstrated the acceptance throughout the community. In conjunction with Shane, the logo was designed. At the opening, Shane acted as the ambassador and presented a welcome to country. An artwork was also developed by a local Indigenous artist for the business. Telstra also made a grant to the Clean Slate Language and Cultural Project, which is based in Redfern.<sup>139</sup> It was decided that this grant would be renewed every ten years, similar to legal trade marks.<sup>140</sup>

It would be an appropriate recognition of cultural protocol for non-Indigenous persons to obtain consult with the traditional custodians of the language and seek permission to use an Indigenous word or name commercially.

#### **Case Study– Ngambala Wiji li-Wunungu – Together We Are Strong, Shellie Morris and the Borroloola Songwomen**

Shellie Morris worked with the Borroloola Songwomen and Barley Regional Arts to develop *Ngambala Wiji li-Wunungu – Together We Are Strong*, an album that featured 9 contemporary Yanyuwa language songs, 1 contemporary song in Gudanji language, and 58 traditional songs from the Yanyuwa, Garrwa, Gudanji an Marra languages. Shellie spent more than 12 years working with 60 Aboriginal communities and learning 17 languages and dialects. The album was created to reflect Indigenous language and culture. Shellie's grandmother was a part of the Stolen Generation Borroloola and it was a healing process for Shellie to return.<sup>141</sup>

When working to prepare the album, the Australia Council of the Arts Protocols were





applied. There are nine principles that ensure ethical work with Indigenous communities takes place. The principles are respect, Indigenous control, communication, consultation and consent, interpretation, integrity and authenticity, secrecy and confidentiality, attribution and copyright, continuing cultures, and recognition and protection. The copyright is split between the Borroloola Songwomen, Shellie Morris and Barkly Arts. The percentage of APRA royalties also meant that a split was divided depending on the relationship that the singer had to the original composer of the song. Each singer would receive a percentage but the one with the traditional relationship would receive a larger percentage.<sup>142</sup>

#### 3.1.4 Use of clan and group names

Another significant issue is the unauthorised use of Indigenous clan and group names by others. This is especially a concern for Indigenous groups when the language group or clan's name is used for commercial purposes. For example, Aboriginal native title groups may enter into Indigenous Land Use Agreements with mining companies in which mining companies agree to engage services of businesses from that local group. The use of the native title group's name by others in the past has confused mining companies into believing that a business is related to the native title organisation.

There are also cases where the commercial use of a clan name will be inappropriate. Such was the case with the use of 'Navajo' by Urban Outfitters for a range of clothing. This caused outrage for Navajo people and their supporters. In the USA, protecting tribal insignia is provided for in the *Native Tribal Insignia Act* which creates a database of tribal seals and flags. This legislation recognises special rights in identifiers of clan groups and prevents others from commercialising or trading off clans' reputations.

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<sup>136</sup> Section 42 of the Trade Marks Act 1995 states that an application for trade mark registration will be accepted if it 'contains or consists of scandalous matter.' However, what is scandalous will depend on social norm and community standards. Trade marks that have been rejected for scandalous grounds include trade marks that are religiously offensive; swear words, words with sexual meanings and trade marks that encourage unlawful behaviour.

<sup>137</sup> Terri Janke and Company, 'New tracks: Indigenous knowledge and cultural expression and the Australian intellectual property system' (2012) Submission to *Finding the Way*, IP Australia Indigenous Knowledge Consultation, 32.

<sup>138</sup> United Nations, *Practical Supplement: Business Reference Guide to the UN Declaration on the Rights of Indigenous Peoples* (December 2015) <[https://www.unglobalcompact.org/docs/issues\\_doc/human\\_rights/IndigenousPeoples/Case\\_Examples.pdf](https://www.unglobalcompact.org/docs/issues_doc/human_rights/IndigenousPeoples/Case_Examples.pdf)>.

<sup>139</sup> Telstra, Muru-D: Recognising Indigenous Culture, <<https://careers.telstra.com/special-pages/lightbox/indigenous-campaign/muru-d>>

<sup>140</sup> United Nations, *Practical Supplement: Business Reference Guide to the UN Declaration on the Rights of Indigenous Peoples* (December 2015) <[https://www.unglobalcompact.org/docs/issues\\_doc/human\\_rights/IndigenousPeoples/Case\\_Examples.pdf](https://www.unglobalcompact.org/docs/issues_doc/human_rights/IndigenousPeoples/Case_Examples.pdf)>.

<sup>141</sup> Terri Janke and Company, *Indigenous Cultural Protocols and the Arts* (2016) <[http://docs.wixstatic.com/ugd/7bf9b4\\_9be09e2471b44893919b8127cd18e3b8.pdf](http://docs.wixstatic.com/ugd/7bf9b4_9be09e2471b44893919b8127cd18e3b8.pdf)>.

<sup>142</sup> Terri Janke and Sarah Grant, *Indigenous Cultural Protocols and the Arts* (Terri Janke and Company, 2016) <[http://docs.wixstatic.com/ugd/7bf9b4\\_9be09e2471b44893919b8127cd18e3b8.pdf](http://docs.wixstatic.com/ugd/7bf9b4_9be09e2471b44893919b8127cd18e3b8.pdf)>.



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Unfortunately, registering a clan name as a trade mark to prevent derogatory use has significant practical limitations. Firstly, the clan's name would need to be filed across a number of classes. A significant issue to overcome is what legal entity should be the registered owner of the trade mark. Should it be one organisation or a collective mark based on membership of an association? Whilst it is possible to apply for a defensive mark for well-known trade marks, a trade mark doesn't really provide integrity of the community's name. It is also uncertain if any Indigenous clan names would be considered sufficiently well known to satisfy the criteria for a defensive mark.

### 3.2 Options

#### 3.2.1 Protocols for using Indigenous names and words

The legal and policy approach to naming geographic places with Indigenous words is a model that could be used for Indigenous naming practices in other areas. For example, scientists might use Indigenous words to name discoveries such as new species or stars. The practice of consulting about appropriate use and getting authorisation from relevant Indigenous people should be followed.

In the same way, non-Indigenous businesses who use Indigenous words as business, product, service and location (such as room and place) names could also follow the practice and consult with relevant Indigenous people or communities. This approach is recommended by the *United Nations Global Compact Business Guide on the Declaration on the Rights of Indigenous Peoples*.<sup>143</sup> There are examples of a developing process of seeking consent and negotiating rights and paying respects to the Indigenous clan groups such as Telstra using a Sydney language word to name Muru-D, its incubator for start-ups discussed above.

Another example is the approach taken by the government body, NSW Education Standards Authority in its development of several NSW Aboriginal Language apps. The apps are being developed for the Aboriginal Language and Culture Nests, which is a network of communities working collectively on reviving Indigenous languages.

The NSW Education Standards Authority developed a cultural protocol, template community consent form and individual consent form to ensure that the collection, recording, use and reproduction of language will be approached in an ethical way. The template consent form outlines the Indigenous cultural and intellectual property clauses in relation to Indigenous Knowledge. The NSW Education Standards Authority makes no claim over the cultural knowledge that is contained in the apps. The community consent form states that the Indigenous Knowledge is owned by the community-endorsed organisation and/or representative on behalf of the community for the life of the app.<sup>144</sup>

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<sup>143</sup> *United Nations Global Compact, Business Guide on the Declaration on the Rights of Indigenous Peoples*(2013) 74.

<sup>144</sup> Information provided by Dr Christine Evans, Chief Education Officer, Aboriginal Education, NSW Education Standards Authority.



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There is a need to educate brand owners and businesses of the importance of Indigenous words as identifiers of culture. Consent and consultation should underpin non-customary applications of words, so that Indigenous language centres and stakeholders are consulted.

#### 3.2.2 Establishing an Indigenous Advisory Committee in IP Australia

As the government agency responsible for administering Australia's intellectual property rights system, IP Australia should recognise the unique cultural, social and economic significance of Indigenous Knowledge to Australia in its vision for a world leading IP system that builds prosperity.

To assist this, IP Australia should increase Indigenous engagement and participation in the examination processes by establishing an Indigenous Advisory Group. An Indigenous Advisory Group could provide advice and guidance to examiners on applications containing Indigenous elements to prevent derogatory use and preserve rights for Indigenous people in their languages.

#### 3.2.3 Tools and Training for Trade Mark Examiners

Trade mark examiners need tools and training to deal with applications that contain Indigenous words. It would be useful to have cultural training, and to be able to access Indigenous language databases. This would help examiners be more aware of Indigenous Knowledge issues that could arise in trade mark applications and examination. Greater communications with AIATSIS could also provide more information so that examiners can make their decisions.

#### 3.2.4 Amending the Trade Marks Examiners Manual to protect Indigenous Knowledge

IP Australia should implement better protections in its examination process of trade marks applications. Additional processes might increase time, resources and costs related to examination process, both for IP Australia internally and for applicants, but it would be a cost-effective option for the Australian Government to minimise misappropriation of Indigenous languages and cultural expressions.

The following processes may be considered for inclusion in the Trade Marks Examiners Manual:<sup>145</sup>

- Guidance and resources to help examiners understand Indigenous culture and knowledge (eg. case studies to demonstrate scenarios, list of key resources such as Indigenous language dictionaries) to help identify Indigenous elements in applications;
- Internal protocol for examiners to report to Indigenous applicants on specific cultural matters (eg. identification and definition of Indigenous words and images used in the application and whether they are descriptive and grounds for rejection under s 41 *Trade Mark Act 1995* (Cth));

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<sup>145</sup> IP Australia provides and publishes the *Trade Marks Office Manual of Practice and Procedure*. The Manual provides guidance to trade marks examiners about all aspects of the trade mark examination process. (See: [http://manuals.ipaustralia.gov.au/trademarks/trade\\_marks\\_examiners\\_manual.htm](http://manuals.ipaustralia.gov.au/trademarks/trade_marks_examiners_manual.htm)).





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- Internal protocol for examiners to dealing with Indigenous words in applications including ascertaining meaning and identifying language groups;
- Guidance on how words in Indigenous peoples' languages are used to describe geographic places (eg. use of place names for land subject to native title that does not permit commercial uses would be contrary to law and grounds for rejection under s 42(b) *Trade Mark Act 1995* (Cth));
- Seeking documentation from applicants that cultural consent has been obtained for commercial use of the Indigenous words and images (if no consent then the trade mark examiner could require a statement from the application on how they will consult with Indigenous people; if there is no consent, the trade mark should not be registrable);
- Introducing additional notifications systems for trade marks filed with IP Australia containing Indigenous elements;
- Increase awareness of and information on using voluntary disclaimers under *Trade Marks Act 1995* (Cth) for trade marks containing Indigenous elements, which are cost-free for applicants;<sup>146</sup>
- Additional Indigenous trade mark classes of goods and services added to the pick list to assist Indigenous applicants and reduce costs (eg. Aboriginal land management; boomerang, didgeridoo).

### 3.2.5 Increasing Indigenous employment in IP Australia

Less than 0.5 per cent of IP Australia's staff members identify as Indigenous.<sup>147</sup> Another way to increase Indigenous engagement and make informed decisions in the examination process would be to employ more Indigenous staff members across IP Australia. IP Australia should increase measures taken to implement its Indigenous Employment Strategy.<sup>148</sup>

Indigenous examiners could provide valuable input into applications and increase Indigenous awareness in IP Australia generally.

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<sup>146</sup> Section 74 of the *Trade Marks Act 1995* (Cth) allows for applicants to make disclaimers (that is, exceptions to their exclusive rights or authorising the use of) to specific parts of their trade mark. This can be useful, for example, for applicants whose marks contain Indigenous words to disclaim that the word is Indigenous and does not limit Indigenous communities' use of the word. To do so is cost-free for applicants. However, they are voluntary only and would rely on the applicant's awareness and knowledge of whether Indigenous elements are present in their marks, and also applicant's willingness to cooperate. The Advisory Council on Intellectual Property reported that there is no information on the use of voluntary disclaimers at application or examination of trade marks and they have rarely been used. See: ><https://www.ipaustralia.gov.au/about-us/public-consultations/archive-of-ip-reviews/ip-reviews/review-enforcement-trade-marks/issues-paper>.> In New Zealand, the Commissioner has powers to require disclaimers to trade marks if it considers that there are public interests for doing so (see section 71 of the *Trade Marks Act 2002* (NZ)).

<sup>147</sup> People and Communication Group, *IP Australia's Indigenous Employment Strategy 2016-2019*, (27 May 2016).

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





### 3.2.6 Specific Indigenous language legislation

One option is to develop a specific law that gives Indigenous people rights to be consulted on the use of their languages for all purposes, similar to the geographic names laws and policies. This would be useful in providing Indigenous people with the right to check the context and the appropriateness of the words.

In 2017, NSW has introduced the *Aboriginal Language Act 2017* (NSW) to promote Indigenous languages and to revive Indigenous languages. The Act establishes a Board of Aboriginal people, appointed by the Minister to develop a strategic plan for the growth and nurturing of Aboriginal languages.<sup>149</sup> Whilst the Act acknowledges that 'Aboriginal languages are part of the cultural heritage of New South Wales'<sup>150</sup> it does not deal with the ownership or custodianship of languages or the protocols relating to use and control of them. Any laws relating to Indigenous languages should empower Indigenous people to make decisions about its maintenance and use.

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<sup>149</sup> Section 11 & 12, *Aboriginal Languages Act 2017* (NSW).

<sup>150</sup> Preamble, (c.), *Aboriginal Languages Act 2017* (NSW).



## 4. Recording Indigenous Knowledge and managing legacy recordings

Indigenous Knowledge is held and practiced for the purposes of looking after country, expressing culture and identity. For many years, Indigenous Knowledge has been passed down primarily from one generation to another primarily through face to face teaching. Knowledge is passed on when Indigenous people from the clan group are ready to take on knowledge.

Indigenous Knowledge such as traditional practices of weaving, arts, ceremony and understanding country is oral and performance based.<sup>151</sup> The cultural information is related to the practice. This makes for some challenges when Indigenous Knowledge is recorded and for how, and to whom, the knowledge can be shared.

### 4.1 Discussion

#### 4.1.1 Free prior and informed consent when making recordings

Indigenous people are often asked to share their knowledge with researchers, writers, teachers, anthropologists, scientists, filmmakers, broadcasters, media, government officers and many others. This often involves a record being created – either a written document, a film or a sound recording. Indigenous people are concerned that they cannot control how their Indigenous Knowledge is recorded and interpreted.

This is an issue when written documents, reports or books are created. Under the *Copyright Act*, the copyright in the expression of the literary work will belong to the person who creates the record. In most cases, this will be the researcher or the writer. Indigenous people cannot control the interpretation of their shared information unless it is confidential information, defamatory or constitutes racial vilification.

There are *Guidelines on Ethical Research on Indigenous Australian Studies* about properly informing Indigenous people before interviewing them for research. The free, prior informed consent of the person being interviewed for research is required. An example is the Australian Anthropological Society, which requires in their Code of Ethics for its members to obtain informed consent of participants.<sup>152</sup> and to obtain copyright clearances for any audio and visual recordings being made if they are to be published or broadcast.<sup>153</sup>

There are also performer's rights in the *Copyright Act* which give rights to performers to consent or prevent records being made of their performances in sound recording or film, and to control how the recording is used in the future. These rights are available to Indigenous performers or interviewees who are performing their cultural expression or talking about or showing their cultural practices. Because consent can be implied by conduct there are

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<sup>151</sup> Terri Janke, *Beyond Guarding Ground, A Vision for a National Indigenous Cultural Authority*, (Terri Janke and Company 2009).

<sup>152</sup> Australian Anthropological Society, *Code of Ethics* (Australian Anthropological Society, 2012) s 3.4.

<sup>153</sup> *Ibid* s 3.7(d)



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considerable 'grey areas', especially when filming or recording is done on personal devices such as mobile phones.

Indigenous people interviewed and recorded on sound recordings who are not paid for their participation will jointly own the copyright in the sound recording.

It is best practice for filmmakers and the sound recordists to get performers to sign consent forms (also known as performer's releases) to film or record. Indigenous interviewees who disclose or perform Indigenous Knowledge can ask for filmmakers and sound recordists to consult with them on how their interview is presented. This has been done by SBS, NITV and the ABC.

Performer's releases have included rights to approval final cut, credit and attribution, processes relating to use of deceased images and future use of the film footage in other contexts. However, in many cases Indigenous interviewees may not know they have the right to negotiate these terms. There are also inconsistencies in practice depending on the filmmaker or sound recordist. Forms may be signed but copies not given to Indigenous interviewees. Over time, people may forget that there were any conditions on use. There is a need for better record keeping and awareness to allow Indigenous people, and their family members if they are deceased, to know what rights were given for use of their interviews and performances.

#### 4.1.2 Controlling future use of recordings

When Indigenous Knowledge is recorded in writing, or in sound recordings and films, copyright is created. The owner of the copyright can control reproductions of the recorded materials. The problem is that the owner of the copyright is the person who made the record. A record which is either a written record, sound recording or film can be authorised for reproduction, with the copyright owner being the person legally required to give consent.

#### **Case Study: Deepening Histories of Place**

The Australian National University through funding by the Australian Research Council started an interdisciplinary and collaborative digital project called "Deepening Histories of Place". An integral part of the project is the collection and capturing of Indigenous Knowledge, such as Indigenous people's stories about land, histories, families and connections to places to investigate the social and environmental links that create historical "highways" of understanding.

The project partners (comprised of a team of government, private, academic and industry partners) wanted to make sure that access and use of Indigenous Knowledge in the project was ethical, appropriate and in accordance to best practice. Funded by one of the project partners, the National Film and Sound Archive and Terri Janke and Company was engaged to develop the *Deepening Histories of Place: Indigenous Cultural and Intellectual Property Protocol*.<sup>154</sup>

<sup>154</sup> Deepening Histories, *Indigenous Cultural and Intellectual Property (ICIP) and Intellectual Property (IP) Protocol* (2013), written by Terri Janke and Lucinda Edwards, Terri Janke and Company,





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The protocols address, amongst other things, that uses of recordings and materials should be negotiated at the start and new, additional uses requires free prior and informed consent. That is, re-consultation with the community with written consent, and a signed clearance.

#### 4.1.3 Representations of Indigenous people on film and media

Indigenous people complained that their representation by filmmakers and media in the past was stereotypical, being made by non-Indigenous people. In 1990 SBS developed one of the first Indigenous protocols for film and TV. Researched and compiled by Lester Bostock, the protocol was developed to assist filmmakers, television programmers and other media practitioners in the production of programs about Indigenous issues, or made in lands of Indigenous people. SBS released an updated version in 2016-17 that aims to again set industry leading protocols for telling Indigenous stories across all of its platforms.<sup>155</sup>

There are also issues of consent to be filmed, and disclosure of restricted knowledge and materials that are in breach of customary laws. In 2006, Screen Australia's *Pathways and Protocols* sets out principles for filmmakers to address these issues. These protocols are a requirement of funding from Screen Australia.

#### Case Study: Screen Australia Pathways and Protocols

*Pathways and Protocols, A Filmmakers guide to working with Indigenous people culture and concepts* is a Screen Australia published guide for the best practices for engaging with Indigenous communities and Indigenous content, and identifies legal and ethical issues involved in conveying Indigenous knowledge and stories to the screen. The document provides an in-depth resource for filmmakers which covers the key areas of; community consultation and consent, copyright and moral rights, the implementation of protocols based on respect for Indigenous culture, heritage, individuals and communities and provides case studies on the use of Indigenous content in productions.<sup>156</sup>

*Pathways & Protocols* are the leading film industry protocols for Indigenous Knowledge protection. Based on the protocols, Screen Australia's funding guidelines include specific requirements where Indigenous Knowledge or Indigenous content is involved in film projects.<sup>157</sup> Depending on the type of content, requirements vary from a plan for research and consultation to evidence of signed clearance forms and written consent for use of Indigenous Knowledge.

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available from <<http://www.deepeninghistories.anu.edu.au>>.

<sup>155</sup> SBS, *The Greater Perspective: Protocols and Guidelines for the Production of Film and Television on Aboriginal and Torres Strait Islander Communities* (2016-17).

<sup>156</sup> Terri Janke, *Pathways and Protocols, A Filmmakers guide to working with Indigenous people culture and concepts*, (Screen Australia 2009), 4.

<sup>157</sup> Screen Australia, *Indigenous Content or Participation* <<https://www.screenaustralia.gov.au/about-us/doing-business-with-us/indigenous-content>>.





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They are well known in the film and screen industry and have served to educate and generate awareness about Indigenous Knowledge rights.

Further, the Australian Film and Television School (AFTRS) Indigenous unit has produced an educational resource on the best practices for Indigenous consultation in making films, documentaries or scripts which includes Indigenous materials. The key points they make are on the importance of community consultation, respecting Indigenous protocols and that authentic collaboration is undertaken during the process. AFTRS provide a short clip of the proposed resource titled 'Indigenous Consultation Trailer' in which some of Australia's leading film makers speak about their process of Indigenous consultation. The resource is aimed at those wishing to produce media based on/including Indigenous content.<sup>158</sup>

#### 4.1.4 Managing Access and Use of Legacy Recordings

While copyright allows some control over access to and use of the recorded form of the Indigenous Knowledge (such as the written document, sound recording or film) and requiring third parties to obtain legal consent for the use of the works, those rights are owned by the legal owner, who is the maker or author of the work. Henrietta Marrie stated that Indigenous people are 'captives of the archives' because Indigenous people do not own the Indigenous Knowledge collected about them.<sup>159</sup>

Once Indigenous Knowledge is recorded, controlling access, use and interpretation of underlying Indigenous Knowledge contained in those works is often beyond the control of the Indigenous Knowledge rights owners.<sup>160</sup> People are free to use the underlying Indigenous Knowledge so long as they did not infringe any IP rights that subsist in the manner in which Indigenous Knowledge is expressed in the work.<sup>161</sup> Further, Indigenous people are also 'concerned that they cannot access records or use and publish them without permission of the copyright owner'.<sup>162</sup>

Galleries, libraries, archives and museums are a vital access point for Indigenous Knowledge<sup>163</sup> as they hold large amounts of material containing Indigenous Knowledge such as films, sound recordings, reports, photographs, books and records. Often these materials are created and owned by filmmakers, ethnomusicologists, government works, photographers, academics or mission administrators.

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<sup>158</sup> Australian Film Television Radio and School, *Indigenous Consultation*, <<http://www.aftrs.edu.au/indigenous/consultation>>.

<sup>159</sup> Terri Janke, *Our Culture: Our Future*; Terri Janke, 'Ensuring Ethical Collaborations in Indigenous Arts and Records Management' (2017) 91 ALJ 377.

<sup>160</sup> Terri Janke, Submission to *Finding the Way*, IP Australia Indigenous Knowledge Consultation (31 May 2012) page 24 <[https://www.ipaustralia.gov.au/sites/g/files/net856/f/submission\\_-\\_terri\\_janke\\_and\\_company\\_ip\\_lawyers.pdf](https://www.ipaustralia.gov.au/sites/g/files/net856/f/submission_-_terri_janke_and_company_ip_lawyers.pdf)>, 13.

<sup>161</sup> World Intellectual Property Organisation, *No. 9 Documentation of Traditional Knowledge and Traditional Cultural Expressions* (2016), 2. <[http://www.wipo.int/edocs/pubdocs/en/wipo\\_pub\\_tk\\_9.pdf](http://www.wipo.int/edocs/pubdocs/en/wipo_pub_tk_9.pdf)>.

<sup>162</sup> Terri Janke, 'Ensuring Ethical Collaborations in Indigenous Arts and Records Management' (2017) 91 ALJ 378.

<sup>163</sup> National and State Libraries of Australasia (2014), Submission to *Finding the Way*, IP Australia Indigenous Knowledge Consultation, 1.





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Alana Garwood-Houng, Librarian at the Australian Institute of Aboriginal and Torres Strait Islander Studies, explains, 'some of this material was created or collected without consent or through deception.'<sup>164</sup> Indigenous people are unaware of what information these institutions possess which is of relevance to their community. Protocols are used to address the issue of accessing, using, storing, copying and presenting material containing Indigenous Knowledge once they are deposited in a library or archive.

The National and State Libraries Australasia developed the *National position statement for Aboriginal and Torres Strait Islander library services and collections*<sup>165</sup> to provide a framework of protocols and best practice guidance to National, State and Territory libraries in their plans and approaches to Aboriginal and Torres Strait Islander library services and collections. The framework encourages collections and services that are 'accessible, appropriate and responsive to the needs and perspectives of Aboriginal and Torres Strait Islander peoples'.<sup>166</sup>

There is also a protocol for referencing and managing Indigenous content in libraries, the *Aboriginal and Torres Strait Islander Library and Research Protocols*.<sup>167</sup> Furthermore, to deal with management of local and regional digital resources on line, Dr Jane Anderson has developed a Traditional Knowledge and Traditional Cultural Expressions labelling program – the Murkurtu Program.<sup>168</sup>

#### Case Study: Mukurtu

Mukurtu is an online platform that stemmed from a project in 2007 between the Warumungu community and Kim Christen and Craig Dietrich. 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. Mukurtu CMS is now an online platform which allows communities to manage and share their cultural heritage.<sup>169</sup>

Mukurtu allows for Indigenous communities to have an online place to share and manage their cultural material and be sure that ethically minded frameworks and protocols are being applied. The licencing around the knowledge can either be Creative Commons or the community can apply Mukurtu's own traditional knowledge licencing. The licencing is broken up into different sections such as TK Commercial, TK Non-Commercial, TK Men Restricted, TK Men General, TK Women Restricted etc.

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<sup>164</sup>Alana Garwood-Houng, 'Protocols: Meeting the challenging of Indigenous information needs,' in Martin Nakata and Marcia Langton (eds), *Australian Indigenous knowledge and libraries*, (Australian Academic & Research Libraries, 2005), 151.

<sup>165</sup> National and State Libraries of Australasia, *National position statement for Aboriginal and Torres Strait Islander library services and collections*, (National and State Libraries of Australasia, 2014).

<sup>166</sup> Ibid.

<sup>167</sup> *Aboriginal and Torres Strait Islander Protocols for Libraries, Archives and Information Services* (Australian Library and Information Association, 1995).

<sup>168</sup> Jane Anderson, 'Options for the Future Protection of GRTKTCEs: The Traditional Knowledge Licenses and Labels Initiative' (2012) 4(1) *World Intellectual Property Organisation Journal* 66.

<sup>169</sup> Mukurtu, *Our Mission* <<http://mukurtu.org/about/>>.





#### 4.1.5 Digitisation and databases

Most records and archival systems, including research and development databases, employ digital technologies which pose additional challenges in relation to ownership and access to storing works that contain Indigenous Knowledge. A 2016 report conducted by the University of Melbourne, *Aboriginal Knowledge, Digital Technologies and Cultural Collections*, identifies four key issues surrounding protection of Indigenous Knowledge protection that are brought about by digital technologies:<sup>170</sup>

1. Ownership and management of digital archives containing Indigenous Knowledge;
2. Control and management of metadata;
3. Role of digital archives containing Indigenous Knowledge in enhancing community, cultural and individual aspirations; and
4. Indigenous control of Indigenous Knowledge online.

With the absence of a legally enforceable right to control Indigenous Knowledge and consent to its use, current practice in Australia is the implementation of organisation or industry-specific protocols to inform best practice processes. Efforts to preserve and document Indigenous Knowledge, particularly through digital technologies, 'can make [Indigenous Knowledge] more accessible and vulnerable to uses that are against the wishes of their holders, thereby undermining the efforts to protect them in an IP sense...care needs to be taken to ensure that acts of preservation do not inadvertently facilitate the misappropriation or illegitimate use of the [Indigenous Knowledge]'.<sup>171</sup>

Digitisation of old legacy materials raises complex issues of copyright ownership. Sometimes the records may not hold details of the provenance or source. So called orphan works raise issues for digitisation and also for making these documents available to other people to publish.

Databases of materials that incorporate Indigenous Knowledge must deal with how the material is displayed and referred to. In the first place, it should be considered whether or not sacred secret material should be put in a database in the first place.

There are labelling systems available like Living Contexts and Mukurtu that have built on the creative commons concept, to enable people to share content on line, but to put markers to identify the suitability of the content to be shared, and how it is culturally valued. This gives a cultural context to the knowledge.

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<sup>170</sup> Poppy de Souza, Fran Edmonds, Scott McQuire, Michelle Evans and Richard Chenhall, *Aboriginal Knowledge, Digital Technologies and Cultural Connections: Policy, Protocols, Practice*, University of Melbourne (October 2016)

<[http://networkedsociety.unimelb.edu.au/\\_\\_data/assets/pdf\\_file/0005/2146091/Aboriginal-Knowledge-MNSI-RP4-2016.pdf](http://networkedsociety.unimelb.edu.au/__data/assets/pdf_file/0005/2146091/Aboriginal-Knowledge-MNSI-RP4-2016.pdf)> 10.

<sup>171</sup> World Intellectual Property Organisation, *Intellectual Property and Genetic Resources, Traditional Knowledge and Traditional Cultural Expressions* (2015)

<[http://www.wipo.int/edocs/pubdocs/en/tk/933/wipo\\_pub\\_933.pdf](http://www.wipo.int/edocs/pubdocs/en/tk/933/wipo_pub_933.pdf)> 21.



## 4.2 Options

### 4.2.1 Practical Tools for Recording Projects

Whilst copyright law will vest ownership in recordings in the maker, it is possible to change this by written agreement to confirm who will own copyright and what terms the recording can be used. For instance, a template written agreement with optional standard clauses, may determine:

- that the person being interviewed owns copyright in the recording;
- that edited forms of the recording must be checked before publication;
- that any other future uses not agreed will be re-checked with the interviewee;
- that the interviewee receives copies of the recordings; and
- whether the recording can be deposited in a library or archive and what are the conditions of access by others to use and publish.

It may also be useful to produce an accompanying guide which outlines the rights of the person being recorded.

The *Guidelines for Ethical Research in Indigenous Australian Studies* contains principles and application notes that promote recognition of rights in Indigenous Knowledge. For example, one key principle is that the responsibility for consultation and negotiation is ongoing. In recognising this, the Guidelines advise researchers that 'rights to record and/or film require clearance from participating interviewees/subjects.'

The Guidelines recommend that the research 'negotiate agreement in relation to the rights and responsibilities in ownership of, and access to, recordings of Indigenous performances and activities, especially where those AIATSIS recordings are likely to be distributed and shared in ways such as digital audio and visual methods, DVD and the internet'.<sup>172</sup> To bolster this, there could be a recording form and guide for researchers, plus a protocol for marking articles that embody recordings so that it is understood that future uses by third parties will still be required to get the prior informed consent of the individual who provided the knowledge, or their community.

### 4.2.2 Practical guides for digitisation projects

Practical guidelines for Indigenous digitisation projects are needed to assist librarians, archivists and collection managers in dealing clearing rights and considering issues that arise when dealing with Indigenous works. Martin Nakata at the University of Technology, Sydney suggested a guide and information sheets which provide information including:<sup>173</sup>

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<sup>172</sup> Australian Institute of Aboriginal and Torres Strait Islander Studies, *Guidelines for Ethical Research in Indigenous Australian Studies*, 2012, <<https://aiatsis.gov.au/sites/default/files/docs/research-and-guides/ethics/gerais.pdf>>.

<sup>173</sup> Martin Nakata et al, *Australian Indigenous Digital Collections: First generation issues* (UTS, August 2008), <<https://opus.lib.uts.edu.au/bitstream/10453/19490/1/Aug%2023%20Final%20Report.pdf>>.



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- Due diligence for Indigenous orphan works;
- Ways to deal with copyright in unpublished works when it inhibits Indigenous access;
- Explaining rights issues in Indigenous materials – creative commons, non-exclusive rights implications, collective and communal transgenerational rights vs western legal notions of rights;
- Constructing a take-down policy that works as a process;
- Examples of statements, disclaimers, contents of digital file footers and headers to provide best practice frameworks;
- Examples of the information need at the initial point of gathering materials;
- Examples of what and how to include the existence of some items for searching purposes but not for viewing online; and
- Restrictions on digitisation such as sacred secret knowledge and sexually explicit material.

#### 4.2.3 Standardising policies in collections and archive practice

A significant issue is that many works are authored by non-Indigenous people who incorporate Indigenous traditional knowledge in their materials. The names of the Indigenous people who provided the information may not be included or they are deemed as 'Aboriginal informants'. Even if the people are known, they do not own copyright to control the dissemination of the material.

AIATSIS, as the manager of the nation's largest collection of Indigenous audio-visual recordings, has developed an Access and Use Policy for its Audio-Visual Collection which takes into account best practice standards for managing Indigenous materials.<sup>174</sup> This policy requires consent from Indigenous communities before material can be viewed and permission must be granted to publish. There is scope for this policy to be standardised across national and state collections.

Managing access and use of unpublished materials that embody Indigenous Knowledge, particularly photographs and audio-visual recordings, can also be a challenge. There are issues that arise if the work is deemed an 'orphan work'. Orphan works are copyright materials where the owner cannot be identified or found by a person seeking to obtain rights to use the work. Archives and museums may hold Indigenous created content from Aboriginal schools and organisations that are no longer operating. For example, early language materials collected by an Aboriginal language resource centres in the 1970s are important materials however, who owns copyright if the language resource centre is no longer operating? What if the members of the language group want to reproduce and adapt the resources? Under current laws, the publication of orphan works without consent of the copyright owner is not an exception. In 2017, the Productivity Commission recommended changes to the orphan works provisions to the *Copyright Act*, limiting liability for use of orphan works where a user has

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<sup>174</sup> Australian Institute of Aboriginal and Torres Strait Islander Studies, *Access and Use Policy, AIATSIS Collection Studies*, < <https://aiatsis.gov.au/sites/default/files/docs/about-us/collections-access-use-policy.pdf>>. Inquiry Report, No 78, September 2016.





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undertaken a diligent search to locate relevant people.<sup>175</sup>

This may impact Indigenous people and their control of their materials. Materials created by Indigenous organisations that contain Indigenous Knowledge often do not contain adequate copyright notices and are not published with ISBNs. This means that these materials are more likely to be classified as 'orphan works'. In the past, records of materials often did not include the name or community of its creator. The orphan works exception could be used by galleries, museums and libraries to publish works in their collections when the creator cannot be found.

Galleries and museums could work with Indigenous people to identify the ownership of materials. Further, users of orphan works with Indigenous content should follow protocols relating to material and seek permission from relevant Indigenous groups before use and publication.<sup>176</sup>

#### 4.2.4 Indigenous Knowledge laws

Options that rely on the existing law such as using signed recording agreements to vest rights in Indigenous people are only useful if the position of Indigenous ownership of copyright can be negotiated at the time the recording is being made. Another approach is to make a new law which recognises that Indigenous people have rights to control the recording of their Traditional Cultural Expressions, and also the dissemination of media that embody their Indigenous Knowledge. In this way, the law would make it clear that if Indigenous Knowledge is captured in a recording, any use of if the recording would require the free prior informed consent of the Indigenous person or community.

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<sup>175</sup> Productivity Commission, Intellectual Property Arrangements, (Inquiry Report No 78, September 2016), Recommendation 6.2.

<sup>176</sup> Australian Law Reform Commission, *Copyright and the Digital Economy*, Report No 122 (2013) 266.



## 5. Misappropriation and misuse of Traditional Knowledge

Traditional Knowledge refers to the skills, techniques and practices that Indigenous people have developed, nurtured and passed on throughout the generations. Traditional Knowledge underpins the fabric of Indigenous identity. In this respect, it has a social, cultural and spiritual dimension. It should also be recognised that in the growing knowledge economy, Traditional Knowledge can play an important role in the economic empowerment of Indigenous people. The misappropriation and misuse of Traditional Knowledge is a concern for Indigenous people because not only does it undermine their rights to practice their culture, it also deprives them of economic participation.

Fundamentally, any commercial applications of Traditional Knowledge should occur only if the Indigenous people agree after being properly advised on the potential risk and benefits. With the rise in recognition of the value of Indigenous Knowledge, there is also an increase in innovating using Traditional Knowledge so that Traditional Knowledge is being accessed and used without the connection to Indigenous people and for commercial gain. Yet, this is done without consultation and consent, and without any benefits flowing back to the Indigenous people and communities providing that access.<sup>177</sup>

### 5.1 Discussion

#### 5.1.1 Traditional Knowledge and research

Indigenous Australians are the most researched people in Australia. A great deal of academic and research activity is underpinned by Indigenous people, their knowledge, their ways of life and their fight for self-determination.<sup>178</sup> The issues for Indigenous people when it comes to research are complex.

Research initiatives and projects are funded by the Australian Government primarily through the Australian Research Council and the National Health and Medical Research Centre, which enforce Indigenous protocols as a requirement of funding. Successful government grant funding applicants must comply with (or compliance is recommended, depending on the particular funding sought):

- the Australian Institute of Aboriginal and Torres Strait Islander Studies' (AIATSIS): *Guidelines for Ethical Research in Australian Indigenous Studies* (GERAIS);
- the Australia Council for the Arts, *Indigenous Cultural Protocols for Producing Indigenous Australian Music, Writing, Visual Arts, Media Arts and Performing Arts*;<sup>179</sup> and
- for research involving Indigenous people, the Indigenous health research funding rules.<sup>180</sup>

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<sup>177</sup> Terri Janke, *Biodiversity, Patents and Indigenous Peoples*, (26 June 2000).

<sup>178</sup> Terri Janke, *Our Culture: Our Future*, 16.

<sup>179</sup> Australian Research Council, *Codes and Guidelines* (ARC, 8 July 2015)

<<http://www.arc.gov.au/codes-and-guidelines>>.

<sup>180</sup> NHMRC, *NHMRC Funding Rules* (2 January 2014) <<https://www.nhmrc.gov.au/book/nhmrc->



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Further, the *National Principles of Intellectual Property Management for Publicly Funded Research* ('National Principles') also provide that Australian research institutions provided with government-funded research should:

'have ways of addressing cases where IP impinges, or potentially impinges, on the cultural, spiritual or other aspects of Indigenous Peoples'.<sup>181</sup>

The National Principles, however, do not provide any guidance on how this can be achieved. It does not address obtaining free, prior and informed consent (FPIC) of Indigenous people and communities in research projects that involve or affect them.

But understanding and implementing FPIC is a bigger issue. The Special Rapporteur on the Rights of Indigenous Peoples stated that 'principles of consultation and consent together constitute a special standard that safeguards and functions as a means for the exercise of indigenous peoples' substantive rights. It is a standard that supplements and helps effectuate substantive rights, including the right to property'.<sup>182</sup> It is fundamental in Indigenous research, but often the problem is that researchers don't know where to start with the consultation and consent process. Existing laws and protocols often do not provide guidance around this.

A criticism of the GERAIS, for example, is that while the GERAIS is used as a benchmark and leading reference document for Indigenous research, researchers often require further guidance around consulting with the community and obtaining consent. Existing laws and protocols do not provide adequate guidance around these issues. It is difficult to identify the correct people to consult and who the proper beneficiaries should be. The extent of consultation required is also unclear.

While it is clearly recognised that descendants from the traditional custodians of the land living on country are considered part of the community and therefore have a right to benefit from use of Traditional Knowledge, there are different views on whether those who live on country but are not descendants from the traditional custodians, or those who are descendants who live off country, should be benefiting from Indigenous Knowledge use.<sup>183</sup>

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funding-rules-2015/6-assess>, criteria 6.2.

<sup>181</sup> Australian Research Council, *National Principles of Intellectual Property Management for Publicly Funded Research* (28 July 2017) <<http://www.arc.gov.au/national-principles-intellectual-property-management-publicly-funded-research#fn8>>, principle 2(e).

<sup>182</sup> James Anaya, *Report of the Special Rapporteur on the rights of indigenous peoples*, Human Rights Council, 22<sup>nd</sup> session, Agenda Item 3, UN Doc A/HRC/21/47 (6 July 2012) [49]. There is extensive literature interpreting the characteristics of FPIC in accordance with UNDRIP. However, there is currently no clear and singular definition for FPIC or for what constitutes 'consultation' or 'consent'. See Amy K. Lehr, *'Indigenous Peoples' Rights and the Role of Free, Prior and Informed Consent'* (United Nations Global Compact, 20 February 2014), <[http://solutions-network.org/site-fpic/files/2012/09/FPIC\\_Indigenous\\_Peoples\\_UN-global-compact.pdf](http://solutions-network.org/site-fpic/files/2012/09/FPIC_Indigenous_Peoples_UN-global-compact.pdf)>; United Nations Global Compact, *A Business Reference Guide: United Nations Declaration of the Rights of Indigenous Peoples* (2013), 25.

<sup>183</sup> Natalie Stoianoff, *Recognising and Protecting Aboriginal Knowledge Associated with Natural Resource Management*, White Paper For Office of Environment and Heritage, NSW, <[https://www.ipaustralia.gov.au/sites/g/files/net856/f/uts\\_-\\_recognising\\_and\\_protecting\\_aboriginal\\_knowledge.pdf](https://www.ipaustralia.gov.au/sites/g/files/net856/f/uts_-_recognising_and_protecting_aboriginal_knowledge.pdf)> 40.







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This highlights the need for some flexibility in identifying beneficiaries in research and resulting benefit sharing arrangements.<sup>184</sup> This also points to the difficulty in being able to bring certainty for external parties who are seeking to do the right thing and consult and obtain consent.

Without this guidance, the problem is that not all research institutions have policies on dealing with and managing Indigenous Knowledge in research and commercialisation, and those that do have policies take very different approaches. Some examples include:

- The University of Western Australia's IP Policy states that, 'It is acknowledged that research with Aboriginal and Torres Strait Islander peoples spans many methodologies and disciplines'. It points to the AIATSIS and NHMRC Guidelines as reference documents.<sup>185</sup>
- The University of Sydney's Intellectual Property Policy recognises and respects Indigenous cultural rights. It requires any research and commercial development that involves 'use of aspects of indigenous spirituality or cultural property'<sup>186</sup> to not only consult with the University's Indigenous Strategy and Services Deputy Vice-Chancellor, but also to negotiate benefit sharing arrangements with the Indigenous people or communities providing that knowledge.

These issues are compounded by inconsistent representation of Indigenous people in Human Research Ethics Committees (HRECs). HRECs provide ethical oversight of research involving humans and review research proposals that involve human participants.<sup>187</sup> Without Indigenous representation on HRECs or awareness of HREC members on Indigenous issues, Indigenous elements and issues in research risk not being spotted in the first place. Another problem that has been a cause of concern is health research and the use of the collection of human genetic samples and the recording of data about Indigenous people themselves. The laws in Australia are not clear.<sup>188</sup> Whilst there are growing practices of obtaining free, prior and informed consent in the Australian health and medical sector with the use of human samples such as the practices of the NHMRC, a higher level of protection should be afforded to Indigenous people in gene research due to the minority and vulnerability of Indigenous communities.<sup>189</sup>

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<sup>184</sup> Ibid.

<sup>185</sup> Office of Research Enterprise – Central Unit, *University Policy on: Code of Conduct for the Responsible Practice of Research*, The University of Western Australia (31 March 2016) <<http://www.governance.uwa.edu.au/procedures/policies/policies-and-procedures?method=document&id=UP12/25>> , see 2.7.

<sup>186</sup> The University of Sydney, *Intellectual Property Policy 2016* (10 May 2016) <<http://sydney.edu.au/policies/showdoc.aspx?recnum=PDOC2016/418>> clause 10.

<sup>187</sup> National Health and Medical Research Council, *Human Research Ethics Committees* (7 July 2017) <<https://www.nhmrc.gov.au/health-ethics/human-research-ethics-committees-hrecs>>.

<sup>188</sup> Humans are excluded from the scope of Australia's biodiversity laws (see definition of 'animal' under s528 of the EPBC Act, and s5(2)(b) of the Biological Resources Act NT); Terri Janke, *Our Culture: Our Future – Report on Australian Indigenous Cultural and Intellectual Property Rights* (Final Report, Michael Frankel and Company, 1999), p. 28.

<sup>189</sup> Mary Daniel, 'Tribal DNA: Does it exist, and can it be protected?', *Oklahoma City University Law Review*, 2005, 830 Okla. City U.L. Rev. 431, 439.





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As stated by Dr Debra Harry, Executive Director of the Indigenous Peoples Council on Biocolonialism,<sup>190</sup>

'When it comes to genetic research, what is lacking is a legal, political, social, and ethical framework that guarantees the protection of the most fundamental human rights of Indigenous peoples ... Without safeguards that ensure Indigenous peoples understand the full implications of their participation in genetic research, understand the potential for secondary uses of their genetic samples and data, and receive measures to ensure prior, fully informed group and individual consent, many of these projects will continue to exploit the world's most vulnerable peoples. Indigenous peoples need to be active participants, not passive subjects, in these processes to ensure their perspectives and interests are represented and protected.'

Without clear consultation and consent at group and individual levels,<sup>191</sup> Indigenous people are concerned that their human genetic material, and their Indigenous Knowledge in relation to genetics (knowledge that may include information not only about the subject but also their families and communities)<sup>192</sup> are at risk of exploitation and appropriation.

There are some examples of Australian research agencies, such as the National Centre of Indigenous Genomics, setting new standards of prior informed consent in genetic research.

#### **Case Study: National Centre of Indigenous Genomics**

The National Centre of Indigenous Genomics (NCIG) maintains a database of around 7,000 Indigenous bio specimens, genomic data and documents for research and other uses for the benefit of Indigenous people.

The NCIG relies on an Indigenous-led board and a high standard of research and ethical consultation and consent processes with Indigenous communities and families represented in its collection.

With AIATSIS GERAIS and the NHMRC Guidelines being the leading and two of the most widely used protocols in Australia when dealing with Indigenous issues in research, it is also useful to understand its characteristics, applications, usefulness, and how users suggest they might be improved.

#### **Case Study: AIATSIS Guidelines for Ethical Research in Indigenous Australian Studies**

The leading and authoritative research protocol with the widest and coverage of Indigenous Knowledge protection issues is the Australian Institute of Aboriginal and Torres Strait Islander Studies' *Guidelines for Ethical Research in Indigenous Studies* (GERAIS).<sup>193</sup> The

<sup>190</sup> Debra Harry, 'Indigenous peoples and gene disputes', *Chicago-Kent Law Review*, 2009, 84 *Chi.-Kent L. Rev.* 147, 192.

<sup>193</sup> AIATSIS, *Guidelines for ethical research in Indigenous Australian Studies*, Canberra 2002. Australian Research Council, *National Principles of Intellectual Property Management for Publicly Funded Research* (28 July 2017) <<http://www.arc.gov.au/national-principles-intellectual-property-management-publicly-funded-research#fn8>>, principle 2(e).





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GERAIS sets out statements of principles for conducting ethical research, and also storing and managing materials resulting from research.

The principles in the GERAIS were developed based on the rights contained in the UNDRIP, applying the rights to self-determination and free prior and informed consent. It puts forward a strong position for Indigenous people to have control over the research process. Importantly, the GERAIS address ownership and control over Indigenous Knowledge and materials containing Indigenous Knowledge, mandating that rights in these must be owned by or shared with the Indigenous contributors or participants.<sup>194</sup> It also addresses considerations on disseminating research material and future uses, including consent from contributors for sacred or secret material.<sup>195</sup>

Consultation and consent are core aspects of the GERAIS, with emphasis on starting the consultation and consent process early to involve potential participants in developing the research proposal and ongoing during (and after) the research.<sup>196</sup> Benefits for Indigenous people and communities are also addressed in the GERAIS, and recommended that it is linked to the outcomes of any research.<sup>197</sup> Each principle of the GERAIS is supported by an explanation and illustrated with some practical applications.

The GERAIS forms part of the Australian Government's Australian Code for Responsible Conduct of Research<sup>198</sup> and the NHMRC National Statement on Ethical Conduct in Human Research.<sup>199</sup> All research initiatives and projects funded by the Australian Research Council and NHMRC, the Australian Government's primary funders of public research, enforce Indigenous protocols as a requirement of funding. Research proposals and successful funding recipients are either required or recommended to comply with the GERAIS.

Compliance with the GERAIS is also embedded in the Department of Environment model access and benefit sharing agreement templates.<sup>200</sup> It is used as a benchmark and

<sup>192</sup>Roger Chennells, Appropriation of the Month: Indigenous Peoples and Genetic Research, 20 May 2015, <<https://www.sfu.ca/ipinch/outputs/blog/appropriation-month-indigenous-peoples-and-genetic-research/>>.

<sup>193</sup> AIATSIS, *Guidelines for ethical research in Indigenous Australian Studies*, Canberra 2002.

Australian Research Council, *National Principles of Intellectual Property Management for Publicly Funded Research* (28 July 2017) <<http://www.arc.gov.au/national-principles-intellectual-property-management-publicly-funded-research#fn8>>, principle 2(e).

<sup>194</sup> Australian Institute of Aboriginal and Torres Strait Islander Studies, *Guidelines for ethical research in Indigenous Australian Studies*, Canberra 2002, principle 4.

<sup>195</sup> Australian Institute of Aboriginal and Torres Strait Islander Studies, *Guidelines for ethical research in Indigenous Australian Studies*, Canberra 2002, principles 5 and 13.

<sup>196</sup> Australian Institute of Aboriginal and Torres Strait Islander Studies, *Guidelines for ethical research in Indigenous Australian Studies*, Canberra 2002, principles 7 and 14.

<sup>197</sup> Australian Institute of Aboriginal and Torres Strait Islander Studies, *Guidelines for ethical research in Indigenous Australian Studies*, Canberra 2002, principle 12.

<sup>198</sup> National Health and Medical Research Council, *Australian Code for the Responsible Conduct of Research* (2007) <[https://www.nhmrc.gov.au/\\_files\\_nhmrc/file/publications/r39\\_australian\\_code\\_responsible\\_conduct\\_research\\_150811.pdf](https://www.nhmrc.gov.au/_files_nhmrc/file/publications/r39_australian_code_responsible_conduct_research_150811.pdf)>, see 1.12.

<sup>199</sup> National Health and Medical Research Council, *National Statement on Ethical Conduct in Human Research* (2007) - Updated May 2015 <<https://www.nhmrc.gov.au/guidelines-publications/e72>>.

<sup>200</sup> Department of Environment, *Model Access And Benefit-Sharing Agreement*





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reference document by many universities such as the University of Western Australia,<sup>201</sup> the Australian National University, University of South Australia<sup>202</sup> and adopted in the University of Sydney Research Code of Conduct.<sup>203</sup>

An independent review of AIATSIS in 2014 indicated some criticisms of the GERAIS and its application in the submissions:<sup>204</sup>

- GERAIS has the potential to be an Australian Standard but it is applied inconsistently – application of NHMRC guidelines is compulsory but the GERAIS is largely voluntary only;
- Often universities and researchers require more guidance and specific involvement of AIATSIS – AIATSIS could have a bigger role for example in assisting with the consultation and consent process; and
- Some of the main criticisms were not with the GERAIS itself but with the role of Human Research Ethics Committees (HRECs) in reviewing research proposals that apply the GERAIS. The concerns raised were mainly that:
  - There is no consistent Indigenous representation on HRECs leading to oversight in Indigenous issues;
  - Lack of training for HREC members in relation to Indigenous research issues; and
  - There is no review process – AIATSIS not involved in the review process.

While it is already considered a leading document in Indigenous research, there remains scope for wider application and improvement of the GERAIS. AIATSIS is also exploring options to make the GERAIS a national standard in Australia.

### Case Study: NHMRC Guidelines for Ethical Conduct in Aboriginal and Torres Strait Islander Health Research

The National Health and Medical Research Council (NHMRC) is the peak funding body for medical and health research initiatives in Australia. The NHMRC has developed guidelines on conducting health research on and with Indigenous people. The main set of guidelines is contained in the NHMRC *Values and Ethics: Guidelines for Ethical Conduct in Aboriginal*

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*Commonwealth Of Australia And Access Party*

<<http://www.environment.gov.au/system/files/pages/e3584028-d083-4aec-acdd-c0aa635a529f/files/commonwealth-and-access-party-model-benefit-sharing-agreement-2012.pdf>>.

<sup>201</sup> University of Western Australia, *Principle Guidelines and Resources*, (2 March 2017)

<<http://www.research.uwa.edu.au/staff/human-research/guidelines>>.

<sup>202</sup> The University of South Australia, *Indigenous Research* (22 November 2016)

<<http://w3.unisa.edu.au/res/ethics/human/indigenous.asp>>.

<sup>203</sup> The University of Sydney, *Research Code of Conduct 2013* (17 May 2013)

<<http://sydney.edu.au/policies/showdoc.aspx?recnum=PDOC2013/321>>.

<sup>204</sup> ACIL Allen Consulting In Collaboration With Professor Mark Rose And Dr Mark Mcmillan, *Australian Institute Of Aboriginal And Torres Strait Islander Studies: Independent Review*, (May 2014) <[http://www.acilallen.com.au/cms\\_files/ACILAllen\\_AIATSISReview\\_2014.pdf](http://www.acilallen.com.au/cms_files/ACILAllen_AIATSISReview_2014.pdf)> 26 – 28.





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and Torres Strait Islander Health Research (the NHMRC Guidelines).

NHMRC enforces the NHMRC Guidelines a requirement of funding. For research involving Indigenous people, NHMRC's assessment criteria provides that funding applicants must, in their funding proposals, address and refer to NHMRC's prescribed guiding documents for Indigenous health research.<sup>205</sup> These documents are NHMRC Guidelines, the NHMRC *Strategic Framework for Improving Aboriginal and Torres Strait Islander People through Research* addressing NHMRC's particular aims and action areas in Indigenous research,<sup>206</sup> and *Keeping Research on Track: A guide for Aboriginal and Torres Strait Islander peoples about health research ethics* for use by communities in considering their participation in research projects.<sup>207</sup>

This means that funding applicants will also be assessed on how their research project demonstrates engagement and participation of Indigenous communities, and how it builds the capacity of Indigenous people and benefits them. However, the documents fail to address certain fundamental principles like respect, ownership and control of Indigenous Knowledge and intellectual property (for example in data produced and reported as a result of the research projects), or dealing with sacred or secret material. Also, without case studies to demonstrate practical applications of the values and principles, implementation is difficult.

The Lowitja Institute and AIATSIS reviewed the NHMRC Guidelines and *Keeping Research on Track* to find out how the documents have been used by researchers, ethics committees and Indigenous communities. The review indicated that majority of researchers surveyed used the NHMRC Guidelines for advice but also found the following as some of the key problems with the documents:<sup>208</sup>

- Provides little assistance to researchers in identifying authorities in the community to talk to about research projects;
- No emphasis on getting Indigenous parties involved earlier on, rather than when the project is already developed with little room for negotiation – the power is with researchers in developing the projects;
- Lack of accessibility of the documents (wider distribution, different formats, media, visual aids, checklists);

<sup>205</sup> National Health and Medical Research Council, *Assessment Criteria* (19 October 2016) <<https://www.nhmrc.gov.au/book/nhmrc-funding-rules-2017/6-assessment-criteria>>, criteria 6.2.

<sup>206</sup> National Health and Medical Research Council, *NHMRC Road Map II: a Strategic Framework for Improving the Health of Aboriginal and Torres Strait Islander People through Research* (2010) <<https://www.nhmrc.gov.au/guidelines-publications/r47>>.

<sup>207</sup> National Health and Medical Research Council, *Keeping research on track: a guide for Aboriginal and Torres Strait Islander peoples about health research ethics* (2006) <<https://www.nhmrc.gov.au/guidelines-publications/e65>>.

<sup>208</sup> AIATSIS and the Lowitja Institute, *Evaluation Of The National Health And Medical Research Council Documents: Guidelines For Ethical Conduct In Aboriginal And Torres Strait Islander Health Research 2004 (Values And Ethics) And Keeping Research On Track: A Guide For Aboriginal And Torres Strait Islander Peoples About Health Research Ethics 2005 (Keeping Research On Track)*, <[https://www.nhmrc.gov.au/\\_files\\_nhmrc/file/health\\_ethics/human/issues/nhmrc\\_evaluation\\_values\\_ethics\\_research\\_on\\_track\\_150513.pdf](https://www.nhmrc.gov.au/_files_nhmrc/file/health_ethics/human/issues/nhmrc_evaluation_values_ethics_research_on_track_150513.pdf)>.







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- Foundation of the documents is different: more 'Western' and defensive approach – inconsistent with other existing guidelines like the AIATSIS GERAIS, which was developed from a proactive human rights perspective using the UNDRIP;
- Weak position regarding community involvement, ownership and control;
- Lacking systems for monitoring ongoing compliance; and
- Not recognising that Indigenous communities are not homogenous.

The guiding documents are being updated by NHMRC.<sup>209</sup> The review involves public consultation and consultation with NHMRC's Principal Committee Indigenous Caucus, which is NHMRC's advisory body on issues relating to Indigenous health research.

### 5.1.2 Using Indigenous Environmental Knowledge

Indigenous peoples have passed on knowledge and understanding of the environment and ecosystems that can assist to develop strategies for managing and caring for our natural world. This includes observing and responding to the impacts of climate change. It also includes cultural practices that sustain country, such as fire management practices. Further, it covers information that might assist with some of Australia's unique challenges such as dealing with protecting our Great Barrier Reef.

Governments and scientists are only now getting to understand how Traditional Knowledge can assist to develop solutions that will have benefits for the all people. However, there is a risk that the role Indigenous people play is overlooked. We must ensure that Traditional Knowledge is not taken, adapted and assimilated without participation and inclusion of Indigenous peoples. This knowledge is recorded, entered and stored in databases which further take the control from Indigenous people to engage in their role as custodians, and transferors of cultural practice, on their country.

Knowledge of a cultural practice is not a copyright work. This is because cultural skills and know-how do not fit into the categories of copyright works or subject matter. Copyright does not protect ways of doing things. It only protects the expression. Such knowledge is not usually patentable as it might not meet the inventive step requirements, and in any case, the patent system is not designed to cover this kind of inter-generational know-how.

The Northern Territory's Natural Resource Management Board has developed *Guidelines for Indigenous Ecological Knowledge Management* (including archiving and repatriation)<sup>210</sup> which put forward best practice protocols for the respecting the collective rights of Indigenous people to their IEK.

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<sup>209</sup> National Health and Medical Research Council, *Ethical guidelines for research involving Aboriginal and Torres Strait Islander Peoples* (26 July 2017) <<https://www.nhmrc.gov.au/health-ethics/ethical-issues-and-further-resources/ethical-guidelines-research-involving-aboriginal->>.

<sup>210</sup> Sarah Holcombe, Michael Davis and Terri Janke and Company, *Guidelines for Indigenous*







### **Case Study: Natural Resource Management Guidelines**

The Territory Natural Resource Management (TNRM), a not for profit community organisation has, in collaboration with communities, developed the *Guidelines for Indigenous Ecological Knowledge Management* (the Guidelines) as best practice protocols to support the practice, recording, storage and use of Indigenous Ecological Knowledge and Indigenous Cultural and Intellectual Property in the Northern Territory.<sup>211</sup> Through case studies and step-by-step guidance, the Guidelines show the importance of respecting and properly managing Indigenous Knowledge in community projects and what practical steps could be undertaken to better understand and work with Indigenous Knowledge.

A key principle of the Guidelines is ‘active protection’ which asks NRM researchers and project managers to engage with Indigenous Knowledge holders and their communities; ensure that the data is in an accessible form and encourage opportunities for inter-generational knowledge transmission: for intangible knowledge transfer.<sup>212</sup> The Guidelines importantly state a process for obtaining free, prior and informed consent.

The Guidelines are encouraged to be made a requirement of funding for NRM projects and they are widely used by the Australian Government. For example, they are used as a resource by the National Landcare Programme, which is an Australian Government initiative that provides funding to regional and national Indigenous natural resource management organisations.

The Programme is committed to a ‘two-way’ transfer of knowledge – that is, on one hand, Indigenous people have access to scientific knowledge and best practice for natural resource management, but also that recording and use of Indigenous Ecological Knowledge needs to be according to agreed protocols and with prior consent of the Indigenous custodians of that knowledge. The Programme’s guidelines for regional NRM funding and funding as an Indigenous Protected Area require this to be addressed in plans for funding.

However, implementation of this can be improved. The Australian Government contracts that fund Indigenous NRM programs and IPAs vest IP rights in materials created as a result of funding to the funding recipient. However, the Australian Government seeks a very wide Creative Commons licence to use and exploit that IP. The funding agreements do not recognise or address ownership of Indigenous Knowledge or cultural rights specifically, however they do allow for sacred or secret material to be excluded from the licence sought by the government. There is also no mechanism provided for monitoring ongoing compliance of the Guidelines.

Whilst there are existing, successful initiatives that give rights to Indigenous Knowledge

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*Ecological Knowledge Management (including archiving and repatriation)*, (Natural Resources Management Board, April 2009).

<sup>211</sup> Natural Resource Management, *Indigenous Ecological Knowledge Manual*, <[http://docs.wixstatic.com/ugd/da28f0\\_624bf834d6ef4672b98820bac2b77283.pdf](http://docs.wixstatic.com/ugd/da28f0_624bf834d6ef4672b98820bac2b77283.pdf)>.

<sup>212</sup> Sarah Holcombe, Michael Davis and Terri Janke and Company, *Guidelines for Indigenous Ecological Knowledge Management (including archiving and repatriation)*, (Natural Resources Management Board, April 2009).





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custodians in the use and management of their Indigenous Knowledge, improvements can be made in putting these initiatives into practice, and to also making them consistent throughout Australia.

There have been positive policy initiatives taken by the Australian Government, such as the National Land Care Programme, and the Indigenous Rangers – Working on Country Programme that recognise the importance of Traditional Knowledge about natural resources and land management. These programs have been developed with Indigenous people for their benefit. There is also a growing practice of Indigenous organisations making their own protocols, and also collecting and storing their own knowledge.

Government agencies such as the Great Barrier Reef Marine Park Authority and CSIRO have protocols for engagement and licence agreements for the use of Indigenous Knowledge. Indigenous Knowledge Agreements are drafted like the general IP licences so that the government agencies can use the materials in their work and to store them in inter-relational databases. Whilst this is good, there is a risk that Indigenous people do not understand government drafted agreements. These agreements may have long term practical impacts and whilst government can explain them as part of the FPIC process, there is a need for independent legal advice.

### 5.1.3 Traditional Knowledge in heritage and native title process

During heritage and native title claims processes, a large body of materials is created and collated including photographs, films, sound recordings, maps, genealogies, Traditional Knowledge and often also Traditional Cultural Expressions. These reports may be developed by advisers, lawyers, anthropologists or other researchers so copyright in the works may not belong to Indigenous people. Who has the right to access, reproduce or publish the information contained within them?<sup>213</sup>

#### Case Study: Guidelines for Managing Information in Native Title

Native title claims result in the collection of a large amount of information – about Indigenous people, their histories, culture and knowledge. AIATSIS is working with native title bodies to develop Guidelines for Managing Information in Native Title. The Guidelines will help Native Title Representative Bodies and Prescribed Bodies Corporate understand best practice measures in dealing with and using information that is collected during the native title claims process.

In consulting for the Guidelines, the issues around ownership, document management, preservation and repatriation of native title information were considered the fundamental issues. Ownership is the first challenge, and it was suggested in consultations that agreements about ownership and copyright in materials should be made at the start of the native title claim process to avoid confusion. AIATSIS notes that ownership of materials at law at times conflict with the cultural obligations of the community and the traditional owners.<sup>214</sup> Digitisation was also raised as an issue. It is a way of preserving materials but

<sup>213</sup> Ibid.

<sup>214</sup> AIATSIS Submission, Productivity Commission, Intellectual Property Arrangements Inquiry, 4 July



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there must be processes and protocols around its use.

The Guidelines will include protocols for NTRBs around handling digital records and returning materials to PBCs what materials are publicly made available to other stake holders, access conditions, and future uses.

Regardless of who the copyright owner is in reports, there may be other restrictions on how the information contained within a connection report can be used. Anthropologists may have an equitable obligation to keep confidential Indigenous knowledge imparted to them, because of the special relationship they have with members of the community.<sup>215</sup> This equitable obligation might arise as a fiduciary duty not to exploit the information for profit or for any other reason than to compile the report – unless the consultant writer obtains free, prior and informed consent. Alternatively, if the information is given in circumstances of confidence, it may be covered by breach of confidence laws.

Therefore, although Aboriginal and Torres Strait Islander people cannot prevent the dissemination and publication of connection reports containing Indigenous Knowledge under copyright law, there may be fiduciary duties owed by authors of the reports to the clans whose knowledge is contained in the works.

#### 5.1.4 Indigenous rangers building cultural enterprise

The Indigenous Rangers Programme is an Australian Government initiative, developed as an employment pathway to support the combination of using Traditional Knowledge and promote the conservation and protection of Indigenous people's ecosystems.

The programme commenced in 2007 and in 2016 provided funding to 109 Indigenous ranger groups and 777 full-time Indigenous rangers across Australia.<sup>216</sup> The Great Barrier Marine Park Authority is also assisting over 20 Indigenous rangers to achieve educational qualifications.<sup>217</sup>

This is a unique programme that benefits Indigenous communities through the reinforcement of Indigenous culture use, and passing on of Traditional Knowledge from generation to generation, employment opportunities, and protection and conservation of remote eco systems.<sup>218</sup>

Indigenous rangers, through their field and on-ground knowledge, play a very significant role in the management and protection of Australia's land and seas. They are also looking at projects that can allow for commercial opportunities to be explored for use of Indigenous Knowledge. For example, in north Australia, the North Australian Indigenous Land and Sea

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2016, <[http://www.pc.gov.au/\\_\\_data/assets/pdf\\_file/0003/201945/subdr583-intellectual-property.pdf](http://www.pc.gov.au/__data/assets/pdf_file/0003/201945/subdr583-intellectual-property.pdf)>.

<sup>215</sup> *Hospital Products Ltd v United States Surgical Corporation* (1984) 156 CLR 41.

<sup>216</sup> Department of Prime Minister and Cabinet, *Indigenous Rangers - Working on Country*, <<https://www.dpmc.gov.au/indigenous-affairs/environment/indigenous-rangers-working-country>>.

<sup>217</sup> *Ibid.*

<sup>218</sup> *Ibid.*





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Management Alliance Ltd (NAILSMA) is supporting Indigenous land and sea rangers in the collection, use, management, monitoring and analysis of data on natural and cultural resources through the development digital apps and tools.<sup>219</sup>

#### Case Study: NAILSMA I-Tracker Program

The Indigenous Tracker (I-Tracker) Applications were developed by Indigenous organisation, NAILSMA to provide a mapping and data service for Indigenous rangers.

Traditional Owners were consulted in making the applications, and the traditional owners have collectively developed a set of overarching Guiding Principles for using the applications.<sup>220</sup> Key components of the Guiding Principles are prior informed consent of traditional owners for data collection, and consultation with traditional owners on the appropriate use and sharing of collected data. This is to help ensure, amongst other things that, the I-Tracker Applications meet the priorities of the particular communities using the apps, and<sup>221</sup> Indigenous people retain ownership and control of knowledge captured, and data and information stored in databases using the I-Tracker apps.

NAILSMA closely monitors downloads and use of the applications. Users are made aware of the Guiding Principles and NAILSMA requests users to provide reasons for using the applications before they are made available for download.

NAILSMA also trains Indigenous rangers to use the applications. Since its creation, the I-Tracker Applications have been successfully used by Indigenous rangers in making decisions about land and sea care management, in a way that also upskills and builds capacity of Indigenous rangers. For example, the Saltwater Country Patrol I-Tracker Application has been used since 2009 to monitor turtles and in partnership with CSIRO, rangers have developed boat-based methods to monitor turtle populations and turtle sightings.<sup>222</sup> In 2016, Indigenous rangers had the opportunity to discuss these methods at a turtle symposium in Perth.<sup>223</sup>

This case study demonstrates how Indigenous organisations are successfully able to implement their own local and regional rights-based solutions to manage their own knowledge based on their own needs and protocols.<sup>224</sup>

<sup>219</sup> North Australian Indigenous Land and Sea Management Alliance, *I-Tracker*, <<https://www.nailsma.org.au/hub/programs/i-tracker.html>>.

<sup>220</sup> North Australian Indigenous Land and Sea Management Alliance, 'Guiding principles for using NAILSMA I-Tracker applications', <<https://www.nailsma.org.au/saltwater-country-patrol-application/download-i-tracker-saltwater-country-patrol.html>>.

<sup>221</sup> North Australian Indigenous Land and Sea Management Alliance, *Looking After Country: The NAILSMA I-Tracker Story*, (NAILSMA, 2014), p. 27.

<sup>222</sup> North Australian Indigenous Land and Sea Management Alliance, 'Marine Turtle Monitoring', <<https://www.nailsma.org.au/i-tracker/marine-turtle-monitoring.html>>.

<sup>223</sup> NAILSMA, 'Indigenous rangers share results at Marine Turtle Symposium, E-News, 29 September 2014, <<https://www.nailsma.org.au/hub/resources/newsletter/enews-indigenous-rangers-share-results-marine-turtle-symposium.html>>.

<sup>224</sup> Rod Kennett, Micha Jackson, Joe Morrison, and Joshua Kitchens, 'Indigenous Rights and Obligations to manage Traditional Land and Sea Estates in North Australia: The Role of Indigenous Rangers and the I-Tracker Project, *Policy Matters*, 2010,





Another example is the Kimberley Land Council Cultural Enterprise Hub, developed to identify and develop opportunities for Kimberley Aboriginal people to innovate. This could include activities such as facilitating or conducting environmental research, undertaking direct land management activities such as prescribed burning for asset protect; biosecurity activities and cultural immersion tourism.<sup>225</sup> Capacity building was identified as a critical foundation step, hence, the cultural hub will work with Prescribed Body Corporates to provide expert services in management advice, business development and marketing and communications.

### **5.1.5 Commercialisation of Indigenous Knowledge in Tourism**

Indigenous tourism is a key aspect of the Australian tourism industry. However, Indigenous peoples complain that their knowledge of country, places and cultural practices has been used by tourism operators without their involvement or consent. The concern is that the stories and representations are incorrect or stereotyped. There is also no credit given to the Indigenous groups for their role and the information is presented without any recognition of the connection to living Indigenous peoples. As Indigenous people on country are in a position to enter tourism markets through ranger activities and cultural tourism, these unauthorised uses of Indigenous knowledge by non-Indigenous tourism operators directly impact on the rights and prospects of Indigenous peoples.

The Larrakia Declaration on the Development of Indigenous Tourism adopted in Darwin in 2012 calls for governments to consult and accommodate Indigenous peoples before undertaking decisions on public policy and programs designed to foster the development of Indigenous tourism. Further, the Declaration calls on the tourism industry to respect Indigenous intellectual property rights, cultures and traditional practices, the need for sustainable and equitable business partnerships and the proper care of the environment and communities that support them.<sup>226</sup>

The Australian Government's *Tourism 2020 Strategy* identifies Indigenous culture and heritage as one of Australia's competitive advantages in tourism.<sup>227</sup> Some outcomes of the Strategy are directly targeted at increasing Indigenous participation in tourism initiatives. However, 'Indigenous participation' in the Strategy appears to be focused on participation in the economic sense – that is, injecting more Indigenous businesses into the tourism supply chain and building their economic capacities and capabilities.<sup>228</sup> As Dr David Foley points out, 'the federal government...fails to acknowledge within their [tourism] reports any recognition of Indigenous cultural capital and/or cultural heritage and its preservation.'<sup>229</sup> Indigenous people should be involved not just in the economic sense, but also in social and cultural sense by having a say in the protection and preservation of Indigenous culture and knowledge in tourism

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<<http://www.savanna.org.au/nailsma/projects/downloads/Policy-Matters.pdf>>.

<sup>225</sup> Kimberley Land Council, *Kimberley Cultural Enterprise Hub: Concept Report*, (Kimberley Land Council, August 2017) p. 20.

<sup>226</sup> The Larrakia Declaration on the Development of Indigenous Tourism (March 2012)  
<<http://www.winta.org/wp-content/uploads/2012/08/The-Larrakia-Declaration.pdf>>.

<sup>227</sup> Tourism Australia, *Tourism 2020* (December 2011)

<<http://www.tourism.australia.com/content/dam/assets/document/1/6/w/u/3/2002107.pdf>>.

<sup>228</sup> Ibid, see Strategy Area 5 'Increase supply of labour, skills and Indigenous Participation'.

<sup>229</sup> Dr Dennis Foley, 'Australian Aboriginal Tourism: Still an Opportunity, but keep the culture intact', (2014) *Australian Institute for Aboriginal and Torres Strait Islander Studies*.





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initiatives.

The Australian Trade and Investment Commission established the Indigenous Tourism Working Group, comprising of Indigenous tourism experts, to focus amongst other things on ways to increase Indigenous tourism employment and Indigenous tourism product offerings in line with the Tourism 2020 Strategy.<sup>230</sup> The Working Group's Terms of Reference takes a step in the right direction, reflecting the principles of the Larrakia Declaration. It mandates that tourism projects being supported by the Working Group must:

- include processes for consultation with relevant Traditional Custodians;
- be designed and implemented with an Indigenous partner or have processes to do so; and
- include comment on benefits – social, cultural and economic benefits on Indigenous people in tourism.

#### 5.1.6 Commercialisation of Traditional Knowledge in the bush food industry

Issues of misappropriation and misuse of Traditional Knowledge are often discussed in relation to material products like inauthentic Indigenous-style souvenirs. But protection of Traditional Knowledge against misappropriation and misuse is also important in relation to the food industry.

Bush tucker recipes and food preparation techniques often contain Traditional Knowledge – these processes are intrinsic to Indigenous heritage and are themselves, expressions of Indigenous culture. Indigenous people are using their Traditional Knowledge on bush tucker foods passed down from generations to innovate and create food products that are made available to wider markets and everyday consumers. It is vital that they are also protected. This is particularly important with Australia's quickly growing bush foods industry. In Ninti One's submission to the *Finding the Way* consultation, it is indicated that Traditional Knowledge has contributed to the commercial development of over 15 bush food species.<sup>231</sup>

The problem is that greater exposure of bush tucker knowledge being introduced into domestic and international markets also means greater risks of that knowledge being misused and misappropriated, or used without benefits to Indigenous people.

The bush foods and bush tucker industry is a rapidly growing industry in Australia. For example, Indigenous businesses such as Dreamtime Tuka, Indigiearth and Kungas Can Cook are successfully using their Indigenous knowledge on bush tucker foods passed down from generations to innovate and create food products that are supplied to wider domestic and markets. This means that Indigenous foods and Indigenous knowledge in relation to bush foods are showcased and made widely available to everyday consumers, increasing awareness of Indigenous culture and history.

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<sup>230</sup>Austrade, Indigenous Tourism Group, <<https://www.austrade.gov.au/Australian/Tourism/Policy-and-Strategy/Tourism-2020/Working-Groups/indigenous-tourism>>.

<sup>231</sup> Ninti One, Submission to IP Australia, 20 June 2015, <[https://www.ipaustralia.gov.au/sites/g/files/net856/f/submission\\_-\\_ninti\\_one.pdf](https://www.ipaustralia.gov.au/sites/g/files/net856/f/submission_-_ninti_one.pdf)>.







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However, greater exposure can mean greater risks of potential misuse and misappropriation of that knowledge or use of that knowledge without any sharing of benefits. This knowledge on bush foods is intrinsic to Indigenous heritage and culture, and needs to be protected. Australian laws provide very limited protections in this regard. As Kylie Lingard states:

'Copyright law only prohibits the reproduction of images or words, not the use of knowledge. For instance, controlling the reproduction of the words of a recipe does not stop the recipe being used to make a food product'.<sup>232</sup>

Similarly, Indigenous people face difficulties obtaining patents over methods of bush food harvesting, cooking and production due to the 'inventive step' requirement of patents.

As a response to the growth of the industry, Indigenous Knowledge protocols, such as the Ninti One's *Aboriginal people, bush foods knowledge and products from central Australia: Ethical guidelines for commercial bush food research, industry and enterprises* are rapidly emerging in this area and are growing in importance.

Confidentiality laws can protect Traditional Knowledge in this regard, for example by using non-disclosure agreement. However, a lot of bush food knowledge is already publicly and freely available,<sup>233</sup> for example in cookbooks or filmed material that are susceptible to misappropriation and violation of cultural integrity. Copyright can provide some legal protection. Bush tucker recipes that are in material form are protected by copyright law, but copyright only protects the way the recipe is expressed from being reproduced. It does not stop others from using Traditional Knowledge in the recipe or from using that recipe or knowledge to create a food product.<sup>234</sup> Trade marks can be used to establish and protect branding of bush food products and Indigenous bush food businesses. However, there are costs associated with applying for and obtaining a trade mark.

Different issues arise at the different stages of commercialisation of bush food products and Indigenous people would benefit from strategies and partnerships that would support them throughout the process of:<sup>235</sup>

- Collecting samples and supplies;
- Research and development;
- Finances and business licensing;
- Marketing; and

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<sup>232</sup> Kylie Lingard and Paul Martin, 'Strategies to Support the Interests of Aboriginal and Torres Strait Islander Peoples in the Commercial Development of Gourmet Bush Food Products' (2016) 23(1) *International Journal of Cultural Property* 33, 49.

<sup>233</sup> Ninti One, 'Strategies to support Aboriginal and Torres Strait islander interests in Gourmet Bush Food Project Development', <[http://www.nintione.com.au/resource/PB006\\_PolicyBriefing\\_StrategiesSupportAboriginalTorresStraitIslanderInterestsGourmetBushFoodProductDevelopment.pdf](http://www.nintione.com.au/resource/PB006_PolicyBriefing_StrategiesSupportAboriginalTorresStraitIslanderInterestsGourmetBushFoodProductDevelopment.pdf)>.

<sup>234</sup> Kylie Lingard and Paul Martin, 'Strategies to Support the Interests of Aboriginal and Torres Strait Islander Peoples in the Commercial Development of Gourmet Bush Food Products' (2016) 23(1) *International Journal of Cultural Property* 33, 49.

<sup>235</sup> *Ibid*, 42.



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- Distribution and sales.

Partnership models are emerging, such as the research partnership between the Orana Foundation and the University of Adelaide to work with Indigenous people to research traditional food practices. It is important that Indigenous people are involved in these processes and that they have a say in the control and ownership of their Indigenous Knowledge.

#### **Case Study: University of Adelaide and The Orana Foundation research partnership**

Chef Jock Zonfrillo, founder of The Orana Foundation, has partnered with the University of Adelaide for a research partnership into developing the Australian native bush foods industry that benefits Indigenous communities as part of a \$1.25 million grant from the South Australian State Government

The research partnership has four components which will involve direct consultations with Indigenous communities:<sup>236</sup>

- Creating a native food database to compile knowledge about native plants used by Indigenous communities;
- Research and assessment of nutritional profile for bioactive compounds of Aboriginal food plants;
- Assessment of food flavours and development of cooking and preparation techniques; and
- Plant growth assessment and production techniques.

There is also peak body in Australia, the Australian Native Food and Botanicals ('ANFAB'), that represents the interests of those involved in the native bush food industry. ANFAB provides some guidance and resources on Australian native foods, and membership to link industry networks. However, it provides little assistance in the protection of Traditional Knowledge in the industry.

## 5.2 Options

### 5.2.1 Requiring FPIC and ABS in government-funded programs

The Australian Government could better protect Indigenous Knowledge through its programs and grants. This can be done by reviewing government guidelines and policies like the Commonwealth Grant Rules and Guidelines,<sup>237</sup> the National Principles of Intellectual Property

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<sup>236</sup> University of Adelaide, 'Building a native food industry in Australia, 30 June 2017, <<https://www.adelaide.edu.au/news/news93262.html>>.

<sup>237</sup> Department of Finance, *Commonwealth Grants Rules and Guidelines*, July 2014,



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Management for Publicly Funded Research,<sup>238</sup> Intellectual Property Principles for Commonwealth Entities<sup>239</sup> to recognise Indigenous Knowledge. These could be reviewed and updated to address:

- Providing a national framework for obtaining FPIC and ABS where Indigenous Knowledge is involved;
- Consistent mandatory compliance of protocols like the AIATSIS GERAIS and Australia Council for the Arts and Screen Australia funding agreements incorporating Indigenous protocols;
- Requiring Indigenous IP plans as part of funding applications;
- Vesting resulting IP in Indigenous Knowledge holders, or joint ownership with Indigenous Knowledge holders; and
- Government seeking licences to use resulting IP for limited purposes only.

This option might lead to increase in time and costs for grant applicants. FPIC and ABS requirements might be considered burdensome and discourage people from applying for government funding. Care would need to be taken to ensure that such requirements did not create disincentives to provide funding to initiatives involving Indigenous Knowledge.

However, with clearer FPIC and ABS frameworks researchers are encouraged to ensure that FPIC of Indigenous Knowledge people are obtained. Also, barriers for Indigenous Knowledge protection often stem from the lack of infrastructure and financial resources within Indigenous communities. Innovation collaborations can help with this. By collaborating with universities, the private sector, other non-Indigenous corporations and governments under clear and certain Indigenous Knowledge arrangements that meet the needs of communities, Indigenous communities have access to resources, technical skills and expertise that would otherwise not be available to them. This was case with Chuulangun Aboriginal Corporation and the University of South Australia.

### 5.2.2 Enhancing government procurement policies to address Indigenous Knowledge

Over the last few years, Indigenous procurement across government has increased in large part due to the Commonwealth Indigenous Procurement Policy. More and more, Indigenous businesses are innovating and using their Indigenous Knowledge to provide goods and services to the Australian government.

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<<https://www.finance.gov.au/sites/default/files/commonwealth-grants-rules-and-guidelines-July2014.pdf>>.

<sup>238</sup>Australian Research Council, *National Principles of Intellectual Property Management for Publicly Funded Research* (28 July 2017) <<http://www.arc.gov.au/national-principles-intellectual-property-management-publicly-funded-research#fn8>>, principle 2(e).

<sup>239</sup>Department of Communication and the Arts, *Intellectual Property Principles for Commonwealth Entities*, September 2016, <<https://www.communications.gov.au/file/20151/download?token=nmvWmdrj>>.



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As major purchasers of Indigenous goods and services, the Australian Government could ensure that its procurement policies<sup>240</sup> include rules that recognise and encourage Indigenous Knowledge protection. It should include Indigenous protocols on obtaining consent for Indigenous Knowledge used in procured goods and services rather than appropriation.

Procurement contracts and tender documentations<sup>241</sup> should include contract terms on Indigenous Knowledge (e.g. defining Indigenous Knowledge, vesting IP and Indigenous Knowledge in Indigenous Knowledge people), include protection of Indigenous Knowledge in procurement confidentiality policies,<sup>242</sup> and narrowing IP licences sought by government in procured goods or services involving Indigenous Knowledge. The Australian Government could also develop internal protocols to assist with educating and raising awareness of procurement officers and contract managers on Indigenous culture, Indigenous Knowledge and related issues.

This policy option could increase responsibilities and obligations of government procurement officers and contract managers, and in turn it could also increase time and costs associated with assessment of tenders and contracting processes.

It could also limit government ability to exploit resulting IP in procured goods and services. However, this option is an effective way of FPIC and preventing misappropriation without requiring changes to the law. It will set international standards for protecting Indigenous Knowledge in government procurement,<sup>243</sup> and could encourage more Indigenous people to go into business with the Australian Government knowing that their Indigenous Knowledge will be protected.

### 5.2.3 Standardising research protocols and guidelines

Already in Australia, protocols are recognised as a major way of protecting Indigenous Knowledge. However as indicated in the submissions to *Finding the Way* and in this Discussion Paper, much work needs to be done to make protocols widely used and accepted.

A policy option is to develop a national set of protocols for Indigenous Knowledge protection. This could be done by harmonising existing industry-standard protocols for using the existing protocol frameworks to develop new national standards. This should include having regard to existing international protocol frameworks such as the WIPO Draft Articles on TK and TCE protection,<sup>244</sup> the Business Reference Guide to the UN Declaration on the Rights of

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<sup>240</sup> This includes the Commonwealth Indigenous Procurement Policy, and the Commonwealth Procurement Rules, and state and territory Procurement Policy Frameworks.

<sup>241</sup> This includes the Commonwealth Contracting Suite.

<sup>242</sup> Currently it is limited only to 'secret indigenous culture'. See Department of Finance 'Confidentiality Throughout the Procurement Cycle', point 10. <<https://www.finance.gov.au/procurement/procurement-policy-and-guidance/buying/contract-issues/confidentiality-procurement-cycle/practice.html>>

<sup>243</sup> The Canadian Government has a Procurement Strategy for Aboriginal Business and the United States Small Business Administration operates the 8(a) Business Development Program. Both have been designed to increase Indigenous employment and business opportunities, however neither address protections of Indigenous Knowledge.

<sup>244</sup>WIPO, 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)>.



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Indigenous Peoples<sup>245</sup> and the Bonn Guidelines.<sup>246</sup> The principles that underpin protocols should cover the gaps in the law which are respect, consultation and consent, communal attribution, benefit sharing and continued maintenance.

However, this could disrupt the business of Indigenous and non-Indigenous stakeholders who are already operating under their own existing protocols. So, developing national protocols should involve engaging and consulting with Indigenous representatives.<sup>247</sup> Protocols should empower Indigenous Knowledge people and support their capabilities to make decisions on use and management of their Indigenous Knowledge and self-determination. For example, like the approach by Kimberley Land Council. Through the Kimberley Land Council's research protocol and policy, researchers who wish to undertake research on Indigenous lands or waters in the Kimberley, with Indigenous communities from the Kimberley and/or with the KLC must agree to comply with the protocol and policy under a Cooperative Research Agreement with the Kimberley Land Council.<sup>248</sup> This includes requirements for the researcher such as obtaining free prior informed consent and sharing benefits of the research with the relevant communities.

Like the Kimberley Land Council Protocols, national protocols should be consistent, visible and accessible. This could be through a website; supporting protocols with educational material and workshops; a centralised point of contact for questions and further information. The Kimberley Land Council has an arm, the Research Ethics and Access Committee, which provides guidance to researchers on the requirements for researching in the Kimberley. The protocol and policy are made available on the Kimberley Land Council website, accompanied by clear information and contact details.<sup>249</sup>

A further issue is making protocols enforceable. Research protocols can be made enforceable through contracts tied to funding, or by law, or by university and research review and ethics committees.

#### 5.2.4 Develop standard research, funding and commercialisation agreements which vest rights in Indigenous people

Agreements play a very important role in Australia's current framework of protecting Indigenous Knowledge. As indicated in the submissions to IP Australia's *Finding the Way*, contracts provide the recognition of Indigenous Knowledge protection rights where there are shortfalls in the law, also leading to greater recognition of issues.

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<sup>245</sup> United Nations Global Compact, *A Business Reference Guide on the Declaration on the Rights of Indigenous Peoples*, (2003).

<sup>246</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>>.

<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, 2012, <[https://www.ipaustralia.gov.au/sites/g/files/net856/f/submission\\_-\\_terri\\_janke\\_and\\_company\\_ip\\_lawyers.pdf](https://www.ipaustralia.gov.au/sites/g/files/net856/f/submission_-_terri_janke_and_company_ip_lawyers.pdf)> 24 .

<sup>248</sup> Kimberley Land Council, *Intellectual Property and Traditional Knowledge Policy* (Kimberly Land Council, 2011), Clause 20.3.

<sup>249</sup> Kimberley Land Council, *Research Facilitation*, <<http://www.klc.org.au/news-media/research-facilitation>>.





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Copyright resulting from research or commercialisation projects can be assigned to, shared with, or controlled by Indigenous people through written agreements like funding agreements, research agreements and partnership agreements.<sup>250</sup>

This can be done by updating government funding agreements to vest resulting IP in Indigenous custodians of Indigenous Knowledge or developing model research agreements and partnership agreements. An example is the Department of the Environment and Energy's funding agreement for the National Landcare Programme, which vests IP rights in materials created as a result of funding to the recipient and funding guidelines mandate that recipients negotiate and obtain approval of Indigenous Knowledge custodians and knowledge holders.

#### 5.2.5 Establishing a National Indigenous Research Advisory Body

One of the main criticisms of the AIATSIS GERAIS is that while it is adopted by most universities that are undertaking research that involve Indigenous Knowledge or Indigenous people, it is inconsistently considered and applied by human research ethics committees (HRECs) in reviewing research proposals.<sup>251</sup> Reasons for this include lack of Indigenous representation in HRECs, no training of committee members on Indigenous research and no oversight by AIATSIS on application of the GERAIS.<sup>252</sup>

The Indigenous Higher Education Advisory Committee recommended that a national advisory body for research institutions and universities should be formed to provide guidance on Indigenous knowledge research.<sup>253</sup> The IHEAC considers that AIATSIS could play a bigger role in this space. This was also suggested in the *Review of Higher Education Access and Outcomes for Aboriginal and Torres Strait Islander People* commissioned by the Australian Government.<sup>254</sup> The review recommended that a specific advisory body should link HRECs at universities as a central point to accessing Indigenous research guidance.

A NICA would be able to fulfil this role (see discussion under Part 8.2 of this Discussion Paper).<sup>255</sup> Researchers and universities would benefit from specific guidance on Indigenous research issues beyond just protocols and guidelines.

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<sup>250</sup> Terri Janke, *Writing up Indigenous Research: authorship, Copyright and Indigenous Knowledge* systems, Terri Janke and Company, 2008.

<sup>251</sup> ACIL Allen Consulting In Collaboration With Professor Mark Rose And Dr Mark McMillan, *Australian Institute Of Aboriginal And Torres Strait Islander Studies: Independent Review*, (May 2014) <[http://www.acilallen.com.au/cms\\_files/ACILAllen\\_AIATSISReview\\_2014.pdf](http://www.acilallen.com.au/cms_files/ACILAllen_AIATSISReview_2014.pdf)> 26 – 28.

<sup>252</sup> Ibid.

<sup>253</sup> Indigenous Higher Education Advisory Council, Submission to IP Australia, <[https://www.ipaustralia.gov.au/sites/g/files/net856/f/submission\\_-\\_indigenous\\_higher\\_education\\_advisory\\_council.pdf](https://www.ipaustralia.gov.au/sites/g/files/net856/f/submission_-_indigenous_higher_education_advisory_council.pdf)>.

<sup>254</sup> Professor Larissa Behrendt et al, *Review of Higher Education Access and Outcomes for Aboriginal and Torres Strait Islander People: Final Report*, (Australian Government 2012) <<https://docs.education.gov.au/system/files/doc/other/heaccessandoutcomesforaboriginalandtorresstraitislanderfinalreport.pdf>>.

<sup>255</sup> Terri Janke, *Beyond Guarding Ground, A Vision for a National Indigenous Cultural Authority*, (Terri Janke and Company, 2009).







### 5.2.6 Creating a national database for Indigenous Knowledge

To stop the registration of patents that use TK, some countries have developed databases for defensive protection. Defensive protection in the context of the patent system hinges on the novelty and inventive step requirements. The inventions must be new and non-obvious. During the patent examination process, the application is assessed in accordance with this criteria with reference to available prior art: that is, information which was available to the public before the filing date of the patent application. If patent examiners had access to a national database containing Indigenous Knowledge, they could use this to assess the prior art. If they found the application's novelty claim was already Indigenous Knowledge, this would mean that the invention is not valid.

India's Traditional Knowledge Digital Library (TKDL) database has been successfully used to protect traditional Indian knowledge from being misappropriated, which occurs mostly transnationally. The database is compiled of information present in fourteen ancient Ayurvedic texts that has been translated into approximately 36,000 patent formulations. The TKDL has also been translated into 5 languages and opened to patent offices around the world under access-sharing agreements. It has helped to:

- Make traditional knowledge accessible to the both the Indian patent offices as well as patent offices in other countries in order to prevent the misappropriation of Indian traditional knowledge;
- Prevent the grant of patents based on traditional knowledge, especially those associated with medicine;
- Save interested parties such as traditional knowledge holders the extensive time and money required to contest patents;
- Document diffuse information on the Indian systems of medicine into an accessible form which is easily understood around the world, particularly as it is translated into 5 languages; and
- Overcome the lack of a single international framework to regulate and protect the use of traditional knowledge.

A database can be a useful defensive mechanism for identifying Indigenous Knowledge people and prevent appropriation of Indigenous Knowledge. It can also be useful for transmission of Indigenous Knowledge to future generations of Indigenous people especially where culture is being eroded to maintain and preserve Indigenous Knowledge. However, there would be limitations in the database's defensive mechanism. The database should not include any secret information and should be careful not to disclose information that Indigenous groups want to commercialise in the future.

Any national Indigenous Knowledge database should be designed, administered and managed by Indigenous people. As the leading organisation on Indigenous studies, the Australian Institute of Aboriginal and Torres Strait Islander Studies ('AIATSIS') could be funded to design, develop and manage an Indigenous Knowledge database with Indigenous communities, with rules for access and use defined by customary law<sup>256</sup> and according to

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<sup>256</sup> Merle Alexander, 'The Role of Registers and Databases in the Protection of Traditional Knowledge: A Comparative Analysis', (2004) United Nations University, Institute of Advance Studies,



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AIATSIS protocols. This would ensure that Indigenous Knowledge recorded in the database is obtained from Indigenous people with their prior informed consent, and sacred/secret Indigenous Knowledge is kept confidential. It could also encourage derivative and follow-on innovation. The database could provide the basis for a *sui generis* database right similar to database rights that exist in the European Union.<sup>257</sup> Access to and use of Indigenous Knowledge included in the database could be licensed, including terms providing ABS. This could be supplemented by registered trade marks protecting the name and branding.

The database would also have to deal with the bigger, practical problem of dealing with the different clans and groups Indigenous Knowledge. There would be a variety and complexity of customary rules of disclosure. These rules are likely to limit who is permitted to access Indigenous Knowledge included in the database and, indeed, what gets included. It may be more practical to enable individual clans to compile and develop their own database materials with sharing protocols.

Indigenous groups should be clear of the impact of recording and compiling knowledge on the face to face cultural practice transfer of knowledge. Care should be taken not to allow documenting or recording Indigenous Knowledge to freeze it in its current form or interpretation. Another potential risk is that a public database could facilitate increased exploitation of Indigenous Knowledge by the private sector in making the information searchable in one place. Although databases like Atlas of Living Australia have adopted terms of use and notices that alert users to the need to respect Indigenous Knowledge rights, Indigenous people should understand that putting information on a database does not of itself create an enforceable right. Consideration should be given to restricted access databases which are used commercially in confidence.

### 5.2.7 Amending Native Plant Legislation

Ninti One's Submission to IP Australia's *Finding the Way* noted that Australia's current native plant laws<sup>258</sup> provide limited avenues for Indigenous involvement:<sup>259</sup>

- Laws allow any person to make a written submission on a draft species management plan but impose no obligation on the authority to specifically consider the views of interests of Aboriginal and Torres Strait Islander people;
- There is no obligation to consult when making decisions about permitting the taking of native plants from the wild; and
- Laws focus decisions about threatened species with reference and priority given to formal scientific information and not Indigenous ecology and knowledge. There are no obligations under current laws to specially consider Indigenous Knowledge, views or

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Tokyo, 28.

<sup>257</sup> European Union, Directive 96/6/EC on the Legal Protection of Databases, 1996, <[http://ec.europa.eu/internal\\_market/copyright/prot-databases/index\\_en.htm](http://ec.europa.eu/internal_market/copyright/prot-databases/index_en.htm)>.

<sup>258</sup> *Environmental Protection and Biodiversity Conservation Act 1999* (Cth); *Biodiversity Conservation Act 2016* (NSW) schs 1, 2 and 6; *National Parks and Wildlife Act 1974* (NSW).

<sup>259</sup> Ninti One, Submission to IP Australia, 20 June 2015, <[https://www.ipaustralia.gov.au/sites/g/files/net856/f/submission\\_-\\_ninti\\_one.pdf](https://www.ipaustralia.gov.au/sites/g/files/net856/f/submission_-_ninti_one.pdf)>.





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interests.

Laws relating to native plants should be amended to ensure Indigenous people and their knowledge are formally recognised as part of Australia's system of plant management and development. Amendments could require, for example, for environmental government authorities to have regard to Indigenous Knowledge and Indigenous interests when making relevant plans and decisions. Another way could be to legislate a requirement for Indigenous representation on relevant advisory boards,<sup>260</sup> and on committees making decisions as to whether species are to be considered threatened.<sup>261</sup>

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<sup>260</sup> Ibid.

<sup>261</sup> Kylie Lingard, *Strategies to Support Aboriginal and Torres Strait Islander Interests in Gourmet Bush Food Product Development* (20 June 2015) Ninti One: CRC Remote Economic Participation, <[http://www.nintione.com.au/resource/PB006\\_PolicyBriefing\\_StrategiesSupportAboriginalToresStraitIslanderInterestsGourmetBushFoodProductDevelopment.pdf](http://www.nintione.com.au/resource/PB006_PolicyBriefing_StrategiesSupportAboriginalToresStraitIslanderInterestsGourmetBushFoodProductDevelopment.pdf)>.





## **6. Misappropriation of genetic resources and associated Traditional Knowledge**

Indigenous people's ecological and biodiversity knowledge of Australia's flora and fauna is widely known to be valuable sources of knowledge and study by researchers, scientists and pharmaceutical companies.<sup>262</sup> A great deal of academic and research activity is informed by solutions, insights and knowledge of Indigenous people into properties of genetic resources such as plants like the Kakadu plum, or *gubinge*.

### **6.1 Discussion**

#### **6.1.1 Access and benefit sharing approaches when collecting genetic resources and Indigenous Knowledge**

Arising out of Australia's obligations as a party to the *United Nations Convention on Biological Resources* (CBD), Indigenous people are given certain rights under Australia's biodiversity laws for their Indigenous Knowledge in genetic resources to be recognised. This is by providing a framework for access and benefit sharing arrangements with the relevant Indigenous communities. Australia has not yet ratified the *Nagoya Protocol*, which implements the access and benefit sharing obligations in the CBD, resulting in different approaches and requirements for access and benefit sharing depending on the location of the genetic resources and the nature of the relevant land tenure.

There are provisions under the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (EPBC Act) and the *Biological Resources Act 2006* (NT) that impose obligations on those who want to access genetic resources on land owned by the Commonwealth and the Northern Territory state government to state any use of Indigenous Knowledge; and through a benefit sharing agreement consented to by the Indigenous owner of the land where access is sought, state what benefits the relevant communities will get in return for the use of their Indigenous Knowledge.<sup>263</sup>

However, the EPBC Act limits these requirements only to access where genetic resources are used commercially. Between 2006 and 2015, only three permits listed on the Department of Environment website have been granted for commercial purposes.<sup>264</sup> The majority of permits issued under the EPBC Act and Regulations have been for non-commercial purposes, which do not require benefit sharing agreements, even where access sought involved use of Indigenous Knowledge.

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<sup>262</sup> Terri Janke, *Our Culture: Our Future*, 42.

<sup>263</sup> *Environment Protection and Biodiversity Conservation Regulations 2000* (Cth) reg 8A.08; *Biological Resources Act 2006* (NT) s27(3).

<sup>264</sup> Two of those permits were granted to the Australian Institute of Marine Science (see: <http://www.environment.gov.au/system/files/resources/0febcc9a-f21e-480a-bc3a-53c197e48139/files/au-com2012153.pdf> and <http://www.environment.gov.au/system/files/resources/0febcc9a-f21e-480a-bc3a-53c197e48139/files/au-com2012154.pdf>).



**Case Study: Access and Benefit Sharing Agreements Department of Environment and Energy**

The Commonwealth Department of the Environment and Energy provides two template agreements for commercial or potentially commercial access to biological resources under the *Environment Protection and Biodiversity Conservation Act 1999* (Cth):<sup>265</sup>

1. Access and Benefit Sharing agreement between Australian government and access party; and
2. Access and Benefit Sharing between access provider (non-government) and access party.<sup>266</sup>

These agreements recognise the Convention on Biological Diversity and contains clauses that bind accessing parties to enter into benefit sharing agreements with Indigenous people where Indigenous Knowledge is used.

While it does not provide guidance on how to engage with Indigenous communities, the Commonwealth template agreement makes compliance with the AIATSIS's Guidelines of Ethical Research in Australian Indigenous Studies mandatory.<sup>267</sup> A list of example policies and protocols is also provided for guidance. The Commonwealth template is also accompanied by an extensive Explanatory Guide<sup>268</sup> to assist users. These templates provide a good starting point, however are limited to only access of resources and associated Indigenous Knowledge on Commonwealth areas covered by the EPBC Act.

To obtain access to biological resources for commercial or potentially commercial purposes, the accessor will need to enter into a benefit-sharing agreement with the access provider before a permit can be issued. A permit will not be issued if the Minister for Sustainability, Environment, Water, Population and Communities, is not satisfied that the benefit-sharing agreement was made with the prior informed consent of the access providers. In 2015, 34 permits were granted, all for non-commercial purposes.<sup>269</sup>

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<sup>265</sup> Commonwealth of Australia, *Model Access and Benefit-Sharing Agreement Commonwealth of Australia and Access Party* (2012), <<http://www.environment.gov.au/system/files/pages/e3584028-d083-4aec-acdd-c0aa635a529f/files/commonwealth-and-access-party-model-benefit-sharing-agreement-2012.pdf>>.

<sup>266</sup> World Intellectual Property Organisation, *Model Access and Benefit Sharing Agreement between Access Provider and Access Party, proposed by the Australian Government*, <<http://www.wipo.int/tk/en/databases/contracts/texts/australiamodel.html>>.

<sup>267</sup> Commonwealth Government, above n 397, Schedule 5 Item 1.

<sup>268</sup> Department of Environment, *Explanatory Guide: Model Benefit-sharing Agreement*, <<http://www.environment.gov.au/system/files/pages/e3584028-d083-4aec-acdd-c0aa635a529f/files/benefit-sharing-guide.pdf>>.

<sup>269</sup> Environment Australia, *List of Permits Issued under the EPBC Act*, <<http://www.environment.gov.au/resource/list-permits-issued>>.



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Queensland also has the *Biodiscovery Act 2004* (Qld), which sets up an access and benefit sharing regime by requiring a 'collection authority' to be granted before collecting native biological resources.<sup>270</sup> However the Queensland Act does not specifically address Indigenous Knowledge access, collection and benefit sharing. Neither does it provide for prior informed consent or mutual terms. Neva Collings and Heidi Evans point out that 'while this has not prevented the adoption of ABS agreements between Indigenous groups and pharmaceutical or other resource-accessing parties, there is no requirement that an agreement be drawn up where private entities utilise traditional knowledge; the legislation provides no way for communities to control commercial use of this potentially valuable resource.'<sup>271</sup>

There are no corresponding laws in Western Australia, Victoria, New South Wales, Tasmania or the ACT. According to Professor Natalie Stoianoff, who has undertaken extensive research in Indigenous Knowledge and genetic resources, Australia takes a 'piecemeal approach' to access and benefit sharing, leading to significant gaps and limited benefits in the existing framework.<sup>272</sup>

This inconsistency in the laws and complexity in navigating them makes it difficult for Indigenous people to use the laws to their benefit. Indigenous people often do not much negotiating power as the existing laws do not provide mechanisms for Indigenous people to enforce their rights or provide any meaningful avenues of redress if access and benefit sharing agreements are not entered into.<sup>273</sup> For example, Katie O'Bryan observes that under the EPBC Act, there are no regulations for Indigenous people where their Indigenous Knowledge is being threatened.<sup>274</sup> There are provisions for members of the public to bring action by way of injunctions of breaches.<sup>275</sup> However, the high costs of bringing an action is a barrier that prevents Indigenous communities from accessing protection of Indigenous Knowledge in such a way. Any proposed policy action must recognise that the high costs of protecting Indigenous Knowledge exclude many Indigenous Knowledge holders from that protection.

### 6.1.2 Consultation and consent for ABS arrangements

The *Nationally Consistent Approach for Access to and Utilisation of Australia's Native Genetic and Biochemical Resources*,<sup>276</sup> endorsed by all Australian states and territories, provides that Australian legal and policy frameworks must

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<sup>270</sup> *Biodiscovery Act 2004* (Qld) pt 3.

<sup>271</sup> Neva Collings and Heidi Evans, 'Access and Benefit Sharing - Protecting Biodiversity and Indigenous Knowledge' [2009] IndigLawB 36; (2009) 7(14) Indigenous Law Bulletin 11.

<sup>272</sup> Evana Wright, Ann Cahill and Natalie Stoianoff, 'Australia and Indigenous traditional knowledge' in Natalie Stoianoff (ed), *Indigenous knowledge forum: comparative systems for recognising and protecting Indigenous knowledge and culture*, (LexisNexis Australia, 2017), 39.

<sup>273</sup> *Biodiscovery Act 2004* (Qld) has offences for no ABS agreement; *Biological Resources Act 2006* (NT) only has offences for no permit.

<sup>274</sup> Katie O'Bryan, 'The Appropriation of Indigenous Ecological Knowledge – Recent Australian Developments' [2004] 1(1) *Macquarie Journal of International and Comparative Law* 20.

<sup>275</sup> *Environment Protection and Biodiversity Conservation Regulations 2000* (Cth) s475. However, injunctions are limited to the kinds of resources protected by the Act that are within the catchment areas of the Act.

<sup>276</sup> Department of Environment and Heritage, *National Consistent Approach for access to and the utilisation of Australia's Native Genetic and Biochemical Resources*, 2002, <<http://www.environment.gov.au/system/files/resources/bbfbd06-d13a-4061-b2f9->







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'recognise the need to ensure the use of traditional knowledge is undertaken with the cooperation and approval of the holders of that knowledge and on mutually agreed terms.'<sup>277</sup>

However, existing ABS laws do not provide an appropriate framework on how to consult with or obtain the consent of Indigenous people. For example, the EPBC Act was criticised as being inadequate in an Independent Review of the EPBC Act, that the administrative approach rather than legislative approach to Indigenous consultation and consent allows for too many inconsistencies in processes and outcomes.<sup>278</sup>

It was recommended that proper processes for consultation and negotiation with Indigenous peoples be written into the Act.<sup>279</sup> Parties seeking access to Indigenous Knowledge, and Indigenous Knowledge people require guidance on how widely to consult, and what constitutes consent. For instance, how do parties seeking access identify the Indigenous stakeholders to be consulted? Is consent provided orally, or in writing? What are the standards of consent? What information is required and how should it be presented in a way that the Indigenous stakeholders can understand it?

These are questions which the Indigenous stakeholder and the access party should agree on before access. It is also more difficult for researchers seeking access, as projects often cross borders which mean potentially having to navigate different ABS legal requirements but also different requirements of consultation and consent. This was experienced by the University of Western Australia in its Kakadu Plum project.

#### Case Study: UWA Kakadu Plum ABS Agreement

In 2013, the University of Western Australia (UWA) was awarded a government-funded research project to study the Kakadu plum. Working with Indigenous communities, organisations and state and federal Government bodies, UWA is leading the project to develop the Kakadu plum industry as a commercial industry for local Indigenous people.<sup>280</sup>

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c115d994de2d/files/nca.pdf>.

<sup>277</sup> Department of Environment and Heritage, *National Consistent Approach for access to and the utilisation of Australia's Native Genetic and Biochemical Resources*, <<http://www.environment.gov.au/system/files/resources/bfbde06-d13a-4061-b2f9-c115d994de2d/files/nca.pdf>>, 5.

<sup>278</sup> Dr Alan Hawke, 'Independent Review of the *Environment Protection and Biodiversity Conservation Act 1999*' (Interim Report, Department of the Environment, Water, Heritage and the Arts, 29 June 2009) 261. <<http://www.environment.gov.au/system/files/resources/5d70283b-3777-442e-b395-b0a22ba1b273/files/interim-report.pdf>>.

<sup>279</sup> Ibid.

<sup>280</sup> University of Western Australia, 'Vitamin C-rich Native Fruit Ripe for Cash Crop Study', (UWA Media Release, 4 December 2013), <<http://www.news.uwa.edu.au/201312046334/research/vitamin-c-rich-native-fruit-ripe-cash-crop-study>>.





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As part of government funding requirements for the project, UWA sought to obtain the free prior informed consent of Indigenous communities in Western Australia and Northern Territory (where the Kakadu plum is a native plant) by negotiating Access and Benefit Sharing Agreements.

UWA identified that a barrier to working with Indigenous groups was navigating and meeting the requirements for obtaining the free prior and informed consent. UWA engaged lawyers with expertise in Indigenous intellectual property and facilitated discussions with Indigenous stakeholders. Resulting from the discussions were template Access and Benefit Sharing Agreements for UWA that not only catered to the needs of the WA and NT communities, but also aligned with requirements under the *United Nations Convention on Biological Diversity*, the *Nagoya Protocol*, the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) and the *Biological Resources Act 2006* (NT).

The templates were also provided with a suite of supporting documents developed particularly for the project, such as a Communications Protocol and FPIC Document. These documents are guides for researchers to help them understand the communication requirements of local communities. For example, the Communications Protocol identifies and provides strategies for what communication channels to use, how to disseminate information, and what time frames to expect for responses from local communities. These are fundamental aspects to understand in obtaining the free, prior informed consent of Indigenous knowledge holders.

This case study demonstrates the potential challenges faced by those seeking access to Indigenous Knowledge – even those who want to do the right thing and engage with communities to enter into access and benefit sharing agreements with them. Problems often arise in understanding Indigenous authority systems and negotiating free prior informed consent for use of Indigenous Knowledge. However, the case study also shows that there are mechanisms and approaches that can be put in place to overcome these barriers.

It can be difficult to identify the right group or clan to give prior informed consent. This is the major argument often put up as a barrier to recognising Indigenous Knowledge rights. How can users of Indigenous Knowledge be sure that they have negotiated and gained consent of the right people? There is a need for legal certainty. It is difficult to identify all the potential stakeholders or consent. External parties will need certainty when dealing with Indigenous Knowledge when they reasonably consider that they have done the right thing.

There are systems developed depending on the governance and customary laws of the specific group. However, the process of consulting and getting consent from a community will depend on the processes, customary laws, number of people, and existence of organisations, resources and geography.

### 6.1.3 Patenting of genetic resources and associated Traditional Knowledge

Aboriginal and Torres Strait Islander people are concerned that the patent system allows the misappropriation of Traditional Knowledge associated with genetic resources with no regard for Indigenous people's rights to that knowledge. Universities and pharmaceutical companies have commercialisation practices that encourage the claiming of exclusive patent rights to methods and plant genes that may arise when Traditional Knowledge is accessed or shared. The contributions of Indigenous people and the inter-relationships that they have with their





knowledge, genetic resources and the environment are ignored.

### **Case Study: Smokebush plant patent**

Smokebush is a plant that grows in the coastal areas of Western Australia and has been traditionally used by Indigenous people in those areas for its healing properties. After being granted a licence by the WA Government to collect plants for screening purposes in the 1960s,<sup>281</sup> the US National Cancer Council discovered in the late 1980s that Smokebush had the potential to be developed into an anti-HIV drug. The Smokebush was one of only a handful of plants from thousands around the world that contained the active ingredient Conocurovone, which had been proven to destroy the HIV virus in low concentrations. The 'discovery' of Conocurovone in Smokebush was patented by the National Cancer Council, who then granted Amrad, a Victorian biotechnology company, the right to develop the patent.

In the 1990s, Amrad paid \$1.5 million to the Western Australian Government to secure exclusive access to Smokebush and related species. It was expected that the government would recoup royalties of \$100 million per year by 2002 if the drug was successfully commercialised.<sup>282</sup> Amrad never entered into a benefit sharing agreement with the local Aboriginal groups. Indeed, Indigenous people received no acknowledgement for their role in having first discovered the healing properties of Smokebush.

These events have been described as biopiracy, and highlight the lack of legal remedy available to Indigenous people under the patent system in respect of unauthorised use of their Indigenous Knowledge.

During the examination of a patent application, the patent examiner must satisfy themselves that the invention involves an 'inventive step', and that the invention is not already included in the prior art base. Indigenous people could develop databases of Traditional Knowledge and make these available to patent examiners. This is similar to what was done in India with the India Traditional Knowledge Database. These defensive databases are made available only to the patent examiners of a country thereby maintaining a degree of secrecy in the knowledge. The aim of the database is to defeat claims of novelty. If a claimed invention lacks novelty, it is invalid.

If a defensive database is developed for Australia, there should be wide consultation and information about the risks made known to Indigenous people. In any case, the database should only compile published documents and not secret knowledge. Further, the aim of the database should also be to encourage and promote researchers to seek prior informed consent of Indigenous people and to negotiate commercial arrangements.

There are numerous patent law doctrines that can be used to prevent misappropriation of Indigenous Knowledge. A patent can be defeated if it can be shown that it lacks novelty and inventive step or that there was prior use. An example is the case of W.R. Grace's Neem

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<sup>281</sup> Henrietta Fourmile, 'Protecting Indigenous Intellectual Property Rights in Biodiversity' (Ecopolitics IX Conference, Darwin, 1-3 September 1995).

<sup>282</sup> Henrietta Fourmile, 'Protecting Indigenous Intellectual Property Rights in Biodiversity' (Ecopolitics IX Conference, Darwin, 1-3 September 1995).



fungicide patent being revoked by the European Patent Office.

### **Case Study: EPO revocation of Indian Neem Tree patent**

The Neem tree is a plant native to India and because of its medical properties, it has been used for thousands of years in traditional Indian remedies.

The United States Department of Agriculture and W.R. Grace, a multinational corporation that produces specialty chemicals and materials, filed a patent application for a process of extracting oil from the Indian Neem tree for use as a pesticide, with the European Patent Office (EPO). The patent was granted but was opposed by European environmental groups, India-based Research Foundation for Science, Technology and Ecology (RFSTE) and the International Federation of Organic Agriculture Movements (IFOAM).<sup>283</sup>

Supported by the Indian Government and 500,000 signatures of Indian citizens,<sup>284</sup> the opposition provided evidence that the patented methods have been traditionally used by Indian farmers to prevent fungus, and by scientists to conduct research on its antifungal properties, long before the patent was granted.<sup>285</sup> The patent was not novel and not an invention as claimed by W.R. Grace. The EPO accepted this argument and, as a result, after years of opposition, the European Patent Office revoked the patent.<sup>286</sup>

This case study demonstrates that Indigenous knowledge systems and methods can successfully be used to establish prior art, and oppose claims of novelty and inventiveness that misappropriate that knowledge.

However, it also shows that while opposing patents is an option to defeat claims of novelty and inventiveness, it requires resources that are not necessarily accessible for Indigenous people. Patent oppositions will require payment of administrative fees to the relevant IP office, putting together opposition cases, and therefore also fees in engaging legal and technical experts to support arguments in opposing the patent.

In Australia, when Mary Kay applied for patent which included the Kakadu Plum, Daniel Robinson, a university researcher, filed a submission during examination to draw attention to prior use of the claimed patent's novelty. This gave the examiner information to seek further information in the examination process. Mary Kay withdrew this patent application.

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<sup>283</sup> Editorial, 'Indian wins landmark patent battle', BBC News, 9 March 2005, <<http://news.bbc.co.uk/2/hi/science/nature/4333627.stm>>.

<sup>284</sup> Anna Selleh, 'Victory over Piracy', ABC Science Online, 19 May 2000, <<http://www.abc.net.au/science/articles/2000/05/19/128927.htm?site=galileo/acedayjobs&topic=latest>>.

<sup>285</sup> Business, 'India wins neem patent case', The Hindu, 9 March 2005, <<http://www.thehindu.com/2005/03/09/stories/2005030902381300.htm>>.

<sup>286</sup> Business, 'India wins neem patent case', The Hindu, 9 March 2005, <<http://www.thehindu.com/2005/03/09/stories/2005030902381300.htm>>.



### **Case Study: Mary Kay Kakadu Plum Patent**

The Kakadu plum or gubinge is a plant native to northern Australia, found in the Northern Territory, north Western Australia, and north Queensland. For thousands of years, it has been traditionally used by Indigenous people as bush tucker and medicine. It is also featured in oral and dreaming stories.<sup>287</sup>

In recent years, the American cosmetic company, Mary Kay, became interested in the Kakadu plum and its cosmetic properties. Mary Kay applied for an Australian patent on Kakadu plum plant extract for use on skincare products. The local Indigenous communities were not consulted about the patent application, and were concerned that the patent owner may be able to restrict the community's use of the plant. There is, however, section 119 of the *Patents Act 1990* (Cth) which provides that, in certain limited circumstances, the use of a patented invention before the patent's priority date is a defence to an allegation of patent infringement.<sup>288</sup>

The application was rejected by IP Australia for lack of novelty and obviousness<sup>289</sup> and was ultimately withdrawn by Mary Kay. However, this case study demonstrates that while Australia has a legal framework for access and benefit sharing, there are gaps in the application and enforcement of the laws.

Mary Kay claimed that they had obtained Kakadu plums from a Northern Territory supplier, under a licence issued by the Australian government.<sup>290</sup> In the Northern Territory, the *Biological Resources Act 2006* (NT) requires an access and benefit sharing agreement from the owners of the land from which they wish to obtain raw biological resources, including Aboriginal land held under the *Aboriginal Land Rights Act 1974* (NT).

However, if Mary Kay sourced Kakadu plum commercially through a commercial supplier or a nursery, Mary Kay would not be obliged to enter into an access and benefit sharing agreement with Indigenous communities.<sup>291</sup> The same applies for any biological resources obtained from non-Commonwealth lands or commercially in NSW, the ACT, Victoria, WA, SA and Tasmania, where there are no access and benefit sharing laws.

Issues with using the patent objection process are that Indigenous people may not know the patents are being filed. Although they are published in the Australian Official Journal of Patents, this is not something that Indigenous people watch. Patent Watch organisations and entities could be established to alert Indigenous people to patents that include genetic materials from their territories and Traditional Knowledge.

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<sup>287</sup> Robin Powell and Lindsay Murdoch, 'Patent fight erupts over Kakadu plum', Sydney Morning Herald, 4 December 2010, <<http://www.smh.com.au/national/patent-fight-erupts-over-kakadu-plum-20101203-18jud.html>>.

<sup>288</sup> *Patents Act 1990* (Cth) s119.

<sup>289</sup> Dr Daniel Robinson, Finding the Way submission: <[https://www.ipaustralia.gov.au/sites/g/files/net856/f/submission\\_-\\_daniel\\_robinson.pdf](https://www.ipaustralia.gov.au/sites/g/files/net856/f/submission_-_daniel_robinson.pdf)>, 15.

<sup>290</sup> Ibid.

<sup>291</sup> Jeremy Morse, 'Nurturing Nature, Nurturing Knowledge: The Nagoya Protocols on Access and Benefit Sharing', *Indigenous Law Bulletin*, May/June 2011, 3 – 6.





#### **6.1.4 Indigenous people are collaborators in research, not just informants or participants**

Another issue is that historically, Indigenous people have been seen more as research subjects or participants. The Department of Industry, Innovation and Science identifies that while modern research initiatives are shifting away from this perspective, Indigenous people's status in research 'has progressed little beyond roles as 'informants or field assistants to researchers'.<sup>292</sup> Indigenous people should be seen as collaborators and partners in research, who make meaningful contributions to science. Requiring collaborations in government funded research involving Indigenous Knowledge may help with changing these views. By encouraging partnerships with Indigenous people, universities and research institutions have a bigger role and responsibility in ensuring that Indigenous interests are respected in research projects and that Indigenous people benefit from their contributions.

There are a growing number of positive examples of research collaborations with Indigenous people, such as the work done by the Jarlmadangah Burru Aboriginal Corporation, Chuulangun Aboriginal Corporation and Dugalunji Aboriginal Corporation with Australian universities.

#### **Case Study: Jarlmadangah Burru Aboriginal Corporation – Marjala Patent**

In 1986, Senior Nyinkina Mangala Lawman John Watson had his finger bitten off while hunting freshwater crocodiles in the Kimberly region. As he was hours away from the Derby Hospital, he used the bark from the Marjala plant to treat his wound. The nyardoo majala tree had always been known to the Nyikina Mangala community in this region for both its significance in the Fitzroy River creation story as well as its healing and pain relief properties.

To explore the opportunities for commercialisation, the Nyikina Mangala elders appointed Paul Marshall, a former Kimberley Land Council administrator, to act as their agent. Marshall organised meetings with Professor Ron Quinn, a scientist from Griffith University in Brisbane. In 1987, after a period of negotiation, the Jarlmadangah Burru Aboriginal Corporation, a community corporation representing the interests of Nyikina Mangala people, entered into an Australian Research and Development partnership with Griffith University. The next step was to conduct scientific research to isolate and identify the active analgesic compounds in the nyardoo majala. This was necessary to prove that they were a 'novel' class of compounds for the purpose of patent registration. It took over 10 years for scientists and the community to lodge a patent application in 2003.<sup>293</sup> Finally, Griffith University and Jarlmadangah Burru were registered as co-owners of the patent in 2004.<sup>294</sup> The 'Mudjala TK Project' is recognised as a leading Indigenous medicine patent project in Australia.

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<sup>292</sup> Expert Working Group Report, 'Indigenous Engagement with Science, towards Deeper Understanding, *Inspiring Australia*, August 2013. iv.

<sup>293</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, 18.

<sup>294</sup> 'Novel analgesic compounds, extracts containing same and methods of preparation', (2004) Publication Number AU2004293125.





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This case study shows that Indigenous people can successfully work with researchers and commercial partners so that they can share in the benefits of their traditional knowledge. However, it also demonstrates the challenges to the patent application process, particularly in relation to securing the necessary funding to support the various legal, scientific and evidentiary aspects of a lengthy patent process. These are significant challenges for Indigenous people when using patent laws to commercialise Indigenous Knowledge.

#### Case study: Chuulangun Aboriginal Corporation – Uncha patent

Kuuku l'yu Northern Kaanju homelands are centred on the Wenlock and Pascoe Rivers in Cape York. As traditional owners, the Kuuku l'yu people have a broad and detailed knowledge of the ecology of their homelands; this includes the medicinal uses of plant species that grow there.<sup>295</sup>

The agreement was informed by ethical guidelines such as the NHMRC Guidelines for Ethical Conduct in Aboriginal Health Research,<sup>296</sup> as well as relevant aspects of standard agreements between the University of South Australia and industry partners. However, the agreement recognised the local Indigenous participants as researchers in their own rights. This meant that while standard guidelines were useful in drafting the agreement, any project undertaken was to be dictated by local Indigenous lore and culturally appropriate ways of working.<sup>297</sup>

Some key features of the agreement included:<sup>298</sup>

- Indigenous law and custom governed how background IP was used during the course of the project;
- Traditional owners undertook plant collections for the project in accordance with the rights of certain people to prepare medicines under customary law;
- Cultural and intellectual property of traditional owners was treated as confidential information that could not be disclosed to any third party;
- New IP developed through the project (such as findings of laboratory based testing and chemical analysis) was to be jointly and equally owned by Chuulangun Aboriginal Corporation and the University of SA;
- Decisions to commercialise any aspects of project IP requires the consent of both parties; and

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<sup>295</sup> David 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 Susy Frankel (eds), *Indigenous peoples' Innovation: Intellectual Property Pathways to Development* (Australian National University ePress, 2012) 29-56, 32.

<sup>296</sup> National Health and Medical Research Council, 'Values and Ethics: Guidelines for Ethical Conduct in Aboriginal and Torres Strait Islander Health Research' (Commonwealth of Australia, Canberra, 2003).

<sup>297</sup> David Claudie et al, n 299, 40.

<sup>298</sup> Ibid, 41.





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- Any research findings were only to be jointly published, and proper attribution given to the Kuuku l'yu researchers who contributed to relevant aspects of the work.

The traditional owners directed the research team to a plant species called *Dodonaea polyandra* or Uncha;<sup>299</sup> which has been used by some Kuuku l'yu individuals as a medicine for mouth pain and inflammation. Testing in laboratories revealed that novel compounds from the Uncha plant have anti-inflammatory properties. In 2010, a joint patent application was filed for a medicine developed from the plants.<sup>300</sup>

The collaboration between the Chuulangun Aboriginal Corporation and the University of South Australia is an example of how recognition of the value of traditional knowledge can be made central to research agreements. It also demonstrates that by acknowledging customary law in undertaking research, Aboriginal and Torres Strait Islander people may be the drivers of research and their valuable knowledge may be commercialised for the benefit of both parties.

### Case Study: Dugalunji Aboriginal Corporation – Spinifex Commercialisation Project

Spinifex grass has been used by Camooweal's Indjalandji-Dhidhanu people to build shelters, as glue in making instruments like spears and boomerangs, and even as medicine. The Dugalunji Aboriginal Corporation and the University of Queensland signed a research agreement in 2015 to work in partnership to transform spinifex grass into commercial products.

The research agreement was negotiated over a period of three years, and aims to recognise the Indjalandji-Dhidhanu people's Traditional Knowledge about spinifex, and to ensure that they have ongoing equity and involvement in the plant's commercialisation. Significantly, the agreement gives the Dugalunji Aboriginal Corporation the right to veto commercialisation altogether.<sup>301</sup>

Indigenous knowledge of sustainable farming methods was key to the agreement. Colin Saltmere is an Injalandji leader and Managing Director of Dugalunji Aboriginal Corporation. Saltmere believes that the agreement can provide employment opportunities for the region through spinifex farming and by using Indigenous rangers to manage the environment where the spinifex grows.<sup>302</sup>

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<sup>299</sup> Rosanna Galvin, 'Medicinal plants project impresses Business and Higher Education Round Table', *UniSA News* (online), December 2013, <<http://w3.unisa.edu.au/unisanews/2013/December/story8.asp>>.

<sup>300</sup> 'Anti-inflammatory compounds', (2010), Patent No. 2009905498.

<sup>301</sup> Hailey Renault, 'Indigenous community signs landmark agreement with University of Queensland to develop spinifex 'nanofibre' industry', *ABC* (online), 29 April 2015. <<http://www.abc.net.au/news/rural/2015-04-29/spinifex-discoveries-drive-industry/6429716>>.

<sup>302</sup> The University of Queensland, *Indigenous opportunity sprouts from desert discovery* (2016) <<http://www.uq.edu.au/research/impact/stories/indigenous-opportunity-sprouts-from-desert-discovery/>>.





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Researchers at the University of Queensland have extracted unique, high grade microfibers from the spinifex. The detailed spinifex composition and the process of processing and refining these materials has formed the basis of patents.<sup>303</sup> The microfibers can be used to make super-strong, ultra-thin condoms and surgical gloves.<sup>304</sup>

This landmark agreement demonstrates that acknowledging Indigenous people as the owners of their traditional knowledge can bring mutual benefits to a partnership. If the technology is successfully commercialised, Indigenous people can share in the benefits but may also continue to share their knowledge so that use of the plant is sustainable.

#### 6.1.5 International companies taking resources out of the country

A lot of research activity in Australia funded by the Australian Government through ARC and NHMRC funding, which have frameworks requiring applicants to address Indigenous Knowledge management in their funding applications.

However, businesses and private researchers that do not require government funding will not be affected by such policies. Because of the gaps in the scope and enforcement of existing ABS laws, the result is that genetic resources and associated Indigenous Knowledge continue to be gathered, recorded and then commercialised without consultation, consent and benefits provided to the Indigenous communities providing the resources and knowledge.

#### 6.1.6 Limitations of Plant Breeders Rights in protecting Traditional Knowledge

To be eligible for protection under the *Plant Breeder's Rights Act 1994* (Cth), plant breeders must illustrate that a new variety is distinct, uniform and stable. Protection lasts up to 25 years for trees or vines, and 20 years for other species.<sup>305</sup> As Simpson notes,

this requires 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>306</sup>

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<sup>303</sup> Patent, 2014353890 and 2015362080, The University of Queensland.

<sup>304</sup> Janelle Miles, 'Queensland researcher discovers nanofibre in spinifex grass names super-strong condoms', *The Courier-Mail*, 30 June 2017, <<http://www.couriermail.com.au/business/queensland-researcher-discovers-nanofibre-in-spinifex-grass-makes-superstrong-condoms/news-story/0f4f154816b810a738e1bcfc2bf470a9>>.

<sup>305</sup> *Plant Breeders Rights Act 1994* (Cth) s 22(2).

<sup>306</sup> Tony Simpson on behalf of the 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.



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Like other intellectual property laws, the ability of plant breeder's rights to protect Indigenous interests is limited in that protection is restricted to a set period and usually vests in individuals and companies, while Indigenous Knowledge is communal and lasts in perpetuity. Plant breeder's rights laws, like patent law, are about commercialisation and facilitating licensing. This could be useful where Indigenous people wish to take part in industry, but it does not give Indigenous people the right to be recognised as plant breeders where they have inter-generationally developed and nurtured plants.

## 6.2 Options

### 6.2.1 Databases and registers

The establishment of databases and registers for Traditional Knowledge is a defensive strategy for dealing with the attempts to patent inventions based on Traditional Knowledge. Once there is documented evidence of Traditional Knowledge as prior art, the prospect of granting a patent application that is based on that knowledge is reduced. The patent applicant's claim of novelty and inventive step is challenged because it can be shown that there is an existing body of Traditional Knowledge and an inventory of historical use. In this way, databases and registers serve as important evidence of prior art.<sup>307</sup>

One option is to make the TK database available for internal use of IP Australia patent examiners in conducting prior art searches, like the Indian Traditional Knowledge Digital Library. The database could compile TK already in the public domain. Although it may have been accessed by researchers and companies, it is not generally readily available in an accessible fashion for patent examiners carrying out prior art searches. There could be linking of patent data to TK and other database resources such as the Atlas of Living Australia.

It will assist examiners in preventing the grant of patents over knowledge or processes contained in the database.

Databases and registers could also have other benefits for Traditional Knowledge holders depending on their form and who may access them. For instance, where the invention still meets the test of novelty, it could assist with identifying TK people who may be entitled to benefit-sharing to prevent use of TK without consent. In this way, the database could also play a role in encouraging collaborations and partnerships in research and development activities.

However, there are fundamental questions that require consideration prior to establishment of databases: what is the intention of the database? Is it primarily to protect against filing of patents that are not novel? If so, then it should only be accessible by the patent office. Traditional Knowledge holders will need to ensure that they keep the knowledge secret in ways that are respectful of the customary obligations, but also, to ensure that any future commercial rights are not compromised.

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<sup>307</sup> Chidi Oguamanam, 'Pressuring 'suspect orthodoxy' traditional knowledge and the patent system', Matthew Rimmer (ed) *Indigenous Intellectual Property: A Handbook of Contemporary Research*, 313 – 333, 327.



## **6.2.2 Developing Indigenous-specific ABS Model Agreements and guides**

The development of Access and Benefit Sharing model agreements and a guide for Indigenous communities would be extremely useful to assist Indigenous parties managing access to land and resources and associated Indigenous knowledge. This will make the law more accessible and provide an enforceable framework for seeking FPIC and sharing benefits.

For use of Traditional Knowledge associated with genetic resources, it would also assist in meeting obligations under Convention of Biological Diversity and support implementation of the Nagoya Protocol in Australia should that agreement be ratified.

## **6.2.3 ABS training and legal support for Indigenous people**

Model agreements and clauses on their own are unlikely to be effective. It is ultimately the parties' responsibilities to conduct their own negotiations and ensure that the contract terms are fair. The Australian Government could support model contracts and clauses with contract negotiation training and capacity building through training on negotiation skills, concepts of free, prior informed consent.<sup>308</sup> There would also be value in providing alternative dispute resolution services to reduce the costs of disputes and encourage effective collaboration.

For example, the National Native Title Tribunal (NNTT) provides extensive guidance for Indigenous people entering into Indigenous Land Use Agreements (ILUA), ranging from short fact sheets to a detailed guidance on negotiating an ILUA with Indigenous communities.<sup>309</sup> The role of the NNTT could be expanded to include Indigenous Knowledge. In fact, it has been suggested by Stephen Gray, an Australian legal commentator on Indigenous intellectual property, that the Native Title Tribunal could play a role in hearing matters relating to the appropriation of Indigenous Knowledge.<sup>310</sup>

A consideration for the Australian Government is that Indigenous communities require time to consult and negotiate agreements, and costs of engaging lawyers to negotiate agreements on their behalf are prohibitive for Indigenous people and communities in enforcing their rights over their Indigenous Knowledge conferred in such contracts. Another consideration is that identifying Indigenous Knowledge people and potential beneficiaries could be time and resource intensive.

Without support, Indigenous people and communities would also be left in a poor bargaining position to negotiate contracts. The potential time and resources involved could deter non-Indigenous parties from wanting to enter into agreements for use of Indigenous Knowledge.

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<sup>308</sup>Indigenous Advisory Committee, *Submission to IP Australia*, June 2012, <[https://www.ipaustralia.gov.au/sites/g/files/net856/f/submission\\_-\\_indigenous\\_advisory\\_committee.pdf](https://www.ipaustralia.gov.au/sites/g/files/net856/f/submission_-_indigenous_advisory_committee.pdf)>, 7.

<sup>309</sup>National Native Title Tribunal, 'About Indigenous Land Use Agreements', <<http://www.nntt.gov.au/ILUAs/Pages/default.aspx>>.

<sup>310</sup> Stephen Gray, 'Peeking into Pandora's Box: Common Law Recognition of Native Title to Aboriginal Art', *Griffith Law Review* (2000) Vol 9, No 2, 227 – 247, 247.



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An example of a dedicated Indigenous contract and legal service is the LawHelp legal service of the Office of the Registrar of Indigenous Corporations. They assist prospective Indigenous corporations by providing a range of legal advice, drafting and negotiation services relating to registration of Indigenous corporations (through partnerships with law firms).<sup>311</sup>

#### 6.2.4 Geographic indications and trade marks for primary industries

An option for the Australian Government is to support the establishment of Indigenous certification or collective trade marks by providing a legally enforceable system of Indigenous Knowledge protection with no need for changes to law.

For example, a certification or collective trade mark for Indigenous arts and crafts products and for the Kakadu plum industry or other bushfoods would be a solution to the problem of Indigenous ecological knowledge of the Kakadu plum being misappropriated, without consent or benefits to Indigenous people. A 2011 scoping study by the Rural Industries Research and Development Corporation into Indigenous fair trade established a framework for developing a labelling and certification program which could be part of the international fair-trade movement.<sup>312</sup>

Regional collective or certification trade marks that are Indigenous-owned and managed would solve these issues. It would give local producers the opportunity to come together and set their own standards for a regional trade mark, and set a self-determining system based on the needs of their region. A national scheme with regional certifiers could also be developed.

Collective marks are restricted for use by associations. An association of local producers could come together, set their own rules for a trade mark that is for use only by members of that association. This was the approach taken for the Peruvian Potato Park collective trade mark. Certification marks can have broader applications, as the certification mark can be used by anyone who complies with the rules.

#### 6.2.5 Changes to the Native Title Act

An option is to amend the *Native Title Act 1993* (Cth) to expressly include Indigenous Knowledge in the bundle of rights recognised in a native title determination. Since the inception of the Native Title Act, there is now a better understanding of what encompasses Indigenous Knowledge and it is clear that Indigenous Knowledge is inextricably connected to land and waters.

The scope of native title rights and interests is constantly evolving and broadening, as in the case of *Akiba on behalf of the Torres Strait Regional Seas Claim Group v Commonwealth*<sup>313</sup> where the court recognised exclusive rights to access resources. However, in the *Ward*

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<sup>311</sup> Office of the Registrar of Indigenous Corporations, 'LawHelp', < <http://www.oric.gov.au/free-services-through-oric/lawhelp> >.

<sup>312</sup> Michael Spencer and Jocelyn Hardie, *Indigenous Fair Trade in Australia: Scoping Study*, Rural Industries Research and Development Corporation, January 2011,

<sup>313</sup> *Akiba on behalf of the Torres Strait Regional Seas Claim Group v Commonwealth* (2013) 300 ALR 1.





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case,<sup>314</sup> the High Court said that Traditional Knowledge rights were not included in native title rights. Given that knowledge and land is inextricably linked, the scope of native title could be extended legislatively to cover Traditional Knowledge.

An argument against this approach that will likely arise is that the inclusion of an intangible property right in legislation exclusively concerned with the recognition of rights in real property, and may generate more confusion than clarity. It may also prejudice custodians of Indigenous Knowledge in areas where native title has been extinguished.

#### 6.2.6 Requiring patent applications to disclose source and origin of genetic resources

An option the Australian Government should explore is amending the *Patents Act 1990* (Cth) to require disclosure of source and Indigenous Knowledge base in patent applications. Indigenous Knowledge disclosure provisions would be a means of making the patent examination process more transparent, and assist with complying with Australia's ABS obligations under the Convention on Biological Diversity by allowing for a system to monitor commercial use of Indigenous Knowledge, beneficiaries are identified and ensure that free prior informed consent is sought. It is a system adopted in several countries including China, Switzerland and Brazil.<sup>315</sup>

However, industry and policy concerns with a disclosure requirement include that it would make the patent application process onerous, time consuming and costly both for applicants and government patent offices.

This has been identified by the WIPO IGC as a key issue, and there are extensive discussions at an international level as is seen from the latest WIPO IGC Draft Articles on the Protection of Traditional Knowledge. Recognising the ongoing debate, WIPO recently released a new publication, *Key Questions on Patent Disclosure Requirement for Genetic Resources and Traditional Knowledge*, to assist policymakers understand the issues arising from Indigenous Knowledge disclosure requirement in patent laws. It recommends that the following are key components in considering disclosure requirements:

- Assess the objectives for disclosure requirements, including competing interests of ABS and IP law systems;
- Know the key stakeholders;
- Assess the costs and capacities;
- Plan to implement disclosures in a mutually supportive manner;
- Implement an IT system capable of collecting statistics and data on disclosure requirements;
- Consider an opposition process for third parties to a disclosure requirement;

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<sup>314</sup> *Western Australia v Ward* (2002) 213 CLR 1.

<sup>315</sup> WIPO *Technical Study on Patent Disclosure Requirements related to Genetic Resources and Traditional Knowledge*, 2004, <[http://www.wipo.int/edocs/pubdocs/en/tk/786/wipo\\_pub\\_786.pdf](http://www.wipo.int/edocs/pubdocs/en/tk/786/wipo_pub_786.pdf)>.





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- Monitor and review progress of disclosure requirements; and
- Capacity building among stakeholders.<sup>316</sup>

### 6.2.7 Specific legislation for Indigenous Knowledge

The features of the law would need to recognise:

- That rights exist in Traditional Cultural Expressions and Traditional Knowledge regardless of whether there is material form;
- Definition and scope of rights so that they can be defined and demarcated;
- The ongoing connection of Indigenous Knowledge to their clans and communities;
- Attribution rights for clan groups (and rights against false attribution);
- Rights to protect against derogatory treatment;
- Processes for prior informed consent (prior authorisation);
- Dealing with derivatives, and new works that are inspired or based on Indigenous Cultural Expression or Knowledge;
- Processes for commercialisation where works are suitable for publication;
- Special protection provisions for sacred and secret works that are not meant for publication, but are governed largely by customary secrecy laws;
- Processes for where there is more than one group who is the source of the knowledge;
- Benefits sharing provisions – this will allow Indigenous people to ask for payment of fees or some non-fee based benefit in recognition of their knowledge's contribution;
- Obligations to adhere to relevant protocols in the first instance;
- The potential to include a database of rights registration, similar to the register that is established in the Victorian Heritage Act,<sup>317</sup> and
- Dispute resolution and enforcement processes.

For Indigenous people, artists and communities, the enactment of new laws would have the benefit of enabling communal rights over content that is currently seen as being in the public domain. Laws acknowledging these rights could empower Indigenous communities with rights that can foster and encourage collaborations that allow Indigenous knowledge holders to negotiate benefits which could include payment of royalties but also jobs on country.

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<sup>316</sup> WIPO, IGC Draft Articles on the Protection of Traditional Knowledge, <[http://www.wipo.int/edocs/mdocs/tk/en/wipo\\_grtkf\\_ic\\_32/wipo\\_grtkf\\_ic\\_32\\_facilitators\\_text\\_rev\\_2.pdf](http://www.wipo.int/edocs/mdocs/tk/en/wipo_grtkf_ic_32/wipo_grtkf_ic_32_facilitators_text_rev_2.pdf)>. Article 7 on Disclosure Requirements has four alternative proposed wordings for the international instrument, ranging from no disclosure required in patent applications, to a requirement of Indigenous Knowledge disclosure, prior informed consent and revocation of patent rights if false information is provided.

<sup>317</sup> *Aboriginal Heritage Act 2006* (Vic) Pt 5A.





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In 2013, Professor Natalie Stoianoff and a team of researchers at UTS working with Indigenous people put to the NSW Government a proposal for a state based legislative 'Competent Authority' framework for Recognising and Protecting Aboriginal Knowledge Associated with Natural Resource Management (the White Paper). The White Paper recommended adoption of a stand-alone regime for the state of NSW, operating within a natural resources management framework. The model law makes it compulsory for a party seeking access to a Knowledge Resource or determination of whether a proposed activity will use a Knowledge Resource must apply to the Competent Authority for access or determination,<sup>318</sup> the Competent Authority would administer the legislation, deal with education, model clauses, codes of conduct and manage databases. Whilst this model has not been acted upon by NSW Government the model provides a useful guide how such a law might work.

### 6.2.8 Implementation of the Nagoya Protocol

In their report *Australia and Traditional Knowledge*, Evana Wright, Ann Cahill and Natalie Stoianoff comment that:

Australia is in the process of determining how best to implement its obligations under the Nagoya Protocol. The Australian Federal Government has engaged in consultation to obtain feedback on the options available to implement the Nagoya Protocol in Australia and the operation of the intellectual property system with regards to traditional knowledge.<sup>319</sup>

An option is to harmonise the Commonwealth and state access and benefit sharing laws. The *Environment Protection and Biodiversity Conservation Act 1999* (Cth), *Biological Resources Act 2006* (NT) and *Biodiscovery Act 2004* (QLD) should have nationally consistent requirements of free prior informed consent and access and benefit sharing where Indigenous Knowledge or Indigenous land is involved.

This is in line with Australia's obligations under Article 8(j) of the Convention on Biological Diversity and would support implementation of the Nagoya Protocol.

### 6.2.9 Seed Bank Protocols

Seed banks can play a role in fostering relationships between Indigenous people and native plants. Seed banks are potentially important to this process due to the Indigenous knowledge they already hold and their ongoing collection. Indigenous Knowledge is disclosed during seed collection and the use of seeds may cause harm to the cultural integrity of the knowledge.

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<sup>318</sup> Section 5A.1, Draft Legislation, 'Recognising and Protecting Aboriginal Knowledge Associated with Natural Resource Management', UTS Indigenous Knowledge Forum and North West Local Land Services 2014, 110.

<sup>319</sup> Evana Wright, Ann Cahill and Natalie Stoianoff, 'Australia and Indigenous traditional knowledge' in Natalie Stoianoff (ed) *Indigenous knowledge forum: comparative systems for recognising and protecting indigenous knowledge and culture* (LexisNexis Australia, 2017), 39.





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Mark Shephard, Mark Perry and Paul Martin<sup>320</sup> explore bridging the gap between collecting data about seeds and being respectful of the Indigenous stewardship. They conclude that organisations that collect seed need to take Indigenous stewardship issues into account in their management processes by adopting an operating protocol for knowledge collection; a means to convert the knowledge transaction into obligations, such as through a knowledge trusteeship; and an administrative process to manage and enforce responsibility.

This could be done by establishing seedbank industry protocols that recognise Indigenous people as the owners of their Traditional Knowledge. Protocols have become common ground for the production of Indigenous art, film and museums. Just how recordings and materials in museums and galleries require consultation and consent, seed banks too, as holders of the seeds of Traditional Knowledge, must develop systems for engaging Indigenous people when sharing seeds of their knowledge.

There are researchers, universities and companies that want to act in good faith and do the right thing. We need to work on this and building relationships and establishing a practice of prior informed consent and protocols for the access and use of seeds. The Nagoya Protocol and CBD is not well understood by the industry. It is important to note that seed banks, gene banks, and plant depositories are an access point for the materials to be transferred to commercial researchers. There are no protocols or rules around getting consent of the relevant traditional knowledge holders or the Indigenous land owners. There is a need for rules around ex-situ collections. It is already established practice in archives and libraries like AIATSIS, who hold recorded information of Indigenous knowledge. The same framework could be implemented in seed and plant banks. Indigenous people need to be involved in the development of these protocols, and build long-term collaborative relationships with scientists and seed institutions.

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<sup>320</sup> Mark Shephard, Mark Perry and Paul Martin 'What do you really need to know? An overview of the challenges associated with the management of Aboriginal and Torres Strait Islander knowledge by seed bank institutions' (CRC-REP Working Paper CW018, Ninti One Limited, 2014).



## 7. Protecting Secret Sacred Knowledge from harm

Indigenous people and communities have customary laws surrounding the management, disclosure and use of secret sacred knowledge and cultural expressions. Secret sacred refers to knowledge that has a spiritual significance in Indigenous knowledge systems. Secret sacred knowledge embodies spiritual practices, beliefs and customs. It may relate to initiation, burial practices or rituals. Depending on the knowledge, it may only be available to women or men or those who are initiated. Its use may be restricted to ceremony, for a particular time or for a specific purpose.<sup>321</sup> Some secret sacred knowledge should only be used by members of the clan group.

Indigenous people believe that the misuse and disclosure of the sacred secret information contrary to customary law, could agitate spiritual connections and result in detrimental effects. The disclosure and misuse of secret sacred information is considered by Indigenous people to be a highly irreverent. In customary law systems, people who transgress these laws are dealt with punitively. Indigenous people's ability to protect their secret and sacred knowledge will depend on how they can meet the legal requirements of confidential information, heritage laws and to a limited extent, copyright.

### 7.1 Discussion

#### 7.1.1 Using confidential information to protect sacred knowledge

The law on confidential information has been invoked by Aboriginal people to protect the disclosure of sacred secret material. In *Foster v Mountford*<sup>322</sup>, the Federal Court recognised that the publication of a book of sacred men's ceremony could undermine the fabric of Pitjantjatjara society and granted an injunction to stop its release.

#### **Case Study: Foster v Mountford**

In *Foster v Mountford* the court awarded an injunction against a researcher who sought to publish information of deep religious and cultural significance after it was found that the information had been given to Mountford in confidence. In the 1970s, a famous ethnographer, Charles Mountford wrote a book on the art and Dreamtime teachings that belonged to Central Australian Aboriginal Peoples of the Pitjantjatjara lands. In this book *Nomads of the Australian Desert*, he published images of sacred sites and other restricted information. The Central Land Council representing the Central Australian Aboriginal Peoples successfully argued that publishing this information would inflict cultural damage upon a minority group. In 1976, the court granted a temporary injunction that prevented the book from being sold. When the case was finally decided, the outcome completely banned the book from sale. Justice Muirhead of the Federal Court decided that it was more important to keep the culturally integral information secret than make it available in the public interest.<sup>323</sup>

<sup>321</sup> Terri Janke and Peter Dawson, *New Tracks: Indigenous Knowledge and Cultural Expression and*



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To use these laws to protect sacred secret information, Indigenous people would have to be show that the information was imparted to the recipient who understood that the information was confidential. Conduct would be relevant to demonstrate this. It would also be possible to use non-disclosure or confidentiality agreements to provide added protection for disclosure of sacred/secret material. The other way to protect against disclosure is for Indigenous people not disclose sacred secret information to researchers. Unfortunately, however, a great deal of sacred secret knowledge has been captured already.

#### 7.1.2 Collections practice and sacred secret materials

Australian museum gallery practice has developed to recognise that there should be special management of 'sacred objects' and 'human remains'. Libraries and archives have developed guides and management practices for identifying, storing and making available materials that contain sacred secret material. Some museums have laws that contain obligations to care for sacred secret materials. There are issues identifying what materials is sacred secret as when the materials were collected records about this might not have been taken.

#### 7.1.3 Art embodying traditional ritual knowledge

The underlying traditional ritual knowledge embodied in an Aboriginal artwork may have references to sacred secret material. Whilst it is acceptable for the artwork to be sold, the stories associated with them may never be widely published. Displaying the work and the reproduction and use of the work will require consideration.

In *Milpurruru v Indofurn*, the living artists were awarded cultural harm damages for copyright infringements where they were living with the anguish of not being able to prevent cultural debasement of important cultural pre-existing designs which were being walked upon.<sup>324</sup> In the same case, the inner sacred men's story of the part taken from the work of Tim Payunya to create the green centre carpet was persuasive in convincing Justice von Doussa that a substantial part of Mr Payunka's work was copied.<sup>325</sup>

#### 7.1.4 Secret Knowledge and plants

Plants and how they are prepared for healing or ceremonial purposes may be sacred secret knowledge. The patents system would not be useful to protect sacred secret preparations or rituals. Fundamentally the patent system is about commercialisation and public disclosure is required in order to obtain the patent. The requirements for disclosure are problematic for

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*the Australian Intellectual Property System*, Submission to *Finding the Way*, IP Australia Indigenous Knowledge Consultation, (Terri Janke and Company, 2012)

<[https://www.ipaustralia.gov.au/sites/g/files/net856/f/submission\\_-\\_terri\\_janke\\_and\\_company\\_ip\\_lawyers.pdf](https://www.ipaustralia.gov.au/sites/g/files/net856/f/submission_-_terri_janke_and_company_ip_lawyers.pdf)>.

<sup>322</sup> *Foster v Mountford* (1977) 14 ALR 71.

<sup>323</sup> C 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).

<sup>324</sup> *Milpurruru v Indofurn Pty Ltd* (1994) 54 FCR 240, 278.

<sup>325</sup> Evidence given by the artist in court to men only. *Milpurruru and Others v Indofurn Pty Ltd and Others* (1994) 130 ALR 659 at 229 - 330.







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Indigenous Knowledge that is sacred or secret, and not appropriate to reside in the public domain or be made available for others.<sup>326</sup>

#### 7.1.5 Heritage laws focus on sacred sites

There are state and territory heritage laws to protect sites and objects of Indigenous sacred significance. Generally, protection does not extend to associated intangible knowledge or sacred knowledge itself.

Since 2016, Victoria's *Aboriginal Heritage Act 2006* (Vic) has specific protections afforded for sacred or secret intangible cultural heritage. Under the Act, registered information may be designated as sensitive information upon request, and access to and use of such information is restricted to written consent of the registered party.<sup>327</sup>

The Uluru Kata Tjuta National Park Film and Photography Guidelines, under the *EPBC Act* (Cth), regulate the capture of sacred sites in artwork, photographs and films empowering the Director of the National Park to take action against publishers of this content.

## 7.2 Options

### 7.2.1 Special protection laws

In 1986 the Australian Law Reform Commission's report on the recognition of Aboriginal customary laws recommended legislative protection for secret/sacred material and the prohibition of the mutilation, debasement or export of items of folklore and the use of items of folklore for commercial gain without payment to traditional owners.<sup>328</sup> This recommendation was not implemented. Indigenous people continue to call for greater protection and higher penalties when secret sacred knowledge is mistreated.

Dealing with sacred secret material in Australian law and policy requires special consideration. How will a person know if the knowledge is sacred? If higher penalties are to be imposed, would it make a difference if a person didn't know the knowledge was sacred?

The WIPO Draft Guides on TCE provide an alternative in option 2 in Article 5:

Member States should/shall protect the economic and moral rights and interests of beneficiaries in secret and/or sacred traditional cultural expressions as defined in this instrument, as appropriate and in accordance with national law, and where applicable, customary laws and in consultation with the beneficiaries.

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<sup>326</sup> Indigenous Advisory Committee, *Finding the Way* submission: <[https://www.ipaustralia.gov.au/sites/g/files/net856/f/submission\\_-\\_indigenous\\_advisory\\_committee.pdf](https://www.ipaustralia.gov.au/sites/g/files/net856/f/submission_-_indigenous_advisory_committee.pdf)>; Virginia Marshall, Terri Janke and Anthony Watson, 'Community Economic Developments 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, 19.

<sup>327</sup> *Aboriginal Heritage Act 2006* (Vic) s 146A(2).

<sup>328</sup> Australian Law Reform Commission, *The Recognition of Aboriginal Customary Laws*, Report No 31, (AGPS, 1986), vol 1, [470].





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International models call for the prohibition of the *wilful* distortion, misrepresentation and destruction of Indigenous Knowledge, and provide special protection for sacred and secret materials, including sanctions for such criminal offences.<sup>329</sup>

### 7.2.2 Education and Awareness

Indigenous people are unwittingly sharing their cultural beliefs and sacred secret information without understanding the ramifications. There is a need for greater education and awareness. Furthermore, researchers, sound recordists and filmmakers should be discouraged from capturing sacred knowledge. If for special circumstances the capture is agreed to, for example, when it is recorded for court cases, or for special research projects, there is a need for clear guidelines and practices around the cataloguing, storage and management of the sacred secret information. All management decisions should be managed by relevant Indigenous people.

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<sup>329</sup> Secretariat of the Pacific Community, *Guidelines for developing national legislation for the protection of traditional knowledge and expressions of culture based on the Pacific Model Law 2002*, <[http://www.wipo.int/wipolex/en/text.jsp?file\\_id=184667](http://www.wipo.int/wipolex/en/text.jsp?file_id=184667)>, 9.



## 8. Conclusion: A Coordinated Approach

Indigenous people have continued to call for the protection of Indigenous knowledge and cultural expression. This paper aims to hone the conversation into considering a package of options in order to recognise Indigenous Knowledge rights. This paper has been developed to encourage debate and canvas suggestions as part of a broader consultation process.

There are many options put forward in this document which may be practically achieved with relative ease, and there are others that require deeper consultation and legislative change. The aim is build a national coordinated approach. For this reason, this Discussion Paper focussed on six key areas in order to identify clear gaps and suggest changes that specifically address them. Across all areas, however, there are a few key core options to consider in designing the package of responses.

### 8.1 Developing National Authority Infrastructure

While many options are available to the Australian Government to better protect Indigenous Knowledge, most options require support and infrastructure. For example, an Indigenous trade mark will require infrastructure to support its administration, and FPIC and benefit sharing arrangements will need support in identifying Indigenous Knowledge holders and facilitating negotiations.

It has been suggested that a National Indigenous Cultural Authority, owned and managed by Indigenous people, could provide infrastructure to assist build capacity and develop networks for exercising authority over Indigenous Knowledge. A NICA could:<sup>330</sup>

- Assist Indigenous people with maintaining, controlling, protecting and developing their Indigenous Knowledge;
- Assist those wishing to use Indigenous Knowledge (e.g. by identifying Indigenous Knowledge people, assisting with clearing rights);
- Facilitate or provide models for free, prior informed consent (including monitoring ongoing consent);
- Ensure benefit-sharing by negotiating contracts for use of Indigenous Knowledge (including a rights tracking database to monitor compliance of contracts);
- Own and administer Indigenous trade marks (e.g. administer the authentication processes, ensure quality control, memberships, distribution of proceeds, monitor use of marks, deal with infringements);
- Provide culturally-appropriate and low-cost dispute resolution; and
- Raise awareness and education of stakeholders on Indigenous Knowledge issues.

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<sup>330</sup> Terri Janke, *Beyond Guarding Ground, A Vision for a National Indigenous Cultural Authority*, (Terri Janke and Company 2009).; Terri Janke and National Congress of Australian First Peoples, *The Call for a National Indigenous Cultural Authority: A Position Paper*, (National Congress of Australian First Peoples, 2013)



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To support self-determination, the NICA should be owned and managed by Indigenous people. It can be a means of implementing the Nagoya Protocol in Australia, by assisting with the measures and framework required to ratify the protocol.

The Australian Government could establish a NICA by:<sup>331</sup>

- Appointing an Indigenous Steering Committee to commence NICA project; and
- Funding an Indigenous authority (e.g. such as the National Congress of Australia's First Peoples or AIATSIS) to develop a NICA by research, consultation, developing a business case and increasing awareness.

## 8.2 Capacity Building Strategies

While there are many existing capacity building initiatives such as *Dream Shield* by IP Australia that educate the public on Indigenous Knowledge protection issues, stakeholders to *Finding the Way* have indicated that strategies should also extend to assisting and empowering Indigenous Knowledge people to build their capacity to take opportunities and to also take action for infringement. Many Indigenous Knowledge people may not understand what rights and remedies they have to control and protect their Indigenous Knowledge.<sup>332</sup>

The Indigenous Higher Education Advisory Council recommended the following capacity building strategies:

- Funding of negotiation skills training through Indigenous leadership programs;
- Raising awareness on culturally sensitive issues around Indigenous Knowledge access, as well as the processes;
- Training on free, prior informed consent;
- Accessible, plain English resources (such as a website and information sheets) for Indigenous Knowledge people and Indigenous Knowledge users; and
- An advisory body to provide information and guidance to Indigenous Knowledge users on how to access and use Indigenous Knowledge.<sup>333</sup>

Terri Janke recommended the establishment a National Indigenous Competent Authority to educate and raise awareness within the community about Indigenous Knowledge rights.<sup>334</sup>

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<sup>331</sup> Terri Janke, *Beyond Guarding Ground, A Vision for a National Indigenous Cultural Authority*, Terri Janke and Company 2009.; Terri Janke and National Congress of Australian First Peoples, *The Call for a National Indigenous Cultural Authority*, National Congress of Australian First Peoples, position paper on National Indigenous Cultural Authority, 2013.

<sup>332</sup> Terri Janke, *Our Culture: Our Future*, 91.

<sup>333</sup> Indigenous Higher Education Advisory Council, Submission to *Finding the Way*, IP Australia Indigenous Knowledge Consultation <[https://www.ipaustralia.gov.au/sites/g/files/net856/f/submission\\_-\\_indigenous\\_higher\\_education\\_advisory\\_council.pdf](https://www.ipaustralia.gov.au/sites/g/files/net856/f/submission_-_indigenous_higher_education_advisory_council.pdf)>.

<sup>334</sup> Terri Janke and Company, 'New tracks: Indigenous knowledge and cultural expression and the Australian intellectual property system' (2012) Submission to *Finding the Way*, IP Australia





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These are not, on their own, enough to protect Indigenous Knowledge, but help build the capacity of Indigenous Knowledge people to understand and then enforce their rights to their Indigenous Knowledge. Capacity building on specific issues like training on free, prior informed consent will lead to models of FPIC to set standards.

### 8.3 Developing Cultural Capability within IP Australia

As the government agency responsible for administering Australia's intellectual property rights system, IP Australia needs develop greater cultural awareness in order recognise the unique cultural, social and economic significance of Indigenous Knowledge to Australia in its vision for a world leading IP system that builds prosperity.<sup>335</sup>

IP Australia has developed a Reconciliation Action Plan which set goals to investigate opportunities to increase employment opportunities of Indigenous people.<sup>336</sup> Less than 0.5 per cent of IP Australia's staff members identify as Indigenous.<sup>337</sup> Another way to increase Indigenous engagement and make informed decisions in the examination process would be to employ more Indigenous staff members across IP Australia. IP Australia should increase measures taken to implement its Indigenous Employment Strategy<sup>338</sup> Indigenous employment specialists can assist in the recruitment of Indigenous people and advise on how to retain them. The employment strategy should not just focus on entry-level positions but should also look at engaging staff at all level and in all areas including as trade mark and patent examiners.

To assist this, IP Australia could increase Indigenous engagement and participation in the examination processes by establishing an Indigenous Advisory Group. An Indigenous Advisory Group could provide advice and guidance to examiners on applications containing Indigenous elements.

Another option could be to train IP Australia examiners on Indigenous culture and Indigenous Knowledge to make them more aware of Indigenous Knowledge protection issues that could arise in examinations. This would help change attitude towards the importance of Indigenous Knowledge not only within IP Australia but also with businesses and consumers that IP Australia deals with.

### 8.4 Indigenous engagement in international agreement-making

There are a number of international forums that are working towards an international framework for protection of Indigenous Knowledge. These should be followed closely as they

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Indigenous Knowledge Consultation, 24

<sup>335</sup> IP Australia, *Agency overview*, <<https://www.ipaustralia.gov.au/about-us/agency-overview>>.

<sup>336</sup> IP Australia, *Reconciliation Action Plan, 2015 – 2018*, <[https://www.ipaustralia.gov.au/sites/g/files/net856/f/ipa\\_reconciliation\\_action\\_plan\\_2015\\_-\\_2018.pdf](https://www.ipaustralia.gov.au/sites/g/files/net856/f/ipa_reconciliation_action_plan_2015_-_2018.pdf)>.

<sup>337</sup> People and Communication Group, *IP Australia's Indigenous Employment Strategy 2016-2019*, (27 May 2016).

<sup>338</sup> Ibid.





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can have a positive impact on the domestic situation. International agreements have the potential to provide Indigenous peoples with a legal framework for international protection for their Indigenous Knowledge and intellectual property. Therefore, the views of Indigenous people in relation to the text of these agreements should be canvassed by government. Furthermore, Indigenous people must have an opportunity to have their voices heard at these international forums. This involves comprehensive, prior consultation with Indigenous people as well as increased Indigenous representation within decision making bodies.

#### 8.4.1 Indigenous representation at WIPO IGC

The WIPO IGC's Indigenous Caucus has drawn attention to the lack of world indigenous representatives, and their lack of participation in the discussion which directly affects their TK and TCE. The Indigenous Caucus called for increased participation. Australia has been instrumental in funding the Indigenous Voluntary Fund and enabling attendance on Indigenous people to the IGC meetings. However, coordination, cooperation and canvassing of Indigenous viewpoints have occurred on an ad hoc basis only.

Given the frequency of IGC meeting and the incremental nature of progress, ongoing engagement with Indigenous experts is needed to ensure their evolving viewpoints can be represented. This could be achieved through an Indigenous Advisory Committee, if this option is progressed. This could be supported by hosting consultation meetings, workshops, or by conducting surveys and undertaking fact finding projects to support larger changes in the Australian Government policies and approaches to negotiations.

National treatment provisions will be important in the WIPO Draft Articles and other IP international agreements, as will be the principles of reciprocity and mutual recognition.<sup>339</sup>

The Australian Government should support the representation of Indigenous people at WIPO IGC discussions, particularly in the ongoing debates around the Draft Provisions for the Protection of TK and TCEs.

IP Australia regularly contributes and comments in the forums. Consultation with Indigenous people is encouraged in IP Australia's contributions,<sup>340</sup> however it is also important for the Australian Government to support the development of Indigenous peoples' views. Greater outcomes can be achieved in international negotiations with Government and Indigenous peoples working together to understand each others views and to present a coherent approach. This is recommended by the Indigenous Higher Education Advisory Council:

Aboriginal and Torres Strait Islander people's views should be encompassed within an entity separate to the Australian nation-state at UN forums. This would accurately reflect the history of Australia and acknowledges that Aboriginal and Torres Strait Islander people never gave up their sovereign status.<sup>341</sup>

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<sup>339</sup> Peter Drahos, 'Towards an International Framework for the Protection of Traditional Group Knowledge and Practice' (Draft Paper, Commonwealth Secretariat, 2004).

<sup>340</sup> Patricia Adjei, Submission to *Finding the Way*, IP Australia Indigenous Knowledge Consultation, <[https://www.ipaustralia.gov.au/sites/g/files/net856/f/submission\\_-\\_patricia\\_adjei.pdf](https://www.ipaustralia.gov.au/sites/g/files/net856/f/submission_-_patricia_adjei.pdf)>.

<sup>341</sup> Indigenous Higher Education Advisory Council, Submission to *Finding the Way*, IP Australia Indigenous Knowledge Consultation,





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This will also support self-determination. The draft provisions will form international benchmarks on Indigenous Knowledge protection so it would be in the best interests of the government to ensure that views and contributions across different Indigenous people and communities are voiced and well-represented.

#### 8.4.2 Indigenous involvement in free trade agreements

Indigenous Australians have raised concerns that the advances made in the application of intellectual property to Indigenous knowledge could potentially be negated by the IP provisions of free trade agreements.<sup>342</sup> When negotiating IP rights in trade agreements, Australia Government officials should ensure that the Indigenous rights to their land, resources and traditional knowledge and traditional cultural expression are not compromised. Any rights in Australia, such as through the recognition of communal ownership of Aboriginal and Torres Strait Islander works in common law, and under industry accepted protocols, should be maintained.

Furthermore, there is a lack of Indigenous engagement in the public processes that inform negotiators in trade agreements. Indigenous Australians lack representative bodies with resources to provide high level analysis of the impact of draft of agreements, and then there are limitations in having a voice to influence positions that favour Indigenous Knowledge rights. In the Australia-US Free Trade Agreement, there were limited exemptions granted to Indigenous communities put into the final draft which related to procurement. These exemptions have allowed the development of a highly successful Indigenous Procurement Policy. However, future negotiations of IP and trade agreements should engage Indigenous people to canvas their opinions of draft agreements. This could be achieved through the same methods as for the IGC. At the very least, the existing rights enjoyed under Australian law and policy should not be compromised. However, care should be taken to maintain Australian policy freedom develop future protections relating to genetic resources and Indigenous Knowledge.

The Australian Government should take heed of Article 18 of the UN Declaration on the Rights of Indigenous people which states that 'Indigenous peoples have the right to participate in decision-making in matters which would affect their rights, through representatives chosen by themselves in accordance with their own procedures, as well as to maintain and develop their own indigenous decision-making institutions.' Before entering into agreements that affect Indigenous peoples' rights to their TK and TCE, the government should consult and cooperate in good faith with Indigenous people, through their representative institutions in order to obtain their free, prior informed consent. This is highly important for international negotiations.

Any international agreement on TK, TCE or that impacts Indigenous Australians' rights to their TK, TCE and IP requires Indigenous pre-consultation. Any agreement must accommodate the diversity of traditional knowledge, and give prominence to the uniqueness of Australian Indigenous cultures. The international arrangement should be strong on enforcement of rights

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<[https://www.ipaustralia.gov.au/sites/g/files/net856/f/submission\\_-\\_indigenous\\_higher\\_education\\_advisory\\_council.pdf](https://www.ipaustralia.gov.au/sites/g/files/net856/f/submission_-_indigenous_higher_education_advisory_council.pdf)>.

<sup>342</sup> Megan Davis, 'Parliamentary Inquiries of Free Trade Agreements and Indigenous Peoples', (2007) 7 *Journal of Indigenous Policy* 90-98, 94.





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of Australian Indigenous peoples beyond borders. Furthermore, there should be coordination of positions in other world forums to ensure that the work done by other Indigenous people is not undermined. Most importantly, solutions should empower Indigenous people as beneficiaries and not state members.

#### 8.5 Education and Awareness

It is important to educate the general public about the importance of protecting and managing Indigenous Knowledge. Films like *Copyrites*, a short documentary produced by Cathy Eatock and Kim Mordaunt explored the issue of copyright protection for Indigenous artists shortly after *Carpets Case*.<sup>343</sup> Alison Page, Indigenous filmmaker is working on a documentary film, *Clever Country*, which will showcase Traditional Knowledge practices.

#### 8.6 Solutions for the future

This paper has put forward options that can be the starting point for a package of solutions. Sui generis protection and an institutional cultural authority are long term goals, however there are practical options that can be done immediately without in-depth consultation and legislative change. Laws and policies of themselves cannot be a complete solution to the protection of Indigenous Knowledge, and it is important that Indigenous people to continue to practice and revitalise their cultural practice.

A holistic, realistic and culturally appropriate approach should be taken to resolving the problem. Actions taken should allow Indigenous people the autonomy to develop – within the various local, regional and national power structures – a range of mechanisms towards the maintenance and strengthening of their cultures. This will ensure that they have something to pass on to future generations for the benefit of all Australians.

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<sup>343</sup> Cathy Eatock and Kim Mordaunt, *Copyrites*, 1997.

## The Way Forward for Protecting Indigenous Knowledge

**Fig 2: The Way Forward – Summary table of issues and options**

<b>Issue 1: Misappropriation of Indigenous Arts and Crafts</b>			
<b>Main themes</b>			
Protecting against derogatory treatment of the authentic culture, and undermines the spiritual and religious meanings – safeguarding against misappropriation			
Buy Indigenous created products or items made in Australia, not inauthentic products manufactured overseas			
Support a strong Indigenous arts sector - undermines authentic Indigenous artists economy			
Consumers don't want products that exploit artists and Indigenous culture – consumer protection			
Promotion of Aboriginal artists, designers, creators and innovators			
Economic development and entrepreneurship			
<b>Legal issue</b>	<b>Gap</b>	<b>Possible options</b>	<b>Models/Frameworks</b>
<p>ACCC misleading and deceptive conduct laws</p> <p>Importation of fake art</p> <p>Appropriation of Indigenous arts and design is not protected under copyright laws</p> <p>Indigenous cultural expression derogatorily used for commercial purposes (e.g.: Chanel Boomerang) – culturally offensive</p> <p>Possible introduction of fair use can lead to more misappropriation</p>	<p>ACCC laws don't protect fake arts because consumer confusion test not met; and the labels Made in China etc are attached</p> <p>Copyright laws do not protect styles that are imitated or works that are out of copyright (public domain)</p> <p>No moral rights for communities (equitable right)</p> <p>Copyright doesn't protect styles</p> <p>International appropriation</p>	<p><u>Administrative</u></p> <ul style="list-style-type: none"> <li>• Development of an Indigenous arts certification mark</li> <li>• Indigenous Art Code – greater funding to promote awareness</li> <li>• National Indigenous Arts Cultural Authority (NIACA)</li> <li>• ATSIEB protocols used throughout government funding programs and procurement</li> <li>• Protocols for fashion designers, graphic designers and architecture</li> <li>• Draft templates for licensing and Indigenous art and design handbook for collaborations</li> </ul> <p><u>Education/Awareness</u></p> <ul style="list-style-type: none"> <li>• Education and awareness for consumers</li> <li>• Education and awareness for souvenir and gift market</li> <li>• Education and awareness for fashion and design</li> <li>• Educate Indigenous designers on IP laws and protocols</li> <li>• Educate people about defensive mechanisms in trade marks and copyright (e.g. Notice of Objection)</li> <li>• Consumer education – like Fake Arts Harm and consumer guides</li> </ul> <p><u>Policy/Program</u></p> <ul style="list-style-type: none"> <li>• Business development for Art Product for lower priced items</li> <li>• Arts Funding programs and promoting artists</li> </ul>	



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	<p>Exploitation of cultural groups; misrepresentation; Appropriation</p>	<ul style="list-style-type: none"> <li>• Procurement policies address Indigenous protocols rather than appropriation</li> </ul> <p><u>Legal</u></p> <ul style="list-style-type: none"> <li>• Fake Arts legislation – Katter Bill with preferred option of Indigenous Art Code (law not to harm existing legitimate arrangements, e.g. authentic Indigenous art licenced for overseas manufacture)</li> <li>• Stand-alone law requiring PIC for use of Indigenous arts and designs</li> <li>• Customs regulations/restriction on import</li> <li>• Enforcing codes under legislation</li> </ul> <p><u>International</u></p> <ul style="list-style-type: none"> <li>• International instrument on protection of traditional cultural expressions at WIPO level to protect the moral interests of indigenous communities to prevent the derogatory treatment of their TCEs</li> <li>• International instrument at WIPO level on traditional cultural expressions to protect the moral interests of indigenous communities to prevent the derogatory treatment of their TCEs</li> </ul> <p><u>Indigenous controlled options</u></p> <ul style="list-style-type: none"> <li>• National Indigenous Arts Cultural Authority</li> <li>• Indigenous owned certification or collective mark with local and regional input</li> </ul>	<p>Amendment to the Australian Consumer Law Gabrielle Sullivan paper US Indian Arts and Crafts Act</p> <p>Competition and Consumer Act Cth, Broadcasting Service Act Cth</p> <p>WIPO IGC Draft Article TCE</p> <p>Australia Council ATSIAB</p> <p>NIAAA Label of Authenticity. Toi Iho Trade Mark, Fair Trade</p> <p>Kenya Taita Basket Trade Mark</p>
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Issue 2: Indigenous languages and clan names commercialised without consent and respect			
Main themes			
Safeguarding against misappropriation			
Promotion and restoration of Indigenous language practice and cultural connections			
Confusing public about origin			
Misleading and deceptive conduct – rides off reputation of Indigenous group for authenticity			
Reclamation of language interrupted			
Derogatory treatment of language			
Legal issue	Gap	Possible options	Models/Frameworks
Appropriation of Indigenous language	Trade marks protect words used as brands	<u>Administrative</u> <ul style="list-style-type: none"> <li>Language protocols for government</li> <li>Protocols for fashion designers, graphic designers and architecture</li> <li>Draft templates for licensing and Indigenous art and design handbook for collaborations</li> <li>Trade marks, business names and company names, and geographic names board</li> <li>Training for TM examiners and review of process for dealing with Aboriginal language to provide a guide in the TM Examiners Manual. Eg: use of disclaimers, search process and references to National language database</li> <li>TM examiners to ask for translation and whether consent obtained for commercial use – new test to trademarkability.</li> <li>More Indigenous staff members at IP Australia</li> <li>Establish Indigenous Advisory Committee in IP Australia</li> </ul>	National Guidelines for the Use of Aboriginal and Torres Strait Islander Place Names – Permanent Committee on Place Names  UN Global Compact Business Guide on the DRIP  NZ TM Practice Guidelines on Maori TMs
Reclamation of language interrupted	Copyright in language dictionaries/databases vests in author/creator		
Derogatory treatment of language	Must be registered; but not anything that is widely known to the public; no recognition of holistic nature of Indigenous Knowledge heritage		
Indigenous languages and clan names commercialised without consent or words used offensively	Copyright in language dictionaries/databases		
	VIC Heritage laws require consent for registered intangible heritage before commercialisation – one application received is for language	<u>Education/Awareness</u> <ul style="list-style-type: none"> <li>Education and awareness for consumers</li> <li>Education and awareness for fashion and design</li> <li>Education and awareness for souvenir and gift market</li> <li>Educate Indigenous designers on IP laws and protocols</li> </ul>	Dream Shield
	TM system has no consent provision	<u>Policy/Program</u> <ul style="list-style-type: none"> <li>ICIP Protocols for Indigenous language funding programs to ensure ownership of materials vest in users' groups</li> <li>Guides for IP, TK and Indigenous language projects with clearance forms and template agreements.</li> </ul>	





## Indigenous Knowledge: Issues for protection and management Discussion Paper

	<p>Copyright doesn't vest in community but the author</p> <p>No special Indigenous language laws language laws except NSW will develop first law; Vic requires</p>	<ul style="list-style-type: none"><li>• Funding language centres and Indigenous language policy</li><li>• Funding for legal and business advice</li><li>• National language centre</li></ul> <p><u>Legal</u></p> <ul style="list-style-type: none"><li>• Special language protection laws</li><li>• Stand-alone law requiring PIC for commercial use of Indigenous Cultural Expression including languages</li><li>• Allow registration of Indigenous clan names as separate part of TM register</li><li>• TM regulation against trade marking Indigenous clan names</li><li>• TM regulation to refer Indigenous marks to Indigenous Advisory Committee</li></ul> <p><u>International</u></p> <ul style="list-style-type: none"><li>• International instrument at WIPO level</li></ul> <p><u>Indigenous controlled options</u></p> <ul style="list-style-type: none"><li>• National Indigenous Arts Cultural Authority</li><li>• Indigenous owned certification mark with local and regional input</li></ul>	<p>NSW Aboriginal Languages Bill 2017 – to establish Centre of Aboriginal languages</p> <p>WIPO IGC Draft Article TCE/Vic Heritage Act</p> <p>South African Model</p> <p>Native American Names and Design Insignia Act</p> <p>NZ Trade Marks Act</p>
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## Indigenous Knowledge: Issues for protection and management

### Discussion Paper

Issue 3: Recording and digitisation of Indigenous Knowledge			
Main themes			
Safeguarding against misappropriation			
Promotion of recording and research on Indigenous cultures			
Researchers capturing, recording and disseminating Indigenous Knowledge without FPIC			
Digitisation of materials			
Legal issue	Gap	Possible options	Models/Frameworks
No PIC for non-material form information in copyright laws	<p>Copyright laws protect works and other subject matter, that meet criteria, however, the publication of Indigenous Knowledge in books, films and reports has exposed Indigenous Knowledge to use by others</p> <p>Recordings and films of TK in research not owned by Indigenous people</p> <p>Protect expression and not ideas</p> <p>Databases publication of TK and access conditions allow wide use without control of Indigenous people</p> <p>Copyright doesn't generally recognise rights of informants</p> <p>However, can do if assigned rights</p>	<p><u>Administrative</u></p> <ul style="list-style-type: none"> <li>Guides and protocols for researchers recording Indigenous Knowledge</li> <li>Access and use policies in museums, archives and libraries including ICIP and digital database policy</li> <li>National guide for recording and researching Indigenous cultural expression and Knowledge.</li> <li>Guides for digitisation projects of Indigenous Knowledge</li> <li>Template research and recording agreements allowing Indigenous people to clearly set out purpose</li> <li>Non-disclosure agreements for sacred and secret knowledge</li> <li>Guidelines for on-line publication of TK to recognise and encourage researchers to engage with Indigenous source communities</li> </ul> <p><u>Education/Awareness</u></p> <ul style="list-style-type: none"> <li>Education for researchers, and university ethics committees</li> <li>Wider promotion of Screen Australia's <i>Pathways and Protocols</i></li> <li>Education and awareness for Indigenous communities - Advice to Indigenous people about risks of publication of Indigenous Knowledge in books, films and reports</li> <li>Education and awareness about copyright and performer rights – ability to negotiate rights</li> <li>Education and awareness about resources and administrative options</li> <li>Notices on published information to encourage collaborations</li> </ul> <p><u>Policy/Program</u></p> <ul style="list-style-type: none"> <li>Guides for IP, TK and Indigenous language projects with clearance forms and</li> </ul>	<p>National position statement for ATSI library services and collections – National and State Libraries Australasia</p> <p>Digitisation guidelines – Nakata et al, UTS report</p> <p>Screen Australia Pathways and Protocols</p> <p>AFTRS educational resources</p> <p>Deepening Histories of Place</p>





## Indigenous Knowledge: Issues for protection and management

### Discussion Paper

	<p>Exploitation of cultural groups; misrepresentation of cultures perpetuates stereotypes</p> <p>False attribution – knowledge is linked to cultural groups in the same way that art is linked to the personality of artists</p> <p>Performers rights exist but consent can be implied by conduct – once consent given, performer has no control over recording unless in writing</p>	<p>template agreements.</p> <ul style="list-style-type: none"> <li>• Funding Indigenous recording projects</li> <li>• Programs like Indigenous Knowledge Centres allow for repatriation and sharing on research materials with Indigenous peoples</li> </ul> <p><u>Legal</u></p> <ul style="list-style-type: none"> <li>• Stand-alone law requiring FPIC for commercial use of Indigenous Cultural Expression including languages</li> <li>• Sui generis Indigenous knowledge or Indigenous research law</li> <li>• Change copyright law to include that Indigenous interviewee of TK and TCE share of copyright in works, films and sound recordings when Indigenous Knowledge is captured, filmed without consideration (like recording folklore clause)</li> </ul> <p><u>International</u></p> <ul style="list-style-type: none"> <li>• International instrument at WIPO level ensuring commercial use shares benefits to community that provided knowledge</li> <li>• Connect with International research and academic networks for wider promotion of National Indigenous Research Protocol.</li> <li>• National industry bodies to support PIC and protocols e.g.: International Filmmakers Association and research networks</li> </ul> <p><u>Indigenous controlled options</u></p> <ul style="list-style-type: none"> <li>• National Indigenous Arts Cultural Authority</li> <li>• Recognition of local and regional Indigenous organisation protocols</li> </ul>	<p>WIPO IGC Draft Articles</p>
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## Indigenous Knowledge: Issues for protection and management

### Discussion Paper

Issue 4: Misappropriation and misuse of Traditional Knowledge			
Main themes			
<p>IP laws encourage innovation and research, but if Indigenous TK holder/community not recognised as inventor or source, locks up knowledge</p> <p>Researchers coming into communities, take knowledge and publish research and information without FPIC</p> <p>IK is commercialised without the consent of people or benefit sharing</p> <p>Stop Appropriation and misappropriation and Indigenous human rights to culture</p> <p>Unfair competition is reaping without sowing – economic justification</p>			
Legal issue	Gap	Possible options	Models/Frameworks
<p>No PIC for non-material form information in copyright laws</p>	<p>TK in public domain and not inventive or novel</p> <p>'Inventorship' limited to scientists and not Indigenous groups/knowledge holders</p> <p>Requires public disclosure/secret info not protected</p> <p>High costs of filing, highly admin. Lack of technical skill</p> <p>No benefit sharing requirement</p>	<p><u>Administrative</u></p> <ul style="list-style-type: none"> <li>Greater promotion and bench marking of GERIS, and National Research Principles</li> <li>Indigenous Research fund recipients to show compliance with Protocol in applications, and compliance is a term of funding agreement including PIC and benefits sharing for government research, capture and publication.</li> <li>University IP policies requiring FPIC (National Publicly Funded Research guidelines see Indigenous provision) – strengthening GERIS</li> <li>Update of Health Research documents Ethics – Values and Ethics and Keeping Research on Track to include National Research Protocols.</li> <li>National Indigenous Research Protocols to include PIC, benefit sharing and cultural protocols/customary law issues, guides on attribution and acknowledge for TK and TCE, and establishment of a National Indigenous Protocols Watch Committee to address lack of enforcement. (IHEAC recommendation)</li> </ul> <p><u>Education/Awareness</u></p> <ul style="list-style-type: none"> <li>Training of HREC committee members</li> </ul> <p><u>Policy/Program</u></p> <ul style="list-style-type: none"> <li>Indigenous Innovation Assistant Program/Collaboration</li> </ul>	<p>David Claudie, Chuulangun/UNISA</p> <p>Maori Advisory Group NZ IP Office</p> <p>Indian Traditional Knowledge Digital Library</p> <p>Chuulangun, Spinifex, Jarmadangah</p>





## Indigenous Knowledge: Issues for protection and management Discussion Paper

		<ul style="list-style-type: none"><li>• Innovation collaboration grants that enable Indigenous knowledge holders and groups to patent inventions based on their TK</li></ul> <p><u>Legal</u></p> <ul style="list-style-type: none"><li>• Disclosure of source in patent application</li><li>• National Competent Authority</li></ul> <p><u>Indigenous controlled options</u></p> <ul style="list-style-type: none"><li>• Support Indigenous bio-protocols and research and access infrastructure</li></ul>	<p>WIPO IGC draft TK articles; Swiss. Brazil and China</p> <p>Nagoya; Natalie Stoianoff South Africa model</p> <p>KLC Research and TK and IP Policy; US Native American Bioprotocols</p>
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## Indigenous Knowledge: Issues for protection and management

### Discussion Paper

Issue 5: Genetic resources and associated Traditional Knowledge			
Main themes			
<p>Nagoya Protocol on Access and Benefit Sharing and CBD implementation            Stop Appropriation and misappropriation of TK            Patents and Plant breeders' rights – Indigenous inclusion in innovation protection systems            Rangers working on country; economic opportunities in remote areas            Environmental management and Stewardship            Native title and Indigenous land and resource rights</p>			
Legal issue	Gap	Possible options	Models/Frameworks
<p>Patent laws protect inventions that are novel, and have an inventive step</p> <p>Filing required with Patents Office public record description</p> <p>Plant Breeders Rights not used by Indigenous people, but breeding of Indigenous identified TK plants occurs without benefit sharing</p> <p>Access and benefit sharing regime not fully implemented in EPBC and State Laws</p> <p>ABS laws in EPBC Act; NT Bio; QLD Code of Bioethics</p>	<p>TK in public domain and not inventive or novel</p> <p>'Inventorship' limited to scientists and not Indigenous groups/knowledge holders</p> <p>Requires public disclosure/secret info not protected</p> <p>High costs of filing, highly admin. Lack of technical skill</p> <p>No benefit sharing requirement</p> <p>Genetic resources and Indigenous Knowledge can be used without PIC or ABS</p>	<p><u>Administration</u></p> <ul style="list-style-type: none"> <li>Grant funding guidelines to make PIC and ABS agreements compulsory e.g.: through ARC or innovation fund, or government funded programs</li> <li>Set national standards for ABS and MAT</li> <li>University IP policies requiring or promoting FPIC and MAT</li> <li>National Publicly Funded Research guidelines and University and public funding research IP Guideline to support FPIC and MAT</li> <li>University and public funding research IP Guidelines</li> <li>Incentives and licence allocations to enable Indigenous people to commercialise genetic resources</li> <li>Access and benefit sharing agreement</li> <li>Seedbanks and herbariums engagement and stewardship</li> <li>Defensive database to inform the prior art</li> <li>Encourage recognition of 'co-inventor' to include Indigenous knowledge holder</li> <li>Indigenous Advisory Group to advise Patent Registrar</li> <li>Defensive TK database (internal use for prior art search)</li> <li>CSIRO/RIRDC best practice guidelines for collaboration research</li> <li>Access and benefit sharing template agreements (review of Cth EPBC template – specific Indigenous guide)</li> <li>Establish national standard on FPIC and MAT</li> </ul> <p><u>Education/Awareness</u></p> <ul style="list-style-type: none"> <li>Indigenous Patent Examiners – Indigenous staff at IP Australia</li> </ul>	<p>Bonn Guidelines</p> <p>Nagoya Protocol</p> <p>WIPO IGC See list of countries in UTS project Article 8j and 15c of CBD Nagoya Protocol</p>





## Indigenous Knowledge: Issues for protection and management Discussion Paper

<p>Genetic resources are commercialised, spring boarding off Indigenous Knowledge and handed down horticultural practice</p>	<p>Inconsistencies across state</p> <p>Genetic resources taken out of country from Indigenous lands (e.g.: Kakadu Plum)</p>	<ul style="list-style-type: none"><li>• Training for Indigenous patent examiners</li><li>• Indigenous people training on oppositions in patents</li><li>• National Watch on Biopiracy</li><li>• Encourage ethical collaborations and promote value of Indigenous Knowledge</li><li>• Case studies on ethical collaborations</li><li>• Guides for collaboration</li><li>• Educate Indigenous groups on plant breeding rights</li></ul> <p><u>Legal</u></p> <ul style="list-style-type: none"><li>• National implementation of ABS EPBC and state laws</li><li>• National Competent Authority</li><li>• Disclosure in patent and plant breeders' application as to source and origin</li><li>• Sui Generis law for TK and Biological Resources</li></ul> <p><u>Indigenous controlled options</u></p> <ul style="list-style-type: none"><li>• Support Indigenous bio-protocols and research and access infrastructure</li></ul>	
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## Indigenous Knowledge: Issues for protection and management

### Discussion Paper

Issue 6: Protecting sacred/secret knowledge from harm			
Main themes			
Right to practice religion Cultural practice and upholding customary laws Prevent exploitation and appropriation of Indigenous Knowledge			
Legal issue	Gap	Possible options	Models/Frameworks
Copyright gives moral rights to artists to protect against derogatory treatment of works	Moral rights are for creators of original copyright works  No special protection for secret or sacred works  Confidential information laws require injunction and court action for relief which is costly	<u>Administrative</u> <ul style="list-style-type: none"> <li>FPIC processes when accessing knowledge</li> </ul> <u>Education/Awareness</u> <ul style="list-style-type: none"> <li>Education for Indigenous people on laws and protection options e.g. confidentiality agreements</li> <li>Awareness program for public</li> <li>Education and awareness for fashion and design</li> <li>Education and awareness for souvenir and gift market</li> <li>Educate Indigenous designers on IP laws and protocols</li> </ul> <u>Legal</u> <ul style="list-style-type: none"> <li>Sui Generis laws for restricting wide publication of sacred knowledge, criminal sanctions</li> </ul> <u>International</u> <ul style="list-style-type: none"> <li>International instrument at WIPO level to protect secret and sacred knowledge and expressions by requiring prior informed consent for external use</li> </ul>	National Archives of Australia - Access Examination Policy  Confidential information – e.g.: <i>Foster v Mountford</i>  Heritage laws  Sacred Sites laws in NT  IGC Draft provisions protection on sacred secret  AIATSIS Act s41  EPBC laws for National Parks and Filming and Photography Guidelines protect sites

