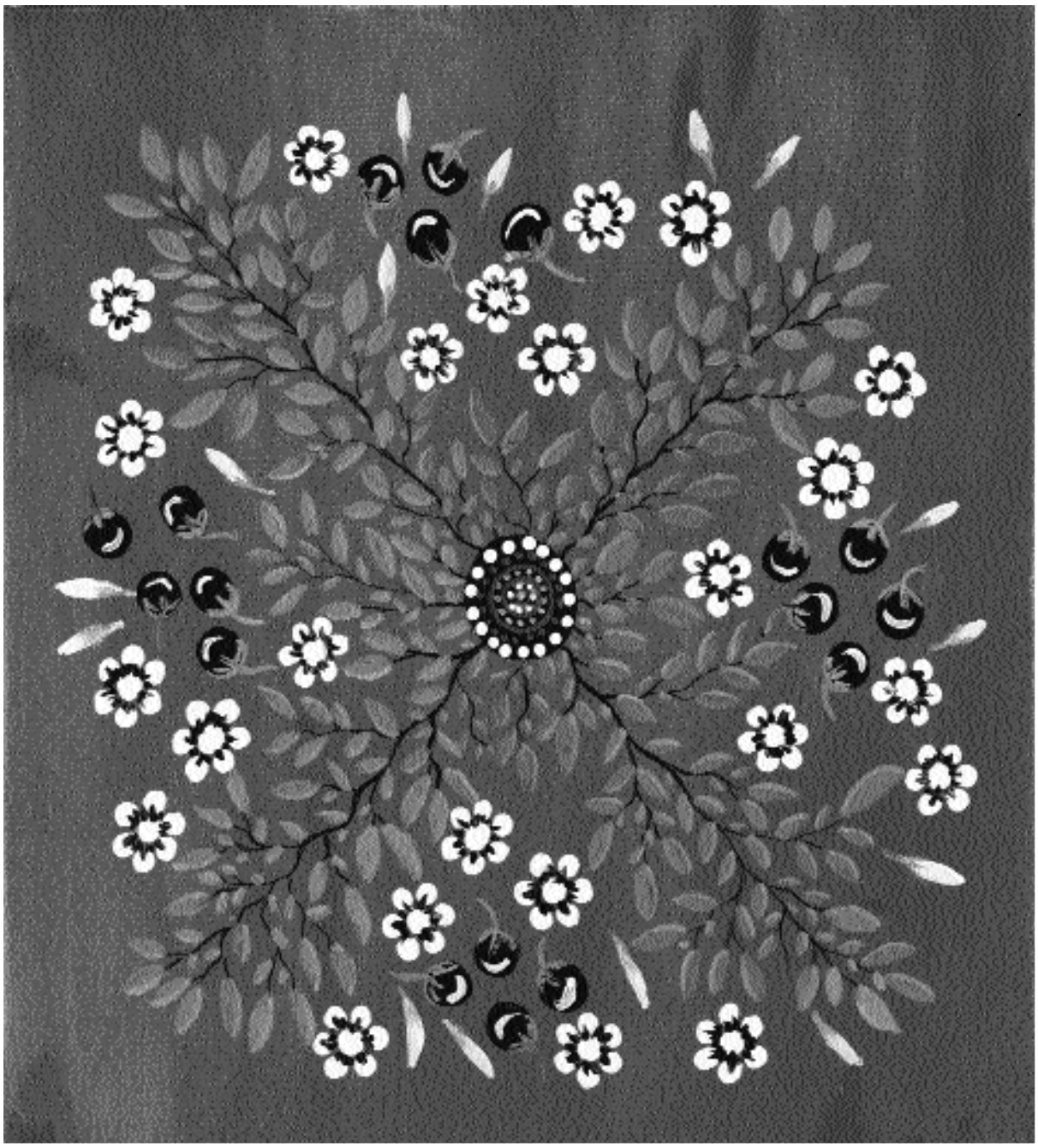


Our Culture : Our Future

Report on Australian Indigenous Cultural and Intellectual Property Rights

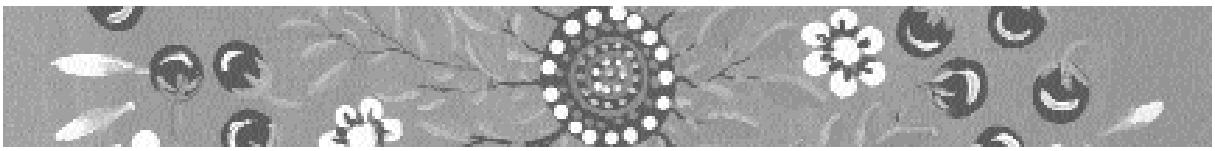
Written and researched
by Terri Janke,
Principal Consultant,
Michael Frankel &
Company, Solicitors.

Prepared for Australian
Institute of Aboriginal
and Torres Strait
Islander Studies and the
Aboriginal and Torres
Strait Islander
Commission.

ISBN 0 646 38084 2

Cumbarra Dreaming

This painting depicts the life cycle of the Cumbarra plant. The Emu berries , buds, flowers and leaves are represented alongside a waterhole. The plant is used by Indigenous people for various purposes including eating, healing and spiritual well being. Indigenous peoples knowledge concerning the use and the preparation of the fruit and the leaves is part of their living cultural heritage.



Report on Australian Indigenous Cultural and Intellectual Property

This Report is part of a process to develop practical reform proposals for the improved recognition and protection of indigenous Cultural and Intellectual Property. it contains findings and recommendations developed out of extensive consultations with ATSIC s Indigenous Refernece Group and other interested parties, and in light of feedback received as submissions to the Discussion Paper.

The Report was researched and written by Ms Terri Janke, Solicitor and Principal Consultant of Michael Frankel & Company, Solicitors, under contract with the Australian Institute of Aboriginal and Torres Strait Islander Studies (AIATSIS) and funded by ATSIC.

We are grateful for the invaluable contribution of the many individuals, organisations and government departments who contributed to the development of this document, specifically those who took time to provide us with written submissions to the Discussion Paper. Thank you to all the individuals and organisations who responded.

We also acknowledge the contribution of the Steering Committee consisting of Dr Mary Edmunds (Chair), Michael Mansell (Indigenous Reference Group), Michael Davis, Graham Dash and Herb Grant (ATSIC), John Sedgewick, Mark Cannon and Darren Knight (Department of Communications and the Arts), Kathleen Schilling (Family Histories Section, AIATSIS), Gaye Sculthorpe (Board Member, AIATSIS); members of the Indigenous Reference Group chaired by Commissioner Ian Delaney; Russell Taylor and Steven Wilde (AIATSIS); members of the Inter-Departmental Committee on Indigenous Cultural and Intellectual Property; the team at Michael Frankel & Company: Michael Frankel (Principal); Raena Lea-Shannon (Associate, Michael Frankel & Company); Greg Duffy (Solicitor, Michael Frankel & Company); Anna Bartle and Corinne Cambourne (Administration, Michael Frankel & Company); Joanne Brown (Consultant); Kim Lincoln (Administration); Bridget Elliot (Editor of Discussion Paper); John Paul Janke (Office of Public Affairs, ATSIC); Victoria Doidge (Magnify Media); Steven Hayes (TND Computer Systems); Daniel Goodwin (Artist); Bruce Pollock (Editor of Final Report) and Helen Stanwix (Layout and Design of Final Report).

We also acknowledge the previous contribution of those organisations and individuals who responded to the *Stopping the Ripoffs Issue Paper*, the House of Representatives Aboriginal and Torres Strait Islander Standing Committere s *Inquiry into Culture and Heritage* and the consultations undertaken as part of the Social Justice Reports.

The laws and policies cited in this report are current as at December 1997. Many changes have occurred since.

Nothing contained in this report should be construed as giving legal advice. The purpose of this report is to provide general information on the issues relating to Indigenous Cultural and Intellectual Property. No person should rely on the contents of this report without first obtaining professional legal advice from a qualified legal practitioner.

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Preface

Background

In October 1994, the then Federal Attorney-General, the Minister for Aboriginal and Torres Strait Islander Affairs and the Minister for Communications and the Arts, jointly released an Issues Paper, *Stopping the Ripoffs: Intellectual Property Protection for Aboriginal and Torres Strait Islander Peoples*. This paper called for submissions from interested parties on the inadequacies of current intellectual property laws in their application to Indigenous arts and culture, and sought recommendations on how these might be overcome.

Inter-Departmental Committee on Indigenous Arts and Cultural Expression

An Inter-Departmental Committee on Indigenous Arts and Cultural Expression (IDC) was set up to evaluate the submissions; to consider legislative and policy reform in this area; and make recommendations to the Government. The IDC is now chaired by the Department of Communications and the Arts and includes representatives from the Attorney-General s Department, the Aboriginal and Torres Strait Islander Commission (ATSIC), the Australian Industrial Property Organisation, the Department of Tourism and the Office of Indigenous Affairs.

Many of the submissions recommended the introduction of specific legislation to give Indigenous custodians the necessary rights to control the use of their arts and cultural material by others.

Indigenous Reference Group

In early 1996, ATSIC established an Indigenous Reference Group (IRG) to find out what Indigenous people believe should be protected, and how problems in this area could best be solved. The IRG is chaired by Ian Delaney, one of the ATSIC Commissioners responsible for Arts, Culture, Broadcasting, Language and the Environment.

The IRG consists of Indigenous people who have expertise and experience regarding cultural and intellectual property. Members include representatives from the National Indigenous Arts Advocacy Association, the Foundation for Aboriginal and Islander Research Action and the National Indigenous Media Association of Australia.

The skill and guidance of the IRG provided enormous assistance in the development of the Report s final recommendations. The IRG also drafted a set of principles and guidelines for the protection of Indigenous Cultural and Intellectual Property Rights. These Principles and Guidelines are listed at Appendix 1 together with a list of Indigenous Reference Group members.

Indigenous Cultural and Intellectual Property (ICIP) Project

ATSIC also funded the Australian Institute of Aboriginal and Torres Strait Islander Studies (AIATSIS) to coordinate a project which aims to develop practical reforms that would improve protection and ensure recognition of Indigenous Cultural and Intellectual Property. AIATSIS appointed Michael Frankel & Company, Solicitors, to carry out the project. Ms Terri Janke is the Principal Consultant. A Steering Committee comprising representatives from ATSIC, the IDC, the IRG and AIATSIS has been convened to oversee the ICIP Project.

The Discussion Paper

A Discussion Paper, *Our Culture: Our Future*, which put forward proposals for the improved recognition and protection of Indigenous Cultural and Intellectual Property, was released in July 1997.

The Discussion Paper identified and outlined some issues and proposed solutions raised in submissions received in response to the following previous government inquiries:

- *Stopping the Ripoffs: Intellectual Property Protection for Aboriginal and Torres Strait Islander Peoples*.

- The House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs Inquiry into Culture and Heritage.

- Social Justice Reports and findings from the consultation process conducted by ATSIC, the Office of the Aboriginal and Torres Strait Islander Social Justice Commissioner, and the Council for Aboriginal Reconciliation.

The Discussion Paper was sent to various Indigenous organisations, industry bodies and government organisations seeking responses to various reform options for the improved recognition and protection of Indigenous Cultural and Intellectual Property.

The paper also aimed to inform Indigenous peoples about the current laws and international developments which effect their rights to use and control their cultural and intellectual property.

A total of 70 submissions were received in response to the *Our Culture: Our Future* Discussion Paper. A full list of respondents is included in Appendix 2.

The Consultants also attended the following workshops:

Mirimbiak Aboriginal Nations Corporation	Indigenous Cultural and Intellectual Property Workshop Melbourne, Victoria 9-10 October 1997

Queensland Community Arts Network	Indigenous Cultural and Intellectual Property Workshop Brisbane, Queensland 20 October 1997
Jumbunna Centre for Australian Indigenous Studies, Education and Research	Knowledge & Learning Circle - Indigenous Intellectual Property Rights and Freedoms Jamberoo, New South Wales 13-17 October 1997

The contents of this Report

This Report contains findings and recommendations to be presented to the Board of Commissioners of the Aboriginal and Torres Strait Islander Commission for consideration.

The findings and recommendations are based on feedback from various workshops, meetings, consultations and submissions received in response to the Our Culture: Our Future Discussion Paper.

PART ONE discusses the nature of Indigenous Cultural and Intellectual Property and the aspects of it that Indigenous people feel should be protected.

PART TWO examines how far the existing Australian legal system protects these aspects of Indigenous Intellectual and Cultural Property.

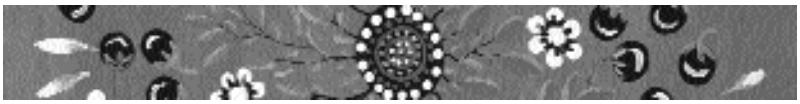
PART THREE considers possible solutions under the headings:

— Legislative solutions;

—Administrative responses;

— Policies, protocols and codes of ethics.

PART ONE
The Nature of Indigenous Cultural and Intellectual Property



CHAPTER ONE

What is Indigenous cultural and intellectual property?

Indigenous Cultural and Intellectual Property Rights refers to Indigenous Australians rights to their heritage. Such rights are also known as Indigenous Heritage Rights .

Heritage consists of the intangible and tangible aspects of the whole body of cultural practices, resources and knowledge systems developed, nurtured and refined by Indigenous people and passed on by them as part of expressing their cultural identity.

Heritage includes:

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

sound recordings).

The heritage of an Indigenous people is a living one and includes items which may be created in the future, based on that heritage.

Any definition of Indigenous Cultural and Intellectual Property should be flexible to reflect the notions of the particular Indigenous group and the fact that this may differ from group to group and may change over time.

Recommendations:

1.1 Informed debate concerning the above definition especially in relation to the issue of commerce versus culture; property versus heritage, should be encouraged.

1.2 Indigenous Australians should be kept informed of the world debate concerning:

1. Indigenous Cultural and Intellectual Property Rights
2. the protection of folklore.

CHAPTER TWO

The commercial value of Indigenous cultural and intellectual property

Contribution to industry

The overwhelming response in this area was that Indigenous cultures contribute substantially to the Australian economy in a range of industries, including:

- Arts and crafts
- Tourism
- Rural (including bush foods and traditional medicines)
- Biotechnology
- Advertising
- Film
- Import/export.

Respondents also noted some other commercial uses of Indigenous cultural heritage, including:

- Academic/research
- Music
- Didgeridoo.

Compensation/royalties

Another overwhelming response was that Indigenous people should receive compensation or royalties for use of Indigenous cultures where appropriate and where prior informed consent has been granted by an Indigenous group.

Indigenous people should be able to stop commodification of certain aspects of their cultures. There are some things that cannot be sold, such as secret/sacred objects and information.

Many felt the cultural importance of culture needed to be reinforced, rather than its commercial application.

How should this be calculated?

Many respondents felt Indigenous people should be empowered with negotiation rights regarding the use of their cultures.

Recommendations:

2.1 An independent economic evaluation and analysis should be conducted by a team including a majority of Indigenous people with specialist skills in accounting, marketing and projection estimates on the value of Indigenous cultural heritage to Australian industries.

2.2 An independent analysis should be undertaken into the cultural losses (or gains) of commercialising Indigenous cultures. This should be conducted in consultation with Indigenous communities. Indigenous people should develop assessment criteria to determine cultural losses and the impact or danger of this for Indigenous culture and people. The assessment criteria could suggest compensation or royalty procedures acceptable or required by Indigenous people.

2.3 Support should be given to develop systems and standards which allow Indigenous people to fully negotiate terms in relation to the commercial use of their cultural heritage.

2.4 The development of education and awareness strategies that reinforce the cultural value of heritage should be supported.

CHAPTER THREE

Major concerns for Indigenous people

Indigenous people are concerned about various uses of their heritage, including the appropriation of Indigenous arts and cultural expression, unauthorised use of secret/sacred mater-

ial and the appropriation of Indigenous biodiversity knowledge, often without their informed consent or knowledge.

There is also a concern for the use of cultural resources developed and nurtured by Indigenous people.

The following is a list of some of the concerns raised:

- Appropriation of Indigenous arts and cultural expression
- Unauthorised use of secret/sacred material
- Appropriation of Indigenous Languages
- Appropriation of Indigenous Spirituality
- Appropriation of Indigenous Biodiversity Knowledge
- Appropriation of Cultural Objects
- Retention of Indigenous Ancestral Remains
- Misuse of Indigenous Human Genetic Material
- Not fully informed concerning research
- Impact of New Technology
- Unfair Contracts

At the heart of these concerns are issues of cultural integrity and authenticity.

CHAPTER FOUR

What rights do Indigenous people want recognised?

The rights Indigenous peoples need in relation to their Cultural and Intellectual Property include the right to:

1. Own and control Indigenous Cultural and Intellectual Property.
2. Define what constitutes Indigenous Cultural and Intellectual Property and/or Indigenous heritage.
3. Ensure that any means of protecting Indigenous Cultural and Intellectual Property is based on the principle of self-determination, which includes the right and duty of Indigenous peoples to maintain and develop their own cul-

tures and knowledge systems and forms of social organisation.

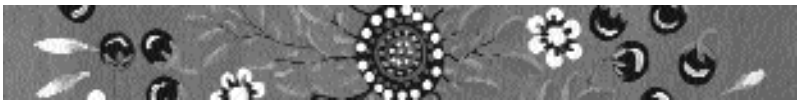
4. Be recognised as the primary guardians and interpreters of their cultures, arts and sciences, whether created in the past, or developed by them in the future.
5. Apply for protection of Indigenous Cultural and Intellectual Property rights which, where collectively owned, should be granted in the name of the relevant Indigenous community.
6. Authorise or refuse to authorise the commercial use of Indigenous Cultural and Intellectual Property according to Indigenous customary law.
7. Require prior informed consent or otherwise for access, use and application of Indigenous Cultural and Intellectual Property, including Indigenous cultural knowledge and cultural environment resources.
8. Maintain the secrecy of Indigenous knowledge and other cultural practices.
9. Benefit commercially from the authorised use of Indigenous Cultural and Intellectual Property, including the right to negotiate terms of such usage.
10. Full and proper attribution.
11. Protect Indigenous sites and places, including sacred sites.
12. Control management of Indigenous areas on land and sea, conserved in whole or part because of their Indigenous cultural values.
13. Prevent derogatory, offensive and fallacious uses of Indigenous cultural and intellectual property in all media including media representations.
14. Prevent distortions and mutilations of Indigenous Cultural and Intellectual Property.
15. Preserve and care, protect, manage and control Indigenous cultural objects, Indigenous ancestral remains, Indigenous cultural resources such as food resources, ochres, stones, plants and animals and Indigenous cultural expressions such as dances, stories, and designs.
16. Control the disclosure, dissemination, reproduction and recording of Indigenous knowledge, ideas, and innovations concerning medicinal plants, biodiversity, and environmental management.
17. Control the recording of cultural customs and expressions, the particular language which may be intrinsic to cultural identity, knowledge, skill and teaching of culture.

Recommendations

4.1 A National Declaration of Indigenous Cultural and Intellectual Property Rights should be developed, based on the list of rights and developed in consultation with Indigenous people.

4.2 Appropriate measures should be taken to educate the broader Australian community about Indigenous value systems, law and cultural processes, where sharing this knowledge is appropriate.

PART TWO
Protection Under the Current Australian Legal Framework



The current Australian legal framework offers limited recognition and protection of Indigenous Cultural and Intellectual Property.

CHAPTER FIVE

Intellectual property laws

Existing intellectual property laws are generally considered inadequate in recognising and protecting Indigenous Cultural and Intellectual Property rights because non-Indigenous notions of intellectual property are quite different from Indigenous beliefs.

Copyright

While some Indigenous artists have used copyright law to protect their interests in their creations, there are problems with the application of copyright provisions to Indigenous works because these works may fail to satisfy the requirements of copyright. These are:

- Originality.
- Material form.
- Identifiable author.

Some of the practical effects of copyright include:

- Exclusive rights are granted to individual authors and makers of recordings to use and deal with the copyright in their works.
- No special protection is given for secret or sacred material.

- Performances of oral Indigenous material are not protected under copyright provisions and receive only limited protection under performers rights.
- There are no performers rights in relation to still photography.

The limitations of protection:

- Commercial interests are protected under copyright law, rather than interests pertaining to cultural integrity.
- There is no right of attribution for Indigenous communities over works that include or incorporate aspects of their cultural heritage.
- Rights are valid for a limited period and then become freely available, where as under Indigenous laws, they exist in perpetuity.
- Individual notions of ownership are recognised, rather than the Indigenous concept of communal ownership.

Designs Act

The *Designs Act* offers limited protection for Indigenous Cultural and Intellectual Property:

- The focus of design protection is to enable commercial interests to gain a competitive edge.
- A limited period of protection is offered whereas traditional rights to Indigenous designs exist in perpetuity.
- Protection is afforded to a registered owner, whereas Indigenous laws recognise communal rights.

Patents Act

Indigenous material often does not meet the requirements of patent because:

- They are not novel.
- They do not involve an inventive step.

Human beings and the biological processes that make them do not constitute a patentable invention. Nevertheless, a contentious issue is that patent application is allowable where human genetic resources such as genes are concerned.

Trade Marks Act

To be registered as a trade mark, Indigenous cultural material would have to be used in the course of trade, which is not appropriate to the cultural significance or the traditional use of such material.

Indigenous people may be able to make use of the restrictive provisions under the *Trade Marks Act* to challenge culturally offensive trade marks which are scandalous or contrary to law.

Breach of Confidence Laws

These may be useful when Indigenous cultural material has not previously been published.

Passing Off

This is a limited resource for Indigenous communities, because it has to be proven that damage to goodwill and reputation has occurred through deception by the respondent.

Recommendations

5.1 Indigenous people need to be informed about existing intellectual property laws and how these impact on their cultural obligations.

5.2 Indigenous people need to be informed about how existing intellectual property laws might benefit their needs regarding the use and control of their Indigenous cultural heritage.

5.3 There is a need for greater protection for Indigenous heritage, particularly in relation to communal rights, and the protection of sacred/secret material.

CHAPTER SIX

Cultural heritage law

Cultural heritage laws are inadequate in their application to all aspects of Indigenous Cultural and Intellectual Property and do not recognise many rights Indigenous people believe are important for the continuation of their culture. Inadequacies include:

- Ownership of cultural heritage is often vested in a government minister rather than in the appropriate Indigenous community.
- The focus of cultural heritage laws is on tangible cultural heritage, such as specific areas, objects and sites. The intangible aspects of a significant site, such as its associated stories, songs and dreaming tracks, are not protected.
- The focus is on past heritage rather than living heritage.
- The emphasis for protection is scientific and/or historical value, rather than cultural and spiritual values.
- The onus is on the relevant government minister to take action to protect; Indigenous participation in decision-making is usually limited.

There has been a turnaround recently in the focus of Indigenous cultural heritage legislation. This has seen the development of cultural heritage agreements and the restoration of hunting and gathering and fishing rights in some States and Territories.

Recommendations

6.1 Indigenous people need to be informed about existing cultural heritage laws and how these impact on their Indigenous Cultural and Intellectual Property Rights.

6.2 Indigenous people need to be informed about how existing cultural heritage laws might benefit their needs regarding the use and control of their Indigenous cultural heritage material.

6.3 There is a need for greater protection of Indigenous heritage, particularly in relation to the protection of knowledge and the intangible aspects of a site or place.

CHAPTER SEVEN

Other relevant laws

Archives legislation

Existing archives legislation fails to specify who can access a particular institution s records. This is of particular concern for Indigenous peoples, as their records often contain personal and culturally sensitive information.

Museum Legislation

These laws focus on anthropological and scientific issues, and not on the cultural and spiritual value to Indigenous peoples of institutions collections.

The Native Title Act

This legislation is currently interpreted as focusing on tangible issues relating to rights to lands and waters.

Defamation

Current defamation laws apply to individuals rather than to indeterminable groups.

Racial vilification laws

These concentrate on material which publicly incites or encourages racial hatred. However, a lot of culturally offensive material falls short of this definition.

Privacy

To date, there is no general right of privacy in Australia.

The Trade Practices Act

This Act prohibits misleading and deceptive conduct and may provide some protection against false labelling and marketing practices affecting Indigenous Cultural and Intellectual Property.

Customs Act and import and export of Indigenous cultural material

Certain laws prohibit the export of Indigenous heritage material such as human remains and rock art and require exporters to apply for a permit to export other materials such as objects made on missions and reserves. The *Customs Act* provides customs officers with search and seizure powers in relation to this material. But there is no law dealing with the export or import of articles which reproduce this material on commercial objects.

Administration and Probate Act (NT) 1993

This Act allows a person to claim an entitlement to the estate of an Aboriginal person who dies without a will, under the customs and traditions of the community of the group to which the deceased belonged.

The management of copyright income or any accruing copyright actions for infringement of a deceased artist s works is not considered.

Broadcasting laws

There are provisions in the *Broadcasting Act* dealing with content on Australian television, radio and on-line services. But they do not adequately address Indigenous issues, including how Indigenous people are portrayed in the media.

Laws relating to geographical place names

Various State and Territory legislation covers geographical names and place names, including those of Indigenous origin. Once registered as a geographic name, a word becomes public property. Businesses and organisations often then use the name, without seeking permission from the relevant Indigenous community.

Recommendations

7.1 Indigenous people need to be informed about the laws which may affect their Indigenous Cultural and Intellectual Property Rights, including laws concerning archives, land rights, native title, defamation, racial vilification, privacy, trade practices, customs, administration and probate, and broadcasting.

7.2 Indigenous people need to be informed how these laws may benefit them in relation to the use and control of Indigenous cultural heritage material.

7.3 There is a need for greater consideration of how these laws might help Indigenous peoples achieve their Indigenous Cultural and Intellectual Property Rights.

CHAPTER EIGHT

International laws

Many international agreements and treaties deal with Indigenous Cultural and Intellectual Property Rights. These may help Indigenous peoples realise their cultural heritage rights.

Recommendations

8.1 Indigenous people need to be informed about the international treaties and agreements which may affect their Indigenous Cultural and Intellectual Property rights, including international conventions on intellectual property; international trade agreements; UNESCO conventions; international conventions on human rights; the International Labour Organisation (ILO) Convention 169; the Convention of Biological Diversity; and the Draft Declaration on the Rights of Indigenous Peoples.

8.2 There is a need for greater consideration of how international laws might assist Indigenous peoples achieve their Indigenous Cultural and Intellectual Property rights; greater use of international legal avenues should be explored.

8.3 The Australian Government should strongly support the passage of the Draft Declaration on the Rights of World Indigenous Peoples, including the provisions on self-determination, cultural and intellectual property rights, education and the media.

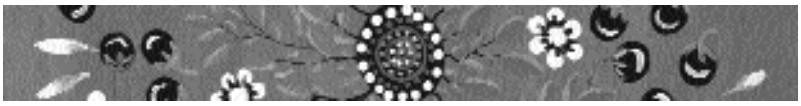
8.4 All governments, cultural institutions and industry bodies should strongly support implementation of the principles outlined in the Draft Declaration when dealing with Indigenous peoples rights.

8.5 Indigenous people need further information about the Draft Declaration on the Rights of World Indigenous Peoples and other international treaties and conventions affecting their Indigenous Cultural and Intellectual Property rights.

PART THREE

Developing Strategies for Protection

A: Legislative Responses



Research and analysis of responses to the Discussion Paper and discussions with the Indigenous Reference Group (IRG) and others, clearly indicates a need to adopt measures to redress shortfalls in the current Australian legal system in providing rights Indigenous people require in relation to their heritage.

In formulating the reform strategies, the following major observations were noted:

- A body of Indigenous law exists.
- The Australian legal system provides limited protection and needs to accommodate Indigenous Cultural and Intellectual Property rights.
- Indigenous peoples have responsibility for their culture, so measures should aim to empower Indigenous people.
- Respect and understanding of culture means recognising that there are two parallel and equal systems of law.

It is fundamental that any changes to the law or major policy initiatives should allow Indigenous people self-determination all levels.

The major recommendations are listed below.

CHAPTER NINE

Amendments to the Copyright Act

9.1 The enactment of a specific Act which protects all Indigenous Cultural and Intellectual Property is preferred over amendments to the *Copyright Act*. However, it is recognised that the introduction of a specific Act would require some amendments to the

Copyright Act for consistency. The specific Act should recognise Indigenous cultural ownership in Indigenous visual arts, craft, literary, music, dramatic works and Indigenous knowledge; and provide rights in that material which allow Indigenous people the rights of prior consent and to negotiate rights for suitable use.

While a specific Act is favoured, if this option is not pursued amendments to the proposed moral rights provisions set out below should be further considered.

9.2 *Moral rights for Indigenous custodians*

Further consideration should be given to amending the *Copyright Act 1968* to include moral rights for Indigenous custodians which provide the Indigenous cultural group whose tradition is drawn upon to create a copyright work with rights of attribution, false attribution and cultural integrity.

Introducing a new type of work - an Indigenous cultural work defined as a work of cutural significance to Aboriginal and Torres Strait Islander people - should be considered. Where ownership of an Indigenous cultural work is communal, as opposed to individual, then the Indigenous owners should be given a right of attribution, a right of false attribution and the right of cultural integrity. However, this might only cover Indigenous cultural works within the copyright period and will not refer to Indigenous material currently considered in the public domain.

9.3 *Collecting fees for use of Indigenous cultural works*

A compulsory licensing system such as that which sets up the Copyright Agency Limited (CAL) is not appropriate for Indigenous cultural works. Any Indigenous collecting society or societies should be voluntary or set up under *sui generis* legislation. The authorisation of use of cultural materials should be based on the premise of prior informed consent and rights should be given to the society under licence rather than as an assignment of rights

9.4 *Performers rights amendments*

A full performer s copyright should be generally supported for all performers. A general performer s copyright will protect Indigenous performing works such as ceremony and dance. Indigenous people need to be included in discussions about adopting a full performer s copyright.

CHAPTER TEN

Amendments to the Designs Act

10.1 A specific Act which protects all Indigenous Cultural and Intellectual Property is pre-

ferred over amendments to the Designs Act to protect pre-existing and Indigenous styles or designs in perpetuity.

10.2 However, to the extent that the *Designs Act* can provide protection for Indigenous communities who wish to commercially exploit their designs (if appropriate under Indigenous customary laws), the Designs Act and its registration process should allow for registration of group interests so that Indigenous communal ownership of cultural designs is recognised. This might be done by allowing trusts and other group entities to become the registered proprietors of a registered design.

10.3 Rights granted under the *Designs Act* should not interfere with the traditional and customary use of Indigenous cultural material.

10.4 AIPO should establish an Indigenous Unit which should, among other things, implement AIPO s access and equity program by encouraging Indigenous business, companies and arts centres to consider this means of protection for commercially applied designs only and provide advice to Indigenous people concerning the limitations of such protection.

10.5 Even in the absence of legislation on the subject, AIPO should adopt procedures for considering applications for the registration of designs which contain or are based on Indigenous designs or themes. Such procedures should ensure that informed consent of the relevant Indigenous custodial group is obtained prior to authorising registration.

CHAPTER ELEVEN

Amendments to the Patents Act and the Plant Breeders Rights Act

11.1 Enactment of a specific Act which provides protection for all Indigenous Cultural and Intellectual Property is preferred over amendments to the *Patents Act* and the *Plant Breeders Rights Act*.

11.2 However, in the event that new legislation is not developed, the *Patents Act* and the *Plant Breeders Rights Act* should be amended deny any person or corporation the right to obtain a patent for any element of Indigenous heritage without adequate documentation of the prior free and informed consent of the Indigenous owners to an arrangement for the sharing of ownership, control, use and benefits.

11.3 Rights granted under the *Patents Act* and the *Plant Breeders Rights A*ct should not

interfere with the traditional and customary use of Indigenous cultural material.

11.4 The possibility of amending the *Patents Act* and the *Plant Breeders Rights Act* to take into account Indigenous concerns requires investigation. Such amendments need to include at least inquiries as to whether it is feasible to:

- allow Indigenous Australians to register their interests or to patent Indigenous knowledge notwithstanding that there is prior publication;
- allow secrecy of these processes, so that people are not forced to disclose details of the remedy; and whether the remedy should be available for public use when the patent expires.

11.5 A new class of proprietary right for traditional knowledge should be considered, or the creation of a transfer agreement for the adoption of procedures which ensure that:

- Indigenous people are informed of patent applications or plant breeders rights applications that include Indigenous material or relate to Indigenous species;
- Prior informed consent to use such material and species has been obtained from any relevant Indigenous group or groups;
- Indigenous people have a right to negotiate the types of use permitted and to share in any economic benefits that might accrue. Where possible, rights should be effected in written agreements.

11.6 Indigenous human genetic material should not be patentable without the full and informed consent of Indigenous people to an arrangement for sharing ownership, control, use and benefits of any derived intellectual property.

CHAPTER TWELVE

Amendments to the Trade Marks Act

12.1 Indigenous and non-Indigenous persons and/or companies should be able to obtain registration of marks containing or incorporating Indigenous designs, sounds, words or symbols but only with the prior informed consent of the particular Indigenous community and if other conditions regarding cultural appropriateness are met.

12.2 The Registrar of Trade Marks should introduce checks and balances and enact regu-

lations to ensure that trade mark applicants seek prior informed consent from Indigenous communities for use of the words, designs, sounds etc before registration is granted. Consideration should be given to the New Zealand model.

12.3 AIPO needs to establish an Indigenous Staffing Unit and a Trade Mark Focus Group/Trade Mark Consultative Group.

12.4 An inquiry should be conducted into existing Indigenous trade marks. The inquiry should consider:

- the number of trade marks which make use of Indigenous cultural material;
- whether use is culturally appropriate;
- whether trade marks are held by Indigenous or non-Indigenous entities;
- whether consent has been obtained.

12.5 Rights granted under the Trade Marks Act should not interfere with the traditional and customary use of Indigenous cultural material.

CHAPTER THIRTEEN

Amendments to cultural heritage legislation

13.1 Cultural heritage legislation should acknowledge Indigenous ownership of Indigenous cultural heritage and property to be vested in the local community of origin. However, where there is no local community claiming ownership, ownership/responsibility should vest with the Indigenous-appointed bodies or organisations.

13.2 Cultural heritage legislation should empower Indigenous people with the management and control of Indigenous cultural heritage to be exercised by the local community and its appointees so that local autonomy over cultural matters is promoted.

13.3 Cultural heritage legislation should cover a wider range of cultural heritage materials including the intangible aspects of objects and sites.

13.4 Cultural heritage legislation should enable Indigenous groups to be the decision-makers concerning cultural significance of sites.

13.5 Further investigation is needed into whether a National Indigenous Cultural Heritage

Authority should be established. Any structure should allow States and Territories the necessary autonomy to control and manage Indigenous cultural heritage within their own areas.

CHAPTER FOURTEEN

Amendments to museums and other cultural institutions legislation

14.1 A separate Act relating to Indigenous Cultural and Intellectual Property Rights is preferred, but in the absence of specific legislation, museum legislation could be amended to include the following measures:

- Museums should establish Indigenous cultural heritage management committees to address issues relating to the identification, return, preservation, use and ownership of Indigenous cultural heritage material held by museums.
- Museum boards should include provision for Indigenous representation.
- Museums should be legally required to repatriate human remains and cultural objects where Indigenous claimants request it.
- Indigenous departments and other staff dealing with care and management of Indigenous collections should work under the direction of the Indigenous cultural heritage management committees.
- The compulsory development of policies which address the access, display, handling and use of Indigenous cultural material.
- Special attention should be given to the access and management of sacred or secret material.

14.2 Archives legislation could also be amended to:

- establish Indigenous cultural management committees to address issues relating to the access, identification, preservation, use, control and copying of Indigenous cultural records held by Archives;
- include provision for Indigenous representation on Boards;
- include the compulsory development of provisions which address the access, identification, preservation, use, control and copying of Indigenous cultural records held by Archives;
- Special attention should be given to the access of personally sensitive material

14.3 Where appropriate, Archives should make copies of records relating to Indigenous cultural issues available to Indigenous people in the spirit of the recommendations of the *Bringing Them Home Report.*

14.4 Museums, Archives and other cultural institutions should provide Indigenous people with access to information on material held in institutions. The development of reports, guide books and databases should be designed, controlled and managed by Indigenous people. Information should be made available via Information Centres.

14.5 Museums, Archives and other cultural institutions should liaise with Indigenous communities to consider the development of new technology-based forms of compiling and disseminating information held by museums and archives. Issues relating to

CHAPTER FIFTEEN

Indigenous control over the collection, administration and distribution of such databases and content developed for disc-based or on-line services must be addressed.

Amendments to Native Title

15.1 Support should be given for native title actions which test and expand the meaning of

CHAPTER SIXTEEN

native title rights and interests to other areas of Indigenous cultural heritage including stories, biodiversity knowledge and cultural objects.

Amendments to other relevant laws

16.1 *Broadcasting law*

- Self-regulatory guidelines which address distribution, publication of Indigenous cultural and intellectual property in the media and on-line services should be developed by Indigenous communities, ATSIC, Australian Film Commission (AFC), service providers, Australian multi-media centres and industry bodies in association with the Australian Broadcasting Authority (ABA).

- On-line industry bodies should be encouraged to support and participate in the development of codes.
- International networks should be established to deal with Indigenous issues on line. This could include:
    - developing guidelines with UNESCO info-ethics;
    - setting up e-mail hotlines to police culturally inappropriate content.

16.2 *Trade Practices*

The Australian Competition and Consumer Commission (ACCC, formerly the Trade Practices Commission) should inquire into the advertising and labelling of Indigenous arts, cultural products and cultural services in association with Indigenous people.

16.3 *Customs Issues*

Australian Customs laws should include provisions which filter the export and import

CHAPTER SEVENTEEN

of fake Indigenous cultural material.

Developments of law

17.1 Cases which expand the common law to protect Indigenous Cultural and Intellectual Property should be supported.

17.2 Unfair competition should be investigated as a potential way to protect Indigenous Cultural and Intellectual Property. Separate legislation based on Article 10bis of the Paris Convention could be useful to protect the commercial interests of Indigenous

CHAPTER EIGHTEEN

people in their cultural heritage and to also safeguard consumers against misleading and deceptive marketing practices.

Specific legislation

18.1 A *sui generis* (specific) legislative framework should be established to protect Indigenous Cultural and Intellectual Property Rights, including ecological knowledge.

Indigenous people prefer the introduction of one Act. However, if this is too broad to legislatively manage, or not feasible constitutionally, it might be possible to implement two or more Acts which deal with the following:

(a) Arts and cultural expression

(b) Indigenous ecological (biodiversity) knowledge.

18.2 Any definition used in the legislation should be broad to allow for the above.

18.3 The legislation should provide protection for works that are intangible; there need not be a requirement of material form. Rights should exist in perpetuity.

18.4 Any rights granted should ensure that there are no time limits on protection and no fixed form requirement for protection to be given.

18.5 The legislation should include provisions which:

- Prohibit the wilful distortion and destruction of cultural material;
- Prevent misrepresentations of the source of cultural material;
- Allow payments to Indigenous owners for the commercial use of their cultural material;
- provide special protection for sacred and secret materials.

18.6 The legislation should not inhibit the further cultural development of materials within their originating communities. That is, customary and traditional use should not be affected.

18.7 The legislation should consider how it will interact with existing copyright and intellectual property laws; for example, perhaps the legislation should apply only to Indigenous cultural works outside of copyright period - where copyright does not exist.

18.8 The legislation should also consider how pastiche and stylised rip-offs of cultural material should be dealt with; that is, false and misleading provisions which make it an offence to make false statements or misleading provisions.

18.9 A central network administration system should be set up with local, regional and state

offices. The organisation should be an Independent Indigenous Authority making use of existing national, regional or local authorities to provide administration.

18.10 An Indigenous Cultural Tribunal should also be established to mediate disputes. The tribunal should be made up of Indigenous custodians, owners, specialists in Indigenous law and community elders. Use of ADR procedures with culturally sensitive mediators. There must be avenues to the Federal Court for determinations.

18.11 Prior authorisation provisions should be included, based on respect, negotiation and free and informed consent.

18.12 There should be fair dealing provisions only for traditional and customary use (this to be defined), research and study, and judicial proceedings. But judicial proceedings relating to sacred/secret material should not be made public or used for other purposes. No innocent infringement provisions.

18.13 There should be a system which allow members to negotiate fees and collect royalties. To this end, voluntary collecting schemes at the regional level are advised. This might be done by a voluntary system of registering material that can be commercially used and by identifying groups, individuals or organisations who can authorise use. Lists of inappropriate material can be generated, taking into account Indigenous secrecy laws.

18.14 To facilitate authorisation and/or fee collection, Indigenous groups could develop protocols on acceptable uses and prohibited uses.

18.15 Particular communities should decide on fees to be charged and how this should be collected and distributed. The Tribunal could act as a guide, and act as arbitrator if disputes arise.

18.16 The legislation should allow particular groups of Indigenous people to bring civil actions against infringers of their cultural and intellectual property and to obtain remedies similar to those under existing intellectual property laws. For example, damages; account of profits; injunction to restrain use and delivery up of infringing material.

18.17 The legislation should include offences such as:

- Criminal sanctions for more serious offences such as destruction and severe mutilation of Indigenous sacred and secret material.
- Fines for unauthorised use of cultural material.

18.18 Confidentiality provisions should set out what can be disclosed to the public and what cannot be; for example, closed tribunal hearings.

18.19 The legislation should address Aboriginal and Torres Strait Islander cultures only. However, the issue of whether Torres Strait Islanders should have a separate legislation requires further consultation with Torres Strait Islander people. International

mechanisms should be reviewed in light of moves internationally for Indigenous systems of protection.

18.20 There should be a grace period of 12 months to allow commercial users to come into line with new amendments.

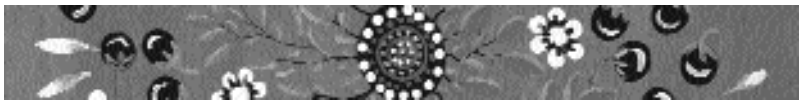
CHAPTER NINETEEN

18.21 There should be extensive consultations with Indigenous people concerning the introduction of any proposed legislation.

PART THREE

Developing Strategies for Protection

B: Administrative Responses



CHAPTER TWENTY

Collecting systems

20.1 *Public domain collecting society*

The establishment of a public domain collecting society for Indigenous works is not favoured because this supports the current legal assumption that Indigenous Cultural and Intellectual Property out of copyright is in the public domain and free for all to use and exploit.

20.2 *Resale royalty*

- Introduction of a resale royalty within the Australian legal system for artists generally is supported in principle.
- There is a need to ensure that administrative costs do not exceed the benefits to artists.
- There is an urgent need for Indigenous artists to participate in informed public debate concerning the best way to introduce a resale royalty to allow for culturally appropriate distribution of revenue collected.
- There is an urgent need for Indigenous artists to be better informed about estate management of copyright and other rights relating to their works.

20.3 *Indigenous collecting society*

Further consideration should be given to the establishment of an Indigenous collecting society. If established, this should be voluntary and operate on the premise of prior consent.

CHAPTER TWENTY-ONE

Negotiating rights under agreement

21.1 *Biodiversity agreements*

- The development of a process of negotiation which facilitates agreements between Indigenous people and local, regional, State and national authorities should be supported.
- Such a process should recognise Indigenous peoples rights to their cultural environment and address Indigenous Cultural and Intellectual Property rights.
- Agreements should be enforceable under national legislation.

21.2 *Cultural agreements*

There should be support for cultural agreements within all industries which allow Indigenous people to negotiate terms for the recognition and protection of their Indigenous Cultural and Intellectual Property rights.

21.3 *Funding research and cultural projects*

Where Indigenous cultural projects or research is commissioned or funded by government agencies and research bodies, a condition of the grant or contract should be that Indigenous Cultural and Intellectual Property rights are respected. Clauses should address the following issues:

- Prior written consent of the Indigenous group whose culture is involved has been obtained.
- Any arising intellectual property rights have been negotiated and agreed upon between parties.
- The proposed use will not be culturally offensive or inappropriate or contrary to Indigenous customary law.

Criteria for grants could include:

- Active involvement of Indigenous people in the area of research or activity.
- Informed consent and support of the people from whom information is sought.
- Respect for confidentiality and privacy.
- Respect for cultural integrity and control of their own heritage.
- All material should be communicated to participating Indigenous people and communities in an accessible and acceptable manner.

CHAPTER TWENTY-TWO

Developing cultural infrastructure

22.1 *National Indigenous Cultural Authority*

A National Indigenous Cultural Authority should be established as an organisation made up of various Indigenous organisations to:

- Develop policies and protocols with various industries.
- Authorise uses of Indigenous cultural material through a permission system which seeks prior consent from relevant Indigenous groups.
- Monitor exploitation of cultures.
- Undertake public education and awareness strategies.
- Advance Indigenous Cultural and Intellectual Property Rights nationally and internationally.

The National Indigenous Cultural Authority should be the peak advisory body on Indigenous Cultural and Intellectual Property Rights.

Representation on the Authority should aim to cover all areas of Indigenous Cultural and Intellectual Property.

The National Indigenous Cultural Authority should be funded by both industry and government.

22.2 *Indigenous Australian Centre for Traditional Medicines*

Support should be given to the development of an Indigenous Australian Centre for Traditional Medicines.

22.3 *Establishing registers*

Consideration should be given to the establishment of a national register which identifies the owners of Indigenous Cultural and Intellectual Property. Any established register should not be a means of evidencing title. The Register should be used only to provide contact details for subsequent users of Indigenous material to contact the relevant community for prior consent. The register should be designed, managed and controlled by Indigenous people.

22.4 *Keeping places and community cultural centres*

Encourage existing local and regional keeping places/community cultural centres to allow Indigenous people to maintain, revitalise and reclaim their cultures.

In line with the *Bringing Them Home* Report, these keeping places should also be given copies of government records.

22.5 *National Indigenous archive*

A national Indigenous archive is not recommended at this stage but could form much of what is already held by AIATSIS and the Australian Museum.

22.6 *Indigenous cultural legal services*

- An Indigenous Cultural Legal Centre should be established similar to the Arts Law Centre of Australia, but should have the powers to provide legal advice and take on legal actions as would general legal services provided by professional solicitors.
- Appropriate provision should be made for Indigenous Australians, both artists and communities, to be represented by fully qualified and experienced intellectual property and copyright lawyers who are familiar with Indigenous legal frameworks. Appropriate provision for lawyers of both sides to be familiarised with relevant traditional or customary laws applying to the people involved, the cultural property and the situation in which it is applied.
- Provision for ongoing legal education for non-Indigenous lawyers, judges and legislators to understand the breadth of Indigenous laws of succession, responsibility and customary interconnections, for example, through moiety and totemic systems.

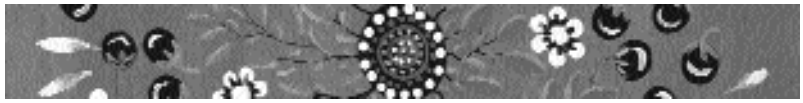
22.7 *Networks*

- Encourage the development of networks between Indigenous cultural organisations immediately.
- Support the establishment of an on-line information network with web links and search engine covering all areas of Indigenous Cultural and Intellectual Property; e-mail discussion lists or usernet groups, working through a central server.
- Support for convening a National Conference of Indigenous Cultural and Intellectual Property Rights.

22.8 *Indigenous-controlled recording, research and publishing companies*

- Encourage the development of Indigenous-controlled recording, research and publishing companies.

PART THREE
Developing Strategies for Protection
C: Policies, Codes and Education



CHAPTER TWENTY-THREE

Development of policies

23.1 *Ancestral human remains*

The introduction of a national policy and/or legislation on the repatriation of Indigenous ancestral remains and sacred objects held by cultural institutions should be supported.

23.2 *Previous Possessions: New Obligations*

Support for the Previous Possessions: New Obligations policy to become a national policy or the basis of national legislation.

23.3 *National Principles for Return of Indigenous Cultural Property*

The National Principles should be disseminated to museums and collecting institutions. ATSIC to monitor implementation.

23.4 *State cultural institutions*

- All State and Commonwealth cultural institutions which hold, collect and display Indigenous Cultural and Intellectual Property should be required to draft and adopt guidelines, in consultation and approved by Indigenous people, which deal with Intellectual and Cultural Property Rights issues.
- There should also be an independent national inquiry into the state collections of Indigenous cultural heritage to identify what materials various bodies hold and whether or not the appropriate Indigenous custodians have been identified.
- There should be a national forum to address issues relating to archival institutions and Indigenous Cultural and Intellectual Property.

23.5 *National Indigenous Language Policy*

- In the absence of specific legislation which provides Indigenous people with rights to own and control their languages, a National Indigenous Language Policy should be drafted and adopted, addressing issues such as:
  - community ownership and group rights over Indigenous languages;
  - rights in perpetuity.

23.6 *Indigenous research policy*

A national Indigenous research policy should be developed.

23.7 *Indigenous policies in other areas*

All areas of industry should be encouraged to develop policies relating to the use and control of Indigenous Cultural and Intellectual Property.

CHAPTER TWENTY-FOUR

Codes of ethics

24.1 *Medical and scientific research ethics*

Medical and scientific ethics associations should develop ethics relating to research and use of Indigenous genetic material.

24.2 *New technology guidelines*

Indigenous people and various Industry bodies such as INTIAA should develop guidelines relating to use and dissemination of Indigenous Cultural and Intellectual Property on line and in multi-media.

24.3 *Media codes of ethics*

- The media should take effective measures to promote understanding of and respect for Indigenous peoples cultural practices and heritage, in particular through special broadcasts and public service programs. These should be where possible made by Indigenous media or made in collaboration with Indigenous peoples.
- Journalists and public relations officers should respect the privacy of Indigenous people, particularly concerning customary, religious, cultural and ceremonial activities, and refrain from exploiting or sensationalising Indigenous peoples heritage.

- Journalists should actively assist Indigenous peoples in exposing any activities which exploit, destroy and degrade Indigenous peoples heritage.

24.4 *Research codes of ethics*

All research institutions including universities, colleges etc should support:

1. The development of a research code of conduct for work within Indigenous communities.
2. The development of research ethics when researching Indigenous communities.
3. The need to address different ownership interests when research is carried out on Indigenous communities, including:
   (a) institutional ownership rights, data and materials produced by the research institution, including materials included in courses pertaining to Indigenous Australians,
   (b) individual intellectual property rights held by researchers and Indigenous contributors.
   (c) collective rights of Indigenous community groups with ownership of language, dreaming stories, dances, songs, etc.

24.5 *Collecting societies codes of ethics*

Collecting societies should establish codes covering the use and authorisation of Indigenous Cultural and Intellectual Property. Such codes should be developed in consultation with Indigenous people.

CHAPTER TWENTY-FIVE

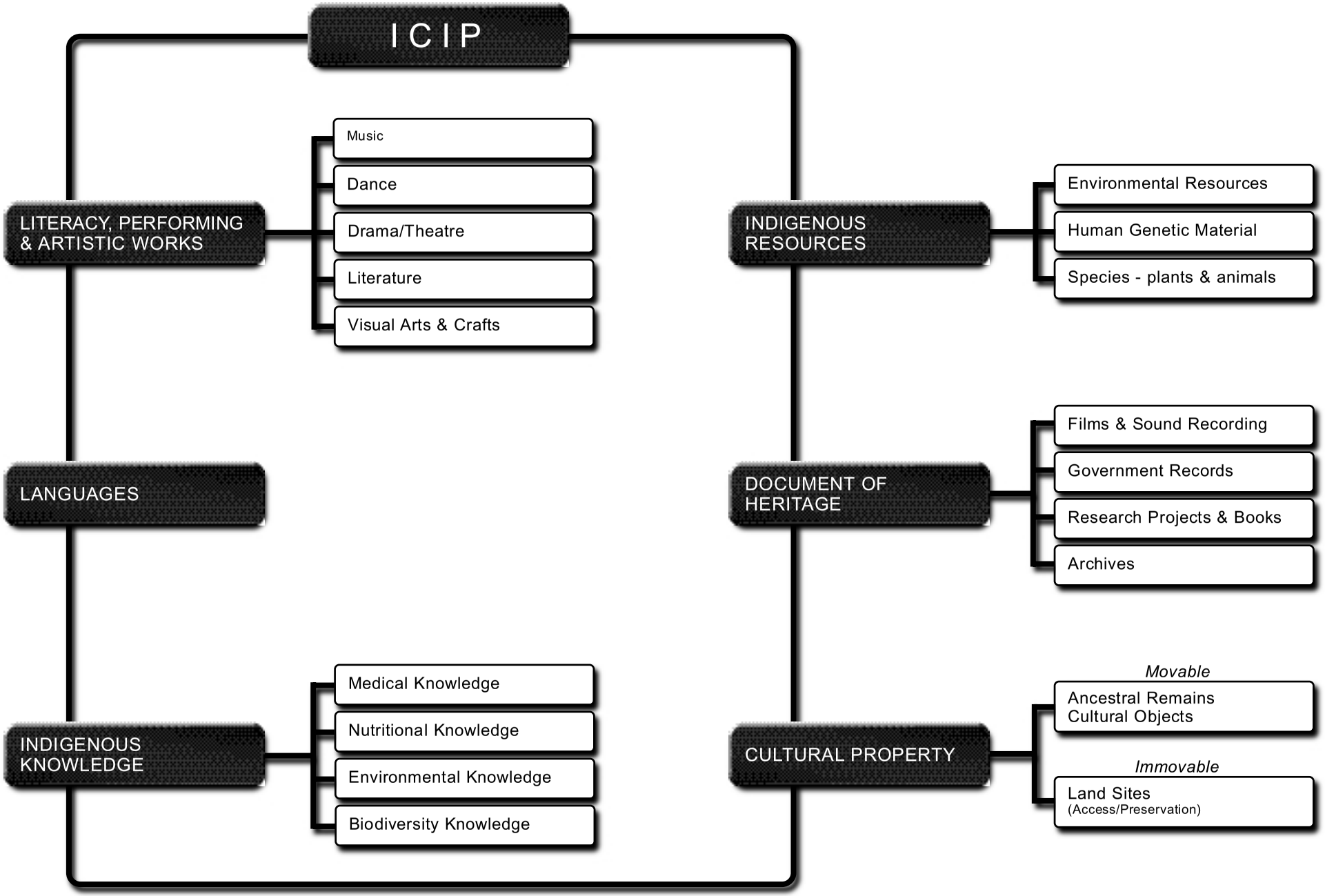
Education and awareness strategies

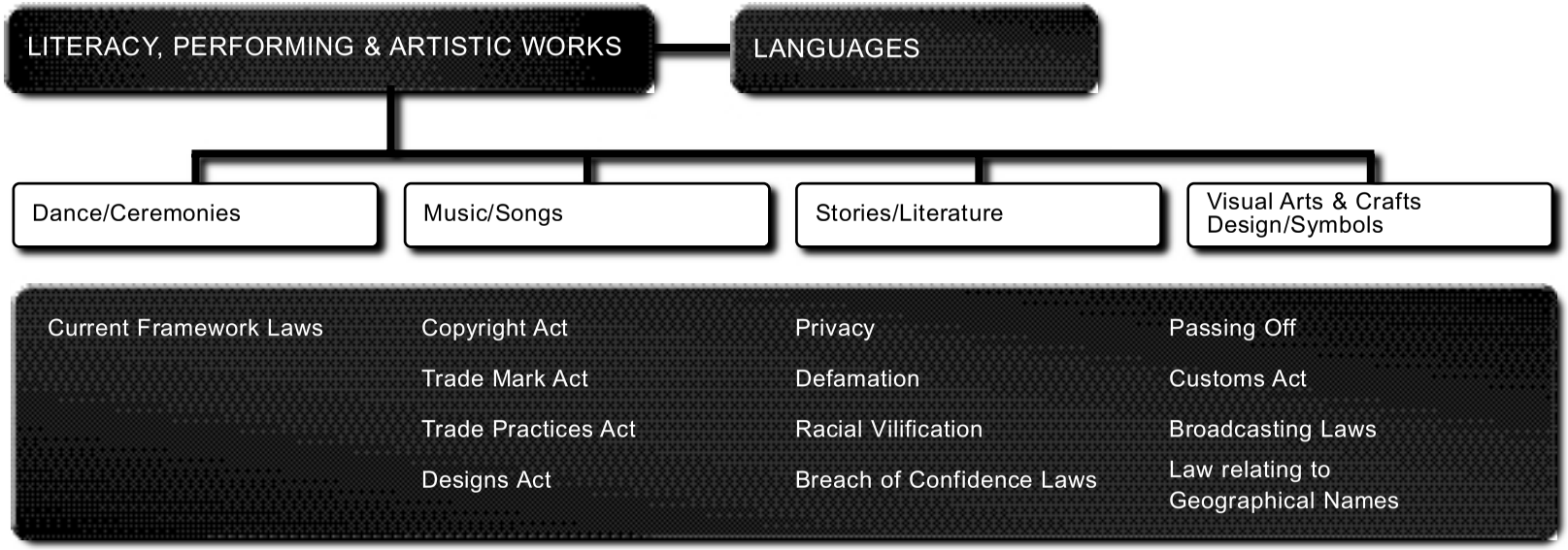
25.1 Awareness strategies for Indigenous people such as legal and cultural workshops and publication of information material on Indigenous Cultural and Intellectual Property rights should be developed.

25.2 Awareness should be raised among the wider community of Indigenous Cultural and Intellectual Property rights and reform options.

25.3 Indigenous associations and organisations should be encouraged to adopt policies and practices which assert ownership over Indigenous cultural heritage.

25.4 Further consultations should be conducted with Indigenous peoples around the country on the reform proposals.


ICIP
LITERACY, PERFORMING & ARTISTIC WORKS
Music
Dance
Drama/Theatre
Literature
Visual Arts & Crafts
LANGUAGES
INDIGENOUS KNOWLEDGE
Medical Knowledge
Nutritional Knowledge
Environmental Knowledge
Biodiversity Knowledge
INDIGENOUS RESOURCES
Environmental Resources
Human Genetic Material
Species - plants & animals
DOCUMENT OF HERITAGE
Films & Sound Recording
Government Records
Research Projects & Books
Archives
CULTURAL PROPERTY
Movable
Ancestral Remains
Cultural Objects
Immovable
Land Sites
(Access/Preservation)
Our Culture : Our Future



REFORMS

LEGAL

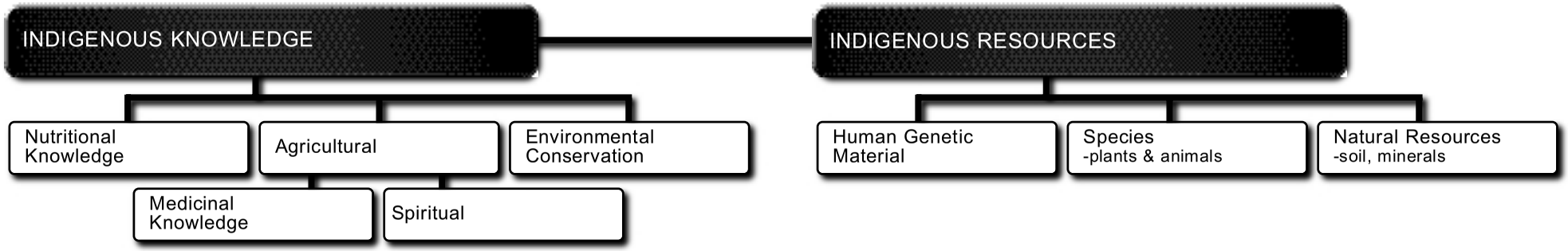
1. Specific Legislation dealing with ICIP issues.
2. Amend Copyright Act to recognise Indigenous ownership (communal) in perpetuity.
3. Resale Royalty.
4. Amend Designs Act to recognise Indigenous ownership (communal) of cultural designs, protection in perpetuity.
5. Amend Trade Mark Act
6. Amend Cultural Heritage Legislation
7. Amend Native Title Act
8. Mabo-style claims
9. Unfair competition
10. Specific Legislation

ADMINISTRATION

1. National Indigenous Cultural Authority.
2. Indigenous Art Certification Marks.
3. Cultural Contracts so Indigenous group interests are protected.
4. Indigenous Arts Collecting Society
5. Register of Cultural Material
6. Indigenous Cultural Legal Services
7. Indigenous Arts Agency
8. Establishment of Networks with Industry bodies

POLICIES/PROTOCOL

1. Development of policies and protocols by all industry bodies working in related areas, developed in association with a National Indigenous Cultural Authority.



* *Traditional knowledge and resources are frequently stored ex situ in specialised conservation centres, botanic gardens, herbaria, research centre, universities etc.*

Current Framework Laws	Patents Act	Environmental and Planning	Management Act
	Plant Breeders Rights Act	Legislation	Native Title Act
	Cultural Heritage Legislation	Conservation and Land	

REFORMS

LEGAL

1. Specific Legislation dealing with ICIP rights and including protection of Indigenous knowledge and Cultural Resources.
2. Amend Patent Act:-
   - to provide recognition and compensation
   - to disallow patenting of Indigenous genetic material to include regulations which provide consultation with Indigenous communities.
3. Amend Plant Breeders Rights Act.
4. Amend Native Title.

ADMINISTRATION

1. National Indigenous Cultural Authority.
2. Cultural Contracts so Indigenous groups interests are negotiated - Art 8(j) CBD
3. Community Controlled Conservation Centres - local registration of knowledge.
4. Greater access to collections, herbariums and information about Indigenous knowledge and resources.
5. Establish links with International Indigenous Knowledge and Resource Network.

POLICIES/PROTOCOL

1. All government and industry bodies to develop policies in association with the National Indigenous Authority which encourage prior informed consent, recognition of Indigenous peoples contribution and ownership of such knowledge.
2. A National Policy to address Indigenous rights to knowledge and resources.

DOCUMENT OF HERITAGE

- Films & Sound Recording
- Records held by Government Departments & Archives
- Photographs
- Genealogies

Current Framework Laws

- Copyright Act
- Archives Legislation
- Museums Legislation
- Privacy Laws
- AIATSIS Act
- Freedom of Information Act
- ATSIC Act

REFORMS

LEGAL

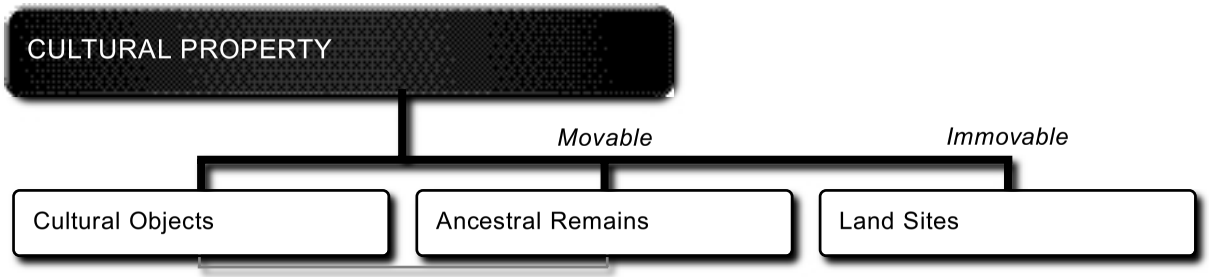
1. Specific Legislation dealing with ICIP Projects including management and access... relating to Indigenous cultural material held by cultural institutions.
2. Amend Archives Legislation re: access
3. Amend Museums Legislation
4. Amend AIATSIS Legislation
5. Amend Copyright Act to include Films/Photographs as "Indigenous Cultural Recordings" and allow fees for reproduction

ADMINISTRATION

1. National Indigenous Cultural Authority.
2. National Indigenous Archives.
3. Local archives return copies of materials to local or regional committees.
4. National Indigenous Film Archives.

POLICIES/PROTOCOL

1. All government departments, libraries, museums and universities to develop policies on the return access, management, ownership of material in association with National Indigenous Cultural Authority.



Current Framework Laws

- Cultural Heritage Legislation
- Native Title Act
- Land Rights Legislation
- Legislation
- Museum and Cultural Institutions

REFORMS

LEGAL

1. Specific Legislation dealing with ICIP rights to cultural property.
2. Amend Cultural Heritage Legislation to:
   - include other aspects of Indigenous Cultural and Intellectual Property.
   - to acknowledge Indigenous ownership.
   - to establish cultural heritage authority.
3. Amend Museum and Other Cultural Institution Legislation to ensure Indigenous rights and concerns are addressed.
4. Amend Native Title Act to allow objects, knowledge etc to be included.
5. Specific Legislation.

ADMINISTRATION

1. Set up National Indigenous Cultural Authority Committee with local, regional and state levels of representation.
2. Set up National Keeping Place or Network of Regional and local keeping places.
3. Registration of Ownership of Cultural Material with Collecting Bodies.
4. Greater access to collections.

POLICIES/PROTOCOL

1. Wider acceptance and implementation of Previous Possession New Obligations Policy.
2. National Policy on Cultural Heritage including return of cultural property.
3. Government and Industry bodies to adopt policies concerning the control, maintenance and management of Indigenous Cultural Property in association with Indigenous people and the National Indigenous Authority

PART ONE

The Nature of Indigenous Cultural and Intellectual Property

The concept of property rights applying to knowledge and ideas was developed in England and Europe in the late 15th century. The invention of the printing press enabled works to be copied in an unprecedented manner. Hence statues were introduced to protect individual creations and inventions; to encourage trade and to censor the wide ciruclation of undesirable ideas.[1]
Today s intellectual property laws originate from this era. Thus intellectual property rights are based on the notion that innovation is the product of the creative, intellectual and applied concepts and ideas of individuals. The state grants specific economic rights to inventive people to own, use and dispose of their creations as a reward for sharing their contributions and to stimulate inventive activities.
Since impact with Europeans, Indigenous Australian cultural heritage material was seen as free for all, as part of the deserving bounty of the colonisers. Until recently, it was considered unlikely that intellectual property rights were applicable to the special features of Indigenous cultural heritage material. However, Indigenous songs, dances, stories, lifestyles, knowledge, biogenetic resources and resource-management practices are increasing in value to modern society as commercial property. In an age of new technology and increasing global markets, Indigenous people worldwide are seeking to protect their cultural and commercial interests. So too, are Indigenous Australians.
Part One of this Report will consider the Indigenous Cultural and Intellectual Property rights Indigenous Australians want recognised and protected within Australian legal and policy frameworks, including:

(a) The nature of Indigenous Cultural and Intellectual Property.
(b) The commercial value of Indigenous Cultural and Intellectual Property.
(c) The major concerns for Indigenous people.
(d) The rights Indigenous people want in relation to their Indigenous Cultural and Intellectual Property.

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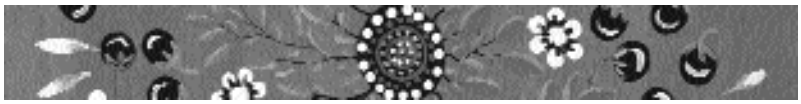
[1] Staniforth Ricketson, *The Law of Intellectual Property*, The Law Book Company, Sydney, 1984, p 58.

Indigenous cultural and intellectual property rights



1.1 What is Indigenous cultural and intellectual property?

Indigenous people view the world they live in as an integrated whole. Their beliefs, knowledge, arts and other forms of cultural expression have been handed down through the generations. The many stories, songs, dances, paintings and other forms of expression are therefore important aspects of Indigenous cultural knowledge, power and identity.

A *Study on the Protection of the Cultural and Intellectual Property of Indigenous Peoples*, by United Nations Special Rapporteur, Erica Irene Daes, of the Economic and Social Council's Sub-Commission on Prevention of Discrimination of Minorities, confirms this approach.[1] In her report, Daes notes that a song or story is not a commodity or a form of property but one of the manifestations of an ancient and continuing relationship between people and their territory .[2] So she considers it is more appropriate and simpler to refer to the collective cultural heritage of each Indigenous people rather than to make distinctions between Indigenous peoples "cultural property" and "intellectual property". According to Daes, any attempt "to try to subdivide the heritage of Indigenous peoples into separate legal categories such as 'cultural', 'artistic' or 'intellectual' or into separate elements such as songs, stories, science or sacred sites", would be artificial. She believes "all elements of heritage should be managed and protected as a single, interrelated and integrated whole".[3] Daes states:

> *Heritage includes all expressions of the relationship between the people, their land and the other living beings and spirits which share the land, and is the basis for maintaining social, economic and diplomatic relationships - through sharing - with other peoples. All of the aspects of heritage are interrelated and cannot be separated from the traditional territory of the people concerned. What tangible and intangible items constitute the*

[1] Mrs Erica Irene Daes, Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities, and Chairperson of the Working Group of Indigenous Populations, *Study on the Protection of the Cultural and Intellectual Property of Indigenous Peoples*, E/CN.4/Sub.2/1993/28,28 July 1993.
[2] *Ibid*, para 22, p 8.
[3] *Ibid*, para 31, p 9.

heritage of a particular indigenous people must be decided by the people themselves.[4]

In light of Daes' findings and recommendations, the Discussion Paper adopted the following working definition of "Indigenous Cultural and Intellectual Property" based on the definition of "Heritage" contained in the *Principles and Guidelines for the Protection of the Heritage of Indigenous People*.[5]

The following working definition was used for research and conducting consultations.

"Indigenous Cultural and Intellectual Property" refers to Indigenous peoples' rights to their heritage. Heritage comprises all objects, sites and knowledge, the nature or use of which has been transmitted or continues to be transmitted from generation to generation, and which is regarded as pertaining to a particular Indigenous group or its territory. Heritage includes:

- Literary, performing and artistic works (including songs, music, dances, stories, ceremonies, symbols, languages and designs).
- Scientific, agricultural, technical and ecological knowledge (including cultigens, medicines and the phenotypes of flora and fauna).
- All items of movable cultural property.[6]
- Human remains and tissues.
- Immovable cultural property (including sacred and historically significant sites and burial grounds).
- Documentation of Indigenous peoples' heritage in archives, film, photographs, videotape or audiotape and all forms of media.

The heritage of an Indigenous people is a living one and includes objects, knowledge and literary and artistic works which may be created in the future based on that heritage.

Ultimately, any definition of Indigenous Cultural and Intellectual Property should reflect the perspective of a particular Indigenous group. The Discussion Paper acknowledged the right of Indigenous groups to decide what constitutes their own Indigenous Cultural and Intellectual Property and cultural heritage, and how this should be defined.[7]

The Discussion Paper sought feedback on the working definition and asked the following questions:

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[4] *Ibid*, para 164, p 39.

5 Mrs Erica Irene Daes, *Final Report on the Protection of the Heritage of Indigenous Peoples*, United Nations Document E/CN.4/Sub.2/1995/26). Guideline 12.

[6] As defined by UNESCO. See Glossary of Terms for definition.

[7] The Mataatua Declaration stressed that Indigenous people should define their own intellectual and cultural property for themselves; Article 1.1. See Appendix 5 for full text.

- What do you think of the working definition for Indigenous Cultural and Intellectual Property?
- Is the scope of the working definition too broad or too narrow?
- What other aspects of Indigenous Cultural and Intellectual Property should be included?
- Should a different name or term be used?

1.2 General responses to the working definition

The Indigenous Reference Group adopted the principles and guidelines of the Special Rapporteur, and endorsed Daes' approach to defining heritage.[8] The group agreed that the adopted working term was comprehensive and adequate as a starting point. Many Indigenous respondents confirmed this approach, while others from industry and government expressed concerns. A range of comments appear below.

1.2.1 *Scope of Indigenous Cultural and Intellectual Property*

While most respondents considered the scope of the working definition was adequate, some believed the definition needed to include the following:

- Indigenous cultural and spiritual identities which are expressed via song, music, dance, stories etc; all land, soil and bodies of water which contain cultural and spiritual significance to Indigenous Australians.[9]
- Cultural and Intellectual Property to include unwritten and perhaps unrecorded historical materials of significance to Indigenous people.[10]
- Declaration of ownership may be made if necessary or if appropriate in relation to Indigenous Customary Laws.[11]
- Indigenous people to attribute meanings and interpretation to their cultural properties; that is, Indigenous people should have the right to define their own cultures.[12]
- Meanings and significance of Indigenous Cultural and Intellectual Property to be respected by non-Indigenous people.[13]
- Scientific knowledge should include all information derived from scientific research into Indigenous Cultural and Intellectual Property. This includes fieldwork notebooks, photos, analysis notes and documentation, unpublished and published reports etc.[14]

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[8] Indigenous Reference Group, *Draft Principles and Guidelines for the Protection of Heritage of Indigenous People,* September 1997. Refer to Appendix 1.

[9] Yunggorendi First Nation Centre for higher Education and Research, Flinders University of South Australia; Submission to *Our Culture: Our Future*, October 1997.

[10] City of Wanneroo, Submission to *Our Culture: Our Future*, October 1997.

[12] *Ibid*.

[13] *Ibid*.

[14] Tasmanian Aboriginal Land Council Aboriginal Corporation, Submission to *Our Culture: Our Future,* October 1997.

- Rights to all native flora and fauna should be included, as well as rights to minerals, including ochre and stone sources.[15]

Some respondents raised concerns about the definition, as follows:

- Daki Budtcha noted that the current definition is too broad and not industry-specific. The categories should be Music Industry, Visual Arts Industry, etc.[16] But in devising the working definition, we purposely chose not to reflect the industry application of Indigenous heritage and aimed to define heritage from a cultural and holistic perspective. Hence, industry definitions were not used as a guide.
- A Queensland Museum submission noted that while Indigenous people might claim documentation of their heritage as part of their intellectual property, the person or organisation that researched and produced the documentation would also have a valid claim.[17] We note that the contribution of people and organisations that research and produce documentation, under current intellectual property laws, is already recognised and protected. Indigenous people's role in informing, identifying, collecting and contributing to that documentation is not.
- The National Library of Australia notes some concerns in relation to Indigenous ownership of documentation of *any* Indigenous peoples heritage. The National Library states:

  > *While there is clearly a copyright interest in materials in public collections such as the National Library s, the principle of ensuring wide public access to them is central to the Library s role. The library s custodial role in holding those resources in trust and acting in the best interests of the community is much the same role, in fact, as the discussion paper attributes to traditional Indigenous custodians.*[18]

- The National Film and Sound Archive's (NFSA) principal concern was that depictions of and information about Indigenous culture was separately identified in the definition. The NFSA made the point:

  > *"While the reference to knowledge and the nature or use of which both broaden out the existing definition, the Archive contains a substantial body of material that contains depictions of Aboriginal culture without comment. Such depictions have considerable value and potential impact in their own right."*[19]

  The NFSA further noted that while the specific inclusion of "Documentation of Indigenous heritage" does to some extent address this concern, they were concerned that the definition focused on the forms of media. The NFSA sug-

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[15] *Ibid*.

[16] Daki Budtcha Pty Ltd, Submission to *Our Culture: Our Futur*e, October 1997.

[17] Queensland Museum, Submission to *Our Culture: Our Future*, October 1997.

[18] National Library of Australia, Submission to *Our Culture:Our Future*, November 1997.

[19] National Film and Sound Archive, Submision to *Our Culture: Our Future*, October 1997.

gested a more effective approach would be to refer to depictions and recordings of Indigenous culture rather than to identify types of depictions and recordings such as video tape or audio tape. It was pointed out that most sensitive material in the NFSA s collection is recordings of sounds in the form of either lacquer disks or wire recordings, rather than audiotape.[20]

1.2.2 *Use of terminology*

Some submissions noted that the term "Indigenous Cultural and Intellectual Property" was problematic.

Indigenous Resource Rights

Michael Davis suggested the use of "Indigenous resource rights" rather than Indigenous Cultural and Intellectual Property .

Indigenous Heritage Rights

The National Parks and Wildlife Service (NSW) supports use of the term "Indigenous heritage rights" rather than "Indigenous Cultural and Intellectual Property rights". The NPWS (NSW) believes use of the term "Indigenous Cultural and Intellectual Property" in isolation from the notion of rights results in the conceptual commodification of that property.[21]

Indigenous Cultural Property

The National Indigenous Media Association of Australia (NIMAA) agrees that all items listed in the working definition are significant to Indigenous peoples. But NIMAA suggests the working definition is too long and cumbersome and should be reduced to "Indigenous cultural property".[22]

Culture and Heritage

A submission from the Yunggorendi First Nation Centre[23] notes that the definition initially sets out to define Indigenous culture and the intellectual property associated with such culture, then informs the reader of a definition pertaining to heritage. The Yunggorendi Centre notes:

> *Culture and heritage seem to be used interchangeably here. Culture differs from heritage. Culture encompasses both the explicit, implicit actions of a community. The explicit culture consists of the observable behavioural and physical signs of culture, that is, the content and the structure. The implicit culture is more abstract, referring to the underlying organisation and transmission systems of a community. The current*

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[20] *Ibid*.

[21] NPWS (NSW), Submission to *Our Culture: Our Future*, October 1997.

[22] National Indigenous Media Association of Australia, Submission to *Our Culture: Our Future*, October 1997.

23 Yunggorendi First Nation Centre for Higher Education and Research, Flinders University, Submission to *Our Culture: Our Future,* October 1997.

> *definition only covers the observable behaviour and the physical and it needs to include the non-physical and the non-behavioural. Heritage can be viewed by some as conservation of culture and not culture itself.*[24]

The term "Indigenous Cultural and Intellectual Property" was used in the course of our research and consultations largely because this was the terminology included in the original tender document released by the Australian Institute of Aboriginal and Torres Strait Islander Studies (AIATSIS). This term is used widely internationally in various standard- setting documents, including Agenda 21, and is referred to in Article 29 of the 1994 draft of the *Draft Declaration on the Rights of Indigenous Peoples*:

> *Indigenous peoples are entitled to the recognition of the full ownership, control and protection of their cultural and intellectual property. They have the right to special measures to control, develop and protect their sciences, technologies and cultural manifestations, including human and other genetic resources, seeds, medicines, knowledge of the property of fauna and flora, oral traditions, literatures, designs and visual and performing arts.*[25]

We note that "heritage" is the terminology used by the Special Rapporteur in her Draft Principles and Guidelines for the Protection of the Heritage of Indigenous People.

In light of the above points, we consider that either "Indigenous Cultural and Intellectual Property Rights" or "Indigenous Heritage Rights" is appropriate to refer to the types of rights of Indigenous people in Australia but note the debate concerning the fact that "property" denotes commercialisation and protection of commercial rights, whereas "heritage" implies preservation and maintenance issues. In the course of our research, we found that Indigenous Australians not only want to protect their heritage. They also want to control and benefit from its commercial application. Hence, the issue of whether "Indigenous Heritage Rights" as a term is preferable to "Indigenous Cultural and Intellectual Property Rights" should be a subject for further debate. This paper will use the term "Indigenous Cultural and Intellectual Property" to be consistent with the terminology in the original AIATSIS brief.

1.3 The nature of Indigenous cultural and intellectual property

1.3.1 *Living tradition*

For Indigenous peoples, cultural heritage is a living and evolving tradition. Its continued practice is vital to the identity and cultural survival of Indigenous groups. So any definition of heritage must be a living one which recognises the continual transmission of Indigenous heritage. As noted by the NSW Department of Aboriginal Affairs,

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[24] *Ibid.*

[25] Report of the Sub-Commission on Prevention of Discrimination and Protection of Minorities at its 46th session*, Draft United Nations Declaration on the Rights of Indigenous Peoples,* United Nations Documents E/CN.4/1995/2 and E/CN.4/Sub.2/1994/56.

Indigenous Australian culture is a living culture:

> *For a living culture based on spirit of place, the major part of maintaining culture and therefore caring for place is the continuation of the oral tradition that tells a story. The process of re-creation rather than reproduction is essential to the reality of Indigenous people. To them, reproduction is unreal, while re-creation is real. The fixation on the written word has implications for the practice of cultural heritage.*[26]

1.3.2 *Holistic nature*

Members of the Indigenous Reference Group stressed the holistic nature of Indigenous Cultural and Intellectual Property. Many submissions supported this, including one from the Centre for Indigenous History and the Arts, which stressed that Indigenous Intellectual and Cultural Property rights cannot be isolated into compartments which are separate from other Indigenous rights and interests. For Indigenous peoples, any discussion about Intellectual and Cultural Property rights will necessarily include a discussion about their rights and obligations to their land. Indigenous peoples maintenance, use and teaching of their knowledge is intimately connected to the traditional lands and territories of each people.[27]

1.3.3 *Communal ownership*

Indigenous Cultural and Intellectual Property is collectively owned, socially based and evolving continuously. A great number of generations contribute to the development of Indigenous cultural heritage. Each particular group has ownership rights over its particular inherited cultural heritage.

1.3.4 *Responsibility and custodianship*

Although Indigenous Cultural and Intellectual Property is collectively owned, an individual or group is often the custodian or caretaker of a particular item of heritage. The traditional custodians are empowered as caretakers in relation to the particular item of heritage only in so far as their actions conform to the best interests of the community as a whole. This type of relationship was noted in the case of *Deceased applicant v Indofurn (*the Carpets Case*)*. For instance, artists may have the authority to depict a traditional, pre-existing design in their artwork by virtue of their birth or by initiation. While they have this right, they hold the knowledge embodied in the work on trust for the rest of the clan.

1.3.5 *Consent to use Indigenous Cultural and Intellectual Property*

Given that Indigenous knowledge is collectively owned, only the group as a whole

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[26] Department of Aboriginal Affairs (NSW), Submission to *Our Culture: Our Future,* October 1997.

[27] Centre for Indigenous History and the Arts, Submission to *Our Culture: Our Future,* October 1997.

may consent to sharing Indigenous Cultural and Intellectual Property. Such consent is given through specific decision-making procedures which differ depending on the nature of the particular cultural item. Consent procedures may differ from group to group. Furthermore, consent is not permanent and may be revoked. As Daes notes:

> *Heritage can never be alienated, surrendered or sold, except for conditional use. Sharing therefore creates a relationship between the givers and receivers of knowledge. The givers retain the authority to ensure that knowledge is used properly and the receivers continue to recognise and repay the gift.*[28]

The notion of what Indigenous cultural material can be shared also shifts over time and according to use, and perhaps even territory. As Film Australia notes, the attitudes towards restricted materials by communities which maintain traditional values are shifting. Films or sections of films which are now not restricted could become so in the future, and vice versa.[29]

1.4 Transmission of culture

The importance of transmission and the use of Indigenous Cultural and Intellectual Property was outlined in the *Report of the Royal Commission into Aboriginal Deaths in Custody*:

> *Aboriginal societies have always had a means of transmitting knowledge about the land, history, kinship, religion and the means of survival even if this knowledge was never written in books or stored in libraries as non-Aboriginal people have done. Younger generations learn from older generations by participation, observation or imitation. Much learning is unstructured and takes place in social contexts amongst kin. Certain types of knowledge, such as religious and ritual knowledge, are imparted at specific times and in an organised and managed way, often as part of initiation ceremonies.*[30]

An important point made by the Berndt Museum of Anthropology is that in current times, cultural information is not always passed down from generation to generation as the Discussion Paper alleged. According to the Berndt Museum of Anthropology, cultural information "may be passed within generations or over generations from people not belonging to a person s cultural group, for instance anthropologists historians and other sources of cultural information such as books and government records. There exist many instances where the information flow between generations is halted and then resumed through another medium other than through family."[31]

In many parts of Australia, it is recognised that as part of the colonisation process, the cultural transmission process was interfered with so that many cultural practices, such as language, have been discontinued. To restore this, Indigenous people look to reclaim their cultures. Access to documentation that recorded Indigenous cultures in the past is therefore vital.

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[28] *Ibid*.
[29] Film Australia, Submission to *Our Culture: Our Future,* October 1997.
[30] *Report of the Royal Commission into Aboriginal Deaths in Custody,* p 335, Ch 16, para 16.1.1.
[31] Berndt Museum of Anthropology, University of WA, Submission to *Our Culture: Our Future,* October 1997.

1.5 Property vs heritage

The Office of National Tourism (ONT) considers there is a distinction between the protection of cultural heritage and the protection of intellectual property for commercial purposes. The ONT submitted that protection of cultural heritage is about preserving culture over a long period to ensure there is something to pass on to future generations, while intellectual property is about protection for a limited period to enable commercial development; and that these types of protection are different and incompatible.[32]

Drawing on this point, it is necessary to examine the international debate concerning the protection of "folklore".[33] Generally, there are two approaches to why it is necessary to protect "folklore", and this is at the heart of the culture versus commerce, or property versus heritage dichotomy.

1.5.1 *Preservationist approach*

The preservationist approach argues there is a need to legislatively preserve and protect "folklore" against the influences of modern society such as mass media, new technologies and the continued globalisation of popular cultures. Such forces threaten to assimilate "folklore" into the dominant cultures.[34]

Indigenous Australian Cultural and Intellectual Property is exposed to the same threat. Much Indigenous heritage material which was primarily practised and produced as part of strengthening and maintaining Indigenous cultural heritage and identity is now applied commercially, often not in the hands of Indigenous people themselves. Hence there is a need for protection so Indigenous people can maintain and control their own cultural dynamic.

1.5.2 *Economic approach*

There is also a purely economic argument regarding folklore protection which has been raised repeatedly in the clash between developing and developed countries. As Janice Weiner states:

> *Under international cultural exchange agreements, developing countries, on the one hand, typically receive copyright-protected works from developed countries, which in turn provide the authors for remuneration. On the other hand, developed countries typically import many works of folklore, which are ineligible for*

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[32] Office of National Tourism, Submission to *Our Culture: Our Future,* October 1997.

[33] Indigenous Australians do not endorse use of the term folklore to refer to their cultures. The term is used here in the context of the international debate concerning the protection of folklore , being the term used by UNESCO/WIPO to describe those elements of cultural heritage through which culture is expressed and passed on, such as songs and dances, stories and traditional knowledge.

[34] Dr Shubha Chaudhuri, Director, Archives and Research Centre for Ethnomusicology, American Institute of Indian Studies, presentation on The Experience of Asia at UNESCO/WIPO Forum on the Protection of Folklore, April 1997.

> *protection under copyright laws. As a result, works of folklore are extensively exploited outside of their communities and countries of origin, without any remuneration or other advantages flowing back to those countries.*[35]

Folklore, and Indigenous Cultural and Intellectual Property, is becoming increasingly more in demand and is therefore economically viable. Should not the owners of cultures receive compensation for its commercial use?

The same issues apply to Indigenous Australians, especially as Indigenous arts, cultural expression and knowledge systems remain a living and vital part of life. Therefore any Australian reforms should attempt to strike a balance between both approaches.

1.6 Updated definition

The following is an amended definition of "Indigenous Cultural and Intellectual Property" based on the findings of the consultation process and the Indigenous Reference Group's *Draft Principles and Guidelines for the Protection of Indigenous Cultural and Intellectual Property.*

"Indigenous Cultural and Intellectual Property Rights" refers to Indigenous Australians rights to their heritage. Such rights are also known as "Indigenous Heritage Rights".

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

- Literary, performing and artistic works (including music, dance, song, ceremonies, symbols and designs, narratives and poetry)
- Languages
- Scientific, agricultural, technical and ecological knowledge (including cultigens, medicines and sustainable use of flora and fauna)
- Spiritual knowledge
- All items of moveable cultural property[36], including burial artefacts
- Indigenous ancestral remains
- Indigenous human genetic material (including DNA and tissues.)
- Cultural environment resources (including minerals and species)

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[35] J.C. Weiner, Protection of Folklore: A Political and Legal Challenge (1987), vol 18, *International Review of Industrial Property and Copyright,* p 67.

[36] As defined by the UNESCO Cultural Property Convention 1970

- Immovable cultural property (including Indigenous sites of significance, sacred sites and burials)
- Documentation of Indigenous people's heritage in all forms of media (including scientific, ethnographic research reports, papers and books, films, sound recordings.)

The heritage of an Indigenous people is a living one and includes items which may be created in the future based on that heritage.

Any definition of Indigenous Cultural and Intellectual Property should be flexible to reflect the notions of the particular Indigenous group and the fact that this may differ from group to group and may change over time.

Chapter One : Recommendations

1.1 Informed debate concerning the above definition, especially in relation to the issue of commerce versus culture; property versus heritage, should be encouraged.

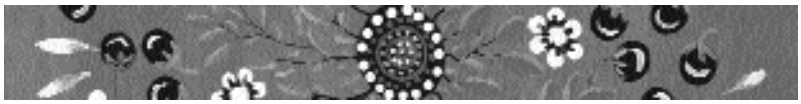
1.2 Indigenous Australians should be kept informed of the world developments and debate concerning:

(i) Indigenous Cultural and Intellectual Property Rights.

(ii) The protection of folklore.

In light of the above points, we believe that either "Indigenous Cultural and Intellectual Property Rights" or "Indigenous Heritage Rights" is appropriate to refer to the types of rights of Indigenous people in Australia but note the debate concerning the fact that "property" denotes commercialisation and protection of commercial rights, whereas "heritage" implies preservation and maintenance issues. In the course of our research, we found that Indigenous Australians not only want to protect their heritage. They also want to control and benefit from its commercial application. Hence, the issue of whether "Indigenous Heritage Rights" as a term is preferable to "Indigenous Cultural and Intellectual Property Rights" should be a subject for further debate. This paper will use the term "Indigenous Cultural and Intellectual Property" to be consistent with the terminology in the original AIATSIS brief.

Commercial value of Indigenous cultural and intellectual property



Cultural and Intellectual Property Rights for Indigenous Australians have been a significant issue for the past three decades. Unfortunately, the protection of such rights has not been given the same priority as other pressing issues like health and native title. As Indigenous culture attracts increasing commercial interest, Indigenous people are concerned that they do not have the necessary rights to ensure appropriate recognition, protection and financial compensation for their contributions. [1]

To date there is insufficient statistical and economic appraisal of the value of this knowledge to the commercial interests and industries. There is a pressing need for an independent, economic evaluation of the facts by suitably qualified people, and research into the impact of commercialisation on Indigenous cultures in Australia.

2.1 Contribution to industry

Despite the fact that Indigenous people are a relatively small percentage of the overall population, the contribution of Indigenous cultural knowledge and resources to Australian industry is enormous. The Indigenous cultural industry is a multi-million-dollar business spanning numerous significant industries.[2] These include:

2.1.1 *Arts and crafts industry*

ATSIC s *National Aboriginal and Torres Strait Islander Cultural Industry Strategy* estimated the Indigenous arts and crafts market to be worth almost $200 million per year.[3] Half of the sales are related to the tourism market, and are likely to increase dramatically with the advent of the 2000 Olympic Games in Sydney.

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[1] ATSIC, *Submission to the House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs, Inquiry into Aboriginal and Torres Strait Islander Culture and Heritage*, unpublished, 1994, p 24.
[2] Kathryn Wells, The Cosmic Irony of Intellectual Property (1996) vol 7(3), *Culture and Policy*: *A Journal of the Australian Key Centre for Cultural and Media Policy*, pp 45-68. Wells provides a detailed analysis of Indigenous historical and contemporary experience in the main industries of rural, arts, biological and medical, tourism, innovative, mining and technology.
[3] ATSIC, *National Aboriginal and Torres Strait Islander Cultural Industry Strategy*, prepared by Focus with the assistance of Sharon Boil & Associates, February 1997, p 5.

The percentage of returns to Indigenous people is marginal. In 1989, the *Review of the Arts and Crafts Industry* estimated that Indigenous people receive just over $7 million per year from the sale of art and crafts.[4] The *Strategy* notes that the economic benefits to Indigenous artists have improved and could now be about $50 million per year, but that the major portion of the sales benefit goes to art traders rather than to the artists themselves.[5]

Furthermore, no accurate statistics have been prepared on what the value of the ripoffs are. This includes pirating Indigenous arts and crafts and the unauthorised reproduction of Indigenous art and craft outside national boundaries.

2.1.2 *Tourism industry*

The Discussion Paper noted that an Australia Council Survey of international visitors to Australia undertaken in February-March 1993 found that 48 per cent of overseas tourists are interested in seeing and learning about Indigenous arts and culture. More than a third of international visitors experience an Indigenous artistic and cultural performance, exhibition or tour. The value of sales of Indigenous arts and souvenirs to international visitors is estimated at $46 million per year.

The Australia Council provided information in a more recent survey entitled International Visitors and Aboriginal Arts, 1996 , which found that almost one-third of visitors to Australia undertake an activity related to Aboriginal arts and culture such as visiting an art gallery or museum to see Aboriginal art or going to a performance of Aboriginal music, theatre, or dance. It was also estimated that purchases of Aboriginal art and souvenirs by international visitors were worth $67 million in 1996. This is an increase from the estimated $46 million in 1993.[6]

The *National Aboriginal and Torres Strait Islander Tourism Industry Strategy* released in August 1997 noted that the scale of Indigenous participation in the tourism industry is now very small, with only about 200 Indigenous tourism operators with established businesses.[7] The value of Indigenous cultural tourism was estimated at around $5 million per year. But there appears to have been no evaluation of the contribution Indigenous cultures make to mainstream tourism.

The Australian tourism industry draws heavily from Indigenous culture in terms of marketing and product, yet historically the participation of Indigenous people has been minimal. However, in recent years there has been increased Indigenous participation and management in tourist and associated industries.[8] The *National Aboriginal and*

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[4] Department of Aboriginal Affairs, *The Aboriginal Arts and Crafts Industry: Report of the Review Committee,* Australian Government Printing Service, Canberra, July 1989, note 69.

[5] ATSIC and Office of National Tourism, National Aboriginal and Torres Strait Islander Tourism Industry Strategy, August 1997, p 5.

[6] Australia Council, Submission to *Our Culture: Our Future*, October 1997.

[7] ATSIC and Office of National Tourism, *op cit*, p 6.

[8] Kathryn Wells, *op cit*, p 56.

Torres Strait Islander Tourism Industry Strategy estimated that about 1,500 Indigenous people are employed in the mainstream tourism industry.

The Office of National Tourism s submission generally recognised the importance of Indigenous culture to international and domestic tourism. A major concern for tourism was the authenticity of products. The Office of National Tourism submitted that it was important to verify the authenticity of Indigenous items to ensure that quality products are available to purchasers and that they can distinguish between authentic products and others.[9]

2.1.3 *Rural industry*

The Australian rural industry is valued at about $27 billion per year.[10] As noted by the *National Aboriginal and Torres Strait Islander Rural Industry Strategy,* Indigenous people contribute their knowledge and resources to this industry, including wild animal resources, bush foods and traditional medicines.

2.1.4 *Biotechnology industry*

A large proportion of the drugs and pharmaceutical products in use today are derived from natural products. According to one international study which surveyed 119 commercially useful plant-based drugs, 74 per cent of these were previously known and used in traditional medicine.[11] The value of Indigenous knowledge to the biotechnology industry in Australia has not been estimated.

2.1.5 *Advertising industry*

Indigenous images are used to market and sell a wide range of Australian products including cars, wine, soft drinks and seats on aeroplanes.[12]

2.1.6 *Film industry*

Since the invasion, Indigenous cultural material has been the subject of a many films ranging from ethnographic films to fiction and feature films such as Charles Chauvel s *Jedda* and Peter Weir s *The Last Wave*. According to Leigh and Saunders, Australia now possesses one of the most complete photographic records of the colonial enterprise known. [13]

Today, Indigenous film-making is on the rise, with Indigenous organisations directly

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[9] Paul Davies, Industry, Science, Tourism, Submission to *Our Culture: Our Future*, October 1997.
[10] ATSIC and the Department of Primary Industries and Energy, *National Aboriginal and Torres Strait Islander Rural Industry Strategy*, May 1997 p 7.
[11] NR Farnsworth, Screening plants for new medicines , in Wilson, EO (ed), *Biodiversity*, National Academic Press, Washington DC, USA, pp 83-97 as cited in Darrel A Posey and Graham Dutfield, *Beyond Intellectual Property*, International Development Research Centre, Canada, 1996, p 14.
[12] See Vivien Johnson (ed), *Copyrites: Aboriginal Art in the Age of Reproductive Technologies*, Touring Exhibition 1996, Catalogue, NIAAA and Macquarie University.
13 Michael Leigh and Walter Saunders, Hidden Pictures Colonial Camera , in Australian Film Commission, *An Indigenous Touring Film Festival*, 1995, p 7.

involved in producing and directing film product.

2.1.7 *Export industry*

The export of Indigenous cultural material is now an important part of the Australian economy. Such items include paintings, boomerangs and didgeridoos, as well as music, dance styles and bush foods.

2.2 Other industries Indigenous culture contributes towards

The Discussion Paper asked respondents to comment on what other industries Indigenous culture contributes towards. The following were suggested:

2.2.1 *Academic/research industry*

Yunggorendi First Nation Centre noted that much academic and research activity is underpinned by Indigenous people, their ways of life and their fight for self-determination. Many schools, universities and colleges now offer curriculum with Indigenous content. Such courses and associated course materials are commodities which institutions can sell to other educational institutions.[14]

2.2.2 *Music industry*

A submission from Daki Budtcha Pty Ltd noted that the exploitation of Indigenous intellectural and cultural property in the music industry had steadily increased in line with the rising popularity of incorporating tribal chants into world music styles.[15]

2.2.3 *Didgeridoo industry*

Karl Neuenfeldt[16] noted that there is a growing didgeridoo industry, both in playing and manufacturing didgeridoos. Making didgeridoos involves a process starting from cutting the raw material to stripping and curing and painting. Indigenous people are concerned that the didgeridoo industry is increasingly being dominated by non-Indigenous people.

2.2.4 *New technology industry*

Several respondents reported growth in Internet websites and CD-roms which include Indigenous content.

2.3 Should Indigenous people share in the benefits?

The Discussion Paper sought responses to the following questions:

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[14] Yunggorendi First Nation Centre, Submission to *Our Culture: Our Future*, October 1997.
[15] Daki Budtcha Pty Ltd, Submission to *Our Culture: Our Future*, October 1997.
[16] Karl Neuenfeldt, Communications and Media Studies, Central Queensland University, Submission to *Our Culture: Our Future*, October 1997.

- Should Indigenous people receive compensation or royalties for the commercial use of their intellectual and cultural property?
- How should losses to cultures be measured and compensated?

2.3.1 *Compensation/royalties*

An overwhelming response was that Indigenous people should receive compensation for aspects of culture which had already been applied commercially in the past.

Most respondents also agreed that Indigenous people should receive royalties for commercial use of their cultural and intellectual property if it is appropriate for it to be applied in that way.

In some cases it was reported that Indigenous people are already receiving or negotiating royalties and other benefits in return for the use of their cultural and intellectual property.

The Central Land Council (CLC) notes that depending on the particular context, it will often be appropriate for compensation to flow not only to individuals whose knowledge, skills, resources or country contribute most directly to the project, but also to a broader group who share rights in these areas .[17] The CLC cites the example of a recent multimedia project at the Yuendumu community, where payments were made not only to those directly involved in the project but also to key kirda and kurdungurlu[18] of country associated with the project .

Consistent with this notion, the CLC s Full Council submitted that contracts developed to control research involving indigenous people and their cultural and intellectual property should build in fair compensation to ... traditional owners for commercialisation of such research .[19]

Many respondents also canvassed the importance of maintaining cultures. The Tasmanian Aboriginal Land Council noted that the importance of culture should also be made known to Indigenous people who are commercialising their cultures, because once destroyed, culture can never be replaced. Losses to culture can be compensated in monetary terms and by other forms of assistance such as employment and training, so if Indigenous people want to they can commercially exploit their own resources. [20]

It was also noted that commercial trade in some Indigenous cultural material such as sacred objects and human remains would never be condoned by Indigenous people. Such trade is offensive to Indigenous people.[21]

2.3.2 *How should compensation/royalties be calculated?*

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[17] Central Land Council, Submission to *Our Culture: Our Future*, January 1998.

[18] Those with patrilineal and matrilineal rights to the country.

[19] Central Land Council, Submission to *Our Culture: Our Future*, January 1998.

[20] Tasmanian Aboriginal Land Council Aboriginal Corporation, Submission to *Our Culture: Our Future*, October 1997.

[21] See Central Land Council, *Sacred Objects Policy*.

Most respondents considered that if it is appropriate and there is consensus within a group, Indigenous people should determine and negotiate the terms of use - including payment of compensation or royalties - for commercial use of their heritage. As the Tasmanian Museum and Art Gallery noted:

> *Yes, Indigenous people should receive compensation and/or royalties for the commercial use of their cultural and intellectual property. For instance, where an Aboriginal or Torres Strait Islander person or community contributes their stories and knowledge to a publication, film or oral presentation, prepared by persons from outside that community, a contract should be entered into at that point whereby the owners of the knowledge are guaranteed a negotiated royalty of the sale of that production.*[22]

Indigenous people should share in the benefits from the approved and appropriate commercial use of their cultural and intellectual property. This might include royalties, training, employment and membership on boards.

Chapter Two: Recommendations

2.1 An independent economic evaluation and analysis should be conducted by a team of experts with specialist skills in accounting, marketing and projection estimates - the majority of them being Indigenous people - into the value of Indigenous cultural heritage to Australian industries.

2.2 An independent analysis should be undertaken to show what cultural losses (or gains) commercialisation has caused for Indigenous cultures. This should be conducted in consultation with Indigenous communities. Indigenous people should develop assessment criteria to determine losses of cultures and the impact or danger of this on Indigenous people and their culture. Assessment criteria could suggest compensation procedures acceptable or required by Indigenous people.

2.3 Support should be given to develop systems and standards which allow Indigenous people to reject, approve and fully negotiate terms in relation to the commercial use of their Indigenous Cultural and Intellectual Property. Appropriate levels of sharing with non-Indigenous Australians need to be considered and defined so that criteria other than the commercial are taken into account.

2.4 Support should be given to develop systems which allow all relevant Indigenous owners to benefit from the commercial use of their Indigenous Cultural and Intellectual Property.

2.5 The development of education and awareness strategies that reinforce the cultural value of heritage should be promoted.

2.6 Funding support should be given to Indigenous communities to be able to continue their cultural practices in ways which protect cultural heritage and its development.

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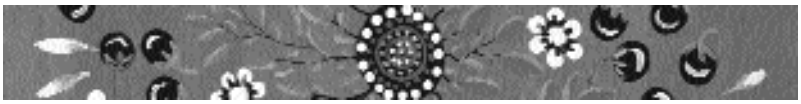
[22] Tasmanian Museum and Art Gallery, Submission to *Our Culture: Our Future*, November 1997.

CHAPTER THREE

The major concerns for Indigenous people



3.1 Appropriation of Indigenous arts and cultural expression

Indigenous people are concerned that the wider Australian community has tended to appropriate their arts and cultural expression and that once appropriated, these have been marketed as an integral part of Australian identity. Complaints of appropriation encompass a range of performing, musical and artistic works including Indigenous words, designs, motifs, symbols, artworks, songs, stories and dance.[1] Indigenous people are concerned that use of Indigenous arts and cultural expression is occurring without the knowledge or permission of the Indigenous artists, or the artists' communities. Sometimes, such use is inappropriate, derogatory, culturally offensive, or out of context.

3.2 Unauthorised use of secret/sacred material

Indigenous people are concerned about the unauthorised use and reproduction of secret or sacred material for commercial purposes. This type of appropriation results in the disclosure of secret/sacred material to those not authorised to know or view such material.

Djon Mundine notes that "often inappropriate sacred images or objects were crassly used to sell common commercial goods without the artist s permission or payment".[2]

3.3 Appropriation of Indigenous languages

The Discussion Paper noted that Indigenous people often object to the use of their languages by non-Indigenous business as brand names, trademarks and business names. Indigenous people feel that the use of Indigenous words, motifs and symbols by non-Indigenous busi-

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[1] ATSIC, *Submission to The Aboriginal and Torres Strait Islander Culture and Heritage Inquiry*, p. 2.
[2] Djon Mundine, The Second Crime , (1997) *Periphery,* Issue No 30, February 1997, p 17.

nesses misleads consumers into believing that the business is owned and run by Indigenous people, or that benefits in some way flow back to Indigenous communities.[3]

Many Indigenous people confirmed this. Staff at the Victorian Corporation of Aboriginal Languages (VCAL), reported that people often call the organisation wanting to use words and names for new products, houses, boats and companies.[4] VCAL identified the need for protocols to be developed concerning language use in relation to a range of issues, including who can learn a language, how languages are taught in schools and how schools and universities deal with books and curricula produced as part of language teaching.[5]

Denise Karpanny, Indigenous Reference Group (IRG) member for the Federation of Aboriginal and Torres Strait Islander Languages (FATSIL) noted that FATSIL had concerns about the misuse of Aboriginal and Torres Strait Islander languages and that ownership and property rights of language were extremely complex, as not one person owns language. FATSIL supports policy development in this area but believes there must be effective informed debate concerning the issues as any reforms will have a lasting impact on future generations of Indigenous people.[6]

3.3.1 *The nature of Indigenous language*

A common issue respondents raised was that language issues are often put into one category. However, language applies to all aspects of Indigenous culture.[7] Languages describe the relationship between people and places including knowledge of natural features, plant and animals.

A submission by Kaurna Language and Language Ecology Class, University of Adelaide, elaborated on the nature of Indigenous language as follows:

> *Indigenous languages are regarded in a fundamentally different way to large, world languages like English. They are regarded as 'owned' entities in the same way that songs, ceremonies and land are owned. Kaurna people see the language as their soul, their whole being. Many Kaurna people feel that the language is the only thing they have left, as everything else has been taken.*
>
> *Indigenous languages are linked closely to their respective territories. The languages come from the land and are inextricably linked to the land and their associated cultures and peoples. Kaurna language, for instance, should be used within Kaurna country. Indigenous people should have the right to call places*

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[3] Quandamooka Lands Council Aboriginal Corporation, Submission to *Stopping the Ripoffs*, 1994.

[4] Robyn Bradley and Antoinette Smith, The Role of the Victorian Aboriginal Corporations for Languages , Indigenous Cultural and Intellectual Property Workshop, hosted by Mirimbiak Nations Aboriginal Corporation, Melbourne, October 1997.

[5] *Ibid* and also Lynette Dent, Language issues in the KODE School , Indigenous Cultural and Intellectual Property Workshop hosted by Mirimbiak Nations Aboriginal Corporation, Melbourne, October 1997.

[6] Denise Karpanny, Presentation at the Indigenous Reference Group meeting, Sydney, September 1997.

[7] Robyn Bradley and Antoinette Smith, *op cit*.

within their country by their own Indigenous names. Language, land and culture are inseparable.[8]

3.3.2 Other concerns in relation to use of Indigenous language

A submission from Rob Amery and the Kaurna Language and Language Ecology Class at the University of Adelaide noted the following uses as areas of Indigenous concern:

i) The use of Indigenous words and names for naming purposes:

- *brand names, trade marks, registered business names, etc;*
- *names used by sporting groups, clubs, societies, etc;*
- *names used by educational institutions;*
- *names used by government entities;*
- *names used by Aboriginal and Torres Strait Islander organisations;*
- *personal names (there are cases of people officially adopting Aboriginal names and changing their names by deed poll, or using Aboriginal names unofficially);*
- *place names;*
- *names for houses, properties, boats, etc.*

(ii) The use of Indigenous words, phrases and texts in cultural tourism:

- *words, phrases, mottos etc on tea-towels, T-shirts and other souvenirs;*
- *the use of words, phrases and texts in interpretive centre displays;*
- *the use of words, phrases and texts on signage for heritage trails;*
- *the use of Indigenous languages by tour guides.*

(iii) The use of Indigenous languages in education:

- *teaching languages within courses of study;*
- *preparation of curriculum materials, textbooks and other educational materials*

(iv) The use of Indigenous languages within literary, performing and artistic works.

- *books, songs, plays, poetry and other works written in Indigenous languages;*
- *translations of stories, plays, songs, poetry and other works into the Indigenous language.*

(v) Historical and archival materials:

- *hymns, prayers, Ten Commandments, Bible translations,*

[8] Rob Amery and Kaurna Language & Language Ecology Class, University of Adelaide, Submission to *Our Culture: Our Future*, October 1997.

speeches and other materials written in Indigenous languages;

- *grammars, dictionaries and other materials which document and describe Indigenous languages.*

(vi) The products of research into Indigenous languages:

- *recording oral texts in the language;*
- *modern grammars, dictionaries and linguistic analysis;*
- *articles written on and about Indigenous languages.*

(vii) Indigenous languages and the Internet:

- *the use of Indigenous languages for names, mottos etc on home pages;*
- *posting vocabularies, texts and other language materials on the net.*

(*viii*) *The (mis-)appropriation of Indigenous languages in the construction of "new age" knowledges*

In relation to the points raised above, much depends on the identity of the user, the context in which the language is used and the purposes for which it is used. Does the user receive financial gain or kudos through use of the language? Is the use of the language for educational purposes? Is the use of the language in the interests of the Indigenous community? Is the language used within the territory to which it belongs? Is the user Indigenous or non-Indigenous? If the user is Indigenous, is the user affiliated to the language group?[9]

3.3.3 *Recording of Indigenous languages*

A submission from Wangka Maya Pilbara Aboriginal Language Centre raised concerns that in the past, much information recorded about Indigenous languages has been taken away in material form and never returned to the community in any tangible, assessable or useful form.[10] "In terms of copyright, the special provisions for researchers regarding skill, labour and effort amount to nothing if research is undertaken without informed consent and realistic returns to the community," the centre noted.[11]

This point was echoed by Rob Amery and the Kaurna Language and Language Ecology Class, who noted that recording Indigenous languages creates various levels of rights regarding Indigenous language, teaching and the development of language curricula.[12] The following example highlights the various levels of rights and how they affect Indigenous peoples ability to control use of their languages.

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[9] Rob Amery and Kaurna Language & Language Ecology Class, University of Adelaide, Submission to *Our Culture: Our Future*, October 1997.
[10] Wangka Maya Pilbara Aboriginal Language Centre, Submission to *Our Culture: Our Future*, October 1997
[11] *Ibid,*
[12] Rob Amery and Kaurna Language Class, *op cit*.

Indigenous language and various levels of rights

A set of language learning tapes and tape transcripts was produced for the Kaurna Language and Language Ecology" course introduced at the University of Adelaide in July 1997. Most of the script was prepared by a non-Indigenous lecturer. The tapes were recorded by that non-Indigenous lecturer with two local Indigenous people. The recordings were made at the University of Adelaide studios using the university's technicians.

The submission notes that there are three different sets of interests in the ownership of these materials:

- ¥ Group rights over the Kaurna language, which belongs to the Kaurna people.
- ¥ Institutional rights. The materials were prepared for a university course with the assistance of the university.
- ¥ Individual intellectual property rights, held by both Indigenous and non-Indigenous people in this case.

Who should have the right to say whether these materials can be used by a different institution in the delivery of courses? Normally the institution would be able to sell courses to another institution. But as noted by the submission from Rob Amery and the Kaurna Language and Language Ecology Class, it is important that the Kaurna community should have the final say in such matters.[13]

3.4 Appropriation of Indigenous spirituality

Another concern is the increasing desire of non-Indigenous spiritual seekers to share and experience Indigenous spiritual rituals. In the United States, Indigenous Americans are outraged by the commercialisation and derogation of indigenous American rituals, often by non-Indigenous people, including medicine wheel ceremonies and sweat lodges. In Australia, too, the encroachment of "new age" spirituality into Indigenous spirituality is causing similar concern. One example, in 1994, was the best-selling book *Mutant Message Down Under*, by Marlo Morgan, which was marketed as a true account of the author s real spiritual experiences among a group of Aboriginal Australians known as "Real People". According to one journalist s report, there is speculation over whether Morgan ever made the journey described in the book.[14] Robert Eggington, of Dumburtung Aboriginal Corporation, condemns the book as a "fabricated fantasy". He further notes that "if she has done what she claims to have done without iniatic right, it is punishable by death under Aboriginal law".[15]

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[13] *Ibid.*

[14] Susan Wyndham, The Mystery of Marlo Morgan Down Under , *The Australian Magazine*, 29-30 October 29-30 1994, pp 26-28.

[15] Robert Eggington, Dumbartung Aboriginal Corporation, Bounuh Wongee, Message Stick , *A Report of Mutant Message Down Under*, 1995.

3.5 Appropriation of Indigenous biodiversity knowledge

3.5.1 *Medicinal knowledge*

A major concern of Indigenous people is that their cultural knowledge of plants, animals and the environment is being used by scientists, medical researchers, nutritionists and pharmaceutical companies for commercial gain, often without their informed consent and without any benefits flowing back to them.

Indigenous people have long been aware of the medical properties of plants in their local surrounds. Traditional knowledge is regarded as common heritage and not as a commodity to be patented for commercial exploitation, perhaps to the exclusion of traditional owners. As with many other aspects of Indigenous culture, knowledge of different plants and their healing properties is restricted to a particular class of people. Knowledge about the therapeutic properties of plants is passed on by word of mouth. Indigenous people get access to such knowledge when they have attained the appropriate level of initiation. Just as practitioners of western medicine must study medicine before they can practise it, so a certain degree of knowledge is required before a plant can be used safely in Indigenous society.

Indigenous medicinal knowledge is now sought after by medical researchers and pharmaceutical companies to save research time and money. Now when plants are identified as commercially viable, their active properties are isolated and the pharmaceutical company takes out a patent on inventions relating to those plants, even though their benefits have been known to Indigenous people for years. One example is the Smokebush.[16]

Smokebush (*Genus Conospermum*)

The Smokebush grows in the coastal areas between Geraldton and Esperance in Western Australia. Indigenous people from this region have traditionally used Smokebush for healing. Fourmile reports that in the 1960s, the Western Australian Government granted the US National Cancer Institute (NCI) a licence to collect plants for screening purposes.[17] In 1981, specimens of the Smokebush plant were sent to the NCI to test for the presence of cancer-fighting properties.

The specimens were found to be ineffective, but they were held in storage until the late 1980s when they were tested again in the quest to find a cure for AIDS. Out of 7,000 plants screened from around the world, the Smokebush was one of only four plants found to contain the active property *Conocurovone*, which laboratory tests showed could destroy the

[16] *Genus Conospermum.*
[17] Henrietta Fourmile, *Protecting Indigenous Intellectual Property Rights in Biodiversity*, Kaltja vs Business Conference, 28 August 1996.

HIV virus in low concentrations. This "discovery" was subsequently patented. The US National Cancer Institute has since awarded Amrad, a Victorian pharmaceutical company, an exclusive worldwide licence to develop the patent.

Under amendments to the *Conservation and Land Management Act 1984 (WA)* in 1985 and the *National Parks and Wildlife Act (WA*), the Western Australian Minister of the Environment has the power to grant exclusive rights to Western Australian flora and forest species for research purposes. In the early 1990s, the Western Australian Government also awarded Amrad the rights to the Smokebush species, to develop an anti-AIDS drug. According to Blakeney, Amrad paid $1.5 million to the WA Government to secure access to Smokebush and related species.[18] Blakeney further reports that if *Conocurovone* is successfully commercialised, the WA Government will recoup royalties of $100 million per year by 2002.[19]

Indigenous people are concerned that they have not received any acknowledgment, financial or otherwise, for their role in having first discovered the healing properties of Smokebush. According to the Centre for Indigenous History and Arts (WA):

> *The current legislation disregards the potential intellectual property rights that Indigenous peoples in WA have in flora on their lands. Furthermore, multinational drug companies could be sold exclusive rights to entire species of flora, preventing anyone from using those species for any other purpose without the consent of the companies.*
>
> *Indigenous peoples in WA now face the possibility of being prevented from using any of the flora which is the subject of an exclusive agreement.*
>
> *It is therefore vital that any reform of the intellectual and cultural property laws include provisions for the recognition of Indigenous peoples as the native title owners of all the biological resources of the flora and fauna that are on their lands.*[20]

3.5.2 *Nutritional knowledge*

Knowledge concerning the nutritional use of Indigenous resources has been extensively documented. Indigenous people are concerned that such information is often given to researchers and others without Indigenous people realising how this information might be exploited. The food industry itself increasingly recognises the value of Indigenous knowledge concerning the nutritional benefits of particular plants and animals.

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[18] Professor Michael Blakeney, Bioprospecting and the Protection of Traditional Medical Knowledge , *European Intellectual Property Reports*, vol 6 (1997) pp 296-303, p 196

[19] *Ibid*.

[20] Centre of Indigenous History and the Arts, Submission to *Our Culture: Our Future*, October 1997.

3.5.3 *Denial of access to Indigenous land and resources*

In relation to bioprospecting, Indigenous people noted concerns about the fact that the quest for species requires access to the land for screening activities. This has led governments to exercise rights over the land and to the denial of the rights of Indigenous people to their traditional lands. The process places Indigenous people in positions where they cannot manage and develop their inherited medicinal knowledge. Under state conservation and land laws, Indigenous people can be restricted access to their land and the plants and animals there, while governments can freely license the rights to this land and the plants and animals within its domain.

3.6 Collection of natural resources

Indigenous people are also concerned that government conservation authorities are collecting specimens from Indigenous land as part of their programs to complete inventories. The collected species are made available for research without reference to the Indigenous owners from whom the specimens were collected.[21]

3.7 Appropriation of cultural objects

3.7.1 *Objects held by museums, universities and cultural institutions*

A large amount of Indigenous movable cultural property, such as art, stone implements and carvings, is now held by universities, museums, galleries and other collecting institutions. Indigenous people are concerned that much of this material was taken from them without their free and informed consent.[22] The Tasmanian Aboriginal Land Council noted that government departments have collected information that Indigenous communities are not aware of. Ownership of this material should be vested in the relevant Indigenous group. Sacred or sensitive material should either be returned or controlled by the relevant Indigenous group.[23]

Many Indigenous people feel it is inappropriate for universities, museums and galleries controlled by the dominant culture to own and exhibit Indigenous cultural items as artefacts .[24] As Albert Mullett pointed out, these cultural objects were created for cultural purposes and were never intended to be preserved forever.[25]

Clements further emphasises the tendency of institutions to focus on the academic and historical value of Indigenous cultural material:

> *Aboriginal people s cultural aspirations are inextricably linked to land ownership. Many museums and collecting institutions are only interested in*

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[21] ATSIC, Submission to *Stopping the Ripoffs*, (1994).
[22] Interview with Liz McNiven, Indigenous Reference Group member.
[23] Tasmanian Aboriginal Land Council, Submission to *Our Culture: Our Future*, October 1997.
[24] Albert Mullett, Presentation to the Indigenous Cultural and Intellectual Property Workshop, hosted by Mirimbiak Nations Aboriginal Corporation, Melbourne, October 1997.
[25] *Ibid.*

obtaining and displaying objects for their academic and curiosity value. The perspective fails to recognise that Aboriginal culture is alive and dynamic.[26]

There is also the fact that having survived the eras of invasion and assimilation, such items are crucial to Indigenous people to help rebuild their cultural foundations.

3.7.2 *Repatriation by museums, universities and cultural institutions*

Indigenous people are also concerned about the repatriation of their cultural objects held by museums, universities and cultural institutions.

Many museums reported that they are now taking part in repatriation programs. For example, the Australian Museum has a repatriation program for cultural objects which has seen the return of several objects to Indigenous communities.[27]

Indigenous people are concerned that the return of such material by museums, universities and cultural institutions is often conditional and on a "permanent loan" basis. For example, museum repatriation programs return material on loan to Indigenous groups only if they have adequate storage and maintenance facilities at their cultural centres or keeping places.[28]

Another concern is that some museums see the need to repatriate cultural material as a moral or ethical obligation, rather than a legal requirement.

3.7.3 *Indigenous ancestral remains*

Indigenous laws hold that the deceased will not enjoy spiritual rest until they are returned to their ancestral home and given the last rites in accordance with tradition. For this reason, Indigenous people feel a deep responsibility to their ancestors to respect their remains and to repatriate them, if necessary, to their rightful burial grounds.[29]

Museums, universities and other collecting institutions house a substantial number of Indigenous remains. The Aboriginal and Torres Strait Islander Social Justice Commissioner submitted that, "While the identities of many individuals whose remains are now kept in these institutions are unknown, those of many more would be revealed if access to all relevant documents was to be enabled."[30]

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[26] Alan Clements, Keynote Address COMA 93: The Central Land Council Policy of Sacred Objects , (1996) *COMA Bulletin of the Conference of Museum Anthropologists*, Issue No 28 August 1996, pp 9-11, at page 10.
[27] Sheryl Connors, Australian Museum, Jumbunna Learning Circle on Indigenous Cultural and Intellectual Property Rights and Freedoms, October 1997.
[28] Delegates at both the Jumbunna Learning Circle on Indigenous Cultural and Intellectual Property Rights and Freedoms (October 1997) and the Indigenous Cultural and Intellectual Property Workshop hosted by Mirimbiak Nations Aboriginal Corporation (October 1997) expressed these concerns.
[29] Aboriginal and Torres Strait Islander Social Justice Commissioner, *Submission to the Culture and Heritage Inquiry, op cit*, p 25.
[30] *Ibid.*

This submission also mentions Indigenous peoples concerns that museums and other institutions have failed to disclose information regarding their collections of remains to the relevant communities. Instead, it is up to Indigenous people to investigate, locate, and seek to repatriate their ancestors remains. The Aboriginal and Torres Strait Islander Social Justice Commissioner s *Submission to the Culture and Heritage Inquiry* states that many collections were compiled with little respect for the rights of the dead and the Indigenous communities to whom the remains belonged.

Several museums are taking part in repatriation programs. The Tasmanian Museum and Art Gallery reported that it is repatriating human remains to Indigenous Tasmanian communities.[31]

3.8 Human genetic material

Indigenous people are concerned about their lack of control over the use of their genes and tissues in genetic testing and screening projects, such as the Human Genome Diversity Project (HGDP). They feel they are being exploited, as their genes are used for research without their control or ownership and often without their knowledge or consent as a group.[32] Under the existing framework of intellectual property rights, Indigenous peoples cannot control the use of the genetic material taken from them.

Michael Mansell reports on Indigenous concerns over the HGDP in Australia and the legal implications of scientists using Indigenous blood samples where consent from the individual is obtained:

> *There is no law in Australia preventing the taking of blood from Aborigines by scientists who not only gain permission to do so, but who also explain the purpose behind it ... what if one or a minority of Aborigines from a particular group goes along with the project despite the strong protest of the broader collective?*[33]

Indigenous people throughout the world are concerned about the implications genetic research and screening projects such as the HGDP may have for them and their cultures. Indigenous genes are specifically given priority by Human Genome Organisation (HUGO) scientists because they are considered to be "pure" and endangered and therefore of great scientific and commercial value.

The concerns of Indigenous people include:

- Genetic testing and screening of people allows researchers to gain information about individuals and populations. This information may reveal some potentially damaging facts about individuals and populations, such as who is susceptible to certain condi-

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[31] Tasmanian Museum and Art Gallery, Submission to *Our Culture: Our Future*, October 1997.

[32] Michael Dodson, Aboriginal and Torres Strait Islander Social Justice Commission, Human Rights and Equal Opportunity Commission, Indigenous Social and Ethical Issues: Control of Research and Sharing the Benefits , Address to the Scientific, Social and Ethical Issues Symposium, 22 July 1997.

[33] Michael Mansell, Barricading Our Last Frontier - Aboriginal Cultural and Intellectual Property Rights , in *Our Land is Our Life: Land Rights - Past, Present and Future*, University of Queensland Press, 1997, pp 195-209.

tions such as cancer and alcoholism. Hence, there is potential for discrimination against people on the basis of their genetic makeup.[34]

- A particular problem may arise where a familial or clan group refuses to allow use of its genetic material, but one of its members consents to genetic material being removed from himself or herself.[35]

- Research companies are patenting Indigenous genetic material for commercial exploitation throughout the world as new medicines or vaccines. Already, the Rural Advancement Foundation International (RAFI) reports three patent claims by the US Government on cell lines from Indigenous people in Panama, Papua New Guinea and the Solomon Islands.[36] Despite the moral question as to whether genetic material can be "owned", Indigenous people usually do not receive a share in the profits, even though their biological resources have been essential to the development of these new medicines.[37]

- Museum collections of Indigenous human remains also cause concern, particularly the risk of physical anthropologists obtaining samples of DNA from the muscles, bones, teeth or hair of these remains to analyse the genetic disposition of these people before colonisation.[38]

The Mataatua Declaration on Cultural and Intellectual Property Rights called for the HGDP to be immediately put on hold until Indigenous peoples around the world have been fully briefed on the implications of the project.[39] Similarly, Indigenous peoples from the Pacific at the Consultation on Indigenous Peoples Knowledge and Intellectual Property Rights in Suva in 1995 proposed and sought support for a plan of action to establish a treaty declaring the Pacific region a life-forms patent-free zone.[40]

Human Genome Diversity Project (HGDP)

The Human Genome Diversity Project is an international scientific project which aims to map and sequence the composition of the human genome. The HGDP, dubbed the "Vampire Project", involves the collection, preservation and analysis of blood, skin and hair samples from different ethnic groups around the world and the accumulation and storage of genetic information from this material in databases.

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[34] Privacy Commissioner, Human Rights and Equal Opportunities Commission, *The Privacy Implication of Genetic Testing*, Report No 5, September 1996, p 20.
[35] Keith Joseph, John Plunkett Centre for Ethics in Health Care, St Vincent s Hospital, Ethical Aspects of Genetic Screening , (Summer 1997) in *Young Lawyers News*, Summer 1997, pp 5-6.
[36] RAFI Communique, Jan/Feb 1994, The Patenting of Human Genetic Material , Jan/Feb 1994, as cited online at http/www/charm.net/‘rafi/19941.html, p 1.
[37] Brant Pridmore, The New Genetics: Risks and Rewards , (Summer 1997) in *Young Lawyers News*, Summer 1997, p 6.
[38] Liz McNiven, Submission to *Our Culture: Our Future*, October 1997.
[39] See Appendix 5.
[40] See Appendix 5.

The project, which began in 1990 and is due for completion in 2005, will enable scientists from the Human Genome Organisation (HUGO) to study the samples in the future, when they believe many ethnic groups will have inter-bred with others and ceased to be sufficiently distinct to be deemed of scientific interest.[41]

Various community groups, including the Rural Advancement Foundation International (RAFI), have objected to the project. Critics argue that the main unit of investigation is human populations which are assumed to be discrete in terms of genetic, linguistic and cultural characteristics and to have been so since prehistoric times. Critics argue that this is a false assumption given that human populations have intermingled over many thousands of years.

In the international arena, RAFI notes that, "Exclusive monopolies over human genetic material are becoming commonplace in the industrialised world, but the profound social, ethical and political issues arising out of private ownership of human biological resources are not discussed. In fact, the development of new technologies is occurring at such a rapid pace that social policies and legal systems are lagging behind."[42]

3.9 Access to and management of land and sites

The unauthorised and inappropriate use of traditional sites and land is a major issue for Indigenous people. For example, submissions to the *Stopping the Ripoffs* Issues Paper included concerns about the use of cave paintings for reproduction on T-shirts and photographing sacred sites for advertising campaigns. Access to these sites is often undertaken without consulting the Indigenous custodians.

Lack of consultation with Indigenous people regarding the tourism industry and the marketing, conservation, management and presentation of traditional sites is another concern. The development of Indigenous themes in the Australian tourism industry has given more and more people access to an increasing number of sacred sites and significant cultural places.

Sites uncovered in the interests of tourism lead to the physical destruction and uncovering of cultural sites and objects.

3.10 Documentation of Indigenous peoples cultures

Most documentation of Indigenous peoples cultural heritage is still compiled by non-Indigenous film-makers, anthropologists, researchers, archaeologists, government officials and the like. This "cultural documentation" is presented in varying formats including "books, scholarly and popular articles, films, audio recordings, photographs, manuscripts, theses and

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[41] Darrell A. Posey and Graham Dutfield, *Beyond Intellectual Property: Toward Traditional Resource Rights for Indigenous Peoples and Local Communities*, International Development Research Centre, Canada, 1996, page 161.

[42] RAFI Communique, *op cit*.

government records".[43] Moorcroft and Byrne state:

> *Many are invaluable, sometimes unique, records of forgotten traditions, long unvoiced languages and family and community histories. Those are vital to Aboriginal and Torres Strait Islander peoples sense of identity.*[44]

The crux of the problem is that Indigenous people do not own much of the information collected about them.[45] Like movable cultural property, most of this information is stored in archives, museums and other academic or cultural institutions. Indigenous Australians point out that they have little say about how this material is represented, accessed, used and disseminated. Often the terminology used by the original non-Indigenous recorders to catalogue items is very offensive.[46]

Knowledge often has been solicited from Indigenous people without them being given the details or the truth concerning its use. For example, information given for the purposes of research is sometimes commercialised, generating income for the researcher. Sometimes, too, the means of dissemination may be offensive and misleading.

Ethnographic material is today central to Indigenous peoples quest to revive and continue their culture, as well as being crucial to research on native title. Eddie Koiko Mabo reportedly used a film made by A.C. Haddon on Aborigines and Torres Strait Islanders on Murray Island, to help demonstrate and prove his people s continuation of cultural practices before the High Court of Australia. This helped lead to the recognition of native title rights.[47]

Feedback from the consultation process also noted the following issues:

3.10.1 *Recording of oral tradition on film and audiotape*

Indigenous people note that their interests in documentation of their cultures in recordings, books and reports are not recognised under copyright law.

Indigenous cultures, stories, information and knowledge are passed from generation to generation by oral means. Generally, under the *Copyright Act 1968*, once these stories are published in books and other documents, the person responsible for transcribing the oral story into written form is recognised as having copyright over the material form.[48] Similarly, when a performance of a previously unpublished story or

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[43] Heather Moorcroft and Alex Byrne, Intellectual Property and Indigenous Peoples Information , in (1996) vol 27(2) *Australian Academic & Research Libraries*, vol 27 No 2, June 1996, pp 87-94, at p 88.
[44] *Ibid*, p 88.
[45] Henrietta Fourmile, Who Owns the Past? Aborigines as Captives of the Archives , (1989) vol 13(1) *Aboriginal History*, vol 13, no 1, 1989 pp 1-8.
[46] Ros Fraser, *Aboriginal and Torres Strait Islander people in Commonwealth records. A Guide to Records in the Australian Archives ACT Regional Office*, AGPS, Canberra, 1993, p 23.
[47] Australian Film Commission, *Submission to the House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs, Inquiry into Indigenous Culture and Heritage*, p 7.
[48] Section 35(2) *Copyright Act 1968*.

dance is recorded on film or audiotape, the maker of the recording is acknowledged legally as owning that film or tape.[49]

3.10.2 *Access to archives*

Access to archives is important to Indigenous people. The Australian Film Commission Report, *The Bush Track Meets the Information Superhighway*, states:

> *Indigenous peoples desire and need to access archives should not be viewed as a problem for those who currently control these records. The majority of these records are stolen images: the communities want to see what has been stolen and have the control of this material returned to them.*
>
> *Commercial considerations are a secondary issue, once people have assessed this material (held in archives), code(s) of ethics determining what can be used by others and under what conditions will be developed. Control over archival material is a Native Title issue and of fundamental importance to Indigenous Australia. The notion of archival material being in the public domain deeply concerns Indigenous people; this notion has been applied to some material without any consultation.*[50]

3.10.3 *Representation of Indigenous cultures in archives*

Many Indigenous people believe they have been misrepresented by anthropologists, researchers and film-makers, citing misinformation contained in research documents, archives, genealogies, films, literature and other forms of media.[51]

This was confirmed by Alex Byrne, who noted Indigenous concerns about the representation of Indigenous cultures, history and peoples in records and publications held in libraries and archives. According to Byrne, such publications hold a wealth of information relating to Indigenous people and are of invaluable use to them in their quest to assert their identities and recover lost or fractured elements of their cultures. Byrne notes the protocols developed by the Aboriginal and Torres Strait Islander Library and Information Resources Network, which deal with some of these issues.[52]

3.10.4 *No informed consent*

Several submissions noted Indigenous concerns about misinformation in research, archives, genealogies, film, literature and other forms of media.[53] Indigenous Australians complain they have little say about how this material is represented,

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[49] Section 98(1) & (2) and Section 22(4) *Copyright Act 1968.*

[50] Prepared by Nick Richardson for the Indigenous Branch of the Australian Film Commission, *The Bush Track Meets the Information Superhighway*, April 1997, p 30. emphasis added by author.

[51] Heather Moorcroft and Alex Byrne, *op cit*, p 87.

[52] Alex Byrne, Director Information Services, Northern Territory University, Submission to *Our Culture: Our Future*, October 1997. (See Ch 23.5.)

[53] Moorcroft and Byrne, *op cit*, p 87.

accessed, used and disseminated. Often the terminology used by the original recorders to catalogue items is offensive.[54]

Indigenous people are also concerned that their images and knowledge have been taken without them being told its intended use; or they are told it will be used for research only to find it has been commercialised and generating income for the researcher. Others argue that many images or information now held in Australian cultural institutions was taken from Indigenous people at a time in Australian history when Indigenous people were said to be a dying race. Indigenous people, disenfranchised by assimilation policies, were therefore not in a position to consent to people taking their images[55] or to the documentation of other aspects of their cultural heritage in books or reports. The later commercial use of these images and information goes against the original intention.

The creation of databases of this material further causes concern to Indigenous people,[56] particularly when these databases are available on-line or on the Internet and for commercial purposes.

3.11 Research issues

Indigenous people are perhaps the most researched people in the world. But in the past research on Indigenous issues and people has generally been conducted by non-Indigenous people. For many Indigenous communities and organisations, there has been little consultation or self-determination in the conduct of the research.[57]

The Koori Centre submitted, "Much of the present research is based on definitions by non-Aboriginals, of what is perceived to be Aboriginal problems. Coupled with this are non-Aboriginal solutions. Thus Aboriginal people become objects of research where problems and solutions are defined outside Aboriginal and Torres Strait Islander frames of reference."[58]

3.11.1 *Not informed on full use of cultural material researched*

Researchers, writers and the like who produce books and reports on Indigenous people and their cultures generally own the copyright in these materials. As copyright owners they are free to use the material however they wish. This was a common concern for Indigenous groups who consented to provide information on the basis that it

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[54] Ros Fraser, *op cit*, p 23 as cited is Rosly, p 63.
[55] Wal Saunders, Executive Officer, Indigenous Branch, Australian Film Commission, Presentation at the Indigenous Cultural and Intellectual Property Workshop, hosted by Mirimbiak Nations Aboriginal Corporation, October 1997.
[56] Australian Film Commission, *Submission to Culture and Heritage Inquiry*, 1994, p 12.
[57] Wendy Brady, Indigenous control of Aboriginal and Torres Strait Islander Research , ASA Conference 1992, Conference Papers Vol 2, p 311.
[58] Taken from the Preamble of the Koori Centre, University of Sydney, *Principles and Procedures for the Conduct of Research*, 1993.

was for research, only to find out later that the researcher has found a commercial use for the information.[59]

3.12 Teaching Indigenous studies

Another issue raised was that teaching Indigenous cultural studies in schools, universities and colleges is often done without Indigenous involvement and without consultation with Indigenous people. Indigenous people are concerned that the cultural significance of information might be glossed over.[60]

3.13 Indigenous music

Indigenous music has enjoyed a recent increase in popularity. Non-Indigenous composers and musicians are making use of recordings of Indigenous traditional music to create new music. According to Merson, the French composers, Deep Forest, produced a hit single by sampling songs from Pygmy people in the Ituri Forest, Zaire and mixing these recordings with synthesised music to produce a new song.[61] The original recordings of the Pygmy people were produced for ethnographic reasons, but are now being used commercially. This type of sampling is increasingly significant in the light of new recording techniques. A submission from Daki Budtcha Pty Ltd, an Indigenous music publishing company, notes:

> *Exploitation of Indigenous music has increased for many reasons, some of which include: (i) the increased appeal and popularity of tribal chants to the ears of industry gurus, (ii) the search for something new in the commercial world ...*[62]

Another issue is that Indigenous musicians are often not paid mechanical royalties for recordings of their so-called "traditional" music. Record companies continue to sell and distribute copies of "traditional" music recordings, but allege they do not have to pay royalties because the music reproduced is not a copyright work.

Gibson notes the common problem where musicians works are recorded with their initial consent, yet without the knowledge or understanding of the *Copyright Act* to inform them that the person or commercial company recording their work may in fact possess copyright over the recording and thus profit from mass-produced copies of it. Gibson suggests that a way to overcome this problem may be to create legal recognition of the non-material copyright over cultural expressions.[63]

Another problem is the failure to attribute the song-writer or, if traditional, the group. One example, noted by Daki Budtcha Pty Ltd, involved a record company recording a song of an

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[59] Warnayaka Arts Centre Inc, Submission to *Our Culture: Our Future*, October 1997.

[60] Discussions from the Knowledge and Learning Circle on Indigenous Intellectual Property Rights and Freedoms, hosted by Jumbunna Centre for Australian Indigenous Studies, Education and Research, October 1997.

[61] John Merson, ABC Radio Science Program, *Gene Prospecting*, Part One.

[62] Daki Butcha Pty Ltd, Submission to *Our Culture: Our Future*, October 1997

[63] Chris Gibson, Submission to *Our Culture: Our Future*, October 1997.

Indigenous composer without providing any attribution. Under the existing *Copyright Act*, there is no right for a person to be attributed for his or her work, whereas this attribution is of vital importance to cultural work and is seen as a mark of cultural respect to the creator.

Another significant issue is the fact that many Indigenous composers are not members of industry associations such as ARIA, AMPAL, AMCOS or APRA. Therefore, industry agreements concerning compulsory licensing schemes do not always work for Indigenous musicians and composers.

3.14 The impact of new technology

Recent technological innovations like CD-ROMs, CD-Is, videodiscs, the Internet and other on-line services[64] have introduced a multitude of global communication links and formats which allow Indigenous people living in remote regions of Australia greater access to networks facilitating the exchange and convergence of ideas and information. These networks provide Indigenous people with niche markets and the opportunity to be in control of these new media.[65] There are already numerous web sites relating to a wide range of Indigenous affairs and interests.

McMahon noted that despite the benefits new technology brings to Indigenous people, "Issues of protection remain uncertain and the potential use and dissemination are wide."[66]

As technology continues to advance, there is an urgent need to identify and promote strategies for the dissemination of Indigenous cultural material through new media. Strategies need to consider the use of Indigenous cultural material by both Indigenous peoples and non-Indigenous publishers, its convergence in the new media and use on the Internet.

Multimedia and on-line access to government and cultural institutions is changing the nature of document and information management. Many government departments around the world now place their records and collections on the web or in CD-Rom format.

3.14.1 *When the Bush Track Meets the Information Superhighway*

> In 1996, the Indigenous Branch of the Australian Film Commission conducted a multimedia project, *When the Bush Track Meets the Information Superhighway.*[67] The project was designed to provide 12 Indigenous communities with information and hands-on access to the world-wide web; experience in designing web sites and using CD-based programs. It also set out to explain the use of archival material so that

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[64] A working definition of on-line service adopted by the ABA in their report to the Minister of Communications and the Arts is: A service that makes content available by a means of a telecommunications network which enables the transmission of information between users or between users and a place in the network.

[65] Marcia Langton, *Well, I Heard it on the Radio and I Saw it on the Television*, Australian Film Commission, Sydney.

[66] Michael McMahon, Indigenous Cultures, Copyright and the Digital Age , (1997) vol 3(90) *Aboriginal Law Bulletin* 1997, pp 14-15.

[67] Australian Film Commission, *The Bush Track Meets the Information Superhighwa*y, April 1997.

Indigenous groups would be better able to make informed decisions about its use within their communities and the use of their culture in programs and products made by others.[68]

According to the AFC report, the workshops were successful. Many participants appreciated the information being delivered in such a culturally appropriate way, where Indigenous people were within their own cultural environments. Many people expressed the hope that these workshops would be regular events. The involvement of the Australian Copyright Council at two of the workshops was useful for participants. The report notes three main priorities for multimedia development:

1. Provision of suitable equipment in communities;
2. Sufficient training to ensure communities are able to develop multimedia on their own terms; and
3. Control over archival material.

The benefit of multi-media in the transmission of culture was also highlighted. Oral history can be presented to children in an interactive manner which can be developed in the community, thereby maintaining its cultural relevance as a living cultural representation.[69]

The AFC also reported that Indigenous people had many concerns about the current use of their cultural material by the non-Indigenous multi-media industry. Inadequate protection in existing government legislation was identified as a primary problem.

3.14.2 *The Internet and Indigenous cultural material*

A submission from the National Indigenous Media Association of Australia (NIMAA) also noted the emergence of the Internet and its potential impact on Indigenous cultural knowledge systems:

> *Cultural material is being placed on the world-wide web. A lot of the old stories have already been translated and put on CD-Rom.*[70]

In response to concerns, NIMAA has formed a collaboration with the Queensland and Northern Territory Multi-media Centre (QANTM) to develop a policy and protocols on intellectual property rights issues.[71]

Several submissions expressed concern about new technology, especially the Internet. Warnayaka Arts Centre Inc - whose submission was made on behalf of the

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[68] Information provided by Walter Saunders, Executive Director, Indigenous Branch, Australian Film Commission.
[69] AFC, *The Bush Track Meets the Information Superhighway, op cit*, p 30.
[70] National Indigenous Media Association of Australia, Submission to *Our Culture: Our Future*, October 1997.
[71] *Ibid.*

Warlpiri people of Lajamanu - questioned how sacred Aboriginal images can be protected when they are so easily accessible to the rest of the world. The problem is tracing infringers. For reasons such as these, Warnayaka is wary about setting up a website.[72]

These reservations with new technology media such as Internet and CD-Rom publications is shared with other Indigenous communities, who tend to consider publishing in new media technology as very different from publishing in books. This stems from the belief that books tend to have a finite number of copies and circulation, which can to some extent be monitored, whereas on-line and CD-Rom are perceived as being much harder to monitor.

3.14.3 *Creation of databases*

The creation of databases of Indigenous cultural material held by government departments, universities, museums and archives is of concern to Indigenous people,[73] particularly when these databases are accessible on the Internet, and often for commercial purposes.

In *Creative Nation* (1990), the then Federal Government stated that it would investigate the establishment of a database to provide Indigenous people with access to information on material held in institutions.[74] But the issue of who would control or own such a database was not and has not been addressed. As the AFC noted:

> *This is a vital issue in regard to the development of new technology-based forms of compiling and disseminating information held by Indigenous communities and institutions. Issues relating to Indigenous control over the collection, administration and distribution of such databases and content developed for disc-based or on-line services must be addressed.*[75]

3.15 Authenticity and cultural integrity

Indigenous people are concerned about issues of authenticity and cultural integrity.

3.15.1 *Use of Indigenous designs and styles by non-Indigenous artist*s

A common complaint is that non-Indigenous artists and graphic designers use Indigenous designs and images in their artwork and therby pass off their work as Aboriginal styles. The X-ray Koala is an example of a stylised version of Indigenous art. (The X-ray or rarrk style comes from Arnhemland, where there are no koalas.) The recognition of these styles as Aboriginal does not necessarily depend on the cultur-

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[72] Warnayaka Arts Centre Inc, Submission to *Our Culture: Our Future*, October 1997.
[73] Australian Film Commission, *Submission to the House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs, Inquiry into Indigenous Culture and Heritage*, p 12.
[74] Commonwealth of Australia, *Creative Nation*, p 79.
[75] Australian Film Commission, Submission to *Stopping the Rip-offs*, 1994.

al origins of the artist, but rather on its distinctive style which is linked to popular concepts of what constitutes Aboriginal art.[76]

This problem exists at all levels of the market and raises the complex issue of "what is Aboriginal art", as well as what should be considered "authentic" and whether non-Indigenous people should use Indigenous images in their work.[77]

3.15.2 *Use of Indigenous images by other Indigenous artists*

Another problem is the appropriation of Indigenous art styles, stories and themes by other Indigenous artists who are not associated with the particular style or dreaming story they have depicted in their artwork. Examples include adopting Wandjina styles[78] in their artwork when they do not have permission to do so from the custodians of these images; or men painting women s dreaming using styles associated with geographic areas, such as the Papunya "dot style".

3.15.3 *Misleading product labelling*

Misleading labelling is affixed to a substantial range of products such as T-shirts, clothing and souvenirs, claiming these products are "authentic Aboriginal", "Aboriginal-style" or wrongfully alleging that royalties are paid to the artists whose designs are represented.

This problem is becoming more widespread as producers and retailers seek to promote their products as "authentic" and that benefits in some way flow to Indigenous artists.

The *Trade Practices Act 1974 (Cwlth)* prevents misleading and deceptive conduct. This is discussed in Chapter 7.

3.15.4 *Imported goods passed off as authentic*

A large amount of "ripoff" material is mass-produced overseas in countries where labour is cheap and there are no copyright laws. These goods are imported into Australia and sold in tourist shops alongside authentically produced Indigenous products.

In 1994, Maruku Arts Centre complained that imported plastic replicas of the wooden coolamons made by the Mutitujulu people were being sold in Australian stores alongside their genuine counterparts, but at a cheaper price. While the imported coolamons had stickers which denoted the country of origin, these were easily removed or lost.[79] Other examples of imported ripoffs include carpets reproducing Indigenous artworks

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[76] Dr Vivian Johnson and Third Year Sociology Students, *The Copyright Issue*, Macquarie University, p 3.
[77] *Ibid*, p 4.
[78] Wandjinas are from Western Australia s Kimberley area.
[79] National Indigenous Arts Advocacy Association, Submission to *Stopping the Ripoffs*, 1994

made in Vietnam;[80] and fabric produced in China reproducing the artworks of Johnny Bulun Bulun.[81] The concern for Indigenous peoples is that the buyer of such imported goods is deceived into thinking that the goods are authentic Aboriginal craft, produced in Australia by Indigenous Australian artists and craft workers.

3.15.5 *Fraudulent representations of artworks*

There are several reports of artworks being sold by art and antique dealers that are not painted by Indigenous artists as claimed, or are not as old as alleged. Issues regarding provenance and the illegal procurement of some artworks and artefacts are therefore also of concern.

Again, this type of conduct may amount to misleading and deceptive conduct, which is discussed in Chapter 7.

3.15.6 *Appropriation of Indigenous personas*

There have been recent reports of non-Indigenous writers and artists adopting Indigenous personas to promote their works; for example, Elizabeth Durack/Eddie Burrup and Leon Carmen/Wanda Koolmatrie. This is a major concern for Indigenous people who consider this is appropriation of Indigenous identity.[82]

Laws relating to fraud and misrepresentation may offer assistance where false documents are used or when contracts and agreements are signed. Laws relating to misleading and deceptive conduct under the *Trade Practices Act 1974 (Cwlth)* may also be useful. These are discussed in Chapter 7.

3.15.7 *Manufacturing and authenticity*

Another concern raised was that in some cases making a cultural product has a number of stages of production and that, in some instances, Indigenous people are only asked to contribute to a stage of this so that the products can be marketed by non-Indigenous manufacturers as authentic Indigenous products.

Karl Neuenfeldt gave an example relating to the production of didgeridoos:

> *Raw woods are cut in the Northern Territory (supposedly by Aboriginal people) and are trucked to Adelaide by commercial carriers (as backloads). The raw pieces are then stripped, have mouthpieces put on and are painted flat black (all by non-Aborigines). After curing , the blanks are dispersed to Aboriginal painters (from various regions of Australia) living in Adelaide who are paid a flat fee per instrument. The instruments are then marketed as Aboriginal made , which in a limited sense they are.*

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[80] These were the facts in *(Deceased Applicant) v Indofurn* (1994) 30 IPR 209.

[81] These were the facts in *Bulun Bulun v R & T Textiles* Federal Court of Australia, No DG3 of 1996.

[82] Anita Heiss, Appropriating our Black Voice , written for Network News, Queensland Community Arts Network, March 1998.

> *There is Aboriginal involvement at the beginning and end of the production process. One large manufacturer insists his didjs are authentic Aboriginal instruments and that he is being altruistic by involving Aboriginal people at all because it would be much easier (and more cost efficient) to get non-Aboriginal people to cut the wood and paint the didjs.*[83]

3.16 High resale value of artworks

> In some instances, Indigenous artworks appreciate in resale value over time, but the artist receives no benefit from the profitable resale of his or her work.

A recent example was that of Johnny Warangkula Tjupurrula. One of his paintings was purchased in the 1970s for $150. In June 1997, it was sold for $206,000. The artist, Johnny Warangkula Tjupurrula, was not entitled to any share of the money.

The right of an artist to share in the profit of the sale of an artwork is recognised in French law as the *droit de suite*. Unfortunately, this right is not recognised in Australian law. Some Indigenous arts centres are interested in introducing a resale royalty and are investigating the possibility of using contracts to enforce this.

In Australia, artists may make use of contract law to secure a reasonable share of profits earned from the sale of their work by entering into an agreement which includes such terms when the work is first sold. But this is limited to the first purchaser only. Second, third and subsequent purchasers are not affected because contracts are enforceable only against parties to the original contract.

3.17 Misrepresentation in the media

Indigenous people are also concerned about the way Indigenous issues are represented in the media.[84] For example, when a news item relating to an Indigenous community from one area of the country is run on television news, stock footage is often used which does not relate to that particular community.

3.18 Community organisations and copyright

Another concern raised by Indigenous people was the situation where an organisation claimed ownership of property, arts and craft work produced by Indigenous arts workers as part of a Community Development Employment Program (CDEP).[85] Under the *Copyright Act*, all works produced in the course of employment belong to the employer. CDEP funding creates a relationship of employer-employee between the artist and the organisation. It was reported that this arrangement had in some instances lead to confusion as to whether the organisation or the artist owned copyright in the work created. A concern is that people are

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[83] Karl Neuenfeldt, Submission to *Our Culture: Our Future*, October 1997.

[84] NIMAA, Submission to *Our Culture: Our Future*, October 1997.

[85] Albert Mullett, Krowathunkoolong Aboriginal Cooperative, Indigenous Reference Group Meeting, 15-16 September 1997.

not made aware of this and that in some cases it might not be appropriate for an organisation to own copyright in work produced under a contract of employment.[86]

Under these funded programs, organisations and educational bodies have produced a great deal of copyright material. Over time, some of these organisations have closed so that there is effectively no entity asserting copyright in material. One example is a recording of traditional Indigenous music funded as part of a language maintenance program, which later closed. The company which recorded the music continued to manufacture and sell the tape even though copyright was in theory held by the disbanded language centre.

Another example was the continued use of designs produced by CDEP-funded artists by licensees long after the arts and craft organisation had closed.

Despite these problems, there may be some benefits in Indigenous organisations owning copyright in works produced by employees. For example, Aboriginal organisations owning copyright in reports and research undertaken by employees allows them to safeguard the interests contained in any reports.

3.19 Unfair contracts

Many Indigenous groups complain that contractual arrangements are being entered into when Indigenous parties do not fully understand the terms and conditions.[86] Tommy May submitted there are few lawyers with relevant expertise to provide information on contracts and copyright.[88] May further noted:

> *Often it is hard to get across to Indigenous people the difference between the two laws - Aboriginal law and white law. People are getting ripped off because of trusting people who use sweet words. There are three particular instances where artists no longer paint because of unfair contracts which say that everything an artist produces for the next five years will belong to the entrepreneur. Because of this people stop painting.*[89]

Another issue is that Indigenous artists interests are not protected because they are in a weak bargaining position,[90] although it was reported that some Indigenous artists are assisted in licensing agreements by arts advisers able to read the contract and provide general advice.[91]

3.20 Lack of political will

A major concern for Indigenous people is the attack on Indigenous rights in the form of

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[86] Liz McNiven, Indigenous Reference Group Meeting, 15-16 September 1997.
[87] Kimberley Aboriginal Law and Culture Centre, *Submission to Stopping the Ripoffs*, (1994,) p 1.
[88] Tommy May, Indigenous Reference Group Meeting, 15-16 September 1997.
[89] Letter from Tommy May read to the Indigenous Reference Group Meeting, 15-16 September 1997.
[90] Arts Law Centre of Australia, *Submission to Stopping the Ripoffs*, (1994).
[91] Anthony Brooks, ANKAAA, Indigenous Reference Group Meeting, September 1997.

amendments to or review to the following legislation:

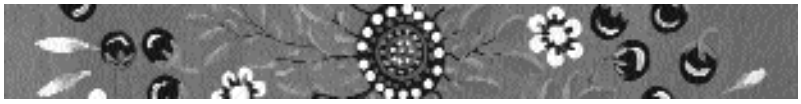
- *Native Title Act 1993*
- *Aboriginal and Torres Strait Islander Heritage Protection Act 1984*
- *Aboriginal Land Rights (NT) Act 1976* (currently under review).

The Northern Land Council (NLC) is concerned that there is a possibility that all three Acts will be significantly weakened, reducing the rights of Indigenous people in the NLC region to protect their cultural, spiritual, intellectual and legal property.[92] There is a growing reluctance by Indigenous people to entrust the government with the protection of their cultures when rights granted can later be taken away.

[92] Northern Land Council, Submission to *Our Culture: Our Future*, October 1997.

CHAPTER FOUR

The cultural and intellectual property rights Indigenous people want



The Discussion Paper noted that Indigenous Cultural and Intellectual Property rights are fundamental to the continuation and maintenance of Indigenous culture. There was unanimous support for this proposition and it was generally agreed that legislative reform and policy initiatives are urgently required to prevent further unauthorised exploitation and erosion of Indigenous cultures.

4.1 Proposed rights in Discussion Paper

The following rights were listed in the Discussion Paper as requiring recognition:

1. The right to own and control Indigenous Cultural and Intellectual Property.
2. The right to control the commercial use of Indigenous Cultural and Intellectual Property in accordance with traditional customary laws.
3. The right to benefit commercially from the authorised use of Indigenous Cultural and Intellectual Property.
4. The right to full and proper attribution.
5. The right to protect sacred and significant sites.
6. The right to own and control management of lands which are conserved in whole or part because of their Indigenous cultural values.
7. The right to prevent the derogatory, offensive and fallacious uses of Indigenous Cultural and Intellectual Property.
8. The right to have a say in the preservation and care, protection, management and control of cultural artefacts, human remains, archaeological and significant traditional sites, traditional food resources and traditional and contemporary cultural expressions such as rituals, legends, and the designs used in, for instance, art, weaving, dances, songs and stories.

9. The right to control the use of traditional knowledge of medicinal plants, agricultural biodiversity, environmental management, the recording of cultural customs and expressions, the particular language which may be intrinsic to cultural identity, knowledge, the skill and teaching of culture.

4.2 Responses concerning rights

The Discussion Paper asked for feedback on the rights listed above. It also asked what other rights should be included. The following lists some of the responses.

4.2.1 *The right to own and control*

There was general support for this right. Many submissions reinforced the importance of communal ownership rights.

Les Malzner noted that the concept of Indigenous ownership was often confused by museums, universities and other cultural institutions as meaning the same as western non-Indigenous ownership concepts.[1] Indigenous ownership is seen more in terms of responsibility for culture rather than excluding others from its use.

4.2.2 *The right to control commercial use*

Generally, there was support for the right to control commercial use of Indigenous Cultural and Intellectual Property in accordance with traditional customary laws.

4.2.3 *The right to benefit commercially*

Generally, there was support for the right to benefit commercially, if the use is culturally appropriate and consented to before being commercially applied. As the CLC noted, this right should extend to all relevant people.

4.2.4 *The right to full and proper attribution*

Generally, there was support for the right to full and proper attribution. But the Tasmanian Aboriginal Land Council pointed out that such a right should not be in isolation of the right to firstly consent to the use of Indigenous Cultural and Intellectual Property.[3]

4.2.5 *The right to protect sacred and significant sites*

In relation to the rights to protect sacred and significant sites, the Tasmanian

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[1] Les Malzner, Indigenous Reference Group Meeting, September 1997.

[2] Central Land Council, Submission to *Our Culture: Our Future*, January 1998.

[3] Tasmanian Aboriginal Land Council Aboriginal Corporation, Submission to *Our Culture: Our Future*, October 1997.

Aboriginal Land Council noted that this right should apply to all Indigenous sites as all sites are considered significant.[4]

4.2.6 *The right to own and control management of lands*

Respondents did not specifically comment on the right to control management of land conserved in whole or part because of its Indigenous cultural values, other than to generally supported the rights listed as adequate.

A point at the Brisbane Workshop on Indigenous Cultural and Intellectual Property that rights should not just be limited to land but should also include environmental resources on land and above land, such as air, as well as sea.[5]

4.2.7 *The right to prevent derogatory, offensive and fallacious use*

In relation to the right to prevent the derogatory, offensive and fallacious use of Indigenous Cultural and Intellectual Property, Film Australia noted that a distinction should be made between two opposing uses of Indigenous Cultural and Intellectual Property to ensure that specific guidelines are adopted to protect against the exploitation of Indigenous issues. These are the portrayal of Indigenous people and their heritage and investigative reporting on Aboriginal issues.[6]

Arts Victoria suggested that this right would have to be countered with some sort of defence for unintentional offence. It was noted that artists often incorporate images into their works as a homage rather than wishing to offend.[7]

In light of the discussions and submissions, it is suggested that offensive use be qualified as being offensive to Indigenous people s beliefs. Also, it is suggested that the word fallacious should be changed to unauthorised use.

These rights relate to cultural integrity issues but do not fully cater for situations where Indigenous cultural material might be mutilated or distorted. An additional right to prevent mutilation and distortions of cultural material is recommended.

4.2.8 *The right to have a say in preservation and care*

Several submissions noted that the wording right to have a say was too weak to give full effect to the rights Indigenous people seek in relation to preservation, care and management issues.[8]

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[4] *Ibid*.
[5] Debra Bennett McLean, Indigenous Cultural and Intellectual Property Workshop, hosted by Queensland Community Arts Network, October 1997.
[6] Film Australia, Submission to *Our Culture: Our Future*, October 1997.
[7] Arts Victoria, Submission to *Our Culture: Our Future*, October 1997.
[8] NSWALC, Submission to *Our Culture: Our Future*, October 1997.

The National Parks and Wildlife Service (NPWS) submitted that the use of the words human remains may be taken to mean all people where the intent is to refer to Indigenous ancestral remains only. NPWS suggested a more appropriate term would be ancestral remains .[9] NPWS also suggested the use of the word Aboriginal or Indigenous rather than traditional .[10]

The NSW Aboriginal Land Council (NSWALC) preferred the use of customary to traditional .[11]

4.2.9 *The right to control the use of traditional knowledge*

The Central Land Council noted that Indigenous people should have the right to control disclosure of traditional knowledge as a fundamental right. Francis Kelly Jupurrula, speaking during the Central Land Council s discussions on the *Our Culture: Our Future* Discussion Paper said:

> *We should keep it [knowledge of traditional medicines and bush tucker] for ourselves, not give it away. We are just like giving our land away altogether. I think we should all keep it because it s confidential. See that tree over there, that s a perentie dreaming that one, we call that tree s name and that perentie will settle down ... The tree is a part of us. That tree is a healer. When it rains, when the water falls and the wind blows you know it makes the country clear and fresh again. I think we shouldn t be giving it away. We should keep it for our generations.*[12]

4.3 Other suggested rights

Some additional rights suggested for inclusion were:

- The right to reclaim all human remains, including such remains as stillborn, foetal, genes, tissues, blood etc for the fulfilment of burial and spiritual healing.[13]
- The right to compensation for subsequent usage of Indigenous cultural and intellectual property without previous authorisation.[14]
- Rights in relation to the representation and discussion of issues of Indigenous culture and Indigenous people in the media.[15]

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[9] NPWS (NSW), Submission to *Our Culture: Our Future*, October 1997.
[10] *Ibid*.
[11] NSWALC, Submission to *Our Culture: Our Future*, October 1997.
[12] Speaking at Akarnenhe Well, 14-16 October 1997, as cited in CLC, Submission to *Our Culture: Our Future*, January 1998.
[13] Lester Iranbinna Rigney, Yunggorendi First Nation Centre for Higher Education and Research, Flinders University of South Australia, Submission to *Our Culture: Our Future*, October 1997.
[14] *Ibid.*
[15] Folklife, Submission to *Our Culture: Our Future*, October 1997.

4.4 Updated list of rights

In light of the great body of material surveyed and the United Nations *Draft Declaration on the Protection of the Rights of Indigenous Peoples* and the Indigenous Reference Group s *Draft Principles and Guidelines for the Protection of Indigenous Cultural and Intellectual Property,* the following charter is a list of the types of heritage rights Indigenous Australian people want recognised and protected within the Australian legal and policy framework:

1. The right to own and control Indigenous Cultural and Intellectual Property .
2. The right to define what constitutes Indigenous Cultural and Intellectual Property and/or Indigenous Heritage.
3. The right to ensure that any means of protecting Indigenous Cultural and Intellectual Property is premised on the principle of self-determination, which includes the right and duty of Indigenous peoples to maintain and develop their own cultures and knowledge systems and forms of social organisation.
4. The right to be recognised as the primary guardians and interpreters of their cultures, arts and sciences, whether created in the past, or developed by them in the future.
5. The right to apply for protection of Indigenous Cultural and Intellectual Property rights, which where collectively owned, should be granted in the name of the relevant Indigenous community.
6. The right to authorise or refuse to authorise the commercial use of Indigenous Cultural and Intellectual Property in accordance with Indigenous customary law.
7. The right to prior informed consent for access to, use and application of Indigenous Cultural and Intellectual Property, including Indigenous cultural knowledge and cultural environment resources.
8. The right to maintain the secrecy of Indigenous knowledge and other cultural practices.
9. The right to benefit commercially from the authorised use of Indigenous Cultural and Intellectual Property, including the right to negotiate terms of such usage.
10. The right to full and proper attribution.
11. The right to protect Indigenous sites including sacred sites.
12. The right to own and control management of land and sea, conserved in whole or part because of their Indigenous cultural values.
13. The right to prevent the derogatory, culturally offensive and unauthorised use of Indigenous Cultural and Intellectual Property in all media.
14. The right to prevent distortions and mutilations of Indigenous Cultural and Intellectual Property.
15. The right to preserve and care, protect, manage and control Indigenous cultural objects, Indigenous ancestral remains, Indigenous cultural resources such as food resources, ochres, stones, plants and animals and Indigenous cultural expressions such as dances, stories, and designs.

16. The right to control the disclosure, dissemination, reproduction and recording of Indigenous knowledge, ideas and innovations concerning medicinal plants, biodiversity and environment management.

17. The right to control the recording of cultural customs and expressions, the particular language which may be intrinsic to cultural identity, knowledge, the skill and teaching of culture.

Chapter Four : Recommendations

4.1 A National Declaration of Indigenous Cultural and Intellectual Property Rights should be developed based on the list of rights which appears above and the Indigenous Reference Group s Draft Guidelines and Principles, developed in consultation with Indigenous people.

4.2 Appropriate measures should be taken towards educating the broader Australian community about Indigenous value systems, laws and cultural processes, where sharing this knowledge is appropriate.

PART TWO

Protection Under the Current Australian Legal Famework

The current legal framework offers limited recognition and protection of Indigenous Cultural and Intellectual Property. Intellectual property laws are generally inadequate in recognising and protecting Indigenous Cultural and Intellectual Property rights because non-Indigenous notions of intellectual property differ significantly from Indigenous beliefs.

Furthermore, cultural heritage laws are considered inadequate in their application to all aspects of Indigenous Cultural and Intellectual Property and do not recognise many rights Indigenous people consider important for the continuation of their culture.

There is a range of other laws which might offer assistance in relation to some rights Indigenous people need; for example, trade practices laws which relate to misleading and deceptive conduct may offer some assistance in cases of misleading labelling.

Part Two of this Report will examine the following existing laws and comment on their application to the types of rights Indigenous people need in relation to their cultural heritage:

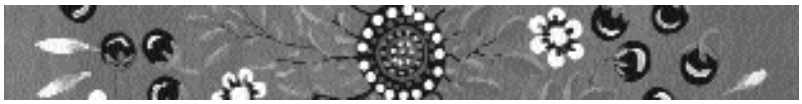
(a) Intellectual property laws.

(b) Cultural heritage laws.

(c) Other relevant laws such as native title, archives and broadcasting laws.

CHAPTER FIVE

Protection under current intellectual property laws



5.1 What is intellectual property?

Intellectual property is defined by the Convention establishing the World Intellectual Property Organisation as referring to the rights relating to literary, artistic and scientific works; performances of performing artists, phonograms and broadcasts; inventions in all fields of human endeavour; scientific discoveries; industrial designs; trademarks, service marks, and commercial names and designations; protection against unfair competition; and all other rights resulting from intellectual activity in the industrial, scientific, literary or artistic fields .[1]

The Australian Constitution gives the Commonwealth the power to make special laws regarding copyright, patents of inventions and designs, and trade marks .[2] The following intellectual property rights are recognised by Commonwealth legislation:

- Artistic, musical, dramatic and literary works; film and sound recordings; and publications, by virtue of the *Copyright Act 1968*.
- Inventions by virtue of the *Patents Act 1990*.
- Trade marks identifying the origin of goods and services under the *Trade Marks Act 1995*.
- Registered industrial designs for the appearance of a commercial product by virtue of the *Designs Act 1906*.
- Certain developed species and varieties of plants under the *Plant Breeders Rights Act 1994.*

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[1] Article 2(viii), Convention Establishing the World Intellectual Property Organisation, 14 July 1967.
[2] The Australian Constitution, s 51(xviii).

- Certain layouts of integrated circuits under *Circuit Layouts Act 1989*.

Other common law intellectual property rights are:

- Breach of confidence law .
- Passing off.

This chapter will discuss the application to Indigenous Cultural and Intellectual Property of the *Copyright Act 1968,* the *Patents Act 1990*, the *Plant Breeders Rights Act 1994*, the *Trade Marks Act 1995* and the *Designs Act 1906*, breach of confidence laws and passing off.

5.1.1 *Rights to use and deal with intellectual property*

Intellectual property laws provide creators and inventors with certain economic rights to exploit their creations and inventions. Intellectual property rights are often not held by inventive individuals but by the corporations, government agencies or cultural institutions that employ them or fund their research.[3] Through international treaties such as the *Berne Convention*, intellectual property rights are enforceable internationally in countries which have signed such treaties in recognition that intellectual property rights are important economic rights.

5.1.2 *The public domain*

The notion of the public domain refers to what is freely available for use and reproduction without the need to obtain permission from the intellectual property owner. As Cecilia O Brien noted, intellectual property law, in a sense, balances the interests of individual author against those attributed to a universal public domain .[4] Under intellectual property laws, much Indigenous cultural heritage material is regarded as being in the public domain.

5.2 *Copyright Act 1968*

5.2.1 *What is copyright?*

Copyright is a set of specific rights granted to the creators of literary, dramatic, artistic or musical works and the makers of sound recordings, films and audio recordings. There is no need to register copyright. It exists as soon as a work is created or a recording is made, as long as certain criteria are met. These include that the works are original and that they have been reduced to material form.

If these criteria are satisfied and the author or maker is an Australian citizen or resi-

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[3] As noted by Darrell A. Posey and Graham Dutfield, *Beyond Intellectual Property: Towards Traditional Resource Rights for Indigenous Peoples and Local Communities*, International Development Research Centre, Canada 1996, p 76.

[4] Cecilia O Brien, Protecting Secret-Sacred Designs - Indigenous Culture and Intellectual Property Law , (1997) vol 2 *Media and Arts Law Review,* pp 57-76 at p 58.

dent, the author or maker generally has exclusive reproduction rights until the term of copyright expires. The copyright term is 50 years after the death of the author. For recordings, the term is generally 50 years from the date of making.

5.2.2 *Meeting the criteria for protection*

Copyright law provides similar rights to Indigenous creators of Indigenous arts and cultural expression, and other aspects of Indigenous cultural and intellectual property, which meet these criteria. But much Indigenous cultural material does not meet these criteria for the following reasons.

Originality

For copyright to exist in a work, it must be original.[5] That is, the creation is not copied from another work and the creator has imparted the necessary degree of labour, skill and judgment to produce the work, giving it some quality or character which the raw material did not have.

As a continuing expression of culture, many Indigenous artists draw from the wealth of their cultural heritage by painting pre-existing clan designs, dancing ceremonies and stories that have been handed down from their ancestors. This aspect of Indigenous Cultural and Intellectual Property raises the question of whether a new Indigenous work based upon or derived from a traditional, pre-existing theme satisfies the copyright requirement of originality.[6] However, any doubt over this has been dispelled to some extent by the court case *(Deceased Applicant) v Indofurn* (the Carpets Case).[7] In this case, the court found there was sufficient evidence of individual artistic interpretation even though the artworks in question followed pre-existing traditional designs.

Material form

To obtain copyright protection, a work must be written down or recorded in some permanent, tangible form. Non-permanent forms of cultural expression, such as performances of stories, song or dance, do not meet the requirement of material form required by the *Copyright Act*. Some Indigenous literary, performing and artistic works are included here. For example, oral traditions do not receive copyright protection. Indigenous communities, as custodians of their cultural heritage, cannot protect their oral traditions and can only receive protection against unauthorised reproduction of that oral tradition if they satisfy elements of the breach-of-confidence laws.[8]

Similarly, designs painted on the body for ceremonies are a significant form of cultur-

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[5] Section 22, *Copyright Act 1968*.
[6] Peter Banki, Protection of Expressions of Folklore in *WIPO - Australian Copyright Program for Asia and the Pacific*, 2-13 November 1987, AGPS, Canberra, p 222.
[7] (1994) 30 *Intellectual Property Reports* 209.
[8] See Ch 5.7.

al expression for many Indigenous communities. Whether a person is entitled to wear a design depends on a "series of qualifications" well defined in Indigenous customary laws.[9] But as body painting is not a permanent medium, it is not protected by copyright law.[10] This means that any subsequent reproductions of a body-painting design are not protected.

Identifiable author

There must be an identifiable author, or authors, for copyright to exist in a work. Given the nature of Indigenous arts and cultural expression, an individual person or group of people will not always be identifiable. The author of many important works of Indigenous art cannot be readily identified. For example, a painting at Ubirr Rock in Kakadu National Park is a well-known artwork, but a single artist or group of artists is unidentifiable and therefore copyright cannot be asserted. Works of this kind are being reproduced in an increasing variety of ways, many of them considered inappropriate and offensive.

5.2.3 *Ownership of copyright*

The author or creator of a work will generally be the owner of the copyright in that work. But there are exceptions to this rule. Employers own the copyright of works created by their employees in the course of a contract of employment. The Crown may own copyright in works produced under its direction and control. This may have effects on Indigenous rights to cultural material.

For example, some Indigenous artists produce significant works of art through arts centres funded by ATSIC, where artists receive wages as employees under the Community Development and Employment Program (CDEP). Under the *Copyright Act*, the centre is recognised as the copyright owner of works artists produce as part of their work there, unless there is a written agreement between the artist and the centre stating otherwise.[12]

5.2.4 *Rights granted under copyright*

Exclusive rights granted to authors

The person who first reduces an oral tradition to material form is recognised as the author of the ensuing work[13] and can exercise the exclusive rights granted to authors under the *Copyright Act* to reproduce the work in material form or to broadcast the work.

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[9] Kenneth Maddock, "Copyright and Traditional Designs: An Aboriginal Dilemma", (1988) vol 2(34) *Aboriginal Law Bulletin*, p 8.
[10] *Merchandising Corp of America Inc v Harpbond Ltd* [1982] FSR 32.
[11] Section 32, *Copyright Act 1968*.
[12] Section 35(6), *Copyright Act 1968*.
[13] *Walter v Lane* [1900] AC 539.

Indigenous Australian cultures pass down stories from the Dreaming through oral tradition, a way of carrying on the culture which continues today. As these stories are recorded for the first time, the person putting the story into material form is recognised as the copyright owner of the written stories. It does not matter whether that person is Indigenous or not, or whether he or she comes from the relevant community. Copyright does not recognise the bounds placed on reproduction of Indigenous arts and cultural material under Indigenous customary law, as the artist or the recorder of the story becomes the unencumbered, exclusive owner of copyright in the work.

Researchers and writers who produce books and reports on Indigenous people and their cultures own the copyright in this material. This is based on the presumption that the researchers and writers have contributed sufficient skill, labour and effort to modify the raw information and materials available. As copyright owners they are free to use the material for whatever purposes they wish. This is a common concern for Indigenous groups who consented to provide information on the basis that it was for research, or on certain conditions, only to discover that the researcher later found a commercial use for the information, which is culturally inappropriate.

Exclusive rights granted to makers of recordings

The copyright in a sound recording or film of a story, dance or other expression of knowledge belongs to the person or organisation which makes the recording or film. As owner of the copyright in the recording, that person or organisation has exclusive rights to sell, display and otherwise exploit the copyright in the film or recording, as they see fit.

Mechanical rights refers to the exclusive rights granted to creators under the *Copyright Act 1968*, usually of musical works, to reproduce the work in a material form.[14] A work is deemed to have been reproduced in a material form if a sound recording or cinematographic film is made of the work .[15]

Division of copyright

The exclusive rights granted to copyright owners can be assigned to others and can be divided by term, duration or territory. Management of these rights can be extremely complex but also, if fully exploited, extremely lucrative.

5.2.5 *Moral rights*

Under the *Copyright Act 1968*, there are no moral rights . Moral rights refers to the rights of a creator to have his or her work credited, or not falsely accredited, and the right not to have the work subjected to derogatory treatment. The *Copyright Amendment Bill 1997* proposes to introduce these important rights. The implications under the Bill for Indigenous artists will be discussed in 9.1.1. However, at the time of

[14]Section 31(1)(a), *Copyright Act 1968.*

[15] Section 21(1), *Copyright Act 1968*.

writing, moral rights are not recognised at law. This has the following effects:

No protection against culturally inappropriate treatment

For Indigenous people, cultural integrity in reproductions of Indigenous cultural material is important. Under customary law, Indigenous custodians are collectively responsible for ensuring that important cultural images and themes are not reproduced inappropriately. The Indigenous creator must be careful not to distort or misuse the cultural knowledge embodied in a work. Although an author is the creator of the artwork, song or story, he or she cannot authorise reproduction of it without ensuring the reproduction complies with Indigenous customary law. Such rights are not recognised under current copyright laws.

No right of attribution

Under the *Copyright Act*, there is no right for a person or group to be attributed for artworks or cultural material. But the ownership of Indigenous cultural material and the right to be correctly attributed for it are very significant for Indigenous people, given the integral relationship between their communities, cultural practices and their land. It is additionally important at a time when proof of rights to native title over land depends on being able to show an on-going connection with it.[16]

While the proposed moral rights amendments will allow creators to have their names placed on the original and on copies of their works, they do not make it a right that Indigenous custodians or groups are named on reproductions of their cultural works.

5.2.6 *Performers rights*

Under the *Copyright Act* certain provisions relate to performers rights.[17] Performers rights give performers the right to prevent certain unauthorised uses of recordings of their performances.[18] But performers do not have any copyright or proprietary right in their performances. The current Act complies with the minimum obligations of the *International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisation of the Rome Convention.*

The Federal Government is now considering whether such rights should be extended to intellectual property type rights in line with the recommendations of the *World Intellectual Property Organisation Performance and Phonograms Treaty (WPPT)*. The Attorney-General s Department and the Department of Communications and the Arts released a discussion paper in December 1997 entitled *Performers Intellectual Property Rights: Scope of Extended Rights for Performers under the Copyright Act 1968*. The issues for reforming performing rights raised in this report are discussed at 9.1.1.

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[16] *Mabo v the State of Queensland* (No 2) (1992) 175 CLR 1.
[17] Part XIA of the *Copyright Act 1968.*
[18] Section 248J, *Copyright Act 1968*.

No protection for performances of oral traditions

Performances of Indigenous music, dances and stories are not eligible for copyright protection unless they are original and recorded in material form.[20] Thus, under existing copyright legislation, traditional custodians of an important sacred dance or ceremony may not be able to stop unauthorised performances of the dance. They may, however, be able to control to some extent the use of recordings of their music and dance performances under the performers protection provisions.

Rights in relation to still photography

Under the *Copyright Act 1968*, the photographer owns copyright in the photograph.[21] An exemption to this, is where the photograph is a commissioned portrait.[22] In this case, the person who is commissioning the portrait is copyright owner.

Generally, Indigenous people cannot stop photographs of themselves, their deceased family members and their sacred sites from being reproduced against their wishes, unless other action can be taken, for instance, under trespass, passing off, trade practices laws or defamation law.

Indigenous cultural and intellectual property and photographs

The responsibilities for culture were highlighted early in 1998 when a Northern Territory Court acquitted the chairman of the Northern Land Council, Galarrwuy Yunupingi, of criminal charges against him. While the charges related to assault and criminal damage, the case raised issues of Indigenous Cultural and Intellectual Property.

According to a report by David Dalrymple,[23] Yunipingu was acting in his role as custodian to protect two Yolngu children who were photographed naked while swimming. Yunupingi snatched a camera from the hands of the photographer, who was on Gumatj land without a permit. Yunupingu ordered the photographer to pay $50 to the children and their father.

According to evidence given in the case, if the photographer paid he would have allowed the photographer to keep the images, subject to conditions. However, the photographer refused, so Yunupingu exposed the film.

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[19] Attorney General s Department, *Performers Intellectual Property Rights: Scope of Extended Rights for Performers under Copyright Act 1968*, December 1997.
[20] Australian Copyright Council, *Aboriginal Arts and Copyright*, Bulletin No 75, p 31.
[21] Section 208, *Copyright Act 1968*.
[22] Section 35(5), *Copyright Act 1968.*
[23] David Dalrymple, Aboriginal reconciliation needs the recognition of two laws , *The Australian*, 27 February 1998.

The photographer is reported to have been a trespasser on Gumatj land because he did not have a permit to enter that land. Under the terms of the permit, there are conditions prohibiting commercial photography. But because the photographer had not applied and attained a permit, he was unaware of these conditions.

Yunupingu wished to prevent personal distress to the children or their family. The images of the children came from Gumatj land. As senior custodian of that clan, Yunupingu was responsible for the representation of Gumatj land and his actions, according to the Court, were therefore consistent with this responsibility.

5.2.7 *Enforcement of copyright*

It is an infringement of copyright if a person exercises the copyright owner s exclusive rights without permission. The copyright owner may take action against infringers to stop them infringing copyright and to hand over any profits made by infringing the copyright owner s rights.

Section 132 of the *Copyright Act* also makes it a criminal offence for a person to sell, or possess for the purpose of sale, an article that she or he knows to be an infringement of copyright. Similar sections cover the importation and distribution of infringing articles. A magistrate can impose fines and order that infringing articles be destroyed, or given to charity or to the owner of the copyright in the work.

Indigenous artists have used this section of the Act in the past to seize articles that infringe their copyright. A case must be made out to th Australian Federal Police for them to act.

5.2.8 *Fair dealing for research and study*

Copyright in relation to a work includes the exclusive right to reproduce the work in material form. This includes reproduction of a substantial part of the work. Reproduction without the consent of the copyright owner is an infringement of copyright unless it can be argued that the use was a fair dealing . *The Copyright Act 1968* allows fair-dealing uses for research or study.[24] A large amount of Indigenous cultural material is reproduced as part of research or study. Such uses may not be a breach of copyright under the fair-dealing provisions.

5.2.9 *Sculptures and craftworks on permanent public display*

The copyright in a sculpture or work of artistic craftsmanship placed in a public place or premises open to the public, otherwise than temporarily, is not infringed by making a painting, drawing, engraving or photograph of the sculpture or work, or by including

[24] Section 40(1), *Copyright Act 1968*.

it in a film or television broadcast.[25] A painting, drawing, engraving, photograph or film of a sculpture or work of artistic craftsmanship can be published and televised without infringing the artist s right of publication. This allows for certain commercial reproductions of the work without the need for permission of the artist to be sought, and without the need for a fee to be paid to the artist.

This defence does not apply to paintings or drawings but rather three-dimensional craft works. According to Lahore,[28] the intention of this section appears to be to allow certain reproductions to be made of works which may more usually be found outside - in parks or streets or in places where it is not practicable to control copying.

The following types of Indigenous cultural crafts may fall under this category: morning star poles;[29] didgeridoos; coolamons; boomerangs; headdresses; and totem and ceremonial poles. If these items are displayed in public museums and galleries, the above exception to infringement would apply.

Yumbulul v Reserve Bank of Australia (1991)

This case in the Federal Court involved reproduction of artist Terry Yumbulul s Morning Star Pole on the Bicentennial $10 note. Morning Star Poles are commonly used in funeral ceremonies of important people. They are made from feathers, wood and string and are painted with designs. The right to create the poles is governed by Indigenous customary law and the method of creating them must comply with religious rules.

Mr Yumbulul created a Morning Star Pole under the authority given to him as a member of the Galpu clan group. The pole was sold to the Australian Museum for public display. As part of an agency agreement, Mr Yumbulul licensed his reproduction rights to the Aboriginal Artists Agency. The right to reproduce the pole was subsequently licensed to the Reserve Bank of Australia to reproduce on the Bicentennial $10 note.

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

Mr Yumbulul took action in the Federal Court against the Aboriginal Artists Agency and the Reserve Bank, alleging he would not have authorised the licence to the Reserve Bank had he fully understood the nature of it. But he was unable to prove this in court.

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[25] Section 65, *Copyright Act 1968*.

[26]Section 68, *Copyright Act 1968*.

[27] Section 69, *Copyright Act 1968*.

[28] James Lahore, *Copyright and Designs*, 3rd revised edition, Butterworths, Sydney 1996, paragraph 42,030.

[29] See *Yumbulul v Reserve Bank of Australia.*

The Court found Mr Yumbulul mistakenly believed that the licence to the Reserve Bank would impose limitations on the use of the pole similar to those in Aboriginal customary law and that this was his belief at the time of granting the licence.

The traditional custodians were not part of the proceedings, so the Court did not have to decide on the issue of communal ownership. However, the Court noted that Australia s copyright law does not provide adequate recognition of Aboriginal community claims to regulate the reproduction and use of works which are essentially communal in origin .[31]

5.2.10 *Period of protection*

The period of copyright protection for artistic, musical, dramatic and literary works is generally the creator s life plus 50 years.[32] The periods differ for other works. The reason for this provision is that although the Act should guarantee protection to the creators of works in order to encourage literary, artistic and musical production and to guarantee them a fair economic return, such works, should, after a given period, fall into the public domain".[33]

This rationale does not apply to Indigenous arts and cultural expression because most of these works remain culturally significant indefinitely. For example, copyright does not protect images depicted in rock paintings that have been in existence since time immemorial, even though these images remain an integral part of that particular clan's cultural heritage.

Unpublished works

According to the Working Party into the Protection of Aboriginal Folklore, the unpublished works provision of the *Copyright Act* provides some protection for ancient works that have been previously published.[34] Section 33(3) of the Act provides that if before the death of the author of a literary, dramatic or musical work the work remains unpublished, publicly performed or broadcast, and their records had not been offered for sale to the public, the copyright in the work continues to subsist until the expiration of 50 years after the expiration of the calendar year in which the work if first published, performed in public, or broadcast, or records of the work are first offered or exposed for sale to the public, whichever is the earliest of those events to happen .

It is important to note that this provision omits artistic works.

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[30] (1991) IPR 481.

[31] *Ibid* at 490.

[32] Section 32(2) of the *Copyright Act*; copyright in a literary, dramatic, musical or artistic work continues to subsist until 50 years after the end of the calendar year in which the author dies.

[33] Department of Home Affairs and Environment, *Report of the Working Party on the Protection of Aboriginal Folklore*, 1981, para 706, p 14.

[34] *Ibid*, para 707, p 14.

The Working Party considered that in light of this section, it would be theoretically possible for copyright in an ancient work that is not artistic which has not been published etc to continue to subsist in perpetuity. In many instances the question would arise whether and when the work was first published or performed in public. In any event, section 33(3) would not save old artistic works of Aboriginals from falling into the public domain. [35]

Hence the question of whether recorded forms of artistic and cultural expression should become part of the public domain, is another important issue to be resolved.

5.2.11 *Limitations of protection*

Even when an Indigenous artistic or cultural work *does* satisfy the elements of copyright, it is difficult to apply copyright law because of the nature of Indigenous cultural expression.[36]

Protecting expression rather than styles

Copyright law protects the *form* of expression of ideas, rather than the ideas themselves. For example, it is not an infringement of copyright to copy a design style, such as the rarkk or cross-hatching style of Indigenous art used largely in Arnhemland regions. But it is an infringement of copyright to copy the whole, or a substantial part of a particular artwork, such as Banduk Marika s *DDianda at the Sacred Waterhole*.

The issue of whether copyright should protect styles was discussed in relation to look and feel or user interface computer screen displays in two United States cases.[37] In Australia, the Copyright Law Review Committee (CLRC) considered the issue as part of its Inquiry into Computer Software Protection. The CLRC found that user interface or look and feel of a computer program is *behaviour* rather than *expression* capable of copyright protection.[38]

Language not protected

While copyright exists in literary works, there is no copyright in languages unless they are expressed in material form; that is, written down or recorded. Indigenous languages themselves are not protected by copyright, but expressions and compilations of Indigenous languages, such as dictionaries and word lists, are eligible for protection.

A submission from Rob Amery and the Kaurna Language and Language Ecology

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[35] *Ibid.*

[36] Dean A. Ellinson, Unauthorised Reproduction of Traditional Aboriginal Art (1994) vol 17 *UNSW Law Journal* p 327, at p 333.

[37] *Whelan Associates v Jaslow Dental Laboratory* 797 F. 3rd 122 (3rd Cir. 1986); *Computer Associates International Inc v Altai* (1992) 23 IPR 385.

[38] CLRC, *Draft Report on Software Protection*, 1993, p 6.

Class at the University of Adelaide noted: There is a need to differentiate between rights over the language *per se* and rights to specific materials written in the language. The people affiliated with the language should be regarded as the 'owners' of the language. As such they should be consulted in matters related to the language. [39]

No special protection for secret/sacred material

The *Copyright Act* does not recognise any continuing right of traditional custodians to limit the dissemination of traditional images or knowledge embodied in art forms after the term of copyright protection has expired. This is the case even though the image or knowledge is of great significance to its traditional custodians and inappropriate use may cause deep offence. The Wandjina image, like the Mimi and Quinkin images, have been reproduced on a wide range of items, including garments. Such reproduction has greatly concerned the traditional custodians of these images.[40] This type of appropriation remains unchecked by existing copyright laws.

Commercial interests versus cultural integrity

A major purpose of the *Copyright Act* is to provide individual creators with specific exclusive economic rights. No provisions address cultural integrity, which for Indigenous artists and their communities is an important Indigenous Cultural and Intellectual Property right. While the proposed moral rights legislation includes provisions for a right of integrity, these rights attach to the individual creator(s).[41]

Under Indigenous customary law, responsibility for ensuring that important cultural images, themes and stories are not reproduced inappropriately rests with the traditional custodians of those items. The proposed moral rights legislation will help traditional custodians prevent culturally inappropriate reproduction of cultural material only if their rights are consistent with those of the individual artist, as first copyright owner.

Individual notions of ownership rather than communal ownership

The rights recognised under the *Copyright Act* are individual rights. This differs from notions of Indigenous cultural property where ownership is communal.

Golvan argues that under copyright principles, the traditional custodians of a pre-existing traditional design may have an equitable interest in the copyright of an artwork which depicts this pre-existing design. This is based on the assumption that the know-how and right to paint such a design were imparted to the artist as part of his or her ceremonial and artistic training. It is imparted with the belief that it will not be used in

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[39] Rob Amery and the Kaurna Language and Language Ecology Course, University of Adelaide, Submission to *Our Culture: Our Future*, October 1997.

[40] As noted by Colin Golvan, Aboriginal Art and the Protection of Indigenous Cultural Rights , (1992) vol 2(56) *Aboriginal Law Bulletin* pp 5-8, at p 8.

[41] Attorney-General s Department, *Proposed Moral Rights Legislation for Copyright Creators, Discussion Paper (Executive Summary)*, p 2.

a manner inconsistent with Indigenous laws. Hence the traditional custodians of the knowledge, as the true owners of copyright, have the right to seek appropriate redress, at least to the extent that they and the artist have the copyright owners right to permit or refuse reproduction of the designs.[42]

This type of relationship is the focus of a case now being litigated: *Bulun Bulun and Another v R & T Textiles*.[43] This case relates to the copyright infringement of artworks by the artist Johnny Bulun Bulun. According to Martin Hardie, one of the issues the case will consider is whether the other traditional Indigenous owners of the body of ritual knowledge from which the work is derived are the equitable owners of the copyright in the artistic work.[44] Judgment of the case is yet to be handed down.

The Carpets Case[45]

The most comprehensive judgment involving copyright and Indigenous arts and culture is the so-called Carpets Case. Three Aboriginal artists and the Public Trustee of the Northern Territory, on behalf of the estates of five deceased artists, brought an action in the Federal Court of Australia for breach of copyright in their artworks. The artworks were reproduced on carpets made in Vietnam and imported and sold in Australia without the artists permission or knowledge.

The artworks depicted traditional imagery from the artists clan groups. The carpet importers argued that copyright did not exist in the artworks because the works drew from pre-existing traditional designs and did not meet the originality and authorship requirements of the *Copyright Act*. The Court disagreed and found that if a design has intricate detail and complexity reflecting great skill and originality, it satisfies the Act s originality requirements, despite the fact that it may have followed a pre-existing design. In this way, the artists owned copyright in their artworks.

Some carpets had altered versions of the artworks. Under the *Copyright Act* it is not necessary for an artwork to be an exact copy for it to infringe copyright. Copying occurs when an artwork has been substantially reproduced. Generally, to consider this the Court will look at the striking similarities between the original artwork and the infringing copy. Quality is more important than quantity and depends largely on the nature of the parts taken from the original artwork.

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[42] Colin Golvan, *op cit*, p 7.
[43] Federal Court of Australia, No DG3 of 1996. The judgement has been released since the writing of this Report.
[44] Martin Hardie, Current litigation in native title and intellectual property: Bulun Bulun and (Deceased Applicant) v R & T Textiles (1997) vol 3(90) *Aboriginal Law Bulletin* p 18.
[45] *(Deceased Applicant and Others) v Indofurn* (1994) 30 IPR 209.

The Federal Court noted that the carpets, although not identical to the artworks, reproduced parts of the original artworks that were centrally important to that particular artwork. For example, the part taken from Tim Payunka Tjapangati s artwork to produce one of the infringing carpets reproduced an important part of the painting which depicted a sacred men's story. This was one factor which led the Court to conclude that copyright had been infringed.

The Court s decision regarding damages was also significant. Having decided that the carpets were infringements of copyright, the Court awarded damages of about $188,000 and ordered the importers to hand over the unsold carpets. Part of the award was given in consideration of the personal hurt and cultural harm the infringements caused to the artists in having their work reproduced in such a culturally inappropriate way. This was because regardless of whether the artists authorised the reproduction of their artworks on carpets, they were responsible under Aboriginal law for the transgression that had occurred and were liable to be punished for such a breach.

Damages under the remedies section of the *Copyright Act* are usually calculated according to the commercial context of the infringement. In the Carpets Case, the Court applied the law widely, allowing damages for cultural and personal interests.

The Court made a collective award to the artists rather than individual awards so the artists could distribute it according to their cultural practices. In this way, the Court indirectly recognised the communal ownership of Indigenous arts and cultural expression.

5.3 The *Designs Act*

Designs legislation protects two and three-dimensional items for commercial purposes.

5.3.1 *What is a design?*

A design refers to the features of shape, configuration, pattern or ornamentation applicable to an article, being features that, in the finished article, can be judged by the eye, but does not include a method or principle of construction .[46] An article as defined under the Act means any article of manufacture , provisions in the Design Regulations allow the Registrar to exclude the registration of designs for articles that are primarily literary or artistic in character. This includes articles which carry printing, such as book-jackets, calendars, dress-making patterns and greeting cards.[47]

5.3.2 *Meeting the criteria for protection*

Under the *Designs Act 1906,* a person may register a design to protect the visual

[46] Defined by section 4(1) of the *Designs Act 1906*.
[47] Sections 4(1) and 17(2) of the *Designs Act 1906* and Regulation 11(1) of the Design Regulations 1982.

appearance of manufactured products. A registered design gives the registered owner the legally enforceable exclusive right to use it to gain a marketing edge and to prevent others from using the design without permission.[48]

To register a design, it must be applied to an article. It must be new , in that it is not known or previously used in Australia; or original , in that it has never been applied to the particular product, although it may have been applied to another type of product.[49] Many Indigenous design items may have difficulty in meeting the new requirement. For instance, the design of the traditional didgeridoo could not be registered because it is already known and previously used in Australia.

Designs are registered with the Designs Office of the Australian Industrial Property Organisation (AIPO) for 12 months and can be extended for up to 16 years. This would not be sufficient to protect Indigenous cultural material in perpetuity.

It now costs $90 to apply for design registration and a further $65 to be registered.[50] While this might not be expensive to register one or two designs, the cost of protecting a whole body of designs belonging to an Indigenous community can be very high, and act as a barrier to using this form of protection.

The *Designs Act 1906* may offer some protection for commercially applied Indigenous designs which meet the new and original requirements. Once registered, these designs are protected from obvious or fraudulent imitations of the registered designs.[51]

In any case, the same legal concepts underlying the *Copyright Act* apply to the *Designs Act*. For example, the legislation provides exclusive rights to the registered proprietor to deal with and use the registered design to the exclusion of others.

The ALRC s *Review of the Designs Act* looked into whether the *Designs Act* provided appropriate protection to Indigenous arts and crafts workers.[52] Throughout the Review, the ALRC became convinced that the appropriate legal response required wider consideration of the issues and supported a broader examination of the legal protection of Indigenous cultural works.[53] In its *Final Report* (1994), there were no recommendations made on this topic, because at that time the House of Representatives Standing Committee was convening the *Inquiry into Aboriginal and Torres Strait Islander Cultural Heritage*. Under the new Coalition Government, the Standing Committee has not included this inquiry in its current list of priorities.

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[48] Australian Industrial Property Organisation, *Intellectual Property - Don t Give Away Your Most Valuable Asset*, August 1996, p 6.
[49] Section 17(1), *Designs Act 1906*.
[50] Fees as at 1 May 1997.
[51] Section 30, *Designs Act 1906*.
[52] Australia Law Reform Commission, *Discussion Paper 58, Designs* (paragraph 2.39); and *Issues Paper 11, Designs* (paragraph 9.9-9.16).
[53] *Ibid*.

5.4 The *Patents Act 1990*

5.4.1 *What is a patent?*

A patent is a right to protect inventions. The patentee is granted the exclusive right, during the term of the patent, to exploit and to authorise another person to exploit the invention. An invention is not merely an idea or a concept. To be patentable, an invention must include one or more features of a product or process which are new; it must involve an inventive step and be useful. It also must not have been secretly used in the patent area before the priority date of the patent claim.

Patent protection is not automatic. The inventor, or the person who has acquired the rights in the invention from the inventor, is entitled to apply to the Australian Industrial Property Organisation (AIPO) for a patent.

Patents give inventors of a new process and/or product exclusive monopoly rights over its economic exploitation, usually for 20 years from the date of the patent.[54] Such a right is given in exchange for public disclosure of details of the invention. Thus, in common with other intellectual property rights, the availability of patent protection provides both a stimulus to inventive persons to carry on their activities, and as a safeguard for their investments to manufacturers and financiers who undertake the development of new inventions .[55]

5.4.2 *Meeting the criteria for protection*

Much Indigenous knowledge concerning agricultural, pharmaceutical and scientific practices is passed on through the generations, but is not generally patentable for the following reasons.

Manner of manufacture

To be patentable, an invention must be a manner of manufacture.[56] A good idea or a mere discovery is not patentable. The discovery of existing, naturally occurring substances cannot be patented unless there is some newly invented method of using the material, or some new adaptation of it to serve a new purpose.[57] As Gray notes:

> *On this analysis, it is clear that the mere existence of genetic resources on land owned or formerly owned by Indigenous people will not give the Indigenous people any intellectual property rights in those resources, should they turn out to have some scientific or commercial value. In order to gain*

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[54] Section 67, *Patents Act 1990*.

[55] S. Ricketson, Reaping without Sowing: Unfair Competition and Intellectual Property Rights in Anglo-Australian Law , (1984) 7 *UNSW Law Journal* p 15.

[56] Within the meaning of section 6 of the Statute of Monopolies.

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

> *patent protection or to prevent others from gaining it, the Indigenous people would have to discover the resources, and put them to a new use with commercial significance.*[58]

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

Novelty

An invention must be novel and involve an inventive step.[59] An invention is generally considered novel and involving an inventive step when it is compared with the prior art base.[60] Under this analysis, many Indigenous groups would be excluded from patenting traditional uses of genetic material and environmental resources because such knowledge is available in the prior art base . Blakeney notes that the practice of ethnobotanists and ethnopharmacologists publishing accounts of the uses of plants by Indigenous people has created a problem with Indigenous people being able to claim patents for their traditional medicinal remedies.[61] This is because once published, such knowledge becomes public knowledge and therefore part of the prior art base. By publishing information themselves about the traditional uses of plants in leaflets and books, Indigenous people also risk being able to patent their traditional medicinal knowledge.[62]

Gray notes that Indigenous groups wishing to challenge the patenting of Indigenous genetic resources on the basis of lack of novelty, would have to prove their knowledge of that use as part of the prior art base .[63] For instance, returning to the Smokebush example, while Indigenous people were aware that Smokebush had certain healing properties, they were not aware of its potential benefits in treating the HIV virus.

In the patent system, claims for mechanical inventions concern the device itself and the methods of making and using that device. Similarly, claims regarding a chemical invention usually apply to the novel compound, a process for producing that compound and sometimes the compound when produced by a particular process. Claims to a pharmaceutical patent are commonly directed to a pharmaceutical composition contained in the novel compound.

Scientists are able to extract the pharmaceutical components of medicinal plants to a level by which the active ingredients can be isolated and defined. It is often this process or the pharmaceutical composition of the Indigenous resource which becomes the subject of patents.

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[58] Stephen Gray, Vampires Round the Campfire , (1997) vol 22(2) *Alternative Law Journa*l p 61.
[59] Section 18(1), *Patents Act 1990*.
[60] Section 7(1), *Patents Act 1990*.
[61] Professor Michael Blakeney, Bioprospecting and the Protection of Traditional Medical Knowledge , Symposium on Intellectual Property Protection for the Arts and Cultural Expression of Aboriginal and Torres Strait Islander People, Brisbane, 28 September 1996, p 3.
[62] While communities may own copyright in such publications, their rights to the information contained in the book does not amount to patent rights.
[63] Stephen Gray, *op cit*, p 62.

Patent rights versus Indigenous Cultural and Intellectual Property Rights

Some Indigenous people believe pharmaceutical companies could patent traditional knowledge, possibly to the exclusion of traditional owners. The AIPO submission noted that a patent cannot be validly granted for something which is already in the public domain, so patents held by pharmaceutical companies cannot prevent Indigenous peoples from using their traditional medicinal remedies.[64] As AIPO notes:

> *Under the existing system, a patent application is advertised after it is accepted. Interested parties have three months to oppose granting of the patent on various grounds, including grounds of prior use. If this is proved, no patent will be granted.*
>
> *It has long been accepted that if a patent is granted, this cannot prevent people from doing what they did privately before the grant of the patent. That is, in the case of traditional knowledge, Indigenous people can continue their traditional medicine practices without fear of infringing any subsequent patent.*
>
> *Alternatively, if a patent has already been granted, the Patents Act allows any person with information that may show a patent should not have been granted, to apply to court for an order to revoke the patent.*

It should be noted that neither of these processes helps Indigenous people gain any royalties.

5.4.3 *Patenting human genetic material*

Human beings, and the biological processes which make them, are not patentable inventions.[65] However, the AIPO currently accepts patent applications which involve human genetic resources. Gray notes this does not prevent patent applications over parts of human beings.[66] Human genetic material such as genes and DNA may form the subject matter of inventions, and therefore be patented.

5.4.4 *High cost of patenting inventions*

Blakeney estimates the cost of patenting an invention in Australia is about $14,000 and ranges from $5,000 to $23,000 in other countries.[67] He notes that such a high cost to apply for and further enforce patent rights often precludes Indigenous communities from making use of patent law to legitimise their rights.

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[64] Australian Industrial Property Organisation, Submission to *Our Culture: Our Future*, October 1997.

[65] Section 18(2), *Patents Act 1990*.

[66] Stephen Gray, *op cit,* p 62.

[67] Michael Blakeney, *op cit,* p 5.

5.5 *Plant Breeders Rights Act 1994*

The *Plant Breeders Rights Act* meets Australia s obligations under the *International Convention for the Protection of New Varieties of Plant 1961 (UPOV)*. The Act gives plant breeders the exclusive commercial rights to market a new plant variety or its reproductive material. Such rights allow the plant breeder to produce, reproduce, sell and distribute the new plant variety; receive royalties from the sale of plants or sell the rights to do so.[68] Plant breeder rights holders can prevent others from selling seeds of that variety. Exceptions are that other breeders can use the protected seeds to develop new seed varieties; and growers do not have to pay royalties on the crop produced and may save the seeds for replanting.[69]

New varieties may be sold for up to 12 months in Australia and four years overseas and still be eligible for plant breeder s rights.[70]

5.5.1 *Meeting the criteria for protection*

To be eligible for protection, it must be shown that the new variety is distinct as well as being uniform and stable. It must also be demonstrated by comparative trial that the new variety is different from the most similar varieties of common knowledge. Protection is obtained from Plant Breeders Rights Australia and lasts up to 25 years for trees or vines and 20 years for other species.[71]

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. [72]

Like other intellectual property laws, the ability of plant breeders rights laws to protect Indigenous plant breeders rights is limited in that protection is limited to a set period and usually vests in individuals and companies, while Indigenous Cultural and Intellectual Property Rights last in perpetuity and are collective.

5.6 *Trademarks Act 1995*

As noted above, some Indigenous people have complained about the use of Indigenous cultural material as business names and trade marks by non-Indigenous people and businesses. It should be noted that the registration of a business name does not create any intellectual property in or to the name which would not otherwise exist.[73] Trade marks law, however,

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[68] Section 11, *Plant Breeders Rights Act 1994*.
[69] Section 17, *Plant Breeders Rights Act 1994*.
[70] Section 43(6)(ii), *Plant Breeders Rights Act 1994*.
[71] Section 22(2), *Plant Breeders Rights Act 1994*.
[72] Tony Simpson, Draft Report prepared on behalf of the Forest Peoples Programme, *The Cultural and Intellectual Property Rights of Indigenous Peoples*, June 1997, p 49.
[73] *Fletcher Challenge Ltd v Fletcher Challenge Pty Ltd [1981]* 1 NSWLR 196. Each State and Territory has legislation which provides for and requires registration of business names, where, generally, business is carried on under a name other than that of the business owner. See, for example, *Business Names Act 1962-1979 (NSW).*

does create certain intellectual property rights.

5.6.1 *What is a trade mark?*

A trade mark is a sign used to indicate the trade origin or source of goods or services. A sign includes any letter, word, name, signature, numeral, device, brand, heading, label, ticket, aspect of packaging, shape, colour, sound or scent.[74]

Once the trade mark is registered, the registered owner will be granted a type of property right to use that trade mark in association with his or her trade and in accordance with the class of goods and services approved by the Trade Marks Office. Trade marks are personal property[75] and can be licensed, assigned and transmitted.

The rights exist so long as the registered owner continues to use the mark in the course of trade. Registration is for an initial 10 years.[76] Renewals of registration must be made. This means effectively trade mark rights can be held and maintained so long as the registered owner continues to register every 10 years and continues to use the mark in the course of trade.

5.6.2 *The trade mark application/approval process*

- Generally, a person who claims to be the owner of the mark and is using or intends to use or license use of the trade mark may apply to register it with the Trade Marks Office at the Australian Industrial Property Organisation (AIPO).[77]
- All applications are examined to consider any grounds for rejecting the application and that it has been made according to the legislation. Division 2 of Part 4 of the *Trade Marks Act* lists grounds by which the Registrar can reject an application. Such grounds include:
- The trade mark does not distinguish the applicant s goods and services from the goods and services of other persons.[78]
- The trade mark or part of the mark comprises of scandalous matter or would be contrary to law.[79]
- The trade mark is likely to deceive or cause confusion.[80]
- The trade mark is substantially identical with, or deceptively similar to the trade mark of another person.[81]

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[74] Section 6, *Trade Marks Act 1995*.
[75] Section 21(1), *Trade Marks Act 1995* .
[76] From the date of the application. Section 72(3) *Trade Marks Act 1995*.
[77] Section 27(3), *Trade Marks Act 1995*.
[78] Section 41, *Trade Marks Act 1995*.
[79] Section 43, *Trade Marks Act 1995*.
[80] Section 43, *Trade Marks Act 1995*.
[81] Section 44, *Trade Marks Act 1995*.

If there are no such grounds the Registrar of Trade Marks must accept the application, notify the applicant and advertise the decision in the *Official Journal.*

A person may oppose the registration of a trade mark by filing a notice of opposition at the Trade Marks Office within three months of the date acceptance was advertised in the *Official Journal*.[82] The Registrar must either refuse to register the trade mark, or register the trade mark with or without conditions or limitation, having regard to how far any ground on which the application was opposed has been established.[83]

There are also appeal avenues to the Federal Court concerning the Registrar s decisions.

5.6.3 *Meeting the criteria*

Indigenous people and organisations may register their designs, words and other cultural material as trade marks if they want to use such marks in the course of trade. This type of protection might assist commercial users of Indigenous cultural material. But a problem for Indigenous individuals and organisations using trade mark law for protection is that the trade mark must apply to the registered owner, who has monopoly rights. Often Indigenous people are reluctant to claim monopoly rights over cultural material which belongs to the group collectively.

5.6.4 *Challenging trade marks of Indigenous cultural material*

The *Trade Marks Act* allows third parties to oppose the registration of a trade mark.[84] Grounds for opposing registration include:

- The same grounds by which registration may be opposed, as discussed in 5.6.2.[85]
- The trade mark contains or consists of a false geographical indication.[86]

Scandalous marks

It is arguable that trade marks which make use of sacred material are scandalous and contrary to Indigenous customary laws. Perhaps there is scope for a particular group or community to challenge such scandalous marks or to at least bring this to the attention of the Registrar at the time of registration. However, McKeough and Stewart consider that while there is little scope for refusing a mark on the grounds that it is scandalous, trade marks incorporating Indigenous cultural material may be opposed on the grounds that they are racist .[87]

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[82] Section 52(1), *Trade Marks Act 1995.*
[83] Section 55, *Trade Marks Act 1995.*
[84] Part 5, *Trade Marks Act 1995.*
[85] Section 57, *Trade Marks Act 1995.*
[86] Section 61, *Trade Marks Act 1995.*
[87] J. McKeough and A. Stewart, *Intellectual Property in Australia*, Butterworths, Sydney 1991, p 357.

Ricketson speculates that many old trade marks, such as the Abo Brand mark used for paints, would not be registrable today because they would be in breach of the race relations legislation .[88] It could be argued that the use of an Indigenous word or symbol etc is contrary to Indigenous law, however contrary to law more likely refers to laws recognised by the Australian legal system.

Culturally offensive marks

Wright notes that North American Indigenous peoples have had little success in preventing the registration of trade marks and names for beer brands and motor vehicles.[89]

Geographical indication

Indigenous cultural material such as words, designs, symbols and so on originate in a particular area or areas. It begs the question as to whether it might be a false geographical indication to use an Indigenous language word or design for a product that is produced outside that country or without the involvement of that particular language community.

There are also procedures for third parties to apply for the cancellation of registration or rectification of the register. These might be used by those who failed to oppose registration within the relevant time period. (See discussions in Chapter 12 for suggested regulations and procedures that the Trade Marks Office could adopt when Indigenous words, designs, and so on are part of an application for a registered trade mark.) The trade mark opposition provisions in relation to these arguments are yet to be tested.

5.6.5 *Collective marks*

Collective marks are a recent addition to the trade marks regime.[90] A collective trade mark is a sign used in relation to goods or services dealt with or provided in the course of trade by members of an association, to distinguish the goods or services of members of the association from those of non-members.[91] Like ordinary trade marks, collective trade marks are used to indicate that the goods or services come from a particular source rather than indicating that the goods or services meet a certain standard. However, the particular source indicated in the case of a collective trade mark is not a single trade source but one comprising the members of the association which has registered the collective mark. Registration is not available for trade marks which are used solely to indicate membership of an association or other organisation. The trade marks must be applied to goods or services.

There is no requirement for filing any rules governing the use of a collective trade

[88] S. Ricketson, *op cit*, p 674.
[89] Shelley Wright, Mabo and the Protection of Aboriginal Art and Culture: The Extension of a Legal Revolution (unpublished), Submission to *Stopping the Rip-offs*, January 1995.
[90] Part 15 of the *Trade Marks Act 1995* introduces collective trade marks as a new category of trade mark.
[91] Section 162, *Trade Marks Act 1995.*

mark. Only members of the association in whose name a collective trade mark is registered may use the collective trade mark. A member of an association in whose name a collective trade mark is registered does not have the right to prevent another member of the association from using the trade mark, unless the use does not comply with any rules of the association governing that trade mark.[92] Collective registered since the establishment of this new category include WA Citrus Improvement Group and Toyota Dealer Group.[93]

A collective mark may be an option for Indigenous cultural products if the purpose is only to show that the products are made by Indigenous producers who are members of, say, an Indigenous cultural industry association. The mark would not necessarily endorse the quality of the goods or services provided by members of such an association, other than to indicate that the association s membership requirements had been met. Thus, if the purpose of the mark is to promote cultural integrity, this might not be the most appropriate mechanism.

5.6.6 *Certification mark*

A certification mark is a sign used to distinguish goods or services which possess a certain quality, accuracy or characteristic. The distinguishing characteristics may include geographic origin, quality of material used or the mode of manufacture.[94] Use of the mark is certified by the registered owner of the certification mark, or by representative organisations approved by the registered owner in accordance with the rules for use.

According to AIPO, the certification provisions are well suited for protecting and authenticating Indigenous people s products.[95] This option is also favoured by many Indigenous groups.

A certification mark may be useful for Indigenous cultural products if the mark is intended to certify that the work is authentic; that is, it is produced by Indigenous people who have a claim to the type of style or to use the type of knowledge or information embodied in that product. This will be discussed in Part Three - Reform Options.

5.7 Breach of confidence laws

Breach of confidence or trade secrets laws have also been used to protect Indigenous arts and cultural expression.[96] To establish an action, the applicant must show that:

- The information has the necessary quality of confidence about it.

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[92] Section 165, *Trade Marks Act 1995*.
[93] As noted in J. W. Dwyer et al (eds), *Lahore, Patents, Trade Marks & Related Rights*, Butterworths, Australia, 1996, pp 50, 138.
[94] Section 169(b),*Trade Marks Act 1995*.
[95]AIPO, Submission to *Our Culture: Our Future*, October 1997.
[96] Stephen Gray, "Aboriginal Designs and Copyright", (1991) vol 9(4) *Copyright Reporter* p 8.

- The information was imparted in circumstances where there was an obligation of confidence.
- There was an unauthorised use of that information to the detriment of the party communicating it.[97]

This area of law has been used to protect Indigenous sacred and secret material. In *Foster v Mountford*,[98] the Court granted an injunction in favour of members of the Pitjantjatjara Council, who took the action to stop the publication of a book in the Northern Territory.

Foster v Mountford

Mountford, an anthropologist, undertook a field trip in 1940 into remote areas of the Northern Territory. Tribal sites and items of deep cultural and religious significance were revealed to the anthropologist by the Pitjantjatjara people. Mountford recorded the information and later wrote a book, *Nomads of the Australian Desert,* which was distributed for sale in the Northern Territory.

The book contained information that was of deep religious and cultural significance to the Pitjantjatjara people. The information was shown to have been given to Mountford in confidence. The Pitjantjatjara people were concerned that continued publication of the book in the Northern Territory could cause serious disruption to their culture and society should the book come into the hands of the uninitiated.

Pitjantjatjara Council Inc and Peter Nguaningu v Lowe and Bender (1982)

Similar findings were made in *Pitjantjatjara Council Inc and Peter Nguaningu v Lowe and Bender (1982)*, an action related to lantern slides taken by Mountford of secret sacred material belonging to the Pitjantjatjara people. The Pitjantjatjara Council was again able to show that an obligation of confidence was placed on Mountford at the time he took the slides. The disclosure of these in public, particularly to uninitiated people, would destroy the social and religious structure of the Pitjantjatjara people.

The Court granted an order that the slides be handed over to the Council to check for slides which related to or recorded any of the philosophical or religious traditions of the Pitjantjatjara . Furthermore, the Court declared that the property in and ownership of the slides, photographs and negatives vested in the Pitjantjatjara Council for and on behalf of the Pitjantjatjara Yankunjatjara and Ngaayatjara peoples .[99]

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

[98] (1977) 14 ALR 71.

[99] [1982] Supreme Court of Victoria, Unreported, See Case Note in 4 *Aboriginal Law Bulletin*, p 11.

These cases illustrate how breach of confidence laws have been applied to protect Indigenous arts and cultural expression. To bring a breach of confidence action, it is necessary to show that the relationship of confidence existed at the time the information was relayed. However, under Indigenous law, it is not relevant whether such "secrecy" exists. If sacred material has been disseminated among people not authorised to receive it, then it follows that a breach of Indigenous law has occurred.

An issue also arises where an Indigenous person not authorised under Indigenous law divulges information and then it is published, or where an Indigenous design is expressed in the work of an individual artist with purported "authorisation" from the community from which the design originates.

5.8 Passing off

A trader can protect his or her business goodwill and reputation in an action over passing off .[100] The classic passing-off situation is where one trader represents his or her goods or services as those of another. However, a range of representations are now actionable, including:

- Misrepresentation as to the source of goods and services.[101]
- Misrepresentation that there is some sort of connection or association with another person s business, whether by way of partnership, sponsorship or licensing.[102]
- Misrepresentation that there is a connection or association with another person s images, character and personalities.[103]
- Deceptive or confusing use of names, descriptive terms and other indications to persuade purchasers to believe that goods or services have an association, quality or endorsement which belongs or would belong to goods or services of, or associated with, another or others.[104]

5.8.1 *Meeting the criteria*

Passing off may be an avenue for Indigenous interests if the following principles of passing off are met:

(i) The goods have or the business has acquired a certain goodwill and reputation;

(ii) That the actions of the defendant have caused, or in all probability will cause, the ordinary purchasers of the plaintiff s goods or ordinary customers of the plaintiff s business, to believe that the defendant s goods are those, or that the defendant s business is that, of the plaintiff;

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[100] *Reddaway v Banham [1896]* AC 199 per Lord Halsbury LC at 204.
[101] *Bollinger v Costa Brava Wines Co Ltd (1960)* RPC 16.
[102] *Hogan v Koala Dundee Pty Ltd (1988)* 12 IPR 508.
[103] *Ibid* per Pincus J.
[104] *Moorgate Tobacco Co Ltd v Philip Morris Ltd (1984)* 156 CLR 414 at 445; at 214; at 516 as cited in Jill McKeough, *Intellectual Property: Commentary and Material*s, (2nd ed) Law Book Company, Sydney 1992, p470.

(iii) That, as a consequence, the plaintiff has suffered or is likely to suffer injury in his (or her) trade or business.[105]

Indigenous interest groups are today gaining reputations as producers from specific regional areas and may therefore be able to show that they have an established good-will or reputation as Indigenous art and cultural material producers. Consumers are purchasing Indigenous arts and cultural products on the strength of this reputation. Perhaps the main limitation for Indigenous interest groups is showing that the damage or likely damage to their goodwill and reputation was brought about by the deception caused by the defendant s conduct, as often this will require survey evidence.

5.9 Summary

Non-Indigenous notions of Intellectual Property vs Indigenous notions of Indigenous Cultural and Intellectual Property

NON-INDIGENOUS	INDIGENOUS
Emphasis on material form.	Generally orally transmitted.
Emphasis on economic rights.	Emphasis on preservation and maintenance of culture.
Individually based - created by individuals.	Socially based - created through the generations via the transmission process.
Intellectual property rights are owned by individual creators or their employers and research companies.	Communally owned but often custodians are authorised to use and disseminate.
Intellectual property can be freely transmitted and assigned - usually for economic returns - for a set time, in any medium and in any territory.	Generally not transferable but transmission, if allowed, is based on a series of cultural qualifications.
Intellectual property rights holders can decide how or by whom the information can be transmitted, transferred or assigned.	There are often restrictions on how transmission can occur, particularly in relation to sacred or secret material.
Intellectual property rights are generally compartmentalised into categories such as tangible, intangible, arts and cultural expression.	An holistic approach, by which all aspects of cultural heritage are interrelated.

[105] *Powell J, Fletcher Challenge Ltd v Fletcher Challenge Pty Ltd [1981]* 1 NSWLR 196.

Chapter Five : Recommendations

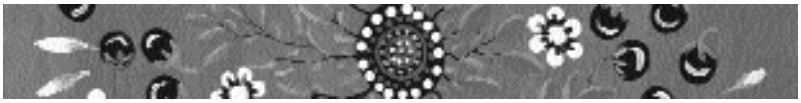
5.1 Indigenous people need to be informed about existing intellectual property laws and how these impact on their Indigenous Cultural and Intellectual Property Rights.

5.2 Indigenous people need to be informed about how existing intellectual property laws might benefit their needs in relation to the use and control of their Indigenous cultural heritage.

5.3 There is a need for greater protection for Indigenous cultural material, particularly in relation to communal rights, the protection of sacred/secret material.

CHAPTER SIX

Current position under cultural heritage laws



6.1 What is cultural heritage?

As noted previously in Part One, Indigenous people define their cultural heritage as the totality of cultural practices and expressions which belong to them collectively, by virtue of their birthright. Such cultural practices and expressions are continuously evolving and comprise both intangible and tangible elements. However, legislatively, Australian governments have tended to interpret cultural heritage much more narrowly.

The protection of Indigenous heritage is viewed as an important national responsibility. The Australian Constitution gives the Commonwealth the power to make special laws with respect to people of any race.[1] It has the power to make laws to acquire property on just terms from any State or person for any purpose for which it has the power to enact legislation.[2] States too, have the power to enact laws regarding cultural heritage. The result is a disparate framework of cultural heritage laws where there is little uniformity between State, Territory and Commonwealth legislation. The table below lists the different cultural heritage laws and conservation laws which deal with Indigenous cultural heritage. Appendix 1 provides a summary of some of these.

Commonwealth	
Aboriginal and Torres Strait Islander Heritage Protection Act 1984 (Cth)	*Native Title Act 1993 (Cth)*
Aboriginal and Torres Strait Islander Commission Act 1989 (Cth)	*Environment Protection (Impact of Proposals) Act 1974 (Cth)*
Australian Institute of Aboriginal and Tor-res Strait Islander Studies Act 1989 (Cth)	*Australian Heritage Commission Act 1975 (Cth)*
	National Parks and Wildlife Conser-vation Act 1975 (Cth)

[1] The Australian Constitution s 52(xxxvi)
[2] The Australian Constitution s 51(xxxi)

Museum of Australia Act 1980 (Cth)

World Heritage Properties Conservation Act 1983 (Cth)

Protection of Movable Cultural Heritage Act 1986 (Cth)

Northern Territory

Aboriginal Land Rights (NT) Act 1976 (Cth)

Northern Territory Aboriginal Sacred Sites Act 1989 (NT)

Heritage Conservation Act 1991 (NT)

Strehlow Research Centre Act (NT)

Victoria

Archaeological and Aboriginal Relics Preservation Act 1972 (Vic)

Aboriginal and Torres Strait Islander Heritage Protection Act 1984 (Victorian Provisions Part IIA)

Mineral Resource Development Act 1990 (Vic)

New South Wales

National Parks and Wildlife Act 1974 (NSW)

Environmental Planning and Assessment Act 1979 (NSW)

National Trust of Australia Act 1990 (NSW)

Queensland

Queensland Museum Act 1970 (Qld)

Cultural Record (Landscapes Queensland and Queensland Estate) Act 1987 (Qld)

Queensland Heritage Act 1992 (Qld)

Australian Capital Territory

Aboriginal Land Grant (Jervis Bay Territory) Act 1986 (Cth)

Land (Planning and Environment) Act 1991 (ACT)

South Australia

Aboriginal Heritage Act 1988 (SA)

Western Australia

Aboriginal Heritage Act 1972 (WA)

Conservation and Land Management Act 1984 (WA)

Environmental Protection Act 1986 (WA)

Tasmania

National Parks and Wildlife Act 1970 (TAS)

Aboriginal Relics Act 1975 (TAS)

Museums (Aboriginal Remains) Act 1984 (TAS)

The scope, aims and effects of the various Acts differ considerably. *Protecting Heritage: A plain English introduction to protecting Aboriginal and Torres Strait Islander Heritage in Australia* presents a good summary of the legislation. This chapter will discuss generally some of the common features of the various cultural heritage laws, as follows:

- Ownership of cultural heritage
- Focus of cultural heritage and definitions of what constitutes Indigenous heritage
- Ministerial discretionary power
- Indigenous participation in the decision-making process
- Access to Indigenous areas
- Cultural Heritage Agreements

6.2 Ownership of cultural heritage

Generally, Indigenous peoples are concerned that cultural heritage legislation fails to recognise them as the legal owners of their own cultural heritage. It is argued by some commentators that this approach of protecting heritage is based on the premise that the cultural heritage of any people is part of the wider cultural heritage of all peoples, and therefore no particular groups should be able to exercise a monopoly over their own heritage.[3]

This type of reasoning does not fit with Indigenous notions of cultural heritage. Under Indigenous customary laws, Indigenous knowledge is collectively owned by the descendants of the particular group. In this respect, Indigenous people request that the ownership of Indigenous cultural heritage and property be vested in the local community of origin.

Unfortunately, cultural heritage legislation has failed to take this into account and the following approaches to ownership of cultural heritage have resulted. *The Queensland Cultural Record Act* does not distinguish between Aboriginal heritage and other heritage in Queensland. The words Aboriginal and Torres Strait Islander have been deliberately excluded. This is perhaps because the legislators recognise the value of Aboriginal heritage not just to Aboriginal and Torres Strait Islanders but to all Queenslanders.[5]

The Victorian cultural heritage protection regime as set up under the *Aboriginal and Torres Strait Islander Heritage Protection Amendment Act 1987* notes in the preamble:

- The importance to Aboriginal people and to the wider community of Aboriginal culture and heritage
- That the Aboriginal people of Victoria are the rightful owners of their heritage and should be given responsibility for its future control and management
- The need to make provision for the preservation of objects and places of religious historical significance to the Aboriginal people
- The need to accord appropriate status to Aboriginal elders in their role of protecting the continuity of the culture and heritage of Aboriginal people

However, as noted by Fourmile, the list of acknowledgments made by the Victorian Government is quickly followed by a paragraph inserted by the Commonwealth which states

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[3] As noted by the Office of Aboriginal and Torres Strait Islander Social Justic Commissioner s Response to the House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs, (unpublished). Submission was prepared by Henrietta Fourmile, Consultant, p22

[4] Henrietta Fourmile, Aboriginal Heritage Legislation and Self-Determination in Australian-Canadian Studies, vol 7,nos 1-2. Special Issue, 1989, pp 45-61, p 22

[5] Fourmile argues the Queensland legislative regime for the protection of Indigenous Cultural Heritage in Queensland, (the *Queensland Heritage Act and Cultural Record (Landscapes Queensland and Queensland Estate) Act 1987 (QLD)*) is discriminatory against Indigenous Queenslanders. This is because the *Cultural Record Act* provides a lesser mechanism for the protection of Indigenous cultural heritage than that which is provided for non-Indigenous Queenslanders under the *Queensland Heritage Act.* See *The Queensland Heritage Act 1992* and the *Cultural Record (Landscapes Queensland and Queensland Estate) Act 1987 (QLD): Legislative Discrimination in the Protection of Indigenous Cultural Heritage (1996)* 1 AILR 507

that the Commonwealth does not acknowledge the matters acknowledged by the Government of Victoria .[6]

Fourmile considers that the South Australian legislation is perhaps the greatest recognition of ownership existing under the cultural heritage laws.[7] The *South Australian Aboriginal Heritage Act 1988* acknowledges that a traditional owner of an Aboriginal site or object means an Aboriginal person who, in accordance with Aboriginal traditions, has social, economic and spiritual affiliations with, and responsibilities for, the site or object. [8]

6.3 Focus of the legislation

6.3.1 *Tangible cultural heritage vs intangible cultural heritage*

The Review of the *Aboriginal and Torres Strait Islander Heritage Protection Act* conducted by Hon Justice Elizabeth Evatt in 1995/96 noted that during the consultations, concerns were raised by Indigenous people that the Act did not cover intellectual property.[9]

As noted in Part One, Indigenous cultural heritage involves an holistic approach where traditions are embodied in songs, stories and designs as well in land and the environment - the intangible interlinked with the tangible. However, the Western legal approach reflected in various cultural heritage laws tends to protect the tangible aspects of cultural heritage only, such are areas, objects and sites.

The Victorian legislation, however, defines Aboriginal Cultural Property as meaning Aboriginal places, Aboriginal objects and Aboriginal folklore . Aboriginal folklore means:

> *traditions or oral histories that are or have been part of, or connected with, the cultural life of Aboriginals (including songs, rituals, ceremonies, dances, art, customs and spiritual beliefs) and that are of particular significance to Aboriginal in accordance with Aboriginal tradition.*

However, the rest of the cultural heritage legislation focuses on areas, sites and objects.

From an Indigenous perspective, it is difficult to separate the tangible from the intangible. Indigenous people can only maintain those aspects of their cultural heritage and identity which they choose to preserve, through access to and protection of locations of spiritual and cultural significance. Their right to perform traditional ceremonies, exercise their artistic creativity and maintain their languages can be achieved effectively only if rights to land and sites are acknowledged and maintained.

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[6] Henrietta, Fourmile, Aboriginal Heritage Legislation and Self-Determination in *Australian-Canadian Studies*, Vol 7, Nos 1 - 2. Special Issue, 1989, pp. 45 - 61, p. 46

[7] *Ibid*, p. 48

[8] **Refer to relevant section of the Act.

[9] Report of the Evatt Review, p 3

6.3.2 *Scientific and historical value vs cultural and spiritual value*

There is a tendency under the current legislation for Indigenous cultural heritage to be defined in terms of its scientific, historical or archaeological value. Some examples:

- In New South Wales, Indigenous cultural heritage is managed by the *National Parks and Wildlife Act 1974 (NSW)* which refers to Indigenous objects as relics. A relic is defined as any deposit, object or material object relating to Aborigines, including Aboriginal remains, excluding handicraft made for sale relating to Indigenous and non-European habitation of New South Wales .
- The *Queensland Cultural Records Act* refers to evidence of human occupation of areas comprising Queensland Estate that are of prehistoric or of historical significance. Section 32 of the *Cultural Record Act* is the only recognition of the continuing cultural significance that areas of Queensland Estate may have for Indigenous people. However, Fourmile notes that if the terms of this section are read in the context of the Act, it is clear that the intention is not to protect sites or objects for the benefit of Indigenous people.[10] The definition of Queensland Estate may in fact restrict the applicability of the Act to some sites that are significant to Indigenous people. Sacred religious places in the form of rocks, waterholes, trees and mountains would not necessarily be evidence of man s occupation of the area comprising Queensland, or be of historic significance, if the definition is interpreted in terms of European culture.

The legislators appear to have placed greater emphasis on European values with respect to determining archaeological, anthropological and scientific significance. To attempt to protect Indigenous rights to Indigenous cultural heritage under such definitions not only undermines the past cultural value of such cultural heritage material, it is also detrimental to the future development and identity of the cultural group concerned.

6.4 Relics vs living cultural material

Some of the State and Territory cultural heritage legislation uses terminology such as relics and archaeological objects . For instance, the *National Parks and Wildlife Act 1970 (Tas)* applies to Aboriginal relics which are defined as including any artefact, painting, carving, midden, or other object made or created by or any object, site or place that bears signs of the activities of any of the Aboriginal inhabitants of the Australia or their descendants.[11] Fourmile considers that the use of such terminology infers that Indigenous cultural property has no connection or significance to Aboriginal people today, (and that they) belong to a dead past .[12]

Recent legislative changes in Western Australia have gone further than other State and

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[10] Henrietta Fourmile, *The Queensland Heritage Act 1992* and the *Cultural Record (Landscapes Queensland and Queensland Estate) Act 1987 (QLD): Legislative Discrimination in the Protection of Indigenous Cultural Heritage (1996)*

[11] Section 3, *National Parks and Wildlife Act 1970 (Tas)*

[12] Henrietta Fourmile, Aboriginal Heritage Legislation and Self-Determination in *Australian-Canadian Studies, V*ol 7, Nos 1 - 2. Special Issue, 1989, pp. 45 - 61, p. 50

Territory laws which focus primarily on archaeological objects or relics. The *Aboriginal Heritage Amendment Act 1995 (No 24 of 1995)* protects places, sites and objects which are currently used by Aboriginal people. An Aboriginal site includes:

- A place of importance and significance where persons of Aboriginal descent have, or appear to have, left any object made or used for any purpose connected with the traditional cultural life of the Aboriginal people, past or present.
- A sacred, ritual or ceremonial site, which is of importance and special significance to persons of Aboriginal descent.
- A place associated with the Aboriginal people which the Aboriginal Cultural Material Committee (ACMC) considers to be of importance and special significance to persons of Aboriginal descent.
- A place where objects are traditionally stored, or to which, under the provisions of this Act, such objects have been taken or removed.

The Act also protects:

- Objects which are or have been of sacred, ritual or ceremonial significance to persons of Aboriginal descent
- Objects which are or were made or used for any purpose connected with the traditional life of Aboriginal people, past or present.

6.5 Ministerial discretionary power

A common feature of most of the cultural heritage is that the ultimate authority is vested in a government minister who has wide discretionary powers over matters relating to Indigenous cultural heritage. For example, powers exercised by ministers under the legislation include:

- The appointment of members of Aboriginal Heritage Advisory Committees where they exist.
- Controlling sales and other means of disposing of Indigenous heritage items.
- Controlling access to sites.
- Controlling Indigenous heritage registers.
- The ultimate authority to determine whether a site or object should be declared a protected site, object or area.

The Report of the Evatt Review noted that Indigenous people were critical of the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984 (Cth)* because the power to protect areas and objects is discretionary. The minister is not obliged to act, even if an area is of significance to Indigenous people.[13] Another concern was that the procedures of the Act open Indigenous people seeking its protection to extreme scrutiny of their spiritual beliefs. The Act

[13] Hon Elizabeth Evatt AC, *Review of the Aboriginal and Torres Strait Islander Heritage Protection Act 1984*, Commonwealth of Australia, (1996), p. 15

does not protect confidential information or respect Indigenous spirituality and beliefs which require that confidentiality be maintained. Nor does the Act adequately recognise or provide for the involvement of Indigenous people in negotiation and decision-making about their cultural heritage.[14]

6.6 Indigenous participation in the decision-making process

Some legislative models provide for the establishment of Indigenous heritage bodies which are consulted as part of the decision-making process. For instance:

- In the Northern Territory, the Aboriginal Areas Protection Authority (AAPA) was established to administer the *Northern Territory Aboriginal Sacred Sites Act 1989.* The board of the AAPA is made up of five men and five women being Aboriginal custodians of sacred sites nominated by the land council and two other members nominated by the government of the day. Similarly, the NSW legislation provides for the establishment of an Aboriginal Cultural Heritage (Interim) Advisory Committee comprising eight people, five of whom are Aboriginal.[15]
- The *South Australian Aboriginal Heritage Act 1988* establishes an Aboriginal Heritage Committee composed entirely of Indigenous people drawn from local communities. The functions of the Aboriginal Heritage Committee are to advise the minister on various aspects of administration of the Act. Section 13 ensures that the minister consults Indigenous people before making any determination or authorisation under the Act. The minister must accept the views of the traditional owners as to whether the land or object is of significance according the Aboriginal tradition. The Act also contains a fundamental guarantee that it will not be used to overrule Aboriginal tradition in terms of Aboriginal people s actions in relation to sites, objects, and remains. It does not affect the ownership of the heritage protected under the Act but the minister does have the power to acquire land or objects for the purpose of protecting them. The Minister may also place such acquisitions in the custody of an Aboriginal person or organisation.

6.7 Restoration of hunting, gathering and fishing fights

Recent amendments to cultural heritage legislation in New South Wales have included exemptions for Aboriginal owners to hunt and gather in certain parks and reserves. For instance, the insertion of section 57(6) provides exemptions to Aboriginal owners for picking food from any tree, timber or plant (including a native plant, flower or vegetation) within the reserve, for domestic, ceremonial or cultural purposes. This includes a protected native plant but not a plant of a threatened species or a plant protected by the plan of management for the reserve. Similar provisions exist for restrictions on harming animals in certain parks and reserves.

Furthermore, the recently enacted *Living Marine Resource Management Act 1995 (Tas)* recognises the right of Indigenous people to continue customary fishing and gathering.[16]

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[14] *Ibid*, page. xiv

[15] Section 27, *National Parks and Wildlife Act 1974 (NSW)*

[16] Sections 10, 60(2)(1), *Living Marine Resources Management Act, 1995*

6.8 Cultural heritage agreements

The Victorian Cultural Heritage regime allows for Indigenous Cultural Heritage Agreements to be drawn up between a local Victorian Aboriginal community and a person owning or possessing an item of Aboriginal cultural property in Victoria.[17] The Agreement can cover such things as the maintenance, sale or use of the property and the rights, needs and wishes of both parties. There are also sections dealing with compulsory acquisition of cultural property by the minister to be vested in the local Koori community on trust, or in the minister on trust for Kooris in Victoria.[18] Other provisions allow for negotiation with museums and universities for the return of Indigenous remains.[19]

6.9 Conservation and land management laws

Conservation and land management legislation such as the *National Parks and Wildlife Services Act* and the *Conservation and Land Management Act 1994 (WA)* also plays a significant role in the ability of Indigenous people to exercise their intellectual and cultural property rights.

In Western Australia, the government has legislatively expanded the functions of the Environment Minister to include the power to grant exclusive rights to Western Australian flora for research. Research for the therapeutic, scientific or horticultural purposes for the good of the people in Western Australia or elsewhere, and to undertake any project or operation relating to the use of flora for such a purpose, subject to the direction and control of the Minister. According to the Centre for Indigenous History and the Arts:

> *The current legislation disregards the potential intellectual property rights that Indigenous peoples in WA have in flora on their lands. Furthermore, multi-national drug companies could be sold exclusive rights to entire species of flora, preventing anyone from using those species for any other purpose without the consent of the companies.*
>
> *Indigenous peoples in WA now face the possibility of being prevented from using any of the flora which is subject of an exclusive agreement.*[20]

Roy Saintly and TALC v Allen & Murray & Latrobe University[21]

This case involved a dispute between the Tasmanian Aboriginal Land Council (TALC) and Latrobe University s archaeology department. The dispute arose when a professor in that department sought to renew permits for the possession of cultural artefacts that had been removed from four cave sites in the southern forest region in Tasmania from 1987-1991.

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[17] Section 21K, *Aboriginal and Torres Strait Islander Heritage Protection Amendment Act 1987*
[18] Section 21L, *Aboriginal and Torres Strait Islander Heritage Protection Amendment Act 1987*
[19] Section 21X, *Aboriginal and Torres Strait Islander Heritage Protection Amendment Act 1987*
[20] Centre for Indigenous History and the Arts (WA), Submission to *Our Culture: Our Future*, October 1997
[21] Unreported, Federal Court, 28 July 1995, No VG643/1995

There were over 400,000 artefacts including food remains, stone and bone tools, animal faeces and bits of shell. There was no skeletal material among the artefacts.

Several of the permits granting departmental staff members the right to take the artefacts from Tasmania had expired, and an application for renewal was made by the department and rejected in 1994. It was argued by Latrobe University that the dispute and the sense of urgency had been manufactured by TALC, and that the Tasmanian Government had been at fault in failing to implement a new system of permits when there had been an extension of the right to possession until such time as the new system was introduced.

TALC argued that the archaeologists were in unlawful possession of the artefacts and that they had been conducting unauthorised research. The Judge found that the four permits issued to Professor Allen had expired, as had the permit issued to Professor Murray. It was found that among the four permits issued to Professor Allen, the most recent had not authorised the removal of the relics from Tasmania. It also found that the issue of the permits had been conditional on the material being returned to the senior archaeologists of the Department of Parks, Wildlife and Heritage upon their expiry.

In light of published statements made by Murray and Allen, the Judge expressed grave doubts as to their willingness to return the relics until they had concluded their research.

While the Judge did consider it to be appropriate for the materials to be returned to Tasmania from Victoria, he required that they be held at the Museum of Victoria until such time as the Minister for National Parks and Wildlife decided on the custody of the artefacts.

In 1995, after the hearing, the Federal Court was requested by the Minister to return all artefacts to the senior cultural heritage officer in the Tasmanian National Parks and Wildlife Service. The artefacts were subsequently returned to Tasmania and stored by the Government until such time as they were given back to the local Aboriginal custodian.

Source: Mark Harris, *Scientific & Cultural Vandalism*[22]

6.10 Current reform proposals

6.10.1 *Evatt Review of the Aboriginal and Torres Strait Islander Heritage Protection Act 1984 (Cth)*

The Review of the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984 (Cth)* undertaken by Hon Elizabeth Evatt, AC (the Evatt Review)[23] recommended the establishment of a body with specific responsibility for monitoring Indigenous cultural heritage protection nationally, to coordinate laws and programs that have an effect on Indigenous heritage and to develop and promote the national cultural heritage policy at all levels of government. The Review recommended that the membership of the agency should include a majority of Aboriginal and Torres Strait Islander

[22] Mark Harris, Scientific and Cultural Vandalism , *Alternative Law Journal*, Vol 21 (1) Feb 1996, pp. 28 - 32

[23] See Appendix for more details about the Findings of the Evatt Review.

people, and should have a gender balance. Anthropologists, archaeologists and others with approximate experience and expertise could also be considered for appointment.[24]

The Report recommends that the major responsibility for heritage protection be undertaken by the States. Other major recommendations include:

- Strong Definition of Aboriginal tradition which includes traditions which have evolved in the post-colonial era including historic and archaeological sites.[25]
- State/Territory laws should provide for blanket protection of all Indigenous sites and objects. There should be appropriate and effective criminal law sanctions to uphold these laws.[26]
- There should be an Aboriginal heritage body responsible for site evaluation and for the administration of legislation. This body should be independent, controlled by Indigenous community members, gender balance and have adequate staffing expertise and resources and access to independent advisers.[27]
- Minimum standards include confidentiality provisions which prohibit any requirement to provide information where to do so would be contrary to Aboriginal tradition. It should also provide protection of information which must not, according to Aboriginal tradition, be disclosed to persons of one particular sex. [28]

Indigenous groups remain sceptical that the proposed amendments meet Indigenous needs. As noted by the Tasmanian Aboriginal Land Council, the recent proposed amendments to the Aboriginal and Torres Strait Islander Heritage Protection Act 1984 (Cth) and the minimum standards proposed by the Minister of Aboriginal and Torres Strait Islander Affairs do not give Indigenous groups confidence that their interests will be taken into account.[29]

6.10.2 *South Australian Aboriginal Heritage Law Reform Proposals*

In South Australia, the *Aboriginal Heritage Bill 1997* is being proposed by the South Australian Government. The Bill attempts to produce certainty in the economic development processes of the State. A submission from ATSIC (SA), states that the Bill fails to offer adequate protection for Indigenous heritage interests.[30] The submission notes the following concerns about the Bill raised by SA Indigenous groups:-

- Unfettered discretion is being given to the Minister. Under the Bill, the Minister

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[24] Hon Elizabeth Evatt AC, *op cit* (1996), page xxxiii
[25] *Ibid*, Recommendation 6.1
[26] *Ibid*, Recommendation 6.2
[27] *Ibid*, Recommendation 6.3
[28] *Ibid*, Recommendation 6.4
[29] Tasmanian Aboriginal Land Council Aboriginal Corporation, Submission to *Our Culture: Our Future,* October 1997
[30] ATSIC (SA), Submission to *Our Culture: Our Future*, October 1997

has the power to look after sites in ways which cut across the responsibilities Indigenous people have to look after heritage places and things. It allows the Minister to decide what is or what is not a significant site or object. The Minister can also request non-traditional owners to speak in matters related to country that does not belong to them.[31]

- The Bill does not allow Indigenous people to adequately protect secret/sacred material. The Bill requires that all sites and objects be listed on a public Roll and Map of Aboriginal Heritage Interests.
- The Bill proposes that a series of Aboriginal Heritage Associations be registered under the Incorporation Act 1985 if they want to be consulted on heritage matters and only registered associations will receive funding for heritage protection.

The reforms to the South Australian legislation are of great concern to Indigenous groups in South Australia because the state reforms are occurring at same time amendments to the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* are being made. Such proposed amendments attempt to stop the use of this Act except in cases that are deemed to be of national interest. The effect of this, according to ATSIC (SA) is that Indigenous groups who are unable to protect their sites or objects in their own State will be highly unlikely to do so anywhere else.[32]

Chapter Six : Recommendations

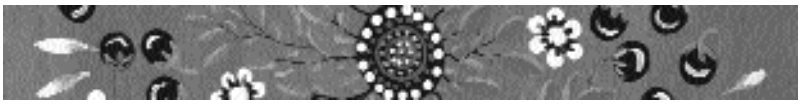
6.1 Indigenous people need to be informed about existing cultural heritage laws and how these impact on their Indigenous Cultural and Intellectual Property Rights.

6.2 Indigenous people need to be informed about how existing cultural heritage laws might benefit their needs in relation to the use and control of their Indigenous Cultural Heritage material.

6.3 There is a need for greater protection for Indigenous heritage particularly in relation to the protection of knowledge and the intangible aspects of a site or place.

[31] *Ibid*
[32] *Ibid*

Other relevant laws



7.1 Archives laws

As noted above, the State and Commonwealth Governments hold a substantial volume of records relating to Indigenous people. Many of these records were created at a time when the government had responsibility for Indigenous people, and many of them therefore contain a large amount of personal detail. Also, research undertaken on behalf of Indigenous people has increased in recent years. Government records are invaluable to Indigenous people to demonstrate connection with the land when submitting land claims, and to trace family members who were taken away under past government policies.[1]

There are existing archives laws which generally deal with issues relating to who can have access to a particular institution s records and what types of records accessible. These laws differ considerably between the Commonwealth and States. However, as stated in the Discussion Paper, they do not deal specifically with issues relating to the management and access of records relating to Indigenous people.

As noted by the Archives Authority of New South Wales, government archives do not select records on the basis of subject coverage. Moreover, government archives generally operate within a legislative framework and in an environment where the focus is the evidential nature of the records and government accountability .[2]

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[1] Australian Law Reform Commission , *Review of the Archives Act, 1983, Issues Paper 19*, Para. 17.4

[2] The Archives Authority of New South Wales, Submission to *Our Culture: Our Future*, October 1997

7.1.1 *The Australian Archives Act 1983 (Cth)*

The *Archives Act 1983 (Cth)* sets out detailed arrangements for the general management and access of Commonwealth government records. The Act establishes the Australian Archives whose role it is to select, preserve, make available for research and promote the use of Commonwealth Government records. As noted by the Australian Archives, the Archives constitutes an extensive resource for the study of Australian history, Australian society and the Australian people.[3] The Australian Archives also notes that there is a substantial quantity of records about or of relevance to Indigenous Australians.

The *Archives Act 1983* provides a right of public access to Commonwealth records over thirty years old unless they contain exempt information.[4] The Act specifies a range of categories of exemption including one which requires the restriction of personally sensitive information. There are no exemptions for Indigenous material of a sensitive or sacred nature. As the Australian Archives note:

> *Identifying information in Commonwealth records which is sensitive to Aboriginal and Torres Strait Islander people has proved difficult for the Archives. We would acknowledge that concerns of Indigenous people expressed at page 10 of the Discussion Paper, and acknowledges that appropriate categories for exemption of, or guidelines for exempting culturally and personally sensitive information may not exist, are valid. The Archives is keen to take further advice from Indigenous community on this issue.*[5]

However, the Australian Archives advises that because governments have played a major role in the lives of Indigenous people, Commonwealth government records will often contain information that is exempted from public access, the Archives has adopted informal arrangements that allow the subject of the record or family members to access this material under certain conditions.[6]

The Australian Archives also notes that a Memorandum of Understanding signed in March 1997 by the Archives and a number of key Northern Territory Aboriginal organisations codifies arrangements which give effect to Recommendation 53 of the Royal Commission into Aboriginal Deaths in Custody. This recommendation requires governments to assist Aboriginal people, access government records which may enable them to re-establish family and community links with those from whom they were separated as a result of past policies of government. The Archives has established an Aboriginal Advisory Group in the Northern Territory to assist with the release of sensitive information in a controlled manner to Indigenous people who are seeking to link with their families from whom they were separated as a result of past policies of government.[7]

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[3] Australian Archives, Submission to *Our Culture: Our Future*, October 1997
[4] Section 33(1)(g), *Australian Archives Act 1983*
[5] *Ibid.*
[6] Australian Archives, Submission to *Our Culture: Our Future*, October 1997, p. 7
[7] Australian Archives, Submission to *Our Culture: Our Future,* October 1997

7.1.2 *Review of the Archives Act 1983*

The Australian Law Reform Commission (ALRC) is conducting a review of the *Archives Act, 1983 (Cth).* In an Issues Paper entitled *Review of the Archives Act 1983*,[8] it notes three issues that arise in relation to records concerning Indigenous people.

1. Who can see the records? Many records relating to Indigenous people deal with entire families and communities. The *Archives Act* does not include provisions for consultation with the subjects of personal information being considered for public release. Whilst the *Archives Act* does not make specific provision for access by individuals to records considered unsuitable for general release, other than through the special access provisions, there are strict conditions that relate to qualifications and purpose.

   The Issues Paper notes that in light of these problems, Australian Archives has made informal arrangements with Indigenous community groups for accredited researchers to access records on behalf of Indigenous communities. This type of access comes within the framework of section 58 of the *Archives Act*. This provides that records may be released outside the provisions of the legislation, where it is appropriate to do so.

2. Indigenous peoples records are often so sensitive for the communities involved that there should be no right of access to them for non-Indigenous people, even if the material they contain would not normally be exempted from public access under the present provisions of the *Archives Act*. Indigenous people in this case should determine which records should be made available, and to whom.

   Existing guidelines for the interpretation of unreasonable disclosure of personal affairs exemption refer to the fact that particular communities may have particular sensitivities. Under the present exemption and appeal provisions, it is uncertain whether exemptions of records could be sustained, even if members of that community wished it.

3. Concerning the issue of ownership of records for Indigenous groups, some argue that the relevant communities should assume ownership. According to the ALRC report, this would mean there would no longer be a statutory regime covering public access to and preservation of the records.

7.1.3 *State Laws*

The Archive Authority of New South Wales operates under legislation which contains an implied rather than statutory right of public access, with transferring agencies set-

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[8] *Ibid.*, See also Human Rights and Equal Employment Opportunities Commission, *Bringing them Home, Report of the findings and recommendations of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from their Families,* 1997.

ting access conditions at the time of transfer, or subsequently.

Other archives operate under library or library archives legislation (WA, SA and Qld), with varying public-access provisions. Differing legislative obligations result in a range of policies and practices, particularly relating to access. There is a need for uniformity.

7.1.4 *Other Access of Information Laws*

These issues are also relevant to other laws relevant to records such as the *Freedom of Information Act 1982 (Cth), Public Service Act 1922 (Cth)* and the *Privacy Act 1988 (Cth)*.

7.2 Museum legislation

Many items of Indigenous Cultural Property are held by museums. In State and Territory museum legislation, Indigenous cultural property falls loosely into categories statutorily defined as anthropology , natural history , relics and the like.

According to the Aboriginal and Torres Strait Islander Social Justice Commissioner s *Submission to the Culture and Heritage Inquiry,* most museum legislation in Australia is anachronistic and does not appropriately identify or describe Indigenous cultural collections, or provide for an Indigenous role in their management in accordance with the principles of self-determination .[9] There is also no provision in the various laws for Indigenous peoples ownership rights to cultural property held in collecting institutions.

Only two museums recognise Aboriginal galleries or collections within their legislation - the National Museum and the Western Australian Museum.

Other State legislation does not provide for Indigenous membership on the museum board of trustees. Whilst there is a general practice for museum boards to appoint an Indigenous member, this is largely dependent on the political climate.[10] As noted in some of the museum legislation, a board of trustees can exercise considerable power over its collections.

7.3 Native Title Act 1993

The *Native Title Act 1993* flows from the High Court s Decision in *Mabo v Queensland* which recognised the existence of native title in Australia. The *Native Title Act* recognises and protects native title, the communal rights and interests in lands and waters,[11] where:

(a) The rights and interests must be possessed under the traditional laws acknowledged and the customs observed.

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[9] Office of the Aboriginal and Torres Strait Islander Social Justice Commissioner, *Submission to the Inquiry into Aboriginal and Torres Strait Islander Culture and Heritage*, prepared by Henrietta Fourmile, 1994.
[10] *Ibid.*
[11] Section 223(1) *Native Title Act 1993*

(b) Indigenous people must, by those laws and customs, have a connection with the land and waters.

(c) The rights and interests must be recognised by the common law of Australia.

The *Native Title Act 1993* also contains a process for determining whether native title exists and what rights and interests native-title holders have. In this way, the Act provides native-title holders with the right to negotiate for registered native-title claimants or holders about protecting, managing and securing access to, heritage areas or sites in native title-affected land or waters where a government proposes to allow mining, exploration or other activities.

However, the Act does not and cannot by itself, recognise the ownership and guarantee the protection of all places, areas and objects of cultural significance to Indigenous people.

7.4 Land rights legislation

There is land rights legislation in some states and territories in Australia which establishes the land Councils who have a say about acquisitions issues, the protection of Aboriginal places and sites. In NSW, for instance, the *Aboriginal Land Rights Act 1983* establishes the NSW Aboriginal Land Council. There are provisions under the Act which also relate to hunting and fishing rights[12] and require a registrar of Aboriginal Owners to be kept.[13]

There is similar legislation in Tasmania and the Northern Territory, however, the *Aboriginal Land Rights Act (NT)* is currently in Review.

7.5 Defamation

Defamation is the communication by one person to another of words, pictures or other material which adversely affects the personal reputation of a third person.

Whilst defamation is available to Indigenous individuals as a cause of action, under the current defamation laws, public statements which defame groups of people are not actionable in civil law. An individual cannot sue in respect of material she or he regards to be defamatory if that material refers to a body, class or group of people.[14] It is only in cases where such material may be reasonably understood to refer to a member of that group, that this member may be allowed to sue.[15]

7.6 Racial vilification legislation

There is state and federal legislation which prohibits public incitement of and public acts of racial hatred or violence. However, these laws are limited in providing protection against culturally offensive reproduction of Indigenous cultural material. The extent to which Indigenous

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[12] Section 47, *Aboriginal Land Rights Act 1983* (NSW)

[13] Part 8A, *Aboriginal Land Rights Act 1983* (NSW)

[14] *David Syme & Co v Canavan* (1918) 25 CLR 234; *Knuppffer v London Express Newspaper Ltd* [1944] AC 116.

[15] *Bjelke-Peterson v Warburton* [1986] 2 Qd R 465

individuals or organisations may use racial vilification laws where publicly disseminated material such as television shows, movies, newspaper articles and films portray Indigenous people in such a way that it is likely to incite or encourage serious hatred, contempt of severe ridicule towards them, is yet to be fully realised.

For instance, in New South Wales, amendments made to the *Anti-Discrimination Act (NSW)* in 1989 make it an offence to "publicly" incite or encourage serious hatred, contempt or severe ridicule towards a person or group of people because of their race, colour, nationality or ethnic origin.[16] A civil action renders vilification unlawful on the ground of race.[17] There is also a criminal offence relating to matter of serious vilification. In 1996-97, the Anti-Discrimination Board reported 62 complaints were made under racial vilification legislation. 34% of which related to print and electronic media. No criminal offences have been made.[18]

Under the federal *Racial Hatred Act 1995*, there are provisions which make it unlawful for a person to do act, otherwise than in private, if the act is reasonably likely, in all the circumstances, to offend, insult, humiliate or intimidate another person or group of persons if the act is done because of the race, colour or national or ethnic origin of the person or group.[19] Whilst there a number of complaints made each year, actions are often declined or settled in conciliation.

The Crown Solicitor notes that in Western Australia, sections 76 to 80 of the WA Criminal Code relate to racial vilification. However, there has been no actual criminal prosecutions made in that State.[20]

According to the Crown Solicitor of Western Australia, there is also recent academic speculation as to whether such legislation is in line with the implied freedom of political communication. Although, the High Court has retreated somewhat from its early willingness to imply freedoms from the Constitution, it is possible that racial vilification legislation is inconsistent with the surviving implied freedom of political communication given that the race debate is so much a part of the current political debate.[21]

7.7 Privacy

In Australia, there is not any general right to privacy.[22] However, such a general right may emerge with the development of the common law. Whilst a number of Commonwealth and State laws deal with certain aspects of privacy, generally these are confined to the privacy of government or credit information. The *Privacy Act 1988* deals with how personal information is collected, stored, used and disclosed by Commonwealth departments. It also provides the subjects of the information with the right to access and correct the information held.

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[16] Section 20B *Anti-Discrimination Act (NSW)*
[17] Section 20C *Anti-Discrimination Act (NSW)*
[18] Anti-Discrimination Board, *Annual Report, 1996-97*
[19] Section 18C, Racial Hatred Act 1995 (Cth)
[20] Crown Solicitor of Western Australia, Submission to *Our Culture: Our Future*, October 1997
[21] *Ibid.*
[22] *Ettinghausen v Australian Consolidated Press Ltd* (unreported, NSW CA, Gleeson CJ, Kirby P, Clarke JA, 13 October 1993)

The Act includes principles which set out standards for dealing with personal information. For instance, one requirement is that the record keeper must retain records about the nature and purpose of the information collected, the classes of individuals about whom records are kept, the period for which it is kept, the people who are entitled to access the information and the circumstances under which they can do so.

Private records about individuals are generally not governed by any privacy rules. For example, where information about genetic testing is generated by a private doctor or hospital, these records remain the property of that doctor or institution. The patient has no general right of access to them.[23]

7.8 *Trade Practices Act 1974 (Cth)*

Section 52 of the *Trade Practices Act* prohibits corporations from engaging in conduct that is "misleading or deceptive or which is likely to mislead or deceive".[24] This provision was designed primarily for the protection of consumers in the context of representations made by corporations in trade or commerce. The operation of section 52 is not restricted by the common law principles relating to passing off. The section provides the public with wider protection from deception than the common law.[25]

The three necessary ingredients to successfully show a section 52 action are:

1. Conduct by a corporation or person[26]
2. Conduct must be in trade or commerce
3. Conduct must be misleading or deceptive.

The *Trade Practices Act* may provide protection against some types of "rip-off" behaviour. In the *Carpets Case*, Justice von Doussa found that the labelling attached to the carpets incorrectly stated that the carpets were produced with the permission of the artists and that royalties were being paid to the artists. This labelling had also been attached to other carpets which had no Aboriginal association at all.[27] By using such labelling, the carpet distributors were misleading consumers to believe that the copyright in the artworks belonged to the company, or was licensed to it, or that the carpets were approved or made under the licence and approval of the Aboriginal artists. In Von Doussa's opinion, such false and misleading conduct amounted to an infringement of sections 52 and 53.

The Act is administered by the Australian Consumer and Competition Commission which was previously known as the Trade Practices Commission.

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[23] *Breen v Williams* as cited in HREOC Privacy Commissioner, *The Privacy Implications of Genetic Testing, Information Paper Number 5*, September 1996, p. 29
[24] Section 52(1) *Trade Practices Act 1974*
[25] *Shosana Pty Ltd v 10 Cantanae Pty Ltd* (1987)11 IPR 249
[26] as extended by section 6 of the *Trade Practices Act 1974*
[27] *(Deceased Applicant) v Indofurn*

7.9 The *Customs Act* and import and export of Indigenous cultural material

The are provisions under the current *Customs Act 1901* relating to import/export of goods. There are also search and seizure provisions. Under the *Protection of Moveable Cultural Heritage Act 1987 (Cth)*, there is a controlled list which includes a category Aboriginal and Torres Strait Islander heritage, archaeology and ethnography .

Some Indigenous objects such as bark and log coffins, human remains, rock art, carved trees, sacred and secret ritual objects cannot be exported at all.

Exporters must apply for a permit to export:

1. Objects relating to famous and important Aboriginal people, or to other persons significant to Aboriginal history.
2. Objects made on Missions and reserves.
3. Objects relating to the development of Aboriginal protests and self-help movements.
4. Original documents photographed during sound recordings, film and video recordings, and any similar recordings relating to objects included in this category.

The Customs Office also has search and seizure powers in relation to copyright infringing items.

The reproduction of Indigenous cultural objects on items such as t-shirts, fabric is not covered under the above Act.

7.10 *Administration and Probate Act (NT) 1993*

Many Indigenous artists die without a written will. As Indigenous art becomes profitable, the income accruing to deceased artists from copyright royalties can provide considerable income to family and community members. The management of copyright income and any accruing actions for copyright infringement is therefore important.

The property of persons dying without a written will is dealt with under Administration and Probate laws. There are provisions in the *Administration and Probate Act (NT) 1993* which allow a person to claim an entitlement to the estate of an Aboriginal person who dies without a will, under the customs and traditions of the community or group to which the deceased belonged and the Public Trustee may take into account cultural laws in the administration of the estate.[28] However, there is a need for greater estate management and planning.

7.11 Broadcasting Laws

The Discussion Paper noted that there are broadcasting laws which regulate content on tele-

[28] Section 71B, *Administration and Probate Act (NT) 1993*

vision, radio and on-line services. Broadcasting is regulated principally by the *Broadcasting Services Act 1992 (Cth)*. This Act covers all sectors of broadcasting including national broadcasting services (ABC and SBS); commercial broadcasting services; and community broadcasting services.[29] The Act requires broadcasters to adopt self-regulatory codes of practice as to content and programming.

A submission from the Australian Broadcasting Authority (ABA) noted the comment in the executive summary of the discussion paper that broadcasting laws regulate content on Australian television, radio and on-line services is not quite accurate. The ABA pointed out that the regulatory framework set up under the *Broadcasting Services Act 1992* only requires the ABA to regulate Australian content and determine program standards for children s programs on commercial and community television broadcasting services. For other types of broadcasting services, the ABA acts in a more consultative capacity rather than as a regulator of content. The Act does not empower the ABA to regulate content in the on-line environment and there is general reluctance by public and legislators to have the on-line environment regulated. [30]

Other relevant laws include the *Australian Broadcasting Corporation Act 1983 (Cth)* which requires the ABC Board to develop codes of practice relating to programming matters and to notify these codes of practice to the Australian Broadcasting Authority.[31]

7.12 Laws relating to geographical place names

A submission from the Surveyer-General for Victoria, noted that each State and Territory has its own legislation covering geographical names/place names.[32] In Victoria, for instance, the *Survey Co-ordination Act 1958* deals with geographical place names. The legislation establishes a Place Names Committee.[33] The functions of the Committee include adopting rules governing the names of places and the spelling of place names;[34] assigning names to places;[35] compiling and maintaining a register of place names[36] and exercising other powers and duties conferred on the Committee by the Act.[37]

Under this legislation, Victorian Place Names Committee has adopted policies for Indigenous place names. For instance, if a new name is required for a place, the use of the traditional Indigenous word is encouraged, subject to the authorisation from relevant Indigenous Communities. Also the use of the word is subject to the derivation from a local language and suitability of translation and whether it is considered acceptable. Provisions also address the authography of the names, the method of spelling the place name. This is also subject to authorisation of the relevant Indigenous community. Any previously unrecorded names are

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[29] Section 11 *Broadcasting Services Act 1992 (Cth)*
[30] John Corker, Australian Broadcasting Authority, Submission to *Our Culture: Our Future*, October 1997
[31] Section 8(1)(e), *Australian Broadcasting Corporation Act 1983 (Cth)*
[32] J R Parker, Surveyor-General for Victoria, Submission to *Our Culture: Our Future*, 1997
[33] Section 24, *Survey Co-ordination Act 1958 (Vic)*
[34] Section 26(a), *Survey Co-ordination Act 1958 (Vic)*
[35] Section 26(e), *Survey Co-ordination Act 1958 (Vic)*
[36] Section 26(h), *Survey Co-ordination Act 1958 (Vic)*
[37] Section 26(j) *Survey Co-ordination Act 1958 (Vic)*

required to be written in the form dictated by that established writing system.[38]

According to the Surveyor-General, once registered as a geographic name, a word becomes public property.[39] This means for instance, that business originating from that place could use the name as a trade name without having to seek permission from the relevant Indigenous group.

Chapter Seven : Recommendations

7.1 Indigenous people need to be informed about the range of laws which may impact on their Indigenous Cultural and Intellectual Property Rights including archives laws, land rights laws, native title, defamation, racial vilification, privacy law, trade practices laws, customs laws, administration and probate laws and broadcasting laws.

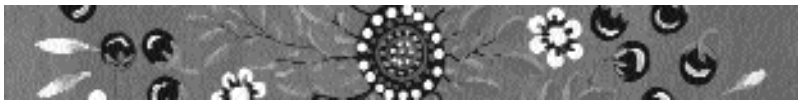
7.2 Indigenous people need to be informed about how these laws may be of benefit to their needs in relation to the use and control of their Indigenous Cultural Heritage material.

7.3 There is a need for greater consideration concerning how these range of laws might assist Indigenous peoples achieve their Indigenous Cultural and Intellectual Property Rights.

[38] Victorian Place Names Committee, *Regulations, Procedures and Policy Statement*, May 1995

[39] Telephone Conversation with John Parker, Chairman, Victorian Geographical Names Committee, 26 November 1997.

International laws



8.1 International law

In the International law area, there is a large body of international agreements and declarations which deal with areas relating to Indigenous Cultural and Intellectual Property. Some commentators have stressed the potential impact various international developments may have on the greater protection and recognition of Indigenous cultural and intellectual property rights.[1] Recent developments in international law such as the Convention of Biological Diversity have recognised the value of traditional indigenous and local peoples customary knowledge, innovations and practices. This has lead to the shift internationally towards recommendations that equitable benefit sharing arrangements should be developed and implemented where indigenous people s knowledge or customary biological and genetic resources are used. [2]

The Discussion Paper noted that international conventions do not automatically turn into domestic law. A variety of political factors impact upon the decision of a nation who ratified a convention to adopt a particular convention. There is no binding legal obligation upon member states to implement the provisions of the convention even if the agreement is ratified.

In the *Tasmanian Dams Case*,[3] it was held that the ratification of an international convention brings its subject matter within the legislative jurisdiction of the Federal Government, usurping the plenary power of the states. Furthermore, in Teoh s Case[4], it was considered that Australia s ratification of International conventions gives rise to a legitimate expectation that government decision makers will exercise their discretion in a manner consistent with Australia s international undertakings. The current government has taken action to limit the decision in Teoh s Case. In a Joint Statement by the Minister for Foreign Affairs and Trade and

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[1] Johanna Sutherland, Representations of indigenous peoples knowledge and practice in modern international politics in Vol 2(1) *Australian Journal of Human Rights* (1995) pp. 39 - 57 at 39

[2] *Ibid.*

[3] *Commonwealth v Tasmania* (1983) 158 CLR 1

[4] *Minister for Immigration & Ethnic Affairs v Teoh* (1995) 128 ALR 353

the Attorney-General, the government stated that the executive act of entering into a treaty does not give rise to legitimate expectations in administrative law. The Government also foreshadowed its intention to enact legislation that with reinforce this position.[5]

As highlighted in the High Court s comments in *Kruger v Commonwealth of Australia* (1997)[6], while Australia s ratification of relevant international instruments may be a political tool by which the Government may be pressured to legislate, there is not principle of international or domestic law which requires such implementation.

8.2 International conventions relating to intellectual property

Australia is signatory to several international conventions relating to Intellectual Property. These include:

- Paris Convention for the Protection of Industrial Property (1883)
- Berne Convention for the Protection of Literary and Artistic Works (1886)
- Madrid Agreement concerning the International Registration of Trademarks (1891)
- Lisbon Agreement for the Protection Appellations of Origin and their International Registration (1958)
- Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations (1961)
- Patent Co-operation Treaty (1970)
- Budapest Treaty on the International Recognition of the Deposit of Micro-organisms for the Purpose of Patent Procedure (1977)

8.2.1 *Paris Convention for the Protection of Industrial Property (1883)*

This Convention established a union between its member States which obliged them to observe certain substantive provisions relating to industrial property and to establish administration mechanisms to implement its provisions. Industrial Property encompasses agricultural and extractive industries including all types of natural and manufactured products such as leaf, fruit, cattle and wines. It applies to patents, industrial designs, trademarks, service marks, trade names and indications of sources and unfair competition.

Yamin and Posey comment that the provisions of Article 10bis of the Paris Convention which obliged Members to ensure that persons are protected form unfair competition resulting for example from acts that cause confusion by any means whatever with the establishment, the goods, or the industrial or commercial activities of a competitor could also be relevant to indigenous groups who wish to control the imitation or unauthorised commercial sale of indigenous products. A failure to provide such protection for indigenous peoples could arguably be a breach of the Convention s Article which

[5] Joint Statement by the Minister for Foreign Affairs and Trade, Alexander Downer and the Attorney-General, Daryl Williams, 25 February 1997).
[6] 146 ALR 126

obliged Members to provide nationals with appropriate legal remedies to repress effecting all acts referred to in Article 10bis of the Convention.[7]

8.2.2 *Berne Convention for the Protection of Literary and Artistic Works (1886)*

This Convention requires parties to protect the rights of authors of literary and artistic works.[8]

Whilst the Berne Convention does not impose obligations on member States to protect Indigenous forms of art and cultural expression, Article 15(4) provides for the protection of unpublished works of folklore. Article 15(4) extends the protection previously given under Article 7(3). Article 7(3) provides for a term of protection for anonymous or pseudonymous works that expires 50 years after the work is made available to the public. Article 15(4) extends the protection provided in Article 7(3) to unpublished works where the author is unknown.

Article 15(4) also states that where it may be presumed that the author of a work is a national of a member State, legislation may be enacted in that country to designate a competent authority to represent the author and enforce the rights of the unknown author in the Members States of the convention. The actual word folklore was not mentioned as it was considered too complex to define. However, it was accepted that the main application of the Article would be to works normally referred to as folklore. It is left to national legislation to determine whether a competent authority should own the works or operate as a collecting society for Indigenous artists.

8.2.3 *Rome Convention (1961)*

Australia acceded to the *Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations* on 1 July 1992. The Convention is effective from 1 October 1992. In Australia, the *Copyright Act 1968* implements the provisions of this convention to the extent that copyright protection is given to the producers of sound recordings and broadcasting organisations. With respect to performers, there is copyright type protection granted, currently performers do not have any copyright or similar proprietary rights in their performances.

Whilst the definition of performer in the *Rome Convention* does not yet include a performer of folklore, there is growing agreement at an international level that the protection of performers should extend to the performers of expressions of folklore.[9] Olsson notes that this trend has been encouraged in the recent *WIPO Treaty on Performances and Phonograms* where the definition of performer was extended to include performers of expression of folklore.[10]

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[7] Farhana Yamin and Darrel Posey, Indigenous Peoples, Biotechnology and Intellectual Property Rights, vol 2, Number 2, *RECIEL*, pp. 141 - 148, p. 144

[8] Article 1 of the *Berne Convention*

[9] 1967, 1982, 1984: Attempts to provide international protection for folklore by Intellectual Property Rights , Document Prepared by International Bureau of WIPO, UNESCO-WIPO World Forum on the Protection of Folklore, p.14

[10] Henry Olsson, Economic Exploitation of Expression of Folklore: The European Experience , A Paper presented at the World Forum on Protection of Folklore, Phuket, Thailand, April 1997

8.2.4 *Budapest Treaty (1977)*

The *Budapest Treaty on the International Recognition of the Deposit of Micro-organisms for the Purpose of Patent Procedure* (1977) was devised to enable applicants with inventions involving micro-organisms to comply with the requirement of full description of biological material in patent specifications. A patent monopoly is granted in return for a full written description of an invention. By depositing a sample of the microorganism and including reference, at an International Depositary Authority (IDA), applicant are able to meet these requirements. The range of material able to be deposited include cells, genetic vectors such as DNA fragments and organisms used for expression of a gene. Australia has one IDA in Sydney.

8.3 International Trade-Related Aspects of Intellectual Property Agreement

The Agreement on Trade-Related Aspects of Intellectual Property Rights Agreement (the TRIPs Agreement) is designed to regulate trade and within that regulation protect the holders of intellectual property in the context of world trade. The TRIPs agreement impacts on Indigenous Cultural and Intellectual Property issues including:

National legislation protecting Indigenous intellectual property

The Special Rapporteur on Discrimination against Indigenous Peoples is of the opinion that articles 1 and 8 of the TRIPs Agreement may require Member States to give greater protection to the heritage of Indigenous peoples, under their national legislation, than they are required to give to intellectual property generally. However, Member States must afford the same special protection to Indigenous nationals of other States.[11]

Patentability of genetic material

Whilst the TRIPS agreement does not create new obligations or restrictions for member States on the patentability of genetic material, it does allow countries to exclude patentability on certain items in particular circumstances.

- Where necessary to protect public order or morality (Article 27(2));
- Plants and animals other than micro-organisms and essentially biological processes for the production of plants other than non-biological and microbiological processes, if other specific protection is provided. (Article 27(3)).

The Special Rapporteur on Discrimination against Indigenous Peoples notes that article 27 appears to permit Member States, if they so wish, to exclude the traditional ecological and medicinal knowledge of Indigenous peoples from patentability.

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[11] Mrs Erica Irene-Daes, Special Rapporteur, *Protection of the heritage of indigenous people: Supplementary report submitted pursuant to Sub-Commission resolution 1995/40 and Commission on Human Rights Resolution* 1996/63, E/CN/Sub.2/1996/22, 24 June 1996, page 11

Geographic indications

According to Article 22 of the TRIPS agreement, geographic indications identify a good as originating in the Territory [of a member], or a region or locality in that Territory, where a given quality, reputation or other characteristic of the good is essentially attributable to its geographic origin .

The most well-known geographic indication is the appellation of origin, originally a French geographic indication applying to products considered to be distinctive due to a combination of traditional know-how and highly localised natural conditions. Thus producers of wines, cheeses and other food stuffs, whose goods are well known for their distinctive qualities and geographic origins, are protected from those who seek to undermine their good reputation by making similar but false claims. For instance, wines from the Champagne region of France are protected in this way and local Champagne producers of the wine have collectively and successfully taken court action against the use of the word champagne by English and New Zealand wine.

Some commentators have suggested that there is scope to argue that expressions of folklore could be protected in a similar way, but this would depend on regional associations of Indigenous peoples gaining government recognition to set up their own appellations of origin or certification-issuing entities.[12]

8.4 UNESCO Convention of Cultural Property (1970)

The *UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership (1970)* of deals with the return of stolen or illegally exported cultural objects.

Australia formally ratified this Convention in 1990 and implemented its provisions by enacting the *Protection of Moveable Cultural Heritage Act*. The Convention obliges States to take the necessary steps to protect cultural property from illegal export, theft or destruction.

The definition of cultural heritage is made according to a number of categories, to take into account the subjective nature of cultural heritage and the fact that it varies from culture to culture.

Members of State are permitted to declare exactly which forms of cultural property are to be protected. The import, export or transfer of ownership of cultural property which is contrary to the provisions of the Convention is regarded as illicit.

The UNESCO Convention has not been ratified by most of the major art-importing countries, thereby rendering protection less effective. According to the Attorney-General Department s submission to the culture and heritage inquiry, the failure to attract ratification is due to the perception that the Convention regime is too complex and imposes too many obligations on member States. Many civil-law countries have not ratified the Convention because of its fail-

[12] Posey and Dutfield, *Beyond Intellectual Property: Towards Traditional Resource Rights for Indigenous Peoples and Local Communities*, International Development Research Centre, Canada, 1996, p. 91

ure to address the situation in those countries whereby a bona-fide purchaser of stolen property acquires lawful ownership of that property.

In an attempt to encourage more countries to join an international scheme for the return of stolen, illegally exported cultural property, UNESCO approached the International Institute for the Unification of Private Law (Unidroit) with the suggestion that Unidroit draft a more acceptable convention on stolen, illegally exported cultural objects.

Unidroit agreed. With UNESCO s assistance, it conducted meetings of government experts in Rome in 1991, 1992, 1993 and 1995. The draft Unidroit convention deals basically with two categories of cultural objects, the first being stolen cultural objects and the second, illegally exported cultural objects. The draft convention seeks to ensure that if certain criteria are met, these objects will be returned.

The draft convention will allow individuals to take action to seek return of their cultural property. In this way, it considers that claims for the return of stolen property may be brought before the courts and other competent authorities within States where the cultural property is located.

If this convention is adopted, this process would assist Indigenous people claiming the return of cultural property to seek restitution. Indigenous people will be able to bring legal actions in their own right and not be totally dependant on the Government to take action. If an action for the return of stolen cultural objects is successful, the Unidroit Convention provides that the claimant will be obliged to pay fair and reasonable compensation to the possessor, provided that the possessor neither knew nor reasonably could have known that the object was stolen and can prove that due diligence was exercised when acquiring the object.

Where illegally exported cultural objects are returned, the State is responsible for the payment of compensation. Indigenous cultural property will be included in the draft convention as according to Article 2 of the draft, cultural objects are defined as those which are of importance for archaeology, prehistory, history, literature, art or science such as those objects belonging to the categories listed in Article 1 of the 1970 UNESCO Convention .

Article 5(2d) of the draft convention, which deals with the return of illicitly exported cultural objects, provides that the Court or other competent authority of the State addressed shall order the return of the object if the requesting State establishes that the removal of the object from its territory significantly impaired the use of the object by a living culture. This provision was included to ensure greater protection for cultural objects actually in use by Indigenous people.

The draft Article 3(3) relates to stolen cultural property and provides for claims to be brought within a particular period of not more than three years from the time when the claimant knew of the location of the object and the identity of the possessor, and in any case, within a period of 30 years from the time of the theft.

The draft convention contains a special clause relating to objects belonging to public collections. This clause proposes that claims for such objects should not be subject to prescription,

or alternatively, that they may be brought within a much longer time limit of, say up to 75 years.

During the negotiations, Australia proposed that if public collections were to receive special treatment under the convention, it was appropriate that cultural objects of particular importance to Indigenous people should receive equal treatment. However, most European countries did not agree.

The draft Unidroit convention, if adopted, would be beneficial for ensuring the increased protection of Indigenous cultural heritage which has been stolen or removed abroad or illegally exported. If adopted, the text will attract those European Art Importing countries which are not currently parties to the UNESCO Convention. This might result in a greater number of States participating in an international regime for the return of stolen or illegally exported cultural property.

8.5 International conventions on human rights

There are several international human rights conventions that refer to Indigenous Cultural and Intellectual Property Rights recognition to which Australia is a party.

8.5.1 *International Covenant on Civil and Political Rights*

The International Covenant on Civil and Political Rights (ICCPR) provides that:

> *In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be deprived of the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion or to use their own language.*[13]

Article 18.1 also states that everyone shall have the right to freedom of thought, conscience and religion .

Australia acceded to the First Optional Protocol to the ICCPR with effect from 25 December 1991. As signatory to this covenant, Australia has obligations to recognise and protect the inherent rights of Indigenous peoples. Wright notes that it is now possible for individuals, or groups of individuals, to take action against the Australian government for breach of specific provisions of this Covenant under the first optional protocol to the ICCPR which was ratified by Australia and effective at 25 December 1991.[14] She notes that it might be argued that failing to adequately protect Indigenous culture, or misappropriating Indigenous arts or artefacts, amount to a deprivation of an Indigenous person s right in community with the other members of their group, to enjoy their own culture. She also notes that apart from the procedural difficulties and expense, there is the problem that these rights apply to individuals and not groups.

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[13] Article 27 of the International Covenant on Civil and Political Rights 1966 (ICCPR), Treaty Series No 23 (1980).

[14] Professor Shelley Wright, *Submission to the Stopping the Ripoffs Inquiry,* (unpublished), 1994, p. 45

The Human Rights Committee has made it clear that it will not address claims directly to do with self-determination.[15]

The Australian Law Reform Commission in its 1986 *Report on the Recognition of Aboriginal Customary Laws*[16] argued that customary laws are so closely intertwined with Aboriginal and Torres Strait Islander cultures and religious beliefs that Article 27 of the ICCPR must be understood as including the right to have Indigenous laws recognised and respected. This article guarantees the rights of members of cultural minorities to enjoy their own culture and to profess and practice their own religion.[17]

The *Royal Commission into Aboriginal Deaths in Custody* supported the ALRC s recommendation and in Recommendation 219 of its report and in its response to this recommendation the Commonwealth indicated its intention to respond to ALRC 31 by the end of 1992. The Aboriginal Education Consultative Group noted that there has been no such response to date and there remains no legally guaranteed action to protect Indigenous intellectual property in an adequate way.[18]

8.5.2 *International Covenant On Economic, Social and Cultural Rights*

The International Covenant on Economic, Social and Cultural Rights (ICESCR) deals with the freedom to own property, freedom to work under fair conditions, freedom to enjoy an adequate standard of living, and the freedom to enjoy the life and culture within which a person is brought up. ICESCR calls for the recognition of collective human rights. Article 15 (1c) of the covenant States:

> *The States party to the present covenant recognise the rights of everyone ...*
>
> *... (c) to benefit from the protection of the Moral and material interests resulting from any scientific, literary or artistic production of which he (sic or she) is the Author.*

This provision advocates under International Law for Indigenous Peoples Rights to safeguard their resources and to benefit from use of their knowledge and goods which is produced and owned by them. Such recognition should be given irrespective of whether Indigenous people wish to commercialise their cultural knowledge or resources.

8.6 International Labour Organisation Convention 169

The International Labour Organisation adopted the Convention Concerning Indigenous and Tribal Peoples in Independent Countries (ILO 169) in 1989. The Convention is not unanimously endorsed by world Indigenous peoples and many flaws have been identified. It has

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[15] *Ominayak and the Lubicon LakeBand v Canada* as cited in ibid p. 46
[16] ALRC, *Recognition of Aboriginal Customary Laws,* (ALRC No 31)
[17] Aboriginal Education Consultative Group, *Submission to the Stopping the Ripoffs*, (unpublished), 1994, p. 7
[18] *Ibid.*

been criticised by the Aboriginal and Torres Strait Islander Social Justice Commissioner as being fundamentally weak in that it does not provide Indigenous peoples with opportunities for the full expression of self-determination .[19]

Despite its inadequacies, there are some important aspects of the Convention that recognise the cultural and economic importance of Indigenous Cultural and Intellectual Property that may benefit the Indigenous peoples of ratifying States.[20] The Convention incorporates provisions for the protection of social, cultural, religious and spiritual values and practices[21], and respect for the integrity of those values, practices and the institutions of Indigenous peoples. Article 23 provides for the protection of certain other cultural rights which may be relevant to the recognition and protection of Indigenous Cultural and Intellectual Property:

> *Handicrafts, rural and community-based industries, and subsistence economy and traditional activities of the peoples concerned such as hunting, fishing, trapping and gathering, shall be recognised as important factors in the maintenance of their cultures and in their economic self-reliance and development.*[22]

Some commentators believe that these cultural rights provisions are the strongest bases from which to assert Indigenous peoples separate identity.[23]

8.7 Convention of Biological Diversity

The Convention of Biological Diversity encourages the use of incentives for conservation and sustainable use activities. The Convention requires parties to facilitate the exchange of relevant information (including specialised knowledge, indigenous and traditional knowledge) from all publicly available sources and advocates that States are to manage biodiversity through national plans.

Article 8(j) of the Convention on Biological Diversity which was ratified by Australia in 1993, requires each signatory to, subject to its national legislation:

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

Australia ratified this convention but has yet to fulfil its obligation under this convention.

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[19] As noted by the Aboriginal and Torres Strait Islander Social Justice Commissioner, *Submission to the Stopping the Ripoffs*, (unpublished)p. 4

[20] Lisa Strelein, The Price of Compromise: Should Australia Ratify 190 Convention 169? in (ed) Bird et al, *Majah: Indigenous Peoples and the Law*, The Federation Press, 1996 pp. 63 - 86

[21] Article 5 of ILO 169

[22] Article 23 of ILO 169

[23] Barsh and Stelein as noted in *Ibid*, p. 75

8.8 Draft Declaration of Rights of Indigenous Peoples

In 1982, the United Nations Economic and Social Council established a Working Group on Indigenous Populations, focusing on the development of international standards concerning the rights of Indigenous peoples. The Working Group has prepared a draft Declaration on the Rights of Indigenous People, which provides a definite statement on the rights of Indigenous people in relation to cultural and intellectual property issues. According to Article 12 of the United Nation's Draft Declaration of the Rights of the World's Indigenous Peoples:

> *Indigenous peoples have the right to practise and revitalise their cultural traditions and customs. This right includes the right to maintain, protect and develop the past, present and future manifestations of their cultures, such as archaeological and historical sites, artefacts, designs, ceremonies, technologies and visual and performing arts and literature, as well as the right to the restitution of cultural, intellectual, religious and spiritual property taken without their free and informed consent or in violation of their laws, traditions and customs.*[24]

Other relevant provisions include:

- The right to full ownership, control and protection of their cultural and indigenous property; (Article 29)
- The right to the protection of vital medicinal plants, animals and minerals; (Article 24)
- The right to own, develop and control traditionally owned or used resources (Article 26);
- The right to determine and develop priorities for their resources (Article 28); and
- The right to compensation to mitigate adverse environmental, economic, social, cultural or spiritual impact (Article 30) .

Furthermore, Article 37 of the Draft Declaration puts the obligation on nation States to adopt national legislation that gives full effect to the Declaration and Article 42 explicitly recognises that the rights contained within the Declaration are the minimum standards for the survival, dignity and well-being of world Indigenous peoples.

At present, the Draft Declaration is making its passage through the United Nations system. Should it be endorsed in its current form, Indigenous peoples will have the right to self-determination which, by its nature, must include the right to determine their own cultural development and therefore, to exercise control over their intellectual and cultural property.[25]

Whilst the Working Group has limited its standard-setting exercises to the Draft Declaration

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[24] United Nations, Draft Declaration on the rights of the World s Indigenous Peoples, Draft Declaration as agreed upon by the members of the working group at its eleventh session, 1991.

[25] Aboriginal and Torres Strait Islander Social Justice Commissioner, *Submission to the Stopping the Ripoffs* (unpublished), p. 4

in the past, ATSIC points out that it may be timely for the Group to draft an international standard on the rights of Indigenous peoples to their intellectual and cultural property.[26]

The Department of Foreign Affairs and Trade reported in November 1996 that it is ensuring the progress of the Draft Declaration of Indigenous Peoples through the international process by lobbying for support from other governments.[27]

Chapter Eight : Recommendations

8.1 Indigenous people need to be informed about the International treaties and agreements which may impact on their Indigenous Cultural and Intellectual Property Rights including international conventions relating to Intellectual Property; international trade agreements, UNESCO Conventions, International conventions on human rights, the International Labour Organisation convention 169, the Convention of Biological Diversity and the Draft Declaration of Indigenous Peoples.

8.2 There is a need for greater consideration concerning how international laws might assist Indigenous peoples achieve their Indigenous Cultural and Intellectual Property Rights and greater use of international legal avenues should be explored and challenged.

8.3 The Australian Government should strongly support the passage of the Draft Declaration on the Rights of Indigenous Peoples, including the provisions on self-determination, cultural and intellectual property rights, education and the media.

8.4 Implementation of principles outlined in the Draft Declaration should be strongly supported by all government, cultural institutions and industry bodies when dealing with issues relating to Indigenous peoples rights.

8.5 Indigenous people require further information about the Draft Declaration and other international treaties and convention affecting their Indigenous Cultural and Intellectual Property Rights.

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[26] The UN Working Group on Indigenous Populations, 13th Session, The Australian Contribution 1995, p.viii, ATSIC, 1996

[27] Anonymous, The Internationalisation of Aboriginal and Torres Strait Islander Issues: How well equipped are we to deal with this trend? , *DFAT News*, Vol 3, No 46 November 1996, p. 1

PART THREE
Developing Strategies for Protection

The research and analysis of responses to the Discussion Paper and discussions with the Indigenous Reference Group and others, clearly indicates a need for measures which to redress the shortfalls in the current Australian legal system, particularly its ability to provide sufficient recognition, protection, remedies and access to the rights Indigenous people need in relation to their cultural heritage.

The purpose of the project was in part to develop practical strategies to improve protection and ensure recognition of Indigenous Cultural and Intellectual Property Rights. Hence, the Discussion Paper looked at a range of possible strategies for protection, including:

1. Changing existing legislation.
2. Enacting specific legislation.
3. Administrative responses.
4. Developing policies, protocols and codes of ethics.
5. Education and awareness strategies.

Part Three of the Report will discuss the responses to the proposals in the Discussion Paper and make recommendations for developing a practical reform strategy.

In developing the reform strategies the following major observations were noted:

1. A body of Indigenous law exists

As observed in Part One, Indigenous laws for dealing with Indigenous cultural and Intellectual Property already exist, and have existed and developed over thousands of years. The feedback shows Indigenous people already live by a set of laws which govern how they can use, deal and disseminate Indigenous cultural knowledge. As noted by Max Stuart, Deputy Chair of the Central Land Council and member of the Indigenous Reference Group, Indigenous people already live by codes. Stuart explained that Indigenous law and the culture are connected:

> *The rights given to a particular group of Indigenous people are given to them and no other group. Other Indigenous people understand this. For instance, the law is different between Kimberley Mob and Tiwi Mob and Central Australian Mob, but we can understand and respect all laws. The white law has to respect Indigenous law. Parliament can change tomorrow - our laws never change.*[1]

2. Australian legal system is out of step with Indigenous laws

The Australian legal system is out of step with Indigenous laws and needs to change to recognise Indigenous laws. Any new law should respect, adapt to, and be responsive to Indigenous laws.

This position was reinforced by a statement by members of the Association of Northern and Kimberley Artists of Australia to the Indigenous Reference Group meeting:

> *The paintings and patterns come from the land. Dancing comes from the land. Names come from the land. The traditional ochres come from the land. Stories come from the land. Sacred ceremonies come from the land. The land belongs to our ancestor and now the clans and the tribes.*
>
> *All of this was looked after by the Yolngu (all Aborigines). Today we are the clans and tribes. We were given it by our ancestors. Each culture, clan and tribe is different. Each clan/tribe gets their own culture from their country. We Arnhemlanders have two moieties - Yirritja and Dhuwa. Our skin names come from our moieties. Our languages are spoken differently. Belonging means responsibility -that is why we have ceremony to show it comes from the land.*
>
> *Your new laws will not change our culture or the meaning of country but your new law has to respect and protect our law.*
>
> *We can t change and won t change. We respect your law. We know your law. You can respect and protect our law. You should respect our law as we respect your law.*

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[1] Max Stuart, Indigenous Reference Group Meeting, 15-16 September 1997, Sydney.

Your copyright law only lasts 50 years after the artist s death. For rock paintings thousands of years old, in your law you can copy this. In our law, it clearly belongs to clans, tribes and families. Your law must be made stronger.

What about writing of our stories. If a story maybe thousands of years old is written or recorded, the writer holds the copyright. In our law the story is ours. Your law must be made stronger to protect our stories.

Filming of our stories or open ceremony. Our stories and ceremonies are very very old. If a filmmaker documents the dance or story they own the image. In our law that belongs to us. Your law must be made stronger.

You can change your law, but our law cannot change.[2]

It should be noted that Indigenous law is not static. It changes and moves to accommodate cultural shifts, as distinguished from mainstream law, which is far more susceptible to political and economic pressures. What is meant by the statement that our law cannot change is that the underlying rule of Indigenous law in serving and maintaining the culture cannot change. In Indigenous law, cultural issues are paramount.

3. Responsibility for culture rests with Indigenous people

Indigenous people must be empowered to protect their cultures. As Max Stuart noted, respect and understanding is linked to maintaining culture:

Fire has to burn all the time - keep it in the mind - we have to hold it together - don t let it blow away - our land is our title - Tiwi Islands are title for Tiwi Islanders - we don t need a paper.

Much of the reform debate to date has assumed the need to introduce specific legislation to effect Indigenous rights. For this reason, many submissions for reform have focused on this option. In many cases the enactment of specific legislation was favoured to amending existing laws in a piecemeal fashion. However, it should be noted that if specific legislation is enacted, existing Australian laws will have to be amended to harmonise with Indigenous law. There needs to be a more flexible interface between Australian law and Indigenous law. This first requires Australian lawmakers to recognise and respect an Indigenous system of law.

Another issue is whether non-Indigenous laws should be the vehicle for recognising Indigenous Cultural and Intellectual Property Rights. As Indigenous Reference Group member Liz McNiven noted, The Government can easily take away legislative rights. [3] Further, many Indigenous people expressed reservations about the Government s commitment to enact specific legislation. Hence, while the adoption of specific legislation is favoured, the recommendations also aim to enable Indigenous people

2 Statement delivered by Christine Christopherson on behalf of ANKAAA Committee, Indigenous Reference Group meeting, 15-16 September, 1997.

3 Liz McNiven, Indigenous Reference Group meeting, 15-016 September 1997, Sydney.

to assert their rights within the current framework as best as possible, with a view to future legal reforms after extensive consultation with Indigenous people.

4. Respect for parallel systems of law

Respect and understanding of culture means recognising there are two parallel and equal systems of law.

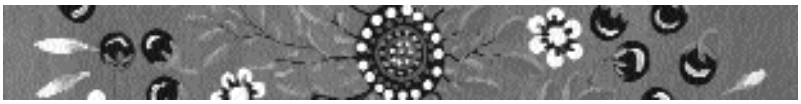
Existing non-Indigenous Australian laws have to change to give due regard to Indigenous Cultural and Intellectual Property laws. Reform should respect both Indigenous and non-Indigenous laws by recognising the coexistence of laws. There must be due regard to Indigenous Cultural and Intellectual Property Rights within the Australian legal and policy framework. This means not only recognising the uniqueness of Indigenous culture but also respecting it and understanding that Indigenous knowledge and Western knowledge are two parallel and equal systems of innovation. Furthermore, it must be recognised that Indigenous customary law and the existing Australian legal system are two parallel systems of law, both of which need to be given proper weight and recognition.

It is fundamental that any reforms should allow Indigenous people self-determination at all levels, including the way reforms of the Australian legal system, if any, should happen.

The aim is to establish an Indigenous solution to the problem so that the issues can be dealt with in a culturally appropriate way and also empower Indigenous decision-makers.

CHAPTER NINE

Amendments to the Copyright Act



As noted in Chapter Five, copyright in its present form is not always appropriate for preventing or remedying the misuse of Indigenous artistic, performing, literary and musical works. This is because Australian copyright law protects economic and individual rights rather than communal and personal rights such as integrity.

The Copyright Law Review Committee (CLRC) is reviewing the *Copyright Act* to consider whether it will be able to deal with important social, commercial and technological changes in the future.[1] The major changes to the Act relate to moral rights and copyright convergence issues.

In its pre-election arts policy statement, For Arts Sake , the Howard Government announced it would review the *Copyright Act* as it applies to Indigenous arts and cultural expression.

The Discussion Paper suggested the following amendments as workable depending on how they are implemented:

1. Moral rights amendments to give Indigenous communities the rights of cultural integrity and cultural attribution.
2. Introduction of a new part to establish a collecting agency for Indigenous works.
3. Extension of performers rights.

Many respondents made submissions on this issue. The following paragraphs summarise their comments.

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[1] CLRC, *Copyright Reform: A Consideration of Rationales, Interests and Objectives*, Office of Legal Information and Publishing, The Attorney General s Legal Practice, February 1996.

9.1 Moral rights for Indigenous custodians

The *Copyright Act* currently does not protect the artist from distortion of his or her artworks. Neither does it provide a right for the creator to be attributed for his or her work. Such rights are referred to as moral rights. They are not economic rights. Therefore, they cannot be assigned. Moral rights attach to and remain with the creator even after the work has been sold or transferred. These rights exist in most European countries.

9.1.1 *Copyright Amendment Bill 1997*

At the time of writing, the *Copyright Amendment Bill 1997* was making its way through Federal Parliament. This Bill proposes to extend the rights available to creators under the Act. The Bill is currently before the Senate which is considering the majority and minority opinions of the Bill from the Senate Legal and Constitutional Legislation Committee. The Bill attempts to put Australia in compliance with its international obligations under the Berne Convention.[2]

The Bill proposes to introduce following rights:

1. Right of attribution

   Right of attribution will provide a creator with the right to have his or her name placed on the original and on copies of his or her works. This is the right of the creator to be identified as the author of the work if any exclusive rights are exercised. This form of identification may be any reasonable form of identification. The right will not be infringed if it is reasonable not to identify the author.[3]

2. The right against false attribution

   The right against false attribution is the right of the author not to have authorship of the work falsely attributed to someone.[4]

3. The right of integrity

   The right of integrity is the right not to have the work subjected to derogatory treatment. Derogatory treatment means doing anything that results in material distortion, mutilation of or material alteration to the work that is prejudicial to the author s honour or reputation; or doing anything else in relation to the work that is prejudicial to the author s honour or reputation.[6] This right will not be infringed if the derogatory treatment is reasonable.[7]

Some other important features of the proposed model include:

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[2] Article 6BIS of the Berne Convention.
[3] Proposed section 145AQ.
[4] Proposed sections 195AB-195AG.
[5] Proposed section 195AH.
[6] Proposed sections 196AI, 195AK.
[7] Proposed section 195AR.

- These rights extend to authors of literary, dramatic, musical or artistic works and directors and producers of films.
- The duration of the moral rights will last for the full term of copyright.[8] If the author dies, her or his personal representatives may exercise and enforce the moral rights.[9] In all other cases, a moral right is not alienable or transmissible.[10]
- An author may waive in writing all or any of her or his moral rights.[11] Where there is no waiver under this section, Section 195AV will operate so that it is not an infringement of a moral right to do, or omit to do something, if the author has consented in writing to the act or omission.
- Moral rights apply to the whole or a substantial part of the work.[12] Where there are joint authors, there is provision for each author to have moral rights in the work.[13] Where there is more than one principal director or principal producer of a film, each of these people has moral rights in the film.[14]

Daniels suggests the impact of moral rights in this regard will be greatest in the area of artistic works.[15]

Given the importance of maintaining the cultural integrity of a work,[16] the right of integrity as proposed in the moral rights amendments would benefit Indigenous artists. However, the proposed moral rights legislation provides personal rights to an individual creator. Under Indigenous customary law, the responsibility for ensuring that important cultural images, themes and stories are used appropriately rests with the Indigenous custodians of a particular item. This means that under the proposed moral rights legislation, traditional custodians would not be able to prevent culturally inappropriate use of their arts and cultural material without relying on the moral rights of an individual artist.

The Bill also proposes that these rights can be waived unconditionally, or that derogatory treatment of works can be consented to. These provisions should not apply to Indigenous creators given the cultural value of the works. As noted by Vi$copy, the current copyright amendment debate has not addressed moral rights as they apply to Indigenous communities and Indigenous creators.[17]

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[8] Proposed section 195AL.
[9] Proposed section 195AM(i).
[10] Proposed section 195AM(ii).
[11] Proposed section 195AZG.
[12] Proposed section 195AZH.
[13] Proposed section 195AZI.
[14] Proposed sections 195AZJ-195AZK.
[15] Helen Daniels, Copyright Protection for Aboriginal and Torres Strait Islander arts and cultural expression: Existing Law and New Developments , paper presented at the Indigenous Arts Commercial Opportunities Conference, Perth, 14 November 1995, p 6.
[16] As observed in *(Deceased Applicant) v Indofurn.*
[17] Vi$copy, Submission to *Our Culture: Our Future*, October 1997.

9.1.2 *Issues for consideration*

The Discussion Paper asked whether the following moral rights should be introduced:

- A right that would allow Indigenous custodians to act against derogatory, offensive and fallacious reproduction and use of Indigenous cultural heritage material (cultural integrity rights).
- A right that would allow Indigenous custodians to take action when a group or community was not acknowledged as the source of a particular item of cultural heritage (cultural attribution rights).

9.1.3 *Responses*

Several submissions supported the proposition in the Discussion Paper that the *Copyright Act* should be amended to protect Indigenous communities against abuses such as unauthorised, derogatory and fallacious reproduction and use of Indigenous cultural material, particularly pre-existing Indigenous designs.[18]

Film Australia noted that when advocating the right to prevent derogatory, offensive and fallacious use of Indigenous Cultural and Intellectual Property, the Report must make the distinction between two uses of Indigenous Cultural and Intellectual Property to ensure that specific guidelines are adopted to prevent exploitation of it:[19]

1. The portrayal of Indigenous people and their heritage.
2. Investigative reporting on Aboriginal issues.

Other respondents noted that the terminology would need to be clearly defined. For example, Indigenous would need to be legislatively defined, as well as derogatory, offensive and fallacious .

Overall, there was support for Indigenous communities being able to protect against derogatory, offensive and fallacious uses of their artistic expressions.

The Tasmanian Aboriginal Land Council noted that a right of attribution in relation to a particular community is no good unless there is also a requirement that prior consent for the use is obtained. Simply acknowledging the source of the material without seeking prior consent is not enough.[20]

The Australian Copyright Council noted there were a number of problems in attempt-

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[18] For example, see Vi$copy, *Ibid*.

[19] Film Australia suggests that guidelines should be established to identify what constitutes a legitimate criticism and an offensive remark. Action should be taken to ensure appropriate knowledge of a group or community as the source of that particular item of cultural heritage.

[20] Karen Brown, Tasmanian Aboriginal Land Council Aboriginal Corporation, Submission to *Our Culture: Our Future*, October 1997.

ing to amend the moral rights provisions in the Bill to provide the rights raised in the Discussion Paper:

> *These problems stem from the differences between the concerns of moral rights legislation and the concerns of Indigenous communities. Moral rights legislation is drafted upon the basis of individual rights and is predicated on 20th century concepts of authorship and authorial integrity. Where Indigenous communities are concerned, any dealing with any Indigenous intellectual and cultural material is within the bounds determined by customary law.*[21]

The ACC submitted this would create the following issues:

- *The creator of the material may not necessarily be the same person as the Indigenous custodian, and moral rights vest in the author whether or not they own copyright.*
- *Moral rights under the Bill last only as long as copyright.*
- *Moral rights under the Bill are only granted in relation to copyright material. They will not apply, for example, to styles or techniques such as cross-hatching or dots and will often not apply in relation to the mere use or production of items such as the bull-roarer or the didgeridoo.*
- *The right of attribution, as drafted in the Bill, does not correspond with the suggested right of acknowledgment of sources raised in Our Culture: Our Future. Neither will it stop plagiarism or lack of acknowledgment of sources.*
- *Insofar as distortion or mutilation is concerned, it is not clear that the nature of the right proposed for an Indigenous custodian would be the same type of right that falls within the right of integrity already listed in the Bill.*
- *It is not clear that use of protected material contrary to Indigenous customary law will necessarily be an infringement of the right of integrity under the Bill.*
- *Exceptions to infringement of moral rights in the Bill will generally not be appropriate in relation to Indigenous cultural and intellectual material. See for example the exceptions in the Bill which relate to whether the use of the material is reasonable in terms of industry practice.*[22]

Summarising the amendments to moral rights, the ACC questions whether the moral rights provisions before the Senate are the best way to address concerns of Indigenous communities. The ACC believes it would be more useful to look at issues such as the acknowledgment of sources and rights of Indigenous custodians in relation to derogatory, offensive and fallacious reproductions and uses of Indigenous Intellectual and Cultural material in stand-alone legislation.[23]

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[21] Australian Copyright Council, Submission to *Our Culture: Our Future*, October 1997.
[22] Proposed new sections 195AQ and 195AR.
[23] Ian McDonald, Australian Copyright Council, Submission to *Our Culture: Our Future*, October 1997.

Another submission, from Tanya Aplin of the Asia Pacific Intellectual Property Law Institute, suggested that under the proposed moral rights amendments, communal exercise of Indigenous moral rights in relation to Indigenous copyright works of a literary, dramatic, artistic or musical nature could be achieved by:

1. Nominating the Indigenous community as the joint author of the work; or
2. Allowing the moral rights in the work to be assigned to the Indigenous community.

According to Aplin, for the purposes of moral rights only, the Indigenous community could be nominated as a joint author of the work. This might be done by characterising an Indigenous work as collaborative in a broader sense, created by an Indigenous communal personality, entitling the community as a whole to be classed as an author. Aplin suggests that one viable option is to make the Indigenous community an author together with the individual artist who makes the work. This would mean classifying the work as a work of joint authorship. A work of joint authorship is defined in Copyright Act to mean:

> *... a work that has been produced by the collaboration of two or more authors and in which the contribution of each author is not separate from the contribution of other authors or the contribution of the other authors.*

Aplin argues that unless members of an Indigenous community actively participate in the creation of the work - that is, that it does not simply emerge from an Indigenous culture - those members would not be joint authors according to this definition. To make Indigenous communities joint authors, there must be amendments to the *Copyright Act* to define joint authorship to specifically apply to Indigenous works.

Aplin suggests that work would have to draw substantially upon the culture of a particular Indigenous community to justify the community as a group being collaboratively involved. Also, the group must be readily identifiable so it can be effectively deemed a joint author and can effectively exercise the moral rights it receives. For example, to exercise a right of attribution, an identifiable community must be named in relation to the works. The remaining provisions on joint authorship would then apply. Therefore, both the individual author and the Indigenous community would have moral rights in the work and would both be able to exercise those rights. Thus, both the individual author and the community would have to be identified on the work. Both the individual author and the community would have the right to prevent the work from being mutilated, distorted or altered in such a way as to prejudice their honour or reputation. In the case of a community, this would refer to the community s honour or reputation. Aplin also considers that under this scheme, both the community and the Indigenous author would be able to prevent others from falsely attributing themselves to their joint works. [26]

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[24] Tanya Aplin, Asia Pacific Institute of Intellectual Property, Murdoch University School of Law, Submission to *Our Culture: Our Future*, October 1997

[25] Section 10, *Copyright Act 1968*.

[26] Tanya Aplin, Asia Pacific Institute of Intellectual Property, *op cit*.

Even if Indigenous communities were recognised as joint authors of copyright works which incorporate the communal cultural heritage of the group as a whole, and moral rights were arguable, this would not affect rights in perpetuity. For Indigenous works, Aplin suggests that rights in perpetuity would be more comprehensive protection because Indigenous works should avoid entering the public domain and losing moral rights protection.[27]

Aplin noted that another way communal moral rights might be recognised under the *Copyright Act* would be to introduce the ability to assign the moral rights in works of an Indigenous nature to an Indigenous community.

According to Aplin, this solution means that Indigenous custodians would have to rely on individual authors recognising them as the proper controllers and exercisers of moral rights, and transferring such rights to them. The problem with this is that the Indigenous community must rely on the morals of the individual author, and there is no real legal mechanism to ensure this is done.[28]

Aplin suggested that assignment must be made to an individual member or members representing a community because of the contract principle of certainty. The nature of an Indigenous community changes and an individual may no longer be an elder or represent the community, so there are likely to be problems with this option. One person could be trusted to assign moral rights to the appropriate person but may not be legally forced to do so.

She further suggests that assignment provisions should only be applicable to Indigenous works and the works should only be assignable to elders who represent Indigenous communities. The solution also requires a clear definition of what an Indigenous work is so that the special alienability provision is invoked. The policy issues surrounding the possible formulations of the definition need to be discussed in much greater detail.[29] Again, rights would only exist for the copyright term and not in perpetuity.

9.2 Collection of fees for use of Indigenous cultural works

The Discussion Paper suggested that one workable amendment to the *Copyright Act* might be to establish a system of collective administration for Indigenous cultural works.

9.2.1 *What is a collective administration system?*

Under a system of collective administration:

> *Owners of rights authorise collective administration organisations to administer their rights, that is, to monitor the use of the works concerned, negotiate with*

[27] *Ibid*.
[28] *Ibid*.
[29] *Ibid*.

> *prospective users, give them licences against appropriate fees and, under appropriate conditions, collect such fees and distribute them among the owners of rights.*[30]

Composers and authors benefit from a third party collecting and administering various rights on their behalf as it is often difficult for individuals to protect and maximise the economic value of their rights.[31]

Copyright users also benefit from collecting administration systems because they have access to a single organisation to ensure they have the necessary clearance to use copyright works for an agreed fee. This reduces the difficulty of locating all relevant copyright owners, a problem with respect to clearance of copyright in Indigenous artworks.

9.2.2 *Suggested legislative model raised in the Discussion Paper*

The Discussion Paper noted that it might be possible to introduce a new part to the *Copyright Act*, similar to Parts VA and VB of the Act, which provides for collection of fees when Indigenous cultural works are copied by schools, universities, libraries, government departments and private sector organisations. A work could be defined as an Indigenous cultural work whereby the ordinary copyright requirements of material form and originality are no longer a hindrance to protection. An Indigenous cultural work could specifically denote works that are out of copyright but are still governed by Indigenous customary laws of disclosure and dissemination. There might also be provisions for Indigenous cultural recordings , that is, film, sound recordings and photographs.

It might then be possible to establish a national collecting agency or statutory authority similar to the Copyright Agency Limited (CAL) or Screenrights which meet similar criteria under the *Copyright Act.*[32] These criteria are reasonably stringent, and include holding monies on trust for copyright owners, and access to records by members. Such a collecting agency must prepare an annual report and send a copy to the Attorney-General, who tables it in Parliament. It also has to keep proper independently audited records.

Collecting agencies administer licensing schemes for certain kinds of uses. They would collect payment for use of expressions on behalf of their Indigenous members. Anyone using an expression for which the collecting society was responsible would be required to complete a records notice for each use. This would form the basis for any remuneration paid to the society, and through the society, to the owner.

Another method to access the amount of copying outlined in the legislation is sam-

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[30] Collective Administration: Copyright and Neighbouring Rights , WIPO, Geneva, 19090 para 8 as cited in Shane Simpson, *Review of Australian Copyright Collecting Societies*, A Report to the Minister for Communications and the Arts and the Minister for Justice, p 9.

[31] *Ibid,* p 10.

[32] Section 135P, *Copyright Act 1968*

pling the works being copied by certain institutions, so that a cross-section of the various uses is ascertained in order to come to an estimate as to the extent of copying.

Whatever method may be employed, the user would not have to be concerned with identifying a particular owner - that role would be carried out by the collecting society. Nor would the owner(s) of particular expressions have to be concerned with monitoring for possible infringements, as the collecting society would undertake this role.

The society could be governed by an Indigenous advisory board, which may have a number of functions, such as:

- Authorisation of uses of Indigenous arts and cultural expression and how royalties should be collected with respect to collective ownership of material;
- Facilitate payments to traditional custodians and relevant communities;
- List artworks suitable for reproduction for commercial purposes, those that are not suitable and those only to be reproduced in certain culturally appropriate ways;
- Advise on policy issues.[33]

The Discussion Paper noted that most collecting societies operate under compulsory licensing schemes where use does not require prior consent if certain procedural requirements are met. Fees are generally collected after use. This might not be appropriate for use of Indigenous cultural material, where prior authorisation of use would be more suitable to prevent inappropriate reproductions. Davies notes that current trends to standardise copyright law internationally, and an increasing move towards compulsory licensing of works, may reduce the potential for Indigenous people to control the use, and norms which govern the use, of their imagery.

9.2.3 *Review of Australian Copyright Collecting Societies*

The *Review of Australian Copyright Collecting Societies* reported on the potential role of a collecting society for Aboriginal and Torres Strait Islander art. It noted that the *Altman Review of the Aboriginal Arts and Crafts Industry* was not convinced that a specialist Aboriginal copyright collection society was warranted. The *Altman Report* argued that there was no need to divide the interests of Aboriginal and non-Aboriginal artists. Aboriginal and non-Aboriginal artists alike can ensure that their respective interests are taken into consideration through a structure that enables the interests of the relevant rights owners to be represented.[35]

The *Review of Australian Copyright Collecting Societies* noted that the Aboriginal Arts Management Association (now the National Indigenous Arts Advocacy Association

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[33]Terri Janke, The Application of Copyright and other Intellectual Property Laws to Aboriginal and Torres Strait Islander Cultural and Intellectual Property , (1997) vol 2(1) *Art Antiquity and the Law* pp 13-26, at 25.
[34] Tony Davies, Aboriginal Cultural Property? , (1997) *Law in Context* pp 1-28.
[35] *Ibid.*, p 266.

[NIAAA]) investigates copyright infringements; supports action taken by other agencies in test-case infringement actions; and negotiates copyright clearances and fees for the use of their members work.

In light of this, the *Review of Australian Copyright Collecting Societies* advocated a cooperative relationship between NIAAA and Vi$copy to administer the rights of Indigenous Australian artists taking into account the extremely complex religious, cultural and economic issues which exist in the market for the exploitation of Aboriginal art.[36] Vi$copy is a recently established agency which negotiates, collects and distributes royalties for visual artists including painters, designers, photographers and sculptors and facilitates the collection of fees for licensing their copyrights. Unlike the Australasian Performing Rights Association (APRA) and CAL, Vi$copy does not administer compulsory licences but operates as a voluntary collecting society whereby artists choose to join as members. Vi$copy s constitution provides that one member of the board must be Aboriginal or Torres Strait Islander. [37]

9.2.4 *Issues for consideration*

The Discussion Paper asked:

- Do you think it is possible for the *Copyright Act* to include an additional provision applying to the collection of fees for Indigenous works, when copied, that would be similar to Part VA and VB of the *Copyright Act*?
- An Indigenous work could be defined as a work that is of particular significance to an Indigenous community and one that is still governed by Indigenous customary laws concerning its use and reproduction. Do you agree? Can you suggest how an Indigenous work might be defined?
- Should there also be protection for Indigenous cultural recordings? Can you suggest how an Indigenous cultural recording might be defined?

The responses to these will be discussed in 9.2.5, 9.2.6 and 9.2.7.

9.2.5 *Collection of fees for use of Indigenous works*

Several submissions noted that establishing a collecting society dedicated to Indigenous rights would develop knowledge and contacts necessary to determine cultural significance and sensitivities. An Indigenous Collecting Society may also develop a distinct profile, ensuring a continued regard for Indigenous rights. A major advantage will be that users will be readily able to identify a point of contact to seek information and permission.[38]

The society would represent owners of copyright in all classes of copyright material

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[36] *Ibid,* p 267.

[37] Vi$copy, Submission to *Our Culture: Our Future*, October 1997.

[38] For example, Screenrights, Submission to *Our Culture: Our Future*, October 1997.

and represent these rights owners on a voluntary basis.

Collective administration requires a lot of resources. Infrastructure would include specialised legal, accounting and information technology expertise. In addition, there are substantial costs associated with data collection and research.

Vi$copy noted that there may be cases where the rights of non-Indigenous and Indigenous copyright owners are similar. In this case, it might be more efficient to make use of existing societies where culturally appropriate. For example, with audio-visual work, there is limited production of Indigenous material. The costs of developing infrastructure to support the research and administration required may be more than the potential royalties collected. Protocols and education are important, as is finding the correct balance between the role of existing collecting societies and an Indigenous collecting society.[39]

While the Australian Copyright Council generally supported the establishment of an Indigenous collecting society, it believes parts VA and VB of the Copyright Act do not provide a good model of a collecting society. As the ACC submission noted:

> *Parts VA and VB were introduced because of difficulties educational institutions were having in obtaining permission for material which was to be used for educational purposes. The parts were introduced in light of the fact schools were photocopying materials regardless of copyright obligations, and that authors and publishers should be protected to some extent from the detrimental effects such infringing use of copyright was having on their income.*[40]

The ACC further notes the following problems in using Part VA and VB of the *Copyright Act* as a model for the establishment of a collecting agency for Indigenous cultural works:

- *The schemes in part VA and VB are blanket or compulsory licensing schemes. They remove the right of the copyright owner to prohibit certain uses of their copyright material. According to ACC such a scheme would not accord with the concern of Indigenous communities. Because of the nature of Indigenous cultural material, Indigenous communities would need to have a greater say in how cultural material is used, if at all.*
- *In ACC s view, it would be more appropriate for Indigenous communities to be granted rights, say under sui generis legislation, to form a voluntary collecting society. In this regard, ACC points out that APRA, Vi$copy, AMCOS, and the PPCA operate as voluntary collecting societies based on agreement with members.*
- *In addition to the administration of the copying scheme under the Copyright Act, CAL also operates a number of voluntary licensing schemes. The*

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[39] Vi$copy, Submission to *Our Culture: Our Future*, October 1997.

[40] Ian McDonald, Australian Copyright Council, Submission to *Our Culture: Our Future*, October 1997.

licensing schemes, in parts VA and VB of the Act, give the Copyright Tribunal a supervisory and determining role in the event that any disputes between the relevant collecting society and the beneficiaries of a licensing scheme develop. In particular, the Tribunal has a role in determining the terms and conditions upon which copyright material is licensed. This role applies both in respect of statutory and voluntary licensing schemes. ACC believe that there is scope that the decisions of relevant Indigenous Custodians, insofar as permissions to use Indigenous cultural material are concerned, should not be subject to review at all. It is questionable whether the Tribunal is the appropriate form in which reviews in relation to the collective licensing of Indigenous cultural material should take.

- *In ACC s view, it would be more appropriate to constitute a review body comprised of Indigenous people under sui generis legislation. The schemes in Part VA and VB of the Act operate only in relation to certain types of copyright material. It would need to be clarified what types of Indigenous work any new collecting society would be authorised to license, particularly in relation to the rights of people who are copyright owners but who are not custodians under customary law. Consideration would need to be given to the types of uses of Indigenous works which may be licensed by the relevant collecting society.*

- *The intended beneficiaries of a scheme would also need to be defined as will the purposes for which dealing with the relevant material should be made, for instance, educational purposes, non-profit dealings of Indigenous works.*

- *Under Parts VA and VB of the Act, CAL and Screenrights must present annual reports to the Federal Attorney General who must present a copy of the report before each House of Parliament. This is not a requirement for voluntary collecting societies such as APRA which issue voluntary licences on behalf of their members. Consideration is therefore to be given as to whether it is appropriate for any licensing scheme or any collecting society that acts in relation to Indigenous works to be subject to annual parliamentary scrutiny.*

- *Under Parts VA and VB of the Act, the Attorney-General has the power to declare a body to be a collecting society for the purpose of the licence scheme included within the Act. The Attorney-General also has powers under the parts to revoke any such declaration which he or she has made. Whether this is appropriate in relation to a collecting society for Indigenous works should be considered. Note that collecting societies such as APRA which issue voluntary licences on behalf of their members are not subject to such control.*

- *Voluntary collecting societies, apart from relevant company and associations law, are subject only to the control of their members and boards.*

- *Under parts VA and VB of the Act, the Attorney-General may only declare*

> *a body to be a collecting society if the body complies with the criteria set out in Section 135ZZB of the Copyright Act. These criteria are clearly aimed principally at the protection of the persons on behalf of whom the relevant collecting society administers the relevant statutory licensing scheme. Simpson noted in his review that the subjection of CAL and Screenrights to the stringent safeguards of the Act and the regulations, together with government approval of the Articles of Association, are appropriate to bodies charged with administration of non-voluntary licences . Further consideration would need to be given to whether such safeguards are appropriate in relation to voluntary collecting societies.*

> *In conclusion the ACC does not feel that it is in the best interests of Indigenous communities either to lobby for changes to the Copyright Act, which would see either the establishment of blanket statutory licensing schemes, or to establish a collecting society which is subject to government control as envisaged under Part VA and VB of the current Copyright Act.*[41]

Screenrights also considered that setting up a collecting society under Part VA and VB would not be appropriate:

> *Compulsory licences are beneficial where individual licences are impractical. They assist users of copyright material to have ease of access to copyright works. There is also the benefit that the scheme is supervised by Government. Copyright owners benefit from the right to fair remuneration than otherwise in practice because administration and management is too hard. Compulsory licence for education use is an example where owner and user benefit from compulsory collective administration.*
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> *With compulsory licences, however, permission from the individual rights holder is not required. The compulsion is on the copyright owner, who loses the power of withholding permission. Usually the copyright owner also loses the power to negotiate terms for the use of their work.*
>
> *While a compulsory licence might provide a mechanism to collect royalties for significant works out of ordinary copyright where use of those works is still governed by customary law, it would not provide any greater cultural protection for works. Compulsory licensing does not take into account circumstances where customary law would prohibit use. Further, collecting societies will have as much difficulty in detecting unauthorised use as Indigenous owners would, so the protection of items under customary law will not be enhanced either.*[42]

The National Parks and Wildlife Service (NSW) supports changes to the law which positively reinforce the recognition of Indigenous Australians being the owners and custodians of their heritage in accord with their customs and traditions. Any associated proposal that establishes a collecting agency for Indigenous cultural works should

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[41] *Ibid.*

[42] Screenrights, Submission to *Our Culture: Our Future*, October 1997.

be directly governed by an Indigenous board derived from the Indigenous owners of those works. A collecting society set up on similar lines to CAL and Screenrights under parts VA and VB of the *Copyright Act* - which establishes the collecting society as a statutory authority is in direct contradiction to principles of self-determination.[43]

Indigenous communities seek autonomy in this area of Indigenous Cultural and Intellectual Property rights. The statutory authority scheme is a centralised one, and this would not be acceptable to Indigenous people. The element of compulsion in the licence administered under the *Copyright Act* which forms the basis for this model may be unacceptable. Indigenous communities appear to want to decide for themselves how their cultural and artistic expression are used.

An alternative would be to make any collecting society voluntary, in that community owners would decide whether or not to join. They would also need to nominate particular uses the body would be given responsibility for. They may wish to retain complete control over certain uses. Given that collecting societies generally collect in relation to works that are commercialised and used widely, sacred and secret material would presumably be outside the jurisdiction of such a body. Any proposed collecting society should not be a government body. It should be established as a private company limited by guarantee with indigenous members together with a trust to distribute income earned in collecting for authorised use.

9.2.6 *Defining Indigenous cultural works*

Indigenous cultural works refers to works created by an Indigenous person or group that have particular significance to an Indigenous community and are governed by Indigenous customary laws concerning their use and reproduction.

Indigenous cultural recordings refers to film, photographs, any written documents and sound recordings which record Indigenous cultural material.[44]

Although the ACC does not agree amendments should be made to the *Copyright Act,* the following comments were made about the definition of Indigenous works and cultural recordings:

> *Any definition is likely to depend upon the context in which the phrases appear. Defining Indigenous works must consider whether it would be useful in a different context to distinguish between ancient Indigenous work, such as rock art; traditional Indigenous works that are produced with the traditions of customary law; non-traditional Indigenous works such as those produced by Indigenous people working outside traditional modes; or works influenced by or reproducing Indigenous traditions.*[45]

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[43] National Parks and Wildlife Service, Submission to *Our Culture: Our Future*, October 1997.
[44] Recreation and Cultural Services, City of Wanneroo, Submission to *Our Culture: Our Future*, October 1997.
[45] Ian McDonald, Australian Copyright Council, Submission to *Our Culture: Our Future,* October 1997.

ACC suggests that it may be necessary to include a definition of infringing Indigenous work which, for example, distinguishes between commercial and non-commercial uses of Indigenous intellectual and cultural material. Perhaps this could be modelled on trade practices or passing-off definitions. For example, material which misleads and deceives the public into believing that the work is a work created in accordance with Indigenous customary law.[46]

9.2.7 *Indigenous cultural recording*

In relation to Indigenous cultural recording, ACC does not know whether any definition needs to differentiate between recordings which record an Indigenous person imparting either information or material subject to customary law in relation to which they are the Indigenous custodians; and recordings which incorporate certain types of Indigenous material but which do not also represent a recording of an authorised Indigenous person. The definition may also need to address what types of recording medium are contemplated.

Mike Lean suggested that Indigenous cultural recordings could be defined as, Any mechanical or electronic record made of any Indigenous cultural property by any method now existing or yet to be discovered, where that recording has been made for a commercial purpose, or is used in the future for a commercial purpose." This includes, by definition, photographs, holographic records, audio recordings, videos, etc, but should not be intended to affect records made by tourists and travellers, with the permission of the custodians, for their own private use.[47]

9.3 *Performers rights*

As noted in Part Two, performers rights gives performers the right to prevent certain unauthorised uses of recordings of their performances.[48] The Discussion Paper noted that Miller suggests consideration should be given to amending the performers rights provisions of the *Copyright Act 1968*.[49] He believes performances of Indigenous cultural and spiritual ceremonies would satisfy the definition of a performance under section 248A of the *Copyright Act*. In light of this, he suggests that if a performance was highly sensitive or sacred, the performer might be able to obtain significant additional damages for breach of this provision.

Miller also recommends Part XIA be amended to enable all persons with an interest in, or connection with, a cultural, spiritual or religious performance to bring an action under the performers rights provisions. However, as the Australian Copyright Council notes, the rights granted to performers are limited and are not on par with the type of

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[46] *Ibid..*

[47] Mike Lean, Submission to *Our Culture: Our Future*, October 1997.

[48] Section 248J *Copyright Act 1968*.

[49] Duncan Miller, Collective Ownership of Copyright in Spiritually-Sensitive Works: *(Deceased Applicant) v Indofurn Pty Ltd* , (1995) vol 6 *Australian Intellectual Property Journal* p 206.

[50] Australian Copyright Council, *Protecting Indigenous Intellectual Property*, Sydney, March 1997, p 64.

proprietary rights contained in copyright. Hence, the rights attach to the performance of the relevant performer only and not the actual song or story being performed.[50] Such an amendment would not be sufficient to protect the material being performed.

(See also Chapter 8 for discussion on international developments concerning the *Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations*.)

Both the Rome Convention and the WIPO Performances and Phonograms Treaty of 20 December 1996 include provisions dealing with the rights of performers. Note that the treaty is open for signing until 31 December 1998 and will come into force three months after the required number of ratifications or accessions has been reached. At the time of writing their submission, the ACC noted that the treaty had been signed by 28 countries. The AAC believes people other than the performer and his or her heirs should not be entitled to bring an action for infringement or for performance right under legislation enacted in relation to either the Rome Convention or the WIPO Performances and Phonograms Treaty.[51]

The Attorney-General has released a discussion paper called *Performers Intellectual Property Rights*, which considers whether Australia should accede to the new WIPO Performance and Phonograms Treaty (WPPT). This extends performers rights as follows:

- To cover moral rights.
- The right to authorise the recording, broadcasting and other communication to the public of their performances.
- The rights to authorise reproduction, distribution, rental and making available on-line to the public sound recordings of their performances;
- The right to share with producers of sound recordings in a single equitable remuneration payable for broadcasting and playing in public of their performances.

The WPPT only covers performances of sound recordings and not audio visual recordings. However, the *Performers Rights Discussion Paper* canvasses the possibility that Australia goes further than the WPPT to include audio visually recorded performances which would encompass film and multi-media.

All that is required now for the makers of sound and audio visual recordings to clear performers rights is to obtain the performer s consent in writing, usually by means of a simple release form. That written release is authority thereafter for all uses of the recorded performance for the full duration of the rights, that is, 25 years after the performance was given.

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[51] *Ibid.*

Lea-Shannon notes that, The concern of performers representatives such as the Media and Entertainment Arts Alliance (MEAA) is that under the current law performers are not further remunerated in the same manner as are copyright owners under statutory licence fees, and that the performer is not afforded the same rights as copyright holders, such as reproduction, rental, importation, transmission, adaptation or any secondary or ancillary rights.[52]

The *Performers Rights Discussion Paper* notes that actors currently have various award arrangements such as the Actors Television Award, the Actors Feature Film Award, the Australian Television Repeats and Residuals Agreement and Television Programs Agreement which provide payments for repeats and residuals. The *Performers Rights Discussion Paper* asks whether such payment mechanisms are adequate compared with the statutory royalties paid to copyright holders.

The WPPT also proposes that performers have moral rights over their performances. If these types of rights are adopted, performers, including Indigenous performers, will be able to better protect their image and reputation. This is an important right in light of technological advances in media which allow for manipulation of images in an unprecedented manner.

9.3.1 *Responses*

In relation to the representation of Indigenous cultural expression and the uses to which recordings of Indigenous people or Indigenous cultural expression are put, the ACC believes it is appropriate to address these concerns in stand-alone legislation which deals generally with the protection of Indigenous intellectual and cultural material.

But the ACC does consider that it might be appropriate to clarify the definition of performance in Section 248A(1) of the *Copyright Act 1968*, that the performance of an Indigenous ceremony is a performance for the purposes of the provision.

ACC also supports amendments to the current performers provisions to upgrade them from being merely a right to consent to a recording and the right to consent to the incorporation of a sound recording onto a film, to a full performer s copyright. This would benefit all performers, including performers of Indigenous cultural materials, which fall within the scope of the provisions.

The ACC does not believe the performers rights provisions in the *Copyright Act* are the appropriate means to address the concerns of Indigenous communities insofar as reproductions of cultural activities such as ceremonies, dances and songs are concerned. The ACC believes the right of Indigenous communities to control reproductions of cultural activity should be dealt with in stand-alone legislation.

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[52] Raena Lea-Shannon, Of Mice and Mules - An Update on Current Legal Issues in the Film Industry . *Australian Screen Directors Association Newsletter*, March 1998.

> The Recreation and Cultural Services Section of the City of Wanneroo submitted that legislation covering performers rights should be amended to give Indigenous communities the right to control any subsequent reproduction of cultural activities such as ceremonies, dances and songs. Control must be defined from an Indigenous point of view; control to include authorisation of a particular Indigenous community, the learning and sharing of their cultural activities with non-Indigenous people for non-commercial or profit purposes.[53]

9.4 Is amending the Copyright Act appropriate?

Various legal commentators have argued that to amend the *Copyright Act* to provide Indigenous communal rights to cultural heritage material would be too complex and that in enacting any amendments, Australia would need to recognise its obligations of reciprocity under the Berne Convention.[54] The Australian Copyright Council echoed this sentiment it its submission. The ACC noted that amendments to the *Copyright Act* may lead to an obligation under the Berne Convention to extend national treatment to persons of other countries. Whether this is so or not, and the ramifications and desirability of such ramifications, requires further consideration.

But what is the problem with Australia having to extend treatment for other Indigenous groups? The *Copyright Act* currently extends to authors and creators of other nations. As noted at the Jumbunna Conference by Indigenous Canadian and US delegates, there is a large amount of fake Indian and Canadian Aboriginal material on sale in Australia. In light of the UNESCO/WIPO moves to effect an international instrument protecting folklore, this would be consistent with offering protection beyond national boundaries.

The ACC considers that to frame amendments to the *Copyright Act* to take national treatment into consideration may mean that protection under the Act is drafted in a way which does not adequately address concerns of Australia s Indigenous communities.[55]

The ACC is not convinced that granting rights to Indigenous communities under the *Copyright Act* is the best way of addressing concerns of Indigenous communities regarding Indigenous intellectual and cultural material, or for collecting fees for the use of Indigenous works.

According to the ACC, another consideration is that any amendment to the *Copyright Act* which gives communities rights in respect of Indigenous intellectual and cultural material, would need to operate in addition to the rights of any copyright owner. This is because of the obligations under the Berne Convention. Whether such rights may supplant those which generally vest in the creator or performer, makes it more complex to draft amendments to the Copyright Act. On the other hand, enacting specific legislation is less difficult and the interplay between any copyright or other existing legislative rights will be subject to public law principles.[56]

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[53] City of Wanneroo, Submission to *Our Culture: Our Future*, October 1997.

[54] See Attorney-General s Department, *Submission to the House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs Inquiry into Culture and Heritage*, p 42.

[55] Ian McDonald, Australian Copyright Council, Submission to *Our Culture: Our Future*, October 1997.

[56] *Ibid.*

Chapter Nine : Recommendations

9.1 The enactment of a specific Act which provides protection for all Indigenous Cultural and Intellectual Property is preferred over amendments to the *Copyright Act*. The specific Act should recognise Indigenous cultural ownership in Indigenous visual arts, craft, literary, music, dramatic works and Indigenous knowledge and provide rights in that material which allow Indigenous people the rights of prior consent and to negotiate rights for suitable use.

While a specific Act is favoured, if this option is not pursued, amendments to the *Copyright Act* including amendments for the proposed moral rights provisions should be given further consideration.

9.2 *Moral rights for Indigenous custodians*

Further consideration should be given to amending the *Copyright Act 1968* to include moral rights for Indigenous custodians which provide the Indigenous cultural group whose tradition is drawn upon to create a copyright work with rights of attribution, false attribution and cultural integrity.

Consideration should be given to introducing a new type of work, an Indigenous cultural work defined as a work of cultural significance to Aboriginal and Torres Strait Islander people . Where ownership of an Indigenous cultural work is communal rather than individual, then the Indigenous owners should be given a right of attribution, a right of false attribution and the right of cultural integrity. However, this might only amount to Indigenous cultural works that are within the copyright period and will not refer to Indigenous material currently considered in the public domain.

In the absence of legislation, Indigenous moral rights clauses should be included in any contracts for the use of Indigenous Cultural and Intellectual Property.

9.3. *Collecting fees for use of Indigenous cultural works*

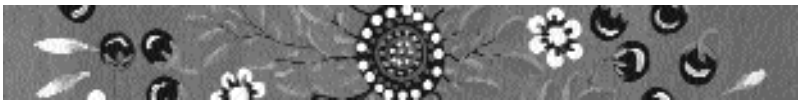
Compulsory licensing systems such as that which sets up CAL are not appropriate for Indigenous cultural works. Any Indigenous collecting society should be voluntary or set up under specific legislation. The authorisation of materials should be based on the premise of prior consent and rights should be given to the society under licence rather than as an assignment of rights.

9.4. *Performers rights amendments*

A full performer s copyright should be generally supported for all performers. A general performer s copyright will protect Indigenous performing works such as ceremony and dance. Indigenous people need to be included in discussions regarding the adoption of a full performer s copyright.

Further consideration should be given to extending the definition of performers to include performers of Indigenous songs, dance and story.

Amendments to the Designs Act



The Discussion Paper asked whether the *Designs Act 1906 (Cth)* should be amended to include provisions which allow Indigenous cultural designs or styles to be registered in recognition of their communal ownership. For example, registration of rarrk or cross-hatching styles could be registered with a particular community or organisation seeking to use such styles for industrial application. A further issue raised was whether the period of protection for Indigenous designs should be in perpetuity.

Very few submissions responded to questions on amending the *Designs Act.* While most of these submissions supported changes to the Act to allow registration of communal rights to Indigenous cultural designs in perpetuity, very few went into detail. From those submissions which did elaborate on the effect of allowing design registration for Indigenous traditional designs in perpetuity, the following is noted.

10.1 Should Indigenous styles be registrable?

The Australian Industrial Property Organisation (AIPO) is responsible for administering the *Designs Act.* AIPO appeared not to be in favour of allowing Indigenous styles to be registrable. AIPO stated:

> *From the discussions in paragraph 7.2 (of the Discussion Paper) it appears that what you believe could be considered for protection are Indigenous styles rather than what would normally be considered a registrable design. If styles were to be registered, the Act would not only need to be amended to allow for communal ownership and rights in perpetuity, but to provide for registration of a style . The question of whether Indigenous designs would meet the requirement of being new under section 17 of the Act would also be an issue.*[1]

The *Designs Act* protects new designs that are features of shape or configurations, patterns or ornamentation applied to commercial articles. The protection of styles of art such as rarrk etc may therefore be better placed within specific legislation.

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[1] AIPO, Submission to *Our Culture: Our Future*, October 1997.

10.2 *Issues relating to registration of Indigenous Designs*

The NPWS (NSW) supported changes to the *Designs Act* to allow registration of Indigenous Designs but raised the following concerns:

- The notion of separating and registering Indigenous cultural designs would require certainty over authenticity of the designs. The question is, who certifies the authenticity of the designs?
- What protection is afforded to cultural designs that are not registered?
- Should cultural designs be registered in perpetuity? The question over certainty of authenticity of the design again becomes relevant.
- The concept of registration in perpetuity, although consistent with cultural principles, will be more effectively achieved through a general amendment to the Act which universally registers all authentic cultural designs rather than on an application basis.[2]

10.3 The appropriateness of designs law to for Indigenous needs

AIPO s response also noted that Australian intellectual property policies provide the creators of intellectual property (or their employers, assignees, heirs or successors in title) an opportunity to gain, for a limited time, an exclusive right to exploit the invention (or design). These rights secure to the creators a return on their investment in genuine creative activity, and this return provides an incentive for further creativity. To provide perpetual rights would be inconsistent with the purpose of Designs (or Patents) Acts . [3]

AIPO further commented:

> *In addition, as a member of the Paris Convention for the Protection of Industrial Property, Australia is required to provide to other members of that convention, the same protection as we provide Australians. That is, we cannot discriminate in favour of Australians. Consequently, any rights given to Indigenous people would also need to be given to applicants from any other country which is a member of the Paris Convention.[4]*

To amend the *Designs Act* to allow for Indigenous groups to register their designs in perpetuity by making changes to allow Indigenous designs to meet the new requirement and to be protected in perpetuity, would not address the valid issues raised by NPWS as to authenticity of designs. Further, the AIPO would not be the most appropriate body to consider this issue.

Designs law, like copyright law, caters for economic and individual rights. To amend the *Designs Act* to give Indigenous people rights of control and ownership over their pre-existing designs and themes might not be as effective as developing new legislation. This is consistent with the view of the ALRC s *Designs, Report No 74*, traditional Indigenous designs and

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[2] Gavin Andrews, NPWS (NSW), Submission to *Our Culture: Our Future*, October 1997
[3] AIPO, Submission to *Our Culture: Our Future*, October 1997.
[4] *Ibid.*

the special issues relating to them cannot be adequately addressed through general designs law and that they should not be considered in isolation from other issues arising out of Aboriginal art, culture and heritage .[5]

Enactment of specific legislation which provides ownership and control rights to Indigenous designs is preferable. Then, applicants for designs incorporating Indigenous designs and material would have to take the provisions of any new legislation into account and negotiate rights with Indigenous custodians.

However, there is scope for the *Designs Act* to allow for groups to register appropriate communally owned designs which are commercially applied and exploited as industrial designs with the informed consent of Indigenous custodians. But it would have to be made known to Indigenous applicants, that once design protection expires the registered designs are released into the public domain. This may not be appropriate for designs that are sacred and reproducing them would cause offence to Indigenous people.[6]

Chapter Ten : Recommendations

10.1 Enactment of a specific Act which provides protection for all Indigenous Cultural and Intellectual Property is preferred over amendments to the *Designs Act* to protect pre-existing and Indigenous styles or designs in perpetuity.

10.2 However, to the extent that the *Designs Act* can provide protection for Indigenous communities who do wish to commercially exploit their designs (if appropriate under Indigenous customary laws), then the *Designs Act* and its registration process should allow for registration of group interests so that Indigenous communal ownership of cultural designs is recognised. This might be done by allowing trusts and other group entities to be registered as the proprietors of a registered design.

10.3 Rights granted under the *Designs Act* should not interfere with the traditional and customary use of Indigenous cultural material.

10.4 AIPO should establish an Indigenous Unit which should, among other things, implement AIPO s access and equity program by encouraging Indigenous business, companies and arts centres to consider this means of protection for commercially applied designs only and provide advice to Indigenous people concerning the limitations of such protection.

10.5 Even in the absence of legislation on the subject, AIPO should adopt procedures for considering applications for the registration of designs which contain or are based on Indigenous designs or themes. Such procedures should ensure that informed consent of the relevant Indigenous custodial group is obtained prior to authorising registration.

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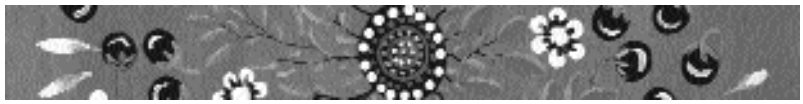
[5] ALRC, *Designs, Report No 74,* (1995) Commonwealth of Australia, p 13.
[6] ALRC, *Designs, Discussion Paper No 58,* (1994) Commonwealth of Australia, p 16.

CHAPTER ELEVEN

Amendments to the Patents Act and the Plant Breeders Act



In light of the problems relating to the appropriation of Indigenous biodiversity knowledge and resources, the Discussion Paper suggested that a solution might be to amend current patents laws and procedures to give Indigenous people rights of recognition or compensation in respect of the use of Indigenous knowledge from which, for example, many agricultural and pharmaceutical products are developed.

The Discussion Paper noted that the Special Rapporteur on Discrimination Against Indigenous Peoples notes that Article 27 appears to permit member states, if they so wish, to exclude the traditional ecological and medicinal knowledge of Indigenous peoples from patentability.[1]

Various declarations made by world Indigenous peoples such as the Mataatua Declaration and the *Final Statement from the UNDP Consultation on Indigenous Peoples Knowledge and Intellectual Property Rights* call for a moratorium on any further commercialisation of Indigenous medicinal plants and human genetic materials until Indigenous communities have developed appropriate protection mechanisms.[2]

While the *Trade Related Aspects of Intellectual Property Agreement* (the TRIPs agreement) does not create new obligations or restrictions for member states on the patentability of genetic material, it does allow countries to exclude patentability on certain items in particular circumstances, including:

- Where necessary, to protect public order or morality (Article 27(2));
- Plants and animals other than micro-organisms, and essentially biological processes

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[1] Mrs Erica Irene Daes, Special Rapporteur, *Protection of the Heritage of Indigenous People: Supplementary report submitted pursuant to Sub-Commission resolution 1995/40 and Commission on Human Rights resolution 1996/63*, E/CN/Sub.2/1996/22, 24 June 1996, p 11.

[2] See Chapter 8.

for the production of plants other than non-biological and microbiological processes. (Article 27(3)).

AIPO, in its response, did not agree and considered that under Article 27(3) members must only provide protection of some form for plant varieties.[4]

11.1 The *Patents Act*

11.1.1 *Patenting Indigenous medicinal plants*

The Discussion Paper asked whether the *Patents Act* should be amended to recognise and protect Indigenous peoples contribution to the development of new medicines and pharmaceutical products. The Discussion Paper suggested that this might be achieved by asking during the process of examination of a patent whether the invention makes use of an Indigenous species and if the identification or discovery of the invention involved Indigenous peoples resources or knowledge. If the answer is yes, then the applicant should be required to show that he or she has the full informed consent of relevant Indigenous custodians to use that knowledge.

Perhaps an Indigenous community whose knowledge or resources are used to form the basis of new medicines without their free or informed consent, should be allowed to appeal or claim to the Commissioner of Patents during the examination period of an application for patent. If such a claim is made, then the Commissioner may require both parties to enter into an agreement which allows Indigenous people to continue to use traditional medicines and practices without infringing any pending patent. The agreement could also provide royalties to the Indigenous communities.

Many Indigenous respondents supported moves towards this idea.

AIPO noted the following in its submission to *Our Culture: Our Future*:

> *Traditional knowledge, including uses of plants and other natural resources, is not currently protected against unauthorised commercial exploitation except by any contractual arrangements that providers may make with those to whom they provide that knowledge or information. Intellectual property laws might be seen as one possible means for protecting traditional knowledge, for example, the herbal remedies used by traditional healers for centuries. However, traditional knowledge would not generally be regarded as patentable since it lacks the requisite new character for patentability. The Patents Act does not deal with commercial or compensation issues and would be unlikely to be an appropriate vehicle for ensuring that indigenous people receive economic benefit from their traditional knowledge.*[5]

11.1.2 *Excluding patents of Indigenous genetic materia*l

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[3] Uruguay Round of the General Agreement Against Tariffs and Trade.
[4] AIPO, Submission to *Our Culture: Our Future*, October 1997.
[5] *Ibid.*

The Discussion Paper asked whether the *Patents Act* should be amended to specifically exclude patenting genetically manipulated plants and animals and inventions relating to human life form.

AIPO s response was:

> *Human beings, and the biological processes for their generation, are already not patentable under subsection 18(2) of the Patents Act. The question of whether genetically manipulated organisms should be patentable has been the subject of some debate. In February 1992, the House of Representatives Standing Committee on Industry, Science and Technology handed down its report* Genetic Manipulation: the Threat or the Glory? *The committee considered the patentability of genetic material in detail and found that there was no justification for denying the biotechnology industry the opportunity to use the* Patents Act *to seek a reward for effort . The current position in Australia is that genetically manipulated organisms are patentable, provided they meet the usual requirements of being new, inventive etc. Also note that under Article 27.3(b) of the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs), members must provide some form of intellectual property protection for plant varieties.*[6]

In 1996, a *Patents Amendment Bill* was introduced to Parliament by the Democrats, proposing that patents of naturally occurring genes should not be regarded as possessing the quality of novelty or inventiveness, and therefore not be patentable. According to the AIPO, the Bill is not a priority with the current Government and Members of Parliament and is therefore unlikely to proceed in the near future.

The effect of biological innovation, use of human cellular or genetic material and artificial manipulation of the environment that impacts on Indigenous people needs to be addressed. Legal reforms protecting Indigenous people from exploitation through genetic research and biotechnology without their consent should be strongly considered. Consideration should be given to amending the *Patents Act* to take into account Indigenous concerns in these areas.

11.1.3 *Patenting Indigenous rights to traditional medicines*

The Discussion Paper also asked whether it was appropriate for the *Patents Act* to allow Indigenous Australians to patent their knowledge about traditional medicines, despite any prior publication or use of that medicine. Many respondents thought there should be some sort of protection offered to Indigenous knowledge holders under the *Patents Act*. For example, a submission from the City of Wanneroo stated that, Indigenous Australians should be allowed to patent their knowledge about traditional medicines prior to publication for commercial use of that medicine including genetically manipulated Indigenous plants and animals. [7]

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[6] AIPO, Submission to *Our Culture: Our Future*, October 1997.

[7] Recreation and Cultural Services, City of Wanneroo, Submission to *Our Culture: Our Future*, October 1997.

AIPO s response was:

> *This is an example of how the existing regime is not appropriate for protection of indigenous knowledge. If it were possible to be granted a patent for information already in the public domain, there is a risk that this will impact on existing rights. Further, the patent term would presumably be the standard 20 years. A requirement of getting a patent is that the best method of performing the invention must be described and this will pass into the public domain once the patent is published and be freely available when the patent expires. Once the patent expires, the information is no longer protected, it is freely available for public use, and indigenous people can no longer claim any control on its use or application.*[8]

The Discussion Paper considered that if it was appropriate for the *Patents Act* to be amended to allow registration of Indigenous medicines despite any prior publication or use of that medicine, there should be processes to allow the traditional processes to remain secret, thereby ensuring that no one is compelled to disclose details of a particular remedy.

AIPO s response was:

> *It is an option for communities to retain their traditional knowledge as confidential information. Traditional medicinal remedies could also be protected against unauthorised commercial exploitation by, for example, use of contractual arrangements. However, the possible protection of information in this manner is not an issue which arises under the Patents Act.*[9]

11.1.4 *Expiration of patents which make use of Indigenous knowledge*

The Discussion Paper also put the question as to whether a remedy should be made available for public use and consumption when the patent expires. The AIPO submission noted:

> *This is a universal patent requirement. In return for the limited exclusive right to exploit the invention, the invention is published, and once the patent expires, the patented item is freely available for anyone to use. This system encourages innovation and provides a constant transfer of knowledge into the public domain.*
>
> *If the answer to this question is no , then what has been granted is not a patent right. A patent exists where in return for the granting of the patent rights, the information in the patent document is made available to the public. During the term of the patent, the patentee controls who can work the invention. Once the patent expires, however, the rights also expire and then any member of the public is free to work the invention. Therefore, once a remedy is patented, use and*

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[8] AIPO, Submission to *Our Culture: Our Future*, October 1997.

[9] *Ibid..*

consumption by the public, without authorisation, on expiration of the patent is simply not an issue.[10]

11.1.5 *Full and informed consent of Indigenous knowledge*

The Discussion Paper asked:

> Should there be provisions introduced which require applicants of patents using Indigenous knowledge and resources to obtain the full and informed consent of the Indigenous community or group whose knowledge or resources are being used to develop the invention?

Many respondents felt there was a need for applicants of patents using Indigenous knowledge and resources to obtain full and informed consent of the Indigenous community or group whose knowledge or resources are being used to develop the invention.[11]

AIPO s response was:

> *As the patent system may not provide protection for Indigenous peoples traditional knowledge, ultimately the effective protection of that knowledge may require greater reliance on the laws of unconscionable behaviour and unjust enrichment, or other areas of law such as contract or licensing arrangements. Indigenous communities could decide to withhold their knowledge except where they have given their prior informed consent through licensing contracts providing for confidentiality, appropriate use and the sharing of economic benefits with the originators of that knowledge. Alternatively, consideration could be given to the creation of a new class of proprietary rights for traditional knowledge, or the creation of a new class of transfer agreement.*[12]

There may be some benefits in following up the creation of a new class of proprietary rights to recognise Indigenous interests. Furthermore, there is great scope for the AIPO to adopt procedures which ensure that the full and informed consent of Indigenous groups is obtained before the registration of any patents that make use of Indigenous material or knowledge. This function could be performed by a newly-established AIPO Indigenous Unit, which might also endeavour to ensure that:

- Indigenous people are informed about patent applications which include Indigenous material or make use of Indigenous knowledge;
- There are agreements between Indigenous custodians and third parties seeking registration of patent rights concerning any possible uses and benefits.

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[10] *Ibid.*

[11] City of Wanneroo, Submission to *Our Culture: Our Future*, October 1997.

[12] AIPO, Submission to *Our Culture: Our Future*, October 1997.

11.2 Amendments to the *Plant Breeders Rights Act*

The Discussion Paper noted that there is also scope for similar reforms as discussed with the *Patents Act* to be introduced to the *Plant Breeders Rights Act*. This Act is administered by the Plant Breeders Rights Office at the Department of Primary Industry and Energy. Amendments to take into account Indigenous people s contribution in the identification of plants was generally supported.

A submission by Tony Simpson and Vanessa Jackson included a *Report on Cultural and Intellectual Property Rights of Indigenous People* prepared by Tony Simpson on behalf of the Forest Peoples Program.[14] The report noted plant breeder rights are often considered to offer a suitable model which could be adapted to provide Indigenous people international recognition and protection of Indigenous Cultural and Intellectual Property Rights relating to plants. However, Simpson considers that the plant breeders rights are accruing international to large corporations from the North, rather than to local or community groups.

Chapter Eleven : Recommendations

11.1 Enactment of a specific Act which provides protection for all Indigenous Cultural and Intellectual Property is preferred over amendments to the *Patents Act* and the *Plant Breeders Rights Act.*

11.2 However, in the event that new legislation is not developed, the *Patents Act* and the *Plant Breeders Rights Act* should be amended deny any person or corporation the right to obtain a patent for any element of Indigenous heritage without adequate documentation of the free and informed consent of the Indigenous owners to an arrangement for the sharing of ownership, control, use and benefits.

11.3 Rights granted under the *Patents Act* and the *Plant Breeders Rights Act* should not interfere with the traditional and customary use of Indigenous cultural material.

11.4 The possibility of amending the *Patents Act* and the *Plant Breeders Rights Act* to take into account Indigenous concerns requires investigation. Such amendments need to include at least inquiries as to whether it is feasible to:

- allow Indigenous Australians to register their interests or to patent Indigenous knowledge notwithstanding that there is prior publication;
- allow secrecy of these processes, so that people are not forced to disclose details of the remedy; and whether the remedy should be available for public use when the patent expires.

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[14] Tony Simpson on behalf of the Forest Peoples Program, *The Cultural and Intellectual Property Rights of Indigenous Peoples*, June 1997.
[15] *Ibid,* p 47.
[16] *Ibid.*

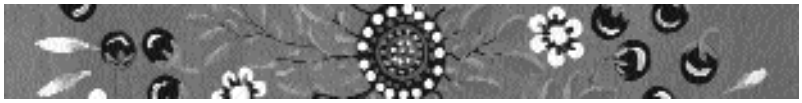
11.5 Avenues should be explored regarding the possibility of creating a new class of proprietary right for traditional knowledge or the creation of transfer agreements to ensure that:

- Indigenous people are informed of patent applications or plant breeders rights applications that include Indigenous material or relate to Indigenous species;
- prior informed consent to use such material and species has been obtained from any relevant Indigenous group or groups;
- Indigenous people have a right to negotiate the types of use permitted and to share in any economic benefits that might accrue. Where possible, rights should be effected in written agreements.

11.6 Indigenous human genetic material should not be patentable without the full and informed consent of Indigenous people to an arrangement for sharing ownership, control, use and benefits of any derived intellectual property.

CHAPTER TWELVE

Amendments to the Trade Marks Act



As noted in Part One, Indigenous people are concerned about non-Indigenous people and companies being able to register trade marks that contain or incorporate Indigenous words, sounds, designs and symbols. Some examples include use of language group names for models of cars. There is also concern about individual Indigenous people being able to register Indigenous words, designs and symbols for use as trade marks to the exclusion of other Indigenous people who have rights to them under customary laws.

The Discussion Paper asked:

- Should Indigenous and non-Indigenous people and/or companies be able to obtain monopolies over trade marks that contain or incorporate Indigenous designs, sounds, words or symbols?
- What types of checks and balances should the Registrar of Trade Marks make when considering a mark which contains or incorporates indigenous symbols or sounds?
- Should the Registrar introduce procedures to ensure that any applicant submitting such a mark should have obtained prior written consent from the relevant indigenous community?
- What should happen to existing trade marks that use Indigenous cultural material without first obtaining the consent of the appropriate community?

Before considering responses to these questions, developments in New Zealand with Maori trade marks will be examined.

12.1 Maori trade mark developments

The *Maori Consultation Paper on a Proposed Intellectual Property Law Reform Bill (1995)* examined the possibility of amending New Zealand trade marks legislation to oblige the

Registrar of Trade Marks to make certain inquiries when Maori cultural material is considered for trade mark registration.[1] The Discussion Paper suggested that similar inquiries could be made by the Australian Trade Marks Office in relation to Indigenous Australians. This could include introduction of provisions which require the Registrar of Trade Marks to undertake certain inquiries when considering an application of a mark which contains or incorporates Indigenous designs, sounds, words or symbols including whether there has been prior consent from the relevant Indigenous community.

After publication of the *Our Culture: Our Future* Discussion Paper, the Maori Trade Marks Focus Group, which analysed the New Zealand trade mark legislation, released another discussion paper, *Maori and Trade Marks*,[2] which suggested a regime to deal with applications for trade marks which use or incorporate Maori words, symbols, sounds or smells. A summary of *Maori and Trade Marks: A Discussion Paper* follows.

Maori Trade Marks Focus Group

The Maori Trade Marks Focus Group noted that the registration of Maori cultural material as trade marks allows for greater recognition of Maori culture. It can also be used to protect Maori cultural and intellectual property and address the issue of cultural inappropriateness.[3] The group recommended that registration of Maori words, symbols or smells should be allowed under certain conditions. These are:

1. The applicant must provide clear evidence of the origin of the trade mark.
2. The applicant must show in some way that the relevant Indigenous group has given permission to the applicant to use the mark.
3. The applicant must show that the appropriate source has been identified.
4. The use of any proposed mark should be culturally appropriate.[4]

The Maori Trade Marks Focus Group proposed the following process of enquiry:

> If a word, symbol, sound or smell related to specific Maori groups, then permission to use the word, symbol, sound or smell in the trade mark must be obtained.
>
> If the word, symbol, sound or smell is important to all Maori, any registration involving that material must be assessed on whether the registration would be culturally appropriate.

As part of the recommended process, the Focus Group recommended a consultative group be established to advise the Commissioner for Trade Marks.[5]

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[1] Ministry of Commerce, Te Manatu Tauhokohoko, *Intellectual Property Law Reform Bill, Maori Consultation Paper, 1995.*
[2] Maori Trade Marks Focus Group, NZ Ministry of Commerce, 1997.
[3] Maori Trade Marks Focus Group, *Maori and Trade Marks: A Discussion Paper*, NZ Ministry of Commerce, 1997, p 19.
[4] *Ibid*.
[5] *Ibid*, p 21.

It should be noted that even under the current New Zealand legislation and practice, the New Zealand Patent Office[6] undertakes a three-stage consultation when examining applications which contain Indigenous content:

1. The application is reviewed by Maori staff at the Patent Office.
2. If Maori staff believe there is a question regarding the appropriate use of Maori cultural material, they refer the application to a Maori advisory agency for an expert opinion.
3. If the advisory agency confirms the concerns raised by Maori staff, the Commissioner for Trade Marks will consider whether to exercise his or her statutory discretion.[7]

Under NZ legislation, a disclaimer can be placed on a trade mark to limit the scope of the trade mark rights.[8] Conditions can also be placed on trade mark registration at the discretion of the Commissioner.[9] The Maori Focus Group reports that the Commissioner can use of these provisions to safeguard cultural integrity. In Australia, there are no such provisions. Goods and services are registered according to class.

The Maori Trade Marks Focus Group also examined the rectification and opposition process concerning trade marks already registered or about to be registered. This is not part of the examination process, but part of the challenging process. Under the *NZ Trade Marks Act*, any person aggrieved by information which should/should not be on the Register of Trade Marks can apply to have the information rectified or corrected. These corrections include putting conditions on the register which were accidentally left off or removing information which should not have been put on the register. A trade mark can also be rectified on the grounds that the mark was registered, although the applicant did not intend to use the mark. It was also recommended that new criteria for refusal or rectification be included which relates specifically to culturally offensive and culturally inappropriate trade marks, such as Manu Beer.[10]

The Focus Group noted that there may be doubt that the definition of a person who is aggrieved extends beyond people in business who are aggrieved, suggesting that culturally aggrieved be part of the definition.

The Focus Group also considered the notion of registered proprietor and suggested that, in light of the communal ownership of Maori cultural material, the registration of trade marks should be open to trusts.

Source: *Maori and Trade Marks: A Discussion Paper*, Maori Trade Marks Focus Group, 1997, NZ Ministry of Commerce, 1997.

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6 In New Zealand, trade marks are administered by the Patents Office.
7 Under section 16 of the Trade Marks Act 1953 (NZ).
8 Section 23(b) of the Trade Marks Act 1953 (NZ).
9 Section 26(2) of the Trade Marks Act 1953 (NZ)
10 NZ Ministry of Commerce, *op cit*, p 22.

12.2 Amendments to Australian trade marks law

12.2.1 *Whether to allow registration of trade marks with Indigenous content*

Many responses to the Discussion Paper stated that Indigenous and non-Indigenous people and companies should be able to obtain trade marks which use or incorporate Indigenous material if the consent of the Indigenous group which owns the material is obtained.[11] Other conditions were also noted.

The NPWS (NSW) submission noted that the concept of individuals, communities and companies being able to register trademarks containing Indigenous cultural images is alien to Indigenous concepts where no person owned images, but rather there was responsibility for certain images. The submission notes that unwarranted registration of Indigenous images could result in Indigenous people being disenfranchised from the free expression of their cultural icons .[12] The submission went on:

> *If trade marking vests sole use (in effect, ownership of the use of the image) of a cultural image with an individual, community or company, then the action of trade marking becomes a further act of cultural genocide.*[13]

A submission by Charmaine Green noted that words and symbols must not have a meaning that is offensive and that there should be special consideration for sacred works or symbols.[14] The New Zealand Maori Focus Group also considered this.

The Australian Industrial Property Organisation (AIPO), which administers the *Trade Marks Act*, noted that:

> *The structure of the trade mark legislation balances individuals rights to trade mark monopolies with the liberty of the rest of the community to free use of language, signs and sounds. It does not discriminate to the advantage or disadvantage of any language or cultural group.*
>
> *Any person may register an Indigenous design, sound, word or symbol so long as the design, sound, word or symbol is being used in the course of trade, as a trade mark, and so long as it is not in conflict with any of the requirements of the Trade Marks Act 1995 — particularly, Division 2 of Part 4 (which sets out the grounds for rejecting an application).*[15]
>
> *As with all trade marks, Indigenous signs and words are examined to determine whether or not they are capable of being distinctive, whether they contain or consist of*

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[11] Mike Lean, Submission to Our Culture: Our Future, October 1997.
[12] Gavin Andrews, NPWS (NSW), Submission to *Our Culture: Our Future*, October 1997
[13] *Ibid.*
[14] Charmaine Green, Submission to *Our Culture: Our Future*, October 1997.
[15] See Part 2 for more information.

> *scandalous material, whether the registration would be contrary to law, whether they are likely to deceive or cause confusion, or whether they are identical or similar to earlier trade marks. These criteria are consistently applied to applications by any person and to applications for any trade marks.*[16]

It appears the consensus is that trade marks containing Indigenous words, symbols and sounds should be allowed, but only under certain conditions, which need to address the following issues:

- Prior consent by relevant Indigenous groups, or if the relevant group is not identified, a national Indigenous organisation.

- Customary use by an Indigenous group must not be interfered with. This could be effected by establishing a new registered class of ownership/use for Indigenous customary user.

- The use must be culturally appropriate; sacred material must not be used.

12.2.2 *Checks and balances*

There was wide support for the introduction of checks and balances within the trade mark application process. One suggestion was that inquiries be directed to Indigenous cultural organisations or language centres to liaise with appropriate local regions or communities through language centres, local land councils or, if in Western Australia, the Commission of Elders.[17]

AIPO noted:

> *The Registrar at present assesses an application against various reference sources, including some dictionaries of Aboriginal languages. However, published sources do not give a comprehensive coverage, and our research is therefore not exhaustive. We would wish to add to our reference material if and as additional material was available.*[18]

AIPO also noted that the *Trade Marks Act* does contain a number of checks and balances:

- The Registrar may reject an application on the grounds set out in Division 2 of Part 4.[19]

- Third parties may oppose the registration of a trade mark under any of the grounds provided in Part 5 of the Act.[20]

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[16] AIPO, Submission to *Our Culture: Our Future*, October 1997.

[17] Charmaine Green, Submission to *Our Culture: Our Future*, October 1997.

[18] AIPO, *op cit*.

[19] See Part 2 for more information.

[20] See Part 2 for more information.

- Part 8 sets out the procedures for amending or cancelling a registered trade mark.[21]
- The provisions of Part 9 of the Act provide for removal of a trade mark from the Register for non-use.[22]

While the *Trade Marks Act* does contain these checks and balances, the following is noted:

1. Scandalous or contrary to law

As noted in Part 2, there is little scope for refusing or challenging a trade mark on the ground that it is scandalous and contrary to law . Existing law does not cover the rights of Indigenous people to protect against derogatory and cultural offensive and inappropriate use of their cultural heritage material. Perhaps a new section which allows for the opposition and cancellation of marks deemed culturally inappropriate should be included, as recommended by the Maori Trade Marks Focus Group.

2. Indigenous groups unaware of process

Indigenous groups are often not aware of their rights to oppose registration of marks and do not often read the Gazette at the approval/opposition stage. There is a need to develop ways to keep Indigenous groups informed. In this respect, AIPO should consider establishing an Indigenous Unit to liaise with relevant Indigenous groups and to serve similar functions as the Maori Staffing Unit in the New Zealand Patents Office.

12.2.3 *Prior written consent*

Many responses stated there is a need to ensure that prior written consent is received from relevant Indigenous groups and communities.[23]

AIPO notes that there is no authority under the *Trade Marks Act 1995* to require consent unless the mark purports to be a representation of a person. While there is no provision expressly requiring this, according to AIPO the authority comes from the need to ensure that the registration of a trade mark is not likely to deceive or cause confusion.[24] AIPO notes that:

> *If a trade mark appears to include the image or signature of a person, the trade mark applicant is asked to provide authority from that person to the registration of the trade mark.*[25]

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[21] Provisions include amendment to correct error or omission (Section 85, *Trade Marks Act 1995 (Cth)*; amendment or cancellation because of loss of exclusive rights to use trade mark (Section 87, *Trade Marks Act 1995 (Cth)*).

[22] AIPO, Submission to *Our Culture: Our Future*, October 1997.

[23] Charmaine Green Submission to *Our Culture: Our Future*, October 1997; Vi$copy, Submission to *Our Culture: Our Future*, October 1997.

[24] Section 43, *Trade Marks Act 1995*.

[25] AIPO, Submission to *Our Culture: Our Future*, October 1997.

One rationale for requiring that consent be obtained for trade marks purporting to be a representation of a person is that without consent the mark could deceive or cause confusion. The use of Indigenous words or symbols as trade marks could also deceive or confuse the public into believing that the company using the unauthorised mark is Indigenous or in some way associated or endorsed by an Indigenous group. Hence, trade mark applicants should seek some sort of consent.

12.2.4 *Existing trade marks*

Several respondents stated that existing trade marks should be investigated and — if registered owners had not already done so — be required to obtain consent. Otherwise they should be removed from the register. As one submission noted:

> *Existing trade marks that use Indigenous cultural material, without having first obtained the consent of the appropriate community, must be made aware of the new procedure or law and must be requested to negotiate use of that trade mark with the relevant Indigenous community or else be penalised for failure to do so.*[26]

This issue requires serious consideration before the development of any definite legislation in regard to trade marks. The NPWS (NSW) recommended that existing registered trade marks containing Indigenous cultural images be reviewed to ensure that Indigenous people are not legally prohibited or limited in the free expression of their cultural identity.

AIPO s response was:

> *Under current legislation there is nothing that can happen unless those marks offend the* Trade Marks Act *in some way — if they do, then ATSIC or anyone else can move to take them off as per Parts 8 and 9 of the Trade Marks Act 1995.*
>
> *However, it should be noted that cancelling or removing a trade mark from the Registrar does not mean that the owner is prevented from using that mark.*
>
> *Action can be taken per Part 8 to cancel the mark — unless the action is brought by the trade mark owner, these actions take place in the courts. The court would need to be shown that the marks had been wrongly registered — and that objections should have been taken under Part 4. To succeed in cancelling a trade mark comprising Indigenous cultural material on the ground that it was without consent, would be difficult to do, unless trade mark proprietorship was at issue, a legal right to control the material was established, or deception or confusion was shown to result through misrepresentation.*

[26] Recreation and Cultural Services, City of Wanneroo, Submission to *Our Culture: Our Future*, October 1997.

Chapter Twelve : Recommendations

12.1 Indigenous and non-Indigenous persons and/or companies should be able to obtain registration of marks containing or incorporating Indigenous designs, sounds, words or symbols but only with the prior informed consent of the particular Indigenous community and if other conditions regarding cultural appropriateness are met.

12.2 The Registrar of Trade Marks should introduce checks and balances and enact regulations to ensure that trade mark applicants seek prior informed consent from Indigenous communities for use of the words, designs, sounds etc before registration is granted. Consideration should be given to the New Zealand model.

12.3 AIPO needs to establish an Indigenous Staffing Unit and a Trade Mark Focus Group/Trade Mark Consultative Group.

12.4 An inquiry should be conducted into existing Indigenous trade marks. The inquiry should consider:

— the number of trade marks which make use of Indigenous cultural material;

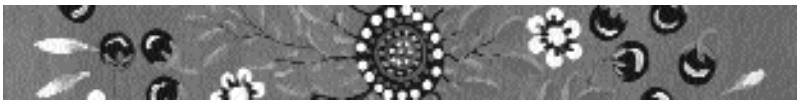
— whether use is culturally appropriate;

— whether trade marks are held by Indigenous or non-Indigenous entities;

— whether consent has been obtained.

12.5 Rights granted under the *Trade Marks Act* should not interfere with the traditional and customary use of Indigenous cultural material.

Amendments to the cultural heritage legislation



13.1 Indigenous rights to own and manage Indigenous cultural heritage

A submission by the Aboriginal and Torres Strait Islander Social Justice Commissioner[1] to the Inquiry into Aboriginal and Torres Strait Islander Culture and Heritage[2] lists the requirements of Indigenous people regarding cultural heritage legislation. The checklist includes:

1. Indigenous ownership of Indigenous cultural heritage and property to be vested in the local community of origin.

2. Management and control of cultural heritage to be exercised by the local community and its appointees.

3. Opposition to centralised authority and administration with, where possible, authority to take action for the protection of heritage being vested with local communities.

   Any centralised administrative structures to be all-Indigenous, with the representatives elected from local community bodies. The roles and functions of such administrative bodies to be limited to coordination, liaison, policy formulation, research and training in accordance with community needs.

4. Local autonomy over cultural matters.[3]

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[1] Office of the Aboriginal and Torres Strait Islander Social Justice Commissioner, *Submission to the Inquiry into Aboriginal and Torres Strait Islander Culture and Heritage*, House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs (1994), prepared by Henrietta Fourmile, Consultant, 1994, pp 24-25.
[2] Conducted by the House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs in 1994.
[3] Office of the Aboriginal and Torres Strait Islander Social Justice Commissioner, *op cit*.

In relation to this issue, the Discussion Paper asked the following questions:

- Should cultural heritage legislation be amended to acknowledge that Indigenous ownership is vested with local communities?
- Should the management and control of cultural heritage be exercised by local Indigenous communities? How could this be done to ensure Indigenous autonomy over cultural matters?
- Should there be a national body established that would monitor Indigenous cultural heritage protection nationally?

Many respondents believe current cultural heritage laws need to be amended to acknowledge that Indigenous ownership is vested with local Indigenous communities rather than a minister or departmental director-general.

According to the NSW National Parks and Wildlife Service (NPWS), existing cultural heritage legislation should be extensively overhauled to provide adequate recognition of Indigenous values and processes and empowerment of Indigenous peoples to conserve, protect, and manage their heritage.[4] Submissions from the NPWS and the NSW Land Council cited a Proposal for Protection of Indigenous Cultural Heritage , put together by the NSW Aboriginal Cultural Heritage Working Group. The proposal seeks to establish a decision-making structure which allows for Indigenous input at the local, regional and state level.

The Aboriginal Cultural Heritage Working Group is made up of the Director-General of the NPWS (NSW), the Department of Aboriginal Affairs, the chairpersons of the NSW Aboriginal Land Council and the Aboriginal Cultural Heritage (Interim) Advisory Committee. The working group has developed a definite proposal for the future management of Aboriginal heritage in NSW. Although not considered by a government at this time, the model sets out the framework for an independent NSW Aboriginal Heritage Commission which will provide the mechanism for Aboriginal ownership, protection and management of Aboriginal cultural property in all its forms.

Indigenous cultural heritage protection: a proposed NSW model

The NSW Aboriginal Cultural Heritage Working Group proposal states that the following key elements should underpin any legislative system for the management and protection of Aboriginal cultural heritage in NSW.

1. Recognition that the descendants of the original Aboriginal inhabitants of the Sate are the rightful owners of Aboriginal cultural heritage in NSW.
2. Respect of Aboriginal cultural protocols and principles including contemporary beliefs, values and practices.
3. Recognition that Aboriginal cultural heritage is part of a broader Aboriginal rela-

[4] National Parks and Wildlife Service (NSW), Submission to *Our Culture: Our Future*, October 1997 .

tionship with the land, including:

(a) land rights

(b) native title rights and interests

(c) land use and sustenance: hunting, gathering and fishing practices

(d) religious, spiritual, cultural beliefs and practices

(e) intangible cultural property: dance, drama, art, music.

4. Provision for the protection and management of culturally significant areas on private and public lands.

5. The establishment of a legislative system which effects a practical balance between:

   (a) The recognised need to preserve and enhance Aboriginal cultural traditions through effective Aboriginal control mechanisms.

   (b) The need to deliver social justice to Aboriginal people in NSW to redress the significant cultural, economic and social dispossession they have suffered.

   (c) The need for governments to ensure the economic, social, and cultural advancement of other non-Aboriginal interests in NSW.

6. Recognise the needs for clearly defined accountability to the Minister and an effective appeal process.

7. The establishment of management processes which:

   (a) Recognise that Aboriginal culture and heritage can only be effectively protected through Aboriginal groups.

   (b) Recognise cultural rights and responsibilities of local Aboriginal communities, Aboriginal owners and custodians.

   (c) Allow for the advocacy of Aboriginal interests.

   (d) Are clear, transparent and accountable.

8. The identification and mapping of cultural country areas in NSW as a basis for operating the proposed Aboriginal Heritage Commission. Such mapping should:

   (a) Be consistent with native title interest.

   (b) Recognise the diversity of Aboriginal cultural heritage interests across the State.

   (c) Be based on at least the following criteria:

   — general Aboriginal language areas

   — common law, cultural law and custom

   — known resource and technology usage patterns

   — historical records of occupation patterns

   — ecological landscape units and elements.

   — practical acknowledgment of existing statutory and administrative systems boundaries.

9. Every opportunity should be given to Aboriginal communities and other land users to discuss, negotiate and resolve land use proposals which include, among other things, Indigenous cultural and heritage community levels.

10. The establishment of centralised and coordinated monitoring of inter-agency policies and programs which affect Aboriginal cultural heritage. A coordinated and consultative approach between all levels of government on the development of policies and programs affecting Aboriginal cultural heritage.

11. Support and encouragement for greater understanding of Aboriginal cultural heritage and management and protection policies through a range of education programs and research work.

12. The establishment of an effective system of prosecution and penalties.

13. Recognition of international standards and agreements developed by the United Nations.

14. Recognition of national standards and policies agreed to by the governments of Australia.

This model recognises the need to operate on a number of levels: state-wide, regional and local. State-wide operations would be managed by a board of commissioners; regional operations would be overseen by country area boards including representatives nominated by Aboriginal owners of the area.

Source: NSW Aboriginal Cultural Heritage Working Group, *Draft Green Paper on the Future Protection and Management of Aboriginal Cultural Heritage in NSW*, October 1996.

Both the NPWS and the NSW Aboriginal Land Council suggested this model could also be extended to operate at a national level by establishing a national body governed by a board of commissioners comprised of the chairpersons of the respective State and Territory authorities. Each State/Territory government would be responsible for developing its own legislative and administrative system. The Commonwealth could encourage the States to adopt the principles and key elements of the legislation.

A national body could coordinate the efforts of Indigenous cultural bodies such as NIAAA, AIATSIS, APRA, AVCS, CAL, CLRC, FAIRA, IRG, NIMAA, and other Indigenous authorities. The national body could act as an important link between Indigenous owners at the community level throughout Australia and governments and international bodies. Any administrative structure supporting a national cultural heritage body must be headed by an Indigenous person.[5]

Others such as the City of Wanneroo also supported the establishment of a national body to implement heritage legislation.[6]

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[5] NSWALC, Submission to Our Culture: Our Future, October 1997; NPWS (NSW), Submission to *Our Culture: Our Future*, October 1997.

[6] Recreation and Cultural Services, City of Wanneroo, Submission to *Our Culture: Our Future,* October 1997.

The National Film and Sound Archive (NFSA) also favours a national body to monitor Indigenous cultural heritage protection nationally. The NFSA notes that a major challenge in managing Indigenous cultural heritage within its collection is the difficulty in identifying the appropriate Indigenous communities to provide advice or authoritative control:

> *It is difficult to find a common point of reference that can provide expertise across the spectrum of cultural material that contains relevant expertise in this complex field and has capacity to liaise with Aboriginal groups.*[7]

NFSA currently relies on AIATSIS for clearing uses, and favours one piece of legislation rather than a range of legislative instruments.

However, a submission from the Tasmanian Aboriginal Land Council noted that it may not always be appropriate for Indigenous ownership to vest with a local group. For example, in Tasmania, there are two levels of interest: local and state-wide. The Tasmanian Aboriginal Land Council submission states:

> *The local group may not always reflect the wishes of the state-wide Indigenous community. Monitoring is passive. The establishment of a national body would not cause significant changes to Indigenous cultural heritage protection.*[8]

13. 2 Holistic definition of Indigenous cultural heritage

The Discussion Paper noted that it might be possible for heritage legislation to address a greater amount of cultural heritage material encompassed in the definition of Indigenous Cultural and Intellectual Property .

Fourmile argues that a more comprehensive definition of what constitutes Indigenous cultural heritage should be included in all cultural heritage legislation. Such a definition should include land, sites, objects, languages, ancestral remains, folklore, customs and traditions, cultural knowledge and history relating to both pre- and post-European contact periods.[9] This view was supported by many respondents to the *Our Culture: Our Future* Discussion Paper.

Golvan suggests that the definition of cultural heritage in various State and Territory legislation could be extended to include artistic works to give the Aboriginal entities the right to act and protect communal interests in cultural heritage generally, as well as artistic works and designs of traditional significance. He also advocates giving local Indigenous communities the right to protect artistic works and designs of traditional significance, in a similar fashion to the protection of copyright interests under the *Copyright Act*. Under this scheme, a recognised Indigenous community could apply for an injunction to restrain the unauthorised reproduction of one of its designs, and seek damages arising from such unauthorised reproduction. These changes could overcome the time-limitation problem and the author provisions of the copyright laws. In this way, significant rock paintings may be protected from inappropriate and

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[7] National Film and Sound Archive, Submission to *Our Culture: Our Future*, October 1997.
[8] Karen Brown, Administrator, Tasmanian Aboriginal Land Council Aboriginal Corporation, Submission to *Our Culture: Our Future*, October 1997.
[9] *Ibid.*

offensive reproduction at the request of Indigenous communities.

The *Report of the Evatt Review* recommends minimum standards be adopted for State and Territory laws. One recommended minimum standard is that the definition of Indigenous cultural heritage should extend to areas of significance; significant objects of religious and cultural property; cultural material (for example, human skeletal remains, tissue material and burial artefacts); and historical and archaeological areas (including built environment).[11] This definition is arguably wider than the existing Commonwealth legislation. For example, film, photographs and so on might be included as significant objects of cultural property. However, it may be narrower than some State or Territory counterparts. The Victorian legislation, for example, includes Aboriginal folklore .

Recent draft proposals for new cultural heritage standards in several States have extended the definition of cultural heritage. For example, in New South Wales, draft proposals formulated by the Department of Aboriginal Affairs (NSW) have extended the type of material covered to include songs and stories associated with a site.[12] In Tasmania, the Tasmanian Office of Aboriginal Affairs and the Tasmanian Land Council have developed a discussion paper which proposes the introduction of holistic cultural heritage legislation. The paper, which proposed the introduction of the *Palawa Heritage Act*, has not yet been released.

In relation to this issue, the Discussion Paper asked the following questions:

- Should the legislation adopt a more comprehensive definition of what constitutes Indigenous cultural heritage; for instance, to allow for the intangible aspects of a site, area or place and the traditional knowledge connected with an object or place?
- What types of cultural heritage should be protected?

The Tasmanian Aboriginal Land Council stated that traditional sites and areas of importance to present-day community cultural landscapes should be protected, but cultural heritage produced for commercialisation might need to be redefined.[13]

One submission noted that amendments to the *Aboriginal and Torres Strait Islander Heritage Act 1984 (Commonwealth)* could include communal protection of artistic works and designs of special cultural significance in the same way that areas and objects are now protected. The Act should be administered by an Indigenous organisation.[14]

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[10] Golvan, *op cit,* EIPR, pp 230-231.

[11] ATSIC, Summary of a Proposal for a Minimum Accreditation Standards Framework - Discussion Paper, March 1997, p 10.

[12] Interview with Tony McAvoy, Department of Aboriginal Affairs (NSW).

[13] Karen Brown, Administrator, Tasmanian Aboriginal Land Council Aboriginal Corporation, Submission to *Our Culture: Our Future*, October 1997.

[14] Joan MacFarlane, Quotes Permissions Consultancy, Submission to *Our Culture: Our Future*, October 1997.

Chapter Thirteen : Recommendations

13.1 Cultural heritage legislation should acknowledge Indigenous ownership of Indigenous cultural heritage and property to be vested in the local community of origin. However, where there is no local community claiming ownership, ownership/responsibility should vest with the Indigenous-appointed bodies or organisations.

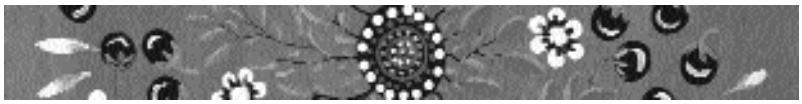
13.2 Cultural heritage legislation should empower Indigenous people with the management and control of Indigenous cultural heritage to be exercised by the local community and its appointees so that local autonomy over cultural matters is promoted.

13.3 Cultural heritage legislation should cover a wider range of cultural heritage materials including the intangible aspects of objects and sites.

13.4 Cultural heritage legislation should enable Indigenous groups to be the decision-makers concerning cultural significance of sites.

13.5 Further investigation is needed into whether a National Indigenous Cultural Heritage Authority should be established. Any structure should allow States and Territories the necessary autonomy to control and manage Indigenous cultural heritage within their own areas.

Amendments to museums, archives and cultural institutions law



14.1 Amendments to museums legislation

Given that museums hold significant collections of Indigenous cultural objects, the Discussion Paper noted suggestions that all museum legislation should be amended to require that:

- Museums establish Indigenous cultural heritage management committees;
- Museum boards include at least one Indigenous member, appointed from the Indigenous management committee;
- That Indigenous departments and other staff dealing with care and management of Indigenous collections work under the direction of the Indigenous cultural heritage management committees.[1]

It was also suggested that similar amendments should be made to legislation establishing other cultural institutions such as universities, galleries and libraries which collect, house and exhibit Indigenous cultural material.

The Discussion Paper asked the following questions in relation to amending museum and cultural heritage legislation:

> Do you think legislation pertaining to museums and other cultural institutions should be amended to acknowledge Indigenous rights and concerns, for example:
>
> - To acknowledge Indigenous ownership of cultural material held by the museum or cultural institution?

[1] Office of the Aboriginal and Torres Strait Islander Social Justice Commissioner, *Submission to the Inquiry into Aboriginal and Torres Strait Islander Culture and Heritage*, prepared by Henrietta Fourmile, (unpublished).

- To require museums to establish Indigenous cultural heritage management committees?
- To ensure that at least one Indigenous representative should sit on the museum board?

The proposals were generally supported by bodies such as the Tasmanian Aboriginal Land Council.

Several museums and cultural institutions also responded to the above questions, noting that they follow guidelines and principles as expounded in the *Previous Possessions: New Obligations* Policy.[2] A range of comments are discussed below.

14.1.1 *Ownership of cultural materials*

A submission from the National Film and Sound Archive noted that while there was no legislation establishing the NFSA, it is concerned about the concept of introducing legislation which would automatically acknowledge Indigenous ownership of cultural material held by museums or cultural institutions, for the following reasons:

> *Much of the film held by the NFSA is owned by private collectors and would not be provided to the Archive for its collection if there was a risk that doing so would transfer its ownership to Indigenous groups.*
> *Indeed whether it is appropriate that the material itself should be owned by Aboriginal groups because of its content is something that is open to question. The significant issue is the use of that material, and the control of the content. While there will be cases where ownership of audiovisual materials can and should be transferred this will not always be the case.*[3]

The concept of ownership and control of cultural materials by Indigenous people relates to Indigenous people s role as custodians for such material and their duty of responsibility towards the ongoing integrity and maintenance of that material. This includes issues relating to display, interpretation, commodification and protection against mutilation of derogation. Such notions of ownership is not necessarily incompatible with those of museums and private collectors.

14.1.2 *Representation on boards*

Several responses from museums noted that museums have already introduced a range of practices including having representation of Indigenous people on boards and cultural advisory committees. For example, the Queensland Museum has employed Indigenous staff; established a Consultative Committee to the Board and appointed an Indigenous member to the Board.[4]

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[2] Council for Australian Museums, *Previous Possessions: New Obligations*, 1993.

[3] NFSA, Submission to *Our Culture: Our Future*, October 1997.

The Central Land Council, however, considered that institutions holding collections of Indigenous cultural material should be required by legislation to have Indigenous representation on their boards. For example, there is no legislative guarantee in the *Museums and Art Galleries Act* that Indigenous people are represented on the board of the Northern Territory Museum despite the large amount of Indigenous material held there. The board s seven members are appointed by the relevant minister and subsequent amendments have further empowered the minister to elect the chairperson.[5] The CLC raised similar issues in relation to the *Strehlow Research Centre Act*, which gives the minister the power to appoint board members, other than Strehlow s widow, but only one member is appointed to represent the interests of Aboriginals .[6]

14.1.3 *Repatriation issues*

The Indigenous Reference Group noted in the draft Principles and Guidelines that human remains and associated funeral objects must be returned to their descendants and territories in a culturally appropriate manner.[7]

Several museums, including the Queensland Museum, reported that they already repatriate ancestral remains and secret or sacred artefacts to Indigenous communities. But it is noted that there is no legal requirement for museums to repatriate cultural material. In the United States, the *Native American Graves Protection and Repatriation Act 1990* established the legal framework for repatriating human remains and ritual objects to North American Indigenous peoples who request them, provided that claimants can prove direct descent or, in the case of objects, prior ownership.

Michael F. Brown notes, The implementation of this legislation, which imposed substantial administrative burdens and was in some quarters regarded as disastrous for the future of American museums, has now become a routine part of museum practice. In fact, many curators hail it as the first step in a historic reconciliation between native peoples and museums, a process that may lead to new and rewarding partnerships. [9]

14.1.4 *Should there be amendments to museum legislation?*

Whether there should be amendments to museum legislation will also depend on whether or not there will be separate legislation providing Indigenous people with rights to their Indigenous Cultural and Intellectual Property. While it would be ideal to have a separate piece of legislation, or to perhaps have an Act similar to the United States *Native American Graves Protection and Repatriation Act 1990,* there may be scope for museum legislation, and other cultural institutions legislation, to include provisions relating to Indigenous Cultural and Intellectual Property. Some suggested provisions are:

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[4] Dr Daniel J Robinson, Assistant Director, Cultural Heritage Section, Queensland Museum, Submission to *Our Culture: Our Future*, October 1997.
[5] Central Land Council, Submission to *Our Culture: Our Future*, January 1998.
[6] Section 9, *Strehlow Research Centre Act*.
[7] IRG Draft Principles and Guidelines, No 16.
[8] Dr Daniel J. Robinson, Queensland Museum, *op cit*.
[9] Michael F. Brown, Can Culture Be Copyrighted? , (1998) vol 39(2) Current Anthropology pp 193-222, at p 194.

- Indigenous representation on museum boards;
- Repatriation to Indigenous communities under certain circumstances to be determined in consultation and negotiation with Indigenous groups; and
- Compulsory development of policies which address the access, display, handling and use of Indigenous Cultural and Intellectual Property held at museums and cultural institutions.

14.2 Amendments to archives legislation

The Discussion Paper considered that it might be possible to amend various archives and record-keeping legislation to allow communities to assume ownership of archival material about them held by government departments and cultural institutions.[10] It was observed that *Bringing Them Home: the Report of the National Inquiry into the Separation of Aboriginal and Islander Children from their Families*, recommended regional and local information centres be established to give Indigenous people greater access to state-held information to facilitate the family reunion process.[11] The Discussion Paper questioned whether such regional and local archives act as custodians for these records on behalf of the people or groups to which the records relate.

Issues:

The Discussion Paper put the following questions:

- Should archives and other record-keeping legislation be amended to acknowledge that Indigenous people and their communities own much of the archival material held by government departments and collecting bodies?
- What provisions should be included to address access to sensitive or secret and sacred material?

14.2.1 *Ownership/custodianship of archives*

The transfer of ownership of custodianship of archives relating to Indigenous people and communities proved to be a sensitive issue. As the Powerhouse Museum noted, ownership of material in archives, where those who are the subject of the material wish to control it, has a number of implications for collecting authorities, including the management of access and the transfer of this condition to other people who are also the subject of archival records. The submission suggested that authorities such as Australian Archives and the Australian Council of Archives should address this issue.[12]

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[10] Terri Janke, Michael Frankel and Company, *Our Culture: Our Future: Proposals for the Recognition and Protection of Indigenous Cultural and Intellectual Property*, Commissioned by AIATSIS and ATSIC as part of the ICIP Project, p 66.

[11] Recommendation 27, HREOC, *Bringing Them Home: National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from their Families*, April 1997, Sydney.

While several submissions stated that archives should legislatively acknowledge that Indigenous people and their communities own or are custodians of archival material held by government and collecting bodies,[13] the responses from archives and collecting bodies did not support this.

The Australian Archives submission does not support amendments to archives legislation that would see ownership transfer to Indigenous people for the following reasons:

> *The Archives position on the ownership of the Commonwealth records is that records generated by the Commonwealth in discharging its functions are, and should remain, Commonwealth records. While there is absolutely no doubt that the records are crucial to Indigenous people for research, they are also of use for a variety of other reasons that may or may not be associated with Indigenous people. Records held by a central agency are available to all potential users under the same rules. This would probably not be the case if records are dispersed and held by a number of centres.*
>
> *There are many practical considerations involved in any discussion of returning archives. The removal of files, or parts of files about Indigenous people, would compromise the integrity of the records of which they form part. The files so removed would no longer be in context, rendering them less meaningful and less useful as evidence. The following cases show some practical problems:*
>
> - *A general correspondence file may include a page which refers to an Indigenous person;*
> - *A file, or a page on a file, may refer to a number of Indigenous people who belong to different communities;*
> - *A file, or a page on a file, may contain references to non-Indigenous people as well as Indigenous people.*[14]

The Australian Archives does support the transfer of copies of records to cultural centres, but notes that if large-scale copying of records held by the Archives is required, suitable funding for providing copies would need to be found.

The Australian Archives notes that legislative uniformity would be difficult to achieve in the short-term because of the number of governments involved. The desired outcome may well be achieved more quickly and effectively through non-legislative strategies. For example, Commonwealth and State archival bodies could adopt common principles and guidelines

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[12] Powerhouse Museum, Submission to *Our Culture: Our Future*, October 1997.

[13] Recreation and Cultural Services, City of Wanneroo, Submission to *Our Culture: Our Future*, October 1997; NPWS, Submission to *Our Culture: Our Future*, October 1997; Charmaine Green, Submission to *Our Culture: Our Future,* October 1997; Tasmanian Aboriginal Land Council, Submission to *Our Culture: Our Future*, October 1997.

[14] Australian Archives, Submission to *Our Culture: Our Future*, October 1997, p 10.

such as those proposed in relation to access to records under Recommendation 25 of *Bringing Them Home*. A key element of this recommendation is an individual s right to access to all material relating to himself or herself, and the involvement of local Indigenous family tracing and reunion services in the access process.

Another submission, from the Archives Authority of NSW, did not support the transfer of ownership of archives material concerning Indigenous people. This submission noted that there are :

> *... immense difficulties with applying the museum experience to the management of archives because of the major differences between these institutions and museums. Archives management is based on the principle of preserving records of enduring value which are an essential resource to their creators; provide evidence of past actions and serve as a corporate memory for future generations of record creators.*
>
> *Archival collections in particular government archives do not select records on the basis of their subject coverage. Moreover, government archives generally operate within a legislative framework and in an environment where the focus is on the evidential nature of the records and government accountability.*[15]

Regarding the ownership of records, the Archives Authority of NSW submitted:

> *All our records about Aboriginal people were created by public servants in the course of their official duties and they are the property of the Crown. The Discussion Paper addresses the issue of ownership of cultural property and the suggestion that archives legislation should be amended to acknowledge ownership by Indigenous people. We have grave concerns about this suggestion and we do not support any proposal for amending archival legislation to acknowledge community ownership of government archival material.*
>
> *However the Authority has no objection to the concept of local or national cultural centres or Indigenous archives where copies of archival records relating to Indigenous people may be stored and made accessible, however, the Authority would be opposed to placing all original* government archival material in such places for the reasons outlined above.
>
> *Furthermore the Authority recognises the importance of initiatives such as employing Indigenous staff. In the past they have sought to recruit Aboriginal staff but have been unsuccessful. The Authority is mindful of the need to publicise the availability of records relating to Indigenous people. To this end, the Authority plans to publish its proposed guide to NSW archives relating to Aboriginal people in the near future.*

14.2.2 *Dealing with sensitive or sacred material*

Another amendment suggested in the Discussion Paper was to include provisions which list those who can access sensitive Indigenous data.[16] This amendment was generally support-

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[15] The Archives Authority of NSW, Submission to *Our Culture: Our Future*, October 1997.

ed, in that access to sensitive, secret or sacred material should be under conditions set by the Indigenous owners of such material.

Chapter Fourteen : Recommendations

14.1 A separate Act relating to Indigenous Cultural and Intellectual Property Rights is preferred, but in the absence of specific legislation, museum legislation could be amended to include the following measures:

- Museums should establish Indigenous cultural heritage management committees to address issues relating to the identification, return, preservation, use and ownership of Indigenous cultural heritage material held by museums.
- Museum boards should include provision for Indigenous representation.
- Museums should be legally required to repatriate human remains and cultural objects where Indigenous claimants request it.
- Indigenous departments and other staff dealing with care and management of Indigenous collections should work under the direction of the Indigenous cultural heritage management committees.
- The compulsory development of policies which address the access, display, handling and use of Indigenous cultural material.
- Special attention should be given to the access and management of sacred or secret material.

14.2 Archives legislation could also be amended to:

- establish Indigenous cultural management committees to address issues relating to the access, identification, preservation, use, control and copying of Indigenous cultural records held by Archives.
- include provision for Indigenous representation on Boards.
- include the compulsory development of provisions which address the access, identification, preservation, use, control and copying of Indigenous

[16] ALRC, *Review of the Archives Ac*t, p 91.

cultural records held by Archives.

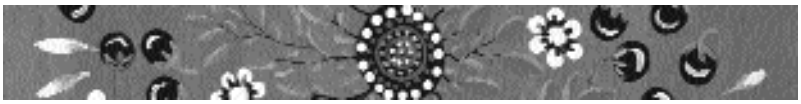
- Special attention should be given to the access of personally sensitive material.

14.3 Where appropriate, Archives should make copies of records relating to Indigenous cultural issues available to Indigenous people in the spirit of the recommendations of the *Bringing Them Home Report.*

14.4 Museums, Archives and other cultural institutions should provide Indigenous people with access to information on material held in institutions. The development of reports, guide books and databases should be designed, controlled and managed by Indigenous people. Information should be made available via Information Centres.

14.5 Museums,Archives and other cultural institutions should liaise with Indigenous communities to consider the development of new technology-based forms of compiling and disseminating information held by museums and archives. Issues relating to Indigenous control over the collection, administration and distribution of such databases and content developed for disc-based or on-line services must be addressed.

Amendments to the Native Title Act



15.1 Amendments to the *Native Title Act*

The Discussion Paper noted that Wright suggests consideration should be given to amending the *Native Title Act 1993* to ensure that a wider range of Indigenous cultural and intellectual property — other than land and sea — is included and protected under a right of native title.[1]

Wright notes that the definition of native title in section 223 of the *Native Title Act* is in line with the definition in *Mabo v Queensland*. Native title or Native title rights and interests are defined as:

> *The communal, group or individual rights and interests of Aboriginal peoples or Torres Strait Islanders in relation to land or waters, where:*
>
> *(a) the rights and interests are possessed under the traditional laws acknowledged, and the traditional customs observed, by the Aboriginal and Torres Strait Islanders; and*
>
> *(b) the Aboriginal peoples or Torres Strait Islanders, by those laws and customs, have a connection with the land and waters; and*
>
> *(c) the rights and interests are recognised by the common law of Australia.*[2]

Given that the definition refers to traditional customs and laws , Wright states it could be argued that this might protect a greater amount of subject matter such as songs, dances and stories associated with places. But the provisions of the Act are unclear, and require clarification.[3]

The Discussion Paper asked whether the *Native Title Act* should be amended to include and protect all other types of Indigenous Cultural and Intellectual Property under the right of native

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[1] Shelley Wright, *Submission to Stopping the Ripoffs*, (unpublished), January 1995.
[2] Section 223, *Native Title Act 1993*.
[3] Shelley Wright, *op cit*, p 10.

title. For example, cultural objects, songs, dances and stories pertaining to Indigenous land and waters.

Many respondents supported this proposition. For example, Stephen Gray stated that the most promising avenue for recognising Indigenous rights is the established principles and procedures under the *Native Title Act*:[4]

> *The nature and incidents of land ownership are to be determined by reference to Indigenous laws and customs. It is legally possible even under the current law that an Indigenous community might claim that its native title rights have been infringed by an act of appropriation of its art and culture, and that it might use the processes of the Native Title Tribunal to assert these rights.*[5]

But Gray pointed to a number of practical difficulties in this course of action, including:

1. The native title process has proved to be complex and time-consuming. To establish that communal rights to art have been infringed may take years in the Native Title Tribunal; whereas if copyright infringement can be established, it would be better to seek a remedy in the Federal Court.
2. It is legally uncertain whether native title rights in art or culture exist at all and if they do, whether they are inextricably linked to native title rights to land. It would be a disproportionate use of time and effort for an Indigenous group to have to prove that it had native title rights in land before it could show that it also had rights in art, and that those rights had been infringed. It also further disenfranchises Indigenous people who cannot show they have existing native title rights in land.

Gray believes the *Native Title Act* can be amended to overcome these shortfalls. In relation to No 1, the rights to arts and cultural material need not be as time-consuming as land, and could involve a mediation process for disputes involving use of Indigenous art. This could be done by setting up an arts unit at the Native Title Tribunal or perhaps through an independent arts advisory body set up to process requests for use of Indigenous works. The unit or advisory body could approach relevant indigenous groups to ascertain whether they consent to a proposed use. Time limits could be placed on this procedure. If disputes arose, they could be referred to the mediation processes of the Native Title Tribunal to determine, according to relevant indigenous law.

In relation to No 2, the questions of legal uncertainly could also be clarified by legislation. As Gray points out:

> *There is no reason why Indigenous rights in art should depend upon establishing native title rights to land. Prior to the acquisition of sovereignty by the British Crown, Indigenous rights in art may well have been inextricably interwoven with land rights in most cases. However, the extinction of native title rights in land does not necessarily entail the extinction of those rights in relation to art.*[6]

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[4] Stephen Gray, Submission to *Our Culture: Our Future,* October 1997.
[5] *Ibid.*
[6] *Ibid.*

Gray suggests the clear and plain intention test for extinguishment used in the Mabo Case would have to be applied. In many cases where a clear and plain intention did exist on the part of the colonisers to extinguish rights in land, that intention would not have extinguished traditional rights in art. Gray argues that intellectual property legislation is of general application and does not show a clear and plain intention to extinguish Indigenous rights in art. Gray believes the *Native Title Act* could allow an Indigenous group to show it had a traditional right to art or culture, even if the land rights of that group had been extinguished. In this way, Gray suggests that many urban Indigenous groups could still maintain native title rights in art.[7]

Bill Morrow submitted that while there is a strong connection between arts, cultural expression and knowledge systems and land, there is a separate native title to such things, the existence of which is not dependent upon native title in land, and which is capable of surviving even though native title in the land with which the designs and rituals were associated may have been extinguished .[8] Morrow suggests that native title rights could extend to personal property such as painting and other cultural objects.[9]

15.1.1 *Native Title Amendment Bill 1997*

The *Native Title Amendment Bill 1997* proposes extensive changes to the *Native Title Act 1993*, involving changes to the right to negotiate provisions and reforms relating to representative Aboriginal/Torres Strait Islander bodies, as well as incorporating other points in the Government s Ten-point Plan .[10]

Some concerns raised by Indigenous people regarding the proposed amendments include:

- Extinguishment without negotiation with native title holder.
- The assault on the right to negotiate.
- The effect of applying a primary production definition to pastoral activities.
- Statutory access to pastoral leases for traditional purposes not being available to all native title holders who meet the higher registration test.[11]

Point 10 of the Ten-point Plan introduces the idea of agreements to facilitate the negotiation of voluntary but binding agreements as an alternative to formal native title machinery. Such agreements could provide some sort of avenue for Indigenous cultural and intellectual property rights to be discussed. But there is little incentive for governments and others to negotiate if there is to be such a reduction of the right to negotiate as proposed under other points in the Ten-point Plan.[12]

In light of the Government s proposals to water down native title rights under the Amendment Bill, Indigenous commentators were doubtful that amendments to the Act

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[7] *Ibid.*

[8] Bill Morrow, Submission to *Our Culture: Our Future*, October 1997.

[9] Bill Morrow, Mabo and the Ownership of Dreams , *Art Monthly Australia,* November 1993, pp 7-9.

[10] Outline of the Proposed Amendments to the Native Title Amendment Bill 1996, Commonwealth of Australia, 8 October 1996.

[11] ATSIC, *The Ten Point Plan on Wik and Native Title: Issues for Indigenous Peoples*, June 1997, p 18.

[12] *Ibid.*

might include extending the scope legislatively to cover Indigenous Cultural and Intellectual Property.[13]

There was, however, support for action to be taken via the common law to assert Indigenous ownership over songs, stories and cultural objects in a way discussed by Gray and Morrow.

15.2 Common law Native Title claims

A number of legal and academic commentators have noted that the High Court of Australia s recognition of native title in *Mabo v Queensland*[14] may provide an alternative focus for discussing legal protection of Indigenous Cultural and Intellectual Property.[15]

In the Mabo Case, the right of Torres Strait Islander people to certain land under certain circumstances was judicially recognised for the first time. The majority of the High Court judges agreed there was a concept of native title at common law and that the source of native title was the traditional connection to or occupation of the land. The nature and content of native title was determined by the character of the traditional connection or occupation. Native title could be extinguished by the valid exercise of government powers if that exercise of power was clear and plain in its intention to do so.[16]

There is a suggestion in the various judgments that the scope of native title could expand to include aspects other than land. For example, Justice Brennan notes in the Mabo Case:

> *Native title has its origin in and is given its content by the traditional laws acknowledged by and the traditional customs observed by the Indigenous inhabitants of a territory. The nature and incidence of native title must be ascertained as a matter of fact by reference to those laws and customs ... the rights and interests which constitute a native title can be possession only by the Indigenous inhabitants and their descendants. Native title, though recognised by the common law, is not an institution of the common law and is not alienable by the common law. Its alienability is dependent on the laws from which it is derived ...*[17]

Puri notes that Justice Brennan is prepared to recognise novel interests in land which, not depending on Crown grant, were different from common law tenures, then this reasoning could be applied to the rights or interests not related to land, and perhaps to sacred objects, ceremonies or customs, which could be recognised at law even though they do not stem from the common law, as long as they were not inconsistent with fundamental principles of common law. [18]

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[13] Northern Land Council, Submission to *Our Culture: Our Future*, October 1997.
[14] *Mabo v Queensland* (1992) 175 CLR 1.
[15] Stephen Gray, Wheeling, Dealing and Deconstruction: Aboriginal Art and the Land Post-Mabo", (1993) vol 3(63) *Aboriginal Law Bulletin* p 10.
[16] Shelley Wright, *Submission to Stopping the Ripoffs*, (unpublished), p 3.
[17] Per Brennan J.
[18] Professor Kamal Puri, Copyright Protection for Australian Aborigines in the Light of Mabo in M.A. Stephenson and S. Ratnapala (eds), *Mabo: A Judicial Revolution*, UQP, St Lucia, p 157.

Wright argues that although an action for infringement which attempted to raise the existence of any type of common-law copyright would fail, there may be an argument that native title, although recognised under the common law, is not itself common law nor derived from it. Rather, it is a *sui generis* form of law which had existed, and continues to exist and develop, long before the introduction of English common law to Australia. The courts do not make Indigenous customary law, as in native title; they simply recognise it.[19]

According to Wright, the absence of statutory instruments extinguishing Indigenous intellectual property rights — and numerous Federal Court judgments recognising the presence of communal interests in Indigenous designs — supports the continued operation of common-law intellectual property rights.[20]

As Wright notes, such rights as Indigenous cultural rights would transcend the normal boundaries between and within intellectual property regimes and protection of cultural heritage .[21] She believes such cultural rights would only arise in relation to traditional forms of Indigenous culture related to the occupation and guardianship of land.

As discussed above, arts, cultural expression and knowledge systems are so closely connected to the land, they cannot be separated from it.[22] Under Indigenous customary laws, cultural heritage is an integrated whole way of life and thinking which connects Indigenous people with all aspects of their inherited cultural heritage, including arts and cultural expression, cultural objects, land and knowledge. So it follows that native title is incidental to the protection of other aspects Indigenous cultural and intellectual property such as knowledge, cultural objects and stories, songs and designs associated with land and the environment. This area of law requires further testing and analysis, particularly in view of the current Government s proposed legislative amendments to the *Native Title Act 1993.*

Chapter Fifteen : Recommendation

15.1 Support should be given for native title actions which test and expand the meaning of native title rights and interests to other areas of Indigenous cultural heritage including stories, biodiversity knowledge and cultural objects.

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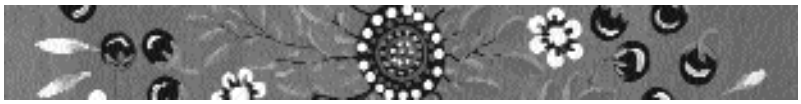
[19] Shelley Wright, *Submission to Stopping the Ripoffs*, 1994 (unpublished), p 7.
[20] *Ibid.*
[21] *Ibid.*
[22] See Stephen Gray (1993) *op cit*, p 4.

Amendments to broadcasting laws



16.1 Amendments to broadcasting laws

The Federal Minister for Communications and the Arts directed the Australian Broadcasting Authority (ABA) in 1995 to investigate the content of on-line information and entertainment broadcasting services, including broadcasting on the Internet. The aim was to ensure that codes of practice for those services were, as far as possible, in accordance with community standards. One of the issues was to consider new measures which might encourage or require on-line services to meet community needs; for example, through the development and adherence to self-regulatory codes of practice, education programs and complaints-handling procedures.[1]

The ABA report, *Investigation into the Content of On-Line Services*, noted that with growing use of on-line services for communication, there were community concerns about the content of some of these services, particularly in relation to pornographic material. The report identified a range of matters to be addressed if on-line services are to be used in a most effective manner. These went beyond concerns about objectionable and unsuitable material and included the potential for vilification, discrimination and harassment.

The ABA reported that despite the global reach of on-line services, codes of practice could be developed within a self-regulatory framework to facilitate the use of on-line services by the Australian community. The report recommended that industry codes of practice be developed by on-line service providers. The main elements of the proposed regulatory framework are:

- The identification of matters which should be included in codes of practice for service providers, which provide appropriate community safeguards, including complaints handling procedures;
- Registration by the ABA of such codes of practice, developed by service providers after a process of public consultation; and
- Monitoring codes of practice, and their effectiveness, by the ABA.

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[1] ABA, *Investigation into the Content of On-Line Services, Report to the Minister for Communications and the Arts*, Sydney, 30 June 1996.

Matters to be contained in the codes included:

- Age verification procedures to limit the holding of open on-line accounts to persons over the age of 18 years;
- Procedures to deal with illegal material;
- Provision of information for users and content providers on legislation which may be relevant in an on-line environment; and
- Provision of information to users regarding filter products or on-line services available to those who wish to restrict access to material which may be unsuitable for children.

It was also proposed that the codes should encourage content providers to label their content in accordance with a purpose-built labelling scheme.[2]

The ABA report stated that industry codes of practice could exist in the domestic arena with the ABA having a monitoring role in relation to codes of practice for service providers. The ABA acknowledged that a cooperative approach by government agencies, the on-line industry and the community is required.

There is scope here for the ABA to include self-regulatory guidelines concerning the distribution of Indigenous Cultural and Intellectual Property on the Internet and in new and existing media technology.

It should also be noted that in 1994, ATSIC recommended that the Commonwealth Government should encourage the ABA to exercise its power under Section 125(2) of the *Broadcasting Services Act 1992* and determine a standard for the portrayal of cultural diversity on television.[3] According to ATSIC, the ABA has an obligation to redress the continuing damage done by stereotyping and negativity in the media.[4] A wide cross-section of Indigenous media organisations, the National Indigenous Media Association of Australia and the Media, Entertainment and Arts Alliance are campaigning on this issue.

Issues

The Discussion Paper sought responses to whether there is scope for the ABA to include self-regulatory guidelines concerning the distribution of Indigenous Cultural and Intellectual Property on the Internet and in other new and existing technology media.

Responses

The representation of Indigenous people in existing and new technology media was raised in numerous responses. Jim Remedio, Chairperson of the National Indigenous Media Association of Australia (NIMAA) and member of the Indigenous Reference Group, noted that

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[2] Ms Kaaren Koomen, Manager, On-Line Services, Australian Broadcasting Authority, *The Internet and Some International Regulatory Issues*, A paper presented at the UNESCO Info Ethics Conference, Monte Carlo, 10-12 March 1997, p 13.

[3] Recommendation 2.2, ATSIC, *Submission to the Aboriginal and Torres Strait Islander Culture and Heritage Inquiry,* 1984, p viii.

[4] *Ibid.*

representation was a significant issue and that NIMAA has a code of conduct for Indigenous media.[5]

The ABA submitted that the Broadcasting Act 1992 does not empower it to regulate content in the on-line environment. The ABA noted that its report, *Investigation into the Content of On-Line Services*, quite clearly illustrates there is an overriding reluctance on the part of most bodies and organisations with an interest in the industry to have the on-line services regulated, if at all .[6] Hence, the ABA proposed that self-regulatory codes of practice made in consultation with the ABA would be a more appropriate way to regulate the content of on-line services.

The ABA suggested that:

> *The development of self-regulatory guidelines for protection of Indigenous Cultural and Intellectual Property disseminated via an on-line services environment may be most usefully explored. The development of such guidelines should take note that the effectiveness of such self-regulatory guidelines will be critically dependent upon the willingness of on-line service providers and content creators and providers to adhere to and enforce those guidelines within the realms of practicability. It should also be noted that the success of such guidelines is dependent on the role and the extent of the input that the on-line services community will have in shaping and drawing up the guidelines.*[7]

The ABA also noted that:

> *Any guidelines must recognise the unique characteristics of Indigenous Cultural and Intellectual Property along with an appreciation of the inherent difficulties associated with the recognition of Indigenous material under existing legal frameworks. Without this fundamental recognition, many people without an understanding of how intellectual property rights are protected by the law, will assume that the same intellectual property rights apply to Indigenous material as they do to other kinds of material. Given the vulnerability of (Indigenous cultural heritage) material in the first place, its dissemination in the on-line environment without any appropriate guidelines about its use might expose it to greater than usual misappropriation and abuse.*[8]

The ABA also noted that the on-line environment transcends national borders, and suggested pursuing efforts to protect Indigenous Cultural and Intellectual Property by international treaties and agreements.[9] Given the liberal nature of the on-line environment, the ABA also advocated that the effectiveness of any guidelines to protect Indigenous Cultural and Intellectual Property would be enhanced if they are developed through collective international cooperative efforts rather than in individual nation states.[10]

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[5] Jim Remedio, Chair, National Indigenous Media Association of Australia, IRG Meeting held in Sydney, September 1997.

[6] ABA, Submission to *Our Culture: Our Future*, October 1997.

[7] John Corker, Australian Broadcasting Authority, Submission to *Our Culture: Our Future*, October 1997.

[8] ABA, Submission to *Our Culture: Our Future*, October 1997.

There are inherent limitations of any guidelines, in that material may be protected in the originating country but once disseminated on-line could be accessed by millions of others from countries not obliged to heed such guidelines. In light of this, the ABA suggested that an international working group be set up to deal with Indigenous issues in the on-line environment. The ABA noted that the UNESCO Info-Ethics Conference[11] may be a possible arena for discussion and exchange of ideas on the issue.[12]

Analysis

Self-regulatory guidelines are difficult to enforce and still allow people to continue to misuse Indigenous cultural heritage material in the on-line environment. Despite this, there is value in establishing such guidelines as they will set industry standards.

The Queensland and Northern Territory Multimedia Centre (QANTM) is looking into ways Indigenous material on-line can be technically protected. Suggestions include protecting images by embedding a watermark so that the images can be traced. But this would not stop people from printing off the images and re-scanning them, or copying them into other media. QANTM is also working on a project to establish protocols for use of Indigenous heritage material on-line and in multi-media.[13]

16.2 Trade practices issues

As noted in Part Two, Indigenous groups are concerned there are many products and services, particularly in the souvenir and tourist market, give a false image of Indigenous manufacture or some Indigenous association.[14]

While the introduction of an Indigenous certification mark and labelling system will promote authentic marketing practices by encouraging consumers to buy authentic Indigenous products,[15] there is also a need to monitor and discourage misleading and deceptive marketing practices. This is particularly important as more producers and retailers promote their products on an "ethical" basis, even though they may not be providing the benefits claimed by Indigenous individuals and communities.[16] Indigenous groups could work together with consumer protection groups, retail and manufacturing associations and the Australian Consumer Competition Commission (ACCC) to address these issues.

Another suggestion raised in the course of consultations was the possibility of developing separate legislation to deal with the commercial exploitation of Indigenous cultural material.[17]

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9 *Ibid.*
10 *Ibid.*
11 The UNESCO Info-Ethics Conference, an international forum which discussed regulating content in the on-line environment.
12 John Corker, ABA, Submission to *Our Culture: Our Future*, October 1997.
13 Telephone interview with Sarah Barry, QANTM, January 1998.
14 See Cairns and District Regional Council s Submission to *Stopping the Ripoffs*, 1994.
15 See Chapter 19 for discussion on the Indigenous Certification Mark and Labelling System.
16 See, for example, *(Deceased Applicant) v Indofurn*, where carpets reproducing unauthorised sacred designs of Indigenous artists were sold with labels incorrectly stating that Royalties are paid to Aboriginal artists .

16.3 Customs Issues

As noted in Chapter 7, under customs laws and the *Protection of Moveable Cultural Heritage Act 1987 (Cth)* there are controls placed on the export of certain Indigenous cultural material.[18]

It was suggested by the Indigenous Reference Group that Australian Customs could adopt procedures which regulate the importation and exportation of Indigenous products. Given the extent of unauthentic products which are mass produced overseas and imported into Australia, such procedures would be beneficial in filtering a lot of bogus Indigenous products currently being sold as authentic .

Chapter Sixteen : Recommendations

16.1 Broadcasting law

- Self-regulatory guidelines which address distribution and publication of Indigenous Cultural and Intellectual Property on-line should be developed by Indigenous communities, ATSIC, Australian Film Commission, service providers, Australian multimedia centres and industry bodies in association with the ABA.
- On-line industry bodies should be encouraged to support and participate in the development of codes.
- International networks should be established to deal with Indigenous issues on-line. This could include:
  - — developing guidelines with UNESCO Info-ethics and other international Indigenous peoples;
  - — setting up e-mail hotlines to police culturally inappropriate content.

16.2 Trade practices

- The Australian Competition and Consumer Commission should conduct an inquiry into the advertising and labelling of Indigenous arts, cultural products and cultural services in association with Indigenous people.

16.3 Customs Issues

- Australian Customs laws should include provisions which filter the export and import of fake Indigenous cultural material.

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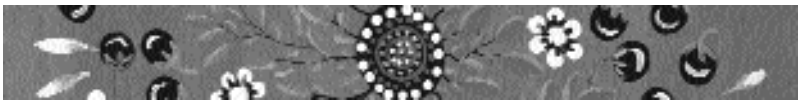
[17] Indigenous Reference Group/Steering Committee Workshop of Report Meeting, 11 December 1997
[18] See 7.9.
[19] Indigenous Reference Group/Steering Committee Workshop Meeting, 11 December 1997

Developments of common law



17.1 What is the common law?

The term common law refers to the body of legal principles which evolve through the interpretation of law by judges, as distinct from the body of law created through legislation. The term originally referred to the common law of England, that is, the general rules applicable to the whole country, as distinct from local customs.

17.2 Equitable ownership of copyright

Golvan argues that under copyright principles, the Indigenous custodians of a pre-existing traditional design may have an equitable interest in the copyright of an artwork which depicts this pre-existing design. This is based on the assumption that the knowledge and right to paint such a design were imparted to the artist as part of his or her ceremonial and artistic training. It is imparted with the belief that it will not be used in a manner inconsistent with Indigenous laws. Hence the traditional custodians of the knowledge, as the true owners of copyright, have the right to seek appropriate redress, at least to the extent that they and the artists have the copyright owners right to permit or refuse reproduction of the designs.[1]

Golvan points to previous English cases in which courts have recognised that an action for an interlocutory injunction to restrain infringement of copyright can be brought by an equitable owner of copyright in his or her own name.[2] He also notes that a permanent injunction will not be granted to an equitable owner unless the legal owner of the copyright is joined as party to the action.[3] This extension of copyright principles is yet to be tested.

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[1] Colin Golvan, Aboriginal Art and the Protection of Indigenous Cultural Rights , (1992) vol 2(56) *Aboriginal Law Bulletin* pp 5-8.
[2] *Sweet v Shaw* 8 LJ 216, *Hodges v Welsh* (1880) 2 Ir Eq Rep 266, *Sweet v Cater* 11 Sim 572 and *Ward Lock & Company v Long* [1906] 2 Ch 550.
[3] [1924] AC 1.

In *Bulun Bulun and (Deceased Applicant) v R & T Textiles*,[4] a case currently before the Federal Court, the artist Johnny Bulun Bulun and a deceased applicant (representative of the traditional Aboriginal owners of Ganalbingu country) have taken action against a fabric importing company for infringing copyright in artworks painted by Bulun Bulun and belonging to the customs of the Ganalbingu people.[5]

The applicants argue that Bulun Bulun s right to paint and permit the reproduction of the artwork is subject to the condition that they and their descendants perpetuate and maintain the integrity of the body of ritual knowledge of the Ganalbingu people. The right is linked to Bulun Bulun s traditional ownership of the land.[6] A judgment on the case had not been delivered at the time of writing.[7]

17.3 Blasphemy

Blasphemy is a common-law offence which aims to suppress material considered offensive to the commonly held religious values within a given religious system. There are also blasphemy laws within the criminal law of some States. Miller argues that the law of blasphemy may prevent people from using sacred ceremonial designs to which Indigenous customary laws apply.[8]

However, as the Australian Copyright Council notes, it is difficult to not only determine whether blasphemy survives in Australian common law, but whether it applies to statements or actions concerning religions other than the Christian faith.[9]

The judgment of Justice Harper in *The Most Reverend Dr George Pell, Archbishop of Melbourne v The Council of Trustees of the National Gallery of Victoria*[10], (the Piss Christ case) raised the question of whether blasphemy still exists in Australia. While the decision not to grant an injunction to the Archbishop to stop the display of a photograph of a crucifix immersed in urine was based on a technical point, the judgement indicates that blasphemy that only protects Christian religions, may no longer have a place in a pluralist, tolerant society such as Australia.[11]

17.4 Unfair competition

Unfair competition generally refers to the act, in the course of trade, of one trader misappropriating the intangible fruits of another trader s skill, time and labour .[12] Such reaping without

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[4] *Bulun Bulun v R & T Textiles*, No DG 3 of 1996.

5 Martin Hardie, Current litigation in native title and intellectual property: *Bulun Bulun and (Deceased Applicant) v R & T Textiles* , (1997) vol 3(90) *Aboriginal Law Bulletin* p 18.

[6] *Ibid.*.

[7] Since the writing of this Report, the judgement has been handed down.

[8] Duncan Miller, *op cit*, p 202.

[9] Australian Copyright Council, *Protecting Indigenous Intellectual Property: A Copyright Perspective*, March 1997, p 58.

[10] October 1997, Unreported Judgment No 7358 of 1997.

[11] Editorial, *Art and Law*, Arts Law Centre of Australia, Issue 4, (1997) pp 8-9.

[12] S. Ricketson, Reaping without Sowing: Unfair Competition and Intellectual Property Rights in Anglo-Australian Law , (1984) 7 *UNSW Law Journal* p 2.

sowing is deemed unfair because it interferes with competition. In the market economy, traders strive to gain an edge over their competitors by innovation, research or reputation. The state considers this edge deserves legal protection because protecting it gives incentives to traders to improve and research their products and lower prices. This in turn benefits the consumer.[13]

In France, unfair competition is a firmly established concept of law. Gautier noted several French cases based on what he referred to as (translated into English) parasitism . In one case, wine growers from the Champagne region successfully stopped Yves Saint Laurent from using the word Champagne to name a perfume.[14] The rationale here is that the wine growers had established a reputation in the name Champagne . The French Court considered that it would be unfair for Yves Saint Laurent to reap the benefits of this without having contributed in any authorised way to their efforts.

Yamin and Posey comment that the provisions of Article 10bis of the *Paris Convention for the Protection of Industrial Property* could also be relevant to Indigenous groups seeking to control the imitation or unauthorised commercial sale of indigenous products.[15] They note that Article 10bis obliges members to ensure that people are protected from unfair competition resulting, for example, from acts that cause confusion by any means whatever with the establishment, the goods, or the industrial or commercial activities of a competitor . They believe a failure to provide such protection for Indigenous peoples could arguably be a breach of the convention, which obliges members to provide nationals with appropriate legal remedies to repress effectively all the acts referred to in Article 10bis .[16]

In Australia, there is limited recognition of the doctrine of unfair competition outside actions of passing off and the misleading and deceptive conduct provisions of the *Trade Practices Act.*[17] Recent legislative developments include the *Olympic Insignia Protection Act 1987 and the Sydney 2000 Games (Indicia and Images) Protection Act 1996*. These Acts aim to stop unauthorised commercial use of specified Olympic Games markings and images by firms or people wanting to suggest they are associated with the Games. The Act authorises the Sydney Organising Committee for the Olympic Games (SOCOG) and the Sydney Para-Olympic Organising Committee (SPOC) to use and license others to use the Games markings and images. Words and phrases such as Olympic , Olympiad , Para-Olympic , Team Millennium and Sydney 2000 are protected. The Act also covers certain images (either aural or visual) that in the way they are presented suggest a connection with the Sydney 2000 Olympic or Para-Olympic Games (section 9).[18]

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[13] *Ibid.*

[14] Pierre-Yves Gautier, Professor, Universite de Paris II, Protection by Industrial Property Law and by Legal Provisions Concerning Obligations , paper presented at the UNESCO/WIPO World Forum on the Protection of Folklore, April 1997.

[15] Farhana Yamin and Darrel Posey, Indigenous Peoples, Biotechnology and Intellectual Property Rights , vol 2(2) *RECIEL* pp 141-148.

[16] *Ibid.*

[17] See also state fair trading legislation.

[18] The logos for the Sydney 2000 Games, ie, the boomerang athlete, mascots etc, are ordinary trade marks which are or need to be registered under the *Trade Marks Act 1995*. They are not registered under the Sydney 2000 legislation.

17.5 Passing off

In *Hogan v Koala Dundee Pty Ltd*,[18] the action of passing off was extended to protect images, characters and personalities. The case involved the sale of koala images in tourist shops called Dundee Country . The court found these images were based on the character and images associated with the film character "Crocodile Dundee", and that many people who saw the name Dundee Country and the koala images would be immediately reminded of the film and actor Paul Hogan s role in it. The court ruled that consumers would assume that Dundee Country had a licence to use the images. Given that there was no licence arrangement between Hogan and the maker of the koala images, the court found it would be unfair for the maker to benefit from Hogan s reputation without having given the actor any consideration, payment or otherwise.

In the same way, consumers may see Indigenous designs and be drawn to them because of the image and reputation of a particular style of artwork, for example, the Papunya dot style. The Papunya artists may have a case against people who pass off their work as coming from this school of art.

Chapter Seventeen : Recommendations

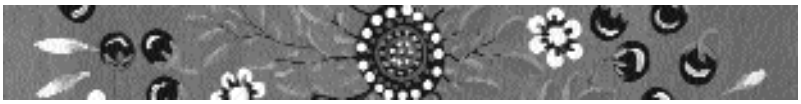
17.1 Cases which expand the common law to protect Indigenous Cultural and Intellectual Property should be supported.

17.2 Unfair competition should be investigated as a potential way to protect Indigenous Cultural and Intellectual Property. Separate legislation based on Article 10bis of the Paris Convention could be useful to protect the commercial interests of Indigenous people in their cultural heritage and to also safeguard consumers against misleading and deceptive marketing practices.

[18] Pincus J in *Hogan v Koala Dundee Pty Ltd* (1988) 12 IPR 508.

CHAPTER EIGHTEEN

Specific legislation



18.1 Legislative models of protection

Several models for specific legislation have been developed as a guide for governments intending to pass laws to protect folklore . These include:

- The UNESCO/WIPO Model Provisions for National Laws for the Protection of Folklore;
- The Tunis Model Law; and
- The Aboriginal Folklore Act Model, devised by the Working Party into the Protection of Aboriginal Folklore.[1]

A summary of these models is provided in Appendix 4, but some common features are:

- There should be some allowance for cultural works that are not in material form.
- Rights should be recognised in perpetuity. This would avoid the problem of time periods nominated in existing intellectual property laws, such as 50 years after the death of the author for copyright protection.
- There should be exceptions for customary uses and other fair uses.
- Non-traditional uses of sacred/secret material should be prohibited.
- The debasement or mutilation of cultural material should be prohibited.
- Systems need to be established to authorise prospective uses.

18.2 Is specific legislation appropriate?

According to the Inter-Departmental Committee on Arts and Cultural Expression

[1] See Appendix 4.

(IDC), most submissions to *Stopping the Ripoffs* favoured the introduction of specific legislation.

In 1995, the Council for Aboriginal Reconciliation reported to the Government on what measures might be appropriate to advance the cause of social justice for Indigenous Australians. In its submission to the Commonwealth Government s report, *Going Forward: Social Justice for the First Australians*,[2] the Council made several recommendations on the development of specific legislation regarding Indigenous Cultural and Intellectual Property, including:

- That the Commonwealth legislate to create a specific new form of intellectual property which would enable Indigenous communities and individuals to protect from exploitation styles of art or craft and knowledge of traditional foods and medicines.[3]
- That such legislation include a power to initiate representative proceedings to enforce such rights and seek forfeiture of any profits made in contravention of these rights.[4]
- That such legislation should be extended to the protection of broad cultural rights.
- That a code of conduct be developed by Indigenous people in consultation with relevant professional associations to deal with issues involving the Indigenous peoples remains and that such a code be made enforceable through Commonwealth Indigenous heritage protection legislation.

The Discussion Paper canvassed the idea of developing specific legislation to protect Indigenous Cultural and Intellectual Property. It was noted that specific legislation would have to be comprehensive and acceptable to all Indigenous peoples. The following questions are a framework for drawing up such legislation:

1. What should be the purpose of the legislation?
2. What should be its scope? Should the legislation apply solely to arts and cultural expression, or should it include the use of traditional knowledge?
3. Should the focus be solely on the traditional rights to Indigenous Cultural and Intellectual Property?
4. Should the legislation include provisions which:
   - Prevent the wilful distortion and destruction of cultural material?
   - Prohibit misrepresentations of the source of the cultural material?
   - Provide special protection of sacred and secret materials?

What other actions should be prohibited?

5. Should the legislation allow remuneration for commercial uses of Indigenous cultural material? If so, how should fees be calculated and charged, collected and distributed?

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[2] The Commonwealth of Australia 1995.
[3] Recommendation 51.
[4] Recommendation 52.

6. The legislation would need to be structured.

   - How should its use be authorised?
   - Should a central body be established for this purpose, or regional or local groups? Alternatively, could existing structures be used, such as land councils, native title bodies, regional councils and arts centres?
   - How should disputes be settled? The options are a tribunal system, through mediation, or alternative dispute resolution procedures.

7. What types of fines or punishment should be imposed?

8. What exemptions or defences should be included? Should there be:

   - Traditional or customary uses?
   - Fair-dealing provisions for research or private study; judicial proceedings and reporting of news, reviews and criticism?
   - There should be no innocent infringement provisions.

9. Should a time frame be introduced - say 12 months - to enable commercial organisations to make arrangements to comply with the new laws?

Most respondents to the Discussion Paper favoured the development of specific legislation rather than amending existing laws. There were many reasons for this. For example, the Australian Copyright Council (ACC) argued that amending intellectual property laws would not be sufficient given that the rationale of these laws is to provide individual, economic rights rather than cultural or communal rights.[5]

The Tasmanian Museum and Art Gallery noted:

> *In line with international fora on Indigenous intellectual property, Indigenous customary law and Australian law should be recognised as parallel and equal systems of law from which will stem respect of traditional practices and restrictions in respect of Indigenous cultural and intellectual property. If formal respect for Indigenous Australian and Torres Strait Islander arts laws is established, many conflicts which arise will have easily been resolved.*[6]

The Indigenous Reference Group (IRG) advocated one piece of legislation to cover the range of rights Indigenous people seek in relation to their heritage.[7] The IRG s draft principles and guidelines include:

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5 Australian Copyright Council, Submission to *Our Culture: Our Future*, October 1997.

6 Debby Robertson, Indigenous Cultures Department, Tasmanian Museum and Art Gallery, Submission to *Our Culture: Our Future,* November 1997.

7 Indigenous Reference Group meeting, Sydney, September 1997.

20. *The national law must guarantee that Indigenous people can obtain prompt, effective and affordable judicial or administrative action to prevent, punish and obtain full restitution and just compensation for the acquisition, documentation or use of their heritage without proper authorisation of the Indigenous owners. Where appropriate the language of Indigenous groups should be applied to the proceedings.*

21. *The national law should deny to any person or corporation the right to obtain patent, copyright or other legal protection for any element of Indigenous heritage without adequate documentation of the free and informed consent of the Indigenous owners to an arrangement for the sharing of ownership, control, use and benefits.*

22. *The national law should ensure the labelling and correct attribution of Indigenous people s artistic, literary and cultural works whenever they are offered for public display or sale. Attribution should be in the form of a trademark or an appellation of origin, authorised by the people or communities concerned.*

23. *The national law for the protection of Indigenous people s heritage should be adopted following consultations with Indigenous people and should have the informed consent of the people concerned.*

18.3 Purpose of the legislation

The Discussion Paper noted that submissions to the *Stopping the Ripoffs* Issues Paper suggested the purpose of any legislation should be:

- To preserve Indigenous cultural tradition and knowledge.
- To protect the economic interests of Indigenous people with respect to their rights to commercialise their intellectual property on the market on their own terms and with the right to negotiation.[8]
- To protect the integrity of Indigenous arts and cultural expression.
- To encourage acceptable use.
- To prevent offensive use, including mutilation, debasement, destruction and unauthorised dealing.
- To prevent use of secret/sacred material outside the traditional or customary context.
- To provide a framework for Indigenous communities to control the use and benefit economically from the commercial exploitation of their arts and cultural expression.

[8] AECG, Submission to *Stopping the Ripoffs*, 1994.

Responses

While many agreed with these purposes, others suggested additional areas. The Centre for Indigenous History (WA) submitted that the legislation should seek to enable Indigenous communities and individuals to:

- Control uses of their Indigenous arts, knowledge and cultural material by others;
- Prevent the exploitation of Indigenous peoples styles of art or craft and knowledge of bush foods and medicines;
- Protect the integrity of their intellectual and cultural property by preventing uses which are offensive to Indigenous peoples;
- Access and control their intellectual property which is contained in institutions, such as libraries, universities and museums;
- Secure a financial return for the use of their cultural and intellectual property where authorised by the Indigenous custodians;
- Encourage acceptable uses of Indigenous Intellectual and Cultural Property.[9]

The National Indigenous Media Association of Australia (NIMAA) submitted that the legislation could set up a body which could, among other things:

- Negotiate on behalf of Indigenous creators, collect licence fees, investigate alleged breaches and institute proceedings against offending parties;
- Educate Indigenous people on their rights under the new law and existing laws.[10]

18.4 Scope of the legislation

Most of the Indigenous submissions made to the *Stopping the Ripoffs* Issues Paper recommended that any specific legislation should include all aspects of Indigenous Cultural and Intellectual Property.[11] For example, the Aboriginal and Torres Strait Islander Social Justice Commissioner recommended that any new or amended intellectual property systems should ensure that the nature of intellectual property rights is defined by, and accords with, the law and customs of Aboriginal and Torres Strait Islander peoples; and should include Indigenous peoples rights and interests in traditional knowledge. It should also recognise and protect Indigenous peoples secret and sacred knowledge, information, sites, objects and areas as well as their religion, spirituality and cultural rights.[12]

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[9] Centre for Indigenous History and the Arts, Submission to *Our Culture: Our Future,* October 1997.
[10] National Indigenous Media Association of Australia, Submission to *Our Culture: Our Future*, October 1997.
[11] See for example the submission of the Aboriginal and Torres Strait Islander Social Justice Commissioner, p 8 and Cairns and District Regional Council Support Unit s submission to *Stopping the Ripoffs*. The Cairns and District Regional Council passed a resolution that special legislation be passed and that the special legislation should ... encompass the full range of Intellectual and Cultural Property issues and further that these should be subject to development and negotiation with Aboriginal and Torres Strait Islander peoples .
[12] Office of the Aboriginal Social Justice Commissioner, Submission to *Stopping the Ripoffs,* p 8.

The IRG and other respondents agreed that any legislation should cover all aspects of Indigenous Cultural and Intellectual Property. In the course of discussions, the following issues were raised:

18.4.1 *Tangible versus intangible*

The Discussion Paper advocated that any definitions used in the legislation should be broad, and should not require an expression to have a material form. Most respondents agreed with this. For example, the National Indigenous Media Association of Australia (NIMAA) noted:

> *A great deal of Indigenous culture is not in material form which means that the first person who reduces the culture to material form is the person who owns the intellectual property in that material. This situation is not satisfactory and could be addressed in legislation.*[13]

18.4.2 *Rights in perpetuity*

The Discussion Paper proposed that the legislation should recognise Indigenous Cultural and Intellectual Property rights to cultural material in perpetuity. Most respondents agreed with this.

For example, the Centre for Indigenous History and the Arts stated:

> *Under the legislation, Indigenous works or knowledge should be covered by protection in perpetuity.*[14]

18.4.3 *Communal versus individual ownership*

David Bennett noted that any specific system should recognise communal ownership as opposed to individual ownership, given that individual ownership rights are already catered for in the current legal framework, however haphazardly.[15]

18.4.4 *Traditional knowledge versus new knowledge*

Bennett also notes that any legislation should focus on traditional knowledge rather than new, also because new knowledge is protected under the current legal framework:

> *A feature of current patent law is that for an idea to qualify for patent it must be novel. Similarly, under current copyright law an idea must be original. By definition, these requirements exclude traditional ecological knowledge. What makes the use of traditional ecological knowledge patentable or copyrightable is its conversion into some new form ...*[16]

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[13] National Indigenous Media Association of Australia, Submission to *Our Culture: Our Future*, 1997.
[14] Centre for Indigenous History and the Arts, Submission to *Our Culture: Our Future*, October 1997.
[15] David Bennett, Submission to *Our Culture: Our Future*, October 1997.

18.4.5 *Arts and cultural expression versus science and biodiversity*

The development of specific legislation in the Australian framework has focussed on arts and cultural expression only and has tended to neglect other areas of heritage such as biodiversity knowledge, resources and scientific and medicinal application of cultural knowledge. For example, the Australian Working Party on Aboriginal Folklore focussed on arts-related cultural material, as did the *Stopping the Ripoffs* inquiry.[17]This is because western culture tends to separate arts from science. However, in Indigenous cultures, the division is less distinct.

Several commentators have noted that it might be more practical to separate arts and cultural expression from Indigenous cultural knowledge about biodiversity and the environment.[18] But the IRG supported the view that any legislation should cover the range of heritage material.[19]

However, if for any reason the specific legislation should focus only on arts, there may be scope for another separate Act to protect traditional ecological knowledge. It is important that laws be developed to address concerns over appropriation of biodiversity knowledge, human genetic material and scientific knowledge.

18.4.6 *Torres Strait Islanders*

One submission raised the issue of whether Torres Strait Islanders should have separate legislative and policy directives.[20] It was noted that any legislative and policy frameworks should take into account the differences between Aboriginal and Torres Strait Islander Cultures. Unfortunately, there were no submissions received from Torres Strait Islander organisations. Although there are two Torres Strait Islander members of the IRG, they were unfortunately unable to attend its meetings. This issue needs to be further canvassed with Torres Strait Islander people.

18.4.7 *Traditional versus urban focus*

The Discussion Paper asked whether the legislation should be aimed solely at traditional rights to cultural and intellectual property. It was noted that Ellinson suggested that the focus should be on so-called traditional arts and cultural expression.[21] Gray, alternatively, notes that the question of the rights of Indigenous artists from a non-traditional background has not been canvassed to date.[22] This is particularly relevant in light of the recent *National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from their Families* and the recognition of the right of those who were stolen, and their families, to reclaim and strengthen their lost cultures.[23]

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[16] *Ibid*.

[17] See Appendix 4.

[18] IDC address to the Indigenous Reference Group Meeting, Canberra, May 6.

[19] Indigenous Reference Group Meeting, Canberra, May 1996.

[20] Ponjydfjydu, Submission to *Our Culture: Our Future,* October 1997.

[21] Dean Ellinson, Unauthorised Reproduction of Traditional Aboriginal Art , (1994) vol 17(2) *UNSW Law Journal* pp 327-344 at 334.

Gray suggests that consultations should include the question: How will the legislation (or any reforms) meet the needs of artists who no longer belong to a traditional community, or whose communities can no longer say they own a particular design?[24] As Gray observes, the work of such artists almost certainly still draws upon their Indigenous heritage, or contains design elements that are identifiably Aboriginal .

Gray points to the work of urban Indigenous artist Gordon Bennett. He believes that while Bennett s work is contemporary, it draws on his experiences and perception of being Indigenous. Should this not to be treated in the same way? In a similar vein, would Indigenous artists who adopt European art styles be eligible for protection under the legislation? For example, should the work of Albert Namitjira receive special protection?

Gray suggests that if *Mabo* principles are applied to so-called urban artists , their rights to such art would be held to have been extinguished just as their traditional rights to land were held to have been extinguished. He suggests setting up a fund similar to that established by Native Title, the Aboriginal and Torres Strait Islander Land Fund, which was established to remedy the injustice of this result in relation to land.[25] The proposed legislation should contain special provisions to protect the artistic heritage and cultural products of urban Indigenous artists, for example, funding cultural education programs.

A submission from the Centre of Indigenous History and the Arts (CIHA) noted that the suggestion that the focus of any legislation be traditional is too narrow and runs the risk of freezing Indigenous culture. CIHA points out, If this approach were to be adopted, it raises the issue of what is the dividing line between traditional and contemporary . Are traditional rights only those which were exercised prior to European contact? [26]

Any legislation should not attempt to freeze Indigenous culture but should aim at allowing both so-called traditional and contemporary rights to be recognised and protected.

18.5 Active provisions

The Discussion Paper noted that specific legislation could be a safeguard against the culturally inappropriate use of Indigenous Cultural and Intellectual Property. For example, certain uses of such material could be prohibited, other than by customary users operating in a customary context. This should protect sacred/secret material.

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[22] Stephen Gray, Submission to *Stopping the Ripoffs*, (unpublished), 1994.
[23] See HREOC, *Bringing Them Home: Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from their Families,* 1997.
[24] Stephen Gray, *op cit.*
[25] *Ibid.*
[26] Centre for Indigenous History and the Arts, Submission to *Our Culture: Our Future*, October 1997.

There could be provisions which allowed traditional custodians to bring civil actions and claims for cultural damages against inappropriate uses of their cultural and intellectual property.
The general effect of the legislation would be to ensure that those who use or incorporate elements of Indigenous culture within their work would have to seek the full and informed permission of the relevant custodians. Should consent be sought prior to such use?

18.5.1 *Prohibited use*

The Model Provisions[27] suggest that national laws should prohibit unauthorised commercial use of expressions of folklore, other than for customary users operating in a customary context, by including provisions which:

- Prohibit misrepresentations of the source of expressions of folklore.
- Prohibit the wilful distortion of folklore in a way that is prejudicial to the interests of the relevant community.
- Provide that any defences to a charge of improper use of sacred/secret material would be narrow.

Responses

The Centre for Indigenous History agreed with this proposition but suggested the definition of wilful distortion should include mutilation, debasement or presentation of Indigenous material in a manner which is offensive to Indigenous peoples, including incorrect and inappropriate contextualisation .[28]
It was further suggested that:

- The provision concerning misrepresentations should also include the words or meaning . The provision should therefore read, Prohibit misrepresentations of the source or meaning of the cultural material. [29]
- The integrity of Indigenous works can be further protected by including moral rights provisions. But because of communal ownership in Indigenous works, the provisions must also state that these moral rights cannot be waived.[30]

18.5.2 *Remuneration*

Should the legislation allow Indigenous communities to charge fees for use of Indigenous Cultural and Intellectual Property?
Many submissions to the *Stopping the Ripoffs* Issues Paper felt specific legislation should allow communities to charge fees for non-customary and commercial uses of their traditional cultural material. The same should apply to non-customary and commercial use of biodiversity and traditional knowledge.

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[27] UNESCO/WIPO Model Provisions for the Protection of Folklore.
[28] Centre for Indigenous History, Submission to *Our Culture: Our Future,* October 1997.
[29] *Ibid.*

The Model Provisions provide that where the competent authority grants authorisation, it may fix the amounts for and collect fees. The fees shall be used to promote or safeguard national culture or folklore.[31] Commentary with the Model Provisions advises that this fee should be shared with the community from which the folklore originates, but there is no advice on how to do this.

Responses

ATSIC South Australia noted the following concerns in relation to royalty systems/remuneration:

> *Individual vs communal ownership*
>
> *Any royalty system needs to take into account that cultural and intellectual property may belong to an individual, group of both. It cannot be assumed that the output of a person belonging to a particular group is the intellectual property of that group. Nor can it be assume that it belongs to the individual. An Aboriginal person may identify themselves or their work as wholly or partially representative of their group. In this case payment could be made to the group.*[32]
>
> *Derivative nature of works*
>
> *If the output can be demonstrated to have a significant measure of originality, a partial royalty payment could be made which reflects individual input. A separate and proportional payment could then be made to the group.*

It is clear that Indigenous people want the legislation to allow Indigenous communities to charge fees when people use, copy their traditional images, designs, songs or dances. But it is not clear how Indigenous Australians believe this might be done.

Most submissions considered that remuneration should go to the particular Indigenous group which owns the cultural item in use rather than to a national authority to use to promote and safeguard Indigenous culture. This could be done by exploring trust arrangements or through some type of collecting society. Each particular group should be given negotiation rights. Where no particular group claims ownership, this can be used for purposes such as cultural revitalisation or education.

18.6 Structure

18.6.1 *Centralised body*

The Aboriginal Folklore Commission Model proposed by the 1981 *Draft Aboriginal*

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[30] *Ibid.*.
[31] Model Provisions, Section 10.
[32] ATSIC South Australia, Submission to *Our Culture: Our Future*, October 1997.
[33] Indigenous Reference Group meeting, Sydney, September 1997.

Folklore Act was based on a very centralised structure, comprising a Folklore Commissioner with wide powers and an Aboriginal Folklore Board to provide advice. Indigenous people do not seem to favour the centralised features of this model, and most prefer regional or local structures which can take into account differing cultural issues.

The question of who has the authority to authorise or clear commercial uses within a particular clan or group may be a significant query and there may be examples of a song, dance or story being practised by different tribal groups.[34]

The Centre for Indigenous History and the Arts favours a national body, but one which allows for regional and community control:[35]

> *A national body could be established, but it must liaise closely with local community organisations, arts centres, land councils, native title bodies, etc. It would act only as an advisory body to communities and groups and oversee the implementation of the Act (eg, the Collecting Society, registration of Certification Mark, etc).*
>
> *The national body should be composed entirely of Indigenous people having a good knowledge of Indigenous Cultural and Intellectual Property, an understanding of the arts industry and arts practice. It is also important that members of the national body have experience with, and an understanding of contractual agreements, particularly in relation to long-term implications for the individual or group concerned.*
>
> *It is also essential that the national body be accessible to all Indigenous peoples in all States and Territories in Australia (eg, have agencies in all the various regions across Australia, hold meetings in each region across Australia). The Indigenous representatives must be selected from across all States and Territories in Australia.*[36]

18.6.2 *Tribunal system*

There are likely to be disputes over which Indigenous group owns certain cultural material and whether a particular person is entitled to use it. One alternative is a tribunal system to mediate any disputes and provide fast-track, low-cost, culturally appropriate remedies. The tribunal could consist of members from Indigenous communities and the legal profession; or it could be a system of tribunals made up of elders from local Indigenous communities;[37] or a central/regional structure. It could tap into existing systems such as local land councils, regional councils or native title tribunal system.

Whilst the Tribunal would not have the power to make legal determinations,[38] the tri-

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[34] Ellinson, *op cit*, p 336. Ellinson discusses notions of traditional Aboriginal ownership.
[35] Centre for Indigenous History and the Arts, Submission to *Our Culture: Our Future*, October 1997.
[36] *Ibid.*

bunal could be a mediating body-making body - similar to the Administrative Appeals Tribunal - made up of traditional elders, customary and commercial users, legal and cultural advisers to mediate disputes concerning the commercial use of Indigenous Cultural and Intellectual Property.

18.6.3 *Statutory body*

Another possibility is a statutory body which could act as a go-between for Indigenous communities and potential users. The body could also provide legal and cultural advice and information to both users and communities, and administer any relevant legislation. A statutory body might also be able to provide financial assistance for Indigenous people taking action over unauthorised use or on behalf of a group of artists.

Any such body would need to have a strong advisory board, preferably composed of Indigenous people. The advisory board s functions could include:

- Authorisation of uses of Indigenous arts and cultural expression and how royalties should be collected with respect to collective ownership of images.
- Facilitation of payments to traditional custodians and relevant communities.
- Development of standard guidelines for negotiating fees.
- Protocols which aim to ensure that commercial uses of works are suitable for reproduction and are not reproduced inappropriately.

The possibility of conflicting claims between Indigenous communities has been emphasised. Mediation and arbitration - best carried out by Indigenous people - would be the first steps to solve such disputes. The statutory body could possibly provide mediation and arbitration facilities. But if this process fails to solve a dispute, it would be referred to the Federal Court, which may have to consider the application of Indigenous law.

Another contentious area is that of fees. There is potentially a very large number of expressions of Indigenous Cultural and Intellectual Property, and a large number of users. Under the *Copyright Act*, if a dispute occurs over fees charged by a collecting society on behalf of its members, and no solution can be reached between the society and the user, the Copyright Tribunal has the power to determine the matter. It is possible that such a body may be needed for this structure.

Whether Indigenous people would accept bodies such as an approved collecting society or a Copyright Tribunal setting fees on their behalf is open to question.

It is preferable that any established bodies remain independent of government.

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[37] Attorney General, Preliminary Paper on *Stopping the Ripoffs* (1995), p 9.
[38] Brandy v Human Rights and Equal Opportunity Commission (1995) 183 CLR 245.
[39] David Bennett, Submission to *Our Culture: Our Future*, October 1997.

18.6.4 *Separate legal bodies*

A range of separate legal entities is another option. Bennett suggests that one way of addressing communal ownership of Indigenous cultural and intellectual property is to establish a legal body such as a foundation who could own cultural material on behalf of Indigenous people. The foundation could distribute royalties and other accrued benefits on an equitable basis to all those with a legitimate claim. Bennett states:

> *Land councils have dealt with classic extractive activities such as mining, oil exploration, logging, etc . The foundation would be a cultural land council designed to deal with the extraction of cultural and intellectual property, genetic and biological resources and the other gold mines of Indigenous peoples heritage and land*.[39]

Bennett suggests that the foundation could establish a system of classifications for knowledge, perhaps along the lines of the Australian Institute of Aboriginal and Torres Strait Islander Studies, so that those who should not know restricted knowledge (business) would not have access to it. The foundation could also attempt to prevent the use of knowledge without the consent of the owners.[40]

Bennett also notes that the Foundation would have legal standing between current intellectual property rights laws and the communal owners of the knowledge. In this way, the foundation as an Indigenous organisation would be in a position to respect and defend, as required, Indigenous intellectual property.[41]

Other legal structures might include the establishment of a trust or company to administer rights of voluntary members.

The establishment of an independent Indigenous authority would be consistent with notions of Indigenous self determination.

18.7 Authorised uses

How do you identify who has the authority to authorise or clear commercial uses within a particular clan or group? There may be instances where a song, dance or story is practised by a number of Indigenous groups.[42] As noted above, the structure proposed by the Working Party into the Protection of Aboriginal Folklore was a centralised structure. The Folklore Commissioner would be granted wide powers and would be advised by an Aboriginal Folklore Board.

The UNESCO/WIPO Model Provisions for National Laws for the Protection of Folklore provide for a system of prior authorisation to be administered by a competent authority which represents the relevant community s interest in protecting its folklore.[43] Authorisation is required for commercial uses of folklore other than in the traditional and customary context, subject to the authorisation and supervision of the competent authority.

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[40] *Ibid.*
[41] *Ibid.*
[42] Dean Ellinson, *op cit*, p 336.

An expression of folklore is used commercially if it is not used in its proper or intended artistic framework as a continuing expression of culture by a particular community. For example, to use a dance in its traditional context would be to use it in its ceremonial or ritual context. Similarly, the term customary context refers to the use of expressions of folklore in accordance with the everyday life of a community, such as selling or making craft.

An advantage of the prior authorisation system is that inappropriate commercial uses of secret/sacred work would be identified. But Weiner notes there may be a disadvantage in that a prior authorisation system may prove administratively burdensome, and those who attempt to bypass the system would have to be caught by other means .[44]

One alternative is to set up a network of authorities through existing systems such as land councils, regional councils or arts and craft centres. There could be a central authority to direct inquirers to the relevant organisations. The authorisation process could be facilitated by on-line databases.

18.8 Possible remedies

The legislation should allow Indigenous groups to take legal action against infringers, allowing them to seek remedies similar to those available under intellectual property laws such as damages, account of profits, delivery up of infringing material and injunction to restrain use. Indigenous groups could also claim for cultural damages similar to those awarded in the *Carpets Case.*

The legislation should also impose criminal sanctions for the more flagrant acts such as destruction and mutililation of sacred objects. Depending on the severity of the case, this could range from fines to imprisonment.

Most commentators felt that customary law should apply if an Indigenous member of a clan exceeds authority. It is not appropriate for outside bodies to deal with punishment where such transgression occurs. Under Indigenous customary law, the traditional custodians meet to discuss the appropriate punishment where a member of the clan is the transgressor of authority. The decision to punish, and how, should be left in the hands of the community elders.[45] Another suggestion is to set up a council of elders from the appropriate region to deal with intellectual property protection and other issues relating to customary law, ownership and rights or usage. Their decisions would be legally enforceable.[46]

18.9 Exemptions and fair dealing

There would need to be exemptions to infringement for traditional or customary users. Should there be exceptions for other uses of cultural material? The UNESCO/WIPO Model Provisions for National Laws for the Protection of Folklore suggests exemptions for research or private study, judicial proceedings, the reporting of news and criticism and review.[47] Similar exceptions exist under the *Copyright Ac*t. They are important provisions as they ensure access to

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[43] Section 3 of the Model Provisions.
[44] Weiner, *op cit*, p 77.
[45] IRG meeting, Sydney, September 1997.

the public is not denied in all circumstances.

The NPWS (NSW) suggested that any defences or exemptions in the legislation should be limited to those defences/exemptions that are generally available in the common law and in existing legislation, for example, fair dealing.[48]

Such exceptions may be inapplicable to sacred or secret material. There may also need to be some exemptions for the uses of certain material in research or study and other fair dealing uses similar to those under the *Copyright Act 1968.*

There should be no provisions for innocent infringement where sacred material is mutilated or when the infringement relates to cultural material being reduced to material form for the first time.

18.10 Relationship with intellectual property laws

The Discussion Paper noted that any legislation will need to deal with the relationship between it and the other intellectual property statutes. The rights under this Act will not be able to override any material in which copyright exists. Basically, the legislation is for arts and cultural expression where copyright has expired or never existed. This would also be the case for trade marks, designs and patents.

18.11 Grace period

The Discussion Paper asked: Should there be a period of grace before any new legislation comes into effect? A period of, say, 12 months would allow commercial users, in particular, to make arrangements to comply with the legislation.

Most submissions agreed that there should be a grace period for those using Indigenous cultural material to come into line with any new laws.

But the NSW Aboriginal Land Council cautioned the need for consideration to be given to the development of accelerated timetables for the introduction of protective measures for especially vulnerable items of Indigenous cultural heritage.[49]

18.12 Codes of conduct

Rather than the legislation prescribing the types of conduct which is protected or prohibited, the Australian Film Commission suggested that it could provide for a process of negotiation to establish protocols or codes of conduct which would govern the procedure for use and recording of Indigenous cultural material. This could be overseen by a national body. This idea is expanded in Chapter 22.

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[46] Kimberley Aboriginal Law and Culture Centre, Submission to *Stopping the Ripoffs*, (unpublished) p 2.
[47] See Appendix 4.
[48] NPWS (NSW), Submission to *Our Culture: Our Future*, October 1997.
[49] NSW Aboriginal Land Council, Submission to *Our Culture: Our Future*, October 1997.

18.13 Further Indigenous consultation/education

There is a need for further consultation on the operation of the proposed model legislation. This will include education in the community as to current law.

Chapter Eighteen : Recommendations

18.1 A *sui generis* (specific) legislative framework should be established to protect Indigenous Cultural and Intellectual Property Rights, including ecological knowledge.

Indigenous people prefer the introduction of one Act. However, if this is too broad to legislatively manage, or not feasible constitutionally, it might be possible to implement two or more Acts which deal with the following:

(a) Arts and cultural expression

(b) Indigenous ecological (biodiversity) knowledge.

18.2 Any definition used in the legislation should be broad to allow for the above.

18.3 The legislation should provide protection for works that are intangible; there need not be a requirement of material form. Rights should exist in perpetuity.

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[50] Australian Film Commission, Submission to *Our Culture: Our Future*, January 1998.

18.4 Any rights granted should ensure that there are no time limits on protection and no fixed form requirement for protection to be given.

18.5 The legislation should include provisions which:

- Prohibit the wilful distortion and destruction of cultural material;
- Prevent misrepresentations of the source of cultural material;
- Allow payments to Indigenous owners for the commercial use of their cultural material; provide special protection for sacred and secret materials.

18.6 The legislation should not inhibit the further cultural development of materials within their originating communities. That is, customary and traditional use should not be affected.

18.7 The legislation should consider how it will interact with existing copyright and intellectual property laws; for example, perhaps the legislation should apply only to Indigenous cultural works outside of copyright period - where copyright does not exist.

18.8 The legislation should also consider how pastiche and stylised rip-offs of cultural material should be dealt with; that is, false and misleading provisions which make it an offence to make false statements or misleading provisions.

18.9 A central network administration system should be set up with local, regional and state offices. The organisation should be an Independent Indigenous Authority making use of existing national, regional or local authorities to provide administration.

18.10 An Indigenous Cultural Tribunal should also be established to mediate disputes. The tribunal should be made up of custodians, owners, specialists in Indigenous law and community elders. Use of ADR procedures with culturally sensitive mediators. There must be avenues to the Federal Court for determinations.

18.11 Prior authorisation provisions should be included, based on respect, negotiation and free and informed consent.

18.12 There should be fair dealing provisions only for traditional and customary use (this to be defined), research and study, and judicial proceedings. But judicial proceedings relating to sacred/secret material should not be made public or used for other purposes. No innocent infringement provisions.

18.13 There should be a system which allow members to negotiate fees and collect royalties. To this end, voluntary collecting schemes at the regional level are advised. This might be done by a voluntary system of registering material that can be commercially used and by identifying groups, individuals or organisations who can

authorise use. Lists of inappropriate material can be generated, taking into account Indigenous secrecy laws.

18.14 To facilitate authorisation and/or fee collection, Indigenous groups could develop protocols on acceptable uses and prohibited uses.

18.15 Particular communities should decide on fees to be charged and how this should be collected and distributed. The Tribunal could act as a guide, and act as arbitrator if disputes arise.

18.16 The legislation should allow particular groups of Indigenous people to bring civil actions against infringers of their cultural and intellectual property and to obtain remedies similar to those under existing intellectual property laws. For example, damages; account of profits; injunction to restrain use and delivery up of infringing material.

18.17 The legislation should include offences such as:

- Criminal sanctions for more serious offences such as destruction and severe mutilation of Indigenous sacred and secret material.
- Fines for breaches of cultural rights.

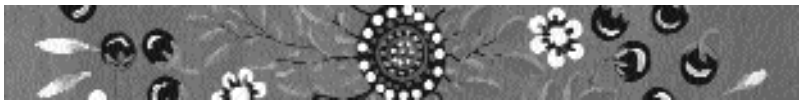
18.18 Confidentiality provisions should set out what can be disclosed to the public and what cannot be; for example, closed tribunal hearings.

18.19 The legislation should address Aboriginal and Torres Strait Islander cultures only. However, the issue of whether Torres Strait Islanders should have a separate legislation requires further consultation with Torres Strait Islander people. International mechanisms should be reviewed in light of moves internationally for Indigenous systems of protection.

18.20 There should be a grace period of 12 months to allow commercial users to come into line with new amendments.

18.21 There should be extensive consultations with Indigenous people concerning the introduction of any proposed legislation.

Indigenous authentication systems



19.1 National Indigenous Authentication Trade Mark

A proposal raised in the early 1980s was to develop a national Indigenous authenticity trade mark . The idea is that an authentication mark would be reproduced on labels attached to authentically produced Indigenous arts and cultural products. The labels would help consumers identify genuine Indigenous arts and cultural products. This would hopefully encourage retailers to stock the products which have the labels, which would in turn benefit Indigenous artists. Many submissions to the *Stopping the Ripoffs* Issues Paper supported this idea.

Issues for consideration

The Discussion Paper raised the following issues for consideration:

- What is the purpose of the certification mark?
- If the aim is to promote authenticity or cultural integrity, how should this be defined?
- What rules should be adopted for use of the mark?
- Who would be the registered owner of the mark, with the power to authorise others to use the mark? Would this authority rest with a special mark association, or with local community art centres, land councils, regional councils, or the ATSIC Board of Commissioners?

19.1.1 *What type of trade mark?*

There are several options for establishing a National Indigenous Authentication Trade Mark. Depending on the purpose, Indigenous people wanted:

1. A common law mark
2. Registered trade mark
3. Collective mark
4. Certification mark
5. A legislative mark similar to the *Sydney Games (Indicia and Images) Protection Act 1996.*

1. Common law mark

The authentication mark could operate as a common law mark or a registered trade mark under the *Trade Marks Act 1995*. If the authentication mark is used in relation to Indigenous products but the mark is not registered, the owner of the mark would have to rely on the common law action of passing off for misrepresentation of the mark, or the misleading and deceptive conduct provisions of section 52 of the *Trade Practices Act 1974.* The owner of the mark would need to establish the elements discussed in Part 2, Chapter 5. However, if the authentication mark is registered under the *Trade Marks Act 1995*, the registered owner would only need to show that the registered trade mark had been infringed. Hence, any authentication mark should be registered under the *Trade Marks Act 1995*. This could be either as an ordinary mark or as a collective or certification mark

.

2. Registered trade marks

A registered ordinary trade mark under the *Trade Marks Act 1995* is a sign used to distinguish goods or services dealt with or provided in the course of trade by a person, from goods or services so dealt with or provided by any other person .[1] Examples of ordinary registered trade marks include the Vegemite and Arnott s trade marks. If the intention of the authentication mark is to use a universal mark on its own that would be used by several Indigenous communities to denote that goods are genuine Indigenous products, then this may not be the appropriate category. It would be more appropriate to seek registration of the authentication mark as a certification trade mark or a collective trade mark.

The *Report of the Review into the Aboriginal Arts and Crafts Industry* noted that some Aboriginal art centres had used logos and documentation to promote their produce as authentic.[2] There is scope for such centres to register trade marks to

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[1] Section 17, *Trade Marks Act 1995.*

further distinguish their products from others in the market.

The Western Australian Aboriginal Business Council has developed an authenticity label for Indigenous products. The label is a registered ordinary trade mark which can be used on any product painted, crafted, designed and produced by Aborigines indigenous to Western Australia.

3. Collective trade marks

A collective trade mark is a sign used in relation to goods or services dealt with or provided in the course of trade by members of an association, to distinguish the goods or services of members of the association from those of non-members.[3] Like ordinary trade marks, collective trade marks are used to indicate that the goods or services come from a particular source, rather than indicating that they meet a certain standard. However, the source in the case of a collective trade mark is not a single trade source but comprises the members of the association which registers the collective mark. Registration is not available for trade marks used solely to indicate membership of an association or organisation. The trade marks must be applied to goods or services.

There is no requirement to file any rules governing the use of a collective trade mark. Only members of the association in whose name a collective trade mark is registered may use it. A member of an association which has registered a collective trade mark does not have the right to prevent another member of the association from using the trade mark, unless the use is against the rules of the association governing that trade mark.[4]

A collective mark may be an option for Indigenous cultural products if the purpose is only to show that the products are made by Indigenous producers who are members of say, an Indigenous cultural industry association.[5] The mark would not necessarily endorse the quality of the goods or services provided by members of an association, other than to indicate that the association s membership requirements had been met.

It might be possible for the rules of an association or codes developed by the association to deal with authenticity issues. In this way, the collective mark would become a type of an endorsement mark.

Since the introduction of this category in 1995, there have been only a few collective marks registered, including marks from groups such as Toyota Dealer Group.

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[2] Department of Aboriginal Affairs, The Aboriginal Arts and Crafts Industry, Australian Government Publishing Service, Canberra, July 1989, p 315.

[3] Section 162, *Trade Marks Act 1995.*

[4] Section 165, *Trade Marks Act 1995.*

[5] Sol Bellear, Guarding our Past, Facing our Future , presented to the Julayinbul Conference on Aboriginal Intellectual and Cultural Property, 25-27 November 1993.

4. Certification marks

A certification mark is used to distinguish goods or services which possess a certain quality, accuracy or characteristic. The distinguishing characteristics may include geographic origin, quality of material used or the mode of manufacture.[6] Use of the mark is certified by the registered owner of the certification mark, or by representative organisations approved by the registered owner under the rules for use.

AIPO asserts the certification provisions are well suited for protecting a certification mark which authenticates Indigenous people s products.[7]

An application must be made to the Registrar of Trade Marks to register a Certification Trade Mark. If the Registrar finds there are no grounds for rejecting an application, the application, including the rules governing the use of a registered certification trade mark, is sent to the Australian Consumer and Competition Commission (ACCC) for consideration. If the ACCC is satisfied that the applicant is competent to certify the relevant goods or services, and that the rules would not be detrimental to the public, the ACCC issues a certificate to that effect. If the ACCC issues a certificate, the Registrar must accept the application, subject to any conditions or limitations. The rules governing the use of a registered certification trade mark must be available for public inspection.

A certification mark may be useful for Indigenous cultural products if the purpose of the mark is to certify that the work is authentic, that is, it is produced by Indigenous people who have a claim to the type of style or to use the type of knowledge or information embodied in that product.

5. Legislative trade marks

It might also be an option for the trade mark to be protected under its own legislation in a way similar to the protection given to the *Olympic insignia in the Olympic Insignia Protection Act 1987* and the *Sydney 2000 Games (Indicia and Images) Protection Act*.

The most favoured type of trade mark was the certification mark. This option would allow Indigenous people to encourage and promote authenticity and cultural integrity. As AIPO noted, the certification provisions are well suited for protecting a certification mark which authenticates Indigenous people s products.[8]

However, there is also value in individual organisations developing their own trade marks to be registered as ordinary marks. So too, Indigenous collective associations could explore collective marks to promote and enhance authenticity.

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[6] Section 169(b), *Trade Marks Act 1995.*

[7] AIPO, Submission to *Our Culture: Our Future*, October 1997.

[8] AIPO, Submission to *Our Culture: Our Future*, October 1997.

[9] Berndt Museum of Anthropology, University of Western Australia, Submission to *Our Culture: Our Future*, October 1997.

19.1.2 *Series of marks*

Respondents seemed to favour a series of marks rather than one mark. As the Berndt Museum of Anthropology noted, the use of a single certification mark would not be consistent with Indigenous authority structures.[9] Also, rules covering use of the mark could vary from region to region.[10]

19.1.3 *Protection of marks*

The Discussion Paper noted that a label will not prevent rip-offs. The degree of protection it affords would only extend to unauthorised use of the mark.

Under the *Trade Marks Act 1995*, a registered trade mark is infringed if a person uses a sign as a trade mark which is identical with, or deceptively similar to, the trade mark of goods or services similar to those for which the trade mark is registered.[11] The registered owners of famous trade marks are also protected: they can take infringement action if a person uses a sign that is identical or deceptively similar to their trade mark. The *Trade Marks Act* also protects registered trade marks by empowering Customs to seize and deal with goods imported into Australia if the importation infringes, or appears to infringe, a registered trade mark.[12]

The Act also creates certain offences for falsifying trade marks[13] and falsely applying a trade mark.[14]

It is also possible to rely on relevant sections of the *Trade Practices Act 1974 (Cth)* and fair trading legislation in each State, which prohibit misleading and deceptive conduct.

19.1.4 *What is the purpose of the mark?*

Respondents generally considered that the mark should denote that the goods or services are produced by Indigenous Australians,[15] and also that the goods or services are produced in accordance with Indigenous laws, thereby denoting some type of cultural integrity in the goods or services. Another suggestion was that the mark authenticate cultural material from different regions and communities, and possibly States, if the material is marketed internationally.[16]

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[10] Charmaine Green, Submission to *Our Culture: Our Future*, October 1997.
[11] Section 120, *Trade Marks Act 1995*.
[12] Section 133, *Trade Marks Act 1995*.
[13] Section 145, *Trade Marks Act 1995.*
[14] Section 146, *Trade Marks Act 1995.*
[15] National Indigenous Media Association of Australia, Submission to *Our Culture: Our Future*, October 1997.
[16] Charmaine Green, *op cit*.

19.1.5. *Defining authenticity*

For the authentication mark to apply as a national mark for all Indigenous Australians, any definition concerning authenticity or cultural integrity of Indigenous goods and services will have to be accepted by Indigenous people nationally as reflecting their notions of what is an authentic Indigenous cultural product.

A label of authenticity

The National Indigenous Arts Advocacy Association (NIAAA) has proposed an authenticity certification mark and labelling system. The main objectives of the trade mark are:

1. To maintain the cultural integrity of Aboriginal and Torres Strait Islander art.
2. To ensure a fair and equitable return to Aboriginal and Torres Strait Islander communities and artists for their cultural produce.
3. To maximise consumer certainty regarding the authenticity of Aboriginal and Torres Strait Islander-derived works, products and services.
4. To maximise multiplicity and diversity of Aboriginal and Torres Strait Islander art.
5. To promote an understanding both nationally and internationally of Aboriginal and Torres Strait Islander cultural heritage and art.

After extensive consultations and research undertaken by Kathryn Wells on behalf of NIAAA, the following notion of authenticity has been formulated:

> *[It is] a declaration by Indigenous Australian artists of identity with, belonging to, knowledge about, respect for and responsibility towards the works of art they create.*
>
> *Identity is about upbringing, beliefs, stories, cultural ways of living and thinking and knowing what it is to be Aboriginal or Torres Strait Islander.*
>
> *Belonging means to be either connected with stories about country or connected with the experiences of history in being Indigenous in Australia.*
>
> *Knowledge is about the familiarity gained from actual experience and also having a clear and certain individual perception of expression.*
>
> *Respect and responsibility is about having regard for and looking after culture. It is about acting in a way which is sensitive to others and which does not exploit other peoples identity, knowledge and belonging.*[17]

[17] Marianna Annas, The Label of Authenticity: A Certification Trade Mark for Goods and Services of Indigenous Origin , (1997) vol 3(90) *Aboriginal Law Bulletin* pp 4-6.

19.1.6 *Marketing the mark and labelling system*

The mark s value as a marketing tool is substantial. To establish goodwill and a reputation in the trade mark, an extensive advertising and monitoring system will need to be mounted to prevent inappropriate use and devaluation of the mark. There is also a need for a marketing and advertising strategy to encourage retailers to purchase "authentic" Indigenous art as well as to urge consumers to buy authentic products.[18]

The labelling system would initially concentrate on the arts-and-crafts souvenir market. Its value to other services has yet to be ascertained.

19.1.7 *Rules governing use of the mark*

If the mark is a certification mark, the rules for its usage would have to guarantee that the goods bearing the mark actually possess the certified characteristics. The rules would need to provide for:

- The intended the use of the mark.
- How the registered owner would monitor the use of the mark and prevent its misuse.
- The people who may be approved for the purpose of certifying goods or services.
- The conditions under which an approved user is to be allowed to use the certification trade mark in relation to goods or services.
- The use of the certification trade mark by the owner and any approved user.
- The settlement of any dispute arising from a refusal to certify goods or services or a refusal to allow the use of a certification trade mark.

The rules could also address the quality of the goods.

19.1.8 *Who will be the registered owner of the mark?*

The Discussion Paper raised the important issue of who should own the mark and authorise its use. The registered owner of the certification trade mark does not normally conduct trade in the kinds of goods and service which are the subject of the mark.[19]

There are several options regarding who might be the registered owner of the mark:

- A newly-established Indigenous Art Mark Association.[20]
- Local community art centres or land councils.[21]

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[18] Kathryn Wells, *Authenticity: Promotion and Protection of Aboriginal and Torres Strait Islander Art*, AAMA Consultancy, December 1993, p 3.

19 *Ibid*, p 7.

20 Kathryn Wells, *op cit*.

21 Marianna Annas, The Label of Authenticity: A Certification Trade Mark for Goods and Services of Indigenous Origin , (1997) vol 3(90) *Aboriginal Law Bulletin* p 6.

- ATSIC Board of Commissioners.[22]

Responses

Most submissions favoured an independent new Indigenous Art Mark Association. NIMAA suggested that a central administering body could authorise different creators around Australia to use the mark in accordance with the rules for its use.[23]

The Centre for Indigenous History and the Arts (CIHA) noted that at present there is no body or agency which is able to take on the role of determining which Indigenous communities or individuals would be eligible to be able to use the mark .[24] CIHA recommended that a new national authority be established, with the authority to allocate use of the mark and police unauthorised uses of it. This national body must have a specific allocation of funds to legally pursue infringements, particularly landmark cases.

The CIHA also suggested that if specific legislation dealing with Indigenous intellectual and cultural property was enacted and a national body ... created under that Act, it could be responsible for registering the certification mark and overseeing its administration, in addition to providing a support role to the implementation of the specific legislation .[25]

Some submissions favoured State-based labels. For example, the Tasmanian Aboriginal Land Council (TALC) suggested that the mark be controlled by appropriate groups recognised at the State level. The TALC reported that Tasmanian Aboriginals would most likely prefer to have their own certification mark.[26] This idea was taken further by participants at the Brisbane Workshop on Indigenous Cultural and Intellectual Property,[27] who suggested a multi-level labelling system that could make use of State, regional and local Indigenous structures.

It is possible for a certification mark to allow multi-level control. The central body can license other State and regional bodies with power to authorise use of the national mark (see figure opposite). The central authority might also develop a series of marks.

19.1.9 *Design for trade mark*

The design or logo must be distinctive, yet acceptable to all Indigenous groups.

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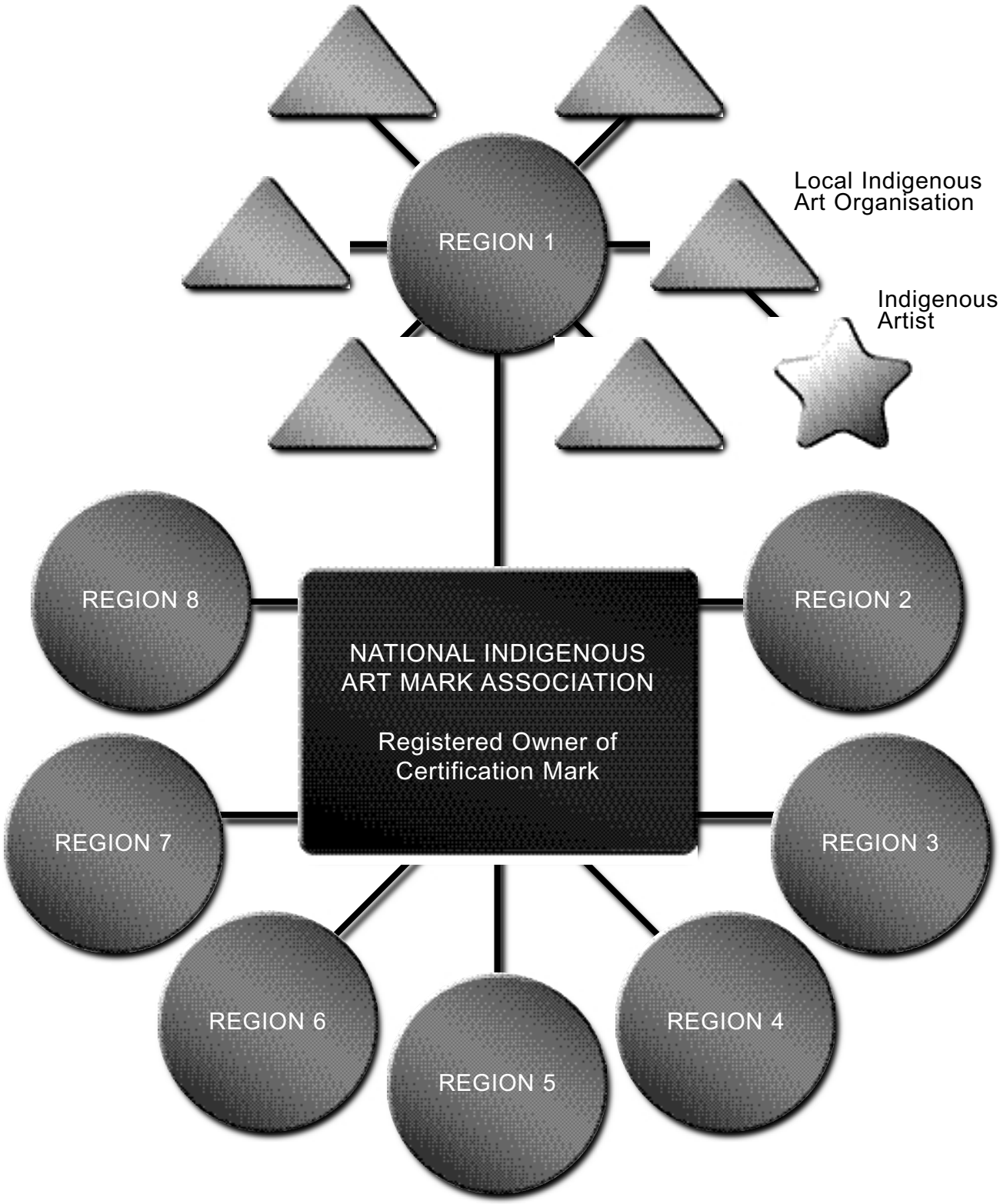
[22] Sol Bellear, *op cit*, p 105.
[23] NIMAA, op cit.
[24] Centre for Indigenous History and the Arts (WA), Submission to *Our Culture: Our Future*, October 1997.
[25] Ibid.
[26] Karen Brown, Administrator, Tasmanian Aboriginal Land Council, Submission to *Our Culture: Our Future*, October 1997.
[27] Indigenous Cultural and Intellectual Property Workshop hosted by the Queensland Community Arts Network, October 1997.



KEY:

NATIONAL BODY
Registerd Owner of Mark
Licenses Granted Only

REGIONAL/STATE BODY
Licenses to Use and
Authorise Use of Mark

LOCAL BODY
Licenses to Use
and Authorise Use

INDIVIDUAL
Licenses to Use only

19.2 Business credential systems

Another possible authentication system is business credentialling. Delegates from the Jumbunna Learning Circle advocated business credentialling systems which support and promote businesses that deal only in authentic Indigenous products, in accordance with fair trading principles and Indigenous cultural protocols. It was suggested that NIAAA and the IRG could oversee this.[28]

However, it is possible for existing Indigenous organisations to adopt such systems in all fields. For example, Aboriginal Tourism Australia could adopt a system of credentialling tourism ventures which promote authenticity and cultural integrity. A trade mark could be developed to promote this.

19.3 Referral services

Another system that might encourage authenticity, particularly in the research and professional field, is the establishment of referral services by Indigenous communities and organisations. These could be promoted to the government and business sector as the preferred people to consult or engage in research activities concerning Indigenous cultural issues.
For example, the Victorian Aboriginal Corporation for Languages developed a Code of Ethics for Researching and Publishing Languages which suggests the registration of Indigenous linguists, language teachers, educators and other specialists, nominated by Aboriginal communities, as the true authorities on matters relating to their language, culture and spirituality.[29]
The registration authority could adopt a badge or logo for authorised members to display on their letterhead and business profiles.

19.4 Other authentication systems

Karl Neuenfeldt notes that in Canada there is a system for music production called Can Con where songs are awarded points for degrees of their Canadianness . These points are allocated to songs according to government requirements for Canadian content and authenticity.[30] Similar systems could be introduced in Australia to measure Aboriginality , either as part of the wider National Indigenous Certification Mark or within various industries.

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[28] Jumbunna Centre for Australian Indigenous Studies in Education and Research (CAISER), Submission to *Our Culture: Our Future*, October 1997.
[29] Victorian Aboriginal Corporation for Languages, Language Conference Report, Camp Jungai Cooperative Ltd, 29-31 July 1996.
[30] Karl Neuenfeldt, University of Central Queensland, Submission to *Our Culture: Our Future*, October 1997.

Chapter Nineteen : Recommendations

19.1 Support should be given to establishing a national certification mark and labelling system which allows local, regional and State decision-making on who may use the label. The mark — and a series of derivative marks which allow for local, regional and State differences — should be registered under the *Trade Marks Act.*

19.2 The purpose of the Indigenous certification mark is to:

- Promote products made by Indigenous people in local, regional, national and international markets.
- Denote authentic Indigenous cultural products.
- Help consumers identify authentic, genuine Indigenous cultural products and to indicate sale of the item is not culturally sensitive and has the authority of the community.
- Increase fair and equitable returns to Indigenous producers.

19.3 Any definition of authenticity adopted and applied under the mark s rules should acceptable to Indigenous people. Indigenous people need to decide upon and be informed of any definition. Any definition must be supported by Indigenous people nationally or allow for local and regional variations.

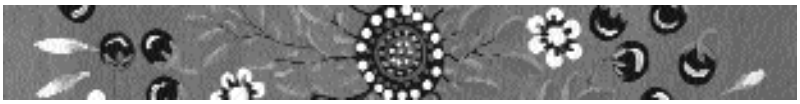
19.4 The registered owner of the mark should be a newly-established Indigenous authority which has the power to license use of the label to local and regional organisations. Indigenous people should be involved in the establishment and management of the authority and its infrastructure. The national authority authorises State, regional and local authorities to affix the mark to products meeting the requirements under the rules. Consent and authority to use the label by individual artists should be made at the local, regional and State level.

19.5 A marketing strategy needs to be developed to coincide with implementation of the mark.

19.6 Indigenous communities should be encouraged where appropriate to make use of registered trade marks and collective marks to enhance goodwill in their products and promote the authenticity of their community s products.

CHAPTER TWENTY

Collecting systems



20.1 Introduction of public domain royalties system

A public domain royalties system involves the payment of royalties for the use of literary and musical works in the public domain , where the use is for profit. For example, the system would apply to Indigenous art where the artist has been deceased for more than 50 years. The royalties could be regarded as a form of cultural levy and provide an effective protection mechanism for a nation s cultural heritage .[1] In effect, this solution provides a source of funds and treats the art as an economic commodity.

This concept has been used by other nations to protect national folklore. Its introduction in Australia would require legislation to establish an administrative body to collect the royalties. (See Chapter 9, Amendments to *Copyright Act*.)

The Discussion Paper noted that the introduction of a public domain collecting system assumes Indigenous cultural works, out of copyright, are in the public domain. While under the current law this is the case, Indigenous rights to such material is inalienable and its use is always conditional. Under Indigenous laws, ownership vests with Indigenous groups in perpetuity.

Many respondents did not support the idea of Indigenous cultural material being considered in the public domain. For this reason, this option was not favoured. It was generally felt that any collecting system should be based on the premise of prior consent.

Alternatively, a submission from the National Library of Australia considered that there was some merit in establishing a public domain royalties system. According to the National Library, the system would be a way of protecting Indigenous materials of unknown authorship and ensuring some return to the community as large. For at least some agencies it would also provide an administratively simple way of dealing with the issues [2]

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[1] Australian Copyright Council *Bulletin* 75, p 39.

[2] National Library of Australia, Submission to *Our Culture: Our Future*, November 1997

20.2 Introduction of a resale royalty

20.2.1 *What is the resale royalty?*

The resale royalty, or *droit de suite*, is the right of an author — or after his or her death, the rights of his or her heirs and other beneficiaries — to receive a percentage of the price of the art when it is resold. This right exists in some countries, including France, and California in the United States. The right of an artist to claim a percentage of the increased value of her or his work on resale is not currently recognised in Australian law.

The Tunis Model Law on Copyright for Developing Countries (1976) included provision for the resale royalty.[3] The model law suggests the introduction of an inalienable right to an interest in any sale of a work. Inalienable means that the author can give the right to a third party voluntarily and that the rights continue after the death of the artist. The law applies only to graphic or three-dimensional works of art and possibly to the manuscripts of writers and composers where these are sold at auction or through a dealer. The Tunis Model Law does not state terms of conditions for exercise of the resale royalty, other than to say this would be determined by the competent authority.[4]

20.2.2 *Australian Copyright Council Report on Resale Royalty (1989)*

In 1989, the Australian Copyright Council reported on whether resale royalty regulations were appropriate for Australia and, if so, what form the regulations should take.[5] The report supported the principle of a resale royalty as a mechanism for encouraging creative endeavour by rewarding visual artists with a share in the increasing value of their creative product .[6] The ACC recommended:

1. That there should be informed public debate together with an education program to confirm the proposition that the scheme is considered important and has public support in principle.

2. Consideration should be given to the best way to introduce the resale royalty. The establishment of an artists collecting society in Australia was considered an urgent need in making sure such consideration was given.

One model the ACC put forward was a legislative scheme. According to the ACC findings, the legislative model would preferably involve amendment to the *Copyright Act 1968* rather than specific legislation. Amendments to the *Copyright Act* would need to

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[3] Section 4bis, *Tunis Model Law on Copyright*, as cited in *Copyrigh*t, July-August 1976.
[4] *Ibid*, p 169.
[5] Australian Copyright Council, *Droit de Suite: The Art Resale Royalty and its Implications for Australia*, Report commissioned by the Australia Council and the Department of Arts, Sport, the Environment, Tourism and Territories, February 1989.
[6] *Ibid*, p 6.

include a general definition of the works of art to be covered. Some other features of the model include:

- The imposition of the royalty on sales with a public element at least in the initial stages of operation;
- A fixed percentage royalty calculated on the full sale price above a specified threshold;
- A right operative over the full term of the copyright, inalienable and effective in relation to sales from the time of the legislation irrespective of the date of creation of the work of art;
- A system of collection and distribution operated through an artists collecting society;
- Civil remedies available to the artists when the scheme is not complied with;
- Inclusion in the scheme of foreign nationals on the basis of reciprocity;
- Consistent with the *Copyright Act*, the scheme should cover Australian citizens and residents.

Since the ACC report, Vi$copy has been established as the Australian artists collecting society.

20.2.3 *Benefits for Indigenous artists*

The Discussion Paper noted that the right to receive a resale royalty is relevant to all artists, but especially to Indigenous artists, because the recognition of Indigenous work in the fine-art market over recent years has resulted in an enormous increase in the value of work produced, say, 20 years ago. The recent example of Johnny Warangkula Tjupurrula highlighted the issue for Indigenous artists: a painting he originally sold for $150 brought $206,000 at auction.[7]

Issues

The Discussion Paper asked:

- Should a resale royalty be introduced?

Responses

At the IRG meeting in September 1997, several members supported the introduction of a resale royalty in Australia.[8] Many respondents to the Discussion Paper also supported the introduction of a resale royalty in Australia, and the National Aboriginal and Torres Strait Islander Cultural Industry Strategy recommended the introduction of roy-

[7] Maria Ceresa, Master painter will settle for a Toyota , *Weekend Australian*, 5-6 July 1997.

[8] Conrad Ratara, Central Land Council, IRG Meeting, 15-16 September 1997.

alties to Indigenous and other artists on resale of their works.[9]

Vi$copy strongly supports the introduction of a resale royalty scheme in the Australian secondary market. It is important for Indigenous artists to not only generate income from artwork during their lifetime but also after their death. The Vi$copy submission cites a statement by Yikaki Maymuru:

> *Copyright is one of the few property rights owned by Indigenous people. The income earned from resale royalties can also be handed down so that families can continue to receive an income which can sustain the community.*[10]

The Tasmanian Museum and Art Gallery proposed that resale royalties could apply only to Indigenous sacred works. The Tasmanian Museum and Art Gallery state:

> *The sacred nature of the knowledge and themes embodied in the works would need to be established and emphasised to give such works a special standing, unless, of course, this type of resale right is won by all artists.*[11]

20.2.4 *Introduction by way of contract*

Some Indigenous arts centres have explored the possibility of introducing a resale royalty as part of their contract of sale. While this may compel first buyers to share the proceeds of the first sale, subsequent purchasers would not be bound to honour the contract of sale with the first buyer. Legislative changes are necessary to bind subsequent purchasers.

20.2.5 *French and European legislation*

The resale royalty (or *droit de suite*) is a right recognised in French law and there are moves within the European Commission to introduce resale royalties throughout Europe.[12] The proposed European legislation is based on the Berne Convention, with provision to exclude private transactions between individuals from its scope. But the right shall apply to resale through public offices, auction houses, galleries or other commercial agencies. It is suggested that royalties shall be payable on the sale price of any transaction involving transfer of ownership of works apart from the first sale. The proposed legislation suggests that the artist s resale right will be inalienable and unwaivable.

The proposed European legislation sets out to standardise the categories of original works subject to the right. Categories include manuscripts, collages, paintings, drawings, engravings, prints, lithographs, sculptures, tapestries, ceramics and photo-

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[9] Action 2.5 of ATSIC, National Aboriginal and Torres Strait Islander Cultural Industry Strategy, prepared by Focus, p 22.

[10] As cited by Anna Ward, Vi$copy, Submission to *Our Culture: Our Future*, October 1997.

[11] Debby Robertson, Tasmanian Museum and Art Gallery, Submission to *Our Culture: Our Future*, October 1997.

[12] European Communication Council, *Exploring the Limits,* 1997, p 213.

graphic works. Works of applied art are excluded. An application threshold of a sale price of ECU 1,000 will be set. Member nations would be able to apply *droit de suite* from a price lower than the EC threshold.

The EC has set a tapering scale of rates based on three price bands. The basic rate would be 4 per cent of the sale price net of tax; the intermediate rate 3 per cent; and the upper rate 2 per cent. Member nations would be free to determine the procedures for collecting and managing the right.

Rights holders would have the right to obtain any information necessary to secure payments under the resale right. Enjoyment of the *droit de suite* would be restricted to EU nationals and foreign authors whose countries offer reciprocal treatment to EU authors.[13]

According to the European Communication Council, the inclusion of Britain in the EU, as recommended by the European Commission, will set the precedent for the introduction of resale royalties in common law countries.[14] In light of this, it is important for Australia to consider the introduction of the resale royalty within the Australian legal system.

20.3 Indigenous collecting society

Another solution put forward was to set up a collective administration system to administer the rights of Indigenous artists, authors and creators. This might be established under legislation as discussed above or it might be voluntary. Discussions and recommendations relating to this are raised in Chapter 9, Amendments to the *Copyright Act*.

Chapter Twenty : Recommendations

20.1 *Public domain collecting society*

The establishment of a public domain collecting society for Indigenous works is not favoured because this supports the current legal assumption that Indigenous cultural and intellectual property out of copyright is in the public domain and free for all to use and exploit.

20.2 *Resale royalty*

- Introduction of a resale royalty within the Australian legal system for artists generally should be supported in principle.
- Administrative costs must not exceed the benefits to artists.

[13] *Ibid.*
[14] *Ibid*.

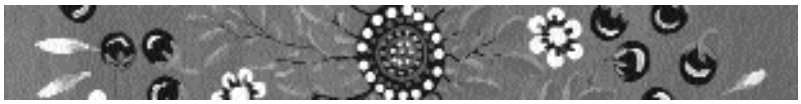
- There is an urgent need for Indigenous artists to participate in informed public debate concerning the best way to introduce a resale royalty to allow for culturally appropriate distribution of collected monies.

- There is also an urgent need for Indigenous artists to be better informed concerning estate management of copyright and other rights relating to their works.

20.3 *Indigenous collecting society*

Further consideration should be given to the establishment of an Indigenous collecting society. If established, the society should be voluntary and operate on the premise of prior consent. It should also be managed and controlled by Indigenous people.

Negotiating rights under written agreements



Although there are currently no laws requiring recognition of Indigenous rights, governments, cultural bodies and commercial interest groups can enter written agreements with Indigenous custodians of cultural knowledge or resources to give effect to these important rights.

The Discussion Paper pointed out that in projects involving Indigenous Cultural and Intellectual Property, there is scope for contracts with commercial users of Indigenous cultural and intellectual property to ensure profits are shared. Trusts or other collective authorities could play a part.

Some good faith agreements have already been made with commercial organisations and governments. But there is no legislative requirement for to do so. It is important to note that if legal reforms suggested in Chapter 18 come about — shifting the onus on to the commercial user to ensure that Indigenous Cultural and Intellectual Property rights are respected — there will be greater use of contracts.

In the absence of legal reforms, government bodies should encourage cultural contracts, especially regarding biodiversity and research. Research and cultural funding bodies such as the Australia Council and the Australian Film Commission could also include clauses recognising Indigenous Cultural and Intellectual Property rights in their grant or funding agreements. Many respondents agreed. For example, a submission from the City of Wanneroo suggested that cultural contracts could cover issues such as:

1. Communal ownership.
2. Attribution.
3. Protection and financial rewards for contribution.
4. Any other relevant provision.

21.1 Biodiversity agreements

Australia s obligations under Article 8(j) of the Convention of Biological Diversity, require it to promote the wider application of traditional knowledge, innovations and practices and encourage the equitable sharing of the benefits arising from the use of traditional knowledge, innovations and practices.[1] The National Strategy for the Conservation of Australia s Biological Diversity includes this objective:

> *Recognise and ensure the continuity of the contribution of the ethnobiological knowledge of Australia s indigenous peoples to the conservation of Australia s biological diversity.*[2]

The Discussion Paper noted that agreements on the use of Indigenous resources could be entered into with research and development agencies including government, pharmaceutical and environmental management companies.

Woodliffe believes that if the claims and aspirations of Indigenous people — and the goals of conservation and sustainable use of genetic resources — are to be dealt with effectively and fairly, certain matters should be subject to clearly defined deeds and regulations,[3] including:

1. Who would determine access to resources and on what terms? In this respect, the principle of informed consent is of paramount importance.

2. How would a fair and equitable compensation be calculated for the contribution of all those who have invested in the discovery, use and continued existence of genetic resources? These would include Indigenous communities, researchers, collectors, producing companies and source countries.

There is great potential in contractual relationships between the collector responsible for making an inventory of genetic resources and a public agency or private pharmaceutical company that screens the resources for commercial development. Some clauses Woodliffe suggests include:

- The collector must not obtain samples or information about the ethno-botanical use of the samples from Indigenous people without their informed consent. Where that sample or information leads to the identification of a sample from which is ultimately derived a product for a use similar to that specified by the Indigenous people, such people are to receive each quarter, a fixed percentage royalty on net sales worldwide.

- Clauses could impose the highest standard on collectors regarding the conservation of biologically diverse ecosystems. For example, the collector must warrant that an environmental assessment of the accumulative affects of collection activities has been conducted by an independent and experienced authority in environmental auditing.[4] The audit would include interviews with Indigenous people and determine violations of

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1 Article 8(j), Convention of Biological Diversity.

2 Objective 1.8, National Strategy for the Conservation of Australia s Biological Diversity.

3 John Woodliffe, Biodiversity and Indigenous Peoples , in C Redgwell and M Bowman (eds), *International Law and the Conservation of Biological Diversity*, Kluwer Law International, 1995, pp 255-269.

4 *Ibid*, p 268.

applicable laws on environmental standards or affects on relations with, or the rights of, such people.

- Other clauses could seek a warranty from the collector that informed consent has been obtained to create the agreement and carry out activities accordingly. This consent must be obtained from appropriate representatives of the Indigenous community living in or using the area where the activities are to be conducted.
- At all stages, there must be wide consultations with local communities, and any conservation measures must be compatible with and build upon Indigenous cultures.[5]

Woodliffe suggests that State and Territory governments could make access to genetic resources conditional on payment of a licence or user fee, or compliance with the above provisions. While Indigenous people are not parties to the contract, their rights are enforced by and through supplementary agreements. It is also possible that a standard biodiversity contract along these lines could be enforced by national legislation.[6]

Merck-INBio agreement

The most widely publicised biodiversity prospecting agreement is the Merck INbio agreement between the US pharmaceutical company, Merck, and the National Biodiversity Institute of Costa Rica (INBio).

INBio is a private, non-profit organisation. These two groups struck a deal in 1991, in that INBio would provide Merck with samples of plants, insects and micro-organisms from designated wild lands in Costa Rica. Merck was given exclusive rights for two years to screen these samples and to keep the patents to any commercial products that resulted from the screening.

Merck, in return, would provide INbio with US$1 million as well as royalties from the sale of commercial products. Costa Rica earmarked half of any royalties for the conservation of the biological diversity in its national parks.[7] This contract was underpinned by national legislation regulating access by collectors to Costa Rican National Patrimony .

Attempts have recently been made to build on the Merck-INBio Agreement by formulating model terms for contracts between collectors and companies to ensure, among other things, recognition of the ethno-botanical knowledge of Indigenous people, the return of benefits to them, and collectors obligations towards them.[8]

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[5] *Ibid.*
[6] *Ibid*.
[7] *Ibid*, p 267.
[8] *Ibid.*

Medical researchers have often made use of Indigenous knowledge and resources in their quest to discover the full extent of the earth s biological resources. The international promotion of ethical research has now encouraged many research companies to enter into agreements with Indigenous people. In 1996, Amrad signed an agreement with the Tiwi Land Council for bioprospecting purposes. The Central Land Council reports that it receives a considerable number of requests for bioprospecting each year.[9] Other Land Council and Indigenous groups are also being approached. A problem many Indigenous groups have noted is that often they do not have any comparative analytical material on which they can base their negotiations. Furthermore, often they do not have the legal resources to consider, draft and negotiate the terms of the agreements. Hence, it would be useful for a minimum standards agreement to be developed. The agreement should aim to provide equitable terms for the sharing of benefits that are derived from bioprospecting activities. The agreement should be developed by Indigenous people in association with pharmaceutical companies and commonwealth, state and local government.

21.1.1 *Local government*

In response to the issues raised in this section, the City of Wanneroo submitted that contracts between Indigenous communities and local government authorities should contain provisions on Indigenous Cultural and Intellectual Property, taking into account cultural sensitivity.[10]

This idea could be extended to other bodies, including tourism associations.[11] Other suggestions included agreements between the Heritage Commission, government agencies, collecting authorities, industry groups, private land-holders and institutions. Participants in the Australian Reconciliation Convention taking part in a seminar on local and regional agreements emphasised the need to develop agreements between local governments and Indigenous communities which can form the basis of appropriate protocols for the use of natural resources. The following proposition was accepted:

> *The Australian Reconciliation Convention supports the development of local and regional agreements about land ownership and use and provision of services to Indigenous communities as a means of recognition and acceptance of Indigenous rights and interests and of recognition of non-Indigenous rights and interests.*[12]

21.1.2 *Government authorities*

There is also scope for government authorities responsible for areas and aspects of Indigenous Cultural and Intellectual Property to enter agreements and/or develop policy concerning the use and control of such cultural material.

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[9] Telephone advice Tony Keyes, Legal Office, Central Land Council

[10] City of Wanneroo, Submission to *Our Culture: Our Future*, October 1997.

[11] Mike Lean, Queensland University of Technology, Submission to *Our Culture: Our Future*, September 1997.

[12] Council for Aboriginal Reconciliation, *Renewal of the Nation*, Convention Outcomes, Melbourne 26-28 May 1997, p 35.

The NSW National Parks and Wildlife Service (NPWS) has primary statutory responsibility for Aboriginal heritage protection in NSW. The *National Parks and Wildlife Act 1974* makes all Aboriginal relics (objects and sites) the property of the Crown and vests responsibility for the care, control and management of relics with the Director General of the NPWS.

The NPWS reported that in 1996, after extensive negotiations, its executive entered into a formal agreement with the service s Aboriginal Heritage staff which included a framework and implementation principles to govern all NPWS Aboriginal heritage management functions.[13]

The NPWS executive recognised that the service would have managed its Aboriginal cultural heritage responsibilities more effectively in the past by consulting more widely with Aboriginal people in their communities. It also recognised that it should have responded more positively to the Indigenous communities long-standing concerns regarding the recognition, protection and management of their cultural heritage. The NPWS has now included an Aboriginal Heritage Vision Statement in its corporate plan. An overriding principle of the Vision Statement is:

> *Recognising and respecting the Aboriginal people of NSW, their long-standing spiritual relationship with the environment and their living and involving cultural heritage as essential components of the State s heritage, history and identity, ensuring that Aboriginal people are actively involved in the protection and management of their cultural heritage in NSW and joining in partnership with Aboriginal communities and peoples for the purpose of enhancing the understanding of and the conservation of the Aboriginal cultural heritage of the State.*[14]

The NPWS Aboriginal Heritage and Policy Framework contains procedures for dealing with Indigenous cultural material. The policy includes clauses drawn from the Draft Declaration of the Rights of Indigenous People and the Daes guidelines:

> *Notwithstanding the limitations of existing legislation, NPWS recognises that Aboriginal people are the rightful owners of Aboriginal cultural heritage information and relics including sites.*
>
> *Where the NPWS is neither the holder of such information nor the owner of the lands on which the relics exist, it will facilitate ... access to the information and relics.*
>
> *When NPWS comes into possession of such information and relics, it recognises that is the caretaker of this material on behalf of Aboriginal people. The service agrees that it will only release the information and/or relics to others, including officers of the service, with the agreement of the relevant Aboriginal people of the area or origin of the information on relics.*

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[13] NPWS (NSW), Submission to *Our Culture: Our Future*, October 1997.

[14] *Ibid.*

> *As far as the law allows, NPWS agrees to respect and honour any reasonable access and confidentiality requirements requested by the relevant Aboriginal community placed over the information and/or relics in possession of or under the control of NPWS.*[15]

Other sections of the policy framework cover participation, advocacy, education and training, transparency, accountability and implementation.

21.1.3 *Regional agreements*

Gibson submitted that during the five to seven years since the Mabo decision and the passing of the *Native Title Act*, Indigenous groups have sought new and diverse ways to gain recognition for the right to make decisions regarding their lands and all aspects of life, based on regionally-negotiated agreements between communities and other stake-holders, including governments, resource developers, national park authorities and environmental groups.[16]

The underlying assumption of these negotiated agreements is the right of Indigenous communities to make decisions regarding their lands and cultures as distinct jurisdictions in themselves.

Gibson believes that while Indigenous sovereign rights have not been recognised by successive Australian governments and are not enshrined in the Australian Constitutional Common Law, the *Native Title Ac*t does provide a framework for regionally-negotiated outcomes to land tenure disputes.[17]

Gibson suggests that the regional agreement framework could be useful for Indigenous Cultural and Intellectual Property rights. Regional agreements do not take any prescribed form and are flexible, to allow Indigenous communities to set their goals and work towards them in negotiation with relevant stake-holders. Several submissions also noted that regional agreements may be an effective way of achieving Indigenous self-determination in political climates where legislative recognition of sovereign rights remains unlikely, as with the current Federal Government s response to the Wik decision .

21.1.4 *Workshop on traditional knowledge and biodiversity*

In October 1997, the Biodiversity Group of Environment Australia convened a workshop to give Indigenous Australians an opportunity to discuss the Convention of Biological Diversity and the National Strategy for the Conservation of Australia s Biological Diversity. According to the workshop participants, the National Strategy for the Conservation of Australia s Biological Diversity only partially recognises Indigenous interests in the use and management Australia s biodiversity and falls short of full and proper recognition of Indigenous rights in resources.[18]

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[15] *Ibid.*

[16] Chris Gibson, Sydney University, Submission to *Our Culture: Our Future*, October 1997.

[17] *Ibid.*

A draft paper on the outcomes of the workshop noted that there has been small progress in including Indigenous people in the use and management of Australia s biodiversity other than a few examples of joint management arrangements and the inclusion of Indigenous representatives on some government and agency advisory committees.[19] The draft paper notes:

> *There is a moral obligation for Australian governments to develop legally binding treaties and agreements with indigenous Australians to protect indigenous culture and resources, as has happened for other indigenous peoples in Canada and New Zealand. Once indigenous rights to Australia s biodiversity are recognised, all Australians will be on equal footing. Only when indigenous rights are recognised will meaningful and binding regional agreements on the management and use of Australia s biodiversity be reached.*
>
> *Agreements need to recognise traditional owners and the broad range of stake holders including industry groups, environment groups, recreation and tourism. This would start the process leading to all levels of government pursuing joint management of natural resources with indigenous Australians. Agreements negotiated with traditional owners are also needed in order to gain access to culture, land and resources, benefit sharing, royalties, compensation.*
>
> *Indigenous peoples need more than just recognition of their rights to own land or environment and resources, they also need continued government funding and resources to manage their land. Funding for this can easily be justified as a royalty for the economic development of Australia and compensation for loss of rights as well as being an opportunity for future joint management.*[20]

The workshop participants established an Indigenous Environment Advisory Group whose function is, among other things, to develop a process of negotiation to facilitate agreements between Indigenous peoples and the Federal Government.[21]

21.2 Cultural contracts

A practice is developing to include Indigenous cultural clauses in film contracts and in research projects concerning Indigenous cultural issues. For example, the Australia Foundation for Culture and the Humanities reported that the Foundation s funding contracts have in the past been amended to take into account the cultural sensitivities involved in certain Indigenous projects.[22] Similar provisions already exist in AIATSIS standard research contracts.

The Discussion Paper noted there is scope for greater use of cultural contracts and asked whether government funded bodies such as the Australia Council, the Australian Film

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[18] Draft document of outcomes of Workshop on Traditional Knowledge and Biodiversity hosted by Biodiversity Group Environment Australia, October 1997.
[19] *Ibid*.
[20] *Ibid.*
[21] *Ibid*.

Commission and the Australian Film Finance Corporation should make it a condition that grant recipients specifically recognise and take into account cultural sensitivities when working on Indigenous cultural projects.
Funding bodies have their own rules and guidelines for ownership of material. It is the responsibility of all parties to make these known and understood to Indigenous applicants or the Indigenous people who are the subject of any funding program.

21.2.1 *Publishing agreements*

There is also scope for publishing agreements to give effect to Indigenous rights. Indigenous publishing house Magabala Books reported that it contractually observes Indigenous cultural interests in its publishing contracts and practices in the following way:

1. *Asking copyright owners to sign heir letters at the time of accepting the contract so that the copyright owner can nominate those persons they wish to have the responsibility for copyright matters for at least a period after their death.*

2. *Magabala Books has, on several appropriate occasions, entered into contracts with Aboriginal corporations as copyright owners. These provisions have not been objected to and, while these arrangements present difficulties in attracting public lending right payments, they truly reflect the role of community in bringing some of our publishing projects to fruition.*

... Over the years, Magabala Books has negotiated contracts which attempt to bring the focus back to those Indigenous people who own their materials in the truest sense. Thus, many Magabala contracts reveal joint copyright as the negotiated position in these cases. We have also negotiated staged withdrawal by recorders from the financial benefit of a share of royalties and/or subsidiary licences.

Magabala Books relies heavily on community organisations for approvals to publish materials. Regional coordinating bodies, such as the Kimberley Aboriginal Law and Culture Centre, are equally invaluable. They, (the community organisations) are accessible, willing to assist, and are aware of the people and issues involved in any consideration of appropriateness of materials for publication.[23]

Music recording and publishing agreements could also include Indigenous cultural and intellectual property rights clauses.

21.2.2 *Location agreements*

One measure to regulate inappropriate reproduction of Indigenous sites on film is to

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[22] Telephone conversation with Judy Turner, Australia Foundation for Culture and the Humanities, July 1997.

restrict access. For example, greater land management opportunities such as those in Uluru/Kata Tjuta National Park — where the Aboriginal custodians have a say in park policy through the *National Parks and Wildlife Conservation Act 1975 (Cth)* — can allow control over activities within the boundaries of the national park. A permit is required to film or photograph in these parks for commercial purposes. By controlling conditions of access to sacred sites and other important areas, the Indigenous custodians can protect these areas from being inappropriately represented in photographs or films.

Agreements similar to film location agreements could be made with film-makers, researchers and all who come on to Indigenous land for commercial purposes. Terms could relate to some of the rights discussed in Part One of this Report.

21.2.3 *Industry body agreements*

There is scope for industry bodies charged with the management of Indigenous cultural material to enter agreements with all relevant parties concerning the use, management and dissemination of material.

The following is an example of an existing agreement which tackles some of these issues:

Film Australia model

Film Australia has been involved in the production of documentaries about Australia s Indigenous community since 1946. The films cover many issues relating to Indigenous culture, examining traditional lifestyles, as well as significant social issues Australia s Indigenous population has faced over the last 50 years. Recent films have been instigated by independent documentary film-makers and continue to include Indigenous people wherever applicable.

The Yirrkala Project was started in 1970 and includes 22 films, all on video. These films document many aspects of Yolngu.

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[23] Magabala Books, Submission to *Our Culture: Our Future*, October 1997.

A memorandum of understanding dated June 1997 between Film Australia and film-maker Ian Dunlop establishes the future custody and use of the ethnographic film collection Dunlop produced for Film Australia between 1962 and 1996. This memorandum has been deposited with relevant parties including Film Australia, the Australian Archives, the Australian Institute of Aboriginal and Torres Strait Islander Studies and Ian Dunlop. It provides guidelines on the secondary use of film footage:

- Material is not to be used in a way which contravenes the spirit or intent of its original use as approved by the community portrayed.
- Any secondary use of the material in which the material is editorially changed or used in another form must have the approval of the relevant Indigenous community.
- No material may be used as straight stock shot footage.
- Each request for footage must be assessed individually and subject to requirements governing access rights.
- The request must be appropriate to the relevant Film Australia production, that is, a history of the film; a serious anthropological, historical or scientific production; a production made by or for the community portrayed in the material; a production endorsed by the community portrayed in the film; a part of a display in a reputable museum or similar institute.
- Shots to be used as a quote or extract may be shortened but not otherwise re-edited provided that this does not alter the meaning of the shot.
- Original source of the extract or quote must be acknowledged with title and date of production.

Film Australia retains copyright ownership to all documentation and film material published by Film Australia up to the date of the memorandum of understanding. Unpublished, written and recorded documentation is deposited under appropriate categories of access with Australian Archives. Still photographs are deposited with AIATSIS.

All Film Australia s film material is deemed to be Commonwealth records under the terms of the *Archives Act 1983.*

Source: Film Australia, Submission to *Our Culture: Our Future*, October 1997.

21.3 Mechanisms for negotiating agreements

As evidenced above, there is great scope for Indigenous people to negotiate their Indigenous Cultural and Intellectual Property Rights by agreements with the various authorities and industry bodies that make use of Indigenous resources.

The Department of Aboriginal Affairs (NSW) suggested there is a need to develop mechanisms which allow Indigenous people to take part in community discussion and decision-making.[24] The Department also recommended that:

- Non-Indigenous negotiators should be trained in cultural awareness relating to Indigenous Cultural and Intellectual Property rights.
- Mainstream legal, cultural, administrative and other industries need to establish education and training of Indigenous Cultural and Intellectual Property rights to generate general awareness and understanding of Indigenous processes of negotiation and laws.[25]

Chapter Twenty-One : Recommendations

Mechanisms which allow Indigenous people to negotiate uses of Indigenous Cultural and Intellectual Property and share in any derived benefits should be encouraged.

21.1 Biodiversity agreements

- The development a process of negotiation which facilitates agreements between Indigenous people and local, regional, state and national authorities should be supported.
- Such a process should recognise Indigenous people s rights to their cultural environment and address Indigenous Cultural and Intellectual Property Rights.
- Agreements should be enforceable under national legislation.

21.2 Cultural agreements

- There should be support for cultural agreements within all industries which allow Indigenous people to negotiate on their Indigenous Cultural and Intellectual Property Rights.

21.3 Funding of research and cultural projects

Where Indigenous cultural projects or research is commissioned or funded by government agencies and research bodies, conditions of the grant/contract should be that Indigenous Cultural and Intellectual Property Rights are respected. Clauses should address following issues:

- Prior written consent of the Indigenous group whose culture is involved has been obtained.

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[24] Department of Aboriginal Affairs (NSW), Submission to *Our Culture: Our Future*, October 1997.

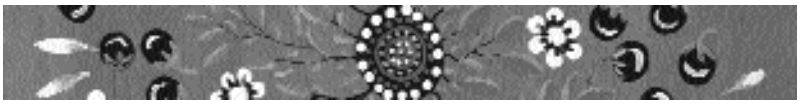
[25] *Ibid*.

- Any intellectual property rights have been negotiated and agreed upon between parties.
- The proposed use will not be culturally offensive or inappropriate under Indigenous customary law.

Criteria for grants could include:

- Active involvement of Indigenous people in the area which is the subject of the cultural project or research.
- Informed consent and support of the people from whom information is sought.
- Respect for confidentiality and privacy.
- Respect for cultural integrity and control of their own heritage.
- All material should be communicated to participating Indigenous people and communities in an accessible and acceptable manner.

Developing cultural infrastructure



22.1 Establishing a National Indigenous Cultural Authority

Another means of implementing reform might be to establish a national representative body with State representative offices and Indigenous staff trained in law, marketing and education. This option could give effect to Indigenous Cultural and Intellectual Property rights without the need for legislative action.

Several respondents and the Indigenous Reference Group in particular favoured this idea because of its ability to be a self-determining model for effecting Indigenous interests.[1] It was also seen as a model which could best address the comprehensive nature of Indigenous Cultural and Intellectual Property. It could also be a way to overcome the problems associated with customary laws being enshrined in legislation.

One suggestion, from Yunggorendi First Nation Centre for Higher Education and Research, was that the Authority should be a state agency system linked to a central agency. This would ensure greater accessibility by Indigenous communities. Such a central agency must play a coordinating and information holding role. State offices could act as agencies for local communities to register cultural and intellectual property.[2] Yunggorendi First Nation also suggested the Authority could house and register cultural and intellectual property and act as a reference centre for Indigenous Australians.[3]

22.1.1 *Functions of the Authority*

The Discussion Paper noted that some possible functions of the Authority could be to:

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[1] See discussion in Reform Options.
[2] Yunggorendi First Nation Centre for Higher Education and Research, Flinders University of South Australia, Submission to *Our Culture: Our Future*, October 1997.
[3] *Ibid.*

- Authorise uses of Indigenous cultural material.
- Provide general information on deals.
- Act as a watchdog over inappropriate and unauthorised use of Indigenous cultural material.
- Undertake public education and awareness strategies.
- Supply information on the existing legal system.
- Provide cultural information.

The Indigenous Reference Group (IRG) suggested that a main aim of the National Indigenous Cultural Authority could be to develop policies and protocols in all industries and areas which make use of Indigenous Cultural and Intellectual Property. Various Indigenous interest groups could be represented by the authority such as health, higher education, secondary education, medicine and tourism.[4]

The body could also monitor Indigenous Cultural and Intellectual Property protection nationally. A national approach to protecting Indigenous people s rights is required. Decision-makers in all States and Territories need to be aware of developments in other areas and communities of Australia, as well as internationally.

Responses

Some suggested functions of the National Indigenous Cultural Authority included:

- Negotiate with government and industry bodies to develop appropriate cultural protocols for dealing with Indigenous cultural property.[5]
- Educate the wider community on Indigenous cultural laws.
- Facilitate education by Indigenous community elders about culture and appropriation.[6]
- Educate Indigenous communities about non-Indigenous legal systems and the interface between the two systems of law.[7]
- Challenge western notions of property ownership of Indigenous cultural material; for example, bring Native Title actions for recognition of rights over intangible cultural property such as stories, songs, designs and knowledge.[8]

The AFC supported the establishment of a National Indigenous Cultural Authority which could include representatives of land councils, Indigenous arts and media organisations, archivists, Indigenous academics and so on. This Authority could play

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[4] Indigenous Reference Group meeting, Canberra, December 1997.
[5] Indigenous Reference Group meeting, Canberra, December 1997.
[6] Delegates at the Brisbane Workshop on Indigenous Cultural and Intellectual Property hosted by Queensland Community Arts Network, October 1997.
[7] Indigenous Cultural and Intellectual Property Workshop hosted by Mirimbiak Aboriginal Nations, October 1997.
[8] *Ibid*.

a role in education and awareness and facilitate negotiations between the recorder and Indigenous community representatives to ensure that appropriate permission is obtained and any conditions on the consent are adhered to.[9]

An authority which facilitates negotiations and authorisations could also collect fees from subsequent users of Indigenous Cultural and Intellectual Property, in a similar manner to a collecting agency. The authority could then distribute funds to the relevant Indigenous groups.

The desired outcome is to establish an Indigenous solution to protecting Indigenous cultural heritage so that the issues can be dealt with in a culturally appropriate way and also empower Indigenous decision-makers.

The Authority will need appropriately skilled staff with legal and cultural expertise and a board made up of Indigenous representatives of all areas of Indigenous cultural heritage, including biodiversity knowledge, medical and health.

22.1.2 *A national alliance*

Delegates from the Jumbunna workshop submitted there is an urgent need for Indigenous communities to form a national alliance which embraces existing interest groups, individuals and networks to specifically deal with issues of Indigenous Cultural and Intellectual Property Rights. Delegates also suggested that such an organisation should consider seeking NGO status.[10] This could be one of the functions of a National Indigenous Cultural Authority.

22.1.3 *Monitoring systems*

The Jumbunna workshop also recommended, among other things, the following action:

> *Encourage all persons to monitor and report suspected instances of appropriation of cultural property and breaches of authenticity to NIAAA, local communities and other appropriate Indigenous advocacy agencies. NIAAA could establish a 1800 reporting number for this purpose.*[11]

There is value in establishing monitoring links between organisations which can take enquiries from informants. This could be another role of a National Authority. Another avenue is to use the Internet and database a system to bring attention to these breaches. International links could also be established to safeguard against breaches in other countries.

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[9] Australian Film Commission, Submission to *Our Culture: Our Future*, January 1998.
[10] Jumbunna Centre for Australian Indigenous Studies in Education and Research (CAISER), University of Technology, Sydney, Submission to *Our Culture: Our Future*, October 1997.
[11] *Ibid.*

22.1.4 *Developing industry codes*

A National Indigenous Cultural Authority could bring together the collective expertise and experience of existing Indigenous peak bodies in the areas of film, arts, biodiversity and research. This authority could develop codes in consultation with the relevant professional associations and industries concerning appropriate uses of Indigenous Cultural and Intellectual Property. The AFC suggested that the authority could be empowered under legislation to enforce the protocols and/or codes of conduct.[12] The AFC noted:

> *The authority could be charged with ensuring that all communities become more cognisant of the current and future uses of recordings of heritage/culture so that each community's specific laws of permission, right to view and their cultural norms, were woven into the protocols and/or codes of conduct. For example, if a visitor (recorder, ethnographer, academic etc) wanted to visit Gunditjmara land, the authority would incorporate the cultural norms of the Gunditjmara into the protocols and/or codes of conduct which together would form part of the permission for the visit. Further, if the recording was to be made by an individual of his relative in a community, the cultural norms of that community would prevail.*[13]

22.2 Establishing an Indigenous Australian centre for traditional medicines

The Discussion Paper noted that the National Aboriginal and Torres Strait Islander Rural Industry Strategy proposed the establishment of an Indigenous-managed Australian Centre for Traditional Medicines, at Wujul Wujul.[14] The centre, if established, would undertake research, documentation, harvesting and processing functions; and help Indigenous communities negotiate contracts with research companies seeking to use their knowledge.

Respondents generally supported this proposal. Many pointed to the role such a centre could play in setting standards for sharing Indigenous traditional knowledge resources with the biotechnology industry.

22.3 Establishing registers

Another option raised in the Discussion Paper was to establish a register of cultural material and knowledge belonging to local Indigenous communities. This would help cultural institutions and others making use of Indigenous Cultural and Intellectual Property to contact the Indigenous owners of relevant rights. The Discussion Paper suggested this could be done under the *Australian Institute of Aboriginal and Torres Strait Islander Studies Act 1989* and

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[12] Australian Film Commission, Submission to *Our Culture: Our Future,* January 1998

[13] *Ibid.*

[14] ATSIC and the Department of Primary Industry and Energy, *National Aboriginal and Torres Strait Islander Rural Industry Strategy*, 1997, p 17.

noted that AIATSIS already undertakes native title research and keeps the Sacred Sites Register, set up under the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984.*[15]

22.3.1 *AIATSIS register*

The Tasmanian Aboriginal Land Council (TALC) submitted that most Indigenous groups have no idea what material AIATSIS holds.[16] TALC suggested there should be greater access to this information by Indigenous people and that the information be returned to the appropriate Indigenous groups.

The establishment of registers would help identify owners, which would be especially useful in the arts and crafts industry. AIATSIS already has experience in this area through a project undertaken by Belinda Scott to establish an Indigenous visual artists database.

There is scope to form some type of intranet database to be used by commercial users of Indigenous art, collecting agencies, cultural institutions and existing Indigenous arts and craft centres to identify ownership of material.

However, as John Clegg notes, a problem with registers is that people often think that if an item is not on the register it is not protected.[17] Hence, there is a need to emphasise that inclusion on the register does not, of itself, confer title.

22.3.2 *Indigenous arts and designs register*

Gray notes that one method of protecting Indigenous clan designs could be to establish some form of written record of protected designs. Artists and communities wishing to assert their legal rights over a design or some other work would apply to have their work included on the record. This method would allow certainty for both the individual artist or community, and an intending user of a work of art.

The problem with a register is that it could stifle development of both traditional and non-traditional art. Attempting to specify what is being protected could have the opposite effect of that intended, in that it could make the task of an intending appropriator easier.[18]

22.3.3 *Register for clearing uses*

Gray supports the establishment of a register to formalise and streamline the process of Indigenous law. He notes that an appropriate organisation could be responsible for providing clearances when subsequent users wish to use a design or item but fear

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[15] ATSIC, Submission to *Stopping the Ripoffs*, 1994.
[16] Tasmanian Aboriginal Land Council, Submission to *Our Culture: Our Future*, October 1997.
[17] John Clegg, Submission to Our *Culture: Our Future,* October 1997.
[18] Stephen Gray, Submission to *Our Culture: Our Future*, October 1997.

infringement on the rights of an Indigenous artist or community.[19] Gray recommends a system of prohibition rather than prior authorisation should be established, as recommended by the Working Party into the Protection of Aboriginal Folklore.

According to Gray, this means it would be necessary in all cases for a person wishing to use traditional Aboriginal art to obtain authorisation from the responsible organisation. He also points out that the organisation would need to have funds and staff available to consult with relevant organisations and communities in response to requests for clearance. There could be a time limit, fair payment, and if appropriate, the organisation could have the power to negotiate terms of use.[20]

22.3.4 *Are registers useful?*

After analysing the feedback received, it appears there is scope for registers or databases to be of use in so far as they relate to material that is already publicly available in some material form. New material or secret and sacred knowledge would need greater rights protection.

Furthermore, Indigenous people should have control over the content of any databases and registers established, as well as who can access and use the knowledge and related information on the register.

If the register is to act as a clearance system, it must be appropriately designed and operate on the premise of prior authorisation rather than under a blanket authorisation.

22.4 Establishing keeping places and community cultural centres

Keeping places or community cultural centres enable Indigenous people to say how they want their material collected, conserved, researched, exhibited, taught and performed. One suggestion in the ATSIC Cultural Policy Framework was to establish a national keeping place and a national network of keeping places.[21] Some commentators have argued for greater consultation with relevant Indigenous groups for the decentralisation of collections into community-based Indigenous museums or keeping places.[22]

Indigenous Australian communities have limited community-owned and operated cultural facilities to allow people to maintain and revitalise their cultures. The keeping place or cultural centre has the potential to become a primary focus or resource for activities concerning culture and identity.

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[19] *Ibid*.
[20] *Ibid*.
[21] ATSIC, Cultural Policy Framework, November 1995.
[22] Louise Anemaat, Documenting Secret/Sacred (Restricted) Aboriginal History , (1989) vol 17 *Archives and Manuscripts* pp 37-49, at p 43.

Issues

The Discussion Paper sought responses to the following issues:

- Should a national keeping place be established to collect, display and manage Indigenous cultural property? Or should there be a network of local keeping places? Should material be held by local communities?

Responses

A network of local keeping places for Indigenous cultural material was generally considered more appropriate considering that a major objective in establishing sovereignty over this material for Indigenous people is to give them access to it and power over how it is used. This could not be done effectively from a distance.

The Tasmanian Aboriginal Land Council noted that the concept of local holdings also gives scope for existing local institutions, such as museums, to continue in their role, accepting that they have adopted open and inclusive policies ensuring recognition of Indigenous people s rights over their collections and program participation by local Indigenous communities.

> *If the objective is to retain Indigenous rights at the local and state level, then a national keeping place is not appropriate, but if such a keeping place is established then Indigenous groups may agree to allow material to be retained there for a certain period. National bodies again usurp Indigenous rights.*[23]

Identified material should be held by local communities for their own purposes. The idea of a central keeping place should be canvassed among the Indigenous communities as an option, although there may be some objections to items from different groups being stored together. Perhaps this is where unreturnable museum collections could be stored, with Indigenous custodians.

22.5 National Indigenous archives

One recommendation made in *Folklife: Our Living Heritage*[24] was that the Government should consider proposals by the Central Australian Aboriginal Media Association (CAAMA) to establish an archival centre in Alice Springs. CAAMA proposed that regional Indigenous archives be set up around the country to store cultural material such as audio recordings of Indigenous music, oral histories, traditional stories, film and video recordings of traditional dances and secular ceremonies, and other relevant material such as documents, publications and photographs.

22.5.1 *Government records*

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[23] Tasmanian Aboriginal Land Council, Submission to *Our Culture: Our Future*, October 1997.
[24] Commonwealth of Australia, *Folklife: Our Living Heritage*, Report of the Committee of Inquiry into Folklife in Australia, AGPS, Canberra 1987, p 163.

The Discussion Paper asked the following question:

- Should a national Indigenous archive be established to house government records relating to Indigenous peoples?

Responses

Some respondents supported the idea of a national Indigenous archive to house government records relating to Indigenous peoples.[25] However, as noted in Part 2, the archives authorities did not support the transfer of original government records but did recommend that copies could be made and housed at regional and local Indigenous archives as suggested in the *Bringing Them Home* report.

22.5.2 *National Indigenous film archives*

Other suggestions for separate Indigenous archives include a national Indigenous film archive.[26]

Responses

The National Film and Sound Archive (NFSA) is the main body in Australia which collects audio-visual materials. According to the NFSA, to establish a separate specialist Indigenous film archive would cause problems in relation to costs and complexity in properly managing audio-visual materials. The NFSA submission noted:

> *A National Indigenous Film Archive should be considered in the context of collecting audio-visual materials and the difficulty in limitations of this. Costs of establishing archives are great and expensive and require specialised technical support. The NFSA strongly supports a distributed national collection of Indigenous material relying on the expertise of the Archive to support the housing of such materials, but there is concern that Indigenous communities might not have the capacity to care for such materials. In relation to the hot humid conditions and the very short life time that audio-visual materials can last in these environments.*[27]

The NFSA submitted that a cooperative structure that would allow materials to be given the proper preservation and storage environments was preferable.

22.6 Indigenous cultural legal services

Where there is scope for Indigenous artists and their communities to take action under copyright and other intellectual property laws, there is often limited funding and insufficient access to quality legal advice. Many worthy cases are not investigated and prosecuted because there

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[25] Mike Lean, Submission to *Our Culture: Our Future*, October 1997.
[26] Australian Film Commission, *Submission to the Culture and Heritage Inquiry* (unpublished).
[27] National Film and Sound Archive, Submission to *Our Culture: Our Future*, October 1997.

is no money. Costs associated with litigation are very high and in taking action, the applicant also risks paying the respondent s costs if the action is unsuccessful. This is often a deterrent to taking any action.

The Discussion Paper noted that there are currently limited legal services for Indigenous Australians regarding intellectual property law. The Arts Law Centre provides practical assistance on financial and contractual issues related to arts. The centre refers most inquiries regarding Indigenous issues to National Indigenous Arts Advocacy Association (NIAAA).

One suggestion raised in the Discussion Paper was to increase support to the Indigenous legal aid framework so that Indigenous legal services are properly resourced to provide advice in intellectual and cultural property issues.[28] For example, funding received by the Northern Australian Aboriginal Legal Aid Service and NIAAA enabled some individual Indigenous artists to bring copyright actions against infringers of their copyright in cases such as *(Deceased Applicant) v Indofurn* and *Bulun Bulun v Nejlam*.

Another possible solution canvassed in the Discussion Paper was to establish a National Indigenous Cultural Legal Centre, with the functions of developing model cultural contracts, providing advice to Indigenous individuals, groups and communities on cultural and intellectual property issues.

Responses

The responses confirmed the urgent need for legal services in all areas of Indigenous Cultural and Intellectual Property. The Tasmanian Museum and Art Gallery noted that:

> *Awareness of the law is essential ... A major priority is gaining the best possible advantage from existing and new laws. Indigenous individuals and communities must have access to legal advice.*[29]

The Central Land Council also supported the establishment of a specialist Indigenous Cultural and Intellectual Property Legal Resource Centre which could provide clear and uncomplicated materials to facilitate community education on current intellectual property laws and promote discussion on reform issues.[30] Some suggested issues requiring advice included copyright, moral rights, resale royalties, and protection of Indigenous knowledge of medicinal plants.

Delegates at the Indigenous Cultural and Intellectual Property Workshop hosted by Mirimbiak in Melbourne noted that a full range of issues should be covered including biodiversity agreements, patents and plant breeders rights, trade marks and environmental law. The group suggested there was scope for existing Indigenous cultural and legal authorities such as the Victorian Aboriginal Legal Service, Mirimbiak Nations (the Victorian native title research body) and Arts Law Referral Centre to network in this area to share legal information and take test

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[28] Law Council of Australia, Submission to *Stopping the Ripoffs* (unpublished), p 3.
[29] Tasmanian Museum and Art Gallery, Submission to *Our Culture: Our Future*, October 1997.
[30] Central Land Council, Submission to *Our Culture: Our Future*, January 1998.

cases to further existing laws.[31]

22.7 Indigenous arts agency

Many Indigenous groups complain that contractual arrangements are entered into without Indigenous parties fully understanding the terms and conditions. Indigenous artists are often not protected because of their weak bargaining position. It was suggested that an Indigenous arts agency could be set up to negotiate on behalf of Indigenous artists and performers, advising on the value of their art, music and cultural expression.

Responses

Discussions with various cultural institutions which clear copyright suggest there is scope for an Indigenous arts agency to act in a manner similar to Vi$copy.

Analysis

Agencies do not require legislation to be established and could be funded to set up voluntarily as an Indigenous organisation or corporation. This would allow much more independence from government, which is consistent with self-determination.

22.8 Establishing networks

22.8.1 *With other Australian Indigenous peoples organisations*

Many IRG members and other respondents to the Discussion Paper saw establishing networks with Indigenous Australian cultural organisations as extremely valuable. Regional networks were also encouraged.[32]

22.8.2 *With international Indigenous peoples organisations*

The Discussion Paper noted that the Special Rapporteur, in her principles and guidelines, recommended that governments, international bodies and private institutions should support the development of regional and global networks for the exchange of information and experience among Indigenous people in the fields of science, culture and education. These principles and guidelines have now been adopted by the Indigenous Reference Group.

Some Indigenous groups complain they have had great difficulty accessing reference material which would enable them to be better informed about the debate. For example, information such as international declarations by Indigenous peoples is not available at community libraries. Remote communities are at a particular disadvantage here.

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[31] Discussions from workshop held by Mirimbiak Nations Aboriginal Corporation, 9-10 October 1997, Melbourne.
[32] Charmaine Green, Submission to *Our Culture: Our Future*, October 1997.

The Discussion Paper suggested that an Indigenous Australian web site dedicated to Indigenous Cultural and Intellectual Property issues and an information database on the Internet would allow easier access. Such networks could feed into larger international resources like the Indigenous Knowledge Network and the Canadian Native Network, enabling Indigenous people worldwide to share information and ideas.

Responses

A web site could also be a service providing greater access to resources via the net incorporating:

- Establishment of an information network with web links and search engine covering all areas of Indigenous Cultural and Intellectual Property.
- Establishment of e-mail discussion lists or usernet groups, working through a central server with a moderator who is paid and dedicated to the job.

There is also a need for face-to-face discussion with world Indigenous people. Delegates from the Jumbunna Learning Circle on Indigenous Cultural and Intellectual Property Rights called for the next international conference on Indigenous Cultural and Intellectual Property Rights be convened. The last one was the Mataatua Conference in New Zealand in 1993.

22.8.3 *With government and industry bodies*

The value in establishing networks with government and industry bodies that work and specialise in areas related to Indigenous cultural heritage was also raised in the Discussion Paper. For example, more use of criminal provisions could be made if greater links were established with the Australian Federal Police and the Australian Customs Office. AFP officers could be trained in the criminal provisions of the *Copyright Act* and on issues regarding Indigenous arts and cultural expression.

22.9 Indigenous owned and controlled recording, research and publishing companies

As noted, copyright in recordings, research and publications of Indigenous material will be owned by the maker of the recording, researcher and publisher respectively. If Indigenous people were in control of recording companies, research bodies and publishing companies this would mean that the ownership of the material is Indigenous owned and controlled.

Already there are benefits in existing Indigenous organisations which record, undertake research and publish Indigenous cultural material. For example:

- Magabala Books is an Indigenous publishing house which through its publishing contracts can meet shortfalls in copyright laws, thereby recognising Indigenous cultural and intellectual property rights.

- The Foundation for Aboriginal and Islander Research Association (FAIRA) instigates research projects which employ archaeologists, anthropologists and the like to research for the benefit of Indigenous Australians. Rather than copyright of the research transferring to the researcher, copyright will be owned by FAIRA as employer of the research.[33]
- Daki Budtcha Pty Ltd is an Indigenous music publisher which can ensure that Indigenous music is produced with recognition of Indigenous cultural rights.
- The establishment of Indigenous-controlled recording studios and labels such as CAAMA allows for culturally appropriate recordings to be undertaken in culturally appropriate surroundings.

There is obviously greater scope for Indigenous people to exercise their Indigenous Cultural and Intellectual Property rights if they have a controlling interest in the organisations that reproduce, disseminate and publish Indigenous cultural material. Consideration should be given to the development of Indigenous controlled bodies within all industries.

Chapter Twenty-Two : Recommendations

22.1 *National Indigenous Cultural Authority*

A National Indigenous Cultural Authority should be established as an organisation made up of various Indigenous organisations to:

- Develop policies and protocols with various industries.
- Authorise uses of Indigenous cultural material through a permission system which seeks prior consent from relevant Indigenous groups.
- Monitor exploitation of cultures.
- Undertake public education and awareness strategies.
- Advance Indigenous Cultural and Intellectual Property Rights nationally and internationally.

The National Indigenous Cultural Authority should be the peak advisory body on Indigenous Cultural and Intellectual Property Rights.

Representation on the Authority should aim to cover all areas of Indigenous Cultural and Intellectual Property.

The National Indigenous Cultural Authority should be funded by both industry and government.

22.2 *Indigenous Australian Centre for Traditional Medicines*

[33] The employer owns copyright in works produced by an employee under a contract of service: Section 35(2) *Copyright Act 1968.*

Support should be given to the development of an Indigenous Australian Centre for Traditional Medicines.

22.3 *Establishing registers*

Consideration should be given to the establishment of a national register which identifies the owners of Indigenous Cultural and Intellectual Property. Any established register should not be a means of evidencing title. The Register should be used only to provide contact details for subsequent users of Indigenous material to contact the relevant community for prior consent. The register should be designed, managed and controlled by Indigenous people.

22.4 *Keeping places and community cultural centres*

Encourage existing local and regional keeping places/community cultural centres to allow Indigenous people to maintain, revitalise and reclaim their cultures.

In line with the *Bringing Them Home* report, these keeping places should also be given copies of government records.

22.5 *National Indigenous archive*

A national Indigenous archive is not recommended at this stage but could form much of what is already held by AIATSIS and the Australian Museum.

22.6 *Indigenous cultural legal services*

- An Indigenous Cultural Legal Centre should be established similar to the Arts Law Centre, but should have the powers to provide legal advice and take on legal actions as would general legal services provided by professional solicitors.
- Appropriate provision should be made for Indigenous Australians, both artists and communities, to be represented by fully qualified and experienced intellectual property and copyright lawyers who are familiar with Indigenous legal frameworks. Appropriate provision for lawyers of both sides to be familiarised with relevant traditional or customary laws applying to the people involved, the cultural property and the situation in which it is applied.
- Provision for ongoing legal education for non-Indigenous lawyers, judges and legislators to understand the breadth of Indigenous laws of succession, responsibility and customary interconnections, for example, through moiety and totemic systems.

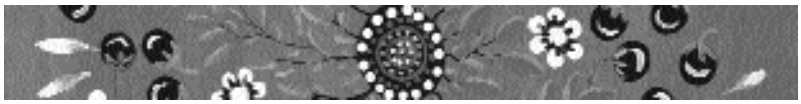
22.7 *Networks*

- Encourage the development of networks between Indigenous cultural organisations immediately.
- Support the establishment of an on-line information network with web links and search engine covering all areas of Indigenous Cultural and Intellectual Property; e-mail discussion lists or usernet groups, working through a central server.
- Support for convening a National Conference of Indigenous Cultural and Intellectual Property Rights.

22.8 *Indigenous-controlled recording, research and publishing companies*

- Encourage the development of Indigenous-controlled recording, research and publishing companies.

Development of policies and protocols



In the absence of laws which deal effectively with Indigenous Cultural and Intellectual Property, policies may assist governments, cultural institutions and professional bodies to manage, store and deal with Indigenous cultural material.

The Discussion Paper noted the following examples of policies developed in Australia to deal with Indigenous Cultural and Intellectual Property.

23.1 Repatriation of human remains

Ormond-Parker states that controversy over repatriation has prompted many museums to develop policies for the return of human remains held in their collections.[1] Ormond-Parker notes that in 1972 the Queensland Museum resolved that it would no longer accept newly disinterred Indigenous remains.[2] Since then various museums, including the Museum of Victoria and the Museum of Australia, have developed policies which address the repatriation of ancestral remains and the return of some secret/sacred objects to their communities of origin.[3]

23.2 *Previous Possessions: New Obligations* policy

In 1993, the Council of Australian Museum Associations (CAMA) launched a policy document entitled *Previous Possessions: New Obligations: Policies for Museums in Australia and*

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[1] Lyndan Ormond-Parker, A Commonwealth Repatriation Odyssey , (1997) vol 3(90) *Aboriginal Law Bulletin* p 10. Ormond-Parker cites an unpublished thesis written by C. Fforde, Department of Archaeology, University of Southampton.

[2] *Ibid.*

[3] Advice of Gaye Sculthorpe and meeting with Luke Taylor, Museum of Australia.

Aboriginal and Torres Strait Islander Peoples.[4] Developed after comprehensive negotiations with Aboriginal and Torres Strait Islander peoples, the principles aim to guide museums in framing their own procedures for dealing with Indigenous peoples and their cultural heritage.[5] The policy s central principle is that Indigenous people have the right to self-determination regarding their cultural affairs.[6] The principles cover a full range of museum activities, including management and collections; access to collections and information; assistance to Aboriginal and Torres Strait Islander communities; and employment and training. Detailed policies cover issues such as:

Human remains (including return and acquisition issues)

This policy states, among other things, that museums will not seek to acquire human remains.[7] While the policy does not require museums to repatriate remains, it states that Aboriginal and Torres Strait Islander people from the community from which the person came must be involved in determining the future disposition of remains which are returned by the museums .[8] It further notes that the museum will deal with all requests for the return of Aboriginal and Torres Strait Islander remains promptly and sensitively.[9]

Secret/sacred material

Among other things, the policy states that custodianship of secret/sacred material is vested in the people - the traditional custodians or their descendants - who have rights in and responsibilities for that material under Aboriginal and Torres Strait Islander customary law.[10] It also states that museums will take appropriate steps to seek out the traditional custodians of secret/sacred material for the purpose of consulting them on their wishes as to the return or retention by the museum acting in a custodial role .[11]

Collections in general

This policy includes guidelines on how museums should deal with the acquisition, ownership, access and return of their collections. For example, the policy states that museums will lend cultural material from their collections to museums ... especially local Aboriginal and Torres Strait Islander keeping places, subject to appropriate conditions concerning conservation and security of items .[12]

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[4] Council for Australian Museum Associations Inc, *Previous Possession: New Obligations, Policies for Museums in Australia and Aboriginal and Torres Strait Islander People*, December 1993.
[5] *Ibid*, p 3.
[6] *Ibid*, Principle 1, p 9.
[7] *Ibid*, Detailed Policy 1.1, p 11.
[8] *Ibid*, Detailed Policy 1.4, p 11.
[9] *Ibid*, Detailed Policy 1.5, p 11.
[10] *Ibid*, Detailed Policy 2.1, p 13.
[11] *Ibid*, Detailed Policy 2.9, p 13.
[12] *Ibid*, Detailed Policy 3.3, p 15.

Governance and management

The policy provides the basis for the consideration that Aboriginal and Torres Strait Islander people should be included on the board of a museum and/or the establishment of an advisory committee of Aboriginal and Torres Strait Islander people to advise in cultural issues.[13]

The Discussion Paper suggested there should be wider acceptance and implementation of the *Previous Possessions: New Obligations* policy and asked for feedback on whether any changes should be made.

There was overwhelming support for the policy from the museum sector.

The Queensland Museum noted that it already practices and has adopted policies which move towards the objectives of the *Previous Possessions: New Obligations* policy, including repatriation of ancestral human remains; establishment of an Aboriginal and Torres Strait Islander consultative committee; and the appointment of an Indigenous representative to the Queensland Museum Board.[14]

The Tasmanian Museum and Art Gallery (TMAG) supported the *Previous Possessions New Obligations* policy, stating that the policy gives them (Indigenous people) control over the dissemination of traditional knowledge and over the management and exposure of heritage objects held by museums . TMAG noted the policy has been adopted widely and has formally created opportunities for participation by Aboriginal and Torres Strait Islander communities in the management of museums, collections of Indigenous objects and cultural properties and activities. TMAG also reported that it has employed a trainee curator of Indigenous cultures from the Tasmanian Aboriginal community and involves the community in any display of Tasmanian Aboriginal objects or art and in the interpretation of activities.[16]

Trevor Pearce, Indigenous Officer with Museums Australia, addressed the Mirimbiak Workshop on Indigenous Cultural and Intellectual Property. He said that while some museums have moved into line with the objectives of the *Previous Possessions: New Obligations* policy, other museums and cultural institutions have not addressed these important issues at all. He supported the position that the policy becomes a national policy or is put into effect by legislation.[17]

While there is evidently considerable policy development and implementation by some museums in the spirit of *Previous Possessions: New Obligations*, there is no obligation for museums to develop or adopt such policies. There have been no

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[13] *Ibid*, Detailed Policy 17, p 17.
[14] Queensland Museum, Submission to *Our Culture: Our Future*, October 1997.
[15] TMAG, Submission to *Our Culture: Our Future*, October 1997.
[16] *Ibid*.
[17] Trevor Pearce, Indigenous Cultural and Intellectual Property Workshop, hosted by Mirimbiak Nations Aboriginal Corporation, 9-10 October 1997.

changes to museum legislation. Compare this with the United States *Native American Graves Protection and Repatriation Act 1990*, which legally entitles Indians to seek repatriation of human remains and sacred objects.

According to Ormond-Parker, *Previous Possessions: New Obligations* subordinates Indigenous rights depending on their scientific value.[18] He also notes that the policy only covers member museums, and other institutions holding ancestral remains, such as universities, are not bound by this policy .[19] It also fails to address issues of administration, funding and management of the repatriation of the items covered by the policy.[20]

Ormond-Parker prefers the *Draft National Principles for the Return of Aboriginal and Torres Strait Islander Cultural Property* which, he believes, acknowledge full ownership, control and management by Indigenous communities of their cultural property .[21]

23.3 Draft National Principles for the Return of Aboriginal and Torres Strait Islander Cultural Property

In 1993, ATSIC drafted a national policy on the protection and return of significant cultural property to Aboriginal and Torres Strait Islander people.

A significant feature of the draft policy is to restore ownership rights to Indigenous peoples who can confirm their cultural obligations and rights regarding certain property held by collecting institutions. The ownership rights include making decisions about the protection, care and return of cultural property to the relevant communities.

The policy calls on collecting institutions to acknowledge and grant this decision-making role to appropriate Indigenous representatives concerning cultural property held in institutions in Australia and overseas. It also calls for governments to seek to influence the holders of private collections.

The policy applies at all levels of government in Australia - Commonwealth, State, Territory and local - as well as to the programs and actions of these governments in relation to the Aboriginal and Torres Strait Islander cultural property identified by the policy, regardless of whether it is held in Australia or overseas.

The onus is on government to provide information and to consult with Indigenous communities on the location of significant objects of cultural property within their collections. This differs from current practice, where the onus is on Indigenous people to ascertain what objects are held in various collections.

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[18] Ormond-Parker, *op cit*, p 9.
[19] *Ibid*, p 10.
[20] *Ibid*.
[21] *Ibid*, p 9.

Where the origin of the cultural property is not known, the policy acknowledges that much material in collecting institutions may not be able to be accurately identified. In such circumstances, governments will accept the need to provide the resources required for necessary research.

In circumstances where cultural property is being returned from overseas institutions and there is insufficient information about its origin and ownership, the Commonwealth Government, in particular, is responsible for arranging its interim safe-keeping and for appropriate research to identify cultural ownership.

Under the policy, all governments share responsibility for implementing the protection and return of significant Indigenous cultural property. This responsibility gives greater recognition to the ownership obligations, interests and rights in significant cultural property held in institutions.

National Principles for the Return of Aboriginal and Torres Strait Islander Cultural Property

That, subject to the agreement of the indigenous members of the Taskforce on the Return of Cultural Property, the national policy will accord with the following principles:

(1) That governments recognise Aboriginal and Torres Strait Islander ownership over Aboriginal and Torres Strait Islander skeletal remains, artefacts and objects having religious and cultural significance.

(2) That they therefore acknowledge that ownership is the appropriate means for Aboriginal and Torres Strait Islander people to protect significant cultural property in the context of their cultural and custodial obligations. Governments will develop procedures to resolve:

- Aboriginal and Torres Strait Islander ownership of significant cultural property in the possession of the Crown;
- the validity of other interests in significant cultural property, including scientific research interests:
- the rights of private holders of legal collections; and
- the return of significant cultural property held in overseas collections.

(3) That the most appropriate Aboriginal and Torres Strait Islander people should have a pre-eminent role in any process for:

- documenting the existence of significant cultural property held in public institutions in Australia and overseas;
- identifying relevant Aboriginal and Torres Strait Islander individuals or communities with ownership rights over particular items of significant cultural property;
- making decisions regarding the protection, preservation, management,

return and safekeeping of significant cultural property; and

- taking initiatives to secure the management and repatriation of significant cultural property, as considered desirable.

(4) That information should be made available to Aboriginal and Torres Strait Islander people concerning the existence and location of significant cultural property held in collections in Australia and overseas.

(5) That a high priority should be accorded to facilitating the return of significant cultural property located in overseas collections, particularly human skeletal remains, tissue material and burial artefacts.

(6) That cultural property should not be retrieved from current locations until the provenance of that property has been sufficiently investigated in accordance with the requirements of relevant Aboriginal and Torres Strait Islander people and suitable arrangements are made for the transport and safekeeping of the property in accordance with relevant cultural precepts.

(7) That Aboriginal and Torres Strait Islander people should have access to reasonable facilities and places for the safekeeping of repatriated significant cultural property.

(8) That, in giving effect to these principles, further attention will need to be directed to negotiation with Aboriginal and Torres Strait Islander organisations on the further development of these principles:

- Better resolution of the category of significant cultural property of historical importance including the development of suitable processes to facilitate determinations by Aboriginal and Torres Strait Islander people as to whether particular objects fall within the terms of the category;
- The incentive for Commonwealth State and Territory Governments to develop and implement policies consistent with these principles; and
- The primary responsibility of the Commonwealth Government to ensure that the principles are complied with in relation to the repatriation of significant cultural property located overseas, notwithstanding the desirability of involvement by State and Territory Governments, as from time to time agreed.

The draft national policy was considered for adoption as a national policy in 1993 by a meeting of State, Territory and Commonwealth Ministers for Aboriginal and Torres Strait Islander Affairs. The meeting failed to endorse the draft national policy, preferring that each State and Territory develop its own policies on cultural property using the policy as a guide. But according to Ormond-Parker, there has been no substantive commitment by the States and Territories to developing cultural property policies or allocating the required funding for effective implementation.[22]

[22] *Ibid*, p 17.

In 1995, as part of the Native Title Social Justice Measures, ATSIC recommended that the Commonwealth Government must adopt a national policy for protection and return of significant cultural property for Commonwealth institutions and ensure that similar policies are applied in the States and Territories .[23] ATSIC recommended that the national policy should encompass:

(a) Human skeletal remains, tissue material and burial artefacts;

(b) Significant objects of religious and cultural property, in accord with Aboriginal and Torres Strait Islander traditions; and

(c) Cultural objects which are of particular significance to Aboriginal and Torres Strait Islander peoples.[24]

Given that much of the material is interstate and overseas, there should be greater emphasis on national cooperation. This should ideally take the form of national legislation on the repatriation of ancestral remains held by Australian museums, universities, private collections and other institutions similar to the American legislation. However, in the absence of effective legislation in this area, there should be a national policy developed in line with the ATSIC Draft National Policy. It is necessary to encourage informed public debate on this issue between Indigenous people and all other relevant interest groups. This might be done by way of a national forum.

23.4 Management of heritage places

23.4.1 *The Burra Charter*

The Burra Charter was adopted by the Australian International Council on Monuments and Sites (ICOMOS) in 1979. The Burra Charter is based on the Venice Charter 1964 (International Charter for the Conservation and Restoration of Monuments and Sites) but is adapted to suit the Australian experience with places of cultural significance. The charter is designed to guide people who provide advice, make decisions or undertake works on heritage places including owners, custodians, managers, technical advisers (such as archaeologists, architects, engineers, historians, planners etc) and administrators (such as those assessing applications for approval of works to, and grants for, places of cultural significance).[25]

The NSW Department of Aboriginal Affairs submitted that the Burra Charter has become a useful and important tool in determining priorities and setting standards for many aspects of cultural practice within an environment of conflicting interests.[26] Although the Burra Charter states that it applies to all types of Australian cultural heritage, the NSW Department of Aboriginal Affairs notes that in its draft revised form the charter does not cater for the needs

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[23] ATSIC, *Recognition, Rights and Reform: A Report to the Government on Native Title Social Justice Measure*s, 1995, Recommendation 76, p 109.

[24] *Ibid*, Recommendation 77.

[25] Australian ICOMOS Inc, The Australian National Committee of the International Council on Monuments and Sites, *The Burra Charter, The Australian ICOMOS Charter on Caring for Places of Cultural Significance*, (1997 revised version) Draft Only, p 1.

[26] Department of Aboriginal Affairs (NSW), Submission to *Our Culture: Our Future*, October 1997.

of Indigenous Australians. Hence, the Charter needs to be amended to encompass greater acknowledgment of Aboriginal and Torres Strait Islander knowledge and value systems, cultural traditions and spiritual places.[27]

The Department suggested amendments could include acknowledgment of prior Indigenous occupation; traditional owners and Indigenous appointed custodians should have priority determination over access, interpretation, care and management according to customary law; and traditional Indigenous custodians should be consulted about appropriate issues relating to customary law.[28]

23.4.2 *Guidelines for the protection, management and use of Aboriginal and Torres Strait Islander cultural heritage places*

The Department of Communications and the Arts, Australian Heritage Commission, AIATSIS, Australian National Conservation Agency and ATSIC have drafted a set of *Guidelines for the Protection, Management and Use of Aboriginal and Torres Strait Islander Cultural Heritage Places* to provide clear guidelines and practical assistance to people concerned with the protection and care of Aboriginal and Torres Strait Islander heritage places.

One purpose of the guidelines is to ensure that Aboriginal and Torres Strait Islander peoples have a central role in making decisions about heritage places .[29] The guidelines are modelled on the Burra Charter and incorporate elements of it, particularly in relation to establishing the significance and maintaining the cultural value of places. The Federal Government in 1993-94 established an Indigenous Cultural Heritage Program as a part of the Distinctly Australian policy statement. This focuses on three main aspects of cultural heritage management: guidelines, training courses, and models.

23.5 Aboriginal and Torres Strait Islander protocols for libraries, archives and information services

The Aboriginal and Torres Strait Islander Library and Information Resources Network has adopted 11 protocols which deal with Indigenous intellectual property issues.[30] It proposes that libraries, archives and information services must recognise the primary rights of the owners of a culture. The protocols include measures to:

- Adopt strategies to become aware of the issues surrounding cultural documentation

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[27] *Ibid*.
[28] *Ibid*
[29] Department of Communications and the Arts, *Guidelines for the Protection, Management and Use of Aboriginal and Torres Strait Islander Cultural Heritage Places*, 1993.
[30] Australian Library and Information Association for Aboriginal and Torres Strait Islander Library and Information Resource Network, *Aboriginal and Torres Strait Islander Protocols for Libraries, Archives and Information Services*, Canberra 1995.

and the need for cultural awareness training.

- Develop proper professional recognition of the primary cultural and intellectual property rights of Aboriginals and Torres Strait Islanders and consult with their representatives.
- Develop ways, including the recognition of moral rights, to protect Aboriginal and Torres Strait Islander cultural and intellectual property.
- Share information on initiatives involving cultural documentation.

This network also recently published a librarian s reference thesaurus for Indigenous terms.

23.6 State and Commonwealth archives and other government agencies

Much cultural property is held by State and Commonwealth government bodies and their agencies, such as archives and universities. A common problem noted by Indigenous people was that they do not know what is held where, because such bodies do not disclose their collections.

Some commentators suggest that collecting agencies should develop proper professional recognition of the cultural and intellectual property rights of Indigenous peoples, consulting. with Indigenous representatives on the application of property rights to materials in their care.[31]

Others note that most institutions already have guides to Indigenous records in their holdings and that they are increasingly employing Indigenous people. But these initiatives often go unnoticed, as Rosly notes:

> *... because they have been done entirely in the context of the particular institution rather than in the broader arena. There is at present no national forum which brings together archival institutions and Indigenous Australians.*[32]

In response to the Discussion Paper the following cultural institutions reported that they had policies concerning Indigenous Cultural and Intellectual Property:

23.6.1 *National Film and Sound Archive*

The National Film and Sound Archive (NFSA) holds a large collection of documentation of Indigenous people s heritage in the form of film, photographs, videotape, audiotape and other forms of media. The collection comprises:

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[31] Moorcroft and Byrne, *op cit*, p 93.
[32] Sue Rosly, Access to Archival Records for Aboriginal and Torres Strait Islander Peoples vol23(1) *Archives and Manuscripts* pp 60-73, at p 62.

1. Ethnographic materials which depict traditional cultural ceremonies or practices as actuality .

2. Commercial materials containing Indigenous performances exploited by Indigenous people with the full rights to that material, and fully informed about the transaction.

NFSA has a policy for handling and collecting Indigenous materials based on extensive consultation and open to continuous review. The policy includes procedures for acquiring, disposing of and giving access to materials with Indigenous content and the handling of materials while within the archive.[33]

23.6.2 *National Library of Australia*

A submission from the National Library notes that library collection in Australia are well-documented and accessible with greater access to collections than ever before through inter-library connections and the internet.[34]

23.6.3 *Film Australia s code of conduct*

Regarding access to sensitive or secret and sacred material, Film Australia s code of conduct ensures that material is collected under an express or implied moral contract between the community being filmed and the film-maker. Both the film-maker and the production company have an obligation to honour the trust placed in the film-maker by the communities being filmed by:

1. Respecting the integrity of the material obtained in good faith.

2. Using this material only in a way approved by the community filmed, including secondary use of the material.

3. Respecting the confidentiality of secret, sacred and other restricted material.

Film Australia s restricted programs carry a set of guidelines outlining conditions of access and use.

1. Access to and use of these films is restricted to approved individuals only.

2. Conditions of access and use vary depending upon the wishes of the community.

3. All applications to Film Australia, Australian Archives, or the Australian Institute of Aboriginal and Torres Strait Islander Studies for access to and/or use of the material is referred to the relevant community in writing.

Restricted labels are placed on all film cans and video containers/cassettes. In rela-

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[33] R. I. Brent, Director, National Film and Sound Archive, Submission to *Our Culture: Our Future*, October 1997.
[34] National Library of Australia, Submission of *Our Culture: Our Future*, November 1997

tion to distribution of prints, all Film Australia programs produced by Ian Dunlop for Film Australia, currently in distribution, have been approved for distribution by Aboriginal communities involved in their making. Use of material as an acknowledged quote or extract should not require any further permission from the community involved provided the guidelines are followed. The guidelines are:

1. Request for use of material made in writing to chief executive of Film Australia. If a change in nature of the organisation results in Film Australia s inability to handle requests, then requests are made in writing to the Australian Archives after consultation with and agreement in writing with the principal of AIATSIS or his delegate.

2. If uncertain about the appropriateness of the request, advice is sought from AIATSIS and/or Ian Dunlop.

3. Material is not to be used in a way which contravenes the spirit or intent of its original use as approved by the community portrayed.[35]

23.7 Research funding bodies

Various respondents to the Discussion Paper noted the development of policies with research funding bodies such as universities and cultural funding institutions which include the adoption of ethics committees and Indigenous steering committees in research projects involving Indigenous Cultural and Intellectual Property. For example, the AIATSIS submission outlined its funding policy as follows.

23.7.1 *AIATSIS funding guidelines*

The current grant application requires clearance by the Research Ethics Committee, which reviews an application before it is assessed by the Research Advisory Committee, which in turn makes recommendations to the AIATSIS Council, which makes the final decision.

AIATSIS supports high quality research that benefits Aboriginal and Torres Strait Islander peoples in accordance with international standards of human rights and scholarship. Ethical research involves a number of fundamental principles:

- Informed consent to the research by the individuals/community with whom or where research is to be carried out, or by their representatives.
- Benefit to the local community as well as to the broader community of Aboriginal and Torres Strait Islander peoples.
- Acknowledgment of ongoing Indigenous ownership of the cultural and intellectual property rights in the material on which the research is based.

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[35] Film Australia, Submission to *Our Culture: Our Future*, October 1997.

- Appropriate use of research results and/or publication of material as agreed with the community or community representatives.

The Institute requires researchers to adhere to its ethical guidelines and gain clearance for projects from an ethics committee, whether from another organisation or from the AIATSIS Research Ethics Committee.

Ethical guidelines

AIATSIS will not approve the research of any individual that offends, or in its opinion is likely to offend, the Aboriginal and Torres Strait Islander people living in the area. Other guidelines include:

- It is only with the cooperation of Aboriginal and Torres Strait Islander people that an applicant can pursue research into Aboriginal and Torres Strait Islander cultures and ensure its documentation for future generations.

- The intending researcher is obliged to inform the Aboriginal and Torres Strait Islander people concerned of the purpose of the work and to obtain their agreement to it.
- Failure to respect Aboriginal and Torres Strait Islander custom can disrupt the life of the communities within which AIATSIS is sponsoring research. This could curtail the researcher s work and hinder possible future research.

Applicants are directed to professional ethics as well such as the Australian Anthropological Society code of ethics.

Informed consent

- Applicants working with communities and individuals need to obtain a permit or approval from relevant Aboriginal and Torres Strait Islander regional/community organisations or individuals. For archaeological research, a permit or approval from the relevant State of Territory government may be needed.
- Informed consent and support from the community is given great weight in the application process. Failure to supply evidence of this may result in the application being refused.
- Two references are also required on whether the researcher is accepted, or likely to be accepted, by the community as a suitable person to carry out the project.
- All information regarding the procedures, use of research and aim of the research must be given in an appropriate manner to the relevant community council/organisation and to individuals involved in the research project, and no procedures should be added to or fundamentally altered after consent is obtained.

Involvement of the community

- Aboriginal co-workers, assistants and subjects of research must receive payment or adequate financial compensation, according to rates set by AIATSIS.

Ownership of Intellectual and Cultural Property Rights

Under present arrangements a research project supported by AIATSIS may be seen as a joint project between the researcher and the Indigenous community involving two areas:

1. Background intellectual property - what one party owns before going into the project and brings to it. This remains the intellectual property of that party.
2. Foreground intellectual property - the results of the joint project. This may be jointly owned by the parties concerned, or ownership allocated by prior agreement.

This means that the cultural and intellectual property rights in the subject material remain with the Indigenous owners. The grantee is the owner of the copyright in the research results where these are used for research purposes and not for profit. AIATSIS holds a non-exclusive royalty free and a perpetual licence to use the research material for the purposes set out in the grant agreement. The purposes are to:

- Make the research material available for public access and use for research purposes.
- Make copies of the research material in other formats.
- Publish the research material.
- Reproduce the research material.

Restricted material

No restricted material shall be distributed without the people who provided the material clearly understanding and consenting to its use. The following paragraph in the application booklet explains:

> *Within Aboriginal and Torres Strait Islander communities films, videos and audio recordings containing restricted material should never be shown or played except upon the explicit request of senior Aboriginal and Torres Strait Islander people who would have been permitted to witness the actual events or other material portrayed. Showings or playing of this kind should only be undertaken by persons with extensive knowledge of the society and community in order to be able to judge accurately the legitimacy of the request. The viewing or hearing of restricted material by the wrong persons, even if inadvertent, can result in deep offence, emotional stress and lasting social hardship for the individual concerned.*[36]

[36] AIATSIS, Submission to *Our Culture: Our Future*, October 1997.

AIATSIS also has guidelines and written agreements for the deposit and transfer of research materials.

23.8 Government policies

Government departments whose portfolios cover areas related to Indigenous Cultural and Intellectual Property should adopt policies which recognise Indigenous peoples rights to own and control their cultural heritage. The Discussion Paper noted the following government department and agency policies:

23.8.1 *Australia Council*

The Australia Council recognises the essential connection for Aboriginal and Torres Strait Islander artists and communities between the arts, culture, heritage and customary law. The Australia Council s National Aboriginal and Torres Strait Islander Arts Policy has the following principles:

Respect

- The Australia Council respects and acknowledges the Aboriginal people and Torres Strait Islanders of Australia as the traditional owners and custodians of Australia and its territories.
- The Australia Council respects and acknowledges the essential connection between arts, culture, heritage, land, sea and customary law in Aboriginal and Torres Strait Islander society.
- The Australia Council will encourage the maintenance and awareness of Aboriginal and Torres Strait Islander cultural protocols throughout the arts.

Authority

The Australia Council recognises that Aboriginal and Torres Strait Islander Authority in self-determination is essential in relation to the arts.

- The Australia Council recognises and acknowledges the rights of Aboriginal people and Torres Strait Islanders to claim control and enhance their cultural development and cultural maintenance through the arts.
- The Australia Council endorses the right of Aboriginal people and Torres Strait Islanders to own and control their cultural and intellectual property.

Rights and responsibilities

- The Australia Council fully endorses the rights of Aboriginal people and Torres Strait Islanders to full express their spiritual integrity and authority through the arts.
- The Australia Council accepts the responsibility of representing the rights and

aspirations of Aboriginal and Torres Strait Islander artists and arts workers.

Diversity

- The Australia Council acknowledges Aboriginal and Torres Strait Islander cultural diversity and cultural pluralism.
- The Australia Council acknowledges Australia s cultural diversity and embraces cultural cooperation.[37]

23.8.2 *Aboriginal and Torres Strait Islander Arts Board (Australia Council)*

The Australia Council s Aboriginal and Torres Strait Islander Arts Board has been active in policy development in this area.[38] Of note are policy developments by the Visual Arts Committee concerning appropriation of designs and imagery. Since the early 1990s, the Visual Arts Committee has published a statement which urges all Aboriginal and Torres Strait Islander artists to develop their own designs, in the better interests of copyright and cultural ownership.[39]

A recent statement notes that despite this published information on copyright, the committee still receives submissions of work which contravene copyright of other artists by using designs such as X-ray, rarkk, cross-hatching, specific dot designs, Quinkin, Wandjina .[40]

The committee notes that it will not only refuse to fund applications where breaches of copyright occur, it also intends to refer the applications to the National Indigenous Arts Advocacy Association (NIAAA) or an appropriate body for legal advice. The Arts Board funds NIAAA, an organisation responsible for advocacy, policy and provision of support services relating to copyright, moral rights and contractual issues.

The Statement has been sent to many clients and is published in the Board s Programs of Assistance booklet. The Visual Arts Committee is reportedly considered updating its policy.[41]

23.8.3 *Australian Industrial Property Organisation*

The Australian Industrial Property Organisation (AIPO) is a division of the Department of Industry, Science and Tourism. It administers the *Patents Act 1990*, the *Trade Marks Act 1995* and *Designs Act 1906.* It also administers the *Olympic Insignia Protection Act 1987 and the Sydney Games (Indicia and Images) Protection Act 1996*. As part of

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[37] Australia Council, Submission to *Our Culture: Our Future*, October 1997.
[38] Interview with Lydia Miller and Faye Nelson, Aboriginal and Torres Strait Islander Arts Unit, Australia Council.
[39] Aboriginal and Torres Strait Islander Arts Board, *Programs of Assistance Booklet*, 1993 edition.
[40] Message from Visual Arts Committee of the Aboriginal and Torres Strait Islander Arts Board, originally released 22 September 1993, updated 7 March 1994.
[41] Interview with Beverley Johnson, Visual Arts Program Officer, Aboriginal and Torres Strait Islander Arts Unit, Australia Council.

the Commonwealth s Access and Equity Strategy, AIPO is exploring potential measures for informing Indigenous communities about industrial and intellectual property laws so they can use the existing intellectual property regime to protect their traditional knowledge.

The Discussion Paper noted that AIPO has contacted land councils and legal services seeking feedback on the sort of information Indigenous people might need. AIPO has also attended conferences to inform Indigenous groups on industrial and intellectual property. Further, AIPO and the Attorney-General s Department have produced a video on intellectual property which has been widely distributed to Indigenous groups.[42]

In light of the findings of the ICIP project, there is much wider scope for AIPO to become involved in policy and procedural developments.

23.8.4 *DOCA s return of cultural property program*

The Discussion Paper reported that the Department of Communications and the Arts funds a program for the return of cultural property. Last year, $180,000 was spent on repatriating cultural material, including human remains and secret/sacred objects. This amount included funding to the South Australian Museum for the final stage of its human-remains provenancing ($75,000).

There were also funds for Museum Australia s Standing Committee for Museums and Indigenous People to develop a strategy for the return of human remains and sacred/secret objects by 2001 to go to the Cultural Ministers Council later this year, and hopefully gain more funds to pursue repatriation at a federal level.[43]

23.9 Land council policies

Land councils play an active role in policy development. The Discussion Paper suggested that support should be given to them for intellectual and cultural property policy development. One example noted is the Central Land Council s Sacred Objects Policy.

23.9.1 *Central Land Council s policy of sacred objects*

The CLC is a Commonwealth statutory authority under the Aboriginal Land Rights (NT) Act 1976. The issue of control over Aboriginal cultural material held by museums and other cultural institutions is of serious concern to traditional landowners in the CLC regions. Council and executive members are the senior people in their communities. CLC policy is therefore set by people at the top of the hierarchical systems with-

42 Susan Farquhar, Certification and Authentication Trade Marks and Industrial Property Protection of Arts and Cultural Expression , paper presented at the International Conference on Artistic and Cultural Expressions, Traditional Knowledge and the Protection of Heritage, 27-29 September 1996, University of Queensland, p 4.
43 Information provided by Marilyn Truscott, Heritage Branch, DOCA, 28/5/97

in communities and other senior figures according to Aboriginal law.[44] The CLC passed a resolution in 1992 regarding sacred objects[45] as follows:

- Aboriginal custodians remain the rightful owners of secret and sacred objects and have the right to decide who shall hold these objects and how and where objects will be held according to Aboriginal law.
- Where the custodians of sacred objects can be identified and located, these objects must be returned to them as soon as possible.
- If custodians do not wish to have their objects returned, their wishes as to the future care, storage and access to their objects must be observed.
- Where custodians cannot be located, sacred objects should be treated in a way which is consistent with Aboriginal law:
  - (i) They must not be displayed in public or viewed by women and children;
  - (ii) Photographs or descriptions of the objects must not be displayed or published.
- The objects must remain available for identification and return to custodians when and if that is possible.
- Sacred objects must not be sold or transferred to private or overseas parties because this prevents adequate control over how such objects are stored and handled.
- Commercial trade in sacred objects is itself offensive to Aboriginal people and the Central Land Council calls on the Aboriginal and Torres Strait Islander Commission and the Commonwealth, State and Territory governments to discourage such trade and to do all in their power to ensure that sacred objects are returned to the control of custodians.

23.10 Industry association policies

Another suggestion raised by the IRG was the need for Indigenous community organisations and industry associations to develop policies to deal with Indigenous Cultural and Intellectual Property,[46] including guidelines.

23.10.1 *NIAAA Policy Statement*

The National Indigenous Arts Advocacy Association (NIAAA) has developed a policy statement on the use of Indigenous designs by non-Indigenous artists which is based on the Guidelines and Principles drafted by the Special Rapportuer of the United Nations Economic and Social Council s Sub-Commission on Prevention of

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[44] Allan Clements, The Central Land Council Policy on Sacred Objects , (1996) no 28 *COMA Bulletin* p 9.
[45] Central Land Council, Submission to *Our Culture: Our Future*, January 1998.
[46] Liz McNiven, IRG meeting, 15-16 September 1997.

Discrimination and Protection of Minorities. The policy states that non-Indigenous artists should refrain from incorporating elements derived from Indigenous cultural heritage into their works without the informed consent of Indigenous traditional custodians.[47]

23.11 Other suggested areas for policy development

The Discussion Paper asked what other areas required policy development. The following is a list of suggested areas:

23.11.1 *Language policy*

Delegates from the Victorian Language Conference held in July 1996 noted several issues regarding Indigenous languages which required policy development, including:

- Who has the right to record Indigenous languages?
- Do researchers have to consult Aboriginal communities before undertaking language retrieval projects?
- How will communities benefit from language research undertaken in their area?
- The issue of ownership of language is complex. The difference between ownership and custodianship were debated. Should the community of the area where the language is spoken be the owner or should the descendants of the people who spoke the language be the owners ? Many participants concluded that language could not be owned, as it is communication.
- Who owns or is the rightful custodian of the language?
- Who can research the language?
- Who is responsible to give permission on language?
- Who has the copyright of the research and publications from this?[48]

The Kaurna Language and Language Ecology submission recommended that an Indigenous language policy should address some of these important issues. It may be that one set of laws or protocol is not sufficient for all Indigenous languages. As the Kaurna group noted:

> *The situation for strong or viable languages, such as Pitjantjatjara, Yolngu Matha or Warlpiri is quite different to Kaurna and other so-called dead or extinct languages. The role of non-Indigenous people in the maintenance and revival of Indigenous languages may be by necessity quite different in different situations.*

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[47] NIAAA Policy Statement as cited in Vivien Johnson, *Copyrites: Aboriginal Art in the Age of Reproductive Technologies*, *Touring Exhibition 1996 Catalogue*, published by NIAAA and Macquarie University, 1996.
[48] Lynette Dent, presentation at Mirimbiak Workshop, October 1997 and Report from Victorian Languages Conference.

It might therefore be more effective to develop a National Indigenous Language Policy Framework which can lead each language group in the development of their own policies.

23.11.2 *Indigenous music policy*

Daki Budtcha noted that the Discussion Paper did not cover Indigenous music issues as thoroughly as it did visual arts issues.[49] Daki Budtcha supported the establishment of cultural protocols which industry professionals and music practitioners should be encouraged to follow as an industry practice to set standards for others intending to reproduce traditional songs, music and stories. Some suggested issues to be included in the policy were:

1. In recording Indigenous cultural material, record companies and artists should endeavour to find out who is the publisher of the material, and who is the traditional clan of the material.

2. If unpublished, subsequent users of Indigenous cultural music should endeavour to ascertain its genuine traditional owners, custodians and clans. Need to seek the professional advice of a linguist or musicologist, preferably Indigenous, in order to ascertain the rightful traditional owners.

3. Once identified, a written consent and authority to use the cultural material must be obtained.

4. Proper attribution must be made to the song person.

5. Check for whether use is culturally appropriate. Whether uses restricted under Indigenous laws etc.

6. Copyright, mechanical or other royalties must be negotiated with the custodian and composers.

7. Heritage rights to the songs should remain the perpetual property of the Indigenous custodians, regardless of the nature of the new musical expression, in so far as it is based on the pre-existing cultural material.

Chapter Twenty-Three : Recommendations

23.1 *Ancestral human remains*

The introduction of a national policy and/or legislation on the repatriation of Indigenous ancestral remains and sacred objects held by cultural institutions should be supported.

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[49] Daki Budtcha Pty Ltd, Submission to *Our Culture: Our Future*, October 1997.
[50] *Ibid*.
[51] *Ibid*.

23.2 *Previous Possessions: New Obligations*

Support for the *Previous Possessions: New Obligations* policy to become a national policy or the basis of national legislation.

23.3 *National principles for return of Indigenous cultural property*

The National Principles should be disseminated to museums and collecting institutions.

ATSIC to monitor implementation.

23.4 *State cultural institutions*

All State and Commonwealth cultural institutions which hold, collect and display Indigenous Cultural and Intellectual Property should be required to draft and adopt guidelines, in consultation and approved by Indigenous people, which deal with Intellectual and Cultural Property Rights issues.

There should also be an independent national inquiry into the state collections of Indigenous cultural heritage to identify what materials various bodies hold and whether or not the appropriate Indigenous custodians have been identified.

There should be a national forum to address issues relating to archival institutions and Indigenous Cultural and Intellectual Property.

23.5 *National Indigenous Language Policy*

In the absence of specific legislation which provides Indigenous people with rights to own and control their languages, a National Indigenous Language Policy should be drafted and adopted, addressing issues such as:

- community ownership and group rights over Indigenous languages;
- rights in perpetuity.

23.6 *Indigenous research policy*

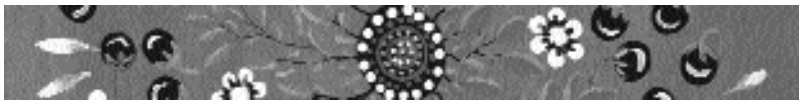
A national Indigenous research policy should be developed.

23.7 *Indigenous policies in other areas*

All areas of industry should be encouraged to develop policies relating to the use and control of Indigenous Cultural and Intellectual Property.

CHAPTER TWENTY-FOUR

Codes of ethics



Although codes of ethics are not legally binding, they provide some guidance and may inspire voluntary compliance and foster equitable partnerships between Indigenous communities and those using Indigenous intellectual and cultural property. To the extent that they are not legally binding, Indigenous people should lobby for legally binding mechanisms to develop such practices.

The Discussion Paper drew attention to the following professional codes of ethics:

24.1 Medical and scientific research guidelines

Medical researchers and scientists have an obligation to respect the interests of those they test and screen and to protect these groups from exploitation.

The National Health and Medical Research Council (NHMRC)[1] has published ethical guidelines on the topic of Indigenous research. The Privacy Commissioner has approved guidelines for the Protection of Privacy in the Conduct of Medical Research. There is scope for a range of medical and scientific research codes of ethics to address Indigenous Cultural and Intellectual Property rights. For example, the Australian Medical Association Code of Ethics should also specifically address Indigenous Cultural and Intellectual Property rights, particularly the issue of access to samples of Indigenous genetic material. This is particularly relevant in light of projects such as the Human Genome Diversity project.

International codes of ethics such as that adopted by the International Society of Ethnobiology should also be encouraged by professional groups and associations.

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[1] Most genetic research in Australia is funded through the National Health and Medical Research Council and is subject to NHMRC guidelines as noted on p 43 of the Privacy Commissioner, Information Paper Number 5, *The Privacy Implications of Genetic Testing*, September 1996.

International codes of ethics

Several professional bodies involved in biodiversity research have issued codes of ethics regarding professional behaviour. In 1988, the International Society for Ethnobiology established a set of principles for members engaged in research with Indigenous and local communities.[2] The US National Institute of Health s National Cancer Institute has also developed general principles to govern its genetic resource collection across the globe. One guiding principle is the payment of compensation for traditional knowledge and biological resources. According to Yamin and Posey, Compensation is interpreted widely to include training, institution building and information transfer . [3]

24.2 New technology guidelines

On the Internet there are already sites which warn that some of the material may offend Indigenous people. See, for example, the AIATSIS web-site at http//www.aiatsis.gov.au. In constructing the web-site, AIATSIS adhered to a working protocol which is reproduced at http//www/aiatsis/rules/htm. The Discussion Paper suggested that similar guidelines and protocols should be adopted for all new technology, including CD-ROM and multimedia products. (See also discussions relating to ABA self-regulatory guidelines in Chapter 16.)

There are also codes of practice established by the Internet Industry Association of Australia (INTIAA). The codes allow monitoring and discipline via a self-regulating industry code of ethics.[4] Codes relating to Indigenous Cultural and Intellectual Property rights should be encouraged.

24.3 Media

Indigenous people consider the representation and discussion of issues of Indigenous culture and Indigenous people in the media is an important right. A submission from the Victorian Folklife Association[5] noted the inadequacy of existing racial vilification and defamation laws and suggested there should be a code of ethics for journalists and public relations people concerning representations in the media about Indigenous issues. It was further considered necessary for journalists and reporters to be made aware of Indigenous cultural values and practices. The media should not be overlooked as they convey information to the general public.

The MEAA has developed guidelines concerning representation of Indigenous people. Commercial broadcasters, the ABC and SBS also have self-regulatory codes

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[2] Yamin and Posey, *op cit*, p 141.

[3] Schweitzer et al, Commentary: Summary of the Workshop of Drug Development Biological Diversity and Economic Growth, *Journal of the National Cancer Institute*, pp 1294-1298, 1991 as cited in Yamin and Posey, p 146.

[4] As reported in Convergence Report, Vol 2, no 9, 10 May 1996, p 1.

[5] Victorian Folklife Association Inc, Submission to *Our Culture: Our Future*, October 1997.

24.4 Other suggested areas for codes of ethics

24.4.1 *Research*

Yunggorendi First Nations Centre noted that the Koori Centre, University of Sydney, has developed principles and procedures for conducting research based on the fundamental principle that Indigenous empowerment and self-determination is fundamental to research .[6] The research principles, among other things, state that:

- Researchers shall consult and collaborate with Indigenous people, their community(ies) or organisations participating in the research project(s). Documentation on the process of consultation and collaboration shall be held by the researchers and produced on request.
- Researchers shall ensure that the research methodology and the culture base from which it proceeds reflect the communal and collective system of Indigenous communities.
- Researchers shall adhere to cultural and customary rules and laws in the Indigenous communities involved.
- Aboriginal or Torres Strait Islander people employed on the research must be remunerated at award or market rates. Contracts of employment must be agreed upon and evidence of the employee s understanding of the contract must be provided.
- All products and publication rights including royalties on all research material must be negotiated with the Indigenous people, communities or organisations.
- The Aboriginal or Torres Strait Islander people, communities, or organisations must retain the right to approve further publication of research material. Access restrictions placed on the research material must be adhered to. Publishers must be made aware of any restrictions placed by the Aboriginal or Torres Strait Islander people, communities or organisations.

Brady suggests that the matter of who owns copyright in the material should be clarified from the beginning of the project.[7] All too often disputes over copyright arise after the project has started. It is necessary to put any agreement in writing, as under the Copyright Act, research will generally be owned by the researcher and not the commissioner or even the people being researched. If these people are to hold a copyright interest in the resultant work, this must be effected in writing.[8]

Generally, there is growing awareness among research funding bodies concerning

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[6] Koori Centre, University of Sydney, *Principles and Procedures for the Conduct of Research*, 1993.

[7] Wendy Brady, Indigenous Control of Aboriginal and Torres Strait Islander Research , ASA Conference Paper 1992, Vol 2, ppage 311-315 at p 314.

[8] Section 196(3) *Copyright Act 1968* requires assignment must be in writing, signed by or on behalf of the assignor.

Indigenous Cultural and Intellectual Property Rights. Many research centres and funding bodies are developing research ethics and convening research ethics committees to guide selection of research projects.

24.4.2 *University education sector*

As noted by Yunggorendi First Nations, there is wide scope for the university education sector to address Indigenous Cultural and Intellectual Property rights issues, including:

1. Building structures and strategies to recognise and address Indigenous Cultural and Intellectual Property into their existing research and teaching.

2. Recognising collective group rights over Indigenous cultural and intellectual material.

3. Allocating funds and resources from the Commonwealth to develop a national agreement within the higher education sector on research ethics and intellectual property rights in relation to Indigenous Australians. The development of a research code of conduct within Indigenous communities is a priority.

4. Offering post-graduate scholarships specifically targeting research into Indigenous Cultural and Intellectual Property.

5. Indigenous knowledge used in undergraduate and post-graduate courses must be negotiated with Indigenous groups and ownership recognised before teaching begins. Communities should be consulted on all matters related to their language being used in higher education. Courses should not include Indigenous language content using terminology of sacred nature or significant private meaning if the owners want it excluded.

6. An Indigenous Cultural and Intellectual Property reference committee should be established within university structures whereby lecturers, research supervisors and research team coordinators who have any queries regarding Indigenous content could consult. Such a committee could also review existing university structures and staff development practices to address Indigenous Cultural and Intellectual Property.

7. Visiting Indigenous elders or Indigenous knowledge custodians should be recognised as beneficiaries of their knowledge and be paid equivalent to academics who possess specialist knowledge. An elder-in-residence program should be funded.

8. Research, literature and art revealing sacred or material deemed culturally explicit should be removed or placed in special collections. A specialist librarian to handle explicit material should be employed.

9. University degree courses are commodities whereby institutions have a right to allow other institutions to use course materials at a cost. Indigenous communities should be consulted and included in discussions where university courses are sold or traded.[9]

24.4.3 *Professional associations*

There is also scope for professional associations to adopt ethics when dealing with Indigenous cultural material. For example, the Australian Association of Archaeologists has a code of ethics relating to Indigenous cultural issues.

A deficiency in professional association codes of ethics is that they often address only procedures for working with Indigenous communities and attaining the necessary information, while the issue of copyright ownership of research material and resultant manuscripts are not covered.[10] It is important that codes of ethics address issues of ownership and control of material produced.

There is potential for a range of professional associations to develop and adopt codes of ethics in association with Indigenous people. The following areas could be covered:

- Visual artists.
- Musicians.
- Writers.
- Craftmakers.
- Film-makers (producers, directors and screenwriters).
- Graphic designers.

24.5 Collecting societies to establish guidelines

Another option is for Australian collection societies or agencies[11] to adopt protocols within their existing collection services. These agencies currently provide collection services on behalf of their members regarding copyright in music, audio-visual, artistic and literary material. These collecting societies are in a position to adopt policies when dealing with the use of Indigenous arts, music, film and literature.

This could be done by forming a cooperative relationship similar to that of Vi$copy and NIAAA. For example, Screenrights could form a policy team with the National Indigenous Media Association of Australia and other Indigenous film advisory bodies. Policy development could include issues such as:

- Authorising use of Indigenous arts and cultural expression and determining how royalties should be collected if images are collectively owned.
- Facilitating payments to traditional custodians and relevant communities.
- Developing standard guidelines for negotiating fees.
- Developing protocols to ensure that commercial use of works is suitable for reproduction where reproduction is appropriate.

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[9] Lester Rigney, Yunggorendi First Nations Centre, Submission to *Our Culture: Our Futur*e, October 1997.
[10] Albert Mullet, Indigenous Reference Group member, IRG meeting, September 1997.
[11] AMCOS, CAL, AMPAL, PPCA, Screenrights, APRA and Vi$copy.

Screenrights supports the development of policies and protocols by existing collecting societies to set the standard for acceptable behaviour when dealing with the use of Indigenous materials. Screenrights submitted this can be done without the need for legislative change and will also be relevant if a compulsory licensing scheme or an Indigenous collecting society is established.[12]

Chapter Twenty-Four : Recommendations

24.1 *Medical and scientific research ethics*

Medical and scientific ethics associations should develop ethics relating to research and use of Indigenous genetic material.

24.2 *New technology guidelines*

Indigenous people and various Industry bodies such as INTIAA should develop guidelines relating to use and dissemination of Indigenous Cultural and Intellectual Property on line and in multi-media.

24.3 *Media codes of ethics*

- The media should take effective measures to promote understanding of and respect for Indigenous peoples cultural practices and heritage, in particular through special broadcasts and public service programs. These should be where possible made by Indigenous media or made in collaboration with Indigenous peoples.
- Journalists and public relations officers should respect the privacy of Indigenous people, particularly concerning customary, religious, cultural and ceremonial activities, and refrain from exploiting or sensationalising Indigenous peoples heritage.
- Journalists should actively assist Indigenous peoples in exposing any activities which exploit, destroy and degrade Indigenous peoples heritage.

24.4 *Research codes of ethics*

All research institutions including universities, colleges etc should support

1. The development of a research code of conduct for work within Indigenous communities.
2. The development of research ethics when researching Indigenous communities.

[12] Alison Cook, Screenrights, Submission to *Our Culture: Our Future*, October 1997.

3. The need to address different ownership interests when research is carried out on Indigenous communities, including:

   (a) institutional ownership rights, data and materials produced by the research institution, including materials included in courses pertaining to Indigenous Australians,

   (b) individual intellectual property rights held by researchers and Indigenous contributors.

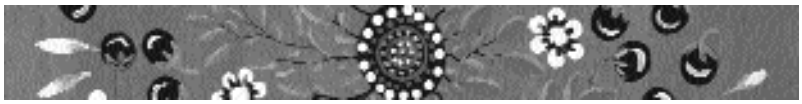
   (c) collective rights of Indigenous community groups with ownership of language, dreaming, dances, songs etc.

24.5 Collecting societies codes of ethics

Collecting societies should establish codes covering the use and authorisation of Indigenous Cultural and Intellectual Property. Such codes should be developed in consultation with Indigenous people.

CHAPTER TWENTY-FIVE

Education and awareness strate-



Education and awareness strategies need to be developed to encourage debate on the Indigenous Cultural and Intellectual Property issues raised in the Discussion Paper. The following strategies were noted:

25.1 Improved awareness strategies for Indigenous Australians

Many blatant examples of the unauthorised reproduction of cultural and intellectual property have occurred because Indigenous people have not been aware of the laws. Often, the person or clan concerned had no idea of their rights within the legal system and how best to protect or exploit them. Many submissions to the *Stopping the Ripoffs* report noted that Indigenous people did not understand copyright.

This situation has improved as a result of the work of organisations such as the National Indigenous Arts Advocacy Association, the Arts Law Centre of Australia and the Australian Copyright Council, but much remains to be done. Education of Indigenous people on their rights and obligations is essential. Any legislative reforms to protect Indigenous Cultural and Intellectual Property should be accompanied by educational packages on Indigenous artists legal rights.

25.1.2 *Legal education for Indigenous artists, writers and performers*

Some Indigenous arts organisations are already taking the initiative in this area. For example, Magabala Books recently conducted a series of workshops on Writers Rights , conducted by Colin Golvan. The workshops discussed copyright issues for writers and artists. Magabala Books has also published *A Basic Guide to Copyright,* based on the content of the workshops, with plain English answers to questions most raised in the workshops. The booklet provides general information on how Indigenous writers can best protect their cultural and intellectual property rights under existing

laws, particularly contracts.[1]

25.2 Awareness program for the wider community

It is also important that the wider community — including potential "rip-off" artists and manufacturers — is aware of the cultural significance of Indigenous arts. The Discussion Paper listed the following initiatives:

- Stickers could be placed on books and calendars containing Indigenous art.
- Signs could be placed at the entrance of exhibitions so viewers are made aware that displays are culturally significant and not suitable for certain types of reproduction.
- Films could focus on Indigenous Cultural and Intellectual Property issues.

Jumbunna Learning Circle delegates noted the need for an effective public education campaign to protect and promote authentic arts and products.[2] Suggestions included developing subjects in school curricula and addressing the issues in professional courses.

25.2.1 *School education*

Various respondents noted the potential for school education programs to raise awareness of Indigenous Cultural and Intellectual Property Rights.

Educators should ensure that school curricula and textbooks teach understanding and respect for Indigenous peoples heritage and history, and recognise the contribution of Indigenous people to the cultural and economic life of the Australian nation.

25.3 Greater consultation on reform options

Many respondents noted there was a need for greater consultation concerning proposed reforms.

Tommy May, a member of the IRG, requested that workshops be held in the Kimberley region so that Indigenous people could be informed at a local level in their own languages and so take part in the reform debate.[3] [Due to budget and time constraints, we were unable to visit this area.]

The Centre for Indigenous History and the Arts (WA) also expressed concern that no consultation workshops were conducted in Western Australia and this meant many Indigenous people could not fully participate in the discussion about their rights. Hence, consultations were requested.[4] Unfortunately, again due to budget and time constraints we were unable to conduct workshops in Western Australia.

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[1] Magabala Books, Submission to *Our Culture: Our Future*, October 1997.
[2] Jumbunna Centre for Australian Indigenous Studies, Education and Research, University of Technology, Sydney, October 1997.
[3] Tommy May, Chair, Mangkaja Arts Centre, IRG meeting, Sydney, September 1997.

Yunggorendi First Nations also stated that any modification to legislation or development of policy must be preceded and followed by intensive education programs to inform Indigenous and non-Indigenous people and their institutions of their rights, responsibilities and obligations.[5]

The ICIP project organisers were required to consult with the Indigenous Reference Group to develop practical reform proposals. In convening the IRG, ATSIC attempted to ensure there was adequate geographical representation. It should be noted that the three workshops that took place were conducted by groups and organisations independently of the project.
Now that a range of reform proposals has been developed, there is an urgent need for further consultations to take place with Indigenous people.

Chapter Twenty-Five : Recommendations

25.1 Awareness strategies for Indigenous people such as legal and cultural workshops and publication of information material on Indigenous Cultural and Intellectual Property Rights should be developed.

25.2 Awareness should be raised among the wider community of Indigenous Cultural and Intellectual Property Rights and reform options, including secondary and tertiary education curricula.

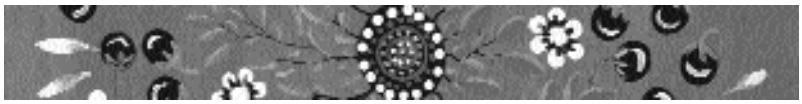
25.3 Indigenous associations and organisations should be encouraged to adopt policies and practices which assert ownership over Indigenous cultural heritage.

25.4 Further consultations to be conducted with Indigenous peoples around the country on the reform proposals.

[4] Centre for Indigenous History and the Arts, Submission to *Our Culture: Our Future*, October 1997.
[5] Yunggorendi First Nations, Submission to *Our Culture: Our Future*, October 1997.

CHAPTER TWENTY-SIX

Conclusion



The purpose of the Indigenous Cultural and Intellectual Property Project was to:

- Survey the existing legal and policy structures in Australia in order to assess how well these structures cater for and protect Indigenous Cultural and Intellectual Property; and
- Develop a range of practical reforms in light of feedback from consultations and discussions with the Indigenous Reference Group that would improve protection and ensure recognition of Indigenous Cultural and Intellectual Property.

In light of these objectives, this Report has been written to inform Indigenous people of the current law and possible options for asserting their cultural and intellectual property rights within these parameters. The recommendations have been drafted to allow Indigenous people to decide what reform measures are adopted. There is a need for further consultation on this.

It is fundamental that any reforms should allow Indigenous people self-determination at all levels, including the way reforms of the Australian legal system, if any, should be effected.

The next stage of developing a strategy for greater protection and recognition of Indigenous Cultural and Intellectual Property is for Indigenous people to assert their Indigenous Cultural and Intellectual Property Rights, by using the strategies outlined in this Report and working together with industry bodies and government agencies towards developing protocols which recognise these rights.

26.1 Short-term strategies

The short-term protection strategies which can be implemented immediately without the need for legislative amendments are

26.1.1 *Development of Indigenous Cultural Protocols*

Without the need for legislative amendments, Indigenous people can commence the

development of cultural protocols in association with various industries. In order to facilitate this, there is a need for some coordinating body. For instance, the Indigenous Reference Group or the more formal structure of a National Indigenous Cultural Authority.

26.1.2 *Negotiate rights under Contracts*

Indigenous people should assert their rights to their cultural and intellectual property and have such rights recognised under contracts. There is a need for greater legal education and specialist knowledge to assist with the development of standard agreements. A specialist Indigenous Cultural and Intellectual Property Legal Centre which produces information material to assist Indigenous people in their negotiations should be established immediately. There should also be greater support for legal cases which test the current legal framework.

Governments and Industry bodies can commence developing agreements concerning use of cultural resources immediately.

26.1.3 *Establishment of an Authenticity Trade Mark*

Priority should be given to developing a national Indigenous authenticity trade mark and labelling system which allows for local, regional and state applications of the trade marks. This will not only benefit consumers but will also promote Indigenous culture and increase returns to Indigenous producers.

26.1.4 *Education and Awareness Strategies*

There is an urgent need for greater education and awareness of Indigenous Cultural and Intellectual Property issues within the wider community. Informed debate between Indigenous people and educational, cultural institutions, libraries, museums should be encouraged.

26.1.5 *Development of Networks*

Indigenous community groups and organisations should form national and international networks which share knowledge and experience. Indigenous people nationally should work together towards solving and monitoring the various problems.

Many of these strategies can be pursued within the current legal system, with Indigenous people having a large amount of control in their development if adequate funding and infrastructure is provided.

26.1.6 *Development of Codes of Ethics*

Professional associations including researchers, doctors, journalists and artists should develop codes of ethics in association with Indigenous people.

26.2 Medium to long-term strategies

The medium to long-term protection strategies will need greater commitment of resources and/or legislative change. These are:-

26.2.1 *Establishment of Indigenous unit within AIPO*

An Indigenous unit within the Australian Industrial Property Organisation is recommended. Some of the suggested functions of the Unit are:

- Establish checks and balances within AIPO concerning culturally appropriateness of marks and whether consent of Indigenous people has been obtained;
- To promote access and equity.

26.2.2 *Establishment of a national Indigenous cultural authority*

An independent National Indigenous Cultural Authority which is established and controlled by Indigenous people is recommended to provide advice on issues relating to Indigenous Cultural and Intellectual Property Rights. This national body can play a coordinating role in the development of policies, protocols and laws which seek to ensure that Indigenous Cultural and Intellectual Property Rights are observed and protected in various industries.

26.2.3 *New laws*

The suggested changes to the various laws and the proposal for a new legislative framework is a much more longer-term strategy and will require further consultation and consideration by Indigenous people.

26.3 A holistic approach

A holistic, realistic and culturally appropriate approach should be taken to resolving the problem, an approach that allows Indigenous people the autonomy to develop — within the various local, regional and national power structures — mechanisms which maintain and strengthen their cultures and ensure that they have something to pass on to future generations for the benefit of all Australians.

Appendix 1

Indigenous Reference Group on Cultural and Intellectual Property

Draft Principles and Guidelines for the Protection of the Heritage of Indigenous People

Considered by ATSIC s Indigenous Reference Group at a meeting held in Sydney, 16-17 September 1997, these principles and guidelines adopt and elaborate on the Principles and Guidelines for the protection of Indigenous Peoples Cultural Heritage drafted by Mrs Erica Irene Daes, Special Rapporteur, UN Economic and Social Council s Sub-Commission on Prevention of Discrimination and Protection of Minorities in her *Study of the Protection of the Cultural and Intellectual Property of Indigenous Peoples (1993).*[1]

Principles

1. The protection of Indigenous people s heritage must be based on the right and duty of Indigenous peoples to maintain and develop their own cultures and knowledge systems, and forms of social organisation.
2. Indigenous people must 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.

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[1] UN Doc E/CN.4/Sub 2/1995/26.

3. Recognition and respect for Indigenous people s own evolving customs, rules and practices for the transmission of their heritage to future generations is essential to these people s enjoyment of human rights and human dignity.

4. Indigenous people s ownership and custody of their heritage must continue to be collective, permanent and inalienable, as prescribed by the customs, rules and practices of each people, and where ownership is not currently recognised the national law should provide for such recognition.

5. The discovery, use and teaching of Indigenous people s knowledge, arts and cultures is inextricably connected with the traditional lands and territories of each people. Control over Indigenous areas and resources is essential to the continued transmission of Indigenous people s heritage to future generations, and its full protection.

6. To protect their heritage, Indigenous people must control their own means of cultural transmission and education. This includes their right to the continued use and, wherever necessary, the restoration of their own languages.

7. To protect their heritage, Indigenous peoples must also exercise control over all research conducted within their territories, or which uses their people as subjects of study.

8. The free and informed consent of the Indigenous owners should be an essential precondition of any agreements which may be made for the recording, study, use or display of Indigenous people s heritage.

9. Agreements must ensure that the Indigenous people concerned continue to be the primary beneficiaries of commercial application of their heritage. Provisions for revocation should be included in any agreements which are made for the recording, study, use or display of Indigenous people s heritage.[2]

Guidelines

Definitions

10. The heritage of Indigenous people is comprised of all objects, sites and knowledge the nature or use of which has been transmitted from generation to generation, and which is regarded as pertaining to a particular people or their country. The heritage of Indigenous people also includes objects, knowledge and literary, performing or artistic works which may be created in the future based upon its heritage.

11. The heritage of Indigenous people includes all moveable cultural property as defined by the relevant conventions of UNESCO; all kinds of literary, performing and artistic works such as music, dance, song, ceremonies, languages, symbols and designs, narratives and poetry; all kinds of scientific, agricultural, technical and ecological knowledge, including cultigens, medicines and sustainable use of flora and fauna; human remains; immoveable cultural property such as sacred sites, sites of historical significance, and burials; and documentation of Indigenous people s heritage on film, photographs, videotape, audiotape and all forms of media.

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[2] Draft of Principle 9 subject to IRG ratification at next IRG meeting.

12. Every element of Indigenous people s heritage has Indigenous owners, which may be the whole people, a particular family or clan, an association or society, or individuals who have been specially taught or initiated to be its custodians. The Indigenous owners of heritage must be determined in accordance with Indigenous people s own customs, laws and practices in its evolving form.

Transmissions of heritage

13. The right of Indigenous people to transmit and share their heritage, in accordance with their customary laws in its evolving form, must be recognised in a national law.

14. In the event of a dispute over the custody or use of any element of an Indigenous people s heritage, judicial and administrative bodies should be guided by the advice of Indigenous elders who are recognised by the Indigenous communities or people concerned as having specific knowledge of Indigenous laws or practices in their evolving form.

Recovery and restitution of heritage

15. The Federal Government, with the assistance of competent international organisations, should assist Indigenous people in recovering control and possession of their moveable cultural property and heritage.

16. Human remains and associated funeral objects must be returned to their descendants and territories in a culturally appropriate manner, as determined by the Indigenous people concerned. Documentation may be retained, displayed or otherwise used only in such form and manner as may be agreed upon with the people concerned.

17. Moveable cultural property should be returned wherever possible to its Indigenous owners, particularly if the Indigenous people assert they are of significant cultural, religious or historical value to them. Moveable cultural property should only be retained by universities, museums, private institutions or individuals in accordance with the terms of a recorded agreement with the Indigenous owners for the sharing of the custody and interpretation of the property.

18. Under no circumstances should objects or any other elements of an Indigenous people s heritage be publicly displayed, except in a manner deemed appropriate by the people concerned.

19. In the case of objects or other elements of heritage which were removed or recorded in the past, the Indigenous owners of which can no longer be identified precisely, the Indigenous owners are presumed to be the entire people associated with the group and country from which these objects were removed or recordings were made.

National programs and legislation

20. The national law must guarantee that Indigenous people can obtain prompt, effective and affordable judicial or administrative action to prevent, punish and obtain full restitution and just compensation for the acquisition, documentation or use of their heritage without proper authorisation of the Indigenous owners. Where appropriate the language of Indigenous groups should be applied to the proceedings.

21. The national law should deny to any person or corporation the right to obtain patent,

copyright or other legal protection for any element of Indigenous heritage without adequate documentation of the free and informed consent of the Indigenous owners to an arrangement for the sharing of ownership, control, use and benefits.

22. The national law should ensure the labelling and correct attribution of Indigenous people s artistic, literary and cultural works whenever they are offered for public display or sale. Attribution should be in the form of a trade mark or an appellation of origin, authorised by the people or communities concerned.

23. The national law for the protection of Indigenous people s heritage should be adopted following consultations with Indigenous people and should have the informed consent of the people concerned.

24. The use of Indigenous languages in education, arts and the mass media should be respected and, to the extent possible, promoted and strengthened.

25. All governments should provide Indigenous communities with financial and institutional support for the control of local education, through community-managed programs, and with use of Indigenous teaching, curricula and languages.

Researchers and scholarly institutions[3]

26. All researchers and scholarly institutions should take immediate steps to provide Indigenous people and communities with comprehensive inventories of the cultural property, and documentation of Indigenous people s heritage, which they may have in their custody.

27. Researchers and scholarly institutions should return all elements of Indigenous people s heritage to the Indigenous owners upon demand, or obtain formal agreements with the Indigenous owners for the shared custody, use and interpretation of their heritage.

28. Researchers and scholarly institutions should decline any offers for the donation or sale of elements of Indigenous people s heritage without clear evidence and without first contacting the people or communities directly concerned and ascertaining the wishes of the Indigenous owners.

29. Researchers and scholarly institutions must refrain from engaging in any study of previously undescribed species or cultivated varieties of plants, animals or microbes, or naturally occurring pharmaceuticals, without first obtaining satisfactory documentation that the specimens were acquired with the consent of the Indigenous owners.

30. Researchers must not publish information obtained from Indigenous people or the results of research conducted on flora, fauna, microbes or materials discovered through the assistance of Indigenous people, without identifying the Indigenous owners and obtaining their consent to publication.

31. Researchers and scholarly institutions should make every possible effort to increase Indigenous people s access to all forms of medical, scientific and technical education, and participation in all research activities which may affect them or be of benefit to them.

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[3] Adoption of Guidelines 26-32 to be confirmed at next IRG Meeting subject to wider acceptance by Indigenous research institutions.

32. Professional associations of scientists, engineers and scholars, in collaboration with Indigenous people, should sponsor seminars and disseminate publications to promote ethical conduct in conformity with these guidelines and discipline members who act in contravention.

Business and industry[4]

33. In dealings with Indigenous people, business and industry should respect the same guidelines as researchers and scholarly institutions.

34. Business and industry should agree to an immediate moratorium on making contracts with Indigenous people for the rights to discover, record and use previously undescribed species or cultivated varieties plants, animals or microbes, or naturally occurring pharmaceuticals. No further contracts should be negotiated until Indigenous people and communities themselves are capable of supervising and collaborating in the research process.

35. Business and industry should refrain from offering incentives to any individuals to claim Indigenous rights of ownership or leadership within an Indigenous community, in violation of their trust within the community and the laws of the Indigenous people concerned.

36. Business and industry should refrain from employing scientists or scholars to acquire and record Indigenous knowledge or other heritage of Indigenous people in violation of these guidelines.

37. Business and industry should contribute financially and otherwise to the development of educational and research institutions controlled by Indigenous people and communities.

38. All forms of tourism based on Indigenous people s heritage must be restricted to activities which have the approval of the people and communities concerned and which are conducted under their supervision and control.

Artists, writers and performers[5]

39. Artists, writers and performers should refrain from incorporating elements derived from Indigenous heritage into their works without the informed consent of the Indigenous owners.

40. Artists, writers and performers should support the full artistic and cultural development of Indigenous peoples and encourage public support for the development and greater recognition of Indigenous artists, writers and performers.

41. Artists, writers and performers should contribute, through their individual works and professional organisation to the greater public understanding and respect for the Indigenous heritage associated with the country in which they live.

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[4] Adoption of Guidelines 33-38 to be confirmed at next IRG Meeting subject to wider acceptance by Indigenous business and industry institutions.

[5] Adoption of Guidelines 39-41 to be confirmed at next IRG Meeting subject to wider acceptance by Indigenous arts bodies.

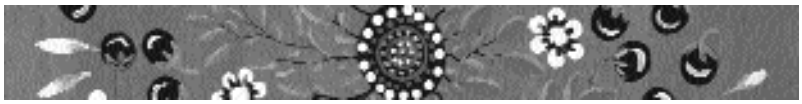
ATSIC s Indigenous Reference Group

In early 1996, ATSIC established an Indigenous Reference Group (IRG) to find out what Indigenous people consider should be protected, and how problems in this area could best be solved. The IRG is currently chaired by Ian Delaney, an ATSIC Commissioner responsible for arts and culture. The IRG consists of Indigenous people who have expertise and experience in various areas of cultural and intellectual property.

Ian Delaney - Chair	ATSIC Commissioner
Albert Mullet	Krowanthunkoolong Aboriginal Cooperative, Victoria
Bronwyn Bancroft	Artist, Sydney
Christine Christophersen	Association of Northern Kimberley and Arnhem Aboriginal Artists, Darwin
Djon Mundine	Museum of Contemporary Art, Sydney
Kay Mundine	Chair, National Indigenous Arts Advocacy Association
Fay Nelson	Aboriginal and Torres Strait Islander Arts Unit, Australia Council, Sydney
Michael Mansell	Tasmania Aboriginal Centre
Joe Brown	Kimberley Aboriginal Law and Culture Centre, Fitzroy Crossing, Western Australia
Rocky Gela	Torres Strait Islander Advisory Board, Adelaide
Aven Noah	Torres Strait Islander Media Association, Thursday Island
Walter Saunders	Indigenous Branch, Australian Film Commission, Sydney
Liz McNiven	Artist, Enngonia
Denise Karpany	FATSIL, Aboriginal and Torres Strait Islanders Corporation for Languages, Queensland National Indigenous Media Association
Tommy May	Mangkaja Arts, Fitzroy Crossing, WA
Les Malezer	Foundation for Aboriginal and Islander Research Action
Conrad Ratara and Max Stuart	Central Land Council, Alice Springs
Tamara Hunter	Centre for Indigenous Art and History, University of Western Australia

Appendix 2

List of Respondents to Our Culture: Our Future Discussion Paper



Australian Film Commission	Wal Saunders and Kim Ireland
Australian Film, Television and Radio School	Rod Bishop, Director
Australian Institute of Aboriginal and Torres Strait Islander Studies	Mary Edmunds Director of Research
Australian Industrial Property Organisation	Andrew A Bain, Director, General
Aboriginal Tourism Australia	Leanne Miller
Asia Pacific Intellectual Property Law Institute	Tanya Aplin
Australia Council for the Arts	Michael Lynch, General Manager
Australian Broadcasting Authority	John Corker, Manager, Legal
Australian Broadcasting Corporation	Judith Walker, Legal Section
Australian Academy of the Humanities	David Bennett, Executive Director
Aboriginal Affairs Department (WA)	Irene Stainton, Manager, Aboriginal Participation
Australian Copyright Council	Ian McDonald, Legal Officer
ATSIC (South Australia)	Lyn O Meara, Manager State Wide Program Co-ordination

Australian Archives	Anne-Marie Schwitlich National Director, Access and Information Services
Arts Victoria	Alison Fraser, General Manager, Arts Industry Development
Central Land Council	H J Furber, Acting Director
Centre for Indigenous History and the Arts	Tamara Hunter
City of Wanneroo	Carmelita Baltazar, Recreation and Cultural Services
Council for Aboriginal Reconciliation	N D Westbury/Pat Dodson
Daki Budtcha Pty Ltd	Ade Kukoyi, Managing Director
Office of National Tourism, Industry Science and Tourism	Paul Davies
Magabala Books	Bruce Sims, Jill Walsh, Samantha Cook for and on behalf of the Management Committee
Crown Solicitor s Office (WA)	Brad Prentice
Department of Aboriginal Affairs (NSW)	Tony McAvoy/Robbie Lloyd, Heritage & Natural Resources Division
Department of State Aboriginal Affairs (SA)	David J Rathman, Director
Department of Employment, Education	Russell Patterson, Assistant Secretary, Training and Youth Affairs Indigenous Employment Initiatives Branch
Film Australia	Sharon Connolly, Chief Executive Officer
Indjibundji Tribal Aboriginal Corporation	Ponjydfljydu
Jumbunna Centre for Australian Indigenous Studies, Education and Research	Chris Evans
National Film and Sound Archives	R I Brent, Director
National Indigenous Media Association of Australia	Brett Leavy, Chief Executive Officer
National Library of Australia	Amelia McKenzie, Executive Branch
Northern Land Council	Katie Haire, Research Officer
Powerhouse Museum	Mr Terence Meaham, Director
Tasmanian Aboriginal Land Council	Karen Brown, Administrator

Archives Authority of NSW	Frances Lemmes, Deputy Principal Archivist
NSW Aboriginal Land Council	Aden Ridgeway, Executive Officer
NSW National Parks and Wildlife Services	Gavin Andrews
Queensland Museum	Dr Daniel Robinson
Tasmanian Museum and Art Gallery	Debby Robertson, Indigenous Culture Department
Screenrights	Alison Cook, Member Services
Committee for Geographical Names in Australia	John Parker, Chairman
Tourism Council of Australia	Pamela Sayers, National Policy Manager
Vi$copy	Anna Ward, Executive Officer
Warnayaka Arts Centre Inc.	Kathleen Andrews
Berndt Museum of Anthropology University of Western Australia	Dr J Stanton, Carly Lane
University of Adelaide (Linguistics)	Rob Amery and Kaurna Language & Language Ecology Class
Victorian Folklife Association Inc.	Susan Faine
Wangka Maya Pilbara Aboriginal Language Centre	Indigenous
Western Australian Tourism Commission	Shane Crocket, Chief Executive Officer
Yunggorendi First Nations Centre for Higher Education, The Flinders University of South Australia	Lester Irabinna Rigney

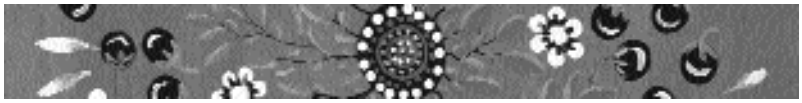
<u>Individuals</u>

Hugh Anderson	
Alex Byrne	Director Information Services, Northern Territory University Academy
John Clegg	University of Sydney (Archaeology)
Dr Gwenda Davey	Monash University, Co-odinator Folklife Studies
Michael Davis	
Hon Doug Everingham	

Chris Gibson	University of Sydney (Geography)
Stephen Gray	Northern Territory University (Law)
Charmaine Green	
Carole Johnson	
Michael Lean	Queensland University of Technology
Vivian Mac Farlane	Quotes Permission Consultancy
Professor Julie Marcus	Charles Sturt University, School of Social Sciences and Liberal Studies
Liz McNiven	Indigenous Reference Group
Bill Morrow	Solicitor
Karl Neuenfeldt	University of Central QLD
Tony Simpson & Vanessa Jackson	
Sharne Thomas	
Professor Shelley Wright	University of Sydney (Legal)

Appendix 3

Indigenous Cultural Heritage Laws



The laws and policies cited in Appendix 3 are current as at December 1997. Many changes have occurred

Indigenous cultural heritage is legislatively protected under a range of Commonwealth, State and Territory heritage legislation as well as certain museum, environmental, land and conservation legislation. Some Acts are specifically related to Indigenous cultural heritage protection while others are for all cultural heritage generally. The following is a summary of the legislative framework.

A3.1 Commonwealth legislation

The Commonwealth legislation includes Indigenous heritage within the general framework of heritage protection. There is also specific legislation which relates to Indigenous cultural heritage.

A3.1.1 *Aboriginal and Torres Strait Islander Heritage Protection Act 1984 (Cth)*

The *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* was originally introduced as an interim measure pending the development of proposed national land rights legislation. The Act was designed to provide the Commonwealth Government with the legal means to protect areas and objects of particular significance to Aboriginal and Torres Strait Islanders under threat of desecration, but not adequately protected under State and Territory laws. The Act is intended only as a last resort to protect Indigenous heritage where State and Territory laws are ineffective or where no equivalent law applies. Indigenous people have increasingly resorted to the Commonwealth as a primary protection for their cultural areas and objects because of inefficiencies in the State and Territory laws.

The *Aboriginal and Torres Strait Islander Heritage Protection Act 198*4 aims to preserve and protect from injury or desecration areas and objects of particular signifi-

cance to Aboriginal and Torres Strait Islanders in accordance with Aboriginal tradition .

Aboriginal tradition means the body of traditions, observances, customs and beliefs of Aboriginals generally or of a particular community or group of Aboriginals, and includes any such traditions, observances, customs or beliefs relating to particular persons, areas, objects or relationships . (s 3(1)). The Minister has powers to make declarations and basically give effect to the protection sought.

A review of the *Aboriginal and Torres Strait Islander Heritage Protection Act* was conducted in 1995-96 by the former Justice Elizabeth Evatt, whose report noted concerns raised by Indigenous people that the Act did not cover intellectual property.[1] The report also noted that Indigenous people were critical of the Act because of the power to protect areas and objects is discretionary. The Minister is not obliged to act, even if an area is of significance to Indigenous people.[2]

Another concern was that the procedures of the Act open Indigenous people seeking its protection to extreme scrutiny of their religious beliefs. The Act does not protect confidential information or respect Indigenous spirituality and beliefs, which require that confidentiality be maintained. Nor does the Act adequately recognise or provide for the involvement of Indigenous people in negotiation and decision-making about their cultural heritage.[3]

Under Section 21X, a local Aboriginal community — having reason to believe that Aboriginal remains held by a university, museum or other institution were found or came from its community area — may request the Minister to negotiate with that institution for the return of the remains to the community.

A3.1.2 *Protection of Moveable Cultural Heritage Act 1987 (Cth)*

This Act covers all moveable cultural property of significance to Australia. It controls overseas trade in the most significant objects of Australia s moveable cultural heritage and provides for the return of objects illicitly imported into Australia and other countries. The Act enables Australia to fulfil its obligations under UNESCO s Convention on the Means of Prohibiting and Preventing the Illegal Import, Export, and Transfer of Ownership of Cultural Property (1970). A controlled list divides Australian protected objects into 13 categories including Aboriginal and Torres Islander heritage, archaeology and ethnography. Some Indigenous objects such as bark and log coffins, human remains, rock art, carved trees, sacred and secret ritual objects cannot be exported at all.

Exporters must apply for a permit to export:

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[1] Hon Elizabeth Evatt AC, Review of the Aboriginal and Torres Strait Islander Heritage Protection Act 1984, August 1996.
[2] *Ibid*, p 15.
[3] *Ibid*, (p xiv).

1. Objects relating to famous and important Aboriginal people, or to other people significant to Aboriginal history.

2. Objects made on missions and reserves.

3. Objects relating to the development of Aboriginal protests and self-help movements.

4. Original documents photographed during sound recordings, film and video recordings, and any similar recordings relating to objects included in this category.

The National Cultural Heritage Committee has 10 members, one nominated by the Minister for Aboriginal and Torres Strait Islander Affairs. Under Sections 15 and 17 of *The Protection of Moveable Cultural Heritage Act 1986 (Cth)*, the committee is considering changing the existing classifications and categories to bring them into line with current views on the significance of this heritage.

A3.1.3 *World Heritage Properties Conservation Act 1983 (Cth)*

This Act implements UNESCO s Convention for the Protection of the World Cultural and Natural Heritage which Australia ratified in 1974. The Convention aims to protect cultural and natural heritage of outstanding universal value . Already on the World Heritage list is Kakadu National Park and Uluru-Kata Tjuta National Park.

The International Council on Monuments and Sites gives independent advice to the World Heritage Committee on areas nominated for listing. Cultural landscapes are now included in nominations, enabling many Indigenous sites to enter the register because Indigenous heritage embraces interaction between people and the natural environment and includes places that have powerful spiritual, artistic or cultural association even in the absence of material cultural evidence.[4] Uluru-Kata Tjuta National Park is the first area in Australia to be listed under this category. The Act protects identified properties in Australia and external territories from damaging activities. If the Governor-General is satisfied that a site, artefact or relics on the site are at risk of damage, he or she can make a declaration that prohibits a range of activities on the site which might result in any damage, unless of course the written consent of the minister is obtained.[5]

The Act protects Aboriginal places under the same broad definition of the *Aboriginal and Torres Strait Islander Heritage Protection Act*. The Commonwealth first used the *World Heritage Properties Conservation Act* to protect Aboriginal sites in the Tasmanian Dams case. Here the Act was used to protect sites in the Tasmanian Wilderness World Heritage area which was threatened with flooding as a result of the Tasmanian Government s proposal to dam the Franklin River. According to the Evatt

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[4] Council for Aboriginal Reconciliation, *Value in Cultures, Recognising Indigenous Cultures as a Valued Part of Australian Heritage*, Key Issues Paper No. 3, AGPS 1994, p 33.

[5] Section 8(iii) and Section 11 *World Heritage Properties Conservation Act 1983 (Cth)*.

Report, Aboriginal involvement in the management of the World Heritage listed properties has been an issue of contention. [6]

A3.1.4 *Museum of Australia Act 1980 (Cth)*

The *Museum of Australia Act 1980 (Cth)* includes provision for establishing a Gallery of Aboriginal Australia.[7] The Act provides that the gallery s council will ensure development and maintenance of the gallery is carried out by Indigenous people.[8]

A3.1.5 *Aboriginal and Torres Strait Islander Commission Act 1989 (Cth)*

The *Aboriginal and Torres Strait Islander Commission Act 1989 (Cth)* has some provisions relating to heritage. Section 3(c) of this Act states that the Aboriginal and Torres Strait Islander Commission aims to further the economic, social and cultural development of Indigenous people. The Act also provides the Commission with the power to protect Aboriginal and Torres Strait Islander cultural property and information considered sacred or otherwise significant to Aboriginal and Torres Strait Islanders. Cultural property is defined by the *Aboriginal and Torres Strait Islander Commission Act 1989* as including material objects and information, such as that which traditionally may be held by anthropological departments or (non-Aboriginal) museums and in genealogical and photographic archives.[9]

A3.1.6 *Australian Heritage Commission Act 1975 (Cth)*

This Act establishes the Australian Heritage Commission whose function is to identify, conserve, improve and present Australia s National Estate , that is those places being components of the natural environment of Australia and the cultural environment of Australia, that have aesthetic, historic, scientific or social significance or other special value for future generations as well as for the present community .

The National Estate does not specifically include objects, only areas. According to the Council for Aboriginal Reconciliation *Value in Cultures* report, in 1994 there were 794 Indigenous places registered as part of the National Estate out of a total of 18,190.[10]

Any person can approach the Commission to ask for registration of a place. The Australian Heritage Commission keeps a Register of the National Estate. Only after a technical assessment of significance has been made, can a place be listed in the register. The place is then protected in that the Commonwealth minister s department and authorities have obligations to do everything possible to ensure their departments and authorities do not:

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[6] Evatt Report, p 24.
[7] *Museum of Australia Act 1980 (Cth),* Chapter 5.
[8] *Ibid,* section 5(4).
[9] Section 7(1)(g), *Aboriginal and Torres Strait Islander Commission Act 1989.*
[10] Council for Aboriginal Reconciliation, *Value in Cultures* report, p 26.

> *... take any action that adversely affects, as part of the National Estate, a place that is in the Register unless he (or she) is satisfied that there is no feasible and prudent alternative to the taking of that action, and that all measures that can be reasonably be taken to minimise the adverse affect will be taken.*[11]

Before taking any action that might affect to a significant extent, as part of the National Estate a place in the register, the minister s departments and authorities must notify the Australian Heritage Commission to enable it to comment.

A3.1.7 *Australian Institute of Aboriginal and Torres Strait Islander Studies Act 1989 (Cth)*

The *Australian Institute of Aboriginal and Torres Strait Islander Studies Act 1989 (Cth)* establishes the Australian Institute of Aboriginal and Torres Strait Islander Studies (AIATSIS),[13] which has powers to promote the study and protection of cultural heritage matters and to encourage community understanding of Indigenous peoples and their societies.[14] The Institute s functions include establishing and maintaining a cultural resource collection consisting of materials relating to Aboriginal and Torres Strait Islander studies ,[15] which means research and study into the culture, history and society of Aboriginal and Torres Strait Islanders.[16]

Under the Act, AIATSIS is established to:

- Undertake and promote Aboriginal and Torres Strait Islander Studies.
- Publish the results of Aboriginal and Torres Strait Islander studies and to assist the publication of the results.
- Conduct research in fields relevant to Aboriginal and Torres Strait Islander studies and to encourage other persons or bodies to conduct such research.
- Assist in training, particularly Aboriginal people and Torres Strait Islanders, as research workers in fields relevant to Aboriginal and Torres Strait Islander studies.
- Establish and maintain a cultural resource collection consisting of material relating to Aboriginal and Torres Strait Islander studies.
- Encourage understanding, in the general community, of Aboriginal and Torres Strait Islander societies.
- Do anything else incidental or conducive to the performance of any of the above functions.

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[11] Section 30(i).
[12] Section 30(iii).
[13] Section 51 *Australian Institute of Aboriginal and Torres Strait Islander Studies Act 1989 (Cth).*
[14] Section 5, *Australian Institute of Aboriginal and Torres Strait Islander Studies Act 1989 (Cth).*
[15] Section 5(e), *Australian Institute of Aboriginal and Torres Strait Islander Studies Act 1989 (Cth).*
[16] Section 3, *Australian Institute of Aboriginal and Torres Strait Islander Studies Act 1989 (Cth)*

Section 41(1) of the Act provides that where information or other matter has been deposited with the Institute under conditions of restricted access, the Institute or the Council shall not disclose that information or other matter except in accordance with those conditions.

Section 41(2) provides that the Institute or the Council shall not disclose information or other matter held by it if that disclosure would be inconsistent with the views or sensitivities of the relevant Aboriginal people or Torres Strait Islanders.

Section 46 makes it offence for a person, in connection with an application for grant or loan, to make a false and misleading statement or to present a document that to the person s knowledge, contains information that is false and misleading.

A3.1.8 *Environment Protection (Impact of Proposals) Act 1974 (Cth)*

This Act has some powers in relation to Indigenous cultural heritage through the mechanism of environmental impact assessment[17] and through public environmental inquiries.[18] The Act gives the Commonwealth minister the power to protect the environment in relation to projects and decisions which are under the control of the Commonwealth Government. Environment is defined as including all aspects of the surrounds of human beings, whether affecting them as individuals or in social groupings. This, in theory, could include significant Aboriginal sites.

A3.2 Northern Territory legislation

A3.2.1 *The Aboriginal Land Rights (Northern Territory) Act 1976 (Cth)*

The *Aboriginal Land Rights (Northern Territory) Act 1976 (Cth)* makes it an offence to enter or remain on land that is a sacred site.[19] Under section 73(1) of this Act, the Legislative Assembly of the Northern Territory has the power to make laws regarding the protection of sacred sites in the Northern Territory. This led to enactment of the current legislation, the *Northern Territory Aboriginal Sacred Sites Act 1989*, which aims to effect a practical balance between the recognised need to preserve and enhance Aboriginal cultural tradition in relation to certain land in the Territory and the aspirations of Aboriginal and other peoples of the Territory of their economic, cultural and social advancement by, among other things, setting up procedures for:

- The protection and registration of sacred sites.[20]
- Entry onto sacred sites and the conditions to which such entry is subject.[21]

The Aboriginal Areas Protection Authority (AAPA) was established to administer the

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[17] Section 6(2), *Environmental Protection (Impact of Proposals) Act 1974 (Cth).*
[18] Section 11(1), *Environmental Protection (Impact of Proposals) Act 1974 (Cth).*
[19] Section 69(1), *Aboriginal Land Rights (Northern Territory) Act 1976 (Cth).*
[20] Section 10, *Northern Territory Aboriginal Sacred Sites Act 1989.*
[21] Section 43, *Northern Territory Aboriginal Sacred Sites Act 1989.*

Northern Territory Aboriginal Sacred Sites Act 1989. The board of the AAPA is made up of five men and five women being Aboriginal custodians of sacred sites nominated by the Lands Council and two other members nominated by the government of the day. The chairman and deputy chairman of the AAPA must be Aboriginal members.[22]

The protection granted under the Act is for places of Aboriginal cultural significance. A sacred site is defined as a site that is sacred to Aboriginals or otherwise of significance according to Aboriginal tradition, and includes any land that, under a law of the Northern Territory, is declared to be sacred to Aboriginals or of significance to Aboriginal tradition .[23]

A traditional owner can apply to have a sacred site registered under section 27 of the Act. As part of the application procedure, the AAPA must consult with the Aboriginal owners of the site to determine a range of factors, such as the traditional basis of custodianships and the names and addresses of custodians; and restrictions applying to traditional information about the site.[24]

Under the Act, custodians have statutory rights which include the right of access to sacred sites in accordance with Aboriginal tradition, regardless of the underlying land tenure.[25] Custodians also have the right to authorise other people, both Indigenous and non-Indigenous, to cross any land, public or private, to enter a sacred site. These rights are enforced by provisions that make it an offence to obstruct an Aboriginal custodian from exercising them.[26]

The traditional custodians also have the power to refuse permission for people to enter or remain on a sacred site,[27] and further powers to determine the nature and extent of works that may be undertaken on or in the vicinity of a sacred site.[28]

Another feature of the Act is that it encourages agreement between custodians and developments. Under section 10(a), the AAPA has the power to facilitate discussions between custodians of sacred sites and persons performing or proposing to perform work on or use land in the vicinity of a sacred site, with a view to their agreeing on an appropriate means of site avoidance and protection of sacred sites .

A3.2.2 *Northern Territory Heritage Conservation Act 1991*

Objects outside sacred sites are protected under the Northern Territory Heritage Conservation Act 1991. This Act is directed largely at non-Indigenous natural and cultural heritage matters. The Act provides protection for places and objects of prehis-

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[22] Aboriginal Areas Protection Authority, Submission to the Culture and Heritage Inquiry.
[23] Section 3 *Northern Territory Aboriginal Sacred Sites Act 1989*. Aboriginal tradition is also defined.
[24] Aboriginal Areas Protection Authority, Submission to the Culture and Heritage Inquiry.
[25] Section 46, *Northern Territory Aboriginal Sacred Sites Act 1989*.
[26] Section 47(4)), *Northern Territory Aboriginal Sacred Sites Act 1989.*
[27] Section 43, *Northern Territory Aboriginal Sacred Sites Act 1989*.
[28] Section 20, *Northern Territory Aboriginal Sacred Sites Act 1989.*

toric, historic, social, aesthetic or scientific value .[29]

The Act provides for a Heritage Advisory Council of which one person must be nominated by the AAPA.[30] The Act aims to provide a structure to identify and control Aboriginal archaeological places and objects. For the purposes of this Act, Aboriginal portable objects include secret and ceremonial objects, log or bark coffins, human remains, portable rock or wood carvings or engravings or stone tools .[31] Under the Act, it is an offence to carry out work of any sort on or damage, desecrate or alter or remove from its location such prescribed objects without approval from the minister.[32] There is also a requirement for the Director of Conservation to be notified on the discovery of a prescribed object including skeletal material.

A3.3 New South Wales legislation

A3.3.1 *National Parks and Wildlife Act 1974 (NSW)*

In New South Wales, Indigenous cultural heritage is generally managed by the *National Parks and Wildlife Act 1974 (NSW)*. Under this Act, the Director-General of the National Parks and Wildlife Service (NPWS) is empowered to create and control Aboriginal places or protected archaeological areas .[33] A relic is defined as any deposit, object or material object relating to Aborigines, including Aboriginal remains, excluding handicraft made for sale relating to Indigenous and non-European habitation of New South Wales . The legislation takes a historical approach to protection.

Without the consent of the director-general,[34] the Act makes it an offence:

(i) To disturb or excavate any land with the purpose of uncovering a relic, or to disturb or remove any relic that is the property of the Crown.[35]

(ii) To damage, deface or destroy a relic or fail to notify the director-general of a relic.[36]

The director-general may issue permits to, among other things, disturb or move relics; take possession of a relic; or erect or maintain a building or structure in one of these areas for safe custody, storage and exhibition of the relic.[37]

The Act provides for the establishment of an Aboriginal Cultural Heritage (Interim) Advisory Committee of eight, five of whom are Aboriginal.[38]

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[29] Section 3, *Heritage Conservation Act 1991 (NT).*
[30] Section 8(1)(d), *Heritage Conservation Act 1991 (NT).*
[31] Section 4, *Heritage Conservation Act 1991 (NT).*
[32] Section 28, *Heritage Conservation Act 1991 (NT).*
[33] Section 85 and 87, *National Parks and Wildlife Act 1974 (NSW).*
[34] Sections 87-89, *National Parks and Wildlife Act 1974 (NSW).*
[35] Section 86, *National Parks and Wildlife Act 1974 (NSW).*
[36] Section 90, *National Parks and Wildlife Act 1974 (NSW).*
[37] Section 86 and 87, *National Parks and Wildlife Act 1974 (NSW).*
[38] Section 27, *National Parks and Wildlife Act 1974 (NSW).*

Figures calculated in 1996 indicated that, since the Act s inception, there have been nine Aboriginal places declared under the Act and more than 30,000 relics identified.[39]

Recent amendments to this Act were contained in the *National Parks and Wildlife Amendment (Aboriginal Ownership Act, 1996, Schedule 1)*. Under this Act, Aboriginal has the same meaning as defined in the *Aboriginal Land Rights Act NSW 1983*. This Act amends the 1974 Act and allows for the establishment of a board of management for a national park or historical site, which is responsible for the care, control and management of the park or site, rather than the director-general.

There are exemptions from Section 45 provisions regarding animals in parks and sites, if used for domestic purposes or for ceremonial or cultural purposes other than an animal of a threatened species or an animal protected in the plan of management for the park or site.

Section 56 covers animals in nature reserves and includes a provision which does not prevent an Aboriginal owner on whose behalf the land of a nature reserve is held by one or more Aboriginal land councils in accordance with Part 4(a), or any other Aboriginal who has the consent of the Aboriginal owner board members, from harming an animal within the reserve for the same purposes.

Section 57, which relates to restrictions regarding timber, vegetation, plants, etc in nature reserves, also provides exemptions under Section 57(6) for Aboriginal owners picking any tree, timber, plant, including a native plant, flower or vegetation, for food for domestic purposes or for ceremonial or cultural purposes (including a protected native plant but not including a plant of a threatened species or a plant protected by the plan of management for the reserve).

A3.4 South Australian legislation

A3.4.1 *South Australian Aboriginal Heritage Act 1988*

The aim of the South Australian Aboriginal Heritage Act 1988 is to provide effective protection of Aboriginal heritage in South Australia. The Act gives Aboriginal people control over Aboriginal heritage and input in decision making unlike other State and Territory legislation. The Act provides blanket protection to all sites and objects of significance to Aboriginal tradition in South Australia. But the Act counters this by providing for ministerial exemptions where certain activities are justified.[40]

The definition of Aboriginal tradition does not attempt to restrict recognition to pre-European tradition. It allows for continuing development of Indigenous culture. The Act assures the confidentiality of information contained on the archives and in the Register

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[39] ATSIC, *Protecting Heritage: A Plain English Introduction to Legislation Protecting Aboriginal and Torres Strait Islander Heritage in Australia*, Land Heritage and Cultural Branch, Canberra March 1996, p 22.
[40] Second Reading Speech, South Australian Hansard, 11 April 1997.

of Sites and Objects. Access is subject to the approval of traditional owners. The Act establishes an Aboriginal Heritage Committee composed entirely of Indigenous people drawn from local South Australian communities. The functions of the Aboriginal Heritage Committee are to advise the minister on aspects of administration of the Act. Section 13 of the Act ensures that the minister consults Indigenous people before making any determination or authorisation under the Act. The minister must accept the views of the traditional owners as to whether the land or object is of significance according the Aboriginal tradition.

When the Act was passed, the South Australian Government stressed that it intended that the day-to-day administration of the Act would, as far as practicable, be delegated to traditional owners or local Aboriginal organisations and the Act reflects this commitment.[41] The Act also contains a fundamental guarantee that it will not be used to overrule Aboriginal tradition in terms of Aboriginal people s actions in relation to sites, objects, and remains. It does not affect the ownership of the heritage protected under the Act, but the minister does have the power to acquire land or objects for the purpose of protecting them. The minister may also place these acquisitions in the custody of an Aboriginal person or organisation.

A3.5 Queensland legislation

A3.5.1 *Queensland Cultural Records Act*

The *Cultural Record (Landscapes Queensland and Queensland Estate) Act* does not distinguish between Aboriginal heritage and other heritage in Queensland. The words Aboriginal and Torres Strait Islander have been deliberately excluded. This is perhaps because the legislators recognise the value of Aboriginal heritage, not just to Aboriginal and Torres Strait Islanders but to all Queenslanders. The definition of Queensland Estate refers to evidence of man s occupation of areas comprising Queensland that are of prehistoric or historical significance.

Section 32 of the Act is the only recognition of the continuing cultural significance that artists of the Queensland Estate may have for Indigenous people. If the terms of this section are read in the context of the Act, it is clear that the intention is not to protect sites or objects for the benefit of Aboriginal people. The definition of Queensland Estate may in fact restrict the applicability of the Act to some sites that are significant to Indigenous people. In view of their cultural affiliations with natural features in Aboriginal heritage, sacred religious places in the form of rocks, waterholes, trees and mountains would not necessarily be evidence of man s occupation of the area comprising Queensland or be of historic significance if the definition is interpreted in terms of European culture.

There is no provision for consultation or for the consent of Aboriginal people to be obtained before the old items under Section 13 of the *Aboriginal Relics Preservation Act 1963* are included under the new Act. Part IV of the *Queensland Cultural Record*

[41] *Ibid.*

Act makes provision for a register of the Queensland Estate in which particulars are entered of items approved by the Governor as items of great significance to Queensland history (Section 41). Again there is no provision for Aboriginal consent or participation.

Section 32 states that no provision of this Act shall be construed to prejudice ... rights of ownership had by a traditional group of Indigenous people or by a member of such a group in a part of the Queensland Estate that is used or held for traditional purposes .

A3.5.2 *Queensland Cultural Heritage Act 1992*

The *Queensland Heritage Act 1992* provides mechanisms for the conservation of Queensland s cultural heritage. The Act protects places and objects of aesthetic, architectural, historical, scientific, social or technological significance to the present generation or past or future generations .[42] The Queensland Heritage Council maintains a Heritage Register under the Act. A permit is required to conduct any harmful activity in the area. The Act s application to Indigenous heritage is limited under section 61 which states that the Act does not apply to:

(a) A place that is of cultural heritage significance solely through its association with Aboriginal traditional or Islander custom;

(b) A place situated on Aboriginal or Torres Strait Islander land unless the place is of cultural significance because of its association with Aboriginal tradition or Island custom and with European or other culture, in which case this Act applies to the place if the trustees of the land consent.

A3.5.3 *Wet Tropics of Queensland World Heritage Area Conservation Act 1994*

This Act provides for the conservation of the Wet Tropics of Queensland World Heritage Area. Under the Act the minister must use best endeavours to ensure any advisory committee established by the Authority includes Aboriginal representatives with appropriate knowledge and experience in the protection of cultural and natural heritage.[43]

A3.6 Victorian legislation

A3.6.1 *Aboriginal and Torres Strait Islander Heritage Protection Amendment Act 1987*

The *Aboriginal and Torres Strait Islander Heritage Protection Amendment Act 1987* provides for the preservation of Aboriginal cultural heritage in Victoria. The preamble of the Act acknowledges the following:

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[42] Section 4, *Queensland Heritage Act 1992*

[43] Section 8, *Wet Tropics of Queensland World Heritage Area Conservation Act 1994.*

1. The importance to the Aboriginal people and to the wider community of Aboriginal culture and heritage.

2. That the Aboriginal people of Victoria are the rightful owners of their heritage and should be given responsibility for its future control and management.

3. The need to make provision for the preservation of objects and places of religious historical significance to the Aboriginal people.

4. The need to accord appropriate status to Aboriginal elders in communities in their role of protecting the continuity of the culture and heritage of Aboriginal people.

The provisions of this Act are similar in many ways to the Commonwealth Act. The big difference is a section enabling Aboriginal Cultural Heritage Agreements to be drawn up between a local Victorian Aboriginal community and a person owning or possessing an item of Aboriginal cultural property in Victoria.[44] An agreement can cover such things as the maintenance, sale or use of the property and the rights, needs and wishes of both parties. There are also sections dealing with compulsory acquisition of cultural property by the minister to be vested in the local Aboriginal community on trust or in the minister on trust for Aborigines in Victoria.[45] There are also provisions which allows for negotiation of museums and universities for the return of Aboriginal remains.[46]

Under Section 21A of the Act, Aboriginal Cultural Property is defined as meaning Aboriginal places, Aboriginal objects and Aboriginal folklore and Aboriginal folklore means:

> *Traditions or oral histories that are or have been part of, or connected with, the cultural life of Aboriginals (including songs, rituals, ceremonies, dances, art, customs and spiritual beliefs) and that are of particular significance to Aboriginals in accordance with Aboriginal tradition.*

Twenty-eight Indigenous communities are designated in the Schedule of the Act.[47]

A3.6.2 *Archaeological and Aboriginal Relics Preservation Act 1972*

Indigenous heritage is also protected by the *Archaeological and Aboriginal Relics Preservation Act 1972*. Under this Act, all relics are automatically given blanket protection. A relic includes an item relating to the past occupation by Aboriginal people of any part of Australia and includes any Aboriginal deposit, carving, drawing, skeletal remains and anything belonging to the total body of material relating to the past Aboriginal occupation of Australia.

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[44] Section 21K, *Aboriginal and Torres Strait Islander Heritage Protection Amendment Act 1987*
[45] Section 21L, *Aboriginal and Torres Strait Islander Heritage Protection Amendment Act 1987*
[46] Section 21X, *Aboriginal and Torres Strait Islander Heritage Protection Amendment Act 1987*
[47] Section 21A(1) and Schedule

It is an offence to wilfully or negligently deface of damage or otherwise interfere with a relic; or to carry out an act likely to endanger a relic. A person may not disturb or excavate any land to uncover or discover a relic without the consent of the minister, who cannot give his or her consent where the relic is of special significance to Indigenous people or where it is likely that further relics of special significance may be found.

A3.7 Western Australian legislation

A3.7.1 *Aboriginal Heritage Act 1972 (WA)*

In Western Australia, the *Aboriginal Heritage Act 1972 (WA)* is the main legislation dealing with Indigenous cultural heritage protection. The Act was amended in 1995 by the *Aboriginal Heritage Amendment Act 1995 (No 24 of 1995)*. The Act protects places, sites and objects currently used by Aboriginal people. The Act goes further than other State and Territory legislation which focuses primarily on archaeological sites or relics. An Aboriginal site includes:

- A place of importance and significance where persons of Aboriginal descent have, or appear to have, left any object made or used for any purpose connected with the traditional cultural life of the Aboriginal people, past or present.
- A sacred, ritual or ceremonial site, which is of importance and special significance to persons of Aboriginal descent.
- A place associated with the Aboriginal people which the Aboriginal Cultural Material Committee (ACMC) considers to be of importance and special significance to persons of Aboriginal descent.
- A place where objects are traditionally stored, or to which, under the provisions of this Act, such objects have been taken or removed.

The Act also protects objects which:

- Are or have been of sacred, ritual or ceremonial significance to persons of Aboriginal descent; or
- Are or were made or used for any purpose connected with the traditional life of Aboriginal people, past or present.

The Act makes it an offence for any person to excavate, destroy, damage, conceal or in any way alter any Aboriginal site, without having authority from the ACMC. The minister may authorise the landowner to do these things, taking into account any recommendations made by the ACMC and the general interest of the community.

Where the ACMC considers a particular site is of outstanding importance, they may recommend that the land be declared a protected area by the WA Government. The Governor in Council may declare an area to be permanently protected or temporarily protected for up to six months. The minister may also restrict who can enter or remain within a protected area, or the land use.

The Governor in Council may also make regulations to ensure that the places and

objects are protected from damage, disturbance or adverse influence. It is an offence for a person to contravene any provision of a regulation.

Other offences include to alter, damage, remove, destroy or conceal an object on or under an Aboriginal site without authority of the ACMC or the minister; to deal with an object in a manner not sanctioned by relevant custom; or to assume the possession, custody or control of such an object. The Act does not take away the rights of traditional Aboriginal people to use areas and objects in accordance with Aboriginal tradition, approved by the relevant Aboriginal possessor or custodian.

Under regulations of the Act,[48] written permission is required before photographs or recordings of Aboriginal sites can be published or used for commercial reproduction. A penalty of $50 is imposed for breaches. The Aboriginal Affairs Department of WA noted that this provision is regularly overlooked by publishers, and if publishing occurs outside WA little can be done under the Act. Reproduction for postcards, material or ceramics and the like are equally hard to enforce.[49]

A3.8 Tasmanian legislation

In Tasmania, Indigenous cultural heritage is governed by two complementary acts: the *National Parks and Wildlife Act 1970 (Tas)* and the *Aboriginal Relics Act 1975 (Tas)*. Under these Acts, Indigenous Tasmanian heritage is under the control of the Secretary of the Department of Parks, Wildlife and Heritage, in a similar way to the scheme in NSW.

A3.8.1 *National Parks and Wildlife Act 1970 (Tas)*

The *National Parks and Wildlife Act 1970 (Tas)* applies to Aboriginal relics which are defined as including any artefact, painting, carving, midden, or other object made or created by or any object, site or place that bears signs of the activities of any of the Aboriginal inhabitants of Australia or their descendants.[50] The Act empowers the Secretary of the Department of Parks, Wildlife and Heritage to reserve land on the grounds of archaeological features and/or Aboriginal relics.[51] The Act provides for establishment of a National Parks and Wildlife Advisory Council, whose membership must include an archaeologist.[52] There is no requirement for appointment of any Indigenous representatives as members.

Under the Tasmanian National Parks and Reserves Regulations 1971, it is an offence to remove, damage, deface of disturb any Aboriginal relic or any object of archaeological, historical or scientific interest.[53]

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[48] Regulation 10h, *Aboriginal Heritage Act Regulations 1974.*
[49] Aboriginal Affairs Department (WA), Submission to *Our Culture: Our Future*, October 1997.
[50] Section 3, *National Parks and Wildlife Act 1970 (Tas).*
[51] Section 13, *National Parks and Wildlife Act 1970 (Tas).*
[52] Section 10(3)(i), *National Parks and Wildlife Act 1970 (Tas).*
[53] ATSIC, *A Plain English Introduction to Legislation Protecting Aboriginal and Torres Strait Islander Heritage in Australia*, p 20.

A3.8.2 *The Aboriginal Relics Act 1975 (Tas)*

The *Aboriginal Relics Act 1975 (Tas)* contains a more restrictive definition of Aboriginal relics than the *National Parks and Wildlife Act 1970 (Tas)*. Under the *Aboriginal Relics Act 1975 (Tas)*, relics refers to Aboriginal objects, remains, sites or places dating before 1876, and only those remains not interred under Aboriginal law.[54] The Act establishes a five-member Aboriginal Relics Advisory Council.[55] One member must be nominated by the minister from a list of people submitted by a body which, in the minister s opinion, represents persons of Aboriginal descent .[56]

With consent of the landowner, the Act provides the minister with the power to declare protected sites.[57] The minister then becomes responsible for the management, maintenance and protection of the relics.[58] It is an offence, without consent of the minister, for a person to interfere with any work carried out on a protected site. It is also an offence to damage, interfere with, or remove a relic from its site.

Any relics found or abandoned on Crown land are deemed to be the property of the Crown.[59] Also, the minister may serve a notice on the owner of any relic, acquiring that relic for the Crown. Any person can apply to a magistrate to quash a notice, provided they can show that they are of Aboriginal descent, or that the relic has been in possession of their family for over 50 years.[60]

A3.8.3 *Museums (Aboriginal Remains) Act 1984 (Tas)*

There are also provisions under the *Museums (Aboriginal Remains) Act 1984 (Tas)* which to some extent recognise Indigenous rights and responsibilities over Aboriginal remains. The Act declared that Aboriginal remains in the possession of the trustees of the Tasmanian Museum[61] and the Queen Victoria Museum[62] were the property of the Crown. The Act enables the minister to serve notices on the trustees compelling them to deliver the remains to elders of the Tasmanian Aboriginal community.[63] Aboriginal elders are exempted from laws that would have prevented them from being able to cremate the remains in order to dispose of them at a specific historical site.[64]

The Aboriginal Land Act 1995 (Tas) transfers the ownership of 12 Crown land sites to Aboriginal peoples. The sites are of historical, cultural, social and economic signifi-

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[54] Section 2, *Aboriginal Relics Act 1975 (Tas).*
[55] Section 3, *Aboriginal Relics Act 1975 (Tas).*
[56] Section 4(2)(b), *Aboriginal Relics Act 1975 (Tas).*
[57] Section 7, *Aboriginal Relics Act 1975 (Tas).*
[58] Sections 8, 9 and 14, *Aboriginal Relics Act 1975 (Tas).*
[59] Section 11, *Aboriginal Relics Act 1975 (Tas).*
[60] Section 12, *Aboriginal Relics Act 1975 (Tas).*
[61] Section 4(1), *Museums (Aboriginal Remains) Act 1984 (Tas).*
[62] Section 6(1), *Museums (Aboriginal Remains) Act 1984 (Tas).*
[63] Sections 4(2) and 6(2), *Museums (Aboriginal Remains) Act 1984 (Tas).*
[64] Section 8, *Museums (Aboriginal Remains) Act 1984 (Tas).*

cance to the Aboriginal community. The land is vested in perpetuity in the Aboriginal Land Council of Tasmania, which is also established under the Act.

A3.8.5 *Planning laws*

The Evatt Report noted two other Tasmanian planning acts that might provide some form of protection for Indigenous cultural heritage sites and areas.[65]

- The *Land Use Planning and Approval Act 1993* contains provisions that might be invoked to protect certain aspects of Indigenous heritage, such as sites or areas, by controlling use and development proposals in the planning process.

- The *State Policies and Project Act 1993* also offers potential protection for the development of State policy on Aboriginal heritage.

A3.8.6 *Living Marine Resource Management Act 1995*

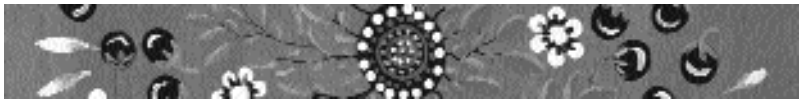
The *Living Marine Resource Management Act 1995 (Tas)* recognises the right of Indigenous people to continue customary fishing and gathering.[66]

[65] As noted by the Evatt Report, p 358, Tas Government Submission 64.

[66] Sections 10, 60(2)(1), *Living Marine Resources Management Act, 1995.*

Appendix 4

Model Laws for Protection



A4.1 The Aboriginal Folklore Model (1981)

In 1974, the Commonwealth Government set up a working party to investigate the protection of Aboriginal folklore.[1] The working party s report, completed in 1981, recommended the enactment of the Aboriginal Folklore Act. This would, among other things,

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

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

The working party recommended against a property right vested in Indigenous groups, for the following reasons:

- According to Indigenous customary law, there is no right of ownership as distinct from other rights.

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

- There was a concern about giving Indigenous communities the right to isolate their folklore from Australian culture generally as this might have the effect of giving Indigenous groups the right to control the reproduction of items of folklore.
- There was concern about the capacity of the courts to deal appropriately with the rights arising out of oral tradition.[2]

These grounds are arguably no longer valid in light of the *Mabo Case* and recent copyright cases which have gone through the Federal courts. They are also based on the premise that the purpose of the legislation is not to recognise Indigenous ownership of their folklore . In light of the various government consultations, it is clear that Indigenous people are seeking recognition of their communal rights to ownership of their cultural heritage, not ownership of this heritage by the nation as a whole.

To prevent potential conflict between the rights of traditional custodians and the rights of individual copyright owners, the working party recommended that the rights of Indigenous groups, to make claims through the Aboriginal Folklore Commissioner, would only apply to items of folklore that were out of copyright.[3]

The report also recommended that copyright owners should not be able to prevent Indigenous groups from using traditional designs, dance or music. In addition, it recommended that copyright and designs legislation should be altered to allow customary users to exercise their customary rights freely in relation to folklore, and not have their rights to use folklore interfered with by other copyright owners.[4]

Regarding non-customary use of secret/sacred materials, the working party recommended that criminal sanctions should be imposed.[5]

A4.2 UNESCO/WIPO Model Provisions for the Protection of Folklore

In 1982, an international Committee of Government Experts adopted the *Model Provisions for National Laws on the Protection of Expressions of Folklore Against Illicit Exploitation and Other Prejudicial Actions* (the Model Provisions). The Model Provisions provide for intellectual property-type protection of folklore against certain unauthorised uses and against distortion.[6] The intention was to go beyond conventional notions of copyright by protecting intangible expressions as well as fixed works.

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[2] *Ibid*, p 36.
[3] *Ibid*, p 37.
[4] *Ibid*, p 45.
[5] *Ibid*, p 31.
[6] 1967, 1982, 1984: Attempts to provide international protection for folklore by Intellectual Property Rights , Document Prepared by International Bureau of World Intellectual Property Office (WIPO), paper presented at the UNESCO-WIPO World Forum on the Protection of Folklore April 1997 p 5.

Following is a list of some of the main features of the UNESCO/World Intellectual Property Office (WIPO) *Model Provisions for National Laws on the Protection of Folklore Against Illicit Exploitation and Other Prejudicial Actions.*

A4.2.1 *Definition of folklore*

The Model Provisions do not expressly define folklore , but they do use the term expressions of folklore to refer to productions consisting of characteristic elements of traditional artistic heritage developed and maintained by a community, or by individuals, reflecting artistic expectations of their community.[7] The following expressions are protected under the Model Provisions whether or not they are reduced to material form:

- Verbal expressions such as folk tales, folk poetry and riddles.
- Musical expressions such as folk songs and instrumental music.
- Expressions by action, such as folk dances, plays and artistic forms or rituals.

The Model Provisions also protect tangible expressions such as drawings, paintings, carvings, sculptures, pottery, terracotta, mosaic, woodwork, metalware, jewellery, basket-weaving, needlework, textiles, carpets, costumes, musical instruments and architectural forms.

A4.2.2 *Nature of protection*

Under copyright, the duration of protection is generally the life of the author plus 50 years. However, the Model Provisions suggest that there be no time limit for the protection of the folklore. The protection is for a community whose existence is not limited in time.[8]

A4.2.3 *Prior authorisation by a competent authority*

The Model Provisions provide for a system of prior authorisation to be administered by a competent authority who represents the relevant community s interest in protecting their folklore.[9]

A4.2.4 *Where is authorisation required?*

Authorisation is required for commercial uses of folklore other than in the traditional and customary context, subject to the authorisation and supervision of the competent authority. An expression of folklore is used commercially if it is not used in its proper or intended artistic framework as a continuing expression of culture by a particular community. For example, to use a dance in its traditional context would be to use it in its ceremonial or ritual context. Similarly, the term customary context refers to the

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[7] Section 2 of the Model Provisions.

[8] As noted by Attorney General s Department, *Stopping the Ripoffs: Intellectual Property Protection for Aboriginal and Torres Strait Islander Peoples - An Issues Paper*, p 12.

[9] Section 3 of the Model Provisions.

use of expressions of folklore in accordance with the everyday life of a community such as selling or making craft.

The Model Provisions refers to *illicit exploitation* of an expression of folklore as meaning any utilisation made both with gainful intent and outside the traditional or customary context of folklore, without authorisation by a competent authority or the community concerned .[10] This means that a utilisation — even with gainful intent — within the traditional and customary context should not be subject to authorisation. Alternatively, a utilisation, even by members of the community where the expression originates and is practices, requires authorisation if it is made outside such a context with gainful intent.[11]

Where copies of expressions of folklore are involved, authorisation is required for the publication, reproduction and distribution . Where copies of expression are not necessarily involved, authorisation is required for the public recitation, public performance, transmission by wireless means or by wire and any other form of communication to the public .[12]

A4.2.5 *Fair use provisions*

There is no need to seek authorisation to use expressions of folklore if the purpose relates to research, conservation and archiving. Furthermore, there is no need for authorisation, outside the traditional or customary context, when an expression of folklore is used:

- For education;
- By way of illustration;
- For creating an original new work;
- For reporting of a current event;
- Where folklore is permanently situated in a public place.

A4.2.6 *Prohibited use*

The Model Provisions prohibit unauthorised commercial use of expressions of folklore. In this way, they prohibit misrepresentations of the source of expressions of folklore and prohibit the wilful distortion of folklore in a way that is prejudicial to the interests of the relevant community.

[10] 1967, 1982, 1984: Attempts to provide international protection for folklore by Intellectual Property Rights , document prepared by International Bureau of WIPO, paper presented at the UNESCO-WIPO World Forum on the Protection of Folklore, April 1997, p 7.
[11] *Ibid*, p 8.
[12] *Ibid*, p 8.

A4.2.7 *Remuneration*

The Model Provisions provide that where the competent authority grants authorisation, it may fix the amounts for and collect fees. The fees shall be used to promote or safeguard national culture or folklore. The Provisions advises this fee should be shared with the community from which the folklore originates, but there is no advice as to how this might be done.[13]

A4.2.8 *Reciprocity*

The Model Provisions also provide for international extension of protection, based on reciprocity.[14] This provision reflects the general recognition by the Committee of Government Experts of the need for international protection in light of the rapidly increasing and uncontrolled use of expressions of folklore beyond the limits of the country or the communities in which they originate.[15]

A4.2.9 *Sanctions*

The Model Provisions provide for offences relating to distortions of expressions of folklore. The national legislator is left to specify the forms and measures of sanctions.[16] All the offence provisions require the element of wilful intent , with fines and imprisonment imposed. There are also civil sanctions and seizure provisions.[17]

A4.2.10 *Towards an international standard*

Many countries saw it as most important to protect expressions of folklore beyond their national boundaries, and the Model Provisions were adopted to provide a regional or international system of protection.[18] In December 1984, the Group of Experts on the International Protection of Expressions of Folklore met to consider the need for a specific international standard on protection. Australia was invited to attend.

The meeting reviewed a draft treaty which provided for an international system of folklore protection, based on the Model Provisions. It was resolved that while the participants recognised the need for international protection of expressions of folklore, the majority considered it was premature to establish an international treaty at this stage, for two main reasons:

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[13] Section 10 of the Model Provisions

[14] Section 14 of the Model Provisions

[15] 1967, 1982, 1984: Attempts to provide international protection for folklore by Intellectual Property Rights , Document Prepared by International Bureau of WIPO, presented at the UNESCO-WIPO World Forum on the Protection of Folklore, p 12.

[16] *Ibid*, p 11.

[17] Section 7 and 8 Model Provisions.

[18] 1967, 1982, 1984: Attempts to provide international protection for folklore by Intellectual Property Rights , Document Prepared by International Bureau of WIPO, presented at the UNESCO-WIPO World Forum on the Protection of Folklore, p 12.

- There was a lack of appropriate sources for the identification of expressions of folklore to be protected. For example, how would a country know what expressions of folklore other signatory countries wanted protected?
- The absence of workable mechanisms for settling the diversity of issues found within not just one country, but several countries of a region. For example, to which country would a user go if he or she wanted to use an expression of folklore which was part of the national heritage of several countries?[19]

A4.2.11 *Phuket Plan of Action*

International protection of folklore was put back on the agenda in 1997. UNESCO/WIPO convened a World Forum on the Protection of Folklore at Phuket, Thailand, in April 1997. The forum drafted a Plan of Action.

- It noted, among other things, that there is no international standard of protection for folklore and that the copyright regime is inadequate in this regard.
- It confirmed a need to define, identify, conserve, preserve, disseminate and protect folklore which has been a living cultural heritage of economic, social and political significance from time immemorial.
- It emphasised the importance of striking a balance between community owning the folklore, and the users of expression of folklore, and stressed that close regional and international cooperation would be essential to the successful implementation of standards.

The majority of delegates endorsed the Plan of Action, which called for WIPO and UNESCO to set up a committee of experts to undertake regional consultations and to draft an international agreement on the *sui generis* protection of folklore by the second quarter of 1998.

It should be noted that participants from the United States and Britain disassociated themselves from the Plan of Action.

A4.3 Tunis Model Law on Copyright for Developing Countries

In 1976, the Tunis Model Law on Copyright for Developing Countries was developed by UNESCO and the World Intellectual Property Office (WIPO).[20] The Tunis Model Law follows the terminology of the Berne Convention and provides for the creation of both economic and moral rights to literary, artistic and scientific works.

Section 6 of the Model Law deals with the protection of national folklore which is protected because in developing countries national folklore constitutes an appreciable part of the cultural heritage and is susceptible to economic exploitation, the fruits of which should not be

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[19] *Ibid*.

[20] The Model Law was adopted by the Committee of Experts convened by the Tunisian Government from 23 February to 2 March 1976.

denied to those countries .[21]

The model law provides that the national folklore need not be fixed in some material form to attract copyright protection.[22] This recognises that works of national folklore are likely to be handed down from generation to generation orally and in a form which has never been recorded.[23]

The Model Law provides protection for works derived from national folklore.[24]

The model law contains provisions for droit de suite (resale royalty) which provides the author of a work with an inalienable right to a share in the proceeds of any sale of that work by public auction or through a dealer .[25] According to the UNESCO/WIPO commentary, this provision takes account of the fact that at the beginning of their careers authors often dispose of their works at ridiculously low prices. These works may subsequently assume considerable value, and it therefore seems equitable that the author should share in the fortunes of his or her work and collect a percentage of the sale price for the work each time it changes owners.[26]

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[21] WIPO, *Tunis Model Law on Copyright, Copyright*, July-August 1976, p 266.
[22] Article (5bis).
[23] WIPO, *Tunis Model Law on Copyright, Copyrigh*t, July-August 1976, p 266.
[24] Section 2, *Tunis Model Law*.
[25] Section 4bis *Tunis Model Law.*
[26] WIPO, *Tunis Model Law on Copyright, Copyright*, July-August 1976, p 266.

Appendix 5

International Indigenous Peoples Discourses

Indigenous peoples worldwide have produced their own declarations and plans of action to create networks and international alliances and to provide governments, industry and relevant organisations with a statement of their concerns. Some of these include:

A5.1 The Mataatua Declaration (1993)

In recognition of 1993, the United Nations International Year for the World s Indigenous Peoples, the Nine Tribes of Mataatua, in the Bay of Plenty region of Aotearoa, New Zealand, convened the First International Conference on the Cultural and Intellectual Property Rights of Indigenous Peoples from 12-18 June 1993, at Whakatane.

More than 150 delegates from 14 countries attended, including indigenous representatives from Japan, Australia, Cook Islands, Fiji, India, Panama, Peru, the Philippines, USA and Aotearoa.

The conference delegates considered a range of significant issues, including the value of indigenous knowledge, biodiversity and biotechnology, customary environmental management, arts, music, language and other physical and spiritual cultural forms. The following Declaration was adopted by Conference Delegates.

Preamble

Recognising that 1993 was the United Nations International Year for the World s Indigenous Peoples:

Reaffirming the undertaking of United Nations Member States to:

- Adopt or strengthen appropriate policies and/or legal instruments that will protect indigenous intellectual and cultural property and the right to preserve customary and administrative systems and practices. — Agenda 21, United Nations Conference on Environment and Development (UNCED), (26.4B);
- Noting the working principles that emerged from the United Nations Technical Conference on Indigenous Peoples and the Environment in Santiago, Chile, 18-22 May 1992 (E/CN.4/Sub.2/1992/31); and
- Endorsing the recommendations on Culture and Science from the World Conference of Indigenous Peoples on Territory, Environment and Development, Kari-Oca, Brazil, 25-30 May 1992;

WE:

Declare that Indigenous Peoples of the world have the right to self determination, and in exercising that right must be recognised as the exclusive owners of their cultural and intellectual property;

Acknowledge that Indigenous Peoples have a commonality of experiences relating to the exploitation of their cultural and intellectual property;

Affirm that the knowledge of the Indigenous Peoples of the world is of benefit to all humanity;

Recognise that Indigenous Peoples are capable of managing their traditional knowledge themselves, but are willing to offer it to all humanity provided their fundamental rights to define and control this knowledge are protected by the international community;

Insist that the first beneficiaries of indigenous knowledge (cultural and intellectual property rights) must be the direct indigenous descendants of such knowledge; and

Declare that all forms of discrimination and exploitation of Indigenous Peoples, Indigenous knowledge and Indigenous cultural and intellectual property rights must cease.

1. Recommendations to Indigenous Peoples

In the development of policies and practices, Indigenous Peoples should:

1.1 Define for themselves their own intellectual and cultural property.

1.2 Note that existing protection mechanisms are insufficient for the protection of Indigenous Peoples intellectual and cultural property rights.

1.3 Develop a code of ethics which external users must observe when recording (visual, audio, written) their traditional and customary knowledge.

1.4 Prioritise the establishment of Indigenous education, research and training centres to promote their knowledge of customary environmental and cultural practices.

1.5 Reacquire traditional Indigenous lands for the purpose of promoting customary agricultural production.

1.6 Develop and maintain their traditional practices and sanctions for the protection, preservation, and revitalisation of their traditional intellectual and cultural properties.

1.7 Assess existing legislation with respect to the protection of antiquities.

1.8 Establish an appropriate body with appropriate mechanisms to:

(a) Preserve and monitor the commercialism or otherwise of Indigenous cultural properties in the public domain;

(b) Generally advise and encourage Indigenous peoples to take steps to protect their cultural heritage; and

(c) Allow a mandatory consultative process with respect to any new legislation affecting Indigenous Peoples cultural and intellectual property rights.

1.9 Establish international Indigenous information centres and networks.

1.10 Convene a Second International Conference (Hui) on the Cultural and Intellectual Property Rights of Indigenous Peoples to be hosted by the Coordinating Body for the Indigenous Peoples Organisation of the Amazon Basin (COICA).

2. Recommendations to states, and national and international agencies

In the development of policies and practices, states and national and international agencies must:

2.1 Recognise that Indigenous Peoples are the guardians of their customary knowledge and have the right to protect and control dissemination of that knowledge.

2.2 Recognise that Indigenous Peoples also have the right to create new knowledge based on cultural traditions.

2.3 Note that existing protection mechanisms are insufficient for the protection of Indigenous Peoples cultural and intellectual property rights.

2.4 Accept that the cultural and intellectual property rights of Indigenous Peoples are vested with those who created them.

2.5 Develop in full cooperation with Indigenous Peoples an additional cultural and intellectual property rights regime incorporating the following:

(a) Collective (as well as individual) ownership and origin-retroactive coverage of historical as well as contemporary works;

(b) Protection against debasement of culturally significant items;

(c) Cooperative rather than competitive framework;

(d) First beneficiaries to be the direct descendants of the traditional guardians of that knowledge; and

(e) Multi-generational coverage span.

Biodiversity and customary environmental management

2.6 Indigenous flora and fauna are inextricably bound to the territories of Indigenous communities and any property right claims must recognise their traditional guardianship.

2.7 Commercialisation of any traditional plants and medicines of Indigenous Peoples must be managed by the Indigenous Peoples who have inherited such knowledge.

2.8 A moratorium on any further commercialisation of Indigenous medicinal plants and human genetic materials must be declared until Indigenous communities have developed appropriate protection mechanisms.

2.9 Companies and institutions, both governmental and private, must not undertake experiments or commercialisation of biogenetic resources without the consent of the appropriate Indigenous Peoples.

2.10 Prioritise settlement of any outstanding land and natural resources claims of Indigenous Peoples for the purpose of promoting customary, agricultural, and marine production.

2.11 Ensure current scientific environmental research is strengthened by increasing the involvement of Indigenous communities and of customary environmental knowledge.

Cultural objects

2.12 All human remains and burial objects of Indigenous Peoples held by museums and other institutions must be returned to their traditional areas in a culturally appropriate manner.

2.13 Museums and other institutions must provide, to the country and Indigenous Peoples concerned, an inventory of any Indigenous cultural objects still held in their possession.

2.14 Indigenous cultural objects held in museums and other institutions must be offered back to their traditional owners.

3. Recommendations to the United Nations

In respect of the rights of Indigenous Peoples, the United Nations should:

3.1 Ensure that the process of participation of Indigenous Peoples in United Nations fora is strengthened so their views are fairly represented.

3.2 Incorporate the Mataatua Declaration in its entirety in the United Nations Study on Cultural and Intellectual Property of Indigenous Peoples.

3.3 Monitor and take action against any states whose persistent policies and activ-

ities damage the cultural and intellectual property rights of Indigenous Peoples.

3.4 Ensure that Indigenous Peoples actively contribute to the way in which indigenous cultures are incorporated into the 1995 United Nations International Year of Culture.

3.5 Call for an immediate halt to the ongoing Human Genome Diversity Project (HGDP) until its moral, ethical, socioeconomic, physical and political implications have been thoroughly discussed, understood and approved by Indigenous Peoples.

4. Conclusion

The United Nations, international and national agencies, and states must provide additional funding to indigenous communities in order to implement these recommendations.

A5.2 Julayinbul Statement on Indigenous Intellectual Property Rights

On November 27, 1993, at Jingarra, in the north-eastern coastal region of Australia, it was agreed and declared that:

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.

Inherent in these laws and integral to that relationship is the right of Indigenous Peoples and Nations to continue to live within and protect, care for, and control the use of that environment and of their knowledge.

Within the context of this Statement, Indigenous Peoples and Nations reaffirm their right to define for themselves their own intellectual property, acknowledging their own self-determination and the uniqueness of their particular heritage.

Within the context of this Statement, Indigenous Peoples and Nations also declare that we are capable of managing our intellectual property ourselves, but are willing to share it with all humanity provided that our fundamental rights to define and control this property are recognised by the international community.

Aboriginal Common Law and English/Australian Common Law are parallel and equal systems of law.

Aboriginal intellectual property, within Aboriginal Common Law, is an inherent inalienable right which cannot be terminated, extinguished, or taken.

Any use of the intellectual property of Aboriginal Nations and Peoples may only be

done in accordance with Aboriginal Common Law, and any unauthorised use is strictly prohibited.

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

We, the delegates assembled at this conference urge Indigenous Peoples and Nations to develop processes and strategies acceptable to them to facilitate the practical application of the above principles and to ensure the dialogue and negotiation which are envisaged by the principles.

We also call on governments to review legislation and non-statutory policies which currently impinge upon or do not recognise indigenous intellectual property rights. Where policies, legislation and international conventions currently recognise these rights, we require that they be implemented.

Declaration Reaffirming the Self-determination and Intellectual Property Rights of the Indigenous Nations and Peoples of the Wet Tropics Rainforest Area

(1) Recognising that the Indigenous Nations and Peoples of the Wet Tropics Rainforest Area have exercised their inherent right to self-determination in regard to the care, protection and use-control of the forest since time immemorial; and

(2) Acknowledging that in the exercise of that right of self-determination the Indigenous Nations and Peoples continue to foster and develop a unique relationship with their total environment; and

(3) Affirming that the values, processes, Law and Lore which the Indigenous Nations and Peoples have developed throughout that relationship are expressed in their intellectual property rights.

Delegates gathered at the Julayinbul Conference (November 25, 26, 27, 1993) on the north-eastern coastal region of the Australian continent hereby affirm:

(1) That the intellectual property rights of the Indigenous Nations and Peoples of their territories in the wet tropical forest areas have traditionally included the recognition of a cultural heritage inherent in their interdependent relationship with the natural environment, and that such cultural heritage remains an integral part of the Indigenous Peoples perception of their inherent rights in relation to their territories in the Wet Tropics region;

(2) That inherent in the exercise of self-determination is the prerogative of the Indigenous Nations and Peoples of the Wet Tropics region to freely exercise the right to hunt and gather within the forests according to such rules and regulations as they deem appropriate;

(3) That in the exercise of their self-determination the Indigenous Nations and Peoples have had and continue to have the inherent rights to restore and maintain their spiri-

tual and ceremonial practices in relation to the forests and waters;

(4) The right of self-determination is predicated upon the right of development by which Nations and Peoples may make such adaptations and changes to their traditional methods of harvest as they deem appropriate;

(5) That the intellectual property of the Indigenous Nations and Peoples of the Wet Tropics region includes and has always included the ability to discover and make what they deem appropriate use of new knowledge derived from their total environment: such as the discovery of new genotypes and the right to control subsequent use of and access to the genetic make-up within the flora and fauna of the forests;

(6) That in the exercise of their self-determination Indigenous Nations and Peoples of the Wet Tropics region are prepared to negotiate joint-management arrangement with appropriate non-indigenous agencies for the care, protection and controlled use of the Wet Tropics region;

(7) That in the exercise of self-determination by the Indigenous Nations and Peoples no presumption should be inferred that such peoples acknowledge the prerogative of any non-indigenous government or agency to extinguish or otherwise delimit their inherent right, title and authority to their territories. Any unauthorised use of Indigenous Nations and Peoples intellectual property is strictly prohibited.

Without derogating in any way from the rights of Indigenous Nations and Peoples to self-determination, the delegates at the Julayinbul Conference hereby call on the Federal and State Governments to honour and fulfil the serious and important international and domestic commitments which they have made about the rights of Indigenous Nations and Peoples relating to the care, protection and use-control of their territories.

(1) These commitments include relevant obligations under international conventions, declarations and other instruments such as the:

- Convention on Biological Diversity
- Rio Declaration on Environment and Development
- Agenda 21, Chapter 26
- UNCED Statement of Forest Principle
- Convention on Conservation of Nature in the South Pacific
- 1992 SPREP Ministerial Declaration on Environment and Development
- Charter of the United Nations
- World Heritage Convention
- International Covenant on Civil and Political Rights, and the
- International Covenant on Economic, Social and Cultural Rights.

(2) Federal and State governments have also made serious and important undertakings in a range of negotiated government policy instruments, including the:

- National Strategy for Ecologically Sustainable Development
- National Forest Policy Statement
- 1992 Inter-governmental Agreement on the Environment
- National Commitment to Improved Outcomes in the Delivery of Services for Aboriginal and Torres Strait Islander Peoples,

and in

- Government responses to the recommendations of the Royal Commission into Aboriginal Deaths in Custody.

(3) The above demands are justified further because of the Federal Government s support for the development of the proposed UN Declaration on the Rights of Indigenous Peoples.

(4) These demands are also justified in the light of the recommendations of the Australian Law Reform Commission in its reports on the Recognition of Customary Law, and in view of the national expectations of the process of reconciliation as being developed by the Council for Aboriginal Reconciliation.

(5) We also call on Federal and State Governments to review the world heritage management arrangements internationally, nationally and locally which impinge upon or do not recognise the intellectual property rights of Indigenous Nations and Peoples.

(6) In particular, the management of the Queensland Wet Tropics World Heritage Area is in need of review immediately, as agreed in the Federal-State agreement of 1990 on Wet Tropics World Heritage management.

AGREED AT JINGARRA
27 NOVEMBER 1993

Abbreviations

AAPA	Aboriginal Affairs Protection Authority (NT)
ABA	Australian Broadcasting Authority
AFC	Australian Film Commission
AFP	Australian Federal Police
ACCC	Australian Consumer and Competition Commission (formerly the Trade Practices Commission)
AIPO	Australian Industrial Property Organisation
ATSIC	Aboriginal and Torres Strait Islander Commission
AIATSIS	Australian Institute of Aboriginal and Torres Strait Islander Studies
APRA	Australasian Performing Rights Association
CAL	Copyright Agency Limited
CALM	Conservation and Land Management Department (WA)
CAMA	Council of Australian Museum Associations Inc
CLRC	Copyright Law Review Committee
DIST	Department of Industry, Science and Technology
DFAT	Department of Foreign Affairs and Trade
DOCA	Department of Communications and the Arts
FAIRA	Foundation of Aboriginal and Islander Research Action
ICOMOS	International Council on Monuments and Sites
IDA	International Depositary Authority, authorised under the Budapest Treaty
IDC	Inter-Departmental Committee on Arts and Cultural Expression
IRG	Indigenous Reference Group on Intellectual Property convened by ATSIC
NIAAA	National Indigenous Arts Advocacy Association
NIMAA	National Indigenous Media Association of Australia
NFSA	National Film and Sound Archive
NPWS	National Parks and Wildlife Service
TMAG	Tasmanian Museum and Art Gallery
UNESCO	United Nations Educational, Scientific and Cultural Organisation
WIPO	World Intellectual Property Organisation

Glossary of Terms

Biodiversity refers to the variety of all the world s life forms, the plants, animals and micro-organisms, the genes they contain, the ecosystems they inhabit, whether terrestrial or marine.

Bioprospecting refers to the practice of collecting and screening biological samples of plants, insects, animals, marine life and micro-organisms found in the wild (or samples already stored in botanical gardens and herbariums), in a search for active chemical compounds or molecules that can be developed commercially into drugs or chemicals used in agriculture.

Culture refers to the holistic ways of living practised and refined by people and communicated from generation to generation.

Cultural property is defined in Article 1 of the UNESCO Cultural Property Convention 1970 as property which, on religious or secular grounds, is specifically designated by each state as being of importance for archaeology, prehistory, history, literature, art or science and which belongs to the following categories:

a. Rare collections and specimens of fauna, flora, minerals and anatomy, and objects of palaeontological interest;

b. Property relating to history, including the history of science and technology and military and social history, to the life of national leaders, thinkers, scientists and artists and to events of national importance;

c. Products of archaeological excavations (including regular and clandestine) or of archaeological discoveries;

d. Elements of artistic or historical monuments or archaeological sites which have been dismembered;

e. Antiquities more than 100 years old, such as inscriptions, coins and engraved seals;

f. Objects of ethnological interest;

g. Property of artistic interest, such as:

   i. pictures, paintings and drawings produced entirely by hand on any support and in any material (excluding industrial designs and manufactured articles decorated by hand);

   ii. original works of statuary art and sculpture in any material;

   iii. original engravings, prints and lithographs;

   iv. original artistic assemblages and montages in any material;

h. Rare manuscripts and incunabula , old books, documents and publications of special interest (historical, artistic, scientific, literary, etc) singly or in collections;

i. Postage, revenue and similar stamps, singly or in collections;

j. Archives, including sound, photographic and cinematographic archives;

k. Articles of furniture more than 100 years old and old musical instruments.

Design means features of shape, configuration, pattern or ornamentation applicable to an article, being features that, in the finished article, can be judged by the eye, but does not include a method or principle of construction .

DNA means Deoxyribonucleic acid, a compound found in genes consisting of a large number of nucleotides attached together in single file to form a long strand.

Equitable interest means an interest or right over property not extending to the legal title.

Gene refers to a unit of the material of inheritance that gives rise to accurate copies of itself. Genes are

passed from parent to offspring. They are very stable in properties and influence every aspect of the organism containing it.

Human Genome Diversity Project refers to the international scientific project which aims to map and sequence the three billion base pairs that make up the human genome. The project started in 1990 and is due for completion in 2005

Indigenous refers to Aboriginal and Torres Strait Islander people of Australia except where reference is made to Indigenous people from other countries.

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.

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.

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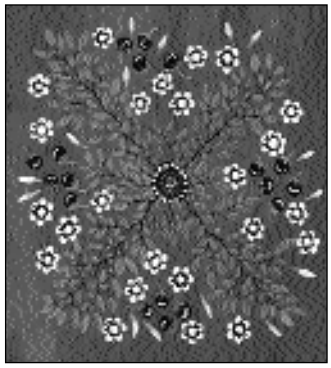

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