Indigenous Ecological Knowledge
and Natural Resources in the Northern Territory

Report on the Current Status of Indigenous Intellectual Property

A report commissioned by the
Natural Resources Management Board (NT)
Component 3(of 3)

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April 2009

Commissioned by the Natural Resource Management Board (NT).

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This document was written by Terri Janke with research and writing support from Jeremy Morse, Solicitor and Anastasia Charles, Admin Assistant, Terri Janke and Company Pty Ltd. The currency of the report is 8 April 2009.

Terri Janke would like to thank Sarah Holcombe and Michael Davis for their teamwork and valuable input.

Credit must also go to Professor Peter Veth, NCIS for reviewing drafts of the report.

Special thanks to Dr Matthew Rimmer, ANU Law Faculty for reviewing the draft in detail and making suggestions for improving the document.

This document is produced for general advice only. If you have a specific legal matter, please seek advice from a suitably qualified legal practitioner.

Michael Davis and Sarah Holcombe (top photo) and Terri Janke and Sarah Holcombe (bottom photo).

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Introduction

> Indigenous peoples have the right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions, as well as the manifestations of their sciences, technologies and cultures, including human and genetic resources, seeds, medicines, knowledge of the properties of fauna and flora, oral traditions, literatures, designs, sports and traditional games and visual and performing arts. They also have the right to maintain, control, protect and develop their intellectual property over such cultural heritage, traditional knowledge, and traditional cultural expressions.
>
> -Article 31.1of the *United Nations Declaration on the Rights of Indigenous Peoples*

Involvement in natural resource management can present the opportunity for Indigenous people to exercise some of the rights listed above. In particular, the potential exists for Indigenous people to:

1. retain their connection with ancestral lands;
2. maintain their cultures; and
3. benefit from the application of their ecological knowledge.

The importance of land within Indigenous cultures cannot be overstated. The opportunity to work on country and manage natural resources provides not only job opportunities and financial benefits for Indigenous people. Perhaps more importantly, being involved in NRM projects on country provides the opportunity for Indigenous people to maintain cultural practices and pass on ecological knowledge to younger generations.

Acknowledging and valuing the holders of knowledge is equally important as protecting the knowledge itself. Giving knowledge holders the opportunity to practice their cultures can help them exercise both their human rights and cultural responsibilities. This in turn will lead to the empowerment of individuals and in turn their communities. This is not merely a matter of providing financial rewards, but a way of acknowledging Indigenous knowledge holders for their intellectual input into projects.

Of course, Indigenous participants should always be financially rewarded for their intellectual input into projects. But in cases where financial rewards are not guaranteed, mere acknowledgement of their knowledge and input can lead to outcomes that are more valuable than money alone.

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Indigenous Ecological Knowledge:
Current status of Indigenous intellectual property

The NT Natural Resource Management commissioned the ANU's National Centre for Indigenous Studies for the IEK ICIP project. This report feeds into the Indigenous Ecological Knowledge/Natural Resource Management project which aims to produce three specific outputs:

1. IEK Knowledge management Guidelines (including Archiving and repatriation) (Guiding principles and appropriate disciplines for establishment of best practice archive and repatriation activity).
2. A Handbook for Working with IEK and IP (Practical guidance manual for Indigenous Ecological Knowledge/Natural Resource Management practitioners).[1]
3. Report detailing current status of Indigenous intellectual property.

1.1 Executive Summary

This report examines the current status of intellectual property laws as they relate to natural resource management and 'Indigenous Ecological Knowledge' (IEK) in the Northern Territory.

Indigenous people have been managing the natural resources of the NT for many generations. The changes brought about by European settlement over the past century have been immense. Removal from land, government regulation and changes to lifestyles has greatly affected Indigenous involvement in the management of the NT's natural resources. Increasingly, Indigenous people are being consulted and involved in natural resource management in the NT as the broader community gains an appreciation of the depth of knowledge held by Indigenous people about the land and its resources.

Participation by Indigenous people and the use of IEK in natural resource management has the potential to provide substantial beneficial outcomes for all involved. That said it is essential that IEK is treated with respect and care, given the sensitive nature of much of the knowledge concerned.

Indigenous ecological knowledge is used in Natural Resource Management in the Northern Territory (NT) in a variety of projects relating to land management including caring for our country, National Parks and Wildlife projects, recording of cultural knowledge of plants and animals, bioprospecting by pharmaceutical companies and university research projects.

[1] Note the title changes to these first two resources. The project team were given licence to develop the resources as they evolved with the project, so this first title is the current title and the second was from the project brief.

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Background to the problem

IEK is now highly sought after and documented. As this occurs, it is only fitting that proper respect is given to Indigenous people and the knowledge they still hold. A number of national and international reports have identified the need for Indigenous rights to cultural knowledge. Cultural rights are fundamental rights for Indigenous people. They are referred to as 'Indigenous cultural and intellectual property' rights, 'heritage rights' or 'rights to traditional knowledge and traditional cultural expression.' An underpinning foundation is the right of Indigenous people to live on their land, and manage it according to cultural practices. Other rights include the right to pass on culture, guard it against loss and debasement and the right to be acknowledged as the source. Since European colonisation, many IEK management practices are no longer practiced. However, there are many that have continued and been innovated, while new cultural practices have developed. These practices are part of Indigenous heritage, to be passed on to future generations. In recording or applying IEK in Natural Resource Management, this principle of cultural respect must be understood. Indigenous people have the right to control their Indigenous Ecological Knowledge.

A concern of Indigenous people is that there is no legal protection of Indigenous ecological knowledge. The lack of recognition of the Indigenous cultural and intellectual property rights (including Indigenous ecological knowledge) was highlighted in the 1999 report *Our Culture, Our Future*. Indigenous cultural and intellectual property rights recognise that Indigenous people are the custodians of knowledge that is inherited through the transmission of cultural knowledge. This knowledge is often owned collectively, and it may be governed by customary laws about who can own and use this knowledge. Indigenous groups want cultural attribution to this knowledge, and they also need to ensure that the cultural integrity of the knowledge is maintained. Indigenous Ecological Knowledge needs to be respected and acknowledged for its value in terms of its importance to Indigenous peoples, and its current and potential value to industry. Indigenous people need to be made aware that public disclosure opens them to risks of theft. IEK needs protection from misappropriation and unauthorised use by third parties, be they researchers, commercial entities, government institutions or industry.

Overview of legal framework

There is currently no specific Australian law or policy providing specific rights for the protection of Indigenous knowledge or Indigenous Ecological Knowledge. However, a range of laws apply to IEK projects which are relevant to consider.

Intellectual property laws may be useful in some ways to protect Indigenous Ecological Knowledge that is in a material form or recorded in sound or film. Intellectual property laws are often the only form of guaranteed protection for ICIP rights, and thus retain an important role. How these laws can be used, displaced by contract (be it voluntarily entered into, or enforced through permits or provisions of access to land and resources law), or made conditional with protocols, becomes the main focus of dealing with legal rights in this area. Wherever possible, copyright laws, trade marks, notices including traditional knowledge notices, performer's rights releases, moral rights, protocols, warnings, and/or

keeping things secret and confidential should be used. The report outlines some proactive ways that Indigenous people and project workers can use intellectual property laws to their advantage. Indigenous people should be educated on practical ways of protecting their IEK through these measures.

Patents laws have limited use for Indigenous knowledge holders and relate specifically to commercialisation of genetic material. Special consideration should be given when IEK is being commercialised and a patent right obtained. Prior informed consent of Indigenous custodians should be obtained and benefits shared, and an agreement entered into. One way that might help against patenting of IEK by unauthorised persons and entities are patent disclosure provisions requiring patent applicants to disclose if the invention has IEK and, if so, that there is prior informed consent and a benefit sharing arrangement.

There are a range of international and domestic environmental laws that stem from the Convention on Biological Diversity *1999. The CBD* provides for benefit sharing where indigenous peoples' knowledge is used for the conservation and sustainable use of biological diversity. Australia has ratified the CBD. The *EPBC Act* (Cth) and the *NT Biological Resources Act* are implemented in light of Australia's obligations under the CBD. Whether or not an Indigenous community shares in the benefits made from their IEK depends on them being able to negotiate a benefit sharing agreement at the time access is granted, but where the potential applications of IEK are not static. Commonwealth and NT governments should support Indigenous communities with access to independent legal advice. Template agreements like the EPBC drafts should be developed.

The *EPBC Regulations* have provisions relating to the capture of images, artistic works and sound recordings in national parks in Commonwealth owned national parks in the Northern Territory (i.e. Uluru Kata Tjuta and Kakadu).

NT land rights and sacred sites laws regulate physical access to land and the protection of specific sites. The emphasis of these laws is on protecting physical, tangible aspects of Indigenous cultural heritage. Intangible cultural heritage or cultural knowledge has been largely overlooked by these laws or policies. See for an exception the use of permits under the *Aboriginal Land Rights Act* (NT) and the *Environment Protection and Biodiversity Conservation Act* (Cth), to control filming and photography within Aboriginal areas, also research protocols prior to permit contracts. Whilst this does not affect the ownership of intellectual property, it places contractual obligations on those who research within Aboriginal communities and on Aboriginal land to abide by written protocols. As such, although the research entity retains the resulting copyright, there are certain contractual restrictions that are enforceable by the relevant Land Councils or Land Owners only. This can be a useful way of controlling IEK dissemination. However, consistency of ICIP and IEK principles should follow across the Territory. Also, note that permits are not required by government workers. These workers should also be made to comply with appropriate protocols.

The *Interim Protocols for Natural Resource Management Board (NT) Indigenous Ecological Knowledge (IEK)* state that all projects need to obtain the informed consent of traditional owners. These protocols are made a condition of the funding agreement between the

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funding recipient and the Natural Resource Management Board (NT). The protocols advocate for mutual benefits for Aboriginal people as well as payment at fair and equitable rates.

There are numerous protocols and guiding documents that establish sound procedures and principles when dealing with Indigenous Ecological Knowledge. However these documents are not legally enforceable other than through contract. The gap between existing laws and best practice protocols should be addressed by attaching them and enforcing them in contracts, or by including them in legislation. It is recommended that the NT NRMB implement its own protocols and guidelines in projects that come under its auspices, and to also encourage the implementation of these protocols and guidelines in all NT NRMB projects that are conducted in the NT.

The funding agreements from the Commonwealth (including new Caring for our Country Program and the previous National Heritage Trust) are relevant to consider in the rights management of IEK. IP clauses with government contracts need to be changed to recognise Indigenous cultural and intellectual property rights.

The other area is whether or not the area is subject to native title. The majority of High Court judges in *Ben Ward & Ors v Western Australia & Ors [2000]* rejected that native title rights apply to traditional knowledge. However, consideration should be given to the dissenting view of Justice Kirby; this issue may be revisited again in the near future.

Commonwealth heritage laws such as the *Aboriginal and Torres Strait Islander Cultural Heritage Act* again have focused on tangible objects or sites as does the *Moveable Cultural Heritage Act*. The *UNESCO 2003 Intangible Cultural Heritage Convention* sets up a new dialogue in cultural heritage protection which involves inventories and will recognise the importance of intangible cultural heritage. Although Australia is not a signatory to that Convention, the principles and practices being established by UNESCO provide useful guidelines.

Repatriation and access to information will need to be measured against existing privacy, freedom of information and archival laws. There should be special consideration for IEK specifically to ensure that sensitive personal information is disseminated. Large institutions and governments are subject to privacy principles, both in the Commonwealth and Northern Territory. Consideration should be given as to how these laws impact on IEK held in archives by government departments and what can be made available.

The passing of the *Declaration on the Rights of Indigenous People* and the UNESCO Convention *for the Safeguarding of Intangible Cultural Heritage 2003* indicate changes that are occurring internationally. The former was supported by the Australian Government on 3 April 2009 although the later has not been ratified by Australia.

Internationally, there are developments to give better recognition within intellectual property regime to traditional knowledge holders. The work of the World Intellectual Property Organization (WIPO) in traditional knowledge and traditional cultural expression should be watched, and if possible, NT Indigenous people should participate in the debate.

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The WIPO draft provisions for the protection of traditional knowledge and traditional cultural expressions are expected to shape the future of laws internationally. However, they fall short of international agreement or treaty and remain controversial.

The Pacific Model law for the protection of traditional knowledge and traditional cultural expression provides sui generis rights to traditional knowledge holders to their traditional knowledge. Users are required to gain prior informed consent before recording or commercialising TK or TCE. The role of a national Indigenous cultural authority has an important facilitating role. Six countries in the Pacific that have draft laws are looking to introduce them in the near future.

The call for sui generis laws in Australia made by Indigenous people as outlined in *Our Culture: Our Future* remains, however there have been no moves so far in this direction.

Currently, the main method of protection is use of existing IP, heritage and environment laws, with contracts, warnings and protocols. Increased ownership of, access to and management of land by Aboriginal people in the NT has provided an opportunity to establish good practices relating to NRM and IEK. Although some attempts have been made to recognise the right of Indigenous people to their ICIP, much remains to be done. Implementing protocols and guidelines for NRM practitioners in various fields should be encouraged. This is the most practical way of ensuring IEK is dealt with appropriately in the immediate future. Enforcement of these by contractual obligations via permit or funding agreement can also be achieved. In the longer term, changes to IP laws and other legislation to recognise Indigenous cultural and intellectual property rights as recommended throughout this report should receive serious consideration.

There is much that can be done by engaging industry and governments to work collaboratively towards the recognition of these rights by using databases, policies, management systems. It may also be possible to establish a National Indigenous Cultural Authority based on agreement and rights management, facilitated between users and traditional knowledge holders.

ICIP issues should be taken into account when recording IEK. As the record, film or document has a continuing life after the project, management and archiving of these documents should be discussed at the outset. The Guidelines developed by Sarah Holcombe provide advice on these issues. Further, any benefits should flow back to Indigenous people from the use of their knowledge. If IEK is recorded it should be repatriated in a way that keeps knowledge alive. If commercially applied, then sharing of benefits agreement outlining commercial terms should be entered into.

Section 2
Intellectual Property Laws

Intellectual property (IP) laws give rights to people to control how the product of their intellect or 'fruits of their mind' are used. For example, literary works, music, films, inventions, trade secrets and even new plant varieties are protected by intellectual property laws. Intellectual property rights have been described as "government tools for regulating markets of information"[2]. Although IEK does not always fit into one of these categories, there are many situations in which IP rights can be used to control dealings of IEK. Some IP rights arise automatically, some need to be applied for and registered, and some can be asserted through written agreements. Others can only be enforced through the court system. This section explores how IP laws affect and control the ownership, collection, reproduction, storage and commercial use of IEK.

A brief summary of IP laws:

IP right- *source*	Need to register	Nature of right	Protects	Dealings	Period of protection
Copyright- *Copyright Act 1968*	No	Right to control publication & reproduction and seek damages for unauthorised use	Original literary, artistic, musical works; sound recordings, films, photographs, written reports. Performances on sound recordings (post 1/1/2005 only)	Can be altered by written agreement, assigned, sold or licensed	Life of author plus 70 years or 50 years for government reports (from publication date)
Moral rights- *Copyright Act 1968*	No	Right to be acknowledged as creator, right to stop derogatory treatment	Original literary, artistic, musical works; films, photographs, written reports, performances	Cannot be sold or assigned other than upon death	Life of author plus 70 years

[2] P. Drahos with J. Braithwaite, *Information Feudalism: Who Owns the Knowledge Economy?*, Earthscan Publications Ltd, London, 2002.

IP right- *source*	Need to register	Nature of right	Protects	Dealings	Period of protection
Performers Rights- *Copyright Act 1968*	No	Rights to: -control unauthorised recordings -refuse consent for performances to be filmed and recorded - to decide how recordings can be used -a share of copyright in some sound recordings	Recorded performances (film & sound)	Can be waived	Use of unauthorised recordings: Sound- 50 years Audiovisual- 20 years Communication to public-20 years Inclusion of recorded performance in a film soundtrack- 20 years
Bulun Bulun equity- *common law*	No	Right in equity for clan representative to take action of copyright infringement against infringe when communal traditional ritual knowledge is incorporated in a copyright work	The copyright owner must be unable or unwilling to take action	Cannot be traded	For copyright period
Standard Patents Patents Act 1990	Yes	Exclusive right to commercially exploit invention	Inventions which are novel, useful, use an inventive step, and have not been secretly used (must be registered)	Can be sold, assigned or licensed	Maximum 20 years
Innovation Patents *Patents Act 1990*	Yes	Exclusive right to commercially exploit invention **if certified**. Cannot relate to plants, animals or humans	As with standard patents but 'innovative step' instead of 'inventive step'	Can be sold, assigned or licensed	Maximum 8 years

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IP right- *source*	Need to register	Nature of right	Protects	Dealings	Period of protection
Confidential Information & trade secrets- *common law*	No	Right to restrict unauthorised publication of confidential material or use of trade secrets	Restricted/secret information/trade secrets	Trade secrets can be sold under contract	No time limit
Plant Breeders Rights- *Plant Breeders Rights Act 1994*	Yes	Right to produce, reproduce, sell & distribute	New plant breeds & varieties (must be registered)	Can be sold, assigned or licensed	20-25 years
Designs *Designs Act 2003*	Yes	Exclusive right to use a design	Visual appearance of a product	Can be sold, assigned or licensed	5-10 years
Trade marks *Trade Marks Act 1995*	Yes	Exclusive right to use	Words, logos, symbols (must be registered)	Can be sold, assigned or licensed	10 years with option to renew

2.1 Copyright

2.1.1 What is copyright?

Copyright is a set of rights granted under the *Copyright Act 1968* (Cth) to creators of literary, dramatic, artistic or musical works and the makers of sound recordings and films.[3] No registration with a government agency is necessary before a work or subject matter is protected by copyright. Neither are payments of fees required.

Copyright protects works (books, photographs and artworks), films and sound recordings. The copyright holder has the right to make copies, sell, license and generally deal with the work. Copyright exists as soon as the work or material is created in a material form.

For information and creative ideas to be protected by copyright, it is necessary that the work or subject matter fall within one of the categories of works or other subject matter defined in the Act:

[3] The power to makes laws in respect of copyrights vests in the Commonwealth of Australia under the Australian Constitution.

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Works	Subject matter other than works
Artistic works (paintings, photographs) Literary works (reports, computer databases, books) Dramatic works (plays, theatre) Musical works (Songs)	Sound recordings (CDs, tapes) Cinematograph films (DVDs, video tapes) Published editions (book layout) Broadcasts (TV and radio programs)

2.1.2 Requirements for protection

Qualified person

The person who created the copyright material must be a qualified person when the work was made.[4] This means that the person must have been an "Australian citizen"; an "Australian protected person" or a "person resident in Australia".[5] However, the Act may still apply if the person is from a country with reciprocal laws.

Material form

Works must be "reduced to writing or to some other material form".[6] This means that works must be written down or recorded in some permanent, tangible form. For example, a written document of an oral traditional story will be protected by copyright but the oral story will not. Some commentators also argue that recording or filming an oral traditional story will be sufficient to provide material form, however, this opinion has not been substantiated in case law.

Originality of works

Copyright works must be original. The work must not be slavish copying from another source. The creator must have used skill, labour and effort to create a new work. Copyright law protects the form of expression of ideas rather than the ideas themselves.[7] A person could interpret existing material in his or her way and therefore own copyright in that expression. Hence, researchers own the copyright in the books and reports they prepare which incorporate knowledge of Indigenous people. As copyright owners, they can be free to deal with the information contained in the book. Copyright laws do not recognise the bounds placed on reproduction of Indigenous Knowledge under Indigenous customary law.

[4] Section 32(1)(a) of the *Copyright Act 1968* (Cth)
[5] Section 32(4) of the *Copyright Act 1968* (Cth)
[6] Section 22(1) of the *Copyright Act 1968* (Cth)
[7] Walter v Lane [1900] AC 539

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Identifiable author

Given that the copyright stems from the act of creating, there must be an author, or authors, to 'create' a copyright work. Generally, the author must be identifiable, although there is some protection for anonymous works.

Old materials out of copyright period

Copyright only protects works and materials for limited time periods. Once this time is over, there is no need to get the consent of the copyright owner to copy or reproduce it. Some old Aboriginal stories, songs and dances were created a long time ago and would be out of copyright. Rock art, for instance, may not be protected by copyright.

2.1.3 Who owns copyright?

In the *Copyright Act 1968*, the creator is referred to as "the author". The general rule is that the author of a work is the first owner of copyright in that work.[8] However, there are circumstances that will change this rule so it is not unusual for the author and the owner of the copyright to be different. These exceptions include employee-produced materials and those produced under the direction and control of the government.

Employers and contractors

Where a work is made by an employee under a contract of employment, the *Copyright Act* gives copyright to the employer. [9] Although it is common practice for employment contracts to be in writing, this point of law applies to oral contracts of employment as well. It would even apply to employees with written employment agreements that do not have copyright terms.

Work created by contractors is different and without a written consultant agreement saying that the commissioning agency should own copyright, a consultant may own copyright in the material he or she creates.

In the context of this project then, if Aboriginal rangers are employed by National Parks and Wildlife Services (NPWS), the position at law is that the NPWS will own the copyright of the works the rangers create, or collaborate in, as part of their duties. The NPWS can deal with the copyright as they see fit. But, if these works include IEK then the protocols for use and publication should be followed. The NPWS could develop a written policy for recognising the IEK of its Aboriginal rangers which covers attribution, cultural integrity and sets out the

[8] Section 35(2) of the *Copyright Act 1968* (Cth)
[9] Section 35(6) of the *Copyright Act 1968* (Cth)

agreed terms of use of IRK. This policy should be made a term of the Aboriginal Ranger's employment contract.

Government copyright

The government will own the copyright in works, films and sound recordings that are:

- produced under its direction and control,[10] and
- first published by the government.[11]

These rules are known as the 'Crown Copyright Provisions' and apply to State, Territory and Commonwealth government. With reference to IEK management work, the Government can assert copyright over materials created by consultants, and over reports and materials it first publishes.

For example, if an Aboriginal person is acting as a consultant to Department of the Environment, Water, Heritage and the Arts, the Commonwealth Government may own copyright works that are created by, or in collaboration with that person. IEK may be included in reports and recorded in film and recording devices as part of Government projects on Natural Resource Management. Rather than the government asserting unlimited rights to reproduce, adapt and control that report, a policy should be adopted to cover ICIP rights.

Land and Sea Management Agencies & Ranger Groups

Since the early 1990s, a number of land and sea management agencies and Aboriginal ranger groups have been established throughout the NT. A number of these programs are now funded by the Commonwealth Government's Department of the Environment, Water, Heritage, and the Arts (DEWHA) through 'Working on Country' program. Some Aboriginal Ranger Programs are funded by the Community Development Employment Projects (CDEP) Programme but this will be changing in 2009.

IEK is central to the operation of Aboriginal Ranger programs. There is a range of copyright materials created which include IEK. Who owns copyright in these materials? This question will depend on the following factors:

- Who created the work or materials?
- Were they an employee or an independent contractor? If they are an employee, then the employer may own copyright.
- If they are an independent contractor, did they have a written agreement that stated who should own copyright? If not, then the contractor may own copyright.

Currently the Aboriginal Ranger Programs are largely implemented by Manager Agencies, under a range of structures:

[10] Section 176 and 178 of the *Copyright Act 1968* (Cth)
[11] Section 177 of the *Copyright Act 1968* (Cth)

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- Incorporated Associations like Dhimurru Land Management Aboriginal Corporation.
- Aboriginal Land Councils such as Anindilyakwa Land Council.

As employers of rangers, these Manager Agencies may end up owning copyright in any materials created.

To receive program funding, the Manager Agency enters into a Commonwealth Funding Agreement with the Commonwealth Government. DEWHA funds the Manager Agency to implement the Aboriginal Ranger Program. It does not employ the individual Aboriginal rangers. There is no direct contractual link between the Aboriginal ranger and the Commonwealth. The applicant pays the Aboriginal Ranger and in this respect, is the employer of the Aboriginal Ranger.

There is scope to address IP issues in Manager Agency management plans and in Commonwealth Government funding agreements.

Dugong and Marine Turtle Knowledge Handbook

Aboriginal Ranger groups are involved in large projects that cover a broad geographic area, such as the dugong and marine turtle project. This project operates across the NT, Queensland and WA with the involvement of a large number of ranger groups. As part of the project, NAILSMA has facilitated the publication of the *Dugong and Marine Turtle Knowledge Handbook*.[12] The Handbook brings together Indigenous knowledge from a number of Indigenous groups. It is part of an overall strategy to ensure Indigenous knowledge and practices are shared between different interest groups. In this way, IEK can be maintained. Such projects recognise the value of IEK by integrating it into management strategies for dugongs and turtles. In large projects such as this, it may be impractical to share copyright between all communal groups but rather, the collective representative agency NAILSMA can own copyright in the expressed form.

2.1.4 Assigning copyright

Copyright can be assigned in writing. This means that the copyright owner can sign a document that gives the copyright to another person.[13] It is also possible to assign future copyright. For example, for IEK projects, a writer might be commissioned by an Indigenous organisation to write a report. The writer commission agreement could include an IP clause which states that the copyright belongs to the organisation commissioning the report.

Creators can also assign copyright to third parties like publishers or universities. This means that the author of a book or the maker of a film will no longer control copyright and neither will the Indigenous people. The creators may have worked directly with Aboriginal people

[12] http://www.nailsma.org.au/publications/knowledge_handbook.html
[13] Section 196 of the *Copyright Act 1968* (Cth)

and therefore have an understanding of cultural obligations associated with the copyright work. Where the rights are assigned to a publisher or university, a concern for Indigenous people is that this link is removed. The new copyright owner may not be aware of cultural protocols. This highlights the urgent need for greater uptake of relevant protocols and laws.

2.1.5 What are the rights of copyright owners?

Under the *Copyright Act 1968* (Cth), a copyright owner has the exclusive economic rights to publish, reproduce, and communicate to the public his or her copyright materials and to authorise others to use and reproduce them.

This includes making copies of works into or from digital files. It also includes photocopying and reproducing a substantial part of that work. For example, permission from the copyright owner would be necessary in cases where substantial parts of a copyright work are published in book form, or placed on the internet.

For literary, musical and dramatic works, the copyright owner has the right to adapt the work. This may concern Indigenous knowledge holders because of the ICIP right of cultural integrity.

If a work, film or sound recording is jointly owned, the rights are shared by the owners. This means that each owner would need to consent before a work is published, licensed or adapted.

2.1.6 Publishing IEK

Publishing IEK material raises ICIP considerations. A researcher or agency may own copyright in a report and can therefore publish it either on their website, or as a book. But, if the report records IEK, the researcher or agency should consult and seek consent to publish from the knowledge holders. Consent, attribution and the sharing of royalties should be discussed with IEK knowledge holders at the outset of projects. There should also be a discussion about copyright ownership of the publication, whether this will be jointly owned, or owned by an organisation or the IEK knowledge holder.

Publishing IEK in Scientific journals

Some scientific journals assert copyright in the articles written by contributors. *Oceania* for example, has a policy along these lines. The journal is often made available online, through digital libraries. Deirdre Koller, Administrator at Oceania Publications stated that: 'For both *Oceania* and *Archaeology in Oceania* the copyright is owned by The University of Sydney as is stated on the issues of the journals. There is no specific agreement between the University and the authors. There are no conditions placed on copyright. However, there is no restriction placed on authors re-using their own articles.'[14]

[14] D. Koller, email to T. Janke, 30 January 2009.

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2.1.7 Cinematographic Films

Copyright protects films such as feature films, television documentaries and home videos. The *Copyright Act* gives the copyright in films to the person who makes the arrangements for the film. But, if a person pays that person to make the arrangements for the film then the person fitting the bill owns copyright.

Film copyright is separate property from the works that are embodied in the film. A film might include a literary work (script), an artistic work and a musical work. The consent of the copyright owner of these works is needed to put them in the film.

Copyright doesn't protect the spoken word or a performance but an unresolved legal question is whether the act of filming an oral or performance work provides the material form criteria for copyright protection.

Another important point is that the person being filmed has performers' rights which require their consent to be filmed.

Many IEK Projects involve the recording of Indigenous knowledge holders talking about natural resources on film. The film might be taken by project officers from Government, a university researcher, or staff from Central Land Council (CLC). So, if the general copyright law was applied, the film copyright would be owned by the person making the film – the government, the university or the CLC.

The consent of the Indigenous knowledge holder, as the performer, is required. The Indigenous knowledge holder can limit the use of the film by exercising his or her performer's rights. For example, it is possible to limit the use of the film for certain purposes. The Indigenous knowledge holder would also have performer's moral rights.

Once consent is given, however, the film owner can make copies of the film, publicly screen it and communicate it to the public, for example on the internet or on television.

Case study: The Documentary, First Australians, Blackfella Films

In making the documentary the First Australians, the filmmakers Darren Dale and Rachel Perkins consulted extensively on the script and the use of archival photographs. Initial consultations with stakeholders - community, elders, academics, historians and descendants - commenced at the start of the project. Members of the team travelled to every state, from Alice Springs, Tasmania, the Kimberley and the Torres Strait. One year into the process, the filmmakers were ready to consult on the first draft of the scripts. The academics were able to read the scripts for review but the communities and families needed face to face consultation. In some instances, the writers, which included Rachel Perkins, Louis Nowra and Beck Cole, spent time reading the script to groups and individuals.

After the script re-draft, the filmmakers consulted again with stakeholders. This time they showed people the images selected from collections to illustrate the story. The use of these images involved not only clearances from collections, but also ICIP rights clearances. To deal

with the complexity, Blackfella films created a comprehensive database with details of the image, where it was held, the language group, the place and where possible, the people. An ICIP rights category was included to record clearances and consultations.

Permission to film landscapes was also part of the process, and in some instance, cultural consultants were hired to assist the film crew. 'We got cultural clearances to film at specific sites, and in some areas, such as the Kimberley we had a cultural consultant accompany us, and paid fees for this service.' – Darren Dale.[15]

Case study: Ten Canoes

Ten canoes 2006, (Rolf de Heer and Peter Djigirr, 2006) is a collaborative film produced with the people of Ramingining. [16] The film was inspired by a photograph of ten canoeists taken by Donald Thomson,[17] an anthropologist who spent time working in Ramingining in the 1930s. Thomson's work includes 2,500 photographs and documents recording Yolngu customs, ceremonies, hunting and daily survival.[18]

Rolf de Heer then visited Ramingining a number of times before filming started. This was so the community could get to know him better and increase contacts within the community. Rolf consulted the Ramingining community specifically regarding the storyline.

The filmmakers had to consider cultural affiliations and kinship issues in the casting. The ten men in Thomson's canoes photograph have been identified over the years, and many people in Ramingining are related in some way to at least one of them. To choose the actors for the film, those with the strongest claims to ancestry were chosen to play their ancestor. The women were chosen because of their kinship relationships to the main men.

Through consultation with the relevant Indigenous people on issues to do with casting and the storyline, the filmmakers were able to discuss the resolution of certain conflicts. In the SBSI documentary, *The making of ten canoes* there is an example of where the director has to work out how he has caused offence to members of the community and how he sorted it out by appropriate consultations with the elders. The documentary shows how the filmmakers worked with the Indigenous community and the subtleties of cultural interchange and the consultation process.[19]

[15] Terri Janke interview with Darren Dale as cited in Draft Screen Australia, Protocols for Filmmakers working in Indigenous communities, Read about *First Australians*, http://www.sbs.com.au/firstaustralians/, viewed 18 February 2009.
[16] http://www.tencanoes.com.au/tencanoes/
[17] DF Thomson, *Goose egg hunters poling themselves through the Arafura Swamp*, April 1937.
[18] Susan Jenkins, 'Colliding worlds at Tandanya 13 canoes at the South Australian Museum', *Art Monthly Australia,* No: 189, pp. 16 – 21.
[19] *The making of ten canoes*, SBS Independent, 2006.

Commissioned by the Natural Resource Management Board (NT).

Case study: *Australia*

Baz Luhrmann's film *Australia* 2008 tells a story about the Stolen Generations. Luhrmann engaged Indigenous filmmaker Steven McGregor as his Indigenous adviser to consult with him. McGregor was chosen because of his cultural links to the north, where the film was shot. When McGregor advised Luhrmann that there were parts of the film that were culturally inappropriate, Luhrmann made changes. McGregor said Luhrmann went to great lengths to make sure the Aboriginal culture and the story of the Stolen Generations was properly represented.[20] The Indigenous actors were consulted about the portrayal of their characters, and aspects of costume and body markings were sent back to the community for approval.[21]

2.1.8 Sound recordings

Copyright protects sound recordings like tapes, music CDs and interviews recorded on digital recording equipment.

The maker of the sound recording is at general law recognised as the copyright owner, as soon as the recording is made.[22]

Like film, copyright in sound recording is separate from the works that are recorded. Hence, consent to record the works is required from the copyright owner.

Also, the person being recorded has performers' rights. This requires the maker of the recording to get their consent.

In NRM projects, an Aboriginal person may be interviewed about IEK on tape, disc and other recording devices. The control of the copyright in the sound recording is then the charge of the person making the recording. Like film, the Aboriginal person can exercise his or her performer's rights and limit the uses made of the recording. They would also have moral rights of attribution and integrity.

Once consent is given however, the maker of the sound recording can make copies, publicly play it and communicate it to the public, for example on the internet or on the radio.

2.1.9 Performer's rights

Performers include actors, dancers and people being interviewed on film and sound recording. Copyright laws give performers the rights to control the recording of their performances. A performer's consent is needed to film or record a performance, and to

[20] Alyssa Braithwaite, Stolen Generations Story Back Behind The Lens In Australia, *National Indigenous Times*, 27 November 2008, p. 12.
[21] ibid.
[22] Section 97, *Copyright Act 1968* (Cth)

broadcast or put it on the internet. Performers can also stop the unauthorised use of their performances on film and sound recording.[23] These rights are different from copyright because they are more about process rather than ownership.

Performers' rights do not cover taking photographs. The taking of photographs of Aboriginal people and the future use of these images is a cultural concern for Indigenous people.

There are exceptions such as films and recordings for news of the day, criticism and review and performing a sporting activity. Performers' rights last for 20 years from the date of filming.

Consent can be oral, implied or written. Drawing from these legal principles, an Indigenous person who is recorded on film as part of the project might be implied to have given consent to be filmed if they stand up in front of the film and provide that information. It obviously causes confusion at a later stage if the person agreed only to be filmed for 'personal reasons' and then the film is beamed around the world on say You Tube.

In 2005, changes to the copyright law gave performers the right to share copyright in sound recordings of their live performances. Both the sound recording maker and the performer will jointly own copyright where a recording is made, and the performer was not paid for their performance by the sound recording maker.[24] Whilst the introduction of these provisions were aimed to stop 'bootleg' recordings of live concerts, it is relevant to Indigenous cultural performance because the definition of performer includes 'performers of folklore expressions'.[25] Hence, with recorded interviews about IEK – the sound recording copyright may be owned jointly by the Indigenous performers and the data collection agency making the recording.

Performers also have moral rights of attribution, against false attribution and the right of integrity.

To clear performers' rights, it is common practice in the film, music and broadcasting industries, to use a performer's release form which sets out the purposes of the recording. In NRM projects, there are some examples of release forms being used; as follows.

Talent release forms

NT NRM workers should seek permission from Indigenous people for filming and recording Indigenous people in Natural Resource Management projects. A release form should be signed by those filmed and recorded in sound, which clearly outlines the proposed use of the film and the sound recording. The release form could also deal with issues including: who to speak to if consent is required for another context (e.g. if the person filmed dies, then who can consent). It might also be useful to state where copies of the film or sound

[23] Under Part XIA of the *Copyright Act 1968* (Cth)
[24] Australian Copyright Council, *Performers' rights, Information sheet, G22*, Australian Copyright Council, Sydney, February 2005, p. 4.
[25] Section 248A and 100AD of the *Copyright Act 1968* (Cth)

recording will be deposited – and if there are any access conditions/restrictions. I would recommend that access for other contexts and by persons other than the original recorders should be subject to prior informed consent.

It is recommended that a template release form for recording IEK be developed by the NT NRMB which limits the use to the purpose of the recording and makes it a condition that the NT NRMB protocols be followed. The types of recordings should include film, sound recording and also photography.

Any future uses of the recording beyond those listed on the release form would need to be cleared with the person on the recording, or if they die, their nominated representative. Proper records should be kept by NRM researchers who make recordings including full name, address and contact details. The following issues should also be covered:

- Who should be contacted if that person dies?
- Where will the recording be deposited for archival purposes?
- Should there be any conditions on access to the recording?

2.1.10 Cultural protocols and recording and filming IEK

In an effort to balance the uses that can be made of films and sound recordings taken in NT NRM Projects, the Draft NT NRMB protocols state:

> Any film or recording involving Aboriginal people or sacred sites, places or objects may only occur with the agreement of relevant traditional owners.
> Recordings of Aboriginal deceased persons must not be published without the permission of relatives of the deceased. Applicants must not broadcast, licence or sell any audiovisual recording without the agreement of traditional owners. [26]

Within the framework of the Commonwealth Environment Protection and Biodiversity Protection regime, there are also guidelines for filming in National Parks which place limitations on filming and the uses that can be made of films.[27] A permit is required to capture images and sound recordings, especially if if you are doing so for commercial purposes. A permit is required for any commercial filming and photography in Uluru Kata-Tjuta.[28] There are also detailed guidelines for commercial filming and photography in the park that might serve as a useful example for other areas. Similarly, a permit must be obtained for commercial filming, photography or artwork in Kakadu National Park.[29] The permit includes detailed conditions that the holder must agree to. For example, the holder must be accompanied by a member of park staff at certain rock art sites, and cannot film Aboriginal people or sacred places.

[26] Interim Protocols NT NRMB, 6.1
[27] Section 354(1) *Environment Protection and Biodiversity Act 1999* (Cth) and Regs 12.06 & 12.09 *Environment Protection and Biodiversity Regulations 2000* (Cth)
[28] Available at http://www.environment.gov.au/parks/permits/uluru-media
[29] Available online at http://www.environment.gov.au/parks/permits/kakadu-photography.html

Commissioned by the Natural Resource Management Board (NT).

When entering Aboriginal Land, permits should be sought from the relevant land council for photography, filming and sound recordings.

For NT parks and reserves, a permit is necessary for filming and photography done in the course of trade or commerce under by-law 13 of the *Territory Parks and Wildlife Conservation By-Laws*. There are restrictions for certain areas in certain parks, as detailed on the permit application, available at http://www.nt.gov.au/nreta/parks/permits/pdf/bylaw13_filming.pdf.

2.1.11 Informed Consent form – Boll research case study

The French researcher Valerie Boll (now at Dhimurru) invited participants to be involved in a research project focusing on the structuring of Indigenous knowledge systems called 'Caring for Country – Managing Indigenous and scientific environment knowledge in North East Arnhemland'. The Project was backed by Dhimirru Aboriginal Corporation.

Valerie uses a free prior informed Consent Form to get the permission of participants to speak to her and be recorded on tape and/or video. The form explained the purpose and funding sources for the project, and lists the benefits of participation in the project. It also notes what will be done with the tape of video record for archiving. The tapes will be help at Dhimurru's office and at the Australian Institute of Aboriginal and Torres Strait Islander Studies. It states that no tapes will be used with consent of the participant and/or Yolngu custodians.

The Form advises that the participate can stop participating in the research

The Form does not state who owns the IP or copyright in any recordings or materials. Interviewees recorded on tape may still own copyright in the sound recording. Although the participant could arguable own copyright in the words of the interview, control of the tape will be most important.[30]

2.1.12 Duration of copyright

Copyright protection does not last forever. The *Copyright Act 1968* (Cth) sets terms of protection which are different depending on the category:

For literary, musical, artistic and dramatic works	-70 years after the death of the creator[31]
For films	-until published plus 70 years from publication[32]
For sound recordings	-until published and 70 years after publication[33]

[30] See Appendix 1.
[31] Section 33 of the *Copyright Act 1968* (Cth)
[32] Section 94 of the *Copyright Act 1968* (Cth)
[33] Section 93 of the *Copyright Act 1968* (Cth)

Commissioned by the Natural Resource Management Board (NT).

If copyright material is first published by government, the duration of the term is less:

For literary, musical, artistic and dramatic works	-50 years from publication[34]
For films	-50 years from publication[35]
For sound recordings	-50 years from publication[36]

This could mean that the protection for IEK publications published by NT NRMB and other government agency would result in a shorter protection period.

Protection of copyright only lasts for a certain statutory period. After this period passes, copyright no longer protects the work and no consent from the copyright owner is required before copies can be made.

In consideration of the duration copyright principles, the NT NRMB should consider:

- Allowing where possible publication of materials which are largely IEK based to be published by the knowledge holders and/or relevant traditional owners or a relevant organisation so protection under copyright lasts longer; and
- Observation of cultural protocols, and prior informed consent for use of IEK contained in copyright works should continue beyond the copyright period.

2.1.13 Communal rights to culture

When IEK is recorded in writing, film or sound recording, the copyright belongs to the individual creators of the literary work, film or sound recording.

Copyright can be held by two or more people jointly. This only occurs when they have actually contributed to the creative process that resulted in the work. For example, if two researchers write an article together, both being involved in the writing process, the copyright in the article would be owned by them both.

The Indigenous clan whose knowledge is recorded has no copyright. So, if a book is written about traditional knowledge of plants in Western Arnhem Land, the individual author is recognised as the copyright owner, not the traditional knowledge holder group. This is the result of the general application of the law. However, it can be changed under agreement.

Copyright gives the individual copyright owner the right to control use and distribution of the copyright material. But in many Indigenous communities, traditional knowledge and traditional cultural expressions are communally owned. A number of people are responsible for a particular piece of knowledge. Indigenous customary laws may restrict the way it can be shared and transmitted. If one person wanted to use or develop a component of the traditional knowledge base, continual consultation and discussion with the wider group is necessary.

[34] Section 180 of the *Copyright Act 1968* (Cth)
[35] Section 181 of the *Copyright Act 1968* (Cth)
[36] Section 181 of the *Copyright Act 1968* (Cth)

Commissioned by the Natural Resource Management Board (NT).

When IEK is expressed in material form, there is a danger that the knowledge will be used without the permission of the people who are responsible for it. This can cause distress for the individual and the community. The individual Indigenous person expressing the knowledge is responsible for looking after the knowledge of the group. But, if copyright doesn't recognise this cultural responsibility, that person cannot control how that knowledge is used.

In 1998, the *Bulun Bulun case*, an Australian court examined the relationship between individual copyright and the communal rights of the clan. The case is an important development. It recognises that copyright owners may owe a special duty to the clan when using traditional ritual knowledge in copyright works. That duty would require then to use their copyright in a way that did not conflict with their Indigenous cultural obligations.

2.1.14 *Bulun Bulun* v *R & T Textiles*

The case of *Bulun Bulun v R & T Textiles*[37] involved Mr. Bulun Bulun, an Aboriginal artist, and the unauthorised reproduction of one of his paintings.

Mr. Bulun Bulun's painting, *Magpie Geese and Water Lilies at the Waterhole*, depicted communally owned designs and knowledge handed down over generations within his clan (the Ganalbingu). Mr. Bulun Bulun had painted the work with permission of his clan, in accordance with customary law. He then sold the work to the Museum and Art Gallery of NT for public display.

Some time later, Mr. Bulun Bulun discovered fabric imported from Indonesia on which his artwork had been reproduced in a slightly modified form. Mr. Bulun Bulun took the company that had produced the fabric to court. The court agreed that Mr. Bulun Bulun's copyright had been infringed, and ordered the company to stop importing the fabric. Mr. Bulun Bulun also received damages under court settlement terms.

Mr. Milpurrurru, a senior clan member of the Ganalbingu then joined Mr. Bulun Bulun as an applicant in another case, to argue that the clan had 'equitable' ownership of the copyright in the artwork.[38] In the words of the lone judge in the case, Justice Von Doussa;

> *[T]hese proceedings represent another step by Aboriginal people to have communal title in their traditional ritual knowledge…recognised and protected by the Australian legal system*.

Justice von Doussa said that Mr. Bulun Bulun was the only owner of copyright in the artistic works he created. He dismissed the arguments that Mr. Milpurrurru had an equitable interest in the copyright of the artwork. However, he then said that there was a 'fiduciary' relationship that existed between Mr. Bulun Bulun and his clan. A fiduciary relationship exists where one person has a relationship of trust or confidence with another person or

[37] *Bulun Bulun v R & T Textiles* Pty Ltd (1998) 41 IPR 513

[38] Under the law of equity (a branch of judicial law), one person can be given part ownership of something for the sake of justice, even if the legal owner is somebody else.

persons. Where a fiduciary relationship exists, the 'fiduciary' (the person owing the duty) must act in the best interests of the principal (the person owed the duty).

In this case, Mr. Bulun Bulun had a duty to the clan to protect the integrity of the artwork in accordance with his customary law obligations.[39] Whilst he was entitled to pursue the exploitation of the artwork for his own benefit, he was still required to take care not to harm the communal interests of the clan.

Colin Golvan, the barrister for Mr. Bulun Bulun has recently reflected upon the significance of the decision:

> Von Doussa J's judgment is an important one in linking obligations under Aboriginal law into the Australian legal concept of fiduciary obligations, and giving recognition to the 'standing' of the clan in certain circumstances – as required by equity. It also illustrates the flexibility of courts in adapting copyright and associated legal principles to the requirements of the protection of age-old cultural practices, reinforcing that the instinct to advocate more or new law is not necessarily appropriate in this context. The judgment also recognises the relationship between artists and clan groups, recording the court's understanding of the importance of the cultural and spiritual role of artists such as Bulun Bulun, and reinforcing the special place of such art in the broader context – being work created in an environment of a close spiritual relationship with the community whose stories and culture it was depicting.[40]

2.1.15 Application of Bulun Bulun Case to research projects

The Bulun Bulun case may have implications for researchers who work with Indigenous knowledge. For example, consider a situation where a researcher has copyright in a book which embodies traditional ritual knowledge, and knows there are customary laws about how that knowledge is to be cared for. There may be a fiduciary duty to safeguard the integrity of the traditional ritual knowledge when dealing with the copyright of the work.[41] If the researcher breaches that fiduciary duty, then there may be rights of the clan representative to stop publication and use of the copyright work in certain circumstances.

Equally, a film maker may owe a fiduciary duty to interviewees when dealing with copyright in the filmed interview in which traditional knowledge is recorded. This is a developing area of law but McCausland suggests that including a custodians' interest notice in access

[39] *Bulun Bulun v R & T Textiles* Pty Ltd (1998) 41 IPR 513 at 530

[40] Colin Golvan, 'The Protection of At the Waterhole by John Bulun Bulun: Aboriginal Art and the Recognition of Private and Communal Rights', Andrew Kenyon, Megan Richardson, and Sam Ricketson (ed). *Landmarks in Australian Intellectual Property Law*. Cambridge: Cambridge University Press, 2009, pp. 191-208 at 207-208.

[41] Sally McCausland, 'Protecting communal interests in Indigenous artworks after the Bulun Bulun Case', *Indigenous Law Bulletin*, July 1999, vol 4, issue 22, pp. 4–6.

permits would help to establish this duty.[42] Indigenous communities might incorporate fiduciary obligations into written agreements, by way of protocols whenever granting outsiders access to traditional ritual knowledge. This could include a duty to consult on an ongoing basis and display a custodians' interest notice in conjunction with any copyright material created.

If appropriate, the community could even insist on owning copyright in the project jointly or that the other party hold it on trust for the benefit of the community.

This line of thought has implications for IEK traditional knowledge holders. Where Aboriginal traditional ritual knowledge is recorded in IEK projects the fiduciary obligations of the copyright owner should be defined. What are the fiduciary obligations of a non-Indigenous researcher or a research entity like the CSIRO or a university? IEK holders should consider the use of the written agreements to cover these concerns. Just as copyright notices are commonplace in asserting rights, using a traditional custodian's notice such as the one recommended by the Arts Law Centre of Australia (reproduced below) may be a good practice to adopt.

2.1.16 Traditional custodians' notice

The Arts Law Centre of Australia recommends the following traditional custodian notice in artworks with traditional knowledge:

> The images in this artwork embody traditional ritual knowledge of the (name) community. It was created with the consent of the custodians of the community. Dealing with any part of the images for any purpose that has not been authorised by the custodians is a serious breach of the customary law of the (name) community, and may also breach the *Copyright Act 1968* (Cth). For enquiries about permitted reproduction of these images contact (community name)". [43]

The practice of including these notices in publications has been adopted by Bachelor Press at Bachelor College (NT). It is recommended that the notice be adopted in IEK publications including those produced by the NT NRMB, universities and other government agencies.

Notices included within published documents and websites will put the users of this content on notice that any traditional knowledge should not be used, adapted or commercialised without the prior informed consent of the relevant traditional custodians.

Here is an example of a notice used in a published language resource on Indigenous plant knowledge produced by Wangka Maya Language Centre (WA):

[42] ibid
[43] www.artslaw.com.au.

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> The language and information contained in this book includes traditional knowledge, traditional cultural expression and references to genetic resources (plants and animals) of the Manyjilyjarra and Warnman people. The information is published with the consent of Manyjilyjarra and Warnman traditional custodians, for the purposes of general education and language maintenance purposes.
>
> Use and reference is allowed for the purposes of research or study provided that full and proper attribution is given to the author, knowledge holder and traditional custodial group. No commercial use by educational institutions is authorised without prior consent and negotiation of rights.
>
> This information should not be used commercially in any way including in tourism, food technology including bush tucker applications, medicines, pharmaceutical products, health and beauty products, storytelling or as trade marks, patents and designs, without observing the Indigenous cultural protocols of prior informed consent, attribution to traditional Indigenous communities, cultural integrity, and the sharing of benefits.

A notice similar to this one could be developed for NT publications with the addition of the following (depending on the content):

The use of this knowledge and resources may also be a breach of the NT Biological Resources Act and the Environmental Protection and Biodiversity Act.

2.1.17 Moral rights

Moral rights are given to creators and performers to protect their reputation and the integrity of their creations and performances. There are three rights granted under the *Copyright Act 1968*:

- the right of attribution - the right to be acknowledged as the creator or performer;
- The right against false attribution – the right not to have another person attributed as the creator or performer; and
- The right of integrity - the right to object to derogatory treatment of a work, film or performance.[44]

The *Copyright Act 1968* grants these rights to the:

- Authors of works - including artists and musicians
- Filmmakers - screenwriters, directors and producers
- Performers - interviewees on film, dancers and actors.

Moral rights cannot be sold or assigned. Creators and filmmakers have moral rights in a work or film even when they have sold or given the copyright to somebody else. For

[44] Part IX of the *Copyright Act 1968* (Cth)

performers, often the copyright in the film or sound recording will belong to someone else. However, the performer keeps the moral rights.

Moral rights of attribution and against false attribution will last as long as copyright continues to subsist in a work, film or recording of a performance.

However, for films and recorded performances, the moral right of integrity for the filmmaker and the performer ceases on his or her death. For authors of works, the moral rights of integrity will continue for full period of copyright.

When the author, filmmaker or performer dies, their legal representative can exercise and enforce moral rights.

In the context of IEK research, the moral rights laws would require attribution of authors of reports, the artists of illustrations, the person who took the photographs and the maker of the films. Moral rights do not extend to Indigenous communities. This means that the ICIP right of attribution and integrity are not exercisable by Indigenous communities under copyright laws. However, the practices and policies should be adopted that recognise these rights. (See discussion below at Indigenous Communal Moral Rights)

We were provided with a template agreement for the 'Working on Country' Program by the Department of Environment, Heritage, Water and the Arts. The agreement is used for Aboriginal ranger projects and work within Indigenous Protected Areas. The following clause relates to moral rights:

> **Activity Material**' means all Material:
>
> (a) brought into existence for the purpose of performing the Activity;
>
> (b) incorporated in, supplied or required to be supplied along with the Material referred to in paragraph (a); or
>
> (c) copied or derived from Material referred to in paragraphs (a) or (b),
>
> apart from Existing Material, in which third parties own Intellectual Property Rights, or Commonwealth Material.
>
> 13.9 For the purposes of this clause 13, the 'Specified Acts' means any of the following classes or types of acts or omissions by or on behalf of Us:
>
> (a) using, reproducing, adapting or exploiting all or any part of the Activity Material, with or without attribution of authorship;
>
> (b) supplementing the Activity Material with any other Material;
>
> (c) using the Activity Material in a different context to that originally envisaged,

but does not include false attribution of authorship.

13.10 Where You are a natural person and the author of the Activity Material, You consent to the performance of the Specified Acts by Us or any person claiming under or through Us.[45]

13.11 In any other case, You agree:

(a) to obtain from each author of any Activity Material a written consent which extends directly or indirectly to the performance of the Specified Acts by Us or any person claiming under or through Us (whether occurring before or after the consent is given); and

(b) upon request, to provide the executed original of any such consent to Us.[46]

These clauses arguably reduce the moral rights of creators. It does this by giving the Commonwealth the right to perform certain Specified Acts without infringing moral rights. The Specified Acts include reproducing the Activity Material 'with or without attribution' and using the Activity Material 'in a different context to that originally envisaged'. Where the contract is signed by someone who is not the creator, that person or organisation must obtain written consent from each creator allowing these Specified Acts.

For example, if a written report is produced about IEK management practices it will become part of the Activity Material. The author of the report could not assert infringement of moral rights if her name is not attributed, and if her work is used for another context.

2.1.18 Indigenous communal moral rights

The Commonwealth Attorney General developed the *Draft Indigenous Communal Moral Rights Bill* in 2003 which proposed the inclusion of Indigenous Communal Moral Rights in the *Copyright Act 1968*. Indigenous Communal Moral Rights would give an Indigenous community the right of integrity, the right of attribution and the right against false attribution for works that 'drew from the traditions of Aboriginal people.' [47] This would apply to communally owned stories, designs, or other cultural material. One important pre-condition however, was that the copyright owner had to voluntarily agree that the Indigenous Communal Moral Rights applied to the work or film. This condition limits is applicability. Despite the shortfalls in the Bill, these proposed amendments have never been considered by parliament, and the Bill's status is unclear.

[45] 'Us' refers to the Commonwealth Department Environment, Heritage, Water and the Arts.
[46] Template agreements provided by Barbara Bell , Working on Country Section, Indigenous Policy Branch, Department of the Environment, Water, Heritage and the Arts, 15 January 2009.
[47] Australian Government's Attorney-General's Department, 'Exposure Draft Copyright Amendment (Indigenous Communal Moral Rights) Bill 2003' circulated to the Department of Communications, Information Technology and the Arts, Minister for Immigration, and Multicultural and Indigenous Affairs.

Commissioned by the Natural Resource Management Board (NT).

In recognising the ICIP right of attribution, the NRMB *Interim Protocols* have clear guidelines for attributing the relevant traditional owners of IEK, and not just the writer (copyright owners). Further, the NRMB *Program Implementation Plan for Indigenous Ecological Knowledge*, has as one of its fundamental principles - Principle 2.1.1 which reads 'IEK will be acknowledged appropriately and respect for applicable protocols will be afforded at all times.'

The International Society for Ethnobiology (ISE) is the leading promoter of ethical research into the relationships between plants, animals, the environment and Indigenous people. ISE has developed the ground breaking ISE Code of Ethics. With respect to attribution, the Code promotes the following 'Principle of Acknowledgement and Due Credit':

> This principle recognises that Indigenous peoples, traditional societies and local communities must be acknowledged in accordance with their preference and given due credit in all agreed publications and other forms of dissemination for their tangible and intangible contributions to research activities. Co-authorship should be considered when appropriate. Acknowledgement and due credit to Indigenous peoples, traditional societies and local communities extend equally to secondary or downstream uses and applications and researchers will act in good faith to ensure the connections to original sources of knowledge and resources are maintained in the public record. [48]

In line with this international standard, the NRMB should develop:

(a) Attribution guidelines for:

i. acknowledging writers, creators of copyright works, and films, performers, even if the copyright vests in the employer organisation, or the commissioning body.

ii. Acknowledging participants.

iii. Attributing Indigenous knowledge holders and Indigenous communities.

iv. Recognising the contributions of Indigenous organisations, research institutions and funding bodies.

(b) A policy outlining the criteria for co-authorship to guide research projects.

(c) Acknowledgement and credits should appear in publications (including databases) so that connections to the original IEK source are maintained.

With respect to Indigenous communal moral rights of integrity, the protocols for respecting the cultural integrity of IEK should take account of appropriate context and interpretation.

[48] International Society of Ethnobiology Code of Ethics, http://ise.arts.ubc.ca, viewed 16 December 2008.

Commissioned by the Natural Resource Management Board (NT).

2.1.19 Copyright Notices

Copyright notices are notices placed in publications, websites, films and other copyright works as a means of identifying the copyright owner(s) of the work in question. Copyright notices do not override the position of the law or written contracts. They are merely 'administrative' in purpose.

Even though it is not necessary to indicate copyright in a work with the copyright symbol ©, it is a good idea to include a copyright notice because those who want to negotiate use of the copyright work will know who the owner is. There are advantages in using the symbol because the © is universally recognised.

Alongside the copyright notice it is standard practice to also include information about uses that are acceptable and includes details about contacting the copyright owner for consent to use the work in other material. The question is how to apply this in the IEK management practices where IEK may be collectively owned. Consider joint copyright ownership issues as well as where an individual owns that version of copyright, but where there is also clan ownership.

Here are some examples of copyright notices:

<u>Example 1</u>

Butterfly song, Terri Janke, published by Penguin Books 2005.

> Text copyright © Terri Janke, 2005
>
> All rights reserved. Without limiting the rights under copyright reserved above, no part of this publication may be reproduced, stored in or introduced into a retrieval system, or transmitted, in any form or by any means (electronic, mechanical, photocopying, recording or otherwise), without the prior written permission of both the copyright owner and the publisher of this book.

<u>Example 2</u>

Arelhe-kenhe Merrethene Arrernte traditional healing, Veronica Perrurle Dobson, published by IAD Press, 2007.

© in traditional knowledge: the Arrernte people
© in compilation: Veronica Perrurle Dobson 2007
© in photographs: Barry McDonald, or as indicated in captions[49]

[49] Veronica Perrurle Dodson, *Arelhe-kenhe Merrethene Arrernte traditional healing*, IAD Press, Alice Springs, 2007, p. xvii.

Commissioned by the Natural Resource Management Board (NT).

Comment: This assumes that copyright in the TK is different from the copyright in the expressed compilation by the author. Consider the following possible alternative:

Traditional knowledge: Arrernte people
This version © Veronica Perrurle Dobson 2007. This publication may not be reproduced in any form without the permission of the author and the TK owners.
Photographs © Barry McDonald, or as indicated in captions

Example 3

Batchelor Press, *Catalogue 2008/2009*, Batchelor Institute

Notice about content of publications

Readers are advised that these publications may include photos and voice recordings of Indigenous people who have passed away. Some readers/listeners may find these images and recordings distressing. The images and recordings have been included at the request of the custodians of the stories.

The stories and images in these publications contain traditional knowledge from different communities/people and have been published with the consent of the custodians of the stories. Dealing with any part of the stories/knowledge for any purpose that has not been authorised by the custodians may breach customary laws and may also breach copyright and moral rights under the Copyright Act 1968 (Cth). For enquiries regarding permitted reproduction of any part of these publications, contact Batchelor Press.[50]

Electronic Rights Management Information

There has been a huge increase in the use of digital technologies (particularly the internet) as a way of transferring and selling copyright protected works. A number of companies have developed technology which aims to prevent illegal copying and downloading of copyright materials such as music, films and electronic books. Information or devices are attached to electronic products which either stop or warn people away from infringing copyright.

Electronic Rights Management Information (ERMI) is information that relates to "a copy of a work or other subject-matter, or any numbers or codes which represent such information electronically".[51] This would usually include information such as the identity of the copyright owner (or licensee) and the terms of use of the material.

As of 2005, it is an offence to knowingly remove or alter an ERMI related to a copyright work and then copy, distribute or communicate the work to the public.[52] Anyone doing so can be

[50] Batchelor Press, https://www.batchelor.edu.au/files/file/batchelor_press/batchelor_press_catalogue.pdf, viewed 1 October 2008.
[51] Attorney General's Department, *Electronic Rights Fact-Sheet- March 2005*, available online at http://www.ag.gov.au/www/agd/agd.nsf/Page/Publications_Electronicrightsmanagement-Factsheet-March2005 , viewed 18 February 2009.
[52] Section 116B, *Copyright Act 1968* (Cth).

charged with a criminal offence and/or sued by the copyright owner (or an exclusive licensee).

2.1.20 Copyright Agency Limited (CAL)

The Copyright Agency Limited is a copyright collecting society that manages author's rights and distributes copyright royalties to its members – authors, publishers, visual artists and photographers. CAL licenses the copying of its members' works to schools, universities, government departments and other organisations. They then collect money from these bodies and redistribute the money to the copyright owners of those materials.

There is potential for authors of IEK publications to receive CAL royalties for use of their works in the educational sector. This is dependent however on the copyright holder being registered and the work being copied in the surveys conducted throughout the year at randomly chosen institutions. If an author's report is copied when the sample is being conducted, CAL will collect this information from schools and universities to determine what books are being photocopied and supplied to students for educational use. Based on this, registered members are paid biannually.

Joint copyright owners will share in the CAL royalties. Currently CAL makes payments to one author, and that author is responsible for sharing the royalties to others with entitlement. In 2010, the CAL system will allow for multiple payments so that an author can direct a share of the royalties to be paid to the other parties.

Copyright notices that allow use for educational purposes may exclude the right of the author to receive payments from CAL. As such, authors and publishers should avoid using copyright notices that allow for unlimited educational use of their works.[53]

An IEK project may involve the publication of books, pamphlets, government reports and website material. There is potential for these publications to be copied and used in the educational sector. The CSIRO is a member of CAL and collects royalties for use of its publications. Academics, researchers and Indigenous authors should become members of the CAL so that if their works are copied under the educational copying scheme, royalties can flow back to them.[54] It is possible for authors and publishers to share royalties with Indigenous people. This could be done by identifying the individual or representative organisation.

2.1.21 Copyright management and NRM project

In the context of Natural Resource Management projects, copyright will take a lead role in the ownership and rights of material created in the course of recording information, and preparing reports including photographs, field notes and reports.

[53] See Copyright Agency Limited website for more information, www.copyright.com.au, viewed 10 December 2008.
[54] Paul Bootes, Author Manager, Phone 02 9394 7600, pbootes@copyright.com.au.

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Copyright is the main form of intellectual property that will impact on natural resource management projects in the recording of information in writing, sound recording and film. It is recommended that a proactive policy and management system be adopted so that contracts, laws and protocols are used to effectively management TK holders interests in the IP generated in NRM projects.

Government funding agreements should be reviewed so that licences given to government agencies to use, sub-licence and alter IP material are subject to the NRM protocols.

2.2 Patents

Patents are legal rights given to inventors to control the making and sale of their inventions for a limited time. Inventions can include products, processes, methods or substances. The *Patents Act 1990* (Cth) provides these rights exclusively to inventors who file applications which meet the requirements of the law. These laws are relevant to Indigenous Ecological Knowledge because IEK may be used as a basis for new inventions such as medicines, pharmaceuticals and food technology.

Patent rights focus on commercialisation rather than the recognition of ICIP rights which are aimed at cultural maintenance. Apart from patents filed by David Unaipon over shearing equipment in the early 1900's, there is little evidence of Indigenous people using the patent system. Patents, at least in theory, can be used by Indigenous people to commercialise products or processes which are based on IEK. However, there is limited evidence of Indigenous people using the patent system for inventions that are the result of Indigenous knowledge. The most likely reasons for this are:

- The high costs and technicalities involved in filing a patent
- Threshold requirements including that an invention demonstrate:
    - Manner of Manufacture
    - Novelty
    - Inventive step
    - Utility
    - No secret Use
- Limitations including:
    - Time limits
    - Individual rights only (no 'community' or 'group' patents).
    - Exceptions (such as the defence of experimental use, compulsory licensing, and crown use).

Patents cannot be filed to protect natural resources from being used by others. A more applicable area of law is the Access and Benefit Sharing Arrangements developing out of the Convention on Biological Resources.

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Research agencies and multi-national companies can create biological inventions from natural resources because they have the technology and equipment to meet the requirements of novelty and inventive step. Indigenous groups do not have access to the scientific tools, or the funding, to do so on an equal basis.

2.2.1 Applying for a standard patent

The Application Process

An application for a standard patent in Australia must be made to IP Australia. This involves preparing detailed specifications describing the invention in full, and completing a patent application form.[55] IP Australia strongly advises engaging a qualified 'patent attorney' to ensure the patent has the best chance of being granted.

According to the IP Australia website, the average cost of filing a patent (including attorney fees) is $6,000 to $10,000. The cost of maintaining the standard patent over 20 years will be a further $8,000.

Novelty

For an invention to be patentable, it must be 'novel'.[56] To satisfy the 'novelty' test, inventions are compared with the 'prior art base' or 'existing available knowledge' about the invention, to determine whether it is already in the 'public domain'. If the invention is already in the public domain, the patent will not be granted. Traditional remedies and applications of a plant and animals may not be patentable because they are widely known, or written about, and are therefore part of the prior art.

Inventive Step

Patents must have an 'inventive step'.[57] An invention is not patentable if it is merely a discovery or knowledge of a naturally occurring product. A lot of IEK may not be patentable due to this requirement. For example, knowledge of the whereabouts, medicinal properties or edibility of a particular plant will not be considered sufficiently 'inventive' to qualify for protection.

Time limit

Patents are granted for a limited time only. Under Indigenous laws rights and responsibilities relating to knowledge generally exist in perpetuity, while a standard patent is only granted for a maximum of 20 years. The limitation on time would render the granting of a patent incompatible with Indigenous notions of responsibility for and ownership of ecological knowledge.

[55] Section 6, *Patents Act 1990* (Cth)
[56] Section 7(1), *Patents Act 1990* (Cth)
[57] Section 7(2), *Patents Act 1990* (Cth)

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Focus on individual rights

Yet another limitation of the patent system, as with other areas of intellectual property, is the focus on the rights of individuals. In Indigenous cultures, cultural and intellectual property rights often belong to a community or a subsection of a community rather than an individual. One way of overcoming this barrier is by having a representative incorporated body or association make the application.

There is scope for recognition of joint invention under the patent legislation. These rights are exclusive economic rights, and subject to assignment/licensing.

2.2.2 Innovation patents

The innovation patents system replaced petty patents in 2001. The innovation patent protects inventions that are merely 'innovative', and not sufficiently inventive to meet the inventive step criteria for a standard patent application. The process is simpler and easier than the full patents process, because there is no examination process. It is only when the owner wants to enforce their patent rights, or someone else wants to challenge the patent, that the patent is examined. In theory, the lower threshold of inventiveness and simplified (and cheaper) application process would make innovations patents more suited to IEK than standard patents.

However, plants, animals and human beings, and biological processes for their generation are excluded subject matter for innovations patents.[58] This limits the possibility of getting an innovation patent over IEK, because the majority of IEK relates to plants and animals. If this restriction was lifted, it might open the door for Indigenous people to patent IEK. There would also be a down side to the restriction being lifted, as it would also leave IEK open more open to exploitation by others.

There has been discussion as to whether the restriction should be lifted. In 2003 ACIP released the report *Should plant and animal matter be excluded from protection by the innovation patent?*[59] The report concluded that there was no immediate reason to extend innovation patents to cover plant and animal material. However it found that there may be reason to do so in the future.

2.2.3 Appropriation of IEK using patents

Unfortunately, the more common experience of indigenous peoples with patents has involved the appropriation of IEK by others. The exploitation of Indigenous knowledge and

[58] Section 18 of the *Patents Act 1990*(Cwlth)

[59] Advisory Council of Intellectual Property, *Should plant and animal matter be excluded from protection by the innovation patent?* Australian Government, November 2004, <www.acip.gov.au/library/ACIP%20Plant%20&%20Animal%20Exclusion%20FINAL%20REPORT.pdf>, viewed 28 August 2007.

resources using the patent system is referred to by Indigenous people as 'biopiracy'. This happens when non-Indigenous people and companies take out patents over inventions based on or informed by IEK.

Most processes or products (such as plant extracts) traditionally used by Indigenous people do not involve an 'inventive step' as required by patent law. However, scientists with access to equipment, research and technology, can isolate the genetic makeup of plants and animals. These genetically engineered products (or the processes used to make them) may be considered 'novel inventions'. Patents can be granted over such inventions, even though they draw from existing resources, and may use traditional knowledge as their basis.

In cases such as this, the Indigenous people are denied the right to benefit from the proceeds resulting from the exploitation of a resulting invention. Indigenous people should be aware of potential patentability of the IEK when recording IEK in books and databases. Dr Ian Heath, former Director-General of IP Australia says,

> …researchers are going to find out about IEK and consider its commercial applications. It is usually the drug and medicine manufacturers that can find out scientifically what's going on being the TK. They can then add the science and meet the requirements of a patentable invention, acknowledging the TK source is the missing link. It is critical that the patent system sort out how Indigenous community's interests can be dealt with in the process. This is where prior informed consent and entering into contractual agreements should be promoted.[60]

The patent of the Smokebush from WA is the most cited example of a patent using IEK.

2.2.4 Smokebush case study

Henrietta Fourmile (now Marrie)[61] has reported on the patenting by an American company of an element found in smokebush, a plant that has been traditionally used by the Indigenous people of Western Australia for its healing properties. In the 1960s, the Western Australian government granted the United States National Cancer Institute (NCI) a license to gather plants for screening for the presence of cancer–fighting properties. The specimens were found to be ineffective, but were stored until the late 1980s when they were retested in the quest to discover a cure for AIDS. Out of 7,000 plants screened internationally, the smoke bush was one of four plants found to possess the active property Conocurvone, which laboratory tests showed could destroy the HIV virus in low concentrations. This 'discovery' was later patented. [62] The NCI sought more samples and a licence to collect more plants in Western Australia. The Department of Conservation and Land Management (CALM) attempted unsuccessfully to negotiate a contract with the NCI. When after four months or so had gone by and there was no contract agreed between Western Australia and

[60] Dr Ian Heath, Telephone conversation with Terri Janke, 4 February 2009.
[61] Henrietta Fourmile, 'Protecting Indigenous intellectual property rights in biodiversity' (Paper presented at Kaltja vs Business Conference, 28 August 1996), cited in Terri Janke, *Our culture, our future*. See also Henrietta Fourmile, 'Indigenous Interest in Biological Resources in Commonwealth Areas: A Synthesis Of Submissions and Related Information', Appendix 10 in John Voumard, *Commonwealth Public Inquiry Into Access To Biological Resources In Commonwealth Areas*. Canberra: Environment Australia, 2000, http://www.ea.gov.au/biodiversity/science/access/inquiry/index.html
[62] Terri Janke, *Our culture, our future*, pp. 24 – 25.

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the NCI, the collector attempted to leave the country with the samples. He was found at Tullamarine airport with two of his three cases full of smokebush and other plants.[63] The claims of biopiracy[64] and the negative publicity for the NCI that followed these events led ultimately to the NCI granting Victorian pharmaceutical company Amrad an exclusive worldwide licence to develop Conocurvone. An agreement was made between CALM and Amrad for Western Australian scientists to be involved in the research on production and preparation of *Conocurvone* and a provision for royalties, from any commercial drug development where the leading compound is Conocurvone, to come to Western Australia.[65] According to Blakeney, Amrad paid $1.5 million to the Western Australian government. Had *Conocurovone* been successfully commercialised, the Western Australian government would have been paid royalties upwards of $100 million[66]. The agreement made no provisions for Indigenous groups to receive benefits. Development of a drug from Cononcurvone was suspended in 2001, although Amrad (now owned by CSI) still holds the licence to do so.[67]

2.2.5 Defensive protection- opposing patents

There are 'defensive' measures that can be taken to stop patent applications from being registered. All patent applications in Australia are published in the *Official Journal of Patents* for three months. This is known as the 'opposition period', in which time anybody can oppose the patent if they believe it shouldn't be granted. The reality is that opposing a patent is in itself a costly process, and only a small number of patents are challenged in this way.

To successfully oppose a patent based on IEK, it needs to be proved that the knowledge was part of the 'prior art base', or that the process or product did not involve an 'inventive step'. In 2005, the European Patent Office revoked a patent over a fungicidal product derived from seeds of the Neem tree. Those who lodged the opposition showed that the fungicidal properties of Neem products had been public knowledge in India for hundreds of years.[68] This case is renowned as the first successful challenge to a 'biopiracy' patent.

[63] Dr Neville Marchant, Caris Bailey and Dr Jack Cannon reported these events in Parke M and Kendall C, 'Bioprospecting of traditional medicinal knowledge' (unpublished paper, Murdoch University School of Law, Perth, 1997) as cited in Terri Janke and Robynne Quiggin, 'Indigenous cultural and intellectual property and customary law', p. 487.
[64] 'Biopiracy' is the term used by opponents of biotechnology patent system to describe bioprospecting, biodiscovery and biotechnology where it contravenes Indigenous cultural or customary law requirements.
[65] Parke M and Kendall C, 'Bioprospecting of traditional medicinal knowledge' (unpublished paper, Murdoch University School of Law, Perth, 1997) as cited in Terri Janke and Robynne Quiggin, 'Indigenous cultural and intellectual property and customary law', p. 487.
[66] Professor Michael Blakeney, 'Bioprospecting and the Protection of Traditional Medical Knowledge' (1997) 6 *European Intellectual Property Reports* 196, cited in Terri Janke, *Our culture, our future*, op cit, 25. To date no large scale commercialisation has occurred.
[67] Vichealth, *A submission in response to the Consultation paper Land and biodiversity at a time of climate change*, http://www.dse.vic.gov.au/CA256F310024B628/0/87FD3CC082EFFF01CA25733F002A6C58/$File/VicHealth+CF371.pdf , viewed 14 January 2009.
[68] Seedquest, 'European Patent Office upholds decision to revoke Neem patent' Seedquest, Germany, 8 March 2005, http://ftp.seedquest.com/News/releases/2005/march/11587.htm, viewed 4 February 2009.

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2.2.6 IEK databases

Private databases (registers)

Another defensive measure that could be taken to stop patenting of IEK is to store it on a private database or register. IEK recorded in a private location could be used as proof that IEK is part of the 'prior art base'. Patents examiners would be given access to the register during the examination process. A patent application that uses traditional knowledge listed in the register could then be refused on the basis that it is already known and used as traditional knowledge. The benefit of a register or private database is that the IEK is not released into the 'public domain'.

Any attempt to develop a private database would need to be endorsed by an official body such as IP Australia or under the *Patent Cooperation Treaty*. That is because under patent laws, information is only considered to be part of the 'prior art base' if it has been made publically available in an accepted format. [69]

Public databases

The alternative to a private database is a public database which can be accessed by anyone. Any IEK stored on a public database is likely to be considered part of the prior art base by patent examiners. The obvious problem with this approach is that the IEK then becomes freely available to the public. This leaves the knowledge open to other kinds of exploitation, which may be at odds with Indigenous customary laws governing ownership and responsibilities for the IEK.[70]

The *Traditional Ecological Knowledge Prior Art Database* is an example of a public database. It is administered by the American Association for the Advancement of Science, and is meant to be used 'by anyone researching traditional ecological knowledge, including scientists, health professionals, and those involved in the patent application process itself.'[71] The problem with this database is that information is freely available to anybody to access and use however they wish. As a consequence, rather than acting to protect the knowledge it contains, this database could be used as an easy access point to the traditional knowledge contained in the database. In this way the database provides an opportunity for unscrupulous researchers to appropriate and commercially develop traditional knowledge without having to consult or return benefits to the knowledge holders. In effect this could allow the exact outcome the database is supposed to be preventing.

Entering IEK on any databases should only be done after legal advice has been obtained on the specific information to be entered.

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[69] See generally Alexander Merle, Chamundeeswari, Kambu, Ruiz & Tobin, 'The Role of Registers & Databases in the Protection of Traditional Knowledge', UNU-IAS, Tokyo, 2003, available on-line at http://www.ias.unu.edu/sub_page.aspx?catID=111&ddlID=169, viewed 30 January 2009.
[70] Ibid, p. 27.
[71] http://ip.aaas.org/tekindex.nsf/TEKPAD?OpenFrameSet, viewed 21 January 2009.

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In summary, a traditional knowledge database is one measure that has been discussed internationally as a possible way of safeguarding against patenting of TK. It works so that the database is a searchable tool for patent examiners to reference what is the 'prior art'. Some commentators suggest that this would preclude a lot of patenting that free rides on TK.[72] However, most biotechnological inventions concern scientific processes that isolate active compounds within a natural resource. A database on TK might not stop a biotechnological patent, as the way in which knowledge is applied may still be considered novel and inventive. In any case, keeping the knowledge secret would be another important factor - how will it be used, who will manage it, and who gets access to it?

2.2.7 Patent disclosure

Within the international IP and TK debate in the WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (IGC), one suggestion raised is to introduce traditional knowledge disclosure provisions into the Patent Cooperation Treaty. TK disclosure provisions would require patent applicants to disclose whether their invention uses traditional knowledge, and whether consent has been obtained from traditional knowledge holders. [73] This suggestion has not been adopted and is still a hot topic. If TK disclosure provisions were included in the Patent Cooperation Treaty (PCT), the Australian Patent Office would have to comply, as would other countries who have signed on to comply with the PCT. Given that Australia is demonstrably 'rich' in transmitted IEK, the Australian government should support this initiative.

2.2.8 Partnerships between Indigenous people and researchers

As previously discussed, there are limited circumstances in which IEK can be patented. However, collaborative scientific and other research projects may lead to the development of patentable inventions based on IEK. When this occurs, it is important that researchers discuss the potential patent application with Indigenous people.

If a patent is filed, the Indigenous knowledge holders should benefit from any commercialisation of the resulting product. One option is to include the Indigenous person (or a representative body) as a joint applicant in the patent application. Alternatively (or additionally) the researcher or institution applying for the patent could enter into a benefit sharing agreement with the relevant Indigenous person or group. Benefit sharing agreements with Indigenous access providers are now legally required under the NT *Biological Resources Act* and the Commonwealth *Environment Protection and Biodiversity Conservation Regulations* in certain circumstances (see relevant sections below).

[72] Udgaonkar Sangeeta, 'The recording of Traditional Knowledge: Will it prevent 'bio-piracy'?', Current Science, Vol. 82, No. 4, 25 February 2002.
[73] See World Trade Organisation Trade Negotiations Committee document TN/C/W/52 19 July 2008, http://trade.ec.europa.eu/doclib/docs/2008/september/tradoc_140562.pdf

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2.2.9 Case study on Marjala tree patent

The marjarla tree is known by the Jarlmadangah Burru people of the Kimberley to have healing and pain relief properties. A community elder used the plant to numb pain after losing a finger when crocodile hunting. He then took a sample of the plant to a University Professor (Ron Quinn) and explained how he used the bark from the tree as a dressing on his wound. Griffith University and Jarlmadangah Burru Aboriginal Corporation (JBAC) have filed several patents in relation to the healing properties of the plant as joint applicants. The most recent was filed in October 2008 for 'novel compounds', patent no. 2008905126.[74]

As joint holders of the patent, JBAC and Griffith University will have the exclusive right to commercialise the patented compound or licence its use to a third party. In October 2008, the JBAC and Griffith University entered an agreement with Avexis (a biotechnology company). The agreement allows Avexis to commercialise the plant in return for sharing of benefits – firstly by the income from sales, and secondly, from the opportunity to cultivate and supply the plant in sufficient quantities to make the product marketable.[75]

2.3 Plant Breeder's Rights

The Australian Plant Breeder's Rights system provides protection for plant varieties.[76] This includes' transgenic plants' – plants created in a laboratory using DNA technology.

The *Plant Breeder's Rights Act 1994* (Cth) meets Australia's obligations under the *International Convention for the Protection of New Varieties of Plant 1961* ("the UPOV Convention"). It gives plant breeders the exclusive commercial rights to market a new plant variety or its reproductive material. Such rights allow the plant breeder to produce, reproduce, sell and distribute the new plant variety, and to receive royalties from the sale of the plant or sell the rights to do so.[77] 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.[78]

Applications for plant breeder's rights are made to IP Australia. The application process is costly and the applicant must provide extensive information requiring considerable labour, expense and expertise. For instance, the applicant must 'provide descriptions of the plant sufficient to establish a *prima facie* case that the variety is distinct from other varieties of common knowledge; particulars of the location at which, and manner by which the variety was bred; particulars of the names (including pseudonyms) by which that variety is known

[74] For more information see Miles, Janelle- 'Aborigine, scientist find pain relief in marjarla tree', *Courier Mail*, 21 October 2008, http://www.news.com.au/couriermail/story/0,23739,24530662-3102,00.html
[75] Zoe Lyon, 'Bartier Perry give community helping hand', *Lawyers Weekly*, 21 November 2008, p. 6.
[76] Section 3 of the *Plant Breeders Right's Act 1994* (Cth)
77 Section 11 of the *Plant Breeder's Rights Act 1994* (Cth)
[78] Section 17 of the *Plant Breeders Rights Act 1994* (Cth)

and sold in Australia; and particulars of any [plant breeder's rights] granted in that variety in Australia as well as of any application.'[79]

Protection for plant breeder's rights lasts up to 25 years for trees or vines and 20 years for other species.[80] Like other intellectual property laws, plant breeder's rights protect plants for a limited time only, and then the species becomes publicly available for commercial exploitation. Indigenous Cultural and Intellectual Property rights last in perpetuity.

Like patents, Indigenous people face similar technological challenges in being able to effectively mobilise the plant breeders' rights system. But the question also remains as with patents, do they want to avail themselves of such rights, when it is a system so different from Indigenous ways of living, and caring for country, and the plants and animals on it.

2.3.1 Requirements for protection

To be eligible for plant breeders rights, an applicant must show:-

- Newness. A new variety is one which has not been sold with the breeder's consent, or has been only recently exploited. A recently exploited variety is one which has been sold with the breeder's consent for up to one year in Australia, and for up to four years overseas, with the exception of trees and vines for which a six year overseas prior sale limit is permitted.

- Distinctness. The variety must be distinct from all other varieties of common knowledge, and this is normally verified by conducting a comparative test growing which includes the new variety and the most similar varieties of common knowledge.

- Uniformity. A variety must be sufficiently uniform in its relevant characteristics, subject to the variation that may be expected from the particular features of its propagation.

- Stability. The relevant characteristics of a variety must remain unchanged after repeated propagation or, in the case of a particular cycle of propagation, at the end of each such cycle.[81]

In comparative trials, the new variety must also be shown to be different from the commonly known varieties. These trials are lengthy and expensive. Most Indigenous communities do not have access to the scientific skills and resources to write detailed submissions, deposit samples and conduct comparative trials. Hence, we found no evidence of Indigenous Australian people using the plant breeders' rights system.

79 Marianne Lotz, 'Indigenous Plants, Indigenous Rights: A Discussion of Problems Posed for Protecting Indigenous Intellectual Property (Paper presented at 8th Annual Conference of Australian Association for Professional and Applied Ethics, Adelaide, 27-29 September 2001). See Sections 26(2)(e)–(h) of the *Plant Breeder's Rights Act 1994* (Cth)
80 Section 22(2) of the *Plant Breeder's Rights Act 1994* (Cth)
81 Section 43 of the *Plant Breeder's Rights Act 1994* (Cth)

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2.3.2 Indigenous concerns

Like other intellectual property laws, plant breeder's rights laws are not suitable for the protection of IEK. The rights given are commercially focussed and are limited to a set period. On the other hand, Indigenous Cultural and Intellectual Property Rights are focussed on cultural maintenance. The collective right to practice cultural knowledge about plants should last indefinitely if that culture is to survive.

Indigenous people are concerned that plant breeder's rights laws alienate their plants and the traditional knowledge associated with it. [82] Plants, knowledge and the environment are inter-connected. Exclusive rights to plant varieties sourced from Indigenous land has the potential to conflict with Aboriginal customary laws about knowledge, land management and caring for country. Indigenous peoples, especially Indigenous farmers, have registered their complaints about the loss of control over plant varieties and seeds for collection, exchange and replanting.[83]

Henrietta Fourmile-Marrie noted that in 1998, an inquiry into the plant breeder's rights certificates issues by the Plant Breeder's Rights Office found that of 36 certificates issued over Australian native plants, 16 had known traditional uses. One of these certificates was issued to the Australian Native Produce Industries Pty Ltd for a traditionally-used Indigenous food species, muntries, *Kenzea pumifera* (AU 96/031). Another certificate was issued to the same company, Australian Native Produce Industries Pty Ltd for sea celery, *Apium prostratium* (AU 96/026). The Rural Advancement Foundation International (RAFI) alleged that no breeding work has been carried out with regard to these species. The issuing of such certificates virtually enables the company to "claim" them for their own commercial purposes.[84]

Henrietta Fourmile-Marrie notes that Aboriginal people are rarely involved in the subsequent research, development and application processes regarding these overseas projects. She considers this contrary to the *Convention on Biological Diversity* obligations in Article 8(j). Aboriginal people are denied the opportunity to share in the benefits of this exciting development but will also not receive any benefits from the application of their knowledge.

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[82] RAFI and HSCA, Plant Breeder's Wrongs: An Inquiry into the Potential for Plant Piracy through International Intellectual Property Conventions (RAFI: Ottawa: Canada, and HSCA, Bairnsdale Australia 1998) as cited in Fourmile-Marrie, p 166. See also Henrietta Fourmile, 'Indigenous Interest In Biological Resources In Commonwealth Areas: A Synthesis Of Submissions and Related Information', Appendix 10 in John Voumard, *Commonwealth Public Inquiry Into Access To Biological Resources In Commonwealth Areas.* Canberra: Environment Australia, 2000, http://www.ea.gov.au/biodiversity/science/access/inquiry/index.html

83 Senator Aden Ridgeway, 'Plant Breeders Intellectual Property', Australian Democrat Speech, Canberra, 21 October 2002. See also the work of international non-government organisation, Grain http://www.grain.org/ , viewed .

[84] RAFI and HSCA, Plant Breeder's Wrongs: An Inquiry into the Potential for Plant Piracy through International Intellectual Property Conventions (RAFI: Ottawa: Canada, and HSCA, Bairnsdale Australia 1998).

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2.3.3 Democrats concerns over 2002 Amendments

In the debate over the *Plant Breeders' Rights Amendment Bill* 2002 (Cth), the Democrats raised particular concerns about the impact of the legislation upon Indigenous communities stating that it failed to prevent biopiracy. Senator Ridgeway moved to entrench Indigenous Australians rights to share in the benefits flowing from Indigenous plants under the Plant Breeders' Rights Scheme.[85] As noted by Senator Cherry, 'This scheme allows tests of new varieties to be conducted by employees of the applicant, limits objection to new plant varieties and makes objection difficult and expensive, and fails to provide any rights for Aboriginal communities—even if the plant is originally discovered on their land.'

According to the Australian Democrats, 'evidence suggests that many plants are being granted an exclusive right under the act although they are not significantly different from plants discovered in the wild. Four years ago, Australia was cited as having the worst record of any industrialised country for biopiracy, responsible for 80 per cent of the documented cases of dubious plant variety claims by the Canadian based Rural Advancement Foundation. Yet little has changed, and biopiracy, including the patenting of plant learning acquired through generations of Indigenous people, continues. Sometimes the legislation is not properly followed, the tests are not sufficiently stringent or the applicants simply disguise the source of the plant variety.

While Indigenous communities are not the only group affected by this Act, their rights and their traditional relationship with the land are being widely ignored in this legislation. The Democrats are proposing amendments that will reduce the chances of biopiracy from Indigenous land and increase the capacity of the Indigenous community to object when biopiracy is occurring. There are moves to add Indigenous representation to the advisory committee that provides expert advice to the minister. Currently, Indigenous and conservation interests are not represented on the committee at all. While encouraging innovation and new commercial varieties is fully supported by the Democrats, legislation that gives rights to one group by denying others is not acceptable.

2.3.4 Protection of Plant Varieties and Farmer's Right Act 2001 (India)

In India, the *Protection of Plant Varieties and Farmers' Rights Act* 2001 (India) has scope for communal ownership. 'Breeder' is defined as 'a person or group of persons or a farmer or group of farmers or any institution which has bred, evolved or developed any variety.'[86] Farmers and local communities can register and commercialise plant varieties.

The definition of 'farmers' contained in the Act is wide, including anybody who 'conserves or preserves…any wild species or traditional varieties or adds value to such wild species or

[85] Senator Cherry (Queensland) (9:25 PM) Monday, 21 October 2002 Page: 5553

[86] Article 2(c), *Protection of Plant Varieties and Farmers' Rights Act* 2001 (India), *Protection of Plant Varieties and Farmers' Rights Act* 2001 (India), viewed 18 February 2009.

traditional varieties through selection and identification of their useful properties'.[87] The definition of 'farmers' variety' is similarly wide, including any variety that has been 'traditionally cultivated and evolved by the farmers in their fields' or is 'a wild relative or landrace… or a variety…about which the farmers possess…common knowledge'.[88]

Under the Act farmers can register farmers' varieties.[89] Farmers are also given the right to sell seeds produced even if they come from a protected variety. [90] The Act also allows local communities to file claims asserting that they have contributed to the evolution of a plant variety.[91] If the claim is verified and the variety in question has been registered by a breeder, the relevant Authority can then order the breeder to compensate the claimant community under a benefit sharing scheme.[92]

2.4 Breach of confidence and privacy laws

Breach of confidence laws protect confidential knowledge from being disclosed to unauthorised persons. It is illegal to take confidential information and use or publish it if:

1. The information is of a confidential nature
2. The information was told to the person disclosing it in a confidential manner and where there was an obligation of confidence; and
3. There was an unauthorised use of that information which is detrimental for the person whose confidence was communicated.[93]

There have been two cases where Aboriginal people have used these laws to protect their cultural interests:

In *Foster v Mountford and Pitjantjatjara Council Inc*[94] Aboriginal people used breach of confidential information laws to limit the publication of sacred material that was not suitable for wide publication. The details of the case are as follows.

Members of the Pitjantjatjara Council took action under breach of confidence laws to stop the publication of a book, *Nomads of the Australian Desert*. Mountford, an anthropologist, undertook a field trip in 1940 into remote areas of the Northern Territory, where Pitjantjatjara male elders revealed, in confidence, tribal sites and items of deep cultural and religious significance. Mountford later published the information, with photographs, drawings and descriptions of persons, places and ceremonies of the Pitjantjatjara people. It was argued that the dissemination of this information could cause serious disruption to Pitjantjatjara culture and society if it was revealed to women, children and uninitiated men. The Federal Court granted an injunction in favour of the Pitjantjatjara Council.

[87] Article 2(k)(iii), *Protection of Plant Varieties and Farmers' Rights Act* 2001 (India)
[88] Article 2(l)(ii), *Protection of Plant Varieties and Farmers' Rights Act* 2001 (India)
[89] Article 39(1), *Protection of Plant Varieties and Farmers' Rights Act* 2001 (India)
[90] Article 39(1)(iv), *Protection of Plant Varieties and Farmers' Rights Act* 2001 (India)
[91] Section 41(1), *Protection of Plant Varieties and Farmers' Rights Act* 2001 (India)
[92] Articles 26 and 41, *Protection of Plant Varieties and Farmers' Rights Act* 2001 (India)
[93] *Coco v AN Clark (Engineers) Ltd* (1969) RPC 41 (Cth)
[94] *Foster v Mountford and Pitjantjatjara Council Inc* (1977) 14 ALR 71.

Breach of confidence does not protect against disclosure of knowledge when the discovery comes about from other ways, or independent discovery. However, "the knowledge of an individual or a community might be protected as a trade secret as long as the information has commercial value and provides a competitive advantage, whether or not the community itself wishes to profit from it." [95] If a third party obtains confidential information by illicit means, legal action may be used to force companies to share its profits.

Undisclosed and confidential Indigenous knowledge could be protected under this area of law by restricting access to areas and exchanging information with outsiders through confidentiality agreements or non-disclosure agreements.

This type of law may be useful to protect sacred information but it could also protect commercial in confidence ideas. It is recommended that confidentiality agreements and non-disclosure agreements be entered into where contractors and researchers are engaged to work on confidential areas, and those that may result in commercially marketable products.

Note however that this will only protect knowledge that is not already in the public domain or published. Knowledge that is already shared with others or written and recorded by anthropologists, researchers, scientists and the like will not qualify for protection under breach of confidence laws.[96]

In a review of the case of *Foster* v *Mountford*, Christoph Antons observes: 'At the time of the case in the mid-1970s, Australian courts had become sensitised to these issues and placed the welfare of Aboriginal communities over the research interests of anthropologists'.[97] He observes that 'the decision appears eminently sensible, even more than 30 years later, and has inspired other courts to turn to equitable principles when dealing with Aboriginal cultural items.'[98]

2.4.1 Research industry and non-disclosure forms

Breach of confidence laws, also called trade secrets laws, are used extensively in research and development. The use of non-disclosure forms is a common practice in the scientific research field.

There is scope for use of these forms in Indigenous projects where the information is confidential for commercial purposes but also for cultural reasons, for example, sacred or sacred knowledge.

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[95] 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 87.
[96] Stephen Gray, "Vampires round the Campfire: Indigenous intellectual property rights and patent laws", *Alternative Law Journal*, Vol 22, No 2, April 1997
[97] Christop Antons, "Foster v Mountford: Cultural Confidentiality in a Changing Australia", in Andrew Kenyon, Megan Richardson, and Sam Ricketson (ed). *Landmarks in Australian Intellectual Property Law*. Cambridge: Cambridge University Press, 2009, p. 110-125 at 125.
[98] Ibid., p. 125.

Commissioned by the Natural Resource Management Board (NT).

2.4.2 Privacy Laws

The Privacy Act 1988 (Cth) controls the collection and use of personal information in Australia. Privacy laws may be particularly relevant for researchers and certain other NRM officers in the NT who are dealing with Indigenous people and their knowledge. In particular there are eleven National Privacy Principles contained in the Act which must be followed by all Commonwealth government agencies, all health service providers and some private businesses. The Privacy Commissioner has made available a Protocol for Australian Government agencies in the NT called *Mind Your Own Business* on their website.[99] These protocols are useful to consider when dealing with the collection of personal information only.

In its report *For Your Information*, The Australian Law Reform Commission stated that the 'most appropriate means of ensuring greater protection of group information that is of particular significance to Indigenous groups is for the Office of the Privacy Commissioner to encourage and assist agencies and organisations to create publicly available protocols that respond to the privacy needs of these groups.'[100] The collecting group should consult and negotiate with the relevant members of an Indigenous group before handling information that is culturally sensitive. According to the report, privacy protocols should be developed in consultation with Indigenous groups and representatives to ensure that they are appropriate and effective. The report noted:

> In recommending the development of privacy protocols, the ALRC is mindful of the concerns expressed about the efficacy of protocols in protecting the privacy rights of Indigenous groups, and acknowledges that protocols may not present the best comprehensive, long-term solution. In addition, the ALRC acknowledges that reform of existing laws would not provide the holistic protection of Indigenous cultural rights sought by some stakeholders to this Inquiry. For example, while the *Privacy Act* might protect privacy of some sacred knowledge of Indigenous groups, it could not provide rights for control of access to Indigenous sacred sites, nor would it allow groups to exercise control over recordings of cultural customs and expressions. Similarly, other laws, such as native title and intellectual property, have only limited capacity to protect Indigenous cultural rights.
>
> In the current Inquiry, the ALRC did not receive sufficient information to recommend that the Australian Government introduce a legislative framework for the protection of a range of cultural rights relating to the traditional laws and customs of Indigenous groups—which might include rights akin to privacy, cultural heritage and intellectual

[99] http://www.privacy.gov.au/publications/HRC_PRIVACY_PUBLICATION.pdf_file.p6_4_79.49.pdf, viewed 7 April 2009.
[100] Recommendation 7.44, *For Your Information*, The Australian Law Reform Commission, http://www.privacy.gov.au/publications/HRC_PRIVACY_PUBLICATION.pdf_file.p6_4_79.49.pdf, viewed 7 April 2009.

Commissioned by the Natural Resource Management Board (NT).

> property rights. Further, in the ALRC's view, such a recommendation would be outside the Terms of Reference for this Inquiry.

7.50 A further inquiry should be undertaken, however, to determine whether the Australian Government should introduce a rights framework for the traditional laws and customs of Indigenous groups. Such an inquiry should involve extensive consultation with Indigenous groups and representatives, and could consider: whether such a framework is desirable; if so, what types of rights should be protected through such a framework; the most appropriate mechanism through which to recognise such rights; the methods for establishing rights and determining disputes among rights-holders; and the relationship between such a framework and other Australian laws.

Two major recommendations followed:

Recommendation 7–1

> The Office of the Privacy Commissioner should encourage and assist agencies and organisations to develop and publish protocols, in consultation with Indigenous groups and representatives, to address the particular privacy needs of Indigenous groups.

Recommendation 7–2

> The Australian Government should undertake an inquiry to consider whether legal recognition and protection of Indigenous cultural rights is required and, if so, the form such recognition and protection should take.

The Australian Law Reform Commission has proposed the establishment of a statutory cause of action for serious invasions of privacy in its report *For Your Information*:

> **Recommendation 74–1** Federal legislation should provide for a statutory cause of action for a serious invasion of privacy. The Act should contain a non-exhaustive list of the types of invasion that fall within the cause of action. For example, a serious invasion of privacy may occur where:
>
> (a) there has been an interference with an individual's home or family life;
> (b) an individual has been subjected to unauthorised surveillance;
> (c) an individual's correspondence or private written, oral or electronic communication has been interfered with, misused or disclosed; or
> (d) sensitive facts relating to an individual's private life have been disclosed.

In *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199, the High Court of Australia considered whether there was a cause of action for breach of personal privacy. Gleeson CJ noted:

> the lack of precision of the concept of privacy is a reason for caution in declaring a new tort of the kind for which the respondent contends. Another reason is the tension that exists between interests in privacy and interests in free speech. I say "interests", because talk of "rights" may be question-begging, especially in a legal system which has no counterpart to the First Amendment to the United States Constitution or to the Human Rights Act 1998 of the United Kingdom.
>
> There is no bright line which can be drawn between what is private and what is not. Use of the term "public" is often a convenient method of contrast, but there is a large area in between what is necessarily public and what is necessarily private. An activity is not private simply because it is not done in public. It does not suffice to make an act private that, because it occurs on private property, it has such measure of protection from the public gaze as the characteristics of the property, the nature of the activity, the locality, and the disposition of the property owner combine to afford. Certain kinds of information about a person, such as information relating to health, personal relationships, or finances, may be easy to identify as private; as may certain kinds of activity, which a reasonable person, applying contemporary standards of morals and behaviour, would understand to be meant to be unobserved.
>
> The requirement that disclosure or observation of information or conduct would be highly offensive to a reasonable person of ordinary sensibilities is in many circumstances a useful practical test of what is private.[101]

2.4.3 Freedom of Information laws

Freedom of Information laws (FOI) gives a person the right to apply for access to government information held by public sector organisations. It is about enhancing government accountability and participation in our democratic system of government.[102] For NT government information, there are two relevant laws – the *Freedom of Information Act* 1982 (Cth) and the the *Information Act 2002* (NT). [103]

Government records may contain information about IEK and the question of whether a person can gain access to these records will rely on whether they meet the requirements of disclosure under the Act. Some of this information may not be suitable for public disclosure. It is noted that the Northern Territory law allows for information to be exempt from being released if it would disclose information about an Aboriginal sacred site or tradition.[104]

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[101] Privacy has been the subject of a number of cases where state courts have applied the doctrine in *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199 – including *Grosse* v. *Purvis* [2003] QDC 151 (16 June 2003); *Doe* v. *Australian Broadcasting Corporation* [2007] VCC 281; and *Giller v. Procopets* [2008] VSCA 236 .

[102] http://www.nt.gov.au/justice/infocomm/foi/index.shtml, viewed 13 August 2008.

[103] Organisations that qualify as 'public sector' are listed in section 5 of the *Information Act (NT)*

[104] Section 56, *Information Act* (NT)

Commissioned by the Natural Resource Management Board (NT).

2.5 Trade Marks

A trade mark identifies the maker of products and services. Under the *Trade Marks Act 1995* (Cth) the registered owner of a trade mark is granted a right to use that trade mark in association with his or her trade in accordance with the class of goods and services approved by the Trade Marks Office of IP Australia. To be registrable, a trade mark must be distinctive. The application process takes about 9 months and is subject to payment of fees. Once examined, and successful, the trade mark registration is granted for a 10 year term. Renewal for another 10 years is subject to the payment of fees. Trade marks may be useful for TK in relation to commercial products arising from TK or natural resources. Trade marks are useful IP tools to assist Indigenous people promote authentic products and services.

2.5.1 Indigenous words and images as trade marks

When applying for a trade mark of an Indigenous word or image, the applicant is not required to obtain any 'permission' to use the Indigenous cultural material. It is not necessary for a person to show he or she has the free prior informed consent of the Indigenous traditional owners in order to register a trade mark related to an Indigenous word, symbol or design, and thereby become the registered owner of the mark.

This might be relevant where a product commercialised is marketed under an Indigenous word or branding. For example, Yolla is the word for muttonbird in Aboriginal Tasmanian languages and it was registered by the Tasmanian Aboriginal Centre to market its food products and the oils made from muttonbird.

A Northern Territory example is the range of products made from Kakadu Plum. These could be marketed under the Indigenous name, as is the case with the jams and chutney products produced by the Larrakia – "Damiyumba". At 13 August 2008 the trade mark database had no registered trade marks under this spelling.[105]

2.5.2 Scandalous and contrary to law marks

A trade mark or part of the trade mark which comprises scandalous matter or is contrary to law may be rejected by the Trade Mark Registrar.[106] This provision is not often used but may provide scope for Indigenous people to challenge registration of culturally offensive marks. Compare with the NZ Trade Mark Law which actually includes a provision similar to this, with the added words, "including Maori". Specifically, the Trade Mark Commissioner must not register a trade mark if 'the Commissioner considers that its use or registration would be likely to offend a significant section of the community, including 'Maori'. A Maori Trade Mark Advisory Committee has been established to advise the Trade Mark Commissioner

[105] Terri Janke, *Minding Cultures: Case Studies on Intellectual Property and Traditional Cultural Expressions* (Geneva: WIPO, 2003).
[106] Section 42 of the *Trade Marks Act 1995* (Cth)

whether the proposed use or registration of a trade mark is likely to be offensive to Maori.[107] A similar process was recommended for adoption in the Australian Trade Marks Office in *Our Culture Our Future*.[108] However, there have been no legislative moves towards this by IP Australia. I note that this year that IP Australia did release its Reconciliation Action Plan. Hence it might be a good time to revisit this issue.

2.5.3 Certification marks

The *Trade Marks Act 1995* has provisions which allow for registration of certification marks. Certification marks are signs or devices used to distinguish goods and services which possess a certain quality, accuracy or characteristic. The distinguishing characteristics may include geographic origin, quality of material used, or the mode of manufacture.[109] 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.

2.5.4 Case study: label of authenticity

In 2000 the National Indigenous Arts Advocacy Association (NIAAA) launched the Label of Authenticity – a certification mark to be used on products which were made by an Aboriginal or Torres Strait Islander person. The rules for the use of the Label of Authenticity provided that:

- the label could only be applied to authentic products or services made by Aboriginal or Torres Strait Islander people.
- the artist must have permission to use the cultural designs included in his or her art.
- that a product or service must state the name of the artist, and the clan.

The label was developed so that consumers could identify products that are made by Indigenous artists and subsequently purchase these products over the numerous 'rip-off' products that saturate the market. Unfortunately, the Label was not widely used by Indigenous artists. The required fee and application process presented hurdles. A national organisation was viewed by many Indigenous artists as being irrelevant at determining the Aboriginality or authenticity of their art. Also, their art was already being distributed by arts centres that already had trading names, trade marks and systems of authentication which operated at a regional level. The limited use of the label focused on souvenirs and mass produced items such as t-shirts and coasters.

[107] Section 198, *Trade Marks Act 2002* (NZ)
[108] Terri Janke, *Our Culture: Our Future*, recommends the establishment of an Indigenous Staffing Unit and an Indigenous Trade Mark Focus Group.
[109] Section 169(b),*Trade Marks Act 1995* (Cth)

Commissioned by the Natural Resource Management Board (NT).

In 2003, NIAAA, was de-funded and although still registered, the marks are not in use. The model was the inspiration for the New Zealand Toi Iho mark which is used to market authentic Maori Made arts and craft.[110]

Case study: Trade marks and Indigenous resource based products

Indigenous people can use natural resources for commercial projects including teas, soaps, chutney and jams. The use of a trade mark can assist with the promotion of the authentic product.

2.6 Geographical indications

A geographical indication (GI) is a name or sign used on products to indicate the particular place the product comes from.[111] A GI is an intellectual property tool used to identify that a product has certain qualities or a reputation, due to its geographic origin. GIs are most commonly used in relation to food products and wine. The geographical indication protects the name by preventing the generic uses of the name and preserving it for use of products made in the traditional manner.[112]

The *Trade Related Aspects of Intellectual Property Rights Agreement (*TRIPS) sets up an international system for GI protection. In Europe, there is a registration system for GIs, which are protected under European Union (EU) regulations.[113] The makers of wine and cheeses have registered geographical indications to protect well-known regionally produced goods that have distinctive qualities. For example, 'Champagne' is protected by the French wine growing region. 'Tuscany' is a geographic indication protected under Italian law for olive oil produced in the Italian region of Tuscany.[114]

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[110] Terri Janke, *Minding Cultures: Case Studies on Intellectual Property and Traditional Cultural Expressions* (Geneva: WIPO, 2003).

[111] Article 22(1) of the Trade Related Aspects of Intellectual Property (TRIPS) Agreement (the TRIPs Agreement), GIs are defined as indications which 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 if the good is essentially attributable to its geographic origin.

[112] Geographical Indications- Information about the protection of regional product names, www.geographicindications.com, viewed 8 December 2008.

[113] Under Regulation (European Community) No. 2081/92 and in the United States under US Certification Registration Mark No. 571.798, World Intellectual Property Organisation, About geographical indications, http://www.wipo.int/about-ip/en/geographical_ind.html, viewed 17 February 2005.

[114] 'Law No. 169 of February 5,1992, Italy, World Intellectual Property Organisation, About geographical indications, http://www.wipo.int/about-ip/en/geographical_ind.html, viewed 17 February 2005.

Commissioned by the Natural Resource Management Board (NT).

There has been much controversy over whether TRIPS should provide similar protection in respect of GIs related to food. The EU has already provided extensive protection for foods such as Parma ham[115] and Parmesan cheese[116]; Feta cheese[117] and Grand Padano cheese[118]; and olive oil[119].

In Australia, the focus on GIs has been on the wine regions and already there has been litigation, most notably regarding the Coonawarra region. In 1993, amendments to the *Australian Wine and Brandy Corporation Act 1980* established the Geographical Indications Committee to determine wine geographical indications and allow the agreement between Australia and the European Union to come into force. Under that agreement the parties agreed to adopt measures so that reciprocal protection of names could be achieved. 'Coonawarra' was one of the Australian names for protection. In *Beringer Blass Wine Estates Limited* v. *Geographical Indications Committee* [2002] FCAFC 295 several applicants' properties were excluded from the 'Coonawarra' geographical boundary fixed by the Geographical Indications Committee.[120] The court considered substantial evidence concerning the region and vineyards including historical evidence, and concluded that there was no absolute correct boundary for this region. A new wine agreement between the parties was entered into in February 2009.[121]

For greater relevance to Indigenous peoples, the authors of the report, *Scoping Project of Aboriginal Traditional Knowledge* suggest that the provisions in the TRIPS agreement would need to be adapted to allow for a concept of 'community of origin'.[122] However, there is scope in our Australian trade marks law and fair trading provisions to allow for Indigenous communities to take advantage of geographical indications.

As a signatory to the TRIPS agreement, Australia is obliged to provide laws by which interested parties can stop others from using geographical indications in a misleading or unfair way.[123] Under the Australian *Trade Marks Act 1995* (Cth), a GI can be registered as a trade mark. A 'geographical indication' is defined as a sign used in relation to goods from a certain country, region or locality that is recognisable in that place as a sign which indicates that the goods:-

(a) originated in that country, region or locality; and
(b) have a quality, reputation or other characteristic attributable to their geographic origin.[124]

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[115] *Consorzio del Proscuitto di Parma* v. *Asda* ('Parma Ham' case) 20 May 2003, Case C-108/01.
[116] *Commission of the European Communities* v. *Federal Republic of Germany* ('Parmesan cheese' case) (2008/C 92/03)
[117] *Federal Republic of Germany and Kingdom of Denmark* v. *Commission of the European Communities* ('Feta Cheese' case) 10 May 2005, C-465/02 and C-466/02.
[118] *Ravil* v. *Bellon* ('Grand Padano cheese' case) 2003 Case-469/00.
[119] *Geographical Indications (Olive Oil 'Kalamata')*, Ministerial Decision, 20/08/1993, No. 379567 (Greece).
[120] See also the King Valley wine region case in *Baxendale's Vineyard Pty Ltd* v. *The Geographical Indications Committee* [2007] FCAFC 122.
[121] Wine Agreement between Australian and European Union, http://www.aph.gov.au/house/committee/jsct/3february2009/treaties/*wine* text.pdf
[122] Smallacombe et al, *Scoping Project on Aboriginal Traditional Knowledge*, DKCRC, February 2007. http://www.desertknowledgecrc.com.au/publications/downloads/DKCRC-Report-22-Traditional-Knowledge.pdf, viewed 2 February 2009.
[123] Article 22(1) of the Trade Related Aspects of Intellectual Property (TRIPS) Agreement
[124] Section 6 of the *Trade Marks Act 1995* (Cth)

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Registration of a trade mark can be opposed if it contains or consists of a geographical indication that is likely to deceive or cause confusion.[125]

Similarly, the *Trade Practices Act* (Cth)[126] and *Consumer Affairs and Fair Trading Act* (NT)[127] each have sections which prohibit, in the course of trade or business, misleading statements concerning the place of origin of goods. There is also the common law action of passing off.

Indigenous peoples' cultural expression reflects their belonging to land and territories. Geographic indications may allow some scope for Indigenous people to use GI labels for their cultural products and services including arts, craft, cultural knowledge and language. Geographical indications can also create economic rewards for producers who use traditional methods in the region where a product or service has been traditionally produced. To develop these measures however, Indigenous regional associations would need to develop their own GI and establish certification-issuing processes.[128]

Geographical indications may be useful for Indigenous communities as a way of registering a product in terms of its origins in a specific location. For instance, the use of the language words for plants that are commercially applied may assist Indigenous people develop a niche market, and protect traditional knowledge practices of harvesting. For example, 'damiyumba' is the Larrakia word used for the Kakadu plum (*Termanali fernandi*). This species grows in other northern areas and not just Larrakia country. However, the use of the name as a GI for products such as jams and teas would identify the origin as being from Larrakia land. The name and a logo could be registered as a trade mark, thereby proactively promoting appellation of origin.

Damiyumba Lime Chutney. Logo art by Pauline Babin. Name rights cleared by Larrakia Association. Product range project development: Lorraine Williams and Greening Australia.

2.6.1 Case study: Pangkarra case study

Australian wineries can no longer use the GIs of the French wine industry since the World Trade Organization stopped the use of French wine names by non-French wine producing

[125] Section 61 of the *Trade Marks Act 1995* (Cth)
[126] Sections 53(a)&(eb) and 75AZC(1)(a)&(i), *Trade Practices Act 1974* (Cth).
[127] Section 44(j) *Consumer Affairs and Fair Trading Act* (NT).
[128] Daryl Posey and Graham Dutfield, *Beyond intellectual property: Towards traditional resource rights for Indigenous peoples and local communities*, International Development Research Centre, Canada, 1996, p. 91.

regions. One Australian wine maker has suggested using an Indigenous word to encapsulate the meaning of 'terroir'. The French word 'terroir' refers to all the factors that influence how grapes grow in a vineyard. This includes soil type, topography, climate, water and human activities such as vine trellising.[129] Jeffrey Grosset of Grosset vineyards in South Australia suggests the word 'Pangkarra' should be adopted as an Australian equivalent. [130]'Pangkarra' is from the Kaurna language of the Adelaide area. In 2004, the South Australian winery, Parri Estate Pty Ltd registered a trade mark of the word Pangkarra. [131] However, one press article reported that there were some discussions with language custodians. It is unknown whether deal terms were entered into for the authorised use of this Indigenous word.

2.6.2 Summary of GIs

There may be some benefits of using geographical indications to protect Indigenous food preparations, medicinal remedies and Indigenous arts and crafts. A geographical indication can promote authentic products to consumers. The duration of protection is also not limited in time like copyright and will be protected as long as use continues. GIs do not give exclusive rights to the particular cultural practice but provide usage rights to the name or symbol being used. They do not give exclusive rights to the information.[132] While most often used on food products, they can be used to identify any product associated with a specific geographic place, and are increasingly associated with non-monetary benefits such as the protection of Indigenous Ecological Knowledge and community rights. GIs can potentially return monies to communities who want to market products that are based upon sustainable traditional production practices.

2.7 Trade Practices & passing off

2.7.1 Trade Practices & fair trading laws

Under the *Trade Practice Act 1974 (Cwth),* it is an offence for a corporation to engage in misleading and deceptive conduct in the course of trade.[133] This area of law has been used to stop rip-off art manufacturers from promoting bogus Aboriginal art products as authentic when they were not produced by Aboriginal artists.

The *Trade Practices Act 1974* contains a range of provisions to protect consumers from false and misleading conduct, including in advertising and in making claims and statements. These laws may be of use to Indigenous interests when non-Indigenous business have appropriated art and cultural expression, and where the consumer is lead to believe or deceived to think the work is authentic Indigenous.

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[129] Max Allen, Wine questions, *Taste Extra*, 25 February 2008.
[130] http://www.grosset.com.au/profile.htm, viewed 2 February 2009.
[131] Trade mark number 1017301
[132] David Downes, *Using intellectual property as a tool to protect traditional knowledge: Recommendations for next steps*, Centre for International Environmental Law Discussion Paper prepared for the Convention on Biological Diversity Workshop on Traditional Knowledge Madrid, November 1997, www.ciel.org/Publications/UsingIPtoProtectTraditionalKnowledge.pdf, viewed 7 March 2008.
[133] Section 52 of the *Trade Practices Act 1974* (Cwth)

Commissioned by the Natural Resource Management Board (NT).

Copyright law protects the way an artistic idea is embodied or recorded. However it does not protect the idea, style of art or the information itself. Commonwealth and State consumer protection legislation, such as the *Trade Practices Act 1974* (Cwlth), protect certain words, art, styles, expressions, illustrations and ideas where they are used in a misleading and deceptive way.

While the Commonwealth trade practice laws focus on the conduct of corporations,[134] the state fair trading laws also cover misleading and deceptive conduct by a person. In the Northern Territory,[135] the *Consumer Affairs and Fair Trading Act 1990* (NT) covers misleading and deceptive conduct by a person.

Case Study: ACCC alleges misleading and deceptive conduct by Indigenous art dealer

In 2008 the Australian Competition and Consumer Commission (ACCC) instituted proceedings in the Federal Court against Doongal Aboriginal Art and Artefacts. Doongal Aboriginal Art and Artefacts was created in 1993 by Mr and Mrs Nooravi. They have three art galleries - two in Kuranda and one in Cairns.

Mr and Mrs Nooravi promoted the work of 3 non-Indigenous artists as 'Aboriginal Art', 'Aboriginal Artefacts', 'Authentic Aboriginal Art' and 'Aboriginal Art in the traditional sense'.

The court found Mr and Mrs Nooravi had engaged in misleading and deceptive conduct in contravention of the *Trade Practices Act 1974*. Mr and Mrs Nooravi were ordered to write to the purchasers of artworks produced by the three non-Indigenous artists to advise them of the court proceedings. The court granted injunctions restraining Mr and Mrs Nooravi, from engaging in similar conduct for 5 years and ordered them to pay the ACCC's costs.[136]

2.7.2 Passing off

Passing off is a common law that protects the commercial interests of a person or company. It is used where one trader has an established reputation and another trader appropriates his or her goods or services, claiming them as their own. Passing off situations include:

- Misrepresentation of the source of goods and services.[137]
- Misrepresentation that there is some sort of connection or association with another person's business, whether by way of partnership, sponsorship or licensing.[138]

[134] Section 6 of the *Trade Practices Act 1974* (Cwlth) allows recourse to individuals in certain situations.
[135] Section 42 of the *Consumer Affairs and Fair Trading Act 1990* (NT)
[136] Australian Competition & Consumer Commission, *Court finds Aboriginal art dealer misled public*, News Release, http://www.accc.gov.au/content/index.phtml/itemId/841224/fromItemId/815456, viewed 9 January 2009.
[137] *Bollinger v Costa Brava Wines Co Ltd* (1960) RPC 16.
[138] *Hogan v Koala Dundee Pty Ltd* (1988) 12 IPR 508.

Commissioned by the Natural Resource Management Board (NT).

- Misrepresentation that there is a connection or association with another person's images, character and personalities.[139]

- 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 to goods or services of, or associated with, another or others.[140]

To be successful in an action for passing off, the person bringing the action (known as the plaintiff) must show:

- The goods or the business have an established goodwill or reputation.

- The competitor's conduct has caused, or may cause, their customers to believe that the competitor's goods or services are the plaintiff's goods or services.

- The plaintiff has lost business, or may lose business because of this deceptive conduct.[141]

2.8 Designs

The *Designs Act 2003* (Cth) protects industrial designs which are designs applied to a product, meaning the overall appearance of the product resulting from one or more visual features of the product.[142] Applications for registration of a design must be made to the Designs Office of IP Australia. There are costs and fees payable to IP Australia associated with the registration of a design and the examination process. To be registered, a design must be 'distinctive' in that it must not be 'substantially similar in overall impression to a design that forms part of the prior art base'.[143]

The period of protection is a maximum of 10 years. An initial term of five years from the filing date is given after acceptance.[144] The registered owner may apply for renewal of the registration for a further five years.[145]

Under Indigenous customary laws, a design or motif belongs to a certain Indigenous cultural group, and there may be certain traditional practices for creating art, and weaving baskets. The Designs law does not protect the content of knowledge. But there may be some limited protection for TK when it is applied to produce items for industrial application. For example, a group of Queensland Indigenous artists who made jewellery designs from Indigenous motifs including platypuses, echidnas and Torres Strait Islander drums registered their

[139] ibid per Pincus J.
[140] *Moorgate Tobacco Co Ltd v Philip Morris Ltd* (1984) 156 CLR 414 at 445; at 214; at 516 as cited in McKeough, *Intellectual Property: Commentary and Materials*, (2nd ed) Law Book Company, Sydney 1992, p. 470.
[141] J Powell, *Fletcher Challenge Ltd v Fletcher Challenge Pty Ltd* [1981] 1 NSWLR 196.
[142] Section 5 of the *Designs Act 2003* (Cwth)
[143] Section 16(2) of the *Designs Act 2003* (Cwth)
[144] Section 46(1) of the *Designs Act 2003* (Cwth)
[145] Section 47 of the *Designs Act 2003* (Cwth)

designs with IP Australia in 2003 before being commercially released. The Saltwater Collection designs are made for mass production so the registration of the designs would give protection.[146]

Case study: Fish traps

The weaving of fish traps from fibre is an Indigenous cultural practice for many Indigenous communities living near seas and rivers. Although the fish trap serves a function, the construction's intricate detail would qualify it as a design. Fish traps would also be protected as a copyright work of artistic craftsmanship. However, if a fish trap is manufactured from a prototype and drawings, and 50 or more are made, this would result in the loss of copyright protection. Already, wire-constructed fish traps are registered as designs, even though the designs appear not to be derived from traditional Indigenous methods and practices.

Industrial designs laws can protect contemporary Indigenous designs that are mass produced on articles. However, it is important to note that these designs would have to meet the 'new and distinctive' requirements of the Designs Act. This could include adaptations and interpretations of pre-existing traditional designs, although the issue of whether Indigenous cultural and intellectual property rights are recognised in adaptations should be addressed. Indigenous sacred material and other culturally sensitive designs should not be used in commercially produced designs. The designs law does not address these cultural issues but people should be aware of authenticity and integrity, and in view of cultural protocols, seek consent and consult relevant people.

Work being undertaken at an international level and through the World Intellectual Property Organisation has focused on the need for new classifications for traditional designs.[147] Discussions have centred on updating and expanding the existing international classification system for industrial designs[148] in view of its relevance to industrial design protection for traditional cultural expressions.[149]

A point to note when considering designs law for protection of Indigenous cultural product is the fact that design protection is for a limited period, and after this time, the design can be copied without the registered owner being able to stop copying. Further, the laws are focused on commercial application of designs, and this will not be appropriate for protecting against the unauthorised and offensive use of Indigenous cultural designs, emblems and cultural property, especially ceremonial objects.

[146] Saltwater Collection website, http://www.saltwatercollection.com/, viewed 25 November 2008.
[147] See the World Intellectual Property Organisation's (WIPO) documents, WIPO/GRTKF/IC/4/3 paras. 164 to 167 and WIPO/GRTKF/IC/5/3, paras. 269 to 272.
[148] The Locarno Agreement Establishing an International Classification for Industrial Designs, 1979.
[149] World Intellectual Property Organisation (WIPO), The Protection of Traditional Cultural Expressions/Expressions of Folklore, Outline of Policy Options and legal mechanisms, Geneva, Seventh Session, November 2004, Para 87.

Commissioned by the Natural Resource Management Board (NT).

2.9 Summary

Intellectual property laws, such as copyright and patent laws, govern the flow and ownership of information and cultural expressions. These laws are not well equipped to deal with IEK. IEK is mostly orally transmitted, communally owned and its flow governed by strict kinship and gender based laws. Western IP laws focus on the individual. They mostly protect the expressions of knowledge such as written texts and commercially viable products.

In some cases, the mainstream IP regime provides the opportunity for Indigenous people to control the use of Indigenous intellectual and cultural property. Confidential information laws, copyright laws, the law of 'equity' and patents law have been used to stop the unauthorised and offensive use of Indigenous cultural knowledge. However, the same laws have also been used to appropriate Indigenous cultural material by non-Indigenous researchers, companies and governments without any acknowledgement or benefit flowing back to the Indigenous people who are the source of the knowledge.

The IP regime has limitations when it comes to protecting Indigenous Ecological Knowledge, such as the lack of recognition of communal rights and a focus on physical expressions of knowledge. Time limits on protection are also at odds with Indigenous concepts of knowledge ownership, under which IEK is held and transmitted perpetually through family and kinship connections.

Intellectual property laws are often the only form of guaranteed protection for ICIP rights, and thus retain an important role. How these laws can be used, displaced by contract (be it voluntarily entered into, or enforced through permits or provisions of access to land and resources law), or made conditional with protocols, becomes the main focus of dealing with legal rights in this area.

Commissioned by the Natural Resource Management Board (NT).

Section 3
Agreements & Contracts

Written agreements can take a number of different forms, and offer an avenue through which Indigenous people and groups can enforce their ICIP rights, ensure their IEK is treated respectfully and ensure that benefit flows back to their communities. Generally, agreements are entered into voluntarily, and each party can negotiate the terms of the agreement. However, in many cases, agreements are required by law. Agreements can be made between two people or involve several people or organisations (each known as a 'party'). Parties to a contract may be as diverse as governments, companies, land councils, native title groups (including claimant groups), individuals, universities and research centres. Although agreements do not all technically have to be in writing and signed, it is very difficult to prove the content of oral agreements and enforce them. Many agreements are required by law to be in writing.

Here are just some of the various forms agreements may take in the realm of natural resource management which may be relevant to Indigenous knowledge:

- Leases over land (e.g. in Uluru and Kakadu);
- Memorandums of understanding;
- Permits (for research, filming and photography, commercial tours - issued by land councils or government bodies such as Parks and Wildlife commission);
- Benefit sharing agreements under NT or Cth legislation;
- Indigenous Land Use Agreements (ILUAs);
- Native title consent determinations;
- Licenses to use copyright material;
- Publishing contracts;
- Joint management agreements (over parks and reserves);
- Royalty agreements from mining and other activities;
- Carbon credit trading agreements; and
- Authorised user agreements (mentioned in the Pacific Model law discussed at 9.1).

As can be seen by the many forms that agreements can take, the scope and variety of issues and situations they can cover are large, and there are numerous elements the parties can agree to.

Depending on context, one party may have a stronger bargaining position when drafting an agreement than another. In many cases, Indigenous people have been and continue to be in an inferior bargaining position with respect to non-Indigenous entities for a variety of reasons. There are cases, however, where Indigenous people can realise and retain a strong bargaining position, and can ensure that the other party respects Indigenous laws and cultures through contract law. As many Aboriginal groups have gained control over their

lands in recent times, their bargaining power has increased accordingly. Representation by organised and well-equipped land councils has also increased the opportunity of Indigenous groups to enforce their rights via contract. For example, the permit system introduced by the *Aboriginal Land Act* has provided a means by which Aboriginal groups can predetermine the conditions upon which others can enter and use their lands. The CLC has developed a number of permits that force the permit holder to respect the intellectual and cultural property rights of the Indigenous people whose lands they are entering.

Another development that has surfaced in recent years is the introduction of legislation which forces 'bioprospectors' to enter benefit-sharing agreements when conducting research into genetic resources in the Northern Territory. These benefit sharing agreements must be entered into with the relevant 'access provider', which may include an Indigenous group if the research and collection of resource is on Indigenous land. Under both Commonwealth and Territory laws, these agreements must make specific reference to the use of Indigenous knowledge.

Both the Commonwealth and Northern Territory governments have developed model benefit sharing agreements or 'deeds'. The Commonwealth templates are available at DEHWA'S website. [150]

The Territory government have not made their templates available for commercial reasons.[151]

Funding for IEK research and NRM in the NT is sourced from a diversity of government and non-government agencies. There is very little coordination amongst these agencies on the content of funding agreements. This section overviews the majority of these funding sources and considers the implications of several of the funding contracts for ICIP. The following is a list of NT and Commonwealth (Cth) government agencies and departments:

- ILC (Indigenous Land Corporation) – check funding contract.[152]
- DEWHA Department of Environment, Water, Heritage and the Arts (Cth).[153]
- Department of Agriculture, Fisheries and Forestry (Cth).[154]
- Department of Climate Change (Cth).[155]
- Department of Education, Employment and Workplace Relations (Cth) DEWR.[156]
- Department of Employment, Education and Training (NT) (DEET).[157]
- The former Department of Education, Science and Training (DEST) (Cth)[158] now incorporated in DEWR.

[150] *Commonwealth Model Benefit Sharing Agreements*- http://www.environment.gov.au/biodiversity/science/access/model-agreements/index.html, viewed 1 October 2008.
[151] Personal correspondence with Murray Hird (NT Dept of Industry Growth), November 2008.
[152] http://www.ilc.gov.au/site/page.cfm , viewed 12 August 2008, The ILC assists Indigenous Australians to acquire land and manage Indigenous-held land sustainably, to provide cultural, social, economic or environmental benefits for themselves and future generations.
[153] http://www.environment.gov.au/, viewed 12 August 2008.
[154] http://www.daff.gov.au/, viewed 12 August 2008.
[155] http://www.climatechange.gov.au/, viewed 12 August 2008.
[156] http://www.dewr.gov.au/, viewed 12 August 2008.
[157] http://www.deet.nt.gov.au/, viewed 12 August 2008.
[158] http://www.dest.gov.au/, viewed 12 August 2008.

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- National Resource Management Secretariat - The Natural Resource Management Ministerial Council (NRMMC) consists of the Australian/State/Territory and New Zealand government ministers responsible for primary industries, natural resources, environment and water policy.[159]
- Department of Families, Housing, Community Services and Indigenous Affairs (FaHCSIA). [160] See also the Aboriginal Benefit Account NT Unit within this Commonwealth Agency.

Non-governmental Organisations may also fund IEK projects and have agreements including:

- Greening Australia[161] – Aboriginal Land Education project. Indigenous funding for 'heritage' program – a walk from Ngukuru. IEK recorder Mike Clark is on the NRM Board and head of Greening Australia. Examples: Greening Australia helping Veronica Dobson on the Rock Hall project. Recognition of community/individual people is important. Greening Australia is acting as a wholesale outlet for Kakadu Plum. In the centre, there are 4 wholesale persons. Harvesters need to get the permit under NT law, even if it is on Aboriginal land. But people are not getting a permit.

- NT NRM Board

- CLC and NLC have Natural Resource Management funded staff.

- World Wide Fund for Nature – Threatened species projects. WWF have held a workshop which identified this as a big issue. This component of the workshop is managed under a bigger project. An example of a WWF funded project involved 'extensive work' with Indigenous people in arid Australia to develop a track based monitoring system for the deserts and rangelands of Australia. The report is freely available on WWF website. [162]

- Natural Resources, Environment and the Arts (NT) [163] Healthy Country, Healthy People project funding. Overarching NT/Cth agreement for workshop together.

- The Commonwealth and Northern Territory governments signed a bi-lateral agreement under which the second half (2002/03- 2007/08) of the NHT was implemented. As the NHT has been taken over by Caring for our Country, this agreement will no longer apply to NRM projects in the NT.

    - Under the Agreement, scientific analysis of natural resources and associated issues should include 'incorporation of Indigenous knowledge, where

[159] http://www.mincos.gov.au/about_nrmmc, viewed 12 August2008.
[160] http://www.facsia.gov.au/, viewed 12 August 2008.
[161] http://live.greeningaustralia.org.au/GA/NAT/, viewed 12 August 2008.
[162] http://www.wwf.org.au/publications/track-based-monitoring-for-the-deserts-and-rangelands/ , viewed 3 February 2009.
[163] http://www.nt.gov.au/nreta/parks/, viewed 12 August 2008.

appropriate, in accordance with agreed protocols and with prior approval of the Indigenous custodians of the knowledge'. Under the IP clause:

a. NT/Cth governments must not disclose project or existing material without the consent of custodians if it contains traditional knowledge or information known to be culturally sensitive to Indigenous organisations or people:
b. IP ownership and sharing of benefits arising from commercialisation to be agreed on a case by case basis when entering financial agreements; and
c. Each party is to be given worldwide permanent license over project material, and NT must get an assignment from a third party to give effect to this.

3.1 Caring for our Country

The Commonwealth Government's Caring for our country Program for Natural Resources Management commenced on 1 July 2008, taking over the National Heritage Trust. Funding for this project was approved for $2.25 billion for its first five years (2008-2013).[164] The Caring for our Country 2009-10 business plan promises significant funding for Indigenous engagement in NRM. Of the six national priorities listed for the Caring for our Country program, three relate directly to Indigenous groups and lands in the Northern Territory. They are;

- the National Reserve System
- natural resource management in northern and remote Australia, and
- community skills, knowledge and engagement.[165]

In particular, Caring for our Country program aims to address these priorities in the following ways;

- 'increase the area of Indigenous-owned land declared as Indigenous Protected
- use traditional ecological knowledge in the development of management plans in… IPA projects
- employ additional Indigenous rangers
- involve at least 15 projects in the use or recording of Indigenous traditional knowledge from Indigenous communities over two years
- assist Indigenous Australians enter the carbon trading market' [166]

In keeping with 2007 election promises, the Department of Environment, Water, Heritage and the Arts has promised to spend $90 million on increasing the number of Indigenous

[164] Commonwealth Government of Australia, Caring for our Country funding, http://www.nrm.gov.au/funding/index.html , viewed 4 February 2009.
[165] Commonwealth Government of Australia, *Caring for our Country Business Plan 2009-10*, http://www.nrm.gov.au/publications/books/pubs/business-plan.pdf , viewed 4 February 2009.
[166] Commonwealth Government of Australia, *Caring for our Country Business Plan 2009-10*, http://www.nrm.gov.au/publications/books/pubs/business-plan.pdf , viewed 4 February 2009.

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rangers and $50 million for the development and expansion of Indigenous Protected Areas.[167] While these figures are nationwide, there are bound to be significant funding opportunities under this program in the Northern Territory. For more information see the National Caring for Country Strategy.

3.1.1 Working on Country- funding contracts and implications for ICIP

'Working on Country' is an important part of the Caring for our Country program. It will provide funding to a number of Indigenous groups in the Northern Territory for environmental and natural resource management projects. Only legal entities and incorporated bodies such as land councils or corporations can apply for this funding.[168]

Working on Country funding can go straight to an Indigenous land management agency if it is incorporated. For example Dhimurru Land Management Aboriginal Corporation and Bawinanga Aboriginal Corporation both have current projects funded under the Working on Country program.

Land councils can also apply for Working on Country funding to help smaller unincorporated groups carry out projects. This is smaller ranger groups, families and individuals. For example, the Central Land Council received $2.6 million under the first round of Working on Country funding to support a number of NRM projects.[169]

Issues may arise when the organisation that receives the funding employs or engages Indigenous individuals to write reports, management plans and other materials. It should carefully be explained to people engaged as employees and consultants that:

- the organisation being funded will own Intellectual Property created for the project;
- IP ownership of pre-existing material will remain with the IP owner; and
- the Commonwealth government can use any materials created or included in works created under the funding agreement for other purposes.

The funded organisation should make sure they get a written permission from participants to use the IP they create. Refer to 3.1.3 for more details on the funding agreement used by DEHWA.

3.1.2 Indigenous Protected Areas

Funding for Indigenous Protected Areas has been boosted to $50 million over five years (2008-09 to 2012-13) through the Caring for our Country initiative. Under the first installment more than $24 million has been announced. This includes five years worth of funding for Australia's 25 declared IPAs, and funding in 2008/09 to help develop new IPAs through new and continuing consultation projects.

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[167] http://www.nrm.gov.au/funding/index.html, viewed 17 July 2008.
[168] Commonwealth Government of Australia, Working on Country Factsheet, http://www.environment.gov.au/indigenous/publications/pubs/workingoncountry.pdf , viewed 4 February 2009.
[169] Commonwealth Government of Australia, Working on Country funded projects, http://www.environment.gov.au/indigenous/workingoncountry/projects/funding-table.html , viewed 4 February 2009.

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Establishing IPAs involves developing a management plan for the area concerned. Under the Caring for our Country business plan, management plans should include traditional ecological knowledge. As with all Caring for our Country projects, funding is supplied under the standard funding agreement (discussed at 3.1.3). When developing management plans with funding provided by DEHWA, Indigenous people should be aware that the Commonwealth government will have a licence to use the material contained in the plan. Refer to 3.1.3 for more details on the funding agreement used by DEHWA.

3.1.3 DEWHA standard funding agreement

All Working on Country, IPA and other programs under the Caring for our Country program are currently funded using a standard funding agreement. This agreement is also used for Indigenous Heritage Protection Grants. The pro forma agreement is currently under review, although there are unlikely to be significant changes to the IP clauses.[170]

Indigenous organisations that secure funding from DEWHA will usually be required to sign one of these agreements. If unincorporated, the Indigenous group or community will need a corporation, association or land council to sign one on their behalf. It is important to remember that this is a template agreement which is to be used as a starting point. Indigenous organisations entering such agreements can negotiate with the funding agency to change the terms of the agreement. Of course there is no guarantee a funding agency will agree to changes. However it is well worth Indigenous people taking positive steps to assert control of their IEK before a project begins.

Intellectual Property

Under the IP clause of the Agreement, Intellectual Property Rights in 'Activity Material' will belong to the organisation entering the agreement (this will usually be an Aboriginal Corporation or a land council). The 'Activity' is the project or program being funded, and must be described in the Activity Schedule included in the agreement. 'Activity Material' includes any materials created or used for the project.[171] This would include management plans and reports for example. This does not however include 'Existing Material', which is material included or supplied with the Activity Material that existed before the agreement is signed. Existing Material, such as a photo taken at an earlier date, belongs to the original owner.

Importantly, the agreement gives the Commonwealth a 'permanent, irrevocable, royalty free, world wide' license to 'use, copy, reproduce, communicate, adapt and exploit' the Intellectual Property Rights in the Activity Material for any Commonwealth purpose.[172] In other words, even if the Indigenous organisation owns all the IP created for the project, the Commonwealth government can use the IP for any Commonwealth purpose without having to further compensate the organisation.

[170] Email correspondence from Barbara Bell (Dept of Environment, Water, Heritage and the Arts), 15 January 2009.
[171] Cl. 1.1, Attachment 1 of the Head Agreement- Standard Terms and Conditions, DEWHA.
[172] Cl. 13.2, Attachment 1 of the Head Agreement- Standard Terms and Conditions, DEWHA.

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Under the definitions in the standard terms and condition, Intellectual Property includes copyright, trade marks, patents, designs or, plant varieties created as a result of the project. However IP does not include moral rights, the rights of performers or confidential information.

The agreement also includes a clause which means the Commonwealth does not have to respect the moral rights of the authors. This means the Commonwealth can reproduce Activity Material without acknowledging the author(s),[173] and use the work in a different context than was originally envisaged.[174]

In contrast, the Indigenous organisation must always acknowledge the funding and assistance provided by the Commonwealth, and get approval from the Commonwealth government for any public announcements and publications related to the funded activity.[175]

Although the agreement gives Intellectual Property Rights to the Indigenous organisation, this does not include performer's rights.[176] The reason for this is unclear, as performers rights are not addressed elsewhere in the agreement. Since 2005, performers have moral rights and in certain cases can share copyright in sound recordings (see Performers Rights at 2.1.9).

Activity Material

Indigenous organisations that sign this funding agreement need to be careful about what IP they include in the Activity Material. Any material created for the Project will be considered Activity Material. Material that existed before the agreement was signed is Existing Material. Although it belongs to the original owner, the organisation is obliged to secure a grant from the owner for the Commonwealth to use it under licence. It should be explained to the people producing or providing Material for the Project that the Commonwealth government may use it for a variety of purposes.

For example, consider the following hypothetical situation:

The Yellow Desert Land Council (YDLC) secures funding from DEWHA for its employed Aboriginal rangers who are researching the endangered yellow tailed desert skink. The aim of the research is to develop a strategy to protect the desert skinks and their limited habitat. The rangers write The Little Yellow Book which includes IEK about tracking methods and the habits of desert dwelling lizards. It also includes a plan for protecting the lizard and its habitat. Under the DEWHA funding agreement:

- Copyright in The Little Yellow Book belongs to the YDLC

[173] Cl. 13.9(a), Attachment 1 of the Head Agreement- Standard Terms and Conditions, DEWHA.
[174] Cl. 13.9(c), Attachment 1 of the Head Agreement- Standard Terms and Conditions, DEWHA.
[175] Cl, 24, Attachment 1 of the Head Agreement- Standard Terms and Conditions, DEWHA.
[176] Cl. 1.1, Attachment 1 of the Head Agreement- Standard Terms and Conditions, DEWHA.

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- The rangers are the moral rights holders in The Little Yellow Book

- The Commonwealth has a worldwide, permanent licence to copy and reproduce The Little Yellow Book, adapt it, sub-licence and reproduce it.

The Commonwealth government then produces a manual on Lizard conservation and protection strategies which is distributed to conservation agencies all across Australia. The manual includes substantial portions of The Little Yellow Book. One of the rangers sees the manual and is distressed to see he is not acknowledged as an author. Particularly of concern, is that he had incorporated a large amount of traditional cultural practice that was collectively owned by his clan, the XX, and the knowledge is now being applied to other people's country.

Under the agreement, the Commonwealth would be allowed to produce and distribute the manual because conservation is a Commonwealth purpose.

This example highlights the potential issues faced by Indigenous corporations who enter agreements and then engage other people or groups to undertake work. Even though the YDLC is the copyright owner of the material produced, it has the responsibility of ensuring all IP included in the work is cleared for use.

Material of particular significance to an Aboriginal Tradition

The Commonwealth must notify the funded organisation if and how they want to use Activity or Existing Material if it is not already available to the public, (eg: in a published book). The funded organisation can then say how the Commonwealth can use the Material if it is 'of particular significance to an Aboriginal Tradition'.[177]

3.2 Indigenous Heritage Program

Another important source of funding is the Indigenous Heritage Program, also administered by the Department of Environment Heritage, Water and the Arts. Fourteen Indigenous projects across the Territory have been granted funding for 2008/09. For example, current project includes the Jawoyn Cultural Heritage Mapping Project, which involves recording 'stories, place names and history from the only remaining Elder with extensive knowledge of the Jawoyn lands'.[178]

Indigenous organisations funded under the Indigenous Heritage Program will be required to sign the funding agreement discussed above at 3.1.3.

3.3 Previous National Heritage Trust funding

The IP clause used for funding in Commonwealth funding agreements requires re-consideration. Clause 14 has an IP Clause that says that all project material will be the IP of

[177] Cl. 13.7, Attachment 1 of the Head Agreement- Standard Terms and Conditions, DEWHA.
[178] Indigenous Heritage Program, http://www.environment.gov.au/heritage/programs/ihp/outcomes-08-09.html, viewed 2 February 2009.

the regional body which is the National Heritage Trust. It defines project materials as including TK. It is questionable whether this is appropriate. Rather it is recommended that the clause refer to the IP protocols that will be developed as the other outputs of this project.

3.4 Contracts require identifiable parties

A fundamental problem with some funding arrangements is that there needs to be a legal entity to enter into an agreement. This makes it difficult for groups and families that are unincorporated due to government requirements that there be an auspicing body. It is more difficult to have a contract with individuals and families. The central issue is who it is that enters into the contract with the relevant funding agencies?[179] Consideration should be given to trust arrangements and assisting IEK holders in accessing information about how to become incorporated as an ATSI Corporation and Incorporated Associations, generally.

3.5 Addressing IP rights in Contracts

The general principles of IP laws can be altered and licences given by way of written agreement. For instance, copyright law in fact, can only be assigned in writing.

It is sometimes made a condition of grant funding that either copyright belongs to the funding agency, but mostly the funding agreement requires that extensive licenses are given to the funding agency to alter and sub-licence Project Materials which may include Indigenous Cultural and Intellectual Property. The question of what rights, assigns, or interests are held in IEK will require examination of the relevant conditions of grant funding at the time the grant was given. This is a principle of contract law – which can be altered by variation and agreement by the parties. This has been increasingly occurring with major collaborative projects such as ARC Linkage grants carried out with Indigenous representative bodies in the Western Desert.[180] The problem is that grant administration of projects under old policies will need to be examined to determine the chain of title to IP and what ICIP clauses, and licences were granted. There is a need for consistency in this area. It is recommended that grant administration and old policies from existing grants be examined. IP arrangements are based on these agreements,

3.6 CLC – Handing down knowledge project

At the Alice Springs group meeting, we discussed the CLC funding projects through the NT NRM Board. The focus is on the transfer of knowledge and going out on country. The

[179] I note that criteria to receive funding e.g. Australia Council funds individuals and legal entities including Aboriginal corporations, incorporated associations, companies limited by guarantee, councils and associations. However, collective groups of people are not funded but can be auspiced by any of the above categories except for individuals.
[180] The Canning Stock Route Project – *Kutju Wangka Ngurra* – Professor Peter Veth pers comm. 2/04/2009.

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'Handing Down Knowledge Project Overview' has listed criteria and an application form. I asked if there was a funding agreement. Nikki Brannigan explained that this depended on the project and that they had established criteria for this. For example, a family going out on country may not be required to have a funding agreement. The larger project such as grants to Community Media organisations or a Library and Knowledge Centre may have a funding agreement. The agreement set out reporting requirements, TK ownership, payments on invoice, and reporting equipment.

If an individual works with traditional owners on country, a researcher/consultant contract should deal with the IP. It may be different if that individual is talking to family and transfers knowledge of stories in this context.

The scale of project and whether the 'researcher' is identified as an 'outsider' or not seems to trigger the research protocol/contract/IP/benefit sharing considerations. This is understandable but not good policy. It may reasonably be asked how many individual TOs have been 'pressured' to sign exclusive deals with mining companies for 'heritage clearances' where communal interests have not been adequately accommodated or considered? Land-management and land-use are arguably forms of research with commercial implications (such as firing carbon credits and prospecting). The same principles must apply in all these cases.

3.7 Summary

Whilst intellectual property laws have rules about ownership of intellectual property, these can be changed by written contracts. Licensing of rights by written contracts is another way of managing how IEK can be used. The funding agreements from the Commonwealth (including new Caring for our Country Program and the previous National Heritage Trust) are relevant to consider in the rights management of IEK. IP clauses with government contracts need to be changed to recognise Indigenous cultural and intellectual property rights.

Consistency across all Commonwealth and Territory funding agencies is recommended towards a national approach to ICIP rights recognition in IEK projects. However, this is problematic given that there are over 20 funding departments which fund projects in the NT to do with Natural Resource Management. There is a need for Commonwealth and Territory funding agreement to take a consistent approach.

More research should be done and a model agreement for the commercialisation of IEK and case studies should be developed to advise Indigenous people and third parties of the terms to be negotiated in a model agreement. The conundrum is that many of these agreements are commercially in confidence. However, to benefit from the aggregate knowledge, a database of agreements needs to be developed and shared. It is recommended that standard terms and conditions be developed with information for IEK holders to engage commercially and negotiate uses.

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Section 4
Environmental Laws

Environmental laws aim to manage the impact humans have on the environment. In Australia, environment laws exist at a local, State, national and international level. Since the 1990s, laws relating to the protecting loss of the world's biodiversity have been established after the adoption of the international treaty the *Convention on Biological Diversity*. These laws respond to increased global concern about the plunder of natural resources which were previously viewed as being in the public domain, and exploitable commodities. Indigenous people were concerned about biopiracy or bioprospecting of genetic resources on their lands, and the unauthorised use of their traditional knowledge relating to those resources.

The *Convention on Biological Diversity* 1992 was adopted at the Earth Summit, the United Nations Conference on Environment and Development. The CBD re-affirmed that countries have sovereign rights over their own biological resources. It promotes conservation of biological diversity, sustainable use of its components and fair and equitable sharing of benefits arising from genetic resources. The CBD aims to develop national strategies for conservation and sustainable use of biological diversity. There are also several articles which relate to Indigenous peoples and the protection of traditional knowledge.

The *Convention on Biological Diversity 1992* has been partially implemented in Australia – with the enactment of the Commonwealth's *Environmental Protection Biodiversity Conservation Act 1999 and* a set of Regulations; and similar legislation in the Northern Territory and Queensland. Other parts of Australia have not established regimes for access to genetic resources and benefit-sharing.

4.1 Biological resources, bioprospecting and biopiracy

Indigenous land contains a wealth of biological resources, and Indigenous people's knowledge involves the application of biological resources. Biological or genetic resources are the 'biological materials of animal, plant, microbial, or other origin that contain the hereditary information necessary for life and are responsible for their useful properties and ability to replicate'.[181]

The collection and use of these resources is referred to as 'bioprospecting'. Bioprospecting is 'the research, collection and utilisation of biological and genetic resources for purposes of applying the knowledge there from for scientific and/ or commercial purposes'.[182] An

[181] Ten, KK and Laird, SA, The Commercial Use of Biodiversity: Access to Genetic Resources and Benefit-Sharing, Earthscan, London, 2000, p. 1.
[182] Ibid, p. 19.

Commissioned by the Natural Resource Management Board (NT).

Australian Parliamentary Committee noted that there has been some debate about the breadth of the term 'bioprospecting':

> The term is sometimes used narrowly, for example by CSIRO and Environment Australia (EA), to cover only the initial collecting of biological material to use subsequently in biodiscovery and further development. A more common use of the term, however, is to refer to the search for valuable chemical compounds and genetic material from plants, animals and microorganisms. In some cases, as in biopesticides, biomining and bioremediation, whole organisms are employed rather than the chemicals and genetic material extracted from them. The broadest meaning of the term encountered by the committee was that used by the Commonwealth Department of Agriculture, Fisheries and Forestry - Australia (AFFA). AFFA suggested that bioprospecting also involved the identification of potential food sources among Australian native plants, although the term is not usually used in this way. Notwithstanding CSIRO's preference for a narrower definition of bioprospecting than is used by most others, the committee has employed the term in its broader sense of the search for valuable chemicals and genetic material. [183]

The phrase 'biopiracy' has been applied to the unauthorised collection of biological resources for research and potential commercialisation. Alain Pottage and Brad Sherman note:

> 'In the classic form of bioprospecting, biotechnology corporations exploit indigenous ethnobotanical knowledge to identify plants with promising pharmaceutical potential. In the rare cases in which bioprospecting pays real dividends, the plants are reduced to chemical compounds and then packaged and patented as pharmaceuticals. Natural products research, as a specific mode of biotechnological research, sets up a long and convoluted chain of relatedness between laboratory science and indigenous knowledge.'[184]

4.2 Convention on Biological Diversity 1992 (CBD)

Convention on Biological Diversity – Articles 8(j), 15.2, 15.4. 15.5. 15.6 and 15.7

The CBD is an international treaty which the Australian government signed and ratified in 1993.[185]As a signatory to the CBD, Australia is obliged to take measures aimed at protecting biodiversity and certain features of the natural environment. The CBD was designed to

[183] House of Representatives Standing Committee On Primary Industries And Regional Services. *Bioprospecting: Discoveries Changing the Future*. Canberra: Australian Government, September 2001.
[184] Alain Pottage and Brad Sherman, "Organisms and Manufactures: On the History of Plant Inventions", *Melbourne University Law Review*, 2007, Vol. 31, p. 539 at541.
[185]Convention on Biological Diversity website, http://www.cbd.int/, viewed 13 August 2008.

conserve biological diversity, ensure sustainable development of biological resources and encourage the sharing of benefits accruing from the use of genetic resources.

One international commentator, Ikechi Mgbeoji, observes that 'the CBD is probably the most detailed and important juridical initiative on the conservation, sustainable use, and equitable sharing of the benefits of plant life forms and plant-based traditional knowledge.'[186]

There are several references to indigenous and local communities in the CBD. The most significant of these for IEK and natural resource management issues are articles 8(j) and 10(c), which oblige member states to recognise the rights of indigenous and local peoples to their cultural prattices and property. Also important is article 15, which relates to benefit sharing.

4.2.1 Articles 8(j), 10 (c), 17 and 18

Article 8(j) is the core provision relating to Indigenous peoples. It makes particular reference to indigenous and local communities, stating that member states should:

> ... respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity and promote their wider application with the approval and involvement of the holders of such knowledge, innovations and practices and encourage the equitable sharing of the benefits arising from the utilisation of such knowledge, innovations and practices....[187]

In addition, Article 10(c) relates to the customary use of biological resources, obliging members to:

> … as far as possible and as appropriate ... protect and encourage customary use of biological resources in accordance with traditional cultural practices that are compatible with conservation of sustainable use requirements.[188]

The UNHCHR has noted that article 10(c) is important in ensuring the survival of indigenous cultures, because particular species of plants and animals 'form the spiritual and economic focus of many indigenous cultures.' [189] Ensuring the continued survival of such species is an important aspect of ensuring the survival of the relevant culture(s).

Article 17 is also relevant in that it facilitates the exchange of information relevant to the sustainable use of biodivesity, which should include indigenous and traditional knowledge, including the repatriation of knowledge where feasible. This has the potential to facilitate

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[186] Ikechi Mgbeoji, *Global Biopiracy: Patents, Plants, and Indigenous Knowledge*. Vancouver and Toronto: UBC Press, 2006, p. 75.
[187] Article 8(j) of the *Convention on Biological Diversity.*
[188] Article 8(j) of the *Convention on Biological Diversity.*
[189] UNHCHR, Leaflet 10- Indigenous Peoples and the Enivironment, www.unhchr.ch/html/racism/indileaflet10.doc , viewed 7 April 2009.

the return of IEK to Indigenous communities as a means of 'filling in gaps' and reviving traditional practices.[190]

Article 18 asks signatories of the Convention to

> ...encourage and develop methods of cooperation for the development and use of technologies, including indigenous and traditional technologies, in pursuance of the objectives of this Convention.

By way of this article, members are obliged to include Indigenous Ecological Knowledge and Indigenous practices in the development of conservation management strategies.

4.2.2 Article 15, Access and Benefit Sharing and the *Bonn Guidelines*

Article 15 of the CBD concerns access to genetic resources and benefit sharing, and is of particular significance to Indigenous people and those involved in NRM. Article 15 specifically recognises that national governments have the authority to determine access to genetic resources occurring in their countries. However, when read together with Article 8(j), national governments have an obligation to ensure this is done in a way that respects and includes Indigenous people and their knowledge. An important aspect of this is ensuring the fair and equitable sharing of benefits with Indigenous people for use of biological resources and traditional knowledge.

In 2000, the Conference of the Parties to the CBD ('COP') decided to establish a Working Group specifically for Access and Benefit Sharing. As a result of work done by this group, *The Bonn Guidelines on Access to Genetic Resources and Fair and Equitable Benefit Sharing of the Benefits Arising out of their Utilisation* were adopted at a COP meeting in 2002. They are meant to be a guide for use by governments and other groups when developing access and benefit sharing policies and strategies in line with the CBD.

The Guidelines, among other things:

- Identify steps involved in the ABS process;
- Emphasise the need for users of genetic resources (e.g. researchers or bioprospectors) to seek the prior informed consent of the providers of those resources (including Indigenous stakeholders);
- Identify basic requirements for mutually agreed terms;
- Define the roles and responsibilities of users and providers;
- Stress the importance of all parties being actively involved in the process;
- Recommend potential incentives, accountability mechanisms, and means of verification; and
- Suggest various monetary and non-monetary benefit schemes.[191]

[190] UNHCHR, Leaflet 10- Indigenous Peoples and the Enivironment, www.unhchr.ch/html/racism/indileaflet10.doc , viewed 7 April 2009.
[191] http://www.cbd.int/abs/bonn.shtml, viewed 13 August 2008.

Commissioned by the Natural Resource Management Board (NT).

The Commission on Intellectual Property Rights notes that there are problems with the implementation of benefit sharing regimes under the CBD at a national level:

> Countries face difficult decisions, both practical and conceptual, in putting benefit sharing into practice. First, the resources in question are often not "owned" by anyone in particular, but are the heritage of one or more communities, which are not necessarily cohesive, or all living in one country. Secondly, while some genetic resources can be traced to very specific areas and habitats, in other cases they comprise components from many countries, in which case benefit-sharing arrangements will be totally impractical. Thirdly, because of the diversity of national circumstances or indeed those within nations in relation, for example, to their cultural, economic or institutional conditions, it is very difficult to devise legislation and practices which cover that diversity in ways that facilitate implementation of such measures. Indeed, care will be necessary to ensure that legislation and practices that seek to give effect to the CBD do not in fact unnecessarily restrict or discourage the legitimate use of genetic resources, whether with a view to commercialisation or in terms of scientific research. There is some evidence that the tightening of restrictions in some countries has hindered the access of biologists studying genetic resources.[192]

The Australian Government has implemented a number of the provisions contained in the Bonn Guidelines in its' *Nationally Consistent Approach for Access to and the Utilisation of Australia's Native Genetic and Biochemical Resources* (discussed below), which have in turn informed the drafting of the *Biological Resources Act 2006 (NT)* and Regulations under the *Environment Protection and Biodiversity Regulations 2000 (Cth)*. Refer to discussions of these laws in sections 4.3 and 4.4.

International Institute for Sustainable Development ABS-Management Tool

The International Institute for Sustainable Development has developed a *Best Practice Standard and Handbook for Implementing Genetic Resource Access and Benefit-sharing Activities*.[193] .

4.2.3 COP 9 2008 – Article 8(j) decisions

In May 2008, the Conference of the Parties 9[194] made determinations with respect to Article 8(j) calling for the Working Party on 8(j) to develop guidelines for documenting traditional knowledge, and inviting parties to consider development of sui generis laws. A document

[192] Page 84 - http://www.iprcommission.org/papers/pdfs/final_report/Ch4final.pdf
[193] IISD, *ABS-Management Tool*, available online at http://www.iisd.org/abs/, viewed 7 April 2009.
[194] COP 9 Decision IX/13, Bonn, 19 - 30 May 2008, http://www.cbd.int/decisions/?m=COP-09&id=11656&lg=0, viewed 9 December 2008.

provided to the COP outlined elements for consideration of nation states.[195] The following purpose of sui generis laws was outlined:

> The overall purpose of *sui generis* systems could be to put in place a set of measures that would respect, preserve and promote the knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity including biological and related genetic resources (hereinafter referred to as "traditional knowledge") and to ensure that they derive fair and equitable benefits from its utilization and that such utilization is based on their prior informed consent. [196]

The aims of sui generis laws could be to:

(a) Control access to, disclosure and use of traditional knowledge;
(b) Exercise their prior informed consent for any access to or disclosure and use of traditional knowledge;
(c) Ensure that they derive fair and equitable benefits from the wider application of their traditional knowledge, innovations and practices; and
(d) Ensure continued customary use of traditional knowledge, innovations and practices and avoid negative effects thereon.

The COP 9 decision of 2008 also set out a framework for the principles to be included in codes of ethics relating to traditional knowledge and biodiversity. The Draft Elements of a code of ethical conduct to promote/ensure respect for the cultural and intellectual heritage of Indigenous and local communities relevant to the conservation and sustainable use of biological diversity contains 11 general ethical principles. One relates specifically to intellectual property:

Intellectual property

8. Community and individual concerns over, and claims to, intellectual property relevant to traditional knowledge, innovations and practices related to the conservation and sustainable use of biodiversity should be acknowledged and addressed in the negotiation with traditional knowledge holders and/or indigenous and local communities, as appropriate, prior to starting activities/interactions . [Knowledge holders should be allowed to retain existing rights, including the determination of intellectual property rights, over their traditional knowledge.][197]

[195] Convention on Biological Diversity, Development of Elements of sui generis systems for the protection of traditional knowledge, innovations and practices to identify priority elements, (UNEP/CBD/WG8J/5/6), UNEP, 20 September 2007, http://www.cbd.int/doc/meetings/tk/wg8j-05/official/wg8j-05-06-en.pdf, viewed 9 December 2008.
[196] Convention on Biological Diversity, Development of Elements of sui generis systems for the protection of traditional knowledge, innovations and practices to identify priority elements, (UNEP/CBD/WG8J/5/6), UNEP, 20 September 2007, http://www.cbd.int/doc/meetings/tk/wg8j-05/official/wg8j-05-06-en.pdf, viewed 9 December 2008.
[197] CBD, http://www.cbd.int/decisions/?m=COP-09&id=11656&lg=0, viewed 9 December 2008.

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4.2.4 'Free Prior Informed Consent' (FPIC)[198]

Under the principle of free prior informed consent, Indigenous people must be properly informed concerning activities that will or might affect them, and then given the opportunity to decide whether or not the activity should go ahead. Most notably, the principle of FPIC is included as a key measure in the CBD in relation to accessing biological materials and traditional knowledge from indigenous peoples and their territories. A commitment to the principle was expressed at the Fifth Conference of the Parties of the CBD Decision V/16, which stated that:

> …access to traditional knowledge, innovations and practices of local and indigenous communities should be subject to prior informed consent or prior informed approval from the holders of such knowledge, innovations and practices.[199]

The principle has also emerged in a number of other contexts. For example, the Committee that interprets the *Convention on the Elimination of All Forms of Racial Discrimination* has issued a recommendation that all parties to the Convention obtain informed consent of indigenous peoples whenever making a decision that concerns their rights or interests.[200] The *Declaration on the Rights of Indigenous People* also calls for member countries to seek the prior informed consent of Indigenous people in relation to any project affecting their lands or resources, and in relation to cultural and intellectual property.[201] Australia is a signatory to this Declaration as of 3 April 2009 (discussed at 6.6).

Currently Indigenous peoples' right to free prior informed consent is for the most part an aspiration. However, gaining the prior informed consent of Indigenous communities is a requirement under articles 8(j) and 15 of the *Convention of Biological Diversity*. In 2004 an IUCN discussion paper suggested a number of features that prior informed consent procedures might contain, including;

- Consent should be gained from every affected community;
- Community discussions should be held regarding all relevant information including:
  - What hopes to be achieved
  - What the effects of the activity will be (including impact statements etc)
  - How long the activity will go for
  - Where the activity will take place
  - Who is conducting, funding, behind the activity
  - What benefits will flow to the community;

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[198] The use of "free" in this concept has raised concern for some people, as it might be seen to imply that the knowledge is free / of no cost. This is not the intended meaning. The "free" it does refer to, is that consent must be given without coercion, without the knowledge holder being pushed by the researcher. Other than wanting to maintain this important element of the concept, this term is developing as a standard in international law (for example the UN Convention on Biological Diversity). Hence, in this report we maintain this full definition. However, in the Handbook for Aboriginal use (By Davis) the definition excludes the "free" to ensure that there is no misunderstanding.

[199] Decision V/16, Annex: Programme of Work, 1 General Principles 5, 139–42.

[200] Office for the High Commissioner of Human Rights,General Recommendation XXIII- Indigenous Peoples, Fifty first session, 1997, http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/73984290dfea022b802565160056fe1c?Opendocument, viewed 10 December 2008.

[201] Articles 11 and 32, *United Nations Declaration on the Rights of Indigenous People*.

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- Information should be presented in a culturally appropriate manner (i.e. on country in a language that all interested parties will understand or with translators);
- Consent should be an ongoing process, before and during and after the activity;
- Decisions should be made in a culturally appropriate manner by all affected parties;
- Consent can be withdrawn at later stage if the community is not happy with how the activity is proceeding.[202]

Mechanisms which facilitate the process of prior informed consent are not well developed. Even if companies, governments and other institutions are willing to gain the prior informed consent of an Indigenous community, a lack of certainty as to the correct procedures that should be taken may be problematic. As such, Indigenous communities, as well as non-Indigenous entities should develop guidelines and procedures on how prior informed consent should be sought. While a template may be useful, the procedure is bound to differ from community to community. Issues and questions that could be addressed include:

- Who are the right people to talk to? (i.e. nominated community or group representatives)
- Who can provide impact statements (particularly cultural impact statements)?
- What types of documentation should be provided to the community?
- How can power imbalances be addressed and remedied?
- How do communities want to benefit from use of their knowledge?
- What mechanisms could be used for Indigenous groups to make complaints/seek redress where proper procedure has not been followed?[203]

4.2.5 Akwe Kon Voluntary Guidelines on the Conduct of Cultural, Social and Environmental Impact Assessments ('the Akwe Kon Guidelines')[204]

The Akwe Kon Voluntary Guidelines were adopted by the Seventh Conference of Parties (COP VII) to the CBD in February 2004. They offer a model for carrying out impact assessments relating to developments proposed to take place on or impact upon sacred sites and land traditionally used or occupied by indigenous communities. The guidelines are based on the concept of prior informed consent, and encourage the full and effective participation of Indigenous people and communities in development planning. As the Guidelines are voluntary, they are not enforceable, but offer a useful guide for policy makers, Indigenous groups and well intentioned developers.

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[202] IUCN (World Conservation Union) Discussion Paper, *Facilitating Prior Informed Consent in the Context of Genetic Resources and Traditional Knowledge*, May 19, 2004, http://pdf.wri.org/ref/perrault_04_facilitating.pdf , viewed 6 April 2009.

[203] United Nations Economic and Social Council, *Report of the International Workshop on Methodologies regarding Free, Prior and Informed Consent and Indigenous Peoples*, Permanent Forum on Indigenous Issues, New York,16-27 May 2005, available online at http://daccessdds.un.org/doc/UNDOC/GEN/N05/243/26/PDF/N0524326.pdf?OpenElement , viewed 16 December 2008.

[204] Secretariat of the Convention on Biological Diversity, *Akwé Kon- Voluntary Guidelines for the conduct of cultural, environmental and social impact assessments regarding developments proposed to take place on, or which are likely to impact on, sacred sites and on lands and waters traditionally occupied or used by indigenous and local communities*, Montreal, 2004,Convention on Biological Diversity, http://www.cbd.int/doc/publications/akwe-brochure-en.pdf, viewed 16 December 2008.

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4.3 Environment Protection and Biodiversity Conservation Act 1999 (Cth) and Environment Protection and Biodiversity Conservation Regulations 2000(Cth)

The *Environment Protection and Biodiversity Conservation Act* (EPBC Act) implements Australia's obligations under Article 8 of the Convention on Biological Diversity. The EPBC Act provides for sustainable development and management strategies for the environment and natural resources.

The Act only applies to Commonwealth areas and reserves such as Ramsar wetlands and World Heritage areas.

The Act can also be used to control activity that will or is likely to have a significant impact on Commonwealth areas or threatened species.[205]

4.3.1 Objects of the EPBC Act relevant to Indigenous people and knowledge

The EPBC Act has a number of specific references to Indigenous people:

> "…to recognise the role of indigenous people in the conservation and ecologically sustainable use of Australia's biodiversity; and
>
> …to promote the use of indigenous peoples' knowledge of biodiversity with the involvement of, and in co-operation with, the owners of the knowledge…"

In order to achieve this and other objects, the Act seeks to promote;

> "…a partnership approach to environmental protection and biodiversity conservation through… recognising and promoting indigenous peoples' role in, and knowledge of, the conservation and ecologically sustainable use of biodiversity."[206]

4.3.2 Management of Commonwealth reserves and heritage places

Under the *EPBC Act* the Director of National Parks is responsible for preparing management plans for Commonwealth reserves. When preparing a management plan, the Director must take into account the interests of traditional owners of land in the reserve, and the interests of any other Indigenous people who are interested in the reserve.[207] There are also provisions under which traditional owners must approve the establishment and composition of boards of management.[208] If the reserve is mostly or partly on Indigenous lands, the majority of the board members must be Indigenous people nominated by the traditional

[205] Section 26(2) of the *Environment Protection and Biodiversity Conservation Act 1999*(Cth)
[206] Section 3(2)(g)(iii) of the *Environment Protection and Biodiversity Conservation Act 1999*(Cth)
[207] Section 368(3)(c) of the *Environment Protection and Biodiversity Conservation Act 1999*(Cth)
[208] Section 377 of the *Environment Protection and Biodiversity Conservation Act 1999*(Cth)

owners.[209] There are joint management boards in place for Kakadu and Uluru-Kata Tjuta National Parks.

Similarly, under the *EPBC Act*'s accompanying Regulations, management plans relating to heritage places must be developed in consultation with the relevant Indigenous people if a heritage place has 'indigenous heritage values'.[210]

4.3.3 Exceptions for certain Indigenous cultural practices

The *EPBC Act* makes exceptions for Indigenous people when it comes to activities involving endangered species. Indigenous people may apply for a permit to undertake activities related to threatened species which are otherwise prohibited by the Act. The Minister will issue a permit only if satisfied that

> …the specified action is of particular significance to Indigenous tradition and will not adversely affect the survival or recovery in nature of the listed threatened species or listed threatened ecological community concerned. Indigenous tradition is defined as 'the body of traditions, observances, customs and beliefs of indigenous persons generally or of a particular group of indigenous persons. [211]

Under the *EPBC Act* Indigenous people may also carry on activities of a 'traditional' nature in Commonwealth reserves as long as they are limited to food gathering and hunting or for religious and ceremonial purposes. The ability to profit commercially from such activity is expressly prohibited and further provision is made for the passing of regulations to curtail such activity.[212]

4.3.4 Access to biological resources and benefits sharing under the EPBC Regulations

The *EPBC Act* provides for the introduction of regulations regarding control of and access to biological resources in Commonwealth areas and the implementation of a benefit sharing scheme.[213] Provisions to this effect were introduced in 2005 as Part 8A of the Regulations. The purpose of part 8A is to be achieved to some extent by "recognising the special knowledge held by indigenous persons about biological resources…"[214]

Anybody wanting to access biological resources in Commonwealth areas for research and product development must apply to the relevant National Parks office for a permit.[215] If access to biological resources is strictly for research (i.e. non-commercial purposes only), the researcher needs written permission from the access provider to enter the land and collect

[209] Section 377(4) of the *Environment Protection and Biodiversity Conservation Act 1999*(Cth)
[210] Section 324S and 324Y of the *Environment Protection and Biodiversity Conservation Act 1999*(Cth), Regulation 10.01E, *Environment Protection and Biodiversity Conservation Regulations 2000* (Cth)
[211] Section 201(3)(c) of the *Environment Protection and Biodiversity Conservation Act 1999*(Cth)
[212] Section 359A of the *Environment Protection and Biodiversity Conservation Act 1999*(Cth)
[213] Section 301 of the *Environment Protection and Biodiversity Conservation Act 1999*(Cth)
[214] Regulation 8A.01(c) of the *Environment Protection and Biodiversity Conservation Regulations 2000* (Cth)
[215] Regulation 8A.06 of the *Environment Protection and Biodiversity Conservation Regulations 2000* (Cth)

samples. They will also need to sign a written undertaking stating that the research will not be commercially used.

If access is for a commercial (or potential commercial) purpose the permit will only be granted if the applicant has entered into a benefit sharing agreement with the relevant access provider.[216] The definition of access provider includes Aboriginal owners and native title holders. Under Regulation 8A.08, a benefit sharing agreement "must provide for reasonable benefit-sharing arrangements, including protection for, recognition of and valuing of any indigenous people's knowledge to be used, and must include…

(h) a statement regarding any use of indigenous people's knowledge, including details of the source of the knowledge, such as, for example, whether the knowledge was obtained from scientific or other public documents, from the access provider or from another group of indigenous persons;

(i) a statement regarding benefits to be provided or any agreed commitments given in return for the use of the indigenous people's knowledge;

(j) if any indigenous people's knowledge of the access provider, or other group of indigenous persons, is to be used, a copy of the agreement regarding use of the knowledge (if there is a written document), or the terms of any oral agreement, regarding the use of the knowledge…"[217]

Regulation 8A.10 requires that where the access provider is an Aboriginal owner or native title holder, the person accessing the material must get the 'informed consent to a benefit sharing agreement'[218] that concerns access to biological resources on that land. Under Regulation 8A.09(2) factors that the Minister must consider when deciding whether informed consent has been given include: the access provider's knowledge of the regulations,

- whether reasonable negotiations took place
- the views of the relevant land council or traditional owners and
- whether there was provision of independent legal advice. [219]

The requirement of informed consent means Indigenous access providers must be properly informed as well as consulted before they permit access to biological resources and use of their knowledge for commercial purposes on their land. It would also suggest that Indigenous people in these situations can deny interested parties access if they are unwilling to give proper consideration and value to Indigenous knowledge.

[216] Regulation 8A.06 & 8A.07 of the *Environment Protection and Biodiversity Conservation Regulations 2000* (Cth)
[217] Regulation 8A.08 of the *Environment Protection and Biodiversity Conservation Regulations 2000* (Cth)
[218] Regulation 8A.10 of the *Environment Protection and Biodiversity Conservation Regulations 2000* (Cth)
[219] Regulation 8A.09(2) of the *Environment Protection and Biodiversity Conservation Regulations 2000* (Cth)

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4.3.5 Model Benefit Sharing Agreements

The Commonwealth government has made model benefit sharing agreements available on the DEWHA website. [220] These agreements have been designed for situations where the access is for commercial or potentially commercial purposes. The *Model Benefit –Sharing Agreement- Commonwealth and Access Party* is for use where the Commonwealth government is the access provider. The *Model Benefit-sharing Agreement - Access Provider and Access Party* is for use when the access provider is someone other than the Commonwealth. The latter agreement would be suitable for use where the access provider is an Indigenous group. As these are 'model' agreements, they simply offer a template which can be tailored to specific situations. Ultimately, it is up to the parties to decide what the agreement says. It is recommended that anyone entering a written agreement should seek legal advice.

Some notable features of the *Model Benefit-sharing Agreement - Access Provider and Access Party* are listed below:

- Intellectual Property will vest in the Access Party (the party gaining access);
- The Access Party can only give IP rights to a third party if the third party enters a benefit sharing agreement with the access provider;
- Schedule 2 includes the headings 'Use of Indigenous People's Knowledge' and 'Benefits or Commitments for Use of Indigenous People's Knowledge'. This includes references to knowledge that has been obtained from sources other than the Access Provider; and
- Recommended thresholds for payment of royalties. As an example, for Pharmaceutical, Nutraceutical or Agricultural products, the following rates are recommended:
    - If gross annual profits exceed $500,000, the Access Provider receives 2.5% of gross profits
    - If gross annual profits exceed $5,000,000, the Access Provider receives 5% of gross profits
- A list of non-monetary benefits including:
    - 'Ad Hoc research'- the Access Provider can request the Access Party to undertake additional research;
    - 'Research Funding'- the Access Provider will provide research funding for the Access Provider to undertake their own research on specimens collected;
    - 'Joint Ventures'- the Access Party will enter into a joint venture with an Australian research centre (the research centre could be specified here);
    - 'Capacity Building'- the Access Party will provide knowledge relevant to, for example, conservation purposes;
    - 'Technology Transfer'; and
    - 'Scientific Research and Development Programmes'. [221]

[220] Department of Environment, Water, Heriatge and the Arts, Model Access and Benefit-Sharing Agreements, http://www.environment.gov.au/biodiversity/science/access/model-agreements/index.html, viewed 20 February 2009.
[221] Schedule 2, Model Access and Benefit-Sharing Agreements, http://www.environment.gov.au/biodiversity/science/access/model-agreements/index.html, viewed 20 February 2009.

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4.3.6 Filming, sound recording and captured image regulations

There are also regulations allowing the Director of National Parks to issue guidelines about controlling activity in a National Park through the permit system. In accordance with the *Environment Protection and Biodiversity Conservation Act 2000* and associated regulations both Kakadu National Park and Uluru-Kata Tjuta National Park publish guidelines for the regulation of commercial filming, sound recording and photography.

In Uluru-Kata Tjuta National Park, *the Guidelines for Commercial Image Capture, Use and Commercial Sound Recording* require photographers, artists, sound recordists and filmmakers to obtain a permit to capture images in the Park for commercial use. Permission is also required for use of images in advertising.[222] Applications are made in writing to the Communications Section of the National Park who then issue the permit. Fees are also charged. For instance, filming fees are $250 a day, whilst art and photography is $20 per day. Conditions are placed on use, and in some cases, an Aboriginal liaison officer may be assigned to a film or sound recording crew subject to payment of reasonable fees.

4.3.7 Research permit requirements under regulations

Under Regulation 12.06(2) or 12.09(1) of the EPBC Regulations, and in accordance with subsection 354(1) of the EPBC Act, a permit is required for research within National Parks. A written application disclosing information about the project and researcher must be made. If approval is given, an agreement is signed between the National Park and the researcher. For Uluru Kata Tjuta National Park, the application for is available on line.[223] The application form makes not inquiry about whether Indigenous people will be interviewed, or IEK will be potentially recorded. It is recommended that this be included to the National Parks process so that researchers are made aware of IEK protocols.

4.3.8 What if National Park permits are not complied with?

If a researcher, filmmaker, artist, or sound recorder do not get a permit or adhere to the conditions of their permit, then the Director of the National Park can instigate an action against them for breach of the permit contract, and the regulations. There are fines listed in the Regulations and penalties for non-compliance. However, the infringement action must be taken by the Director. Aboriginal people need the Director to act.

In 2003, the publication of the book, *Bromley Climbs Uluru* angered Anangu elders because images of the summit were displayed and the walking of the rock was promoted. Action was not taken against the authors, Alan and Patricia Campbell, by the Director although Anangu had requested the publication to be amended before agreeing to issue a permit for commercial use of captured image.[224]

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[222] Uluru Kata-Tjuta National Park, 2006, Department of Environment and Heritage, http://www.environment.gov.au/parks/permits/pubs/guidelines.pdf, viewed 30 January 2009.
[223] http://www.environment.gov.au/parks/permits/uluru-research.html, viewed 30 January 2009.
[224] AAP General News, 'Sydney Authors won't be prosecuted: Cochrane', 11 August 2003.

Commissioned by the Natural Resource Management Board (NT).

4.3.9 Indigenous Advisory Committee

The *Environment Protection and Biodiversity Conservation Act 1999* also provided for the establishment of an Indigenous Advisory Committee, which according to the DEHWA website:

> …advises the Minister for the Environment, Heritage and the Arts on the operation of the EPBC Act, taking into account the significance of Indigenous peoples' knowledge of the management of land and the conservation and sustainable use of biodiversity.[225]

The Indigenous Advisory Committee consists of Indigenous Australians chosen 'on the basis of their expertise in Indigenous land management, conservation and cultural heritage management.'[226]

4.3.10 Review of the EPBC Act 1999

The Federal Government commissioned a review of the *Environment Protection and Biodiversity Conservation Act 1999* in October 2008, due for release in mid 2009. (Under the Act a review is required every 10 years.[227]) A discussion paper has been released for comment on the DEHWA website. The discussion paper contains the following key questions relevant to Indigenous people:

- Are there opportunities to harmonise legislative provisions for the protection of indigenous heritage values? If so, how?
- Does the Act adequately support Indigenous involvement in the preparation of management plans for Commonwealth reserves? If not, what improvements could be made?
- Do the processes under the Act facilitate the involvement and cooperation of Indigenous people as owners of knowledge of biodiversity?
- Does the Act make adequate provision for Indigenous tradition to be taken into account in decisions made under the Act?[228]

Dr Peter Drahos has contended that there is a need for a global collecting society to collect royalties in respect of use of Indigenous genetic resources, and to take enforcement action against 'bio-pirates'.[229]

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[225] Department of Environment, Water, Heritage and the Arts, Indigenous Advisory Committee, Indigenous Communities and the Environment- Indigenous Advisory Committee, http://www.environment.gov.au/indigenous/committees/iac.html, viewed 20 February 2009.

[226] Department of Environment, Water, Heritage and the Arts, Indigenous Advisory Committee, Indigenous Communities and the Environment- Indigenous Advisory Committee, http://www.environment.gov.au/indigenous/committees/iac.html, viewed 20 February 2009.

[227] Section 522A, *Environment Protection and Biodiversity Conservation Regulations 2000* (Cth)

[228] Australian Government Department of the Environment, Water, Heritage and the Arts, *Independent Review of the Environment Protection and Biodiversity Conservation Act 1999*, 2008, Commonwealth of Australia, available online at www.environment.gov.au/epbc/review, viewed 20 February 2009.

Commissioned by the Natural Resource Management Board (NT).

4.4 Biological Resources Act 2006 (NT)

The *Biological Resources Act 2006* (NT) regulates 'bioprospecting' activities in the NT. Among other things, it provides a framework under which a share of profits made from bioprospecting flows back to those who provide access to their land, including Indigenous people. Indigenous people must also be compensated for use of their knowledge in bioprospecting activities. Industry Growth administers the *NT Biological Resources Act 2006*.

The NT government has a *Policy for Access to and use of biological resources in the Northern Territory*. It states that the NT government:

> "…acknowledges the rights of Indigenous Territorians in regard to their traditional ecological knowledge and the potential benefits which may flow to them from the utilisation of such knowledge."[230]

4.4.1 What is bioprospecting?

Put simply, bioprospecting is the collection of biological resources for research and potential commercialisation. As defined by the *Biological Resources Act 2006* (NT), this only includes research relating to the genetic resources or biochemical compounds contained in a biological sample such as a plant or an animal.

Other activities such as the collection of plant and animals for food or firewood, extracting essential oils from plants, or collecting plants for propagation are not considered bioprospecting in the Northern Territory.[231] Bioprospecting in the NT does not include the taking of biological materials by Indigenous people, as long as it is in accordance with their traditions and for non-commercial purposes such as food gathering or ceremony.

4.4.2 How is the Biological Resources Act relevant to Indigenous people?

Anybody accessing Aboriginal land for bioprospecting purposes must gain the prior informed consent of the Indigenous land holders. Bioprospectors must also enter benefit sharing agreements with Indigenous people when they commercially develop biological resources accessed from their land. There is a further requirement that bioprospectors must share profits with Indigenous people when using Indigenous knowledge.

The Northern Territory government will not issue a bioprospecting permit unless the applicant can show evidence of a benefit sharing agreement with the access provider (the person who controls access to the land). If the land is controlled by someone other than the

[229] Peter Drahos, 'Indigenous Knowledge, Intellectual Property And Biopiracy: Is A global bio-collecting society the answer?' (2000) 22 (6) *European Intellectual Property Review* 245-250.
[230] NT Government Dept of Business, Economic, and Resource Development *Policy for Access to and use of biological resources in the Northern Territory*
[231] Section 5 of the *Biological Resources Act 2006* (NT)

owner, the bioprospector must also consult the person in possession of the land (such as a lease holder) to organise access.

4.4.3 What is a benefit sharing agreement?

In this situation, a benefit sharing agreement is a contract detailing how a bioprospector will compensate a landholder for providing them access to their land. Under the *Biological Resources Act*, benefit sharing agreements must provide for:

> '…reasonable benefit-sharing arrangements including protection for, recognition of and valuing of any Indigenous people's knowledge to be used…'[232].

Even when the biopropsecting has not taken place on Indigenous land, a benefit sharing agreement must include a statements regarding:

> 'any use of indigenous people's knowledge, including details of the source of the knowledge, such as, for example, whether the knowledge was obtained from the resource access provider or from other indigenous persons'[233], and

> '… benefits to be provided or any agreed commitments given in return for the use of the indigenous people's knowledge'[234].

The requirement for benefit sharing agreements as contained in the *Biological Resources Act* has the potential to ensure Indigenous people are rewarded for the commercial development of biological resources accessed from Indigenous land or based on Indigenous Ecological Knowledge.

One of the shortfalls of the Act is that knowledge obtained from a published source such as a scientific journal rather than directly from an Indigenous person, is not considered 'Indigenous knowledge' for the purposes of the Act. This highlights the risks involved in making IEK freely available on public databases or similar.

As of September 2008 there had not been any benefit sharing agreements entered into by an Indigenous group under the *Biological Resources Act 2006* (NT). In consultations, there was minimal feedback obtained about the new law. The general consensus was that the NT 'bioprospecting' law does not favour Indigenous interests but instead focuses on trade. A concern was that subsistence harvest seems to have been overlooked.

[232] Section 29(1) of the *Biological Resources Act 2006* (NT)
[233] Section 29(1)(h) of the *Biological Resources Act 2006* (NT)
[234] Section 29(1)(i) of the *Biological Resources Act 2006* (NT)

Commissioned by the Natural Resource Management Board (NT).

4.5 Biodiscovery Act 2004 (Qld)

Queensland's *Biodiscovery Act 2004* (Qld), creates an access regime for the collection of native biological materials in Queensland.[235] The Act makes no mention of Indigenous people or traditional knowledge in relation to biodiscovery. As noted in a report written by the Environmental Defender's Office of Northern Queensland, the Act provides "no opportunities for community participation and consultation (particularly for indigenous communities) in the Act's decision-making and enforcement processes."[236] This shows a failure on the behalf of the Queensland government to respect Australia's international obligations under the CBD. It is also clearly at odds with Commonwealth laws on bioprospecting. The only effort made by the Queensland government to give force to these principles is through the 'code of ethics' discussed below.

4.5.1 Queensland Biotechnology Code of Ethics 2006

The *Queensland Biotechnology Code of Ethics* urges anyone involved in biotechnology in Queensland to consult and share benefits with Indigenous knowledge holders.[237] In particular the Code of Ethics contains the following statements:

> We recognise that there may be culturally significant aspects of the knowledge of Aboriginal and Torres Strait Islander people, that we will treat in a sensitive and respectful manner if used in the course of biotechnology.
>
> Where in the course of biodiscovery we obtain and use traditional knowledge from Indigenous persons, we will negotiate reasonable benefit sharing arrangements with these persons or communities.
>
> In the course of biodiscovery activities we will comply with the *Native Title Act 1993* (Cwth).
>
> We will not commit acts of biopiracy and will not assist a third party to commit such acts.[238]

This Code of Ethics must be complied with by any organisation that gets funding or support from the Queensland government. For private organisations that do not rely on any government funding, the Code is voluntary. All organisations that are bound by the Code of

[235] http://www.legislation.qld.gov.au/LEGISLTN/CURRENT/B/BiodiscovA04.pdf
[236] Environmental Defender's Office of northern Queensland, *Submission on exposure draft of the Biodiscovery Bill 2003*, available online at http://www.edo.org.au/edonq/images/stories/documents/edonq_submission_on_biodiscovery_bill_2003.pdf , viewed 18 February 2009.
[237] Available upon request from Qld Government Office of Biotechnology and Therapeutic Medicines and Devices; email breanne.baumann@dtrdi.qld.gov.au.
[238] *Queensland Biotechnology Code of Ethics 2006*, p 8, http://www.industry.qld.gov.au/dsdweb/v4/apps/web/content.cfm?id=6786, , viewed 18 February 2009.

Commissioned by the Natural Resource Management Board (NT).

Ethics are identified in a public register of Biotechnology Organisations.[239] The Code of Ethics does not attract legal sanctions, which means it is not legally enforceable. Also, the Code of Ethics does not provide any guidance on how benefit sharing agreements should be entered.

Given these lesser requirements of the Queensland law, bioprospectors may well choose to focus their efforts on Queensland rather than the NT or Commonwealth areas. Ideally the principles contained in the *Nationally Consistent Guidelines* should be incorporated into Queensland *Biodiscovery Act*.[240] This would bring Queensland into line with the NT and Commonwealth laws, and reduce the likelihood that bioprospectors would take advantage of the weaker law to the detriment of Indigenous access providers and knowledge holders.

4.6 Pacific Regional Model Law on Traditional Biological Knowledge, Innovations and Practices (2000)

In the Pacific, the exploitation of biological resources has taken a central focus since the 1990s when Indigenous human genes from the Hagahai tribe of PNG were the subject of a US Patent.[241] The Pacific, like Australia, is ecologically diverse and unique. The commodification of traditional knowledge and resources could potentially bring about lucrative biotechnological products. Professor Zakri of the United Nations University observes:

> The South Pacific is a unique and highly complex region that has the world's largest ocean and is home to some of the greatest cultural, linguistic and biological diversity in the world. It is also a region where the majority population is Indigenous and still retains much of their traditional knowledge and the values of their communities. The cultural and biological diversity of the region however is under threat due to a series of factors, including population growth, over-fishing and poverty. As a region, the Pacific has experienced more than its fair share of external experimental research that has resulted in the commodification and misappropriation of important components of their ancestral inheritance. For others, it might be difficult to understand how a plant could be regarded as a living ancestor, or that human blood retains its life spirit even after it has been collected for medical research and synthesized and isolated for specific DNA qualities. Such values are still very much a part of the daily lives and analysis of Pacific communities.[183]

[239] Public Register of Biotechnology Organisations, available online at http://www.industry.qld.gov.au/dsdweb/v4/apps/web/content.cfm?id=6682, viewed 25 November 2008.
[240] See also Michael Davis, *Protecting Culture: Indigenous Cultural and Intellectual Property Rights in the Far North Queensland Wet Tropics*, A Report to the Aboriginal and Torres Strait Islander Commission Cairns and District Regional Council, August 2002.
[241] Eric L Kwa, 'In the wake of the Hagahai Patent: Policy and Legal Development on Gene Ownership and Technology' in (eds) Aroha Te Pareake Mead and Steven Ratuva, *Pacific Genes & Life Patents*, Call of the Earth and the United Nations University Institute of Advanced Studies, Wellington, New Zealand, 2007, pp. 150 – 165.

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The Traditional Biological Knowledge, Innovations and Practices Act (2000) is a model proposed for adoption by Pacific countries. It defines 'traditional biological knowledge' as 'knowledge whether embodied in tangible form or not, belonging to a social group and gained from having lived in close contact with nature regarding:

- living things, their spiritual significance, their constituent parts, their life cycles, behaviour and functions, and their effects on and interactions with other living things, including humans, and with their physical environment;
- the physical environment;
- the obtaining and utilising of living or non-living things for the purpose of maintaining, facilitating or improving human life.'[242]

Section 8 establishes an ownership right over traditional biological knowledge, an innovation or a practice. It is an additional right to IP rights but where there is inconsistency between these laws, the IP laws shall be made void (section 3(2)). Sections 8(2) and 8(4) make it an offence for a prospective user to use the knowledge, innovation or practice for commercial purposes without making complying with sections 10 and 11 of the Act. These sections mandate 'prior informed consent' and 'access and benefit sharing' procedures respectively. The prior informed consent procedures contained in section 11 involve making an application to a Competent National Authority, which must then identify and inform the owner of the proposed use. If informed consent is given by the owner, the user must negotiate an Access and Benefit-Sharing Agreement with the owner, under the supervision of the Competent National Authority.

Article 9 gives owners of knowledge, innovations and practices the three moral rights (ie the right to attribution of ownership, the right against false attribution of ownership, and the right to integrity). These are akin to moral rights under copyright laws.

Clark Peteru, a Samoan lawyer working as Environmental Legal Adviser at the South Pacific Regional Environment Programme (SPREP), has made the following comments about the Model Law:

> Some of the key issues that Pacific Island Countries have identified in relation to national adoption of the Model Law are:
>
> - Its relationship to access and benefit sharing issues;
> - Its relationship with existing (conventional) IPR laws;
> - How enforceable it would prove in practice;
> - How its implementation would be funded.
> - Which office should administer the Model Law:
>   - a Department of Culture has expertise in traditional knowledge and may provide expert and impartial advice in ownership disputes;

[242] Section 4 of the *Traditional Biological Knowledge, Innovations And Practices Act (2000)*, in Aroha Te Pareake Mead and Steven Ratuva (eds), *Pacific Genes & Life Patents*, Call of the Earth and the United Nations University Institute of Advanced Studies, Wellington, New Zealand, 2007, pp 237- 245.

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- a Department of Environment has expertise on biological materials, Access and Benefit Sharing laws and the Convention on Biological Diversity;
- a Department of Justice looks after intellectual property matters, has experience with registration procedures, and may facilitate dispute resolution through the Court system.[243]

4.7 Summary

As a response to the many environmental issues facing the global community, the Rio Earth Summit was held in 1992. One of the major outcomes form the summit was the United Nations *Convention on Biological Diversity*. The CBD is the most far reaching and important international treaty on biodiversity and the environment to date. In an effort to meet its obligations under the *Convention on Biological Diversity*, the Australian government introduced the *Environment Protection and Biodiversity Conservation Act* in 1999, followed with the introduction of accompanying regulations in 2000. Similar legislation was introduced in the Northern Territory in 2006 in the form of the *Biological Resources Act 2006* (NT).

Between them, these laws control access to biological and genetic resources in many areas of the NT. In certain cases the person or entity accessing these resources must obtain consent from, and share benefits with the local Indigenous people. This is in line with the CBD, which recognises the close and traditional dependence of indigenous communities on biological resources.

These laws also make efforts to address the need, as identified in the CBD to 'respect, preserve, maintain and promote the wider use of traditional knowledge with the approval and involvement of the users of such knowledge'.[244]

[243] http://www.earthcall.org/files/2007/COE_PUBLICATION_Final.pdf, p. 189.
[244] Convention on Biological Diversity, Indigenous & Local Communities, http://www.cbd.int/ , viewed 25 March 2009.

Section 5
Land & Heritage Laws

5.1 Native title

5.1.1 The *Native Title Act* 1993 (Cth)

The *Native Title Act 1993*, defines native title as 'rights and interests…in relation to land or waters where: the rights and interests are possessed under the traditional laws acknowledged, and the traditional customs observed' by the Indigenous people, who 'by those laws and customs, have a connection with the land or waters' and where 'those rights and interests are recognised by the common law of Australia'.[245]

Under the section 223 definition, it is arguable that the right to protect and benefit from Indigenous cultural knowledge should be considered a native title right, given the centrality of land to Indigenous people and the holistic nature of Indigenous cultures. Recognition of such a right could potentially give native title holders the ability to protect and control the use their cultural knowledge and its tangible manifestations in ways not usually possible under established intellectual property law regimes.

5.1.2 Native Title and Traditional Knowledge

In *Ben Ward & Ors v Western Australia & Ors [1998]*, the trial judge (Justice Lee) recognised the native title holders' 'right to maintain, protect and prevent the misuse of cultural knowledge'. However, on appeal to the Full Federal Court and subsequently the High Court, common law recognition of such a right was rejected. In *Western Australia* v *Ward*, the majority of the High Court of Australia followed a strict interpretation of s223 to exclude any right not directly connected with land, asserting the demonstrated ability of established intellectual property regimes to effectively address such matters.[246] Their reasoning was that:

> The `recognition' of this right would extend beyond denial or control of access to land held under native title. It would, so it appears, involve, for example, the restraint of visual or auditory reproductions of what was to be found there or took place there, or elsewhere. It is here that the…fatal difficulty appears.[247]

[245] Section 223 of the *Native Title Act 1993* (Cth)
[246] *Western Australia* v *Ward* [2002] HCA 28.
[247] Western Australia v Ward [2002] HCA 28, at para. 59.

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The Federal Court in *Neowarra v State of Western Australia* used the same reasoning as that used by the majority of the High Court in *Ward* to further deny a native title claimant recognition of certain ICIP rights. In particular, the applicant was seeking recognition of the right "to prevent the disclosure otherwise than in accordance with traditional laws and customs [of] tenets of spiritual beliefs and practices (including songs, narratives, rituals and ceremonies) which relate to areas of land or waters, or places on the land or waters".[248] In the eyes of the court, this claim suffered the same 'fatal difficulty' as the one referred to in *Ward*.

It is worth mentioning here the minority judgment of Justice Kirby in the Ward case. (Although minority judgments do not affect the court's decision, they are an important indication that the law is not always clear). Justice Kirby's judgment in Ward has been referred to as a 'principled, honourable dissent'[249]. Although recognised insightfully the inability of current intellectual property regimes to deal with Indigenous cultural knowledge. He refused to rule out the possibility of recognising Indigenous knowledge within native title rights, stating eloquently that:

> …cultural knowledge, as exhibited in ceremony, performance, artistic creation and narrative, is inherently related to the land according to Aboriginal beliefs, it follows logically that the right to protect such knowledge is therefore related to the land for the purposes of the Native Title Act...[250]

While at this stage the common law definition of native title does not include rights to cultural knowledge, the sound reasoning of Kirby's dissent in Ward suggests the issue may be revisited in the future.

5.1.3 Indigenous Land Use Agreements (ILUAs)

Another aspect of the Native Title Act of significance to ICIP rights and NRM in the NT is the provision made for the use of Indigenous Land Use Agreements (ILUAs). ILUAs are voluntary agreements that native title holders or claimants can enter into with governments, companies, landholders and other interested groups. ILUAs can involve a number of different entities, and generally concern the use and management of land and waters and/or natural resources. There are requirements under the *Native Title Act* under which ILUAs must relate to one of a list specified matters.[251] Once registered with the NNTT ILUAs are considered legally binding contracts for the parties involved. They will even bind native title holders of the land concerned who are not party to the agreement.

Since the introduction of the *Parks & Reserves (Framework for the Future) Act 2003* (NT) a number of ILUAs have been drafted (with more on the way) as a means of establishing joint

[248] *Neowarra v State of Western Australia (2003)* FCA 1402, at para. 485.
[249] Matthew Rimmer, "Blame It On Rio: Biodiscovery, Native Title, and Traditional Knowledge" *Southern Cross University Law Review*, Vol 7, No 11, Dec. 2003
[250] *WA v Ward*, pp161-162
[251] Sections 24BB & 24CB of the *Native Title Act 1993* (Cth)

management arrangements over a range of national parks (as explained below at 5.9). As such ILUAs are an important consideration for anyone involved in NRM the Northern Territory. There are currently 84 ILUAs, far outweighing the number of successful native title claims in the Northern Territory.

Under ILUAs, Indigenous groups can give up certain native title rights or agree to the use of their land in return for benefits such as monetary compensation, future royalties from the exploitation of minerals or other resources, and employment opportunities. They also offer a potential avenue through which Indigenous groups might enforce local Indigenous laws and cultural protocols. For example, Indigenous groups entering ILUAs might choose to include a clause which obliges the other party to acknowledge and respect Indigenous laws relating to the use of Indigenous Ecological Knowledge and resource management. ILUAs can be used as legally required benefit sharing agreements for access to biological resources under the *EPBC Act (Cth)* and the *Biological Resources Act (NT)*.

5.2 Heritage laws

5.2.1 *Aboriginal & Torres Strait Islander Heritage Protection Act* 1984 (Cth)

Under this Act, Aboriginal people may apply to the Minister to have a place or object protected. If satisfied that the object is "a significant Aboriginal object" and that is "under threat of injury or desecration" the Minister can make a declaration providing for the protection and preservation of the object (or place).

When passed the Act was meant to be a temporary measure to provide relief where State or Territory legislation was inadequate, until such time as anticipated land rights legislation would fill the gap. Unfortunately such legislation has not eventuated, even amidst the fleeting optimism immediately following the Mabo decision.

Many commentators are critical of the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* saying it fails to protect Indigenous heritage, and that it is flawed in its practical implementation.

Since its introduction, only a handful of declarations have been made, and there is a perceived unwillingness of governments to punish contraventions under the Act.[252] It is currently under review.

5.2.2 *Protection of Moveable Cultural Heritage Act 1986* (Cth)

The *Protection of Movable Heritage Act* deals specifically with the movement of movable cultural heritage across Australia's external borders. The Act controls the export of items of cultural significance to or made by Indigenous Australians which are not made specifically for sale.

[252] http://www.rachelsiewert.org.au/500_parliament_sub.php?deptItemID=47

Commissioned by the Natural Resource Management Board (NT).

Certain objects of high ritual significance cannot be exported from Australia under any circumstances. The regulations contain a specific list of such 'Class A' items which include "sacred and secret ritual objects…" and "bark and log coffins used as traditional burial objects."[253] The export of other Indigenous objects of heritage value is controlled through a permit system. Importantly, declarations under the ATSIHPA Act do not affect permits given under section 12 of the Protection of Movable Cultural Heritage Act.

5.2.3 *Natural Heritage Trust of Australia Act 1997* (Cth)

This is where funding originally came from however now it is taken from the Caring for our Country scheme. It has no binding or punitive clauses.

5.3 Aboriginal Land Rights (NT) Act 1976 (Cth) (ALRA)

A number of NT Acts relating to the management of natural resource are relevant to ICIP and IEK, through specific sections and operation in conjunction with other laws.

Although it is Commonwealth legislation, the ALRA is applicable only in the Northern Territory. Enacted in 1976, the ALRA provided for the grant of large areas of land to Aboriginal people in the NT and the opportunity for traditional owners to make further claims over certain Commonwealth lands. The Act also provides for the creation of Aboriginal Land Trusts to hold those lands. Under the ALRA, Land Councils are designed to represent the owners of land given back under the Act.

In a historical sense, the ALRA has been of great significance to the survival of ICIP and IEK in the NT. Vast tracts of land have been handed back to Indigenous groups, effectively allowing many to return to land and practice their cultures accordingly. Although the Act does not provide for 'express' protection of ICIP or IEK, on a broader level it is extremely significant.

5.3.1 Land Councils

The ALRA provides the legal framework through which Aboriginal Land Councils are created.[254] Land councils play an important role in the negotiation and enforcement of Indigenous rights. The ALRA states that the functions and roles of the Land Councils. Several of these functions may be relevant to IEK, including the duties to:

- consult Aboriginal people living on or concerned with the area of the Land Council regarding management of the land and any proposals relating to use of the land;
- protect the interests of all Aboriginal people living on the Land Council's area; and
- help Aboriginal people protect sacred sites in their designated area.

[253] Regulation 1.3 (a) & (b) *Protection of Movable Heritage Regulations 1987* (Cth)
[254] Section 21, *Aboriginal Land Rights (Northern Territory) Act 1975*(Cth)

Commissioned by the Natural Resource Management Board (NT).

The ALRA has also given land holder groups and traditional owners the right to say who enters their lands, and to a large extent what activities and development can take place on their land.

5.3.2 The permit system

Section 19 of the ALRA in conjunction with the *Aboriginal Land Act*, fostered the introduction of a permit system for entry onto land held under the ALRA. This has given landholding traditional owners the ability to control access to their lands and associated natural resources (see 4.2).

Section 69 prohibits persons from entering or remaining on land that is a sacred site. Criminal sanctions may apply. A sacred site is defined as:

> …a site that is sacred to Aboriginals or is otherwise of significance according to Aboriginal tradition.

Recent and proposed amendments to the ALRA are related to the NT Intervention. Recently the permit system was abolished for government employees and in common areas of major communities, airstrips and access roads on lands subject to the ALRA.[255] Any amendments that weaken the permit system will reduce the ability of Indigenous land holders to enforce their already fragile ICIP rights. The permit system offers a valuable means of using contractual arrangements to ensure IEK is protected in NRM projects on Aboriginal lands.

The Northern Territory Intervention decision has been handed down. In *Wurridjal* v. *The Commonwealth of Australia (the Northern Territory Intervention case)*, the High Court, by a 6-1 majority, held that the creation of the statutory lease on the Maningrida land constituted an acquisition of property from the Land Trust but the acquisition was on just terms due to the compensation provisions in the *Northern Territory National Emergency Response Act 2007* (Cth). [256] Furthermore, there was no acquisition of Mr Wurridjal and Ms Garlbin's rights under section 71 of the *Land Rights Act* because those rights had been preserved throughout the intervention. To the extent that abolition of the permit system had resulted in an acquisition of property, just terms were afforded by the compensation provisions of the *FaHCSIA Act*.

5.3.3 Inter-tidal waters adjacent to land

In *Northern Territory of Australia v Arnhem Land Aboriginal Land Trust* [2008] HCA 29 (30 July 2008) ("The Blue Mud Bay Case"), the High Court confirmed the right of Indigenous land holders to control access to inter-tidal zones adjacent to their land. Thus people wanting to exploit these zones for the resources found within them are now technically required to seek permission to do so from the Aboriginal owners.

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[255] E Mackay , 'Recent Developments: Copyright and the Protection of Indigenous Art' (2008) 7(2) *Indigenous Law Bulletin* 11-13. http://www.ilc.unsw.edu.au/publications/documents/Mackay_Article.pdf

[256] *Wurridjal* v. *The Commonwealth of Australia (the Northern Territory Intervention case)* [2009] HCA 2.

Commissioned by the Natural Resource Management Board (NT).

In light of this decision, the permit system will apply to intertidal waters adjacent to land which has been granted under the ALRA. Permits to access these areas could be drafted to include conditions relating to Indigenous cultural and intellectual property. This may be particularly relevant to scientific and research institutions carrying out work in inter-tidal areas. It also means that the relevant land holders will be considered access providers for the purposes of the *Biological Resources Act* (see 4.4).

5.4 Aboriginal Land Act 1991 (NT) ('ALA')

In conjunction with the ALRA the *Aboriginal Land Act 1991* (Cth) controls entry onto land, and establishes a permit system by which Land Councils and traditional owners can issue permits for people to enter land "subject to such conditions as…the Land Council or traditional owners … think fit."[257]

Under the ALA, either Land Councils or traditional Aboriginal owners can issue permits for entry onto Aboriginal lands. Both the NLC and the CLC have developed a number of permits to allow a range of activities, from general research to filming. Each has its own set of special conditions which dictating what the permit holder can and can't do when on Aboriginal land.

This has proven to be a valuable mechanism, as it provides a contractual 'back door' through which ICIP rights can be imposed upon entities wanting to carry out projects on Aboriginal land. Effectively this allows for the assertion and protection of Indigenous Cultural and Intellectual Property (ICIP) rights through the permit system. There is room for expansion and improvement of this method of asserting ICIP rights. The use of contract law to assert ICIP rights is discussed further in the 'Agreements and Contracts' section. (The CLC permits are listed at 7.5).

Case study: Central Land Council research clearances

We talked with Leon Terrill, CLC lawyer, about the Land Act and were advised that in a research application you had to identify what your purpose was. CLC provides information to applicants and permit forms. No fees are required for permits. However there was one project concerning Wild horses on Aboriginal land that had to get a permit and pay $150 for a traditional owner guide.

The Central Land Council has also developed Project Principles to be followed by holders of a 'special purpose' permit for projects on Aboriginal land. The Principles contain express provisions compelling the permit holder to respect and acknowledge Indigenous laws and protocols relating to Indigenous Ecological Knowledge and other ICIP matters.

[257] *Sections 5(1)&(2),* Aboriginal Land Act 1992 (NT)

Commissioned by the Natural Resource Management Board (NT).

5.5 Aboriginal Sacred Sites Act 1989 (NT)

The *Aboriginal Sacred Sites Act* 1989 (NT) creates a legal framework to protect sacred sites in the Northern Territory. The Act is supposed to strike a balance between the 'the need to preserve and enhance Aboriginal cultural tradition…' and 'the aspirations of (all peoples) of the Territory for their economic, cultural and social advancement…".[258]

The Act controls (and in some cases has punitive clauses for); access to, work on, and the impacts on sacred sites. Natural resources projects may involve access and work around sacred sites, therefore, this Act may be relevant.

The *Sacred Sites Act* created Aboriginal Areas Protection Authority (AAPA), whose functions include:

-Responding to requests for site protection; this includes documenting and storing knowledge about the sacred site and developing protective measures;[259]
-facilitating discussions between custodians and developers;[260]
- maintaining a register of sacred sites; and
-issuing authority certificates for work on or near sacred sites[261]

All sacred sites in the Northern Territory are covered by the Act, but it is ultimately up to a court to decide whether a site is 'sacred'. Applications can be made to the AAPA to have a site registered, but even if registered, the site is still only 'prima facie' (on the face of it) a sacred site. Furthermore, any decision of the AAPA can be over ruled by the Minister for Indigenous Policy (though the Minister must give reasons).

Section 38 makes it a criminal offence for a person to record or communicate information of a 'secret nature according to Aboriginal tradition' acquired by reason of membership or in the employment or service of the AAPA.

The Act also guarantees Aboriginal people rights of access to sacred sites "…in accordance with Aboriginal tradition…"

The CLC has created a separate process in relation to sacred sites. Some articles we researched highlighted that there has been some confusion and debate over whose responsibility sacred sites are between the land councils and AAPA. This is due largely to the ambiguity and potential conflict between the ALRA and the ASSA. The land councils are also given functions under s23(1) in relation to sacred sites. Discussions have been taking place in an attempt to resolve the issue and develop protocols, but have been unsuccessful. [262]

[258] http://www.nt.gov.au/aapa/, viewed 31 July 2008.
[259] Annual report 2007 at p 8 http://www.nt.gov.au/aapa/files/annualreports/AAPA_AnRep_web%2006-07.pdf .
[260] Section 10(a), *Northern Territory Aboriginal Sacred Sites Act 1989* (NT)
[261] Section 10(f), *Northern Territory Aboriginal Sacred Sites Act 1989* (NT)
[262] AAPA annual report 2007 http://www.nt.gov.au/aapa/files/annualreports/AAPA_AnRep_web%2006-07.pdf

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Issues and challenges

Authorities such as NPWS and NT Sacred Sites Authority are also relevant to consider. These hold different levels of knowledge that is public. There needs to be consideration of the issue of whether a custodian has the same rights/status as a traditional owner.

In NSW, the NPWS (DECC) has the Aboriginal Heritage Information Management Services (AHIMS) that has different level of access. The NPWS maintains the Aboriginal Heritage Information Management System (AHIMS). AHIMS includes:

- a database and recording cards for all Aboriginal objects, Aboriginal places and other Aboriginal heritage values in NSW that have been reported to the NPWS; and
- a database index of archaeological reports and a library of these reports.[263]

Consideration should be given to the context within which site data are recorded. Issues for IEK context include:

1. Who are the right people to access and learn from these archives?;
2. Some people have different levels of knowledge;
3. The process of accumulating knowledge;
4. Men's knowledge recording – given in the context. Men are taught by older men;
5. Women teach women and young girls. This needs to be recorded;
6. Issues around authority to access and transmit cultural data; b) gender and age-related access conditions; c) assumptions of cultural competency by archive users; d) lodgements access and reproduction protocols.

5.6 NT Mining legislation

The *Mining Act* and associated laws operate concurrently with the ALRA, dictating procedures through which exploration and mining licences are issued. Under section 139 of the Act mineral leases are not to be granted over Aboriginal land unless the mining entity holds an exploration licence, which must be issued in accordance with provisions of the ALRA. In effect, traditional owners have a power to veto mining operations on Aboriginal land, although the Minister can ultimately override such a veto 'in the public interest'.

5.7 NT Fisheries Act

Under Section 53 of the *Fisheries Act* nothing in the Act may limit the right of Aboriginal people "who have traditionally used the resources of an area of land or water in a traditional manner from continuing to use those resources in that area in that manner." As a result, Indigenous cultural rights and ecological knowledge are protected by the Act, but only to the extent that those rights are practiced as they were before European settlement.

[263] http://www.environment.nsw.gov.au/licences/AboriginalHeritageInformationManagementSystem.htm, viewed 12 August 2008.

Commissioned by the Natural Resource Management Board (NT).

It is arguable that the focus of this provision takes the view that Indigenous cultures must be static and conservative to maintain authenticity. It directly denies Indigenous people the opportunity to benefit commercially from use of their cultural and ecological knowledge in contemporary times. It is recommended that provisions of this nature should be amended to allow Indigenous people the right to benefit commercially from culturally appropriate and sustainable use of natural resources.

5.8 NT Heritage Conservation Act 1991

The *Heritage Conservation Act* may be relevant to IEK and NRM for a number of reasons. The Act provides a means through which places or things of significance can be protected and/or conserved. This is of particular significance to the tourism industry, given the large number of tourists interested in coming to the Territory to visit such places. Just how this is done however may be problematic in terms of outdated notions of how ICIP is perceived. This fact was pointed out in a government review some years ago in which it was noted:

> "The problem is that the current legislation defines Indigenous heritage in terms of rock art sites and other archaeological sites 'pertaining to the past occupation by Aboriginal people'. This is despite the fact that large numbers of Indigenous people live in the Territory's major towns, and have many diverse histories to tell."[264]

Recommendations regarding the basic framework for a new Heritage Act made in the report were endorsed by Cabinet in May 2005. A new Heritage Bill is close to completion, and is due to be circulated to key stake holders and tabled in the NT parliament in coming weeks.[265]

5.9 Territory Parks and Wildlife Conservation Act (NT) & Parks and Reserves (Framework for the Future Act) (NT) 2003

The Framework for the Future Act was drafted in the wake of the High Court's decision in *Western Australia v Ward* [2002] 191 ALR 1 ("Ward"). The Ward decision cast doubt over the validity of a number of parks and reserves that had been declared under the *Territory Parks and Wildlife Conservation Act 2003*. The *Frameworks for the Future Act* was designed to create a framework for negotiations and joint management of Territory parks and reserves, and provide an alternative to the lengthy process of land claims.

Under the *Parks and Reserves (Framework for the Future) Act* a significant number of Parks and Reserves formerly held under the ALRA or by the Territory government have been handed over to traditional owners, on the condition that they lease those lands back to the Territory government for a term of 99 years. All land reserved has or will become the subject of joint management regimes through the lodgment of ILUAs as provided for by the

[264] *Heritage Conservation Act (1991) Review 2003*, *http://www.nt.gov.au/nreta/heritage/manage/pdf/briefingnotes.pdf*
[265] Personal communication, NT Dept. of Natural Resources, Environment, The Arts and Sport, 27 January 2009.

Commissioned by the Natural Resource Management Board (NT).

Native Title Act. Aboriginal groups also agreed to withdraw any land claims and native title claims over the lands concerned.

After the *Framework for the Future Act* was introduced, the *Territory Parks and Wildlife Act* was amended in 2005 to provide for joint management between the Territory government and traditional owners. The objective of joint management is to jointly establish an equitable partnership to manage and maintain the park or reserve…for the following purposes:

(a) benefiting both the traditional Aboriginal owners of the park or reserve and the wider community; and

(b) protecting biological diversity…

Under Section 25AC of the Act:

The objective is to be achieved by managing the park or reserve in accordance with the following principles:

(a) recognising, valuing and incorporating Aboriginal culture, knowledge and decision making processes; and

(b) utilising the combined land management skills and expertise of both joint management partners…

Case Study: Joint management

One example of how the joint management regime is being implemented is a project at the Devils Marbles Conservation Reserve (Karlu Karlu), where Indigenous knowledge has been recorded in four local languages.

> "The fieldwork involved documenting the uses of plants and animals for bush medicines and bush tucker, the areas which need to be protected in the park and history of the women in the Devils Marbles area."[266]

Bill Panton advised they have just finished a process for Karlu Karlu ("the Devils Marbles") in the NT.[267]

The new framework under these Acts is significant in a number of areas for natural resource managers in the Territory, particularly in relation to the tourism industry.

Territory Parks and Wildlife Conservation by-laws contain prohibitions on certain activities that may relate to IEK or ICIP. Those involved in natural resource management in these

[266] http://www.clc.org.au/OurLand/land_management/reports/report2-karlu-karlu.asp
[267] http://www.nt.gov.au/nreta/parks/manage/pdf/draft_devilsmarbles.pdf, viewed 18 July 2008.

areas (e.g. tourism operators) should be made aware of these by laws, e.g. by-law 27 'protection of paintings'.

Case study: National Parks and Wildlife Service (NPWS) and Land Council coordination

When working with Indigenous people and recording heritage, the National Parks and Wildlife Service say they only need to know the bare minimum of information. They don't need any sacred/secret or any 'deep' knowledge. The planning process for National Parks and Wildlife Service relies on the Land Council for identifying traditional owners. It then goes back to the group for consensus. National Parks and Wildlife Service refers cultural mapping to the Lands Council who employ consultants to document this material. The cultural information they require is only for the use of the park to advise on issues such as seasonal access for ceremonies, conflicts between current use and cultural beliefs.

Case study: NPWS and working with Indigenous people

Good relationships now exist between park managers and Indigenous people, when they did not necessarily do so in the past. Rangers and traditional owners show support and recognition for each others' backgrounds and respect for each other. Rangers are being given knowledge by elders because they do not necessarily have experienced younger Indigenous people to take on the task of holding TK. In this respect rangers assume a proxy 'custodial' role. Knowledge is being transmitted to, and held by, the rangers. This evinces a need for guidelines for staff acting as custodians of this knowledge.[268]

Comments

There are high mortality rates within the Indigenous community, which means that younger people are increasingly in authority. They rely on maps that their fathers created often with non-Indigenous anthropologists. These maps are held in repositories such as National Park and Wildlife Services and other Government Departments. Remaining on country and keeping connections is hard and young people do not have as many cultural opportunities. Parents might want them to pursue a western education which means that inter-generational transfer of Indigenous knowledge is affected.

IPAs

NPWS officers stress the growing importance of Indigenous Protected Areas as a type of Indigenous land tenure. Dhimurru is an example and there is a legislative relationship supported by law. There is a range of positions that work directly to the Dhimurru Board. Regional development links also include government contracting and economic benefit sharing and livelihoods in land issues.

Bawinanga Aboriginal Corporation has developed a turtle business from combining TK knowledge about nesting turtles with scientific knowledge. They developed a system

[268] Consider this in light of the *Foster v Mountford* scenario – publication of materials after being initiated – consider ethical issues.

whereby the turtles development is arrested so they can be sold as pets. There are issues that arise about the protection of TK from this commercial sale of turtles. Bureaucratic processes must be transparent. Once a market is set up there can be benefits for Indigenous people. Another example is the Oenpelli python that can be bred for commercial sale, but there may be issues relating to cultural beliefs that restrict Indigenous people trading in species related to ceremony.[269]

The documentation of traditional knowledge about Kakadu plum has demonstrated that it is safe to consume after prolonged processing. This type of information could be useful commercially for safe testing of food products. For instance, Aboriginal knowledge of the edibility of fruit can authenticate food use, and break though the process of testing, which is usually quite lengthy. Traditional Owners are aware of the loopholes and that the laws are not protecting traditional knowledge. Examples occur in other areas – and not necessarily Indigenous traditional knowledge - such as St. John's wart, which is heavily used in remedial preparations. Aboriginal Pharmacopeia and the use of Aboriginal knowledge of the healing properties of plants and animals is a well established industry now.[270]

Indigenous Protected Areas were discussed by the Alice Springs group and the focus that management of these IPAs have for protecting and recognition of IEK. Most projects have basic documentation to assist people with management of IP, benefits arising and related issues.[271]

5.10 Summary

Land is the central and connecting factor in any discussion about IEK and NRM. The person or groups that controls access to land determines what processes need to be undertaken by natural resource managers and how they are legally required to deal with the Indigenous people responsible for the land concerned.

Since the mid 1970s, a number of laws have been introduced in the NT that specifically recognise the right of Indigenous Northern Territorians to control access to their lands and their cultures. Land rights, heritage, native title laws have attempted in one way or another to recognise the rights of Indigenous peoples to practice and control their cultures.

These laws have in effect offered a means through which Indigenous people can assert their own cultural practices and control the use of their IEK. For example, by controlling access to land under the *Aboriginal Land Rights Act*, Indigenous land owners have been able to set the terms upon which research by outsiders is carried out on their lands. In Uluru and Kata-Tjuta National Park, where a joint management plan is in place between the Federal government and traditional owners, Indigenous IEK is being incorporated into land management regimes

[269] Peter said that the Oenpelli python is not a ceremonial snake but the olive python is.
[270] http://www.ntl.nt.gov.au/__data/assets/pdf_file/0017/25037/occpaper10.pdf, viewed 18 July 2008.
[271] http://www.forestpeoples.org/documents/conservation/wpc_recs_5_24_eng.pdf, viewed 11 August 2008. 'It is widely acknowledged that successful implementation of conservation programmes can only be guaranteed on long term basis when there is consent for and approval by indigenous peoples among others, because their cultures, knowledge and territories contribute to the building of comprehensive protected areas. There is often commonality of objectives between protected areas and the need of indigenous peoples to protect their lands, territories and resources from external threats."

and used to boost Indigenous employment and commercial opportunities in the tourism sector.

These evolving laws and land management strategies have gone some way to improving the relationship between Indigenous Northern Territorians and the Australian legal system. Natural resource managers must now deal with Indigenous peoples in the Northern Territory and take into account the unique relationship that exists between Indigenous people and the land. There is a growing realisation that Indigenous people have a great deal of knowledge in terms of natural resource management and that Indigenous land management strategies benefit both the Indigenous communities and the broader community. It is important that this incorporation of IEK into NRM practices involves consultation and involvement with Indigenous people, as well as the sharing of benefits.

Legal requirements concerning access to land and the resources found upon it do not necessarily reflect Indigenous (or 'customary' laws) when it comes to dealing with land. For example, the Indigenous group responsible for their land under their own laws may not control access to a land or even have a legal interest in the land. This does not mean they should not be consulted. No matter what the land tenure, natural resource managers should always make efforts to contact the Indigenous group or groups affiliated with the land.

Section 6
Protocols, Guidelines & Policy

There are a range of protocols, guidelines and policies that relate to ICIP, and TK and may be of use for IEK management projects. Protocols in particular may provide an example of best practice when dealing with Indigenous people and knowledge. Protocols are not legally enforceable unless included or referred to in a contract. Kathy Bowrey has discussed the curious role of protocols in the protection of traditional knowledge:

> Protocols are prescriptive – in that they prescribe particular types of behaviour. They also have the capacity to convey a mode of behaviour that institutions and individuals are presumed to follow. Protocols prescribe modes of conduct through emphasizing or normalizing particular forms of cultural engagement. Whilst this effect is not assured, over time protocols do have the capacity to influence change in ways that differ to stringent bureaucratic or legislative programs. Protocols are part and parcel of repositioning certain agendas. They are ostensibly based in choice and therefore less than law as command. It is true that an individual, or even an institution either chooses to follow them or not. But this is also true of positive law…[272]

She concludes: 'The challenge is of allowing for productive 'private' negotiations that can present as alternative and distinctive, without allowing the formal legal order to presume that the indigenous case always falls outside of its categories and power.'[273]

6.1 The Commonwealth Department of the Environment, Water Heritage, and the Arts

- *Caring for Our Country* - are guidelines for Indigenous participation in Natural Resource Management. Published by the National Heritage Trust.[274]
- *Natural Heritage Trust- Indigenous Knowledge Forum Workshop Outcomes-* [275]
- *Working with Indigenous Knowledge in Natural Resource Management-Guidelines for Regional Bodies*[276]-

[272] Kathy Bowrey, "Alternative Intellectual Property? Indigenous Protocols, Copyleft and New Juridifications of Customary Practices", *Maquarie Law Journal*, 2006, Vol. 6, p. 65-95 at p. 84, http://www.law.mq.edu.au/html/MqLJ/volume6/06Bowrey.pdf
[273] Ibid, p. 95.
[274] Australian government- Caring for our Country, http://www.nrm.gov.au/publications/guidelines/indigenous-participation.html, viewed 18 July 2008.
[275] http://www.environment.gov.au/indigenous/publications/pubs/workshop.pdf
[276] http://www.environment.gov.au/indigenous/publications/pubs/guidelines.pdf

Commissioned by the Natural Resource Management Board (NT).

6.2 National Parks and Wildlife Commission (NPWC)

The NPWS (within NRETA) developed a draft cultural protocol manual for interpretive signage and use of TK in 2000; "Aboriginal Cultural Interpretation Guidelines for the NT", March 2000. It was created with input from the Northern Land Council and the Central Land Council for joint management. The document had some very useful recommendations - namely use of written agreements, copyright notices, and consultation with traditional owners re: interpretative signage.

During discussion we were also advised that some 30 parks will be handed over to traditional owners and leased back to the Government. There will be more schedule 3 parks.[277] Indigenous land use agreements (ILUAs) will operate so that Land Councils will have more control. Hence, protocols will need to be implemented and followed and the inclusion of ICIP principles might better protect IEK, through access contract conditions.

6.3 Desert Knowledge CRC

6.3.1 DK-CRC Intellectual Property Protocols

The Desert Knowledge Cooperative Research Centre has developed Aboriginal knowledge and Intellectual Property protocols and research engagement protocols.

The *Desert Knowledge CRC Protocol for Aboriginal Knowledge and Intellectual Property* stresses the need for persons and organisations engaging with Indigenous people to follow best practice regarding:

- Ethics;
- Confidentiality;
- Free and prior informed consent of indigenous knowledge holders; and
- The use of benefit sharing agreements.

The protocols give guidance on appropriate procedures for surveying, scoping, collecting, storing, accessing and publishing data relating to Aboriginal intellectual knowledge, practices, personal and other information. [278]

The research engagement protocol elaborates on certain basic principles contained in the more general knowledge and IP protocol. Issues such as prior informed consent, the importance of participation of Aboriginal people, and benefits accruing from research carried out on Aboriginal lands are addressed in more detail.[279]

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[277] Schedule 3, *National Parks and Wildlife Act 1974*, http://www.austlii.edu.au/au/legis/nsw/consol_act/npawa1974247/sch3.html. viewed 18 July 2008.
[278] *Desert Knowledge CRC Protocol for Aboriginal Knowledge and Intellectual Property,* http://www.desertknowledgecrc.com.au/socialscience/downloads/DKCRC-Aboriginal-Intellectual-Property-Protocol.pdf, viewed 29 August 2008.
[279] http://www.desertknowledgecrc.com.au/socialscience/socialscience.html, viewed 17 July 2008.

Commissioned by the Natural Resource Management Board (NT).

6.3.2 Case Study: Waltja Tjutangku Palyapayi Aboriginal Corporation – Pay Scale

The Desert Knowledge Cooperative Research Centre (DKCRC) partners the project 'Research Nintiringtjaku' with Waltja Aboriginal Corporation for employment and professional development of Aboriginal people who support research in and with their communities. A group of potential Aboriginal researchers are drawn from over 9 language groups and 30 settlements. These researchers are listed on a database so that DKCRC researchers can engage RN researchers in settlement of their work.

Waltja Tjutangku Palyapayi Aboriginal Corporation and DKCRC developed a pay scale for Aboriginal Researchers. This makes sure that the range of skills of Aboriginal participants at different levels in research is recognised. For example, a Cultural mediator/cultural knowledge expert: 1) Expert - $35 per hour or $245 per day, 2) Senior Expert - $45 per hour or $315 per day.[280]

6.4 Australia Council for the Arts

The Australia Council has a number of protocol booklets relating to Indigenous arts and media available on its website.[281]

These are well used within the Australian arts industry, and are being adapted by Arts Tasmania for specific arts issues in that State. Canadian Aboriginal artists are also in the process of adapting the protocols for their use. The protocols are useful as a guide, and are made binding by way of funding grant conditions.

6.5 Land Councils – CLC and NLC

The Central Land Council uses a number of protocols designed to protect the intellectual and cultural property rights of Indigenous people. They are tied into its permit application system to ensure persons and organisations who are entering Aboriginal land engage appropriately with people and resources they come into contact with. The protocols are made enforceable under contract law in this way. Anybody accessing Aboriginal land under the permit system for the following special purposes must apply in writing and agree to the conditions imposed by the relevant permit:

- General research;
- Anthropological research;
- Organised tourist activity;
- Archaeological work;
- Environmental and conservation activities;
- Linguistic work; and
- Photography, film, recording and media.

[280] Desert Knowledge CRC, www.desertknowledgecrc.com.au/socialscience/socialscience.html, viewed 7 January 2009
[281] Australia Council for the Arts, http://www.australiacouncil.gov.au/publications/indigenous, viewed 20 October 2008.

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CLC protocols are permit based although there are four strands which pick up on research being done on ecological knowledge. See CLC's Project Principles and Special Purpose Permits.[282]

All protocols in their respective permits can be found at the CLC website.[283]

Unfortunately recent changes to the Land Rights Act mean the permit system currently does not apply to communal areas, roads, airstrips and certain other places. Further amendments are predicted under the current Federal Labor Government (see ALRA in section 3).

6.6 NAILSMA

The North Australian Indigenous Land & Sea Management Alliance (NAILSMA) has developed interim protocols for NRM projects involved in the transfer of Indigenous Ecological Knowledge or "Talking Culture on Country"[284], and Guidelines and Protocols for the Conduct of Research.[285] It is a two page protocol including informed consent, participation benefits, Aboriginal culture and intellectual property rights, methodology, photography, film and recording, publication and dissemination of research. As with the protocols developed by other NT bodies such as the CLC and DK-CRC, there is a focus on:

- Participation of Indigenous people;
- Prior Informed Consent; and
- Benefit Sharing.[286]

The 2007 Northern Australian Indigenous Land and Sea Management Alliance Guidelines and Protocols for the conduct of Research represent an important resource.[287] NAILSMA endorses and expects researchers to comply with the AIATSIS 2000 Research Guidelines.

6.7 AIATSIS Guidelines for Ethical Research

The Australian Institute of Aboriginal and Torres Strait Islander Studies Guidelines for Ethical Research in Indigenous Studies are… "founded on respect for Indigenous peoples' inherent right to self-determination, and to control and maintain their culture and heritage".[288] It outlines the principles for ethical research and provides Guidelines for implementation of these principles of ethical research. With respect to intellectual property rights the

[282] Central Land Council, http://www.clc.org.au/permits/specialpurpose.asp, viewed 17 July 2008.
[283] Central Land Council, http://www.clc.org.au/media/publications/protocols/protocols.asp, viewed 17 July, 2009.
[284] http://www.nailsma.org.au/projects/iek.html, viewed 17 July 2008.
[285] http://www.nailsma.org.au/publications/nailsma_research_guidelines_and_protocols.html
[286] This document appears to adapted from Michael Davis's protocols drafted for CLC and the Desert Knowledge Co-operative Research Centre. <ww.nrmbnt.org.au/files/iek/Interim%20protocols%20for%20IEK%20projects.pdf>.
[287] http://www.nailsma.org.au/publications/nailsma_research_guidelines_and_protocols.html, viewed 29 August 2008.
[288] http://www.aiatsis.gov.au/__data/assets/pdf_file/2290/ethics_guidelines.pdf, viewed 17 July 2008.

guidelines are silent on copyright ownership but a principle relating to Indigenous intellectual and cultural property as follows:

> **The intellectual and cultural property rights of Indigenous peoples must be respected and preserved.**
>
> *Indigenous cultural and intellectual property rights are part of the heritage that exists in the cultural practices, resources and knowledge systems of Indigenous peoples, and that are passed on by them in expressing their cultural identity.*
>
> *Indigenous intellectual property is not static and extends to things that may be created based on that heritage.*
>
> *It is a fundamental principle of research to acknowledge the sources of information and those who have contributed to the research.*

The ethics guidlines are currently being updated and revised under the aegis of the AIATSIS Council. These appear to be the leading ethics framework used by most universities so input into the update to include the NRMB draft protocol principles is strongly recommended.

6.8 Aboriginal and Torres Strait Islander Protocols for Libraries (ATSILRN)

The Aboriginal and Torres Strait Islander Library and Information Resources Network (ATSILRN) has developed the *Aboriginal and Torres Strait Islander protocols for libraries, archives and information services*.[289] These protocols provide a guide to appropriate ways of interacting with Aboriginal and Torres Strait Islander people in the communities, and to handling materials with Aboriginal and Torres Strait Islander content.

They include protocols for dealing with content and issues surrounding the management of sacred material, accessibility on use, and Indigenous cultural and intellectual property issues. Further, there are principles relating to education, training and staffing. [290]

The protocols propose that the primary rights of the owners of a culture must be recognised by libraries, archives and information services; as follows:

2.1 These should adopt strategies to become aware of the issues surrounding cultural documentation and the need for cultural awareness training;

[289] Byrne, Alex, Garwood, Alana, et al*, Aboriginal and Torres Strait Islander protocols for libraries, archives and information services*, endorsed by Aboriginal and Torres Strait Islander Library and Information Resources Network (ATSILIRN), 1995, available on-line at < http://www.cdu.edu.au/library/protocol.html>

[290] 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.

Commissioned by the Natural Resource Management Board (NT).

2.2 Develop proper professional recognition of the primary cultural and intellectual property rights of Aboriginal and Torres Strait Islanders and consult with their representatives; and

2.3 Develop ways, including the recognition of moral rights, to protect Aboriginal and Torres Strait Islander cultural and intellectual property; and

- Share information on initiatives involving cultural documentation.

6.9 Draft NPWS/CLC joint management protocol (Leon Tyrell protocols)

To guide the joint management of Northern Territory Parks and Reserves by Parks and Wildlife Service (PWS) and Land Councils, a written protocol document is to be drafted to establish procedures in relation to Indigenous knowledge and IP in jointly managed parks and reserves in the NT. Given that there are to be a number of jointly managed parks under land management arrangements, the protocol could be of great significance. A discussion draft document by Leon Terrell (CLC lawyers) was provided to us. The document uses the term 'Aboriginal Knowledge and Intellectual Property' to refer to the cultural heritage of Aboriginal people, as defined by Aboriginal people. The term embraces the totality of Aboriginal cultural heritage. A set of categories are listed, although non-exhaustive, and the document recognises that the different categories require different procedures:

- Ethnographic information and sacred sites clearances;
- Recording of traditional songs, stories and poems;
- Recordings of oral histories, stories about Aboriginal culture and life;
- Recordings of eco-knowledge;
- Biological resource harvesting;
- Art, including rock art;
- Languages and words;
- Products that incorporate Aboriginality;
- Performances of music, dance, song and poetry;
- Artefacts and human remains;
- Filming and photography; and
- Research.

The document sets out principles for dealing with the above categories. It suggests an overarching agreement between PWS and CLC, deals with the ownership of any intellectual property in materials incorporating traditional knowledge, created by either party. Presumably the IP will vest in the CLC, on trust for traditional owners. The document also has protocols and procedures for dealing with recordings of traditional songs, stories and poems. For instance, it states that 'traditional stories should only be published after appropriate informed consultation, and where they are published, the authorship should be acknowledged in accordance with instructions, which may require group attribution.'

Commissioned by the Natural Resource Management Board (NT).

The document notes that procedures for dealing with 'recordings must be consistent with IP law, but also provide for appropriate control by Aboriginal owners regardless of who owns the formal intellectual property.'[291] The intention, here seems to be to recognise that even alongside copyright, there is another level of rights which require clearance from traditional owners of AKIP. The document proposes that clearances be obtained through the CLC who will store and administer the recordings as part of their statutory role in recording land ownership information.[292] Under the guidelines, the CLC will own the copyright in written recordings by the CLC and PWS staff and contractors, on behalf of the Aboriginal owners and store recordings in accordance with established procedures. Access and publication of the recordings is subject to consent being obtained by traditional owners.

Some questions that arise from the current draft are: what about the moral rights of the copyright material form creators? Also, performers have moral rights which need to be considered in the protocol. Another issue relates to the individual informant or traditional knowledge holder who provides the oral information that is recorded in the recordings – should these people have control over the use of the recordings they contribute to directly.

6.10 International Federation of Pharmaceutical Manufacturers & Associations (IFPMA)- Guidelines for Members on Access to Genetic Resources and Equitable Sharing of Benefits Arising out of their Utilization

The IFPMA is a non-profit organisation representing national industry associations and companies in the field of pharmaceutical biotech and vaccine research and development. The IFPMA's member companies include pharmaceutical giants such as Pfizer, GlaxoSmithKline and AstraZeneca.

The IFPMA has developed guidelines for its members on accessing genetic resources and equitable benefit sharing which support the objectives of the Convention on Biological Diversity.[293] The Guidelines encourage 'industry best practice' by gaining Prior Informed Consent and using formal benefit sharing contracts when using traditional knowledge that is associated with genetic resources. The Guidelines also include a statement encouraging members to avoid any actions that would impede the 'traditional use' of genetic resources.

The IFPMA calls for several enabling steps by Government, including the establishment of 'focal points' which should 'establish clearly which indigenous groups…possess rights to authorize access to particular genetic resource(s)'. The Guidelines go on to suggest that such

[291] Leon Terrell, Northern Territory Parks & Reserves, Aboriginal Knowledge and Intellectual Property Protocol,' Page 4, Draft for Discussion, 4 December 2007.
[292] Page 5.
[293] International Federation of Pharmaceutical Manufacturers & Associations, *Guidelines for IFPMA Members on Access to Genetic Resources and Equitable Sharing of Benefits Arising out of their Utilization*, http://www.ifpma.org/Issues/index.php?id=744 , viewed 17 December 2008.

focal points would serve to provide transparency and certainty to industry, and that they could establish databases to record the existence of genetic resources and its uses.

6.11 International Society of Ethnobiology- Code of Ethics

The International Society of Ethnobiology (ISE) is an association based in the US committed to achieving and promoting an understanding of the relationship between human societies and their environments. A core value of the ISE is the 'recognition of Indigenous peoples as critical players in the conservation of biological, cultural and linguistic diversity'.[294]

The ISE has developed a Code of Ethics which 'provides a framework for decision making and conduct for ethnobiological research and related activities', and is binding on its members.[295] The goals of the Code are to encourage and facilitate positive and equitable relationships between researchers and indigenous peoples based on meaningful collaborations and respect. The Code includes an explanation of the 17 principles listed below along with 12 practical guidelines and a glossary.

i. Prior rights and responsibilities
ii. Self-determination
iii. Inalienability
iv. Traditional guardianship
v. Active participation
vi. Full disclosure
vii. Educated prior informed consent
viii. Confidentiality
ix. Respect
x. Active protection
xi. Precaution
xii. Reciprocity, mutual benefit and equitable sharing
xiii. Supporting Indigenous research
xiv. The dynamic interactive cycle
xv. Remedial action
xvi. Acknowledgement and due credit
xvii. Diligence.[296]

[294] International Society of Ethnobiology, http://ise.arts.ubc.ca, viewed 16 December 2008.
[295] International Society of Ethnobiology, http://ise.arts.ubc.ca, viewed 16 December 2008.
[296] International Society of Ethnobiology, *International Society of Ethnobiology Code of Ethics (with 2008 additions)*, http://ise.arts.ubc.ca/global_coalition/ethics.php , viewed 16 December 2008.

Commissioned by the Natural Resource Management Board (NT).

6.12 The Society for Economic Botany, Inc

The Society for Economic Botany is a US based non-profit organisation whose members include over 1000 entities involved in research, education and other activities to do with the 'past, present and future use of plants'.[297] The Society has adopted 'Guidelines of Professional Ethics, available at their website.

6.13 World Wide Fund for Nature

The World Wide Fund for Nature is an international agency that WWF has collaborated with many world Indigenous peoples and their organizations on activities such as conservation area management, sustainable use of natural resources and policy advocacy. Drawing from its past experiences, and as a guideline towards its future work, the WWF has a statement of principles entitled *Indigenous peoples and conservation: WWF Statement of Principles* which were originally drafted in 1996, and updated in 2007. In working with Indigenous people's knowledge the statement notes:

> With respect to the existing knowledge of indigenous communities, prior to starting work in a particular area, WWF will establish agreements with the indigenous organizations representing local communities, to ensure that they are able to fully participate in decisions about the use of knowledge acquired in or about the area they inhabit, and equitably benefit from it. These agreements will explicitly determine the ways and conditions under which WWF will be allowed to use such knowledge.'[298]

6.14 International Standard for Sustainable Wild Collection of Medicinal and Aromatic Plants (ISSC-MAP)

In 2007 the Medicinal Plant Specialist Group of the IUCN's Species Survival Commission launched this Standard to promote the sustainable management and trade in wild medicinal and aromatic plants. Principle 4 of the Standard, 'Respecting Customary Rights' states:

> …indigenous people's customary rights to use and manage collection areas…and resources shall be recognised and respected.[299]

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[297] The Society for Economic Botany, Inc, www.econbot.org, viewed 29 December 2008.
[298] World Wide Fund for Nature, *Indigenous peoples and conservation: WWF Statement of Principles,* http://assets.panda.org/downloads/183113_wwf_policyrpt_en_f_2.pdf, viewed 17 November 2008.
[299] Medicinal Plant Specialist Group, Principle 4, *International Standard for Sustainable Wild Collection of Medicinal and Aromatic Plants (ISSC-MAP*). Version 1.0. Bundesamt für Naturschutz (BfN), MPSG/SSC/IUCN, WWF Germany, and TRAFFIC, Bonn, Gland, Frankfurt, and Cambridge (BfN-Skripten 195), 2007. Available online at http://www.floraweb.de/map-pro/Standard_Version1_0.pdf , viewed 7 January 2009.

Commissioned by the Natural Resource Management Board (NT).

Principle 4 goes on to state that indigenous peoples should maintain control over MAP collection operations and share in the benefits. The Standard contains a useful table of indicators by which compliance with the Standard should be judged.[300]

6.15 Language use protocols

In consultation with the groups it was noted that researchers should acknowledge the community and language of those being researched. Language belongs to the community. The researchers need to acknowledge the community as the source. Language recording is ultimately for the benefit of the community. In our consultations, one commentator noted that 'Language researchers blow in and blow out'. Issues that the community need to know is where records are going to be deposited. The *National Indigenous Languages Survey Report 2005* written by AIATSIS and FATSIL noted that '…over 100 Australian Indigenous languages are currently in a very advanced stage of endangerment and will cease being spoken in the next 10–30 years if no decisive action is taken.'[301] The recording of language involves many references to natural resource management including plant and animals names etc. A range of protocols to protect and recognise language maintenance should be considered as part of the NRM management.[302]

6.16 Protocols for people involved in commercial bush foods

The Australian Bushfoods Industry makes wide use of Indigenous knowledge and resources, and a concern for many Indigenous people is that commercialisation is occurring without their involvement or proper acknowledgement of Aboriginal Traditional knowledge or Aboriginal custodial ownership. Also, they are concerned that there is a lack of proper consultation with Aboriginal people by researchers and industry participants, and that as well there are limited opportunities available for Aboriginal people in employment, training and governance. To address these issues, the Merne Altyerr-ipenhe (Food from the Creation time) Reference Group is in the process of developing protocols for people involved in commercial bush foods.

[300] Medicinal Plant Specialist Group, Principle 4, *International Standard for Sustainable Wild Collection of Medicinal and Aromatic Plants (ISSC-MAP*). Version 1.0. Bundesamt für Naturschutz (BfN), MPSG/SSC/IUCN, WWF Germany, and TRAFFIC, Bonn, Gland, Frankfurt, and Cambridge (BfN-Skripten 195), 2007. Available online at http://www.floraweb.de/map-pro/Standard_Version1_0.pdf , viewed 7 January 2009.
[301] http://www.arts.gov.au/__data/assets/pdf_file/35637/NILS_Report_2005.pdf, viewed 16 November 2008.
[302] See Federation of Aboriginal and Torres Strait Islander Languages (FATSIL) – www.fatsil.org.

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6.17 Summary

There are already a range of protocols in Natural Resource Management developed in Australia including the NRMB Interim protocols, the Desert Knowledge Cooperative Research Centre protocols, the various land council protocols and the WWF Statement of Principles.

Ethics protocols and research ethics need to be tightened regarding enforcement. How effective are they though? Are they legally binding? What recourse does a person have if their knowledge is used in a way that was not disclosed at the outset?

Use of IEK for research and educational purposes seems to be a suitable use of traditional knowledge especially when it is school based. This is being done already with traditional plant knowledge. There may be different issues for consent when the documents created from research are published. Protocols for research must make this distinction and create consent processes which acknowledge the different ways that knowledge can be used.

Implementing protocols and guidelines for NRM practitioners in various fields should be encouraged. This is the most practical way of ensuring IEK is dealt with appropriately in the immediate future. Enforcement of these by contractual obligations via permit or funding agreement can also be achieved.

Section 7
Archives, Museums & Libraries

Archives, museums, libraries and other information services collect, store and manage Indigenous Ecological Knowledge. Collected over the past 200 years, there are records including documents, cultural objects, tapes and films. In many cases, these records contain important cultural practices and knowledge. Access to these records is important for Indigenous people to strengthen their cultural practices. Whilst copyright controls the copying of these articles deposited and held in these institutions, there are laws and policies which govern how the archives, museums and libraries deal with Indigenous cultural materials. A number of protocols have also been developed by collecting institutions to guide the management of their Indigenous cultural materials.

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 constitute an extensive resource for the study of Australian history, Australian society and the Australian people. The Australian Archives also notes 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.[303] 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 notes:

> *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, 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 the Indigenous community on this issue.*

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.

[303] Section 33(1)(g), *Australian Archives Act 1983* (Cth)

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This chapter will examine cultural institutions laws, policies and protocols.

7.1 Australian Institute of Aboriginal and Torres Strait Islander Studies

The Australian Institute of Aboriginal and Torres Strait Islander Studies (AIATSIS) is established under the *Australian Institute of Aboriginal and Torres Strait Islander Studies Act 1989* (Cth) to undertake, publish and promote Aboriginal and Torres Strait Islander studies. AIATSIS maintains Australia's largest collection of Indigenous materials including manuscripts, field notes, published books, films and sound recordings.[304] Section 41(2) of the *Australian Institute of Aboriginal and Torres Strait Islander Studies Act 1989* aims to protect Indigenous cultural interests by prohibiting AIATSIS from disclosing:

- information deposited under conditions of restricted access accept in accordance with those conditions; and
- information inconsistent with the views or sensitivities of relevant Aboriginal persons or Torres Strait Islanders.

Much of the research materials held at AIATSIS was written or recorded by persons other than the relevant Indigenous owners. Hence, the copyright in the material is controlled by people who are not cultural custodians. The right of Indigenous people to deal with, or be consulted with how that information is used is not provided for by the *Copyright Act 1968*.

To illustrate this point, one can examine the copyright of films. Under general Australian copyright laws, the maker of a film or the funding body, is the sole owner of copyright in a film. If someone wants to copy the film, they would only be required to get the permission of the copyright owner. The film may depict cultural knowledge being told by an Indigenous knowledge holder. To make a copy of the film, only the consent of the copyright owner is required. Usually, this is the filmmaker. Under copyright laws, there is no obligation to seek permission from the Indigenous group for use of the film, the knowledge or to reproduce the image of the Indigenous knowledge holder. Copyright does not protect ideas, concepts or information which is not recorded in a material form. Other than performer's rights, there is no copyright in a person's image. However, Indigenous cultural protocols require recognition of ownership of knowledge and cultural expression. This would include not only the right of attribution and integrity, but also consent for use. Section 41 of the *AIATSIS Act* allows AIATSIS to manage the information if the depositor of the information had placed conditions on the information being disclosed, and also if the information was inconsistent with the sensitivities of relevant Indigenous people.

According to the AIATSIS Audio-Visual Policy published on the AIATSIS website, whilst this section aims to restrict disclosure of secret/sacred or personal material, it has 'allowed copyright owners, many of whom are non-Indigenous, to place restrictions on material for other reasons, such as pending publication. Such restrictions are contrary to AIATSIS'

[304] Section 5, *Australian Institute of Aboriginal and Torres Strait Islander Studies 1989 (Cth)*

current objectives. Materials restricted for reasons other than their secret/sacred or personal content are no longer accepted into the collection.'[305]

In 2005, AIATSIS developed an audio-visual access policy which requires not only consent from copyright owners, but also the Indigenous community which is the subject of recordings, photographs and films, before publication of that material is allowed. The AIATSIS Audiovisual Archive Code of Ethics states:-

> *10.3.2 Access to the collections*
>
> (a) The rights of the legal copyright owner will be respected. The Audiovisual Archive also recognises the rights of Indigenous communities and individuals, who are the owners of most of the knowledge contained in the collections. Every attempt will be made to provide access to the collections in accordance with the wishes of the copyright owner(s) and Indigenous owner(s).
>
> (b) Copies of material will only be provided for publication purposes if the requestor has consulted with the relevant Indigenous community or individual(s) and has received written permission to proceed, even in such cases where the copyright owner has approved publication.[306]

This approach encourages consultation at all levels, between the researcher, the relevant Indigenous subjects of studies and AIATSIS staff.

7.2 National Museum of Australia

The National Museum of Australia has statutory functions under the *National Museum of Australia Act 1980* (Cth) to develop and maintain a national collection of historical material, to exhibit material which relates to Australia's past, present and future.[307] Section 5 establishes an Aboriginal and Torres Strait Islander Gallery and empowers the Museum to make policy to secure the development and maintenance of the Gallery. In 2006, the Museum established its Secret Sacred and Private Materials Policy. The policy has principles and guidelines relating to housing of the collection, access to the collections, conduct in the keeping place and repatriation. The policy has principles and guidelines relating to housing of the collection, access to the collections, conduct in the keeping place and repatriation. The policy also states that 'Any research undertaken on secret/sacred and private materials held on behalf of communities must have the prior consent of traditional custodians or

[305] Australian Institute of Aboriginal and Torres Strait Islander Studies, Audio-visual Archives Collection Management Policy, Canberra, 2005, http://www.aiatsis.gov.au/audiovisual_archives/audiovisual_archives_collection_management_policy_manual/access_policy, viewed 13 August 2008.

[306] Australian Institute of Aboriginal and Torres Strait Islander Studies, Audio-visual Archives Collection Management Policy, Canberra, 2005, http://www.aiatsis.gov.au/audiovisual_archives/audiovisual_archives_collection_management_policy_manual/code_of_ethics, viewed 29 August 2008.

[307] Section 6 of the *National Museum of Australia Act 1980* (Cth)

those authorised by them. All research will comply with recognised and appropriate ethical research guidelines.'[308]

The Museums of Australia Association has developed a national museum policy for Indigenous materials called *Continuous Cultures, Ongoing Responsibilities*. The policy requires its member museums to conform to its Code of Ethics which includes standards of ethical practice with regards to the acquisition, display, research and disposal of Aboriginal and Torres Strait Islander peoples' cultural materials and ancestral remains, and with regard to professional conduct.'[309]

7.3 Strehlow Research Centre

The Strehlow Research Centre is an interesting case study because it was set up to maintain Aboriginal cultural objects collected by the late Professor TGH Strehlow. Established under its own legislation, the *Strehlow Research Centre Act 2005* (NT), the Centre's functions include:

- housing and maintaining 'cultural, historical and anthropological significance owned by the Territory '; and
- providing 'secure and restricted storage facilities for elements of the collections and objects' that are culturally sensitive'. [310]

The collection includes objects, film, sound recordings and archival materials about Aboriginal men's sacred and secret ceremonies. The Website notes that the display of this information may cause distress or offence to Aboriginal people.

A collection policy was developed in 2007 which covers access policy, includes an application form and two template licence agreements to use the materials: one is for access to secret sacred material and personally sensitive information and the other is for general material.[311]

To access the collection, a written request must be made to the Director. Research on the Collection is at the discretion of the Board who will take into account 'the sensitivity of the material involved, and the wishes and views of the Traditional Custodians of that material, in making a determination on access.' [312]

[308] National Museum of Australia, *Aboriginal and Torres Strait Islander secret/sacred and private material policy*, 23 May 2006.
[309] Museums Australia Inc., *Continuous Cultures, Ongoing Responsibilities: Principles and guidelines for Australian museums working with Aboriginal and Torres Strait Islander cultural heritage*, February 2005.
[310] Section 6 of the *Strehlow Research Centre Act 2005* (NT)
[311] Strehlow Research Collection Policy 2007, http://www.nt.gov.au/nreta/museums/strehlow/pdf/collection_policy.pdf, viewed 30 January 2009.
[312] Strehlow Research Centre, 'Researcher Access to the Strehlow Archives', http://www.nt.gov.au/nreta/museums/strehlow/archives.html, viewed 30 January 2009.

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This Centre was established under *sui generis* Northern Territory legislation in 1988; The Strehlow Research Centre Act. The Strehlow Centre building opened in Alice Springs in 1991. The original aim of the Centre was to centralise and preserve Strehlow's diverse ethnographic collection of ceremonial artefacts, photographs, films, recordings, genealogies, field and personal dairies and letters; a 'keeping place'. At the time there was controversy and debate amongst some Indigenous groups and organisations about the value of a repository that did not allow for repatriation or encourage Aboriginal participation in the development of the Centre. Nearly twenty years on, the major work of preserving and archiving the collection has been virtually completed and the focus appears to be turning to making the collection accessible through indexing it and cross-referencing materials with supporting materials. To this end, the Act was revised in 2005 to allow for repatriation. The first successful repatriation, the return of shields and tjurunga (all male ceremonial objects), took place in mid 2008. In late 2008 there were another 10 possible repatriation claims potentially waiting to be processed. Establishing the unique provenance of objects and identifying those with contemporary rights requires extensive research, which typically includes linking requesters with genealogies, film footage or photos and written ethnographic evidence.

This refocused SRC has also led to the engagement of a contract staff member to specifically process requests for genealogies. Since May 2008 there has been a 30% increase in requests, usually from women, for family genealogies. This new social history role has the potential to engage the, principally Arrernte, Aboriginal community, as perceptions gradually change. However, if the SRC is to shift from being a research centre for non-Indigenous people (there is also an open access library) to a resource centre for Aboriginal people then it seems clear that a suite of formal policies are required. Such policies would include an Indigenous access protocol and access agreement and the development of an Aboriginal committee to advice on the future direction of the Centre and its approach to repatriation. The minister also still has the ultimate power to decide whether objects leave the centre.

7.3.1 Archival Research General Access Form

Applications can be made online. The Archival Research General Access Form asks for details of the applicant, the project outline and to clearly state the material you seek to access. The following notice also appears on the form:

> *Due to the culturally-sensitive nature of some material held at the Strehlow Research Centre, many items can only be accessed by men, Aboriginal people and/or those directly acting on behalf of Aboriginal people.*

The applicant must also answer the following questions:

- Are you aware that you may need to consult with the Aboriginal community regarding access to some items in the Strehlow Collection?

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- Are you aware that the SRC may require you to sign a Deed of Confidentiality?
- Are you aware that the SRC may charge you for some services?

7.3.2 Deed of licence forms

The NT government asserts ownership of the physical material and the copyright in the materials. Under the deed, the NT Govt grants a non-exclusive licence to the successful applicant researcher to use the materials on limited terms. The researcher must agree to comply with these conditions. For the deed relating to sacred secret material, the researcher must not disclose the material to any other person. The deed requires the researcher to provide an indemnity to the NT government that it will do so. An indemnity is a security against loss. This means that if the NT government suffers damage or loss from the publication or dissemination of sacred secret information, the researcher will be financially responsible.

The Strehlow Model is useful to consider for management of IEK materials. The policy is comprehensive in its use of copyright and contract legal frameworks. Although, there is no formal recognition that the cultural material belongs to the traditional custodians, the role of the NT government is stated to be one of trustee over cultural materials collected and created by Strehlow. The Board consists of Kathleen Stuart Strehlow or her nominee, while Kathleen Strehlow lives, and 6 other members appointed by the Minister of whom one must be appointed to represent the interests of Aboriginal people (ie the do not have to be Aboriginal)[313]

While it is the stated policy of the board to consult traditional custodians regarding access to the materials, the traditional custodians can express their concerns, but ultimately the decision rests with the Board.

In 2008, the Board approved an IEK Project undertaken by Theresa Nano, to access the Strehlow fieldnotes of Strehlow to check for IEK management practices.

7.4 National Library of Australia

Established under the *National Library Act 1960* (Cth), the functions of the National Library includes maintaining and developing a national collection of library material relating to Australia and the Australian people, and to make that material available to people and institutions, such to conditions determined by the library.[314] The library holds manuscripts, books and audio recordings, many of which relate to Indigenous knowledge.

[313] See the Strehlow Research Centre Act: http://www.austlii.edu.au/au/legis/nt/consol_act/srca2005261/
[314] Section 6 of the *National Library Act 1960* (Cth)

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7.4.1 Bringing them home oral history project

As part of their focus on oral histories, the library manages the Bringing them Home Oral History project, which records and stores the oral stories of many of the stolen generation. The management and collection issues relating to this project may provide some useful guidance for the collection and management of IEK is that is collected in sound recordings.

For the Bringing Them Home Oral History Project the National Library of Australia (NLA) used a form that seeks permission for oral stories to be housed in the NLA collection. The NLA wanted to respect the sensitivity of the material. The recordings are only available for research with consent of the speaker. None of the recordings are made available online. The form includes a clause which asks the speaker to name a person who can speak for their recording after they die, or if they are unable to respond to any requests. The clause states: In the event of my death, the following person is named as next of kin.[315]

To recognise that the speakers owned their stories, the form included a term recognising that the copyright in the transcript belongs to the speaker. This means that if someone wanted to publish it, they would need to get the consent of the speaker. Another clause also sets out that the copyright in the recording belongs to the NLA and limits the library's use of the recording.

With other recordings deposited in the NLA collection, a standard deposit form is used which allows depositors to set conditions of access. For example, I tried to access an oral recording by a Torres Strait Islander woman taken by Dr Karl Neuenfeldt. I requested a copy of the recording online, then library staff contacted me advising I need to get the consent of the speaker before the copy would be made available to me. This practice recognises the speaker has some right to control the use of their knowledge and stories.

Doreen Mellor, then coordinator of the Bringing them Home Oral History project says.. 'The NLA is careful about the Bringing them home records. There is a lot of material online for public use. Even though many people have agreed (given consent) that this material could go online, the NLA recognises that the material contains sensitive content. There are plans to publish some recordings online. However, participants will be consulted about the content to be included. Some participants have died, so next of kin as identified on the forms will be consulted.[316]

This example shows that when producing oral records it is important to keep the details of who is speaking and to use a form which deals with the rights given by the speaker. Without these details clearly provided, the NLA staff are reluctant to accept material where the speaker has not been advised of the deposit, and been made aware of terms of access to that recording by the general public. Practical measures like forms and consulting speakers can overcome these issues. But for older recordings, there are still many unresolved issues

[315] National Library of Australia, Bringing Them Home Oral History Project, Permission For Use Form, provided by Doreen Mellor.
[316] D. Mellor, telephone conversation with T. Janke, 30 January 2009.

such as identifying who is the speaker, and what consents were given to the recorderfor use and deposit of that recording.

7.5 National Film and Sound Archives

The *National Film and Sound Archive Act 2008* (Cth) sets up the NFSA as a body corporate. The NFSA manages a large Indigenous collection. There are over 16,000 titles at NFSA that have Indigenous content or reference. This is 3% of the title held by NFSA including sound and radio, image, multi-media and documentation titles.[317]

The collection comprises 'ethnographic material' — materials that depict traditional cultural ceremonies or practices as 'captured' from a scientific perspective both within (and outside) the research norms of the day. There are also commercial forms of media containing Indigenous performances, which have been produced and compiled with those being filmed having consented to the use of the material at least for the purpose it was originally filmed. For example, feature films with Indigenous actors form part of the collection.

NFSA's Indigenous materials policy sets out procedures for acquiring, handling, disposing of and providing access to materials with Indigenous content.[318]

> "In relation to Indigenous subject matter, sensitivities have greatest force when the works and other materials accessed include recordings and/or depictions of secret and/or sacred events recorded with or without permission. In the past, some Aboriginal peoples have given secret information to respected researchers, not realising that the information would be published and made available to the general public. In such circumstances, an item need not be readily available to everyone simply by virtue of its prior publication, and may require specific permission from the relevant peoples of association."[319]

Liz McNiven, Indigenous Curator from the NFSA said 'We want the Indigenous collection to be accessible but also sensitive to Indigenous cultural laws and protocols. To view a film that is unpublished, a person would need consent from the copyright holder. If there is any cultural sensitivity they also need to contact the traditional custodians, advising what the purpose is and ask for permission to view the film. If there is no cultural sensitive material in the film you can view it straight out.'[320]

[317] Mary Miliano, Archivist, Indigenous Collection, National Film and Sound Archive, email dated 14 August 2006.
[318] National Film and Sound Archive, *Indigenous materials policy*, copy provided to author by Mary Milano, then Project Manager, Aboriginal and Torres Strait Islander Collection, NFSA, Canberra 2003.
[319] National Film and Sound Archive, *Collection Policy and Statement of Curatorial Values*, September 2006, p. 34
[320] L. McNiven, telephone conversation with A. Charles, 4 February 2009

Commissioned by the Natural Resource Management Board (NT).

7.6 Land Councils (as registers)

Both the Northern and Central Land Council hold archival material including photographs, genealogies, records, field notes, sound recordings and films. This material includes IEK content. Some material is secret and sacred. Other information may never have been published. Access to these materials by staff, and by the public is a management issue.

Both the Central and Northern Land Council holds archival materials from 1976. The archives – referred to as the Land Interest Reference (LIR) systems - are closed to the public. Access by staff is subject to certain restrictions, notably the LIR staff consult with the regional anthropologist who mediate requests from other staff members if the issue concerns traditional ownership and land tenure. For in-house access between sections of the CLC, the person accessing the file must have clearance from the section where the record was made.

If a member of the public wants to access material they must submit a written request to the Director of the particular Land Council. The records do not leave the premises. The records unit says that they have not received any requests from the public to access IEK materials.[321]

According to the 2006 *Annual Report*, the archives are managed in accordance with the *Commonwealth Archives Act 1983* and according to the Records Management Association of Australia's Administrative Functions Disposal Authority (AFDA) schedules.[322] The NT Archives policies are also relevant.

The CLC must also protect personal information contained in its archives as it is subject to the Commonwealth *Privacy Regulations* 2003.

The CLC has a photo archive of 5000 pictures which is publicly searchable. These photos are mostly already published content from *Land Rights News*. A searchable unit in the foyer of the CLC main office allows access to the public to examine the collection. The Ara-Iritja model is used. A deceased warning notice appears on screen before the session of searching begins.

[321] Tel attendance on Margaret McAdam, Central Land Council, Records Unit, 3 February 2009.
[322] CLC, *Annual Report 2006*, http://www.clc.org.au/AboutUs/annual_report/clc_annualreport2006.pdf , viewed 3 February 2009, p. 56.

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7.7 NT Archives

The NT Archive is in Darwin. As the Commonwealth administered the NT from 1911 to 1978, the records held by the Archives office in Darwin hold considerable information about Aboriginal children removed from their families. These include Aboriginal population records, patrol officers reports and records about government run institutions that housed Aboriginal children. An MOU was developed in 1997 for open access commonwealth records (those that are over 30 years old). A register of wards and records relating to pastoral properties, health and education are also stored.

By virtue of the *Information Act 2002* the Northern Territory Archives Service has the responsibility to preserve and facilitate access to Territory archives and to coordinate standard recordkeeping practices for Northern Territory Government organisations. This includes CLC and NLC.

The oral history program recognises the importance of recording history of NT and a special unit provides assistance with the project, and offers custody of the final materials. The sound recording and a corrected copy of the transcript are deposited under permanent, safe storage conditions in the NTAS repository in Darwin. The interviewee is provided with a transcript.

A written agreement between NTAS and the interviewee sets out the terms of access. Registered researchers are allowed to inspect the material without restrictions but sometimes access can be limited for a number of years or made conditional on the interviewee's permission being obtained. There may be different conditions place on use where publication is intended.[323] According to the website, most researchers access the transcript, and this is clearly copyright of the interviewee. Copying of the materials is subject to copyright clearance.

7.8 Digitisation and Databases

Digitisation is one way that these records can be shared and made available to Indigenous communities. In recent years this has been done through the development of databases and other knowledge storage systems such as the Ara Iritja project. There are issues that arise with respect to Indigenous cultural protocols. To address these issues, some Australian cultural institutions have developed policy and protocols.

In the 2008 report *Australian Indigenous Digital Collections: First generation issues*, Martin Nakata and others investigated the issues faced by institutions when digitising Indigenous materials. A key finding of the report was that those digitising Indigenous material should ensure that those materials are readily accessible to Indigenous people. It also found that

[323] http://www.nt.gov.au/nreta/ntas/oralhist/index.html, viewed 3 February 2009.

digitisation should focus on materials that will enhance understanding of Indigenous pasts and improve Indigenous futures.[324] The report is the first step in a project that aims to deliver protocols for collection and digitisation of Indigenous materials.

There is no central database that supports the identification of IEK projects. In our consultations we were told that Steve Johnson is talking about developing a meta-level database. Any database must be of use to Indigenous people. There is a need to coordinate projects so that people can work with existing information on databases and support the recording of cultural knowledge, but also engage in on-country work. Our initial consultations uncovered a central question for traditional owners - is a database safe? They worry about who can access it and there are also the maintenance issues of being able to keep it up to date, safe and accessible within their community. The issue of moderated databases again raises its head.

A central depository for field notes is another consideration. Language centres discuss this issue with respect to linguists who keep notes off-country. They complain that these important cultural records are held in Universities or in linguists' offices without originals or at least mirror copies being deposited within archives at community or country levels. Communities want to have access to the raw data so that they can have primary data to work from. The question arises - when you write something down you make it available – you create copyright, and you can control who accesses it. One project manager noted that he was concerned about the recording of cultural information where IP is contractually assigned to the government. In these cases he is telling people not to put anything in writing so that there is no recording or material knowledge to create copyright. But this of course is near impossible and contrary to most research briefs. There will always be field notes, photographs and films generated. The work that researchers create may be on working files. These files may be subject to Archives laws, FOI laws and so forth – which will have a direct bearing on who can access them. Consider the role of the NT Commonwealth Archives Acts and University policy (CDU) given that NAILSMA is part of Charles Darwin University.

The question of who own copyright in field notes was dealt with by the Federal Court with respect to field notes made by anthropologist Michael Robinson in the native title case Daniels or *Ngarluma –Yindjibarndi*, and was also raised in *Jango* concerning Peter Sutton's field notes. Consider also that field notes contain IEK but also personal notes and records of the individual researcher (The *Evidence Act* redefined lines between opinion, expert and hearsay evidence). There are a number of ethical and sensitive issues that need to be considered from the point of view of the researched and the researcher. For example, the AIATSIS collection has many field notes deposited by researchers after they have well and truly completed research and even regular contact with the studied communities or individuals. Note that use of the audio-visual content is subject to clearance not just from copyright owner but also the Indigenous community.[325]

[324] Nakata, N. Martin and V Nakata, Dr A Byrne, J McKeough, G Gardiner, J Gibson, *Australian Indigenous Digital Collections: First generation issues*, UTS, 2008 available on-line at http://epress.lib.uts.edu.au/dspace/bitstream/2100/809/1/Aug%2023%20Final%20Report.pdf, viewed 17 November 2008.

[325] http://www.aiatsis.gov.au/audiovisual_archives/audiovisual_archives_collection_management_policy_manual, viewed 17 July 2008.

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Databases and reference systems available in the NT include the NLC land interest reference system. This is only available to internal staff including anthropologists, lawyers and field workers; LGNT has established layers of access. The issue is if there is a community portal should it allow open access, or multi-layered access. TAMI (Text, Audio, Movies and Images) system is a concept developed by researchers at CDU that could provide useful guidance in the development of new software. Ramingining Knowledge Centre was developing good storage and knowledge management practices - however after the Council took over the offices, the knowledge centre is without a 'site'. This is political reality where community councils decide how buildings are used and resources deployed. If the knowledge centre is not strongly supported in the community, it is hard to argue for its maintenance and ultimately its survival.

Case Study: Groote Eylandt Indigenous Knowledge Database

The Anindilyakwa Land Council from Groote Island has initiated the 'MemoryPlace' database, which is designed to store Indigenous knowledge in a variety of categories.[326]

Memory Place is a software project being developed by the Anindilyakwa Land Council, who represent the traditional owners of the Groote Eylandt archipelago in East Arnhem Land, for use in Indigenous communities on Groote Eylandt and in other communities. The software is being developed in close partnership with the NT Library.

> 'Memory Place is designed to store and present information and materials including but not limited to: clan songs and stories; modern music; historical and contemporary photos and videos; Indigenous plant and animal knowledge; totemic information; mapping data and information about places; photos and stories about art and crafts; information about people and clans. The first version of Memory Place contains a sub-set of the above, and later versions will expand on this.'
>
> 'Memory Place has been developed in response to the wishes of older Groote Eylandters to pass on cultural knowledge and language to younger generations, and provide a safe keeping place for records of the past, in a culturally sensitive and responsible way. Memory Place seeks to address the many challenges and current issues in the rapidly developing and converging fields of Indigenous Knowledge recording, and digital archiving in Indigenous communities.'[327]

Knowledge centre networks are a means by which knowledge and research can be controlled and accessed by Indigenous communities (see also the UNESCO Intangible Heritage Convention).[328] A local cultural centre is not just about Indigenous knowledge, but also includes images of paintings, data about looking after country, narratives on women's issues, men's knowledge and so forth. It is hard for it to be just dedicated to IEK. There is also an ontological conundrum, whereby the IEK categories established on a database along

[326] http://memoryplace.sourceforge.net/, viewed 20 January 2009.
[327] http://memoryplace.sourceforge.net/, viewed 20 January 2009.
[328] http://www.unesco.org/culture/ich/, viewed17 July 2008.

western knowledge systems (e.g. seed species) tend to dissect the holistic nature of Indigenous categories.[329]

Issues and challenges

Databases from such knowledge centres have an opportunity to be applicable to the practical needs of land managers, Land Councils and the IEK knowledge holders, themselves. Stories, connections on the ground and language maintenance are all addressed. Even public domain information can be re-claimed and represented on a database. Often it is about how it is presented and what is appropriate.

7.8.1 Heritage Mapping

The Uluru Heritage Mapping Database is supervised by Mick Sharkey from SA. They have been using it at the Tjibaou Centre in New Caledonia and in Vanuatu. An academic in NYU is also working on it. Wanen Canando (Rainforest project) Aboriginal Rainforest Council. They have found a home in Tropical Forest Centre. Henrietta Marrie is back at JCU (Centre for sustainable communities) and is working on a project for 'cultural mapping' (FNQ). 19 claims in world heritage area and the project is about teaching people to use GPS, maps and record what they want to know about their culture.

There are several new blue sky heritage mapping initiatives – including most recently the ANU ARC Linkage Rock Art and *tjukurrpa* Project on the Canning Stock Route where all data will be repatriated to knowledge centres in the Western Desert and Kimberley regions. This data will be also be mobilised (where relevant) for an integrated management plan under an Indigenous governance structure that is respresentative of, and covers lands crossed, by this 1800km linear desert landscape (Peter Veth pers comm. 02/04/2009).

7.8.2 Knowledge Centres

In giving back IEK to Indigenous communities, a strong network of knowledge centres should be established. Already there is the Northern Territory Library's, Libraries and Knowledge Centres (LKC) program and implementation of the Our Story database (a re-branded *Ara Irititja* system) in 16 remote Indigenous communities in the Northern Territory of Australia. In recognition of the LKC program the Bill & Melinda Gates Foundation's Global Libraries initiative awarded the Access to Learning Award of $1 million to the Northern Territory Library (NTL).

Over 4 years ago the Northern Territory Library negotiated a territory wide licence to use, and re-brand the *Ara Irititja,* software developed by the Pitjantjatjara Council. This license allows for the software to be installed in all Northern Territory community libraries at no cost to communities. In all cases the community owns the content in the database and the data is stored according to rules set by community leaders. NT Library technical support and library management expertise ensure that content in the database is appropriately

[329] I note that Martin Nakata has done work relating to ontology and disciplines of research see *Savaging the Disciplines*.

structured and stored and is appropriately archived according to local requirements as well as made accessible to the community. [330]

The *Ara Irititja* database software has been praised for its flexibility. The aim of *Ara Irititja* is to bring home materials of cultural and historical significance to Anangu on the APY Lands.[331] The interface and database is well known. It includes photographs, sound recordings, films, letters and books, artworks and objects. *Ara Irititja* (means stories from a long time ago in Pitjantjatjara and Yankunytjatjara). This allows users to interact with content and block names/access to respect cultural laws if a person has passed away. *Ara Irititja* service the machines for the communities.

However some criticism of the devices and screen set up is that they require high English language skills. In this respect, more icons could be used to aid use, and training in use of the devices should be funded. Another consideration concerns whether the knowledge retrieval systems should be in Aboriginal language. Another concern is that such databases are not moderated systems and do not have edit functions for external users. Taking on board some of these limitations both the Pitjantjatjara Council and the Northern Territory Library have begun work on the next generation of software to be used in their respective communities. Similar issues are currently being addressed by the Western Desert's Martu Archive.

Issues and challenges

Knowledge centres need further encouragement. There is potential for knowledge centres to alienate people, which should be addressed? Consider the role of Indigenous knowledge holders to interact with these centres. There is also the need for databases to hold and safeguard cultural knowledge which is passing with its holders. Publications in books give credibility to Indigenous people to manage their country because it is written down. It has a form which gives authority even if it is taken out of context. The value of oral tradition is not to be overlooked, though to lose its focus and veracity could occur if it is contested against the written record of traditional practice.

7.8.3 Promote a living IEK tradition

A fundamental question about the promotion of knowledge in databases was whether it promotes a dead knowledge view rather than a living IEK tradition. One commentator noted 'the best place for knowledge is in the heads of the next generations.' We need to look after culture by making sure that there is inter-generational transfer. He said, 'We need to be active and put knowledge into practice and get people onto country.'

[330] http://www1.aiatsis.gov.au/exhibitions/conference/conf06/papers/Cate%20Richmond.doc, viewed 17 July 2008.
[331] http://www.irititja.com/, viewed 17 July 2008.

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7.8.4 Databases

The United Nations University has a paper about the role of traditional knowledge databases.[332]

Issues for databases relate to two points:

- commercial protection for selling – can promote the sale of traditional knowledge;
- prior art protection - community registers and defensive protection measures.

Case study: repatriation of the Smithsonian Institute material

As shown by the following case study, there is opportunity for materials currently held in archives to be repatriated to Indigenous communities that may help the revitalisation of culture.

In 1948, an expedition was led to Arnhem Land by self-taught ethnologist Charles P. Mountford. The Smithsonian Institute and National Geographic Institute sponsored the expedition, in which a large number of sound recordings, films and photographs were made of the local Indigenous populations at Oenpelli and at other locations in Arnhem Land.

In 2006, Martin Thomas from the history department of the University of Sydney was in Arnhem Land. Thomas had digital copies of a number of the 1948 recordings retrieved from the ABC and AIATSIS archives, which he played a number of enraptured community members. Because they had been held in a 'restricted' category in the archives, many of the recordings had been lying dormant. Having being converted into digital form, the recordings became portable and were easier to repatriate.

7.8.5 Categorising information

There is concern that databases would run the risk of classifying Indigenous knowledge according to western scientific categories. This would undermine the holistic nature of Indigenous knowledge systems. For example, a scientific database may categorise species from a western scientific worldview, however the holistic relationships of plants and animals and the value of active knowledge should not be overlooked. Professor Peter Veth suggest that emic rather than etic categories for plant, animal and mineral uses should also be used wherever possible.[333] As Michael Christie notes, 'setting up databases should not be about boxing knowledge. The context of knowledge should be about use.'[334]

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[332] http://www.ias.unu.edu/binaries/UNUIAS_TKRegistersReport.pdf, viewed 12 August 2008.

[333] Emic and etic are anthropological terms referring to two different kinds of data collected during fieldwork concerning human behavior. An "emic" account is a description of behavior or a belief in terms meaningful (consciously or unconsciously) to the actor; that is, an emic account comes from within the culture. An "etic" account is a description of a behavior or belief by an observer, in terms that can be applied to other cultures; that is, an etic account is '"culturally neutral". The etic account is from a self-consciously outsider perspective, and it attempts to be neutral or objective.

[I] Interview Michael Christie, March 2008.

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As the people with knowledge grow old, recording elders performing cultural practices is one way to ensure that IEK can be passed on to the next generations. Given the living nature of IEK, it is important that the collection and management of IEK in archives and other knowledge storage systems is done respectfully and wherever possible for the primary benefit of Indigenous people. See also Output 2- *Guidelines for Indigenous Ecological Knowledge Management (including archiving and repatriation)*.

7.9 Summary

Archives, museums, libraries and other information services may seem to have different objectives to Indigenous in regards to the protection of traditional knowledge. However, there is growing awareness in this sector and practical examples which highlight potential benefits for both Indigenous people and libraries, museums and archives to work together. Digitisation introduces new opportunities to store information in communities, and to repatriate and learn old practices that were recorded many years ago. Making digital copies also raises questions of cultural protocols about what is appropriate for wider dissemination and incorporation into new knowledge products. Consent and consultation with Indigenous communities is a guiding principle. Managing IEK information in an appropriate and sensitive way could contribute greatly towards protection of IEK.

Section 8
Research Institution Laws & Policies

The laws, policies and contractual arrangements of research institutions govern the work of the researcher in Indigenous communities. They may even have clauses and provisions relating to the ownership of research intellectual property and materials, if the research work is being funded, or conducted under the auspices of the research organisation.

8.1 AIATSIS Act and guidelines

The Australian Institute of Aboriginal and Torres Strait Islander Studies is a statutory authority of the Commonwealth government charged with promoting Indigenous Australian cultures. The Institute is also an Indigenous Australian organisation, with a Council of predominately Indigenous academics and an increasing proportion of Aboriginal and Torres Strait Islander members and staff. The main functions of the Institute include: -

- Undertaking and promoting Aboriginal and Torres Strait Islander Studies and encouraging other persons or bodies to conduct such research;
- Publishing the results of such studies;
- Assisting in training persons, particularly Indigenous Australians, as research workers in fields relevant to Aboriginal and Torres Strait Islander Studies.[335]

In an effort to meet these goals, the Institute: -

- Employs staff to conduct research, and to mentor and administer research projects conducted by others - particularly younger and Indigenous researchers;
- Funds a grants program;
- Commissions particular research projects to be done by independent researchers;
- Funds research fellowships;
- Undertakes consultancies;
- Publishes and otherwise makes available research reports and outcomes.

AIATSIS have developed Guidelines for the Ethical Research in Indigenous Studies (discussed at 7.7).

[335] Section 5, *Australian Institute of Aboriginal and Torres Strait Islander Studies Act 1989*

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8.2 CSIRO

The *Commonwealth Scientific and Industrial Research and Organisation (*CSIRO) has particular expertise in the field of bioprospecting and biodiscovery. It observed in a parliamentary submission:

> The evolution of these high technology industries based on bioprospecting, bioprocessing and related biotechnologies take place within a global business system in which a number of technologies and operators interact. The products that may arise must be able to compete with overseas markets and business opportunities, and it is therefore critical that Australia clearly defines some market niches in which we can develop and market our excellence. Trying to be a world leader in anything but selected niches will just not work.
>
> At the same time there are tremendous opportunities to utilise our existing rural infrastructure to bring economic growth into regional Australia by encouraging the development of small to medium enterprises using fermentation and other microbiological systems to make product based on biological feedstock. CSIRO would like to reiterate that the only way to develop a prosperous bioindustry in regional areas based on bioprospecting Australian biodiversity would require solving all of the problems outlined earlier by taking a holistic, whole-of-business-system approach driven by visionary and skilled, entrepreneurial industry people.[336]

CSIRO notes in its submission: 'Whilst there are numerous examples where individual plants are known by Australian indigenous communities to have particular and desirable properties, it should be recalled that quite often the biodiscovery stage involves mass screening processes and the individual origin and characteristics of biological materials may be unknown to the company doing the screening and discovering biological activity'.[337] CSIRO emphasized: 'There is therefore a critical role for bioprospectors in identifying the original source and tracing it back to the biological specimen to secure a return flow of benefits.'[338]

In July 2007, CSIRO initiated its Indigenous engagement strategy. The Strategy aims to achieve greater Indigenous participation in CSIRO's research and development agenda and activities. This participation will ensure that CSIRO benefits from the insights that Indigenous people can bring to the national challenges. It also provides a means of ensuring that CSIRO's activities are as effective as possible in contributing to the challenges and aspirations of Indigenous communities.[339] There are four principles and notably, one relates to scientific opportunities – engage in research and project underpinned by a universally accepted ethical framework, that will impact on the quality of life of Indigenous peoples and thereby all Australians.

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[336] Parliament of Australia, http://www.aph.gov.au/house/committee/primind/bioinq/sub14e.pdf , viewed 7 January 2009.
[337] Parliament of Australia, http://www.aph.gov.au/house/committee/primind/bioinq/sub14e.pdf , viewed 7 January 2009.
[338] Parliament of Australia, http://www.aph.gov.au/house/committee/primind/bioinq/sub14e.pdf , viewed 7 January 2009.
[339] CSIRO, http://www.csiro.au/files/files/plnd.pdf, viewed 16 November 2008.

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8.3 The Australian Institute of Marine Science

The Australian Institute of Marine Science (AIMS) is a Commonwealth statutory authority, which was established by the *Australian Institute of Marine Science Act 1972* (Cth). The Institute specializes in research relating to marine biodiversity, impacts and adaptation to climate change, water quality and ecosystem health.[340]

AIMS is a pioneer in biodiscovery. The organisation has played an important part in the debate over the regulation of access to genetic resources and benefit-sharing.[341]

AIMS has emphasised:]

> The objective of our approach is to facilitate access for bioprospecting and increase the likelihood that beneficial commercial products will be developed, while protecting the rights of the community to a share in the benefits flowing from such products. This can be achieved by delaying final negotiations on benefit sharing with access controlling agencies until a compound reaches patent protection and the transition to commercial research. At the point of initially granting access to the resource, benefit sharing negotiations should be replaced by an agreement which commits the permitee to negotiate with the source agency should a compound originating from an organism collected under the permit proceed to commercial research.[342]

AIMS has entered into a benefit-sharing agreement with the Queensland Government covering the field of biodiscovery research on biota collected from the seabed in areas of Queensland's marine jurisdiction.[343]

AIMS has engaged in the transfer of sponge aquaculture to Indigenous communities:

> `Research into 'low-technology' sponge aquaculture, for take-up by remote and indigenous communities, is progressing very well. It is being carried out in close collaboration with the communities in Palm Island (central GBR), Torres Strait and Arnhem Land, and focuses on five species of sponges common to these areas. All five species exhibit different fibre/skeletal qualities and target different sectors of the commercial bath sponge industry. Technology is being transferred to the communities through workshops and traineeships, with reports to indigenous communities and stakeholders, including the Indigenous Land Council, the Australian

[340] Australian Institute of Marine Science website, http://www.aims.gov.au/docs/about/about.html, viewed 20 March 2009.

[341] Australian Parliament, http://www.aph.gov.au/house/committee/primind/bioinq/sub27e.pdf, viewed 20 March 2009.

[342] Australian Institute of Marine Science website, http://www.aims.gov.au/docs/about/about.html, viewed 20 March 2009.

[343] Australian Institute of Marine Science website - 'Biotechnology Benefit Sharing Agreement between the AIMS and the State of Queensland', http://www.aims.gov.au/pages/about/corporate/bsa-aims-qldgov.html , viewed 20 March 2009.

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> government Department of Agriculture, Fisheries and Forestry, Coolgare Community Development Employment Programme, Torres Strait CRC and Torres Strait Regional Authority.
>
> Successful techniques of sponge culture developed under this project have been adopted by several indigenous communities that are working to develop sponge farms. These farms provide new economic and educational ventures owned and operated by indigenous communities in remote and regional Australia.[344]

8.4 Charles Darwin University

Environmental and scientific staff use Indigenous knowledge in their disciplines but arguably need to give greater recognition to the value of Indigenous Knowledge in terms of payments and attribution.

CDU has an Indigenous Peoples Policy which provides a framework for managing CDU activities that impact upon the Indigenous community. While the Policy's implementation is based on sound principles such as respect, consultation, understanding and sensitivity, there is little in the policy providing for benefits to flow back to Indigenous communities and individuals who are the subject of research projects.

CDU's Intellectual Property Policy states that it will be implemented in a way that ensures "there are processes in place to handle cases where the Intellectual Property rights of the University impinge or potentially impinge on the cultural, spiritual or other aspects of Indigenous peoples…", although how is this is to be achieved is unclear.

Grants for research should take into account payments for Indigenous consultants and research institutions with which they are associated as consultants. A wider perspective on payments needs to be considered in applying for the grants. For instance, an individual may give over knowledge as an 'informant' but there is 'social ownership of knowledge'. There needs to be a mechanism for the payment and attribution of the knowledge custodian(s) and not just an individual handing over traditional knowledge.

Protocols are a different system of identifying which people have the right to speak on different pieces of knowledge. Researchers tend to single out individuals, a family or a group, and they tend to receive the majority of benefits. Limited discretionary monies for to participation from national competitive grants schemes tend to compound if not produce this conundrum.

The impact of the intervention had meant that people need to link up their fees with Centrelink payments. They have to declare if they get money for consultancy (research) work, and even if this is one off, it affects their take home money. Ms Ford is working with one community, who have organized a system –whereby they use short term contracts.

[344] Australian Institute of Marine Science, Annual Report 2004-'05, viewed 30 March 2009. http://www.aims.gov.au/pages/about/ar20042005/pdf/ar20042005s-033048.pdf

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The University requires greater focus on ICIP in its existing policies.

There was a perception that the Australian Research Quality Framework (RQF) set up by the Howard government privileged science over the humanities. Linda Ford spoke about the way the University RQF was set up through VC's Committee.

Linda's PhD was completed through Deakin University. The research focused on her language Mak Mak Marranunggu (White Sea eagle) and Nancy Daiyi, her mother. Nancy was one of her official supervisors. This recognised her mother's role as the knowledge holder. The university made provisions for this and recognised that Indigenous people are experts in their language. This was a precedent for a PhD of this kind.[345]

A good model university project: National Recording Project

Linda Barwick and Allen Marrett are working on the National Recording Project to develop an Indigenous music language database. [346] The IP work on this project is being done with support from UNESCO and it is an excellent way to record the interaction of language, music and history. 20 years ago music recordings were isolated from intangible culture.

8.5 University of United Nations

The University of United Nations is in the process of establishing a Traditional Knowledge Institute at Charles Darwin University. This will be a useful resource for NT traditional knowledge holders, as the Traditional knowledge Institute will be the first in the world and probably very likely to be the gateway to TK holders in the Top End. Rahera Noa is currently based in Darwin, at the Centre. As Project Co-ordinator at UNU-IAS, Noa is responsible for activities relating to the establishment of a UNU Institute on Traditional Knowledge (TK). In 2007, a pilot program was established which aims to produce among its output, a book on the role of TK. [347] A Traditional Knowledge Bulletin was launched as part of the program in March 2007.[348]

[345] http://www.filmaust.com.au/wilderness/pdf/nancyandlinda_transcript.pdf, viewed 21 July 2008. 'So we have an Indigenous standing committee in the School of Ed Studies where I work and lecture to teacher education students, and to overcome and help me in working in a very western environment I've tried to create these new ways for the faculty to think about engaging Indigenous communities and to employ more Indigenous academics, and that's been quite successful. When I started three years ago I was the only Indigenous lecturer in the School of Education Studies, and now we have the Indigenous Standing Committee.'
[346] http://www.aboriginalartists.com.au/NRP_news.htm, viewed 21 July 2008.
[347] http://www.ias.unu.edu/sub_page.aspx?catID=107&ddlID=302, viewed 17 November 2008.
[348] http://www.unu.edu/tk/ , viewed 8 December 2008.

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8.6 Desert Knowledge CRC

The Desert Knowledge CRC has developed protocols and systems that are best practice for archiving and repatriation of IEK knowledge.

Case study: Titjikala Project

In 2002, John Briscoe, a TK holder from the Titjikala Community, invited Louis Evans, a researcher from Curtin University in Western Australia, to help him with a project to record TK relating to plants. The aim of the project was to document "the TK of Titjikala community elders about plants on a password protected electronic database and validat(e) this knowledge through laboratory studies on plant extracts."

From the beginning of the project talks were held between the various parties involved to address IP rights over TK relating to plants. A number of people involved prepared a case study on the project outlining their experiences in the project and explaining how the process of reaching agreements evolved. Some valuable lessons were learned, particularly in regards to engaging the community, drafting agreements that would provide benefits to the community, and protecting the TK that would be recorded.

The case study contains the following observations:

- "…protecting traditional knowledge (TK) of plants and their uses is most likely to be achieved through the development of effective protocols for preserving and recording traditional knowledge (TK) and the use of contract law in commercial applications of that knowledge…
- relationship building and a partnership approach based on trust and mutual respect were found to be of fundamental importance
- TK holders are faced with the dilemma of how to commercialise their knowledge but still remain faithful to their ancestors and to their spiritual beliefs
- a key concept articulated and later formalised as part of the research agreement, was that the process should be one of partnership to achieve a common goal
- on the one hand was the risk of failing to protect the TK rights of the Titjikala community if commercialisation of a medicinal product did eventuate while on the other hand there was a risk of the research not proceeding due to the need to comply with an excessively complicated process
- consultations involving all or most of the community is a more effective approach to agreement making than a process involving a representative person or representative structure.[349] This 'whole of community' approach was used in the Titjikala case study, with recommendations being developed by the research team, endorsed by the Council of Elders and the TCGC and then finally endorsed at

[349] Sullivan, P. (2006). *Indigenous governance: The Harvard project on Native American economic development and appropriate principles of governance for Aboriginal Australia*. Research Discussion Paper No. 17. Canberra: AIATSIS. Retrieved October 1, 2008, from http://www.aiatsis.gov.au/__data/assets/pdf_file/5621/DP-17.pdf.

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community gatherings to which all community members were invited. However, this decision-making process was lengthy and involved high transaction costs.
- questions have been raised regarding the issue of exclusivity of this contract and possible financial benefits to the Titjikala community, given that some of the plants studied occur over wide geographic regions and have cultural significance to many different Aboriginal groups."

A written agreement was reached in relation to the project between the Tapatjatjaka Community Government Council and Curtin University. Of particular interest are the three clauses contain under the heading 'Intellectual Property and use of research materials'.

These clauses state that:
- IP developed in the project will be shared between the participants according to a negotiated agreement, and
- Ongoing Indigenous ownership of the cultural and IPR in the material on which the research is based should be acknowledged.

8.7 Ethics

8.7.1 Ethics Committees

There are a number of ethics Committees with which proposed research in the NT should be discussed. For example, all proposals for activities in the Northern Territory that involve the capture or collection of vertebrates for scientific research must be approved by Charles Darwin University Animal Ethics Committee.

For general research involving Indigenous people, you should contact the Central Australian Ethics Committee or Top End Ethics Committee. This is a separate issue to organising access and obtaining permits from the relevant landholders or their representatives (eg Land Councils).

8.7.2 National Statement on Ethical Conduct in Human Research

For any research involving humans, researchers should consult and follow the National Health and Medical Research Council's *National Statement on Ethical Conduct in Human Research*.[350] This *National Statement on Ethical Conduct in Human Research (*'National Statement') is intended for use by:

- any researcher conducting research with human participants;
- any member of an ethical review body reviewing that research;

[350]National Health and Medical Research Council, 2007, available at http://www.nhmrc.gov.au/publications/synopses/e35syn.htm, viewed 8 January 2009.

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- those involved in research governance; and
- potential research participants.

Chapter 4.7 of the National Statement deals specifically with research involving Aboriginal and Torres Strait Islander Peoples, which it states 'spans many methodologies and disciplines'. Guideline 4.7.11 states that:

> The research approach should value and create opportunities to draw on the knowledge and wisdom of Aboriginal and Torres Strait Islander Peoples by their active engagement in the research processes, including the interpretation of the research data…[351]

8.8 Summary

Research institutions can play an important role in the protection of IEK by implementing policies which respect, acknowledge and reward IEK holders for their contribution. Universities and research institutions have written policies on intellectual property rights to the work and materials made by its staff, students and consultants. Many universities like Charles Darwin University appear to have no Indigenous cultural and intellectual property policy. The Australian National University IP policy notes that that the AIATSIS Guidelines for Ethical Research in Indigenous Studies be adopted as the guiding principles for Indigenous research. However, the AIATSIS guidelines do not provide a guide on copyright, negotiating agreements as well as recording, repatriation and future use(s). The NT NRMB should promote the Guidelines and the Handbook as the relevant reference for all University researchers doing work within the Northern Territory. It can do this by promoting the Guidelines and Handbook to national universities.

[351] Ibid.

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Section 9
Case studies

There is potential for IEK to be commodified in a many different ways. For example, IEK could be used in commercial ventures, as part of research projects, for scientific and educational purposes, or in books for publication. This raises the issue of how benefits can be shared with Indigenous people and what processes should be taken to ensure their involvement and continuing cultural ownership. The following case studies highlight just some of the various IP issues that have arisen in real life situations, and how they have been managed and approached in differing ways.

9.1 Merne Altyerr-ipenhe (Food from the Creation time)

Case Study: Protocols from *Merne Altyerr-ipenhe* Reference Group in Central Australia for commercial bush food R&D and enterprises[352]

The *Merne Altyerr-ipenhe* (Food from the Creation time) Reference Group is drafting a document titled *Protocols for people involved in commercial bush foods enterprises, research and development with plants, plants, products or Aboriginal knowledge sourced from Central Australia*. The Reference Group is a non-incorporated group convened through partners (CSIRO, Charles Darwin University and Central Land Council) of the Desert Knowledge CRC (Douglas and Walsh, 2008). The Reference Group has seven members who are senior cultural experts and/or business people from Arrernte, Pitjantjatjara, Warlpiri and Warumungu lands. The group is based in Alice Springs and has several roles. One of its objectives was to develop a code of conduct for researchers, processors, consumers and others involved in the commercial bush food economic value chain.

As at 2008, there was no formal body that represented Aboriginal harvesters, sellers or Aboriginal knowledge experts or structures in central Australia. Yet there has been a steady expansion of bush food (or 'native food') products sales and a substantial investment in commercial bush food R&D. There is concern amongst Reference Group members that current domination of the industry by non-indigenous people, the distance from knowledge and product source to interstate markets and the rapid pace of development has and will continue to marginalise the custodians of bush food species in central Australia. All members see the inevitability of commercial trade in bush foods; conversely all members recognise the challenges faced by Aboriginal groups in the transfer of bush foods with complex, multiple non-monetary values to a commodity with a simple dollar value.

[352] Case study provided by Fiona Walsh, Research Scientist – Ethnoecologist CSIRO Sustainable Ecosystem, email 18 November 2008. ©Fiona Walsh, CSIRO, 2008.

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The protocols will be a voluntary code of conduct that will complement the various legal options for recognition, recompense and active agreements with Aboriginal custodians of bush food species. The protocol document has several main parts:

- an overall vision;
- a review of the major roles played by Aboriginal people contributing to the bush food economic value including traditional ecological system and the elements that contribute to species utilisation and domestication;
- a synthesis of customary governance and intellectual property management systems of desert Aboriginal people related to plant resources; and
- twelve protocols.

Notably, the document has a strong emphasis on asserting the roles and customs of Aboriginal people in respect to bush foods because these are often overlooked or boxed into a single role in illustrations of the economic value chain. By contrast, there are multiple roles played by Aboriginal people (Fig 1). The protocol lists the types of detailed ecological knowledge that have been utilised by researchers and the commercial industry. The Australian native foods industry would not exist without Aboriginal knowledge and practice.

The twelve protocols cover topics including:

- Respect for Aboriginal people and cultural traditions;
- Equitable benefits and returns;
- Aboriginal employment, training and learning;
- Aboriginal cultural education about bush foods;
- Governance by Aboriginal people;
- Geographic origin (sourcing seeds and plant materials, naming plants); and
- Restoration of country, ecology and land care and Communication.

These have been compiled 'from the ground up' by identifying the topics repeated by group members. Under each protocol heading there are direct quotes, a synthesis, legal equivalents and practical actions. Work on the protocols by the Reference group and supporting researchers has been complemented by legal and international expertise bought in through CDU.

In 2008, the full council of CLC passed a motion supporting the Reference Group's development of the protocols. The final document is due in early 2009. It is also likely to be presented to Australian Native Food Industry Ltd which a peak body that advises the federal government's RIRDC. It will be made publicly available through the Desert Knowledge CRC.

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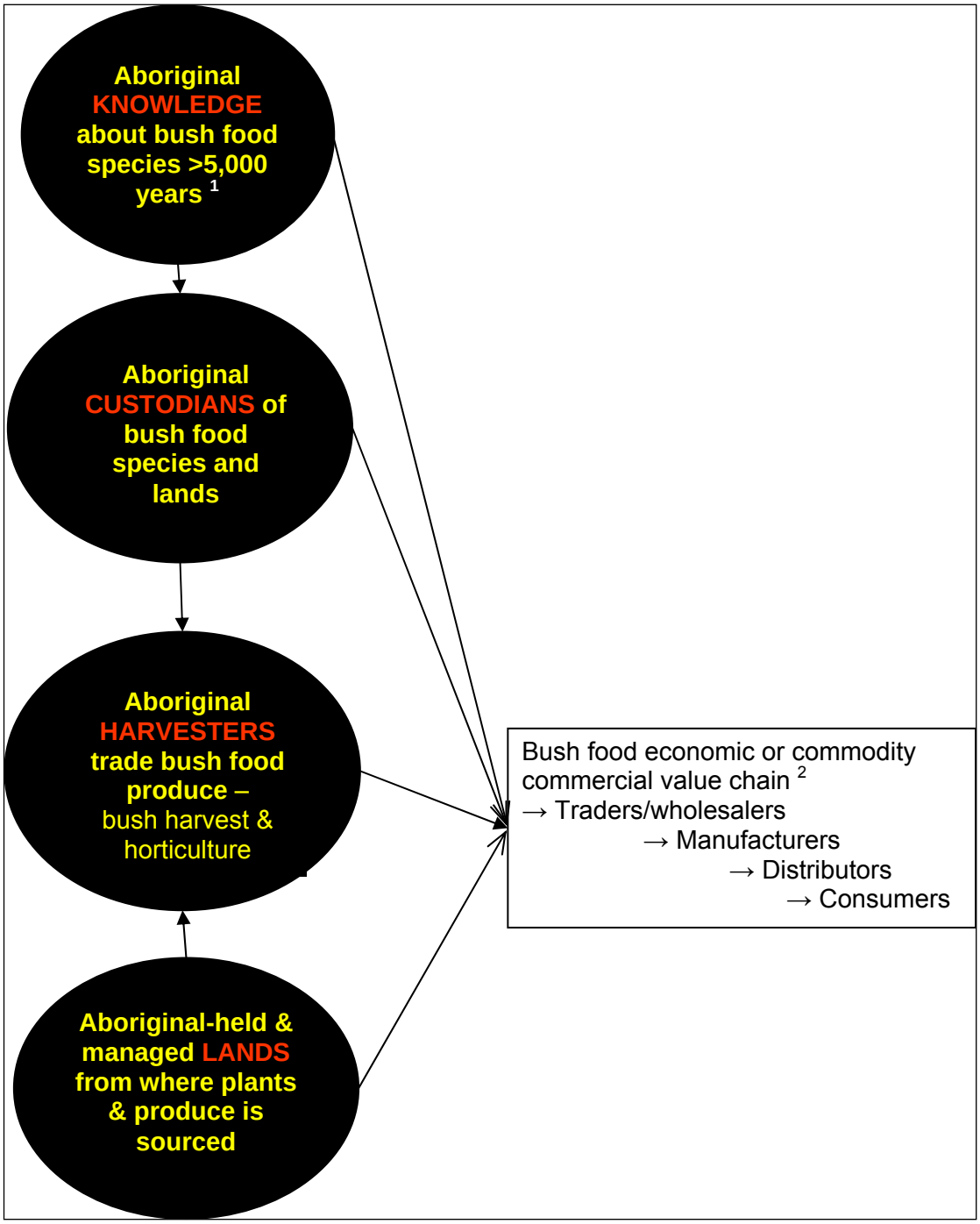

Figure 1 Multiple roles of Aboriginal people drawn upon by commercial bush food economic value chain ©*Merne Altyerr-ipenhe* (Food from the Creation time) Reference Group et al., in prep.)

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Douglas, J. & Walsh, F. (2008) Research governance – convening the Merne Altyerr-ipenhe (Food from the Creation time) Reference Group IN CAMPBELL, M. & CHRISTIE, M. (Eds.) Indigenous community engagement at Charles Darwin University. Darwin, Uniprint NT.

Merne Altyerr-Ipenhe (Food from the Creation Time) Reference Group, Douglas, J. & Walsh, F. (in prep.) Protocols for people involved in commercial bush foods enterprises, research and development with plants, products or Aboriginal knowledge sourced from Central Australia Alice Springs, Desert Knowledge CRC and Central Land Council.

9.2 Case study: the Ngurra Kurlru project

In 2007 Desert Knowledge CRC facilitated the process of publishing and disseminating a paper called *Ngurra-kurlu: a way of working with Warlpiri people*.[353] The paper shows how Warlpiri culture can promote the healthy functioning of people and country in contemporary contexts.

The research and writing of the NK paper was undertaken by three authors. Wanta Pawu Kurlpulurnu Jampijinpa (Wanta Patrick) is a fully initiated Warlpiri man from the community of Lajamanu. Miles Holmes is an anthropologist and PhD researcher from the University of Queensland. Lance Box who was at that time a teacher linguist at the Lajamanu Community Education Centre (CEC). The NK template started to take shape in 2005, and was refined over several years through work done by all three authors.

The authors spoke about putting these ideas into writing or expanding on a video that had already been made and placed on the internet. At this time Jocelyn Davies and Michael LaFlamme from Desert Knowledge-CRC suggested that NK could be published as a working paper through their organisation. All agreed that Wanta would be recognised as lead author because he had done the majority of the work in distilling NK from the complexities of Warlpiri culture. Holmes and Box would work to make the paper scholarly and understandable in western terms.

In July 2007 the authors began formal discussions with DK CRC about the terms of a contract under which DK CRC could publish the material as a working paper. At first the DKCRC funding was to be disbursed from CSIRO to the authors. This would automatically mean that the IP rights in the paper would vest in DKCRC, as is the usual position under CRC funding agreements, i.e. that the funding body owns copyright. This is common practice for funding bodies and research institutions.

[353] WJ Pawu-Kurlpurlurnu, M Holmes and L Box, 2008. *Ngurra-kurlu: A way of working with Warlpiri people*, DKCRC Report 41. Desert Knowledge CRC, Alice Springs, http://www.desertknowledgecrc.com.au/publications/downloads/DKCRC-Report-41-Ngurra-kurlu.pdf , viewed 4 February 2009.

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However, this paper was different to DKCRC's usual work in that the research was designed, conducted and funded by parties external to DKCRC.

CSIRO and DKCRC then agreed that DKCRC should disburse the funding direct to the authors. This would allow DKCRC to vary its standard copyright conditions. DKCRC developed the publication proposal into a contract under which Miles Holmes was engaged by DK CRC as a consultant to coordinate the development of the report (largely for insurance purposes). DKCRC requires consultants to provide certificates of professional indemnity. Holmes was also asked to assure DKCRC that 'if the elders, for example, sued anybody it would be me and not the CRC'. In this case, Holmes was prepared to take this risk, but noted that in other circumstances the need to have insurance would make it difficult for an Indigenous group without a 'tame' consultant like himself.[354]

Furthermore, as the consultant Holmes then had to employ Wanta so he could pay him. Under copyright laws, any intellectual property created by Wanta would legally belong to Holmes as the employer. This could be altered by an IP clause in an employment agreement. Given the small amount of funding provided by DKCRC, these extra administrative burdens and liabilities on Holmes were onerous. These issues highlight the potential legal complexities of entering funding agreements.

One of the outcomes from early discussions was consensus that the DKCRC would have the right to publish the report but further uses of the report (to make a video or a poster for example) would need further negotiation on a case by case basis. There was also a provision in the agreement that the three authors would own copyright and any other IP created under the contract jointly. This would not have modified the standard position under the Copyright Act, i.e. the authors as the creators are the copyright owners. However this position is often altered by funding and publishing agreements. For example, when someone is engaged as a consultant as Holmes was, a condition of the consultancy is often that copyright passes to the person who has commissioned the consultant to write the report. Also when a publisher agrees to publish a work, as DKCRC was doing in this case, it is common for publishers to require that authors assign the copyright to the publisher under an agreement.

Here we can see how written agreements can be tailored to meet the exact needs and consensus of the parties involved. It shows how negotiations and agreement can deliver an outcome that suits the parties, rather than them having to rely on the black letter of the law, or the policy of a particular research institution or publisher.

Although copyright had been discussed and addressed in the contract, an error occurred at the printing stage. The copyright notice listed DKCRC as copyright holders rather than the authors. Although this would not actually affect the legal status of copyright, all involved rightly felt it was important that the copyright notice reflect the actual agreement between the parties. Discussions between the parties quickly resulted in the error being corrected. The copyright notice on the final report reads:

[354] Personal email correspondence from Miles Holmes, 13 January 2009.

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It is vital to recognise and encourage individual innovation such as that displayed by the lead author in this case. As well as promising to improve the lives of Warlpiri if properly implemented, a work of this nature may open up opportunities for economic development for Indigenous people. For example, Wanta may acquire benefits if the report becomes widely distributed, from sources such as sales royalties and ongoing payments from the Copyright Agency Limited for any use of the work made by educational institutions. What may be even more important is the recognition and interest Wanta is now receiving for his lead role in compiling the report. As Holmes commented:

> …no one thought about the money. In fact I would say that in most aboriginal issues lack of money is rarely the problem. Lajamanu receives millions in mining royalties and is not really much better off for it. What is far more important is power and influence. That's why we put Wanta as the lead author so that people would know who to ask for more information – that way we hoped that Wanta keeps his finger in the pie and not have whitefellas speaking for him. This strategy has worked quite well in that Lance and I are receiving minimal recognition for the paper whereas Wanta is speaking everywhere and has recently been invited to France to speak there.[355]

At the same time the report is a valuable educational tool which may promote a better understanding of Indigenous cultures and improve cross cultural relationships and understanding in many areas, including NRM. As the report states, 'environmental managers will be interested in how ngurra-kurlu is a template for Warlpiri approaches to sustaining country.'[356] The authors' innovation and creative output should be rewarded and recognised for these reasons alone. For these purposes, copyright laws can be a valuable tool for Indigenous creators.

However, the inability of IP laws to recognise the unique communal responsibilities regarding Indigenous knowledge means that cultural knowledge contained in a report may be left open to exploitation. In this case, under the contract any 'existing intellectual property including any know-how and traditional knowledge' was specifically excluded from the IP to be owned by the authors. This reflects efforts on behalf of the parties to protect traditional knowledge by not having it vested in the individual authors. It also reflects the position of the law that knowledge itself is not protected, rather it is the material expression of the knowledge that is the subject of IP rights.

The issue then arises, that now the TK is publically available, others are free to use it. Although the written material is protected by copyright laws, there is nothing protecting the knowledge itself. In this case, there may not be any particular IEK contained in the report that could be picked up and exploited by others for commercial gain (regarding plant uses for example). This may not always be the case however. Asserting communal ownership of

[355] Personal email correspondence from Miles Holmes, 13 January 2009.
[356] WJ Pawu-Kurlpurlurnu, M Holmes and L Box , 2008. *Ngurra-kurlu: A way of working with Warlpiri people*, DKCRC Report 41. Desert Knowledge CRC, Alice Springs, http://www.desertknowledgecrc.com.au/publications/downloads/DKCRC-Report-41-Ngurra-kurlu.pdf , viewed 4 February 2009.

cultural knowledge through a TK notice at the front of reports is one way of putting others on notice and asserting rights in communally held knowledge.

It should also be noted that the lead author of this report was very careful to only speak about subjects that he was authorised to under customary laws, knowing that the report was to be published and widely distributed. However it may not always be the case that knowledge shared by Indigenous persons should be made freely available, if for example it is restricted on a gender basis. Use of protocols can ensure that researchers always check to make sure any Indigenous knowledge they receive or record is not restricted. Researchers should also be sure to explain to the person providing the knowledge exactly how it will be used.

The lessons learned and comments:

1. Communication is the key. As this case study shows, discussions between the parties meant that copyright remained with the Indigenous author, a situation both DK-CRC and CSIRO were happy to agree to. Without negotiations on the matter, DK-CRC would have retained copyright;

2. Agreed arrangements will often displace the policies of research institutions. Those not directly involved in previous discussions will need to be made aware of any such arrangements and check project contracts rather than use templates and refer to policy. To avoid mistakes such as the one made at the printing stage in this case;

3. Copyright notice assertions are not legal claims of copyright but are purely administrative. Still, checks to ensure that the correct copyright owners are recognised should always be made;

4. Copyright Agency Limited (CAL) fees may be payable to authors for statutory uses of their work (e.g. by educational institutions). Publishing bodies should always advise Indigenous ‘authors’ of this as it may provide significant income; and

5. Including a TK notice is a way of putting others on notice that a work contains traditional knowledge or IEK, even where the knowledge itself may not be protected under the general law. This does not affect the rights of the individual author.

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9.3 Kakadu plum

9.3.1 Regulatory issues

The 'Kakadu plum' (*Terminalia ferdinandiana*) also known as the 'Bill goat plum' is a smallish semi-deciduous tree that grows only in certain areas of northern Australia. The tree bears a small fruit which has long been harvested by a number of Indigenous groups, and has been found to contain a remarkably high concentration of vitamin C. In recent years the fruit has been commercialised as a food and beverage additive and in cosmetic products by several companies. In a 2006 report by the Joint Venture Agroforestry Program, demand for the fruit was calculated at 10-12 tonnes per annum, with an estimated return of roughly $10 per kilo.[357]

Although in its infancy, the Kakadu plum industry has the potential to develop into a sustainable business opportunity for certain well positioned Indigenous communities. Development of such industries should be encouraged as a means of generating economic and social benefits for Indigenous communities. The connection of Indigenous people and IEK to bush products of this nature is in fact a selling point in itself.[358]

Accessing resources- the process

The first step in the process is to secure access to the land where harvesting will take place. The nature of the land tenure will determine what laws apply regarding the IEK to be used in the processes. For private land, you must organize access through the person who controls the land, e.g. the owner or lease holder.

If the land is held by an Aboriginal trust under the ALRA in the northern area of the NT, the first step is to contact the NLC and apply for a permit to enter land under section 19 of the ALRA. The NLC, as the representative Land Council, has an obligation to then consult the traditional owners of the land, and may ask the applicant to provide details of how the traditional owners will receive benefits for the use of their knowledge, and if they are to be included as partners in the project. Similarly if the land was in an area in the southern areas of the NT, the company would need to make an application to the CLC for a special purpose permit.

[357] Gorman, Julian and Peter Whitehead- Researchers (for the Joint Venture Agroforestry Program), *Small-scale Commercial Plant Harvests by Indigenous Communities*, Rural Industries Research and Development Corporation, 2006, p. 17.
[358] "Value-adding within communities is important, especially to supply items to the tourist trade, and can greatly increase returns. Direct connection with an ancient culture with profound knowledge of Australian plants may itself be a marketable commodity. In north Australia, Aboriginal entrepreneurs may do better to exploit such links, in preference to acting as anonymous suppliers of bulk products." Rural Industries Research and Development Corporation *Small-scale Commercial Plant Harvests by Indigenous Communities*

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Permission to collect Resources

A permit to access Aboriginal land does not include the right to collect the Kakadu Plum. The Northern Territory Parks and Wildlife Service is the only body that can issue a permit to collect wild plants and animals in the Northern Territory. A basic application for a permit to collect wildlife generally doesn't require any statement regarding the use of any IEK (if collecting the Kakadu Plum to use as a food product for example).

Bioprospecting

On the other hand, if the purpose of collecting the Kakadu Plum is to carry out scientific research and develop (for example) a vitamin supplement based on this research, the process will be more complex. When issuing wildlife collection permits, the NTPWS decides whether the proposed activity could be considered 'bioprospecting'. If it is, the applicant will then need to apply to the NT Department of Industry Growth for a permit to conduct bioprospecting activities. The permit will only be issued if the applicant can show evidence of a benefit sharing agreement with the access provider.[359] On Aboriginal land, this will be the relevant Aboriginal land Trust or traditional owner's group.

The benefit sharing agreement must contain a statement regarding the Indigenous knowledge to be used in the proposed activity, and how benefits will be shared with the providers of the knowledge.

Indigenous people

Indigenous groups across the Territory have been harvesting the Kakadu plum as a food source for generations. The harvest of the Kakadu plum and knowledge surrounding it should be considered an expression of culture, to which Indigenous people are guaranteed the right under international law.

The right of Indigenous people to collect the Kakadu plum and other food sources for their own 'traditional use' is now recognised by a number of pieces of Commonwealth and Northern Territory legislation. (For example section 122 of the *Territory Parks and Wildlife Act (NT)*)

The right has also been recognised in relation to land granted under the *Aboriginal Land Rights Act* (section 71) and the *Native Title Act*. Thus, for most areas in the Northern Territory, the basic starting point is that Aboriginal people are permitted to harvest the Kakadu plum, as long as they are doing so 'in accordance with Aboriginal tradition'.

If, on the other hand, an Aboriginal group wants to harvest and *sell* the Kakadu plum, they must apply to the Territory Parks and Wildlife Commission for a permit to do so, as must other Territorians. Aboriginal people collecting the Kakadu Plum for commercial purposes, *even when on Aboriginal land* are required to apply for such a permit. They are however

[359] Section 27, *Biological Resources Act 2006* (NT)

exempt from paying the usual royalty rate of $1 per kilo to the NT government. Given the widespread occurrence of the Kakadu Plum across the NT, permits for commercial harvest of Kakadu Plum have to date been freely issued.

If the Kakadu plum were listed as an endangered species, the right of Aboriginal people to collect for commercial purposes would not be as clear cut. Any dealing with species listed as endangered are regulated by the Commonwealth *Environmental Protection and Biological Act*. The EPBC Act also applies to activities on Commonwealth lands (such as certain areas of Kakadu and Uluru Kata Tjuta national parks) and other specified lands including Ramsar wetlands and national and world heritage listed areas, or activities likely to significantly impact upon the area, a threatened species or ecological community, or a migratory species. Permission to conduct an activity in these situations must be sought from the relevant Federal and Territory departments, and a management plan might also be required under the EPBC Act.

9.3.2 The Damiyumba Project

One of the projects identified during consultation was the Damiyumba project. A Larrakia woman is creating bush tucker products including chutney and jam from the Kakadu plum (Billygoat plum); (Damiyumba[360] Lime Jam). Lorraine Williams from Greening Australia has been working on enterprises and the development for food products has raised issues of traditional knowledge, traditional bush foods and commercialisation. The project is funded through Greening Australia who Lorraine works for in managing the project. Key questions include:

- Who owns the IP to the products?
- Where will the information be archived?
- Who owns the project?
- Now royalties for commercialisation of products is developing. They received funding from the National Heritage Trust to set up and they hold on trust royalties from the sale of the products that they commercialise.

The Daniyumba lime chutney is ready for sale as part of the Greening Australia project.

They are using the Larrakia word with an artwork as an unregistered trade mark with permission from the Larrakia Association. What licences and IP issues including TMs arise?

How was consent from the Larrakia obtained? Lorraine went to the meeting and told them the name and asked that they wanted to market and make sales with it. A logo was drawn up based on an artwork. The elders are extensively involved in the process. The product is prepared at CDU kitchens and they get the elders to test it for quality it. All the profits are returned to a central bank account. The women are trained at the University with the Larrakia Nations Governing Committee oversees the project. Lorraine presented to the women's management program and it was accepted as a project. She also presented it in Garma Festival because of its commercial success and mobilisation of traditional knowledge

[360] Translated in Larrakia as 'billygoat' plum.

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within an appropriate framework of control and benefits. One issue raised in Garma was a concern about the impact on the black cockatoos. One woman said if you are taking away all the billygoat plum trees - what will happen to the black cockatoos? She was worried because she related black cockatoos to her husband, his totem, and she was really worried about the possible cultural impacts.

9.4 Bushfire Management practices

As there is a real risk that old people are dying without passing on knowledge, funded projects often involve the recording IEK. Traditional fire burning techniques are being taught by elders to the younger generations in the Mimal Ranger Program. The project is supported under the CDEP scheme, and was funded by the Commonwealth Department of Environment Heritage and the Arts from 2005-2007 as part of the Indigenous Heritage Program. The Mimal Rangers have also worked with the NT Bushfire Council, CSIRO and the NT Department of Natural Resources.

Indigenous knowledge relating to bush fire management practices may be of significant economic value in Central Arnhem Land as a means of generating 'carbon credits'. Traditional owners of the area between Maningrida on the coast to the headwaters of the Katherine and Mann Rivers entered an agreement in 2008 with the Northern Territory Government, the Northern Land Council and Darwin Liquefied Natural Gas (DLNG). Early season burn offs by Aboriginal Rangers is expected to reduce greenhouse gas emissions by 100 000 tonnes a year. DLNG have agreed to pay traditional owners one million dollars a year over the next 17 years. At this stage the arrangement is run on a fee for service basis, but will generate carbon credits when the Commonwealth Government's Carbon Pollution Reduction Scheme begins to operate. See *UNU-IAS Report on carbon trading and Indigenous Peoples*.[361]

9.5 Case study: Glenn Wightman- recording and publishing IEK

Glenn Wightman is a botanist who has been researching the healing and nutritional value of plant life in the NT for many years. He works for the Biological Resources sector of the NT Department of Natural Resources, Environment, The Arts and Sport. He has been working with senior custodians and recording traditional biological knowledge since the 1980s. He has overseen the publication of a number of books on plant and animal knowledge.

According to the copyright notices used in the front of the books, copyright is shared between the custodial groups and the NT Department of Natural Resources, Environment, The Arts and Sport (the publisher). As copyright can only be held by a legal entity, it is held on behalf of the custodial groups c/o a representative corporation. For example, *Jaminjung, Ngaliwurru and Nungali plants and animals: Aboriginal flora and fauna*

[361] Ingrid Barnsley, (2008) *Emissions Trading Carbon Financing and Indigenous Peoples*, UNU-IAS, available on-line at http://www.ias.unu.edu/resource_centre/UNU-CARBONMARKET.pdf , viewed 8 December 2008.

Commissioned by the Natural Resource Management Board (NT).

knowledge from Bradshaw, Gregory National Park and Timber Creek area[362] contains the following copyright and IP notice:

> **This book is copyright**. Apart from any fair dealing for the purpose of private study, research, criticism or review, as permitted under the Copyright Act, no part of this publication may be reproduced by any means whatsoever without the written permission of the publisher and copyright owners.
>
> The **Jampinjung, Ngaliwurru and Nungali plant and animal names and uses** in this book are the intellectual property of Jampinjung, Ngaliwurru and Nungali people. This knowledge should only be used with written consent of the intellectual property owners. It is against the law to use this knowledge without permission.
>
> The **western scientific knowledge and illustrations** are the property of the Department of Natural Resources, Environment, The Arts and Sport. These materials should not be used without appropriate approval.
>
> © Jaminjung, Ngaliwurru and Nungali people
> c/o Diwurruwurru-jaru Aboriginal Corp….
>
> © Dept of Natural Resources, Environment, The Arts and Sport….

The above copyright notice asserts that copyright is owned on behalf of the said communal groups by Diwurruwurru. This is an effective way of overcoming the problem that communal groups cannot own copyright because they are not recognised as legal entities. It does however place a burden on the corporation. This might be construed as a 'trust' or fiduciary relationship (see 'Bulun Bulun'), on which basis the corporation would have a legal duty to take action against any copyright infringers, on behalf of the communal owners. These types of arrangements should be clearly defined in written contracts.

Another issue that arises is whether Judy Marchant Jones, the lead author, has copyright. According to the copyright notice she does not. This may have been agreed between the parties, and should have been in writing, unless Judy was employed by either the Department or the Aboriginal Corporation. Even where copyright is given to communal groups in line with customary laws, the effort of individual authors should also be recognised.

The assertion that the 'plant and animal names and uses' are the intellectual property of the (communal groups) is certain to be true under the customary laws of the groups, but may not be effective or even legally correct in western IP terms. It is only the actual expression of the knowledge that is protected by copyright. The knowledge of how the plants and animals are used is not protected. Likewise, copyright does not generally protect names or language. At law, the only way the knowledge itself could be protected is under patent law, which has its own limitations and difficulties (see Patents chapter). Furthermore, once this knowledge

[362] Marchant Jones, Judy, NT Dept. of Natural Resources, Environment, The Arts and Sport/Diwurrurru-jaru Aboriginal Corporation, Jaminjung, Ngaliwurru and Nungali plants and animals: Aboriginal flora and fauna knowledge from Bradshaw, Gregory National Park and Timber Creek area, Dept of NREAS, Palmerston, Australia.

is published with the consent of the custodians, it will not be protected by confidentiality laws.

The copyright notice also asserts that the knowledge 'should only be used with written consent of the intellectual property owners' and that it is 'against the law to use this knowledge without permission.' While in certain circumstances there is a requirement to obtain the prior informed consent of knowledge holders for use of the knowledge (under the *Biological Resources Act* for example), this is not the case if the knowledge has been made publically available[363] (see Environmental Laws chapter). If the knowledge is published in a book therefore, the knowledge can most likely be used without the consent of the traditional custodians without breaking any current laws. This should not discourage publishers from using such notices, as it surely represents best practice. However it may be more correct to say 'it is against the laws and customs of the (Aboriginal group) to use this knowledge without permission.'

These issues highlight the potential problems faced when publishing books containing Indigenous ecological knowledge. However, as noted by Glenn Wightman, the very real danger that so much knowledge is being lost at a rapid rate necessitates the collection and storage of this information for the benefit of future generations of Indigenous people at the very least. Furthermore, the publication of such books can revitalise cultures, and generate royalties and numerous other benefits to Indigenous knowledge holders. The lack of protection afforded to IEK by IP laws should not stand in the way of such important projects. The modification of current laws or the introduction of sui generis laws as recommended throughout this report would go some way to addressing these issues.

9.6 Case study: Hoodia Plant African Trust

In the early 1960s, the South African Council for Scientific Research (CSIR) commenced a project that included research into edible plants known to the San people of the Kalahari. Based on the knowledge of the San people, they became aware that the 'Hoodia' plant, when eaten acts an appetite suppressant. CSIR considered that the plant might be used to develop an anti-obesity drug. At the time, the technology was not available to develop a drug from the plant, but by the 1980s advances in science helped the CSIR identify the molecule in the plant which was responsible for suppressing appetite. Previously unknown to Western science, the molecule was christened P57.[364]

After taking out a number of patents around the world, CSIR eventually licensed the patents to an English pharmaceutical company, who in turn sold the rights to develop the compound extracted from the plant to Pfizer, a multinational drug company. Pfizer planned to develop the P57 into a prescription drug. Some estimate the P57 drug, if successful, could generate up to $8 billion dollars a year.

[363] Section 29(2)(b) of the *Biological Resources Act 2006* (NT)
[364] Wynberg, Rachel, 'Rhetoric, Realism and Benefit Sharing: Use of Traditional Knowledge of *Hoodia* Species in the development of an Appetite Suppressant', Journal of World Intellectual Property 7(6), 2004, pp 851-876.

Commissioned by the Natural Resource Management Board (NT).

In the meantime, CSIR had developed a Bioprospecting Policy under which they undertook to share in the benefits of bioprospecting with the knowledge providers. Although the rights to p57 had already been licensed and on sold, in 2003 CSIR entered a benefit sharing agreement with the San people guaranteeing them a percentage of any royalties CSIR were to receive for the sale of the drug.

The benefit sharing agreement included a statement that the 'San people are custodians of an ancient body of traditional knowledge…related inter alia to human uses of the Hoodia plant.' As a result of the agreement, the San Hoodia Benefit Sharing Trust was established into which royalties would be paid for the benefit of the San and several other communities. Although clinical tests are still running on the drug Pfizer have developed, the San are well positioned to become overnight millionaires if the drug ever reaches the market. [365]

While it provides a useful example and model for the commercialisation of traditional knowledge, there are several concerns as to the nature of the San-CSIR agreement. For one, the agreement is only between the San and CSIR, although there are two other companies profiting from commercialisation. Although the San are to receive 6% of CSIR's royalties, this in fact only equates to about 3c for every $1,000 the drug makes (0.003%).[366]

Another concerning aspect of the agreement is that the San are prevented from using their traditional knowledge of the Hoodia for any other commercial application. Thus if the drug developed fails to generate any money, the San receive nothing, without the opportunity to commercialise the Hoodia plant in any other way. For example, the San have since entered an ABS agreement with the Hoodia Growers Association, but prevented from receiving a share of the profits by the CSIR contract.

Furthermore, the only benefits to be received under the agreement are monetary in nature. Again, this means that whether or not the San receive any benefits from sharing their knowledge depends entirely on the commercial success of the drug developed by Pfizer. It also poses challenges as to how the money earned will be spent, given the lack of capacity and experience of the recipients to handle large amounts of money. Non-monetary benefits could include training, education, initiatives for nature conservation or capacity building measures.

Rachel Wynberg of the non-profit organisation Biowatch and Roger Chennells, the San people's lawyer, identify a number of lessons for the future which should be taken from the San-CSIR agreement, including:

1) The need for full disclosure about future use;
2) The parties should be fairly matched in legal and negotiating skills;
3) Benefits should be shared throughout the process with all stakeholders; and
4) Environmental costs of bioprospecting should be addressed.[367]

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[365] http://www.cellhealthmakeover.com/weight-loss-diet-supplement.html, viewed 18 July 2008.
[366] Wynberg R. 'Sharing the Crumbs with the San', available online at Biowatch South Africa, http://www.biowatch.org.za/main.asp?include=docs/clippings/csir-san.htm , viewed 12 December 2008.
[367] The SAN-CSIR ABS Agreement- Lessons for the Future, http://vh-gfc.dpi.nl/img/userpics/File/presentations/TheSAN-CSIR-ABSagreement.pdf, viewed 12 December 2008.

Commissioned by the Natural Resource Management Board (NT).

9.7 Case study: Acacia

According to Henrietta Fourmile-Marrie, Aboriginal knowledge was instrumental in identifying 44 of 49 species of acacias traditional used by central Australian Aboriginal communities as potential food species for planting overseas.[368]

Jeannie Devitt, then CSIRO researcher considered that with respect to food potential, what is currently known about the food value of acacias has been largely the result of tapping into Aboriginal knowledge.[369] The CSIRO website notes that CSIRO scientists 'have been working with Aboriginal communities for more than a decade. With the help of the true experts – Aboriginal people from communities in the Australian deserts – they have made new seed collections of *Acacia colei* and other edible-seeded wattles and have worked with farmers in Niger to develop farm-scale acacia plantations.'[370]

In one example, Acacia trees were planted in Niger in the 70s and 80s to use as firewood and create windbreaks against firestorms. Then in the 90s CSIRO scientist Jock Morse travelled with Warlpiri women Rosie Nangala and Kay Napaljarri to Niger. While there, they passed on knowledge to the Hausa people of how to harvest the seeds of the tree for flour, in effect uncovering a valuable new food source in a famine prone region.[371] The CSIRO hailed the project as a 'remarkable success' and 'an example of Australia's unique contribution to world food security'.[372] As CSIRO forester Chris Harwood explained:

> …from a scientist's perspective, the research needed to gain the same degree of knowledge possessed by Aboriginal elders about Australia's edible plants would take countless years and millions of dollars.[373]

The Warlpiri women were happy to share knowledge. In return they were sponsored to travel overseas by the Commonwealth Department of Primary Industries and Energy. According to a CSIRO media release, the Aboriginal women would return from Africa with 'African recipes and methods of cultivating the wattle'.[374] Before the trip took place, Harwood stated that 'two-way exchange might give a further boost to the rapidly-growing Australian native foods industry and cultivation of tree crops by Aboriginal communities'.[375]

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[368] ibid, p. 165.
[369] J Devitt, "Acacia: a traditional Aboriginal food source in Central Australia", in Australian Dry-zone Acacias for Human Food. Proceedings of a workshop held at Glen Helen, Northern Territory, Australia" (eds) A, P House, and CE Harwood (East Melbourne CSIRO, 7 – 10 August 1991) at 51.
[370] CSIRO, 'Australian Native Foods', www.cse.csiro.au/research/nativefoods, viewed 3 September 2007.
[371] CSIRO, Global Development, Fact Sheet, available on line at http://www.csiro.au/files/files/p5e8.pdf, viewed 23 March 2009.
[372] CSIRO media release 97/205, 15 October 1997, 'Aboriginal Tradition and CSIRO help beat hunger', http://www.csiro.au/communication/mediarel/mr1997/mr97205.htm, viewed 23 March 2009.
[373] CSIRO, Global Development, Fact Sheet, available on line at http://www.csiro.au/files/files/p5e8.pdf, viewed 23 March 2009.
[374] CSIRO media release 97/205, 15 October 1997, 'Aboriginal Tradition and CSIRO help beat hunger', http://www.csiro.au/communication/mediarel/mr1997/mr97205.htm, viewed 23 March 2009.
[375] CSIRO media release 97/205, 15 October 1997, 'Aboriginal Tradition and CSIRO help beat hunger', http://www.csiro.au/communication/mediarel/mr1997/mr97205.htm, viewed 23 March 2009.

Commissioned by the Natural Resource Management Board (NT).

The case highlights the value of Indigenous ecological knowledge of plants in a wide variety of contexts, and the need for knowledge holders to be properly rewarded for sharing this, which can save researchers and government vast amounts of time and money.

9.8 Summary

The above case studies illustrate that IP issues will vary from project to project depending on the nature of the IEK, the proposed focus of use and the project details. The case studies illustrate the importance of seeking the free prior informed consent of Indigenous knowledge holders and relevant groups. Such consent should be obtained at the star, and embedded at stages of the process, to ensure that ICIP principles are reflected in the project.

Photo: A range of bushfood products collected by Lorraine Williams.

Section 10
Sui Generis Legislation

10.1 Pacific Model Law

The *Pacific Regional Framework for the Protection of Traditional Knowledge and Expression of Culture* (the 'Pacific Model') establishes 'traditional cultural rights' for traditional owners of traditional knowledge and expression of culture.[376] The prior and informed consent of the traditional owners is required to reproduce, publish, perform, display, make available on line and electronically transmit traditional knowledge or expressions of culture. The Pacific Model recognises the pivotal role of a cultural authority in administering prior informed consent rights. The explanatory memorandum of the Pacific Model law states:

> 'The model law provides two avenues by which a prospective user of traditional knowledge or expressions of culture for non-customary purposes can seek the prior and informed consent of the traditional owners for the use of the traditional knowledge or expressions of culture. These avenues are:
>
> - applying to a 'Cultural Authority' which has functions in relation to identifying traditional owners and acting as a liaison between prospective users and traditional owners; or
> - dealing directly with the traditional owners.
>
> In both cases, the prior and informed consent of the traditional owners is to be evidence by an 'authorised user agreement'. And in both cases, the Cultural Authority has a role in providing advice to traditional owners about the terms and conditions of authorised user agreements and maintaining a record of finalised authorised user agreements.' [377]

This model law would be an excellent reference point should Australia develop similar appropriate Indigenous ICIP legislation. There are six Pacific countries lined up to introduce Traditional Cultural Expression law – Fiji, Palau, Cook Islands, Papua New Guinea, Kiribati and Vanuatu. Palau has drafted a *Bill for the Protection and Promotion of Traditional Knowledge and Expressions of Culture*. The Bill aims to establish a new form of Intellectual Property identified as 'traditional knowledge and expressions of

[376] Section 6, *Model Law for the Protection of Traditional Knowledge and Expressions of Culture*, South Pacific Community, Noumea, 2002. Drafted by Kamal Puri and Clark Peturu under commission of the SPC, and workshopped at a working group of legal experts in July 2002.

[377] Explanatory Memorandum for the Model Law for the Protection of Traditional Knowledge and Expressions of Culture, South Pacific Community with legal expert teams from UNESCO, WIPO, 2003

culture' and to vest ownership of this new property in the appropriate traditional groups, clans, and communities. 'Ownership' is defined as 'the manner of collective property control recognised in traditional law and does not create or imply non-traditional property interests for individual members of the owner.' The proposed law for Palau requires prior and informed consent for all non-customary uses of traditional knowledge and expressions of culture.

The Pacific Model also advocates for changes to Patents Law – disclosure of origin and whether traditional ecological knowledge was used or a basis for the invention being applied for. If it was, then the prior informed and written consent of the owner must be obtained, and an access and benefit sharing arrangement entered into. This model has some useful features that we can learn from, but it is unlikely that the Commonwealth government will want to amend our patent law for patent disclosure provisions. (See the WIPO IGC discussions, where some countries seem to be supportive of it, but others, notably USA, are against it).[378]

10.2 The Philippines Indigenous Peoples Act of 1997

The Philippines Indigenous Peoples Act of 1997 has as its objects: to recognise, protect and promote the rights of Indigenous cultural communities, Indigenous peoples, creating a national commission on Indigenous peoples, to establish and implementing protection mechanisms. Section 2(b) provides that the State shall protect the rights of ICCs/IPs to their *ancestral domains* to ensure their economic, social and cultural well being and shall recognise the applicability of customary laws governing property rights or relations in determining the ownership and extent of ancestral domain. Ancestral domains refer to all areas generally belonging to ICCs/IPs comprising lands, inland waters, coastal areas, and natural resources therein, held under a claim of ownership, occupied or possessed by ICCs/IPs, by themselves or through their ancestors, communally or individually since time immemorial, continuously to the present except when interrupted by war, force majeure or displacement by force, deceit, stealth or as a consequence of government projects or any other voluntary dealings entered into by government and private individuals/corporations, and which are necessary to ensure their economic, social and cultural welfare.

The Phillipines law covers rights in traditional knowledge and allows Indigenous peoples to limit access to ancestral domains to researchers, and to be attributed as the source of information in written documents and publications that result from research on ancestral domains. It also allows for Indigenous people to receive royalties from the income generated from any of the research conducted, or from the publication of materials.

A specific order issued in 1995 known as Executive Order 247 regulates bioprospecting of genetic resources on ancestral domains, and such activities are only allowance with the prior informed consent of Indigenous communities, obtained according to customary law.[379]

[378] For example, WIPO IGC, *Overview of the Committee's work on Genetic Resources*- WIPO/GRTKF/IC/8/9, http://www.wipo.int/edocs/mdocs/tk/en/wipo_grtkf_ic_8/wipo_grtkf_ic_8_9.pdf , viewed 30 March 2009.
[379] http://cyber.law.harvard.edu/openeconomies/okn/asiatk.html, viewed 1 October 2008.

Commissioned by the Natural Resource Management Board (NT).

10.3 African Traditional Knowledge Bill

In South Africa, an African Traditional Knowledge Bill provides for the recognition and protection of traditional performances having an indigenous origin and a traditional character; to provide for the recognition and protection of copyright works of a traditional character.[380] In this way, the Bill confers copyright on a traditional work if: (a) the work was created (i) on or after the date of commencement of the Intellectual Property Laws Amendment Act, 2007; or (ii) within a period of fifty years preceding the date contemplated in subparagraph (i); and (b) the community from which the work or a substantial part thereof originated is or was an indigenous community when the work was created."[381]

The drafters of this proposed law have also provided for the establishment of a National Council in respect of traditional intellectual property and a national database for the recording of traditional IP. A national trust fund has been established which Indigenous clans can access for cultural purposes. Amendments to the Trade Mark Laws are also included which provide protection for geographical indications, recognising that art and culture come from specific areas. The Bill has been put on hold after submissions and public consultation revealed that the majority of stakeholders present agreed that this Bill is 'unworkable'. Denise Nicholson, representing library interests said that the Bill is being hurried through without careful thought. She has noted,

> …one of the issues is that they have not defined 'traditional works' and 'indigenous communities' and this leaves it wide open. Also issues around oral folklore which cannot be fixed which is a requirement of the Copyright Act. The general feeling is that a sui generis system would be better to deal with TK issues than in the Copyright Act, as they have proposed. Ownership issues were debated a lot." [382]

The South African government is currently re-working the draft bill before it returns to Parliament. The South African developments will inform Australia's legal framework. [383]

10.4 African Model Legislation for the Protection of the Rights of Local Communities, Farmers and Breeders

The *African Model Legislation for The Protection of the Rights of Local Communities, Farmers and Breeders, and for the Regulation of Access To Biological Resources* (2000)[384] has as its main aim; the desire to ensure the conservation, evaluation and sustainable use of biological resources, include agricultural genetic resources, and knowledge and technologies

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[380] South African laws, *Intellectual Property Laws Amendment Bill, 2007*(South Africa), http://www.info.gov.za/view/DownloadFileAction?id=81111, viewed 29 August 2008.

[381] Republic of South AFRICA, Department of Trade and Industry, Intellectual Property Laws Amendment Bill, 2007, Submissions on draft due by 30 June 2008, Contact: Mr. MacDonald Netshitenzhe, SA Dept. of Trade & Industry, Email: publiccomments@thedti.gov.za.

[382] Refer to Matthew Rimmer forwarded email from Denise Nicholson, South Africa, 18 June 2008.

[383] http://www.dti.gov.za/ccrd/ipbills.htm, viewed 16 November 2008.a

[384] *African Model Legislation For The Protection of the Rights of Local Communities, Farmers and Breeders, and for the Regulation of Access To Biological Resources (2000)*- http://www.cbd.int/doc/measures/abs/msr-abs-oau-en.pdf, viewed 1 October 2008.

in order to maintain and improve their diversity as a means of sustaining all life support systems. It provides for prior informed consent when access of biological resources is being undertaken, and promotes fair and equitable sharing of benefits. “Benefit sharing” means the sharing of whatever accrues from the utilisation of biological resources, community knowledge, technologies, innovations or practices. Part III, 3(1) notes: Any access to any biological resources and knowledge or technologies of local communities shall be subject to an application for the necessary prior informed consent and written permit. Applications are to be made to a National Competent Authority.[385] The National Competent Authority must consult with local communities in order to ascertain whether they consent. Any access without consultation is deemed invalid.[386] There is a public registry established for advertising by the authority or it can be advertised in the newspaper.

When compared with the NT *Biological Resources Act 2008*, there are similar features – such as that consent is required - and additional ones such as a register that people could search, as well as the requirement to advertise applications.

10.5 Summary

The above sui generis models of law promote the prior informed consent and exchanges based on mutually agreed terms coordinated through international and national regimes and as well as the promotion of benefits sharing. They are useful model for the NRM sector. Australia should be considering development of model laws as various nations adopt laws to protect traditional knowledge, the international IP system under the World Intellectual Property Organisation is also examining the interface of TK, TCE and intellectual property.

[385] Part III, (3)
[386] Part III, (5)

Section 11
International Treaties & Instruments

Australia is a signatory to the following laws and treaties and as such is bound by them. Ultimately it is up to the Commonwealth government to incorporate these laws into domestic legislation and enforce them accordingly.

11.1 UN Declaration on the Rights of Indigenous Peoples

The UN DRIP has been developed over many years by the UNs Working Group on Indigenous Populations through extensive consultations with indigenous peoples from around the world. Although not binding on Australian governments, it is arguably the strongest and most comprehensive statement of Indigenous rights drafted in any form to date. It includes a specific Article which relates to the cultural and intellectual property rights of Indigenous peoples. Recognising…

> "…that respect for indigenous knowledge, cultures and traditional practices contributes to sustainable and equitable development and proper management of the environment…".

The DRIP then goes on to state in Article 31.1 that:

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

Article 32 also affirms that:

> "Indigenous peoples have the right to determine and develop priorities and strategies for the development or use of their lands or territories and other resources…"

and that;

> "States shall consult and cooperate in good faith with the indigenous peoples…to

> obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources....".

The Australian Government adopted the *Declaration on the Rights of Indigenous People* on 3 April 2009. It is hoped that this document will set the framework for future partnership of working together in all areas, including protection of 'traditional knowledge'.

11.2 Intellectual property treaties

11.2.1 Berne Convention

The *Berne Convention for the Protection of Literary and Artistic Works* is the founding international document upon which Australian copyright laws are based. As a signatory to the Convention, Australia has implemented much of its content into domestic law in the form of the *Copyright Act 1968* (Cth), which is discussed in Section 2. Some relevant provisions for IEK may be the anonymous works provisions, but otherwise there are no specific provisions relating to IEK or traditional knowledge.

11.2.2 Paris Convention for the Protection of Industrial Property

Australia is a signatory to the *Paris Convention for the Protection of Industrial Property* which concerns the protection of industrial property. The Paris Convention covers patents, industrial designs and trade marks, and the repression of unfair competition. An important provision of the Paris Convention means that Australia must give the same right to citizens of other countries as it gives to Australians regarding the protection of industrial property. Again, these bring into Australian law our patents, designs and trade marks laws. The convention applies to IEK to the extent that IEK meets the general law provisions. There are no specific provisions for IEK.

11.2.3 Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS)

TRIPS is an international treaty that was finalised by the World Trade Organisation (WTO) in 1994 during the Uruguay round of the General Agreement on Tariffs and Trade (GATT) in 1994. The treaty sets down minimum standards for many forms of intellectual property (IP) regulations to which countries who are members of the WTO must conform. This includes Australia. Although designed to encourage and enhance trade between countries, the TRIPS agreement has been criticised for a range of reasons. In particular, it seeks to impose a system allowing for the patenting of all 'technologies' including certain biological materials and genetic resources. This may lead to increased conferral of individual property rights over natural resources such as plants and the genetic information of other biological resources, even people. These provisions of the TRIPS agreement seem to be in stark contrast to the intent and content of certain provisions of the CBD.

Commissioned by the Natural Resource Management Board (NT).

The following are international instruments that Australia has not yet signed, and therefore is not bound by their provisions. They do, however, provide a strong framework for best practice and should be referred to when developing protocols.

11.2.4 WCT & WPPT

The WIPO (World Intellectual Property Organisation) Copyright Treaty (WCT) and WIPO Performances and Phonograms Treaty (WPPT) were designed to expand upon and extend copyright law for creators of artistic works, performances and sound recordings. Following Australia's accession to both treaties they came into force in Australia in July 2007.

Amendments to our copyright law followed so that performers now have rights for live performances, including moral rights (see Copyright section above). In other words, the definition of maker takes into account unpaid live performers who may have a share of copyright in sound recordings made by others. The definition of live performance in the WPPT includes a performer of folklore. This phrase has been inserted into our Copyright Act since 2000. This may be relevant for researchers collecting information from Indigenous knowledge holders as audio recordings. (See generally Copyright in section 2).

11.2.5 WIPO Development agenda

WIPO has embarked upon a development agenda to 'ensure that development considerations form an integral part of WIPO's work.' After formally establishing the Development Agenda in October 2007, the WIPO General Assembly adopted a set of 45 recommendations and 6 clusters to enhance the development dimension of the Organization's activities. Recommendation 18 emphasizes the need 'to accelerate the process on the protection of genetic resources, traditional knowledge and folklore, without prejudice to any outcome, including the possible development of an international instrument or instruments.'

In 2000, the World Intellectual Property Organisation (WIPO) established an *Inter-Governmental Committee on Intellectual Property Genetic Resources, Traditional Knowledge and Folklore* (IGC). Within this framework, several member States and many Indigenous people have argued for greater recognition and use of customary laws and protocols in formulating systems for the protection of expressions of folklore and traditional cultural expression. In particular, this includes applying customary laws to issues relating to acquiring, maintaining and enforcing traditional cultural expression rights.[387]

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

Commissioned by the Natural Resource Management Board (NT).

11.3 The International Bill of Human Rights

In 1948 the United Nations General Assembly adopted the Universal Declaration on Human Rights, setting down general principles of human rights for all people on the general basis that 'All human beings are born free and equal in dignity and rights' (Article 1) and that they should enjoy certain human rights without discrimination of any kind. Article 27 of the Universal Declaration states:

- Everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits.
- Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.

Following on from the Universal Declaration, members of the UN then went on to develop two further treaties expanding upon and clarifying the principles it contained. Together with the Universal Declaration, these two treaties (the *International Covenant on Economic Social and Cultural Rights* and the *International Covenant on Civil and Political Rights*) comprise what is known as the 'International Bill of Human Rights'. As the guiding international instruments on human rights, these treaties (both of which Australia has ratified), have clauses which are relevant to the rights of indigenous peoples to benefit from their cultural and intellectual property.

11.3.1 International Covenant on Civil and Political Rights (ICCPR)

In particular, Article 27 of the ICCPR states,

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

11.3.2 International Covenant on Economic Social and Cultural Rights

Article 15.1 of the ICESCR states:

> The States Parties to the present Covenant recognize the right of everyone:
> (a) To take part in cultural life;
>
> (b) To enjoy the benefits of scientific progress and its applications;
>
> (c) To benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.

Commissioned by the Natural Resource Management Board (NT).

11.4 International Convention for the Protection of New Varieties of Plants

This convention established the Union for the Protection of New Varieties of Plants (UPOV). In 1991 UPOV developed the *Plant Variety Treaty*, to which Australia is a signatory. This treaty has since been enshrined into Australian domestic law through the *Plant Breeders Rights Act*.

11.5 International Treaty on Plant Genetic Resources for Food and Agriculture

The *International Treaty on Plant Genetic Resources for Food and Agriculture* was adopted by the Food and Agriculture Organisation of the United Nations in 2001. Although Australia is a signatory to the Treaty, the Australian government is yet to introduce any of its provisions into domestic law.

The purpose of the Treaty is to create a system which facilitates access to plant genetic resources for food and agriculture to ensure biodiversity, sustainability and food security. As part of this system the Treaty aims to ensure the rights of local farmers and traditional knowledge holders to share in benefits arising out of the use of plant genetic resources. The provisions of the treaty are designed to compliment and support the Convention on Biological Diversity.

Article 9 of the Treaty is relevant to Indigenous people, in that it recognizes 'the enormous contribution' made by indigenous communities to the 'conservation and development of plant genetic resources which constitute the basis of food and agriculture production throughout the world.'[388] Article 9 obliges members to introduce measures which will protect 'traditional knowledge relevant to plant genetic resources for food and agriculture'. It also calls for members to implement schemes for equitable sharing of benefits for utilisation of plant genetic resources.

It should be noted that although Article 9 refers to Indigenous communities, it is headed 'Farmer's Rights', and there is no clear definition of what a 'farmer' is. Any proposals to introduce this treaty into Australian law should avoid drawing distinctions between farmed plant genetic resources and those harvest directly from the bush based on traditional knowledge.

The Treaty establishes a Multilateral System of Access and Benefit-sharing for plant genetic resources, for 64 of the most important food crops in the world. The 'Standard Material Transfer Agreement' drafted for exchange of genetic material between contracting parties might be a useful template for Indigenous communities supplying plant genetic resources to others. Among other things, the agreement contains a clause stopping the recipient of the genetic material from claiming IP rights over it.

[388] Article 9, *International Treaty on Plant Genetic Resources for Food and Agriculture*.

Commissioned by the Natural Resource Management Board (NT).

11.6 FAO International Code of Conduct for Plant Germplasm Collecting and Transfer

This Code was adopted by the FAO in 1993. A primary objective of the code is:

> To promote the conservation, collection and use of plant genetic resources from their natural habitats or surroundings, in ways that respect the environment and local traditions and cultures…

The Code also aims to promote recognition of the rights and needs of local communities and those who manage wild plant resources. Although there is no specific reference to indigenous people in the Code, there are a number of provisions which encourage sharing of benefits and consultation with 'local communities'. These provisions may be useful to Indigenous communities providing plant genetic resources or traditional knowledge relating to their whereabouts and usage.

11.7 ILO 169

The International Labour Organisation adopted the Convention Concerning Indigenous and Tribal Peoples in Independent Countries (ILO 169) in 1989.[389] The Convention is not unanimously endorsed by world Indigenous peoples and many flaws have been identified. It has 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".[390]

Despite its inadequacies, some important aspects of this Convention that recognise the cultural and economic importance of Indigenous Cultural and Intellectual Property that may benefit the Indigenous peoples of ratifying States.[391] The convention incorporates provisions for the protection of social, cultural, religious and spiritual values and practices,[392] 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".[393]

Some commentators believe that these cultural rights provisions are the strongest bases from which to assert Indigenous peoples' separate identity.

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[389] ILO 160, http://www.unhchr.ch/html/menu3/b/62.htm, viewed 29 August 2008.
[390] As noted by the Aboriginal and Torres Strait Islander Social Justice Commissioner, Submission to *Stopping the Ripoffs*, (unpublished), 1994, p 4.
[391] Lisa Strelein, "The Price of Compromise: Should Australia Ratify 190 Convention 169?" in Bird et al (eds), *Majah: Indigenous Peoples and the Law*, The Federation Press, 1996, pp 63-86.
[392] Article 5 of ILO 169.
[393] Article 23 of ILO 169.

Commissioned by the Natural Resource Management Board (NT).

11.8 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)* 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 States 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. [394]

11.9 UNESCO Convention for the Safeguarding of Intangible Cultural Heritage 2003

The Convention for the Safeguarding of Intangible Cultural Heritage acknowledges the importance of 'living heritage' which can take many forms including:

- Oral traditions and expressions including language;
- Social practices, rituals and festive events; and
- Knowledge and practices concerning nature and the universe.

The Convention encourages the recognition of the importance of and the threats to intangible cultural heritage and suggests measures for its safeguarding. The Commonwealth Government has not signed this Convention, so it has no binding force in Australia.

11.10 UNESCO Convention for the Protection and Promotion of the Diversity of Cultural Expressions

The UNESCO *Convention on the Protection and Promotion of the Diversity of Cultural Expressions* 2005 recognises among other things the importance of intellectual property rights in sustaining those involved in cultural creativity. It also recognises the importance of traditional knowledge as a source of intangible and material wealth, and in particular the

[394] Article 3, *UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership (1970)*, http://portal.unesco.org/en/ev.php-URL_ID=13039&URL_DO=DO_TOPIC&URL_SECTION=201.html, viewed 17 February 2009.

knowledge systems of indigenous peoples, and its positive contribution to sustainable development, as well as the need for its adequate protection and promotion.[395]

In its 2007 policy *New Directions for the Arts*, the Australian Government committed to ratify and give effect to the UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions. The Department of the Environment, Water, Heritage and the Arts is the lead agency in the ratification process and is currently seeking views from relevant groups on the likely implications of Australia's accession to the Convention.[396]

11.11 International Union for the Conservation of Nature

The International Union for Conservation of Nature (IUCN) is an international agency who aims is to assist 'the world find pragmatic solutions to our most pressing environment and development challenges. It supports scientific research, manages field projects all over the world and brings governments, non-government organizations, United Nations agencies, companies and local communities together to develop and implement policy, laws and best practice'.[397]

The IUCN's websites notes that:

> Indigenous and traditional peoples have often been unfairly affected by conservation policies and practices, which have failed to fully understand the rights and roles of indigenous peoples in the management, use and conservation of biodiversity. In line with numerous international instruments (e.g., Agenda 21; ILO Convention 169; Article 8(j) of the CBD; and the UN Declaration on the Rights of Indigenous Peoples) several IUCN WCC resolutions emphasise indigenous peoples' rights to lands, territories, and natural resources on which they have traditionally subsisted. These resolutions stress the need to enhance participation of indigenous peoples in all conservation initiatives and policy developments that affect them. Furthermore, they recognise that indigenous peoples possess a unique body of knowledge relevant for the conservation and sustainable use of natural resources.'[398]

Under the IUCN World Conservation Congress (WCC) Resolutions, IUCN aim to:

- Respect indigenous peoples' knowledge and innovations, and their social, cultural, religious and spiritual values and practices.
    - Recognise the social, economic and cultural rights of indigenous peoples such as their right to lands, territories and natural resources, respecting their social and cultural identity, their customs, traditions and institutions.

[395] (http://unesdoc.unesco.org/images/0014/001429/142919e.pdf), viewed 1 October 2008.
[396] Email dated 30 September 2008, from jane.carter@environment.gov.au.
[397] International Union for Conservation of Nature, http://cms.iucn.org/about/index.cfm, 16 November 2008.
[398] International Union for Conservation of Nature, http://cms.iucn.org/about/work/programmes/social_policy/sp_themes/sp_themes_ip/index.cfm, viewed 16 November 2008.

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- Strengthen the capacity of indigenous peoples to ensure the potection of their knowledge and the fair and equitable sharing of any benefits arising from its use.

- Support processes for improving the national and international legal and policy framework relevant to the rights of indigenous peoples in the context of the environment and biodiversity conservation. To accomplish this IUCN's Commission on Environmental Law has set up an Indigenous Peoples Specialist Group.

In response to the WCC resolution 1.53, the IUCN and WWF World Commission on Protected Areas developed *Principles and Guidelines on Indigenous and Traditional Peoples and Protected Areas*, which may be of assistance for Indigenous groups and NRM groups involved in managing the various types of protected areas in the Northern Territory. Among other things, the Guidelines recommend at 1.3 that:

> The formulation of protected area management plans should actively incorporate indigenous and traditional knowledge…

The Guidelines also call for agreements between conservation institutions (including management agencies) and indigenous peoples for the management of protected areas that are based on full respect for indigenous peoples' rights relating to their lands and territories including:

> …collective rights to maintain and enjoy their cultural and intellectual heritage, particularly the cultural patrimony contained in protected areas, and the knowledge related to biodiversity and natural resource management…[399]

11.12 WIPO Draft Provisions on TK & TCEs

In 2000 the World Intellectual Property Organisation established the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (IGC). [400] The IGC has been conducting in depth research and developing detailed documents which are extremely relevant for people working in this field.[401] The WIPO IGC has divided their work in this area into two streams: 'traditional knowledge' (TK) and 'traditional cultural expressions' (TCEs).

'Traditional cultural expression' (TCE) includes songs, stories, ceremonies, rituals, dance and art including rock art, face and body painting, sand sculptures, bark paintings.

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[399] Guideline 2.2(h), IUCN, *IUCN Principles and Guidelines on Indigenous and Traditional Peoples and Protected Areas*, http://cms.iucn.org/about/work/programmes/social_policy/sp_resources/documents/index.cfm, viewed 16 December 2008.

[400] See the World Intellectual Property Organisation's website, <www.wipo.int/globalissues>.

[401] Our government is represented on that IGC, but there has been limited input from Indigenous Australians into the government's contribution, and little feedback to Indigenous communities. The Australian Francis Gurry was appointed as the Director General of WIPO in September 2008.

Commissioned by the Natural Resource Management Board (NT).

Acknowledging there are various definitions of TK, for the purposes of the Gap Analysis, TK is referred to as the:

> content or substance of knowledge resulting from intellectual activity in a traditional context, and includes the know how, skills, innovations, practices and learning that form part of traditional knowledge systems, and knowledge embodying traditional lifestyles of indigenous and local communities, or contained in codified knowledge systems passed between generations.[402]

For each of the streams, the IGC has been undertaking three interconnected processes:

- Consideration of a 'list of issues' concerning protection of TK and TCEs;
- Consideration of a set of "Revised Objectives and Principles for the Protection of TK and TCEs" (Draft Provisions), and
- Drafting a "Gap Analysis" on the protection of TK and TCEs.[403]

This work has resulted in six separate documents, which although still in draft forms have already begun to shape future laws and policies relating to traditional cultural expressions and traditional knowledge. For example, laws based on the draft provisions are soon to be implemented in five Pacific nations including Papua New Guinea, Fiji and the Cook Islands.

The Draft Provisions on TK list the following sixteen Policy Objectives:

1. Recognise value
2. Promote respect
3. Meet the actual needs of traditional knowledge holders
4. Promote conservation and preservation of traditional knowledge
5. Empower holders of traditional knowledge and acknowledge the distinctive nature of traditional knowledge systems
6. Support traditional knowledge systems
7. Contribute to safeguarding traditional knowledge
8. Repress unfair and inequitable uses
9. Concord with relevant international agreements and processes
10. Promote innovation and creativity
11. Ensure prior informed consent and exchanges based on mutually agreed terms
12. Promote equitable benefit-sharing
13. Promote community development and legitimate trading activities
14. Preclude the grant of improper intellectual property rights to unauthorized parties
15. Enhance transparency and mutual confidence
16. Complement protection of traditional cultural expressions

[402] WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore, *Draft Gap Analysis on the Protection of Traditional Knowledge*, 30 May 2008, available online at http://www.wipo.int/tk/en/igc/gap-analyses.html, viewed 10 December 2008.
[403] See the World Intellectual Property Organisation's website, <www.wipo.int/globalissues>.

Commissioned by the Natural Resource Management Board (NT).

The WIPO provisions on TK and TCEs include compliance with the 'free, prior and informed consent' principle and the recognition of customary laws and practices. Under the WIPO Provisions the prior consent of the traditional owners of cultural expressions would be required prior to recording, to publication and communication to the public. There would also be moral rights for communities but these would be automatic and not just voluntary.

11.13 United Nations Conference on Trade and Development (UNCTAD) Workshop (2004)

The UNCTAD-Commonwealth Secretariat held a Workshop on Elements of National *Sui Generis* Systems for the Preservation, Protection and Promotion of Traditional Knowledge, Innovations and Practices and Options for an International Framework in 2004. Peter Drahos suggested that there were a number of essential elements for an international framework protecting traditional group knowledge and practices:

> The central conclusion of this paper is that a treaty on TGKP should focus on the enforcement dimension of TGKP. Specifically this would involve members in the establishment of a Global Bio-Collecting Society that would coordinate enforcement work so as to constitute an international enforcement pyramid. The treaty should also establish a review mechanism and a set of indicators that could be used to evaluate the progress of states on the regulation of TGKP. At this stage of the evolution of protection for TGKP, a treaty should not attempt to set substantive international norms of protection (for example, by creating an international norm of misappropriation of TK). Instead, states should focus on creating a treaty that does not discourage the development of national approaches and norm-creation on TGKP, but does offer the members of such a treaty a means of cooperating and coordinating on the enforcement of TGKP. A treaty that is modest in setting substantive standards, but strong on coordinating national enforcement activities will be far more likely to avoid the fate, which befalls many treaties, of becoming a dead letter.[404]

11.14 Indigenous statements

11.14.1 Maatatua Declaration on the Cultural and Intellectual Property Rights of Indigenous Peoples (1993)

In 1993 the nine Maatatua tribes in the Bay of Plenty Region of Aotearoa, New Zealand convened an inaugural ICIP Rights Conference. Delegates adopted the historic *Maatatua Declaration on the Cultural and Intellectual Property Rights of Indigenous People*. Among the set of principles, the following self-determination and ownership of ICIP principle was included:

[404] Peter Drahos 'Towards An International Framework For The Protection Of Traditional Group Knowledge And Practice', UNCTAD-Commonwealth Secretariat Workshop, Geneva, Switzerland, 4-6 February 2004.

Commissioned by the Natural Resource Management Board (NT).

> The right to self determination, the exercise of which includes recognition of Indigenous people as the exclusive owners who are capable of managing their ICIP, and their intellectual property. [405]
>
> Indigenous people affirm that "the knowledge of Indigenous Peoples of the world is of benefit to all humanity." The sharing of this knowledge is qualified by the requirement that Indigenous people's fundamental rights to define and control this knowledge are protected by the international community'.[406]

11.14.2 Julayinbul Statement 1993

Indigenous delegates in Australia developed the *Julayinbul Statement on Indigenous Intellectual Property Rights* in 1993.[407] The statement identifies the rights of Indigenous people to continue to live within and protect, care for, and control the environment and Indigenous heritage. The statement also recognises 'Aboriginal intellectual property, within Aboriginal Common Law, is recognised as an inherent inalienable right which cannot be terminated extinguished or taken.' The statement seeks to extend the prior informed consent provisions of the CBD to Indigenous people's intellectual property. Claim 7 notes:

> 'that in 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 territory. Any unauthorised use of Indigenous Nation's and Peoples' intellectual property is strictly prohibited.'[408]

The Julayinbul Statement is an important standard setting statement for development of legal protections of Indigenous Australian heritage.

11.15 Summary

Internationally, there are a growing number of laws that recognise the rights of Indigenous people to their unique cultural heritage. A number of treaties, declarations and 'model laws' have been developed by various organisations and representative groups to reflect the needs and aspirations of indigenous peoples. It is important that Australian laws continue to develop in line with this trend. Some of these international developments are shaping Australian law to benefit Indigenous people. A sui generis law offers the strongest support for Indigenous cultural and intellectual property rights as they specifically recognise the unique nature and needs of Indigenous peoples and their cultures. There is no indication that Australia will introduce sui generis laws on Indigenous cultural and intellectual property rights. In our region however, a number of Pacific nations are considering developing 'traditional knowledge' and 'traditional cultural expression' laws based on the Model Law for the Protection of Traditional Knowledge and Expressions of Culture.

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[405] *Maatatua Declaration on the Cultural and Intellectual Property Rights of Indigenous People*, preamble.
[406] Ibid.
[407] The full text is available in Terri Janke, *Our Culture, Our Future*, pp. 3110 – 313.
[408]

Section 12
Conclusions and recommendations

12.1 Conclusions

As Indigenous people and the use of their knowledge is increasing used in the field of Natural Resource Management in the Northern Territory (NT), there is a need to address issues relating to protection of Indigenous cultural and intellectual property. A framework of protocols for the negotiated prior informed consent for use of Indigenous ecological knowledge should be followed.

Indigenous Ecological Knowledge needs to be respected and acknowledged for its value in terms of its importance to Indigenous peoples, and its current and potential value to industry. The relationship between natural resource management and IEK can be generally placed in four categories:

i. protection from exploitation – recognition of the prior informed consent right
ii. the right of Indigenous people to benefit from use of their knowledge – the access and benefit sharing right
iii. the recording and maintenance of Indigenous Ecological Knowledge
iv. the need for Indigenous people to put the knowledge into practise – fostering 'on country' intergenerational transfer of knowledge.

These four areas overlap in many ways and may in some circumstances compete. The challenge is to find the balance. For instance, the recording of Indigenous ecological knowledge must be done in a way that the knowledge is sufficiently protected from misappropriation, while at the same time acknowledging that IEK is a living tradition. IEK must be made available to the Indigenous people for their own use and benefit.

A range of laws and IP tools may be useful to protection IEK including copyright, contracts, protocols, notices and trade marks. Efforts to address Indigenous Cultural and Intellectual Property issues should aim to follow the critical and key principles of:

- Respect for culture –prior informed consent;
- Promoting integrity and authenticity;
- Proper attribution – acknowledging cultural sources of Indigenous clan owned stories, songs, and knowledge; and

- Sharing of benefits.

These principles are expanded in the Handbook, produced by Michael Davis, and the *Guidelines for Indigenous Ecological Knowledge Management (including archiving and repatriation)* written by Sarah Holcombe, which form the other two outputs of this project.

Further consideration should be given to protection of IEK and Indigenous cultural and intellectual property within the Australian legal framework towards a sui generis law. Australia's adoption of the *Declaration on the rights of Indigenous people* sets a new path for working together in Natural Resource Management in terms of recognizing Article 31.1 and the right of Indigenous people to ' maintain, control, protect and develop their intellectual property over such cultural heritage, traditional knowledge, and traditional cultural expressions.'

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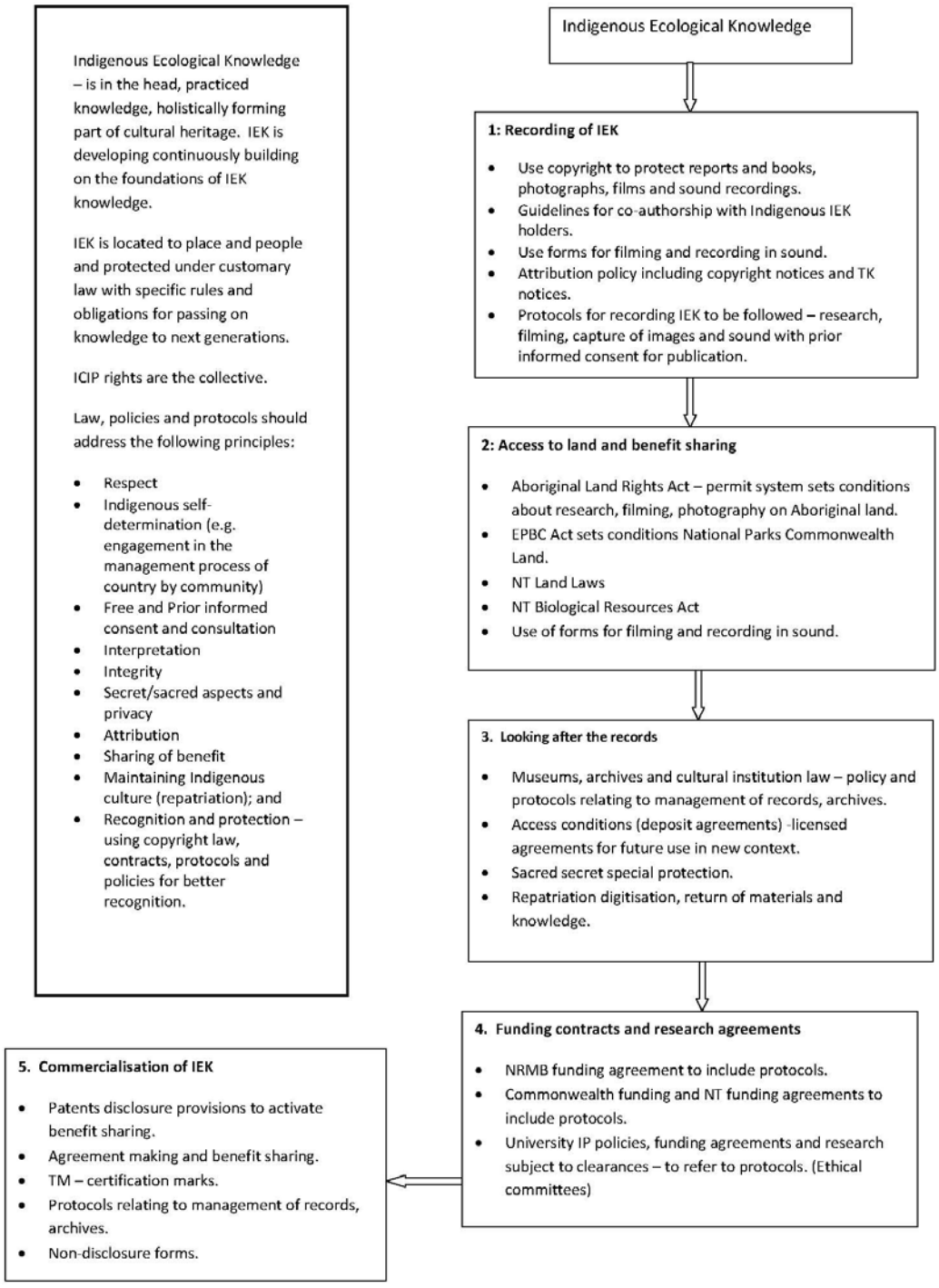
12.1.2 Strategy plan overview



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12.2 Recommendations

The following recommendations are made to assist with the implementation of the protocols, guidelines and the wider use of the handbook.

12.2.1 Engage IEK consultant

To interpret IEK, and protect cultural integrity and address self-determination and prior informed consent principles, involving Indigenous people, who are the IEK knowledge holders would seem to be useful strategy. Identifying the appropriate people to work on an IEK project is the first and fundamental step. See the Indigenous consultants' initiative at the www.cdu.edu.au website.

12.2.2 Skills development of IEK knowledge holders

The structure of land management groups means that they take leadership roles in NRM. This introduces aspects that do not necessarily fit in with community norms. For example, IEK workers noted that being a manager of other people, especially elders may go against cultural hierarchy structures. These issues need to be discussed further with IEK workers and elders.

12.2.3 Respectful working relationship

Whilst establishing legal frameworks is one way to set parameters for IEK management, the importance of respectful working relationship between IEK knowledge holders and government officers, park workers etc was also noted as a significant factor in determining IEK rights to data. It should be recognised that relationships between people also have an influence on a successful partnership between science and TK practice. The development of trust precedes the giving of information by people and it will determine how to act within particular projects and shifts in use applications. The building of trust is central. Valuing both knowledge systems, and both professional knowledge bases, is a fundamental cornerstone of respect.

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12.2.4 Legal resources

The following legal resources would be useful to assist management and getting the message out:

a. A legal information tool kit consisting of documents/releases and how to use them;

b. A database of clauses – such as the WIPO database of clauses; and

c. A case study booklet to assist people with their project – with legal and cultural issues, as well as funding agreements is recommended. What worked? What could be improved? Possible focus of future pilot projects could be to fund a pilot project to examine IP issues and develop role model agreements and protocols. This project would road test how IP management systems and protocols are useful. The technical advisory panel (TAPs) could be involved to give feedback.

12.2.5 Legal workshop

There is a need for further discussions about the IP/IEK complexities and awareness and education of IP laws especially copyright for IEK knowledge holders. I would recommend a workshop. Also, consciousness raising of IEK researchers is urgently needed.

12.2.6 Databases

A database for the management of IEK should be established, with comprehensive details on ownership of IEK to knowledge holders, copyright owners, traditional owners and the type of rights that are cleared for relevant parties for use.

12.2.7 Getting the message out

In the feedback from our workshops, people recommended that a community guide is crucial. One participant said that we must educate the Aboriginal community by using DVDs as well as literacy based information. Can we put something on television? There needs to be more discussion about format and accessibility of the IEK outputs produced as part of this project.

Another suggestion was television dissemination of the information as this will increase access. Imparja could have a program, but there would need additional resources, and this could be a secondary stage of the project.

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In terms of written information, the group said that short summaries would help get the message to people out bush is the process. The group could look at it, and recommend text. Getting information to Indigenous people could involve IAD Press,[409] CAAMA[410] and Imparja.[411] Possibly also NITV could be involved.

12.2.8 IEK Conference 2009

A conference is proposed to be held by December 2009 to discuss IEK repatriation and NRM. Some suggested people to attend include:

- Victor Stefensen, Traditional Knowledge Recording Project
- International Society of Ethnobiology (ISE)[412]
- Maori WAI 262 – claimants or lawyer
- World Intellectual Property Organisation representatives.
- Pacific Model Law consultants working with Secretariat of the Pacific Community and the Pacific Islands Forum Secretariat.

12.2.9 Concluding comments

In conclusion, to protect Indigenous Ecological Knowledge and recognise ICIP rights in the NRM projects, a range of IP tools can assist copyright, performers' rights, trade marks used in association with contracts, protocols, guidelines, notices, accreditation and access conditions. Strategies for protection should be comprehensive and include both legal and non-legal measures. Whilst these approaches can assist in the ways noted in this report, the protection of ICIP rights within sui generis legal framework remains a long term objective for Indigenous Australians.

[409] http://www.iad.edu.au/press/iadpresshome.htm, viewed 11 August 2008. IAD Press publish books in language, and about Bush Foods and Medicines and natural resources. Last year, they published a book by Veronica Dobson, *Arelhe-Kenhe Merrethene - Arrernte Traditional Healing* is a comprehensive overview of the different methods of healing used by the Arrernte people of Central Australia.

[410] http://www.caama.com.au/caama/, viewed 11 August 2008. CAAMA has a clear mandate to promote Aboriginal culture, language, dance and music while generating economic benefits, including training, employment and income generation. CAAMA produces media products that engender pride in Aboriginal culture and informs and educates the wider community of the richness and diversity of the Aboriginal peoples of Australia.

[411] http://www.imparja.com/, viewed 11 August 2008. Imparja Television broadcasts to many remote communities in the NT.

[412] http://ise.arts.ubc.ca/, viewed 21 July 2008. Declaration of Belem and the Code of Ethics of the International Society of Ethnobiology (ISE) provides a framework for decision-making and conduct for ethnobiological research and related activities.

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Definitions

'Aboriginal' means a descendant of an Aboriginal person, an original inhabitant of Australia.

'Benefit-sharing' is a term used in the context of the Convention on Biological Diversity and access to genetic resources including plants and animals. The terms refers to the exchange between those who grant access to a particular resource and those who provide compensation or reward for its use.

'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."[413] Indigenous people's heritage is a living heritage and includes objects, knowledge, artistic, literary, musical and performance works that may be created now or in the future based on that heritage.

'Human Rights ' are recognised in the International Bill of Rights, which consists of the *Universal Declaration on Human Rights*, the *International Covenant on Cultural and Political Rights*, and the *International Covenant on Economic, and Social Rights*. Although Australia is a signatory to each of these instruments, many of these human rights have not been specifically introduced into Australian law.

'Indigenous' refers to the descendants of Aboriginal and Torres Strait Islander people, the original inhabitants of Australia's mainland, Tasmania and the Torres Strait Islands when used with a capital 'I'. When it is used with a lower case 'i' it refers to world indigenous peoples.

'Indigenous cultural and intellectual property (ICIP)' refers to Indigenous people's rights to the tangible and intangible aspects of their Heritage.

'Indigenous Ecological Knowledge' refers to the ecological information, passed on through the generations that Aboriginal people draw upon to live their culture. It is a term used to describe the knowledge held by Indigenous people about the natural environment and its resources. IEK is diverse and includes knowledge relating to plants and animals, weather patterns, bush food, fire management and cultural practices. It is knowledge relevant to Aboriginal people, individually or communally, as part of their heritage. It includes oral stories, language, songs, skills, knowledge of sites, historical information and genealogical information. Aboriginal Knowledge is an integral part of Aboriginal cultural heritage values. It is central to Aboriginal identity, beliefs systems and cultural practices. Aboriginal people

[413] Janke, Terri, *Our Culture: Our Future – Report on Australian Indigenous Cultural and Intellectual Property Rights,* Michael Frankel and Company, written and published under commission by the Australian Institute of Aboriginal and Torres Strait Islander Studies and the Aboriginal and Torres Strait Islander Commission, Sydney 1999.

have obligations to pass this knowledge on as part of their cultural practices. Whilst it may draw upon other sources, Aboriginal Knowledge is fundamentally the community's interpretation of its culture and knowledge. It is important to realise that IEK differs greatly from place to place and is often unique to a particular group of people. IEK may sometimes be shared with a number of groups because a plant or animal resource crosses boundaries, or the environment is similar. However, there may be local variations. IEK is a living body of knowledge held by various individuals and communal groups across the Territory that has survived and evolved over thousands of years and will continue to adapt to the rapidly changing world.

The term 'Indigenous Ecological Knowledge' is sometimes regarded as problematic in that it segments Indigenous Knowledge, whereas Indigenous knowledge systems are holistic in nature, and the tangible and intangible are interconnected. For the purposes of this report, the term 'Indigenous Ecological Knowledge' is used, understanding that it may not be an entirely satisfactory being more a proxy term for a more complex set of knowledges.

'Intellectual Property Rights' Certain rights attach to property, giving the owner the right to say how a certain thing is used. These rights only arise when a person has a connection with the property in question. For the most part, intellectual property rights fall into this category. That is, they give a person rights to control how their intellectual property is used. These rights are often 'exclusive', meaning that the owner is the only one who can deal with their intellectual property in the ways specified. In effect, this gives the owner the right to stop others from using their IP, much in the same way as the owner of land has the right to stop other people from entering their land.

'Prior informed consent' refers to the principle that recognises that the prior informed consent of Indigenous peoples and their communities must be obtained before any research or use of the Indigenous cultural and intellectual property is undertaken. This principle has growing recognition in international law in documents such as the Convention of Biological Diversity.

'Sacred' means restricted class of information based on ritual, ceremonial status or gender based.

'Sacred and secret' refers to information that is restricted under customary laws. For instance, some cultural information may be learned or viewed only by men or only by women, or only after initiation.

'Traditional owner' refers to those Indigenous people who have the responsibility through membership in a descent group (clan) for caring for particular country. As defined in the Australian Heritage Commission, *Ask First, A guide to respecting Indigenous heritage places and values*, "traditional owners are authorised to speak for country and its heritage." Authorisation to speak for country and heritage may be as a senior traditional owner. It could also be an elder or a Native Title claimant.[414]

[414] Australian Heritage Commission, *Ask First, A guide to respecting Indigenous heritage places and values*, Canberra, 2002, See definitions section on page 4.

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'ICIP' refers to indigenous cultural and intellectual property rights as per *Our Culture, Our Future* contains 17 rights Indigenous peoples need in relation to their Cultural and Intellectual Property. These are 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 cultures 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.

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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.

As of yet not all of these rights are effective at law, and whether Indigenous people can realise these rights will depend on the legal and policy framework within which they reside.

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Acronyms

AAPA	Aboriginal Areas Protection Authority
ALRA	Aboriginal Land Rights Act
CBD	Convention on Biological Diversity
CLC	Central Land Council
DK CRC	Desert Knowledge Cooperative Research Centre
EPBC	Environment Protection & Biodiversity Act
GIS	Geographic Information System
ICIP	Indigenous Cultural and Intellectual Property
ICMR	Indigenous Communal Moral Rights
IEK	Indigenous Ecological Knowledge
IK	Indigenous Knowledge
ILUA	Indigenous Land Use Agreement
IP	Intellectual Property
IUCN	International Union for Conservation of Nature
NAILSMA	North Australian Indigenous Land and Sea Management Alliance
NHT	Natural Heritage Trust
NLC	Northern Land Council
NRM	Natural Resource Management
TRIPS	Agreement on Trade Related Aspects of Intellectual Property Rights
UNESCO	United Nations Educational, Scientific and Cultural Organization
WIPO	World Intellectual Property Organisation
WCC	World Conservation Congress
WWF	World Wide Fund for Nature

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Appendix A – Boll informed consent form

The following Informed Consent form was drafted by Valerie Boll in 2007 for her work with Dhimurru Land Management Aboriginal Corporation. It is reproduced with the kind permission of Valerie Boll and Djawa Yunupingu, Dhimurru's Director. ©Valerie Boll, 2007.[415]

Informed Consent Form for:

"Caring for Country – Managing Indigenous and scientific environment knowledge in North East Arnhem Land".

I want to invite you to help me in my research focusing on the structuring of Indigenous knowledge systems, especially the interplay between Indigenous knowledge systems and Western knowledge systems and the 'Two way' knowledge system used in North East Arnhem Land.

My name is Valerie Boll. I'm a French researcher interested in traditional ecological knowledge. I have spent seven and a half years in Australia, and approximately 2 years in Arnhem Land, consulting with scientists, Aboriginal people and researching the collections of many museums. Dhimurru Land Management Aboriginal Corporation is supporting my research. Twice, in 2002 and 2004, we were awarded a research grant from the Australian Institute of Aboriginal and Torres Strait Islander Studies in Canberra and I worked on Dhalwangu's traditions and beliefs on frogs (and toads). In 2007 and early 2008, we were awarded 2 research grants for the Australian Institute of Aboriginal and Torres Strait Islander Studies in Canberra and the Christensen Fund in California, USA for a new project called **"Caring for Country – Managing Indigenous scientific environmental knowledge in North East Arnhem Land".**

You can talk with Djawa Yunupingu, Dhimurru's director, if you have any questions about the new project.

Yolngu people have established ways of encountering others ranging from Indigenous neighbours, visitors from Indonesia and Papua New Guinea and finally Europeans and those who came with them. The relationship between Yolngu knowledge and Western science is a developing dialogue but we need to understand how Indigenous knowledge systems and Western knowledge systems are structured and interplay to improve local education programs, biological diversity research and conservation and management programs.

[415] Valerie Boll email contact: [yskp@dhimurru.com.au]

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That's why I would like to record any information you might have. I will be taking notes but I also will tape- and video-record our conversations to ensure that we remember exactly what was said. I will assign codes to each tape and its transcript and will delete any references to individual's names or any form of other identification if you wish so. The tapes will be kept in a locked file cabinet at Dhimurru's office and at the Australian Institute of Aboriginal and Torres Strait Islander Studies in Canberra. No tapes will be used for external purposes without additional written assent from you and/or consent from Yolngu custodians concerned.

Your participation in this study is voluntary, and you have the right to stop participating at any time. You also can refuse to answer any question(s) for any reason. At no time during any group discussion will you be asked to provide or share personal information or be pressed to provide any other information that you do not wish to share. Everything you say will be kept absolutely confidential. In addition, if requested, I will use pseudonyms (cover names) to disguise the identity of all participants in any written or published material resulting from this study.

Benefits of participation include the opportunity to help:

- To protect your cultural environment and the biological diversity in north-east Arnhem Land.
- To recognise the value of Aboriginal traditional ecological knowledge and their practices and incorporate these ones in biological diversity research and conservation programs.
- To understand the role of modern education and science in undermining Indigenous knowledge and ways of teaching and learning.
- To identify opportunities for integrating relevant aspects of Indigenous knowledge and approaches to teaching and learning into the formal education curriculum.
- To provide the resources to enable Yolngu people to retain their own cultural heritage and preserve their store of oral literature in order to pass on all this knowledge to younger generation and integrate it into modern education, biological diversity research and conservation programs.

If you have any questions or concerns about participating in this project, or any unhappiness with any part of this study, you may talk to me – confidentially – to Djawa Yunupingu, director or to Steve Roeger, Executive Officer of Dhimurru, or write to us, PO Box 1551, Nhulunbuy 0881 Northern Territory (Ph: (08) 8987 3992, Fax: (08) 8987 3224, E-mail: nhamirri@dhimurru.com.au)

Please sign both of these consent forms. One is for you, and the other (next page) is for my records.

Thank you.

I hereby certify that I have read this consent form or had it read to me, I understand its content, and agree to be interviewed with a tape/video recorder for this project. I understand that I don't have to answer any questions that I don't feel like answering, and that I can end the interview any time that I wish.

Commissioned by the Natural Resource Management Board (NT).

Please print your name_____

Signature_____ Date_____

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Acknowledgments

Thanks to Peter Veth for proofing all three of the resources. Also, thanks to Matt Rimmer for reviewing the report and making suggestions to improve it.

This was a collaborative project conducted through several workshops, meetings, telephone discussions and via email from May 2008 to early April 2009. We would like to thank the following people for participating in the workshops and providing comment.

Top End (Darwin)
Prue Adamson (NRETA)
Thomas Amagula (Anindilyakwa Land Council)
Pauline Baban (Larrakia)
Wayne Campion (Bawinunga)
Michael Christie (CDU)
Carol Christopherson (NLC)
Peter Cooke (Wardekkan)
Kate Duigan (NRETA)
Linda Ford (CDU / Northern Territory Government)
John Greatorex (CDU)
Karman Lippett (NT NRM board)
Ian Munro (Bawinunga)
Bill Panton (NRETA)
Trish Rigby (NLC/IEK TAP panel)
Steve Roeger (Dhimurru)
Annie Sailor (Larrakia)
Bas Verschuuren (Dhimurru)
Pam Wickham (NRETA)
Lorraine Williams (Larrakia Ranger group)
David Wise (NAILSMA)
Djawa Yunapingu (Dhimurru)
Violet (Kakadu - NLC)

Centre (Alice Springs)
David Alexander (CLC)
Nikki Brannigan (CLC)
Rayleen Brown (Bush foods ref group)
Jocelyn Davies (CSIRO)
Veronica Dobson (Bush foods ref group)
David Doleman (CLC/IEK Cwth)
Josie Douglas (CDU)
Jay Gibson (NT Libraries)
Amelia Graham (NRETA)
Theresa Mcarthy (NT Libraries)

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Adam McFie (Strehlow Research Centre)
Maree Meredith (CLC)
Meg Moony (Tangengetyre)
Jamie Moore (NRETA)
Mack Moyses (NRETA)
Gina Smith (B.F ref group)
Leon Terril (CLC)
M.K Turner (B.F ref group)
Fiona Walsh (CSIRO)
Lorna Wilson (Bush foods ref group)

Others:
Bruce Rose (Department of Environment, Water, Heritage and the Arts, IPA program)
Valerie Boll and Djawa Yunupingu, Dhimurru
Banduk Marika (artist)