

PROTECTING THE KNOWLEDGE AND CULTURAL EXPRESSIONS OF ABORIGINAL PEOPLES

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I INTRODUCTION

Peter Johnston wrote extensively on the interrelated human rights and constitutional law issues concerning Australian Aboriginal Peoples, particularly with a Western Australian focus. That state has been the origin of a number of significant cases concerning Aboriginal land rights from the late 1970s. He tracked the struggle of the Yungngora community to establish land rights in relation to its ancestral lands in the Noonkanbah region,¹ commencing with its initially unsuccessful efforts in 1979² and culminating almost 30 years later with success in the decision of Mr Justice French (as he then was) in *Cox on behalf of the Yungngora People v Western Australia*,³ a copy of which was handed to Aboriginal elder Dickey Cox on the banks of the Fitzroy River.⁴

In 1998 Peter Johnston had written on the opening moves in the important land rights case brought by the Miriuwung Gagerrong Peoples.⁵ This case made its way to the High Court in 2002 as *Western Australia v Ward; Attorney-General (NT) v Ward; Ningarmara v Northern Territory; Ward v Crosswalk Pty Ltd* (henceforth “*Ward*”).⁶ One of the issues which was canvassed in *Ward* was whether respecting access to sacred sites for Aboriginal Peoples, where artworks on rock were located, or ceremonies were performed could be regarded as an incident of native title. This was rejected in a joint judgement of Gleeson CJ, Gaudron, Gummow and Hayne JJ as the assertion of something going beyond what was provided in s 223(1)(c) of the *Native Title Act 1993* (Cth) “to something approaching an incorporeal right akin to a new species of

¹ Discussed in Peter Johnston, ‘Litigating Human Rights in Western Australia: Lessons from the Past’ (2013) 15 *UNDALR* 111 at 121-124.

² *Noonkanbah Pastoral Co Pty Ltd v Amax Iron Ore Corporation* (Unreported, Supreme Court of Western Australia, Brisden J, 21 and 27 June 1979).

³ [2007] FCA 588.

⁴ For a general overview of the Noonkanbah disputes see Quentin Beresford, *Rob Riley: An Aboriginal Leader’s Quest for Justice*, Canberra, Aboriginal Studies Press, 2006 at 106-118.

⁵ *Western Australia v Ben Ward (on behalf of the Miriuwung Gagerrong Peoples)* 145 ALR 512 discussed in Peter Johnston, ‘Gender Restricted Evidence in Aboriginal Land Claims - Legal and Constitutional Issues’ (1998) 2 *Mac L Rev* 98.

⁶ (2002) 213 CLR 1.

intellectual property”.⁷ The joint judgement expressed the concern 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.”⁸

The joint judgement referred to observations of von Doussa J in *Bulun Bulun v R & T Textiles Pty Ltd*,⁹ that “a fundamental principle of the Australian legal system was that the ownership of land and ownership of artistic works are separate statutory and common law institutions.”¹⁰ The joint judgement noted that in various matters of the cultural knowledge of Aboriginal peoples or Torres Strait Islanders “the law respecting confidential information, copyright, and fiduciary duties” provided some protection.¹¹

Some suspicion about “fundamental principles” of the Australian legal system might be permissible since the Blackstonian principle that Australia was a “settled colony” was exploded by the High Court in *Mabo v Queensland (No 2)*.¹² Could not access to sacred sites be regarded as a kind of usufructuary right?

In any event the confidence reposed by the joint judgement in the law respecting confidential information, copyright, and fiduciary duties to protect the traditional knowledge (TK) and traditional cultural expressions (TCEs) of Aboriginal Peoples might be rather over-stated. The law of confidential information will protect only secret TK and TCEs.¹³ As for copyright, French J, as he then was, noted in *Yumbulul v. Reserve Bank of Australia*¹⁴ that it may be the case that “Australia’s copyright law does not provide adequate recognition of Aboriginal community claims to regulate the reproduction and use of works which are essentially communal in origin.”¹⁵ The fiduciary duties argument had been run in *Bulun Bulun*¹⁶ but this was of little assistance to the plaintiffs who could only call fiduciary rights in aid against a tribal artist and not against third parties who had imitated the art of the Ganalbingu.

⁷ Ibid at [59].

⁸ Ibid.

⁹ (1998) 86 FCR 244 at 256.

¹⁰ (2002) 213 CLR 1 at [60].

¹¹ Ibid at [61].

¹² (1992) 175 CLR 1.

¹³ See, for example, *Foster v Mountford and Rigby Ltd* (1976) 14 ALR 71; [1978] FSR 582.

¹⁴ (1991) 21 IPR 481.

¹⁵ Ibid at 490.

¹⁶ (1998) 86 FCR 244.

In any event, the international negotiations described below suggest that TK and TCEs are largely outside the purview of conventional intellectual property law and require a *sui generis* form of protection. This article examines the international negotiations surrounding the *sui generis* protection of TK and TCEs and discusses the desultory Australian attempts to deal with this subject.

II INTERNATIONAL DISCUSSIONS AROUND THE PROTECTION OF THE CULTURAL AND INTELLECTUAL PROPERTY OF INDIGENOUS PEOPLES

In exploring the practical questions concerning the preservation and protection of the beliefs and practices of indigenous peoples, it is useful to identify the nature of the demands for this conservation and protection. A useful starting place is the 1993 report of Erica-Irene Daes, Special Rapporteur of the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities and Chairperson of the Working Group on Indigenous Populations.¹⁷ In the opening paragraph of her report, Professor Dr Daes, explained that:

For indigenous peoples the world over the protection of cultural and intellectual property has taken on growing importance and urgency. The very concept of "indigenous" embraces the notion of a distinct and separate culture and way of life, based upon long-held traditions and knowledge which are connected, fundamentally, to a specific territory. Indigenous peoples cannot survive, or exercise their fundamental human rights as distinct nations, societies and peoples, without the ability to conserve, revive, develop and teach the wisdom they have inherited from their ancestors.

She traced the first official recognition, in the United Nations system, of "the evil and continuing danger of ethnocide, and of the role Governments and intergovernmental institutions should play in preventing any further erosion of indigenous peoples' cultural and intellectual heritage" to a 1981 conference in San José, Costa Rica. 33 years later, we are still groping towards intellectual property or *sui generis*-based measures to deal with "ethnocide". One reason for this long drawn out process is suggested by the language used in paragraph 4 of Professor Dr Daes' report where she observes that "the protection of cultural and intellectual property is connected fundamentally with the realization of the territorial rights and self-determination of indigenous peoples." This association between self-determination and the protection of

¹⁷ Erica-Irene Daes 'Discrimination Against Indigenous Peoples' E/CN.4/Sub.2/1993/28, 28 July 1993.

cultural and intellectual property has raised political problems, particularly in those countries that are nervous about the aspirations of their indigenous peoples.

Another explanation for the protracted debate about protecting and conserving the beliefs and practices of Aboriginal peoples and which is the subject of this paper is whether those beliefs and practices are amenable to the kinds of legal measures which are under discussion. As is discussed below, UNESCO (United Nations Educational Scientific and Cultural Organisation) and WIPO (World Intellectual Property Organisation) have been grappling with the distinction between cultural and intellectual property, as the basis for legislation. However, as Professor Dr Daes' observes, from the perspective of indigenous peoples this is an unrealistic distinction as they "regard all products of the human mind and heart as interrelated, and as flowing from the same source: the relationships between the people and their land, their kinship with the other living creatures that share the land, and with the spirit world."¹⁸ Thus she states that it is "inappropriate to try to subdivide the heritage of indigenous peoples into separate legal categories such as 'cultural', 'artistic' or 'intellectual', or into separate elements such as songs, stories, science or sacred sites" as this would imply giving different levels of protection to different elements of heritage."¹⁹

Professor Dr Daes concludes that 'it is clear that existing forms of legal protection of cultural and intellectual property, such as copyright and patent, are not only inadequate for the protection of indigenous peoples' heritage but inherently unsuitable.'²⁰ In her review of "Intellectual Property and Other Intangibles", Dr Jessica Lai amplifies this observation to note the incompatibility of western notions of property and ownership with indigenous concepts of communal relationships.²¹ Dr Lai notes that "neither, 'intellectual property' nor any equivalent term exists in Māori." Notwithstanding this lacuna, in June 1993 the Nine Tribes of Mataatua in the Bay of Plenty Region of Aotearoa (New Zealand) convened the First International Conference on the Cultural and Intellectual Property Rights of Indigenous Peoples which issued the Mataatua Declaration on Cultural and Intellectual Property Rights of

¹⁸ Ibid at [21].

¹⁹ Ibid at [31].

²⁰ Ibid at [32].

²¹ Jessica Christine Lai, *Indigenous Cultural Heritage and Intellectual Property Rights: Learning from the New Zealand Experience*, Springer, 2014, ch 3.

Indigenous Peoples.²² The first clause of this Declaration provided that “in the development of policies and practices, indigenous peoples should: define for themselves their own intellectual and cultural property.” The Australian Aboriginal peoples went a little further than this in November 1993 when the peoples of the Daintree Forest region issued the Julayinbul Statement on Indigenous Intellectual Property Rights which stated that “Aboriginal intellectual property, within Aboriginal Common Law, is an inherent, inalienable right which cannot be terminated, extinguished, or taken ... Any use of the intellectual property of Aboriginal Nations and Peoples may only be done in accordance with Aboriginal Common Law, and any unauthorised use is strictly prohibited.”²³

In retrospect, it was probably unwise for the Māori and Australian Aboriginal Peoples to adopt the terminology of western legal systems in debating the issue of cultural heritage, as this has had the effect of framing the debate in an IP context, or implying IP-related solutions.

III INTERNATIONAL NEGOTIATIONS ON CULTURAL HERITAGE

As was mentioned above, the international debate around the protection and preservation of the TK and TCEs of Aboriginal peoples has sometimes been framed in the context of intellectual property and sometimes as a matter of intangible cultural heritage. This oscillation between the two approaches can be seen in the deliberations of UNESCO. In 1952 it had adopted the Universal Copyright Convention²⁴ as an instrument for those states, such as the USA and a number of Latin American countries that were unwilling to accede to the Berne Convention for the Protection of Literary and Artistic Works, but still wished to participate in some form of multilateral copyright protection.²⁵ In November 1972, UNESCO adopted the Convention concerning the Protection of the World Cultural and Natural Heritage.²⁶ This Convention addressed the protection of tangible material items, considered to possess outstanding value to human history, art, science, or aesthetics. The protection of intangible

²² Available at

<<https://www.ngatiawa.iwi.nz/cms/CMSFiles/File/Associations/mataatua%20declaration.pdf>>.

²³ Available at <http://guides.slsa.sa.gov.au/content.php?pid=278586&sid=4704011>.

²⁴ 216 UNTS 132 (completed in Geneva, Sept.6, 1952)

²⁵ See, for example, Joseph S. Dubin, ‘The Universal Copyright Convention’ (1954) 42 *California Law Review* 89; Peter Berger, ‘The Berne Convention: Its History and its Key Role in the Future’ (1988) 3 *Journal of Law & Technology* 1.

²⁶ 1037 UNTS 151, 11 ILM 1358 (1972)

cultural heritage was proposed by the Government of Bolivia in April 1973 which suggested that a Protocol be added to the Universal Copyright Convention to protect the cultural patrimony of all nations.²⁷

Henceforth UNESCO oscillated between the protection of folklore as an artifact of intellectual property or as a matter of intangible cultural heritage. In 1975 UNESCO considered with WIPO the development of an international instrument for the protection of folklore, but this was considered to be unrealistic and that the issue “was of a cultural nature and, as such, was beyond the bounds of copyright.”²⁸ In May 1978, the Secretariats of UNESCO and WIPO agreed that UNESCO would examine the question of safeguarding folklore on an interdisciplinary basis and within the framework of a global approach, while WIPO would focus on copyright aspects of folklore.²⁹ In 1980 UNESCO and WIPO established a Working Group on the Intellectual Property Aspects of Folklore Protection. The work of this Committee resulted in Model Provisions for National Laws on the Protection of Expressions of Folklore Against Illicit Exploitation and Other Prejudicial Actions which was adopted by both organizations in 1985. After this date UNESCO has focused on the protection of folklore in the context of cultural heritage.

In 1989 the General Conference of UNESCO adopted a Recommendation on the Safeguarding of Traditional Culture and Folklore. The Recommendation defined “folklore (or traditional and popular culture)” as the

... totality of tradition-based creations of a cultural community in so far as they reflect its cultural and social identity; its standards and values are transmitted orally, by imitation or by other means. Its forms are, among others, language, literature, music, dance, games, mythology, rituals, customs, handicrafts, architecture and other arts.

The Recommendation called for Member States to identify, conserve, preserve, disseminate, and protect folklore, but was criticised for providing insufficient explanation on implementation.³⁰ At the request of the Czech Republic,

²⁷ Government of Bolivia, ‘Official request that a Protocol be added to the Universal Copyright Convention for the protection of folklore’ 24 April 1973 (Ref. No. DG 01/1006-79).

²⁸ Samantha Sherkin, ‘A Historical Study on the Preparation of the 1989 Recommendation on the Safeguarding of Traditional Culture and Folklore’ paper presented at seminar on *A Global Assessment of the 1989 Recommendation on the Safeguarding of Traditional Culture and Folklore: Local Empowerment and International Cooperation*, Washington, D.C., 27-30 June 1999 available at <http://www.folklife.si.edu/resources/unesco/sherkin.htm>.

²⁹ Ibid.

³⁰ Bradford S. Simon, ‘Global Steps to Local Empowerment in the Next Millennium: An Assessment of UNESCO’s 1989 Recommendation on the Safeguarding of Traditional Culture and Folklore’ paper

Lithuania and Bolivia, and with the support of Bulgaria, Côte d'Ivoire, Slovakia and Ukraine, the 30th session of the UNESCO General Conference (November 1999) adopted a Resolution to prepare a preliminary study on the “advisability of regulating internationally, through a new standard-setting instrument, the protection of intangible cultural heritage.”³¹ Paralleling this development UNESCO was addressing the question of intangible cultural heritage in the context of cultural diversity, which in 2001 culminated in the UNESCO Universal Declaration on Cultural Diversity.³² Article 1 of this observed the diverse forms of culture “across time and space.” Article 1 observed that “as a source of exchange, innovation and creativity, cultural diversity is as necessary for humankind as biodiversity is for nature.” The next logical step was the 2003 UNESCO Convention on the Safeguarding of Intangible Cultural Heritage³³ which entered into force in April 2006. The principal purposes of this Convention were identified in Art 1 as safeguarding and ensuring respect for intangible cultural heritage. For the purposes of this Convention Art 2.1 defined “intangible cultural heritage” as

... the practices, representations, expressions, knowledge, skills – as well as the instruments, objects, artefacts and cultural spaces associated therewith – that communities, groups and, in some cases, individuals recognize as part of their cultural heritage.

It observed that this intangible cultural heritage, “transmitted from generation to generation, is constantly recreated by communities and groups in response to their environment, their interaction with nature and their history, and provides them with a sense of identity and continuity...” Article 2.2 listed as “intangible cultural heritage”, as defined in paragraph 1:

- (a) oral traditions and expressions, including language as a vehicle of the intangible cultural heritage;
- (b) performing arts;
- (c) social practices, rituals and festive events;
- (d) knowledge and practices concerning nature and the universe;
- (e) traditional craftsmanship.

presented at seminar on *A Global Assessment of the 1989 Recommendation on the Safeguarding of Traditional Culture and Folklore: Local Empowerment and International Cooperation*, Washington, D.C., 27-30 June 1999, <http://www.folklife.si.edu/resources/unesco/simon.htm>.

³¹ Resolution 25/B/III 1-1-2-(a)(iii) Records of the UNESCO General Conference, 30th session.

³² (2001) 41 ILM 57 (2 November 2001).

³³ 2368 UNTS 1 (adopted on 17 October 2003).

Article 11 of the Convention required that each State Party shall “take the necessary measures to ensure the safeguarding of the intangible cultural heritage present in its territory” and that among the safeguarding measures parties should “identify and define the various elements of the intangible cultural heritage present in its territory, with the participation of communities, groups and relevant non-governmental organizations.” Article 12 provided for each State Party to draw up “inventories of the intangible cultural heritage present in its territory.” Additionally, Art 13 required parties to endeavour to adopt policies, and designate or establish one or more competent bodies for the safeguarding of the intangible cultural heritage present in its territory and support this with appropriate legal, technical, administrative and financial measures.

The Convention on the Safeguarding of Intangible Cultural Heritage followed the approach of the Model Provisions for National Laws on the Protection of Expressions of Folklore Against Illicit Exploitation and Other Prejudicial Actions in requiring that national measures be taken. This shared the perceived defect of the Recommendation on the Safeguarding of Traditional Culture and Folklore that national signatories required guidance on implementation, as well as the fact that those countries in which the unauthorised use and exploitation of artifacts of cultural heritage was occurring would be unlikely to adopt controlling legislation.

IV INTERNATIONAL NEGOTIATIONS ON THE PROTECTION OF TK AND TCES AS INTELLECTUAL PROPERTY

The first international consideration of the protection of TK occurred in a joint UNESCO/WIPO World Forum on the Protection of Folklore that was convened in Phuket in April 1997. At that meeting the representatives of organisations of Indigenous and Aboriginal peoples called for the promulgation of an international convention to protect TK. In response, WIPO in its 1998-99 biennium instituted a schedule of regional fact-finding missions “to identify and explore the intellectual property needs, rights and expectations of the holders of traditional knowledge and innovations, in order to promote the contribution of the intellectual property system to their social, cultural and economic development”.³⁴

³⁴ WIPO, *Intellectual Property Needs and Expectations of Traditional Knowledge Holders*, WIPO Report on Fact-finding Missions on Intellectual Property and Traditional Knowledge (1998-1999) (WIPO Publication 768E).

In a Note, dated September 14, 2000, the Permanent Mission of the Dominican Republic to the United Nations in Geneva submitted two documents on behalf of the Group of Countries of Latin America and the Caribbean (GRULAC) requesting the creation of a Standing Committee on access to the genetic resources and TK of local and indigenous communities.³⁵ The work of that Standing Committee was to be directed towards “defining internationally recognized practical methods of securing adequate protection for the intellectual property rights in traditional knowledge.”³⁶

At the WIPO General Assembly the Member States agreed the establishment of an Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore. Three interrelated themes were identified to inform the deliberations of the Committee: intellectual property issues that arise in the context of (i) access to genetic resources and benefit sharing; (ii) protection of TK, whether or not associated with those resources; and (iii) the protection of expressions of folklore.³⁷

At the First Session of the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (“IGC”) held in Geneva from April 30 to May 3, 2001, the Member States determined the agenda of items on which work should proceed and prioritised certain tasks for the Committee. Principal among these was “the development of ‘guide contractual practices,’ guidelines, and model intellectual property clauses for contractual agreements on access to genetic resources and benefit-sharing.”³⁸

This soft law approach to the protection of TK continued for a number of years. In August 2004 the IGC began to consider the ‘objectives’ and ‘principles’ that should underpin texts for the protection of TK and TCEs. This task has continued through all the 28 sessions of the IGC to 2014.

V TRADITIONAL CULTURAL EXPRESSIONS DEFINED

A 2002 paper prepared for the fourth session of the IGC pointed out that in discussions in various intergovernmental, regional and national and non-governmental fora, the meaning and scope of the term “traditional cultural expressions” referred “to more or less the same subject matter such as

³⁵ WIPO Doc. WO/GA/26/9.

³⁶ *Ibid* at Annex I, 10.

³⁷ See WIPO, ‘Matters Concerning Intellectual Property Genetic Resources Traditional Knowledge and Folklore’, WIPO Doc, WO/GA/26/6, August 25, 2000.

³⁸ See WIPO Doc, WIPO/GRTKF/IC/2/3, September 10, 2001, [1].

‘expressions of folklore’ ... and ‘intangible and tangible cultural heritage’.³⁹ In analysing the nature of TCEs “relevant to questions of IP protection” it was pointed out that expressions of traditional culture “may be either intangible, tangible or a combination of the two”, but that “the underlying traditional culture or folkloric knowledge from which the expression is derived is generally intangible. For example, a painting may depict an old myth or legend – the myth and legend are part of the underlying intangible “folklore,” as are the knowledge and skill used to produce the painting, while the painting itself is a tangible expression of that folklore.⁴⁰

The 2002 paper referred to the WIPO/UNESCO Model Provisions for National Laws on the Protection of Expressions of Folklore against Illicit Exploitation and other Forms of Prejudicial Action, 1982 which distinguished between intangible and tangible expressions of folklore.⁴¹ This distinction was adopted by the IGC in its eighth session in draft provisions embodying policy objectives and core principles for the protection of TCEs.⁴² Proposed Art 1 of the draft text provided:

- (a) “Traditional cultural expressions” or “expressions of folklore” are any forms, whether tangible and intangible, in which traditional culture and knowledge are expressed, appear or are manifested, and comprise the following forms of expressions or combinations thereof:
 - (i) verbal expressions, such as: stories, epics, legends, poetry, riddles and other narratives; words, signs, names, and symbols;
 - (ii) musical expressions, such as songs and instrumental music;
 - (iii) expressions by action, such as dances, plays, ceremonies, rituals and other performances,

³⁹ ‘Preliminary Systematic Analysis of National Experiences with the Legal Protection of Expressions of Folklore’, WIPO/GRTKF/IC/4/3, October 20, 2002, [21].

⁴⁰ Ibid.

⁴¹ [. . .] “*expressions of folklore*” means productions consisting of characteristic elements of the traditional artistic heritage developed and maintained by a community of [name of country] or by individuals reflecting the traditional artistic expectations of such a community, in particular:

- (i) verbal expressions, such as folk tales, folk poetry and riddles;
- (ii) musical expressions, such as folk songs and instrumental music;
- (iii) expressions by actions, such as folk dances, plays and artistic forms or rituals; whether or not reduced to a material form; and
- (iv) tangible expressions, such as:

- (a) productions of folk art, in particular, drawings, paintings, carvings, sculptures, pottery, terracotta, mosaic, woodwork, metalware, jewelry, basket weaving, needlework, textiles, carpets, costumes;
- (b) musical instruments;
- (c) [architectural forms].”

⁴² ‘The Protection of Traditional Cultural Expressions/Expressions of Folklore: Revised Objectives and Principles’, WIPO/GRTKF/IC/8/4, April 8, 2005.

whether or not reduced to a material form; and,

tangible expressions, such as productions of art, in particular, drawings, designs, paintings (including body-painting), carvings, sculptures, pottery, terracotta, mosaic, woodwork, metalware, jewelry, baskets, needlework, textiles, glassware, carpets, costumes; handicrafts; musical instruments; and architectural forms which are:

- (aa) the products of creative intellectual activity, including individual and communal creativity;
- (bb) characteristic of a community's cultural and social identity and cultural heritage; and
- (cc) maintained, used or developed by such community, or by individuals having the right or responsibility to do so in accordance with the customary law and practices of that community.

By the 28th session⁴³ the definition of TCEs was removed from Art 1 and included in a dictionary at the beginning of the text which provided that “for the purposes of this instrument:”

[Traditional] cultural expression means any form of [artistic and literary], [creative and other spiritual] expression, tangible or intangible, or a combination thereof, such as actions⁴⁴, materials⁴⁵, music and sound⁴⁶, verbal⁴⁷ and written [and their adaptations], regardless of the form in which it is embodied, expressed or illustrated [which may subsist in written/codified, oral or other forms].

Thus Art 1 provides: “The subject matter of [protection]/[this instrument] is traditional cultural expressions”.

VI TRADITIONAL KNOWLEDGE DEFINED

The first reference to TK in an international instrument occurs in the 1992 Convention on Biological Diversity (CBD), which in its preamble, refers to:

Recognizing the close and traditional dependence of many indigenous and local communities embodying traditional lifestyles on biological resources, and the desirability of sharing equitably benefits arising from the use of traditional knowledge, innovations and practices

⁴³ WIPO/GRTKF/IC/28/6, June 2, 2014.

⁴⁴ [Such as dance, works of mas, plays, ceremonies, rituals, rituals in sacred places and peregrinations, games and traditional sports/sports and traditional games, puppet performances, and other performances, whether fixed or unfixed.]

⁴⁵ [Such as material expressions of art, handicrafts, ceremonial masks or dress, handmade carpets, architecture, and tangible spiritual forms, and sacred places.]

⁴⁶ [Such as songs, rhythms, and instrumental music, the songs which are the expression of rituals.]

⁴⁷ [Such as stories, epics, legends, popular stories, poetry, riddles and other narratives; words, signs, names and symbols.]

relevant to the conservation of biological diversity and the sustainable use of its components.

The CBD does not define traditional knowledge and it is not specifically referred to in the operative provisions of the CBD but Art 8 provides that each Contracting Party shall, as far as possible and as appropriate:

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

The CBD contains no suggestions as to the sort of legislation that might be used to protect TK or secure the equitable sharing of benefits from its use. In fact it was not until 2010 that the Conference of Parties to the CBD concluded the Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization (ABS) to the Convention on Biological Diversity, which had a number of provisions dealing with remunerating the exploitation of TK. The Nagoya Protocol does not define TK and like the CBD, it provides (in Art.5.5) that each Party “shall take legislative, administrative or policy measures, as appropriate”, in order that the benefits “arising from the utilization of traditional knowledge associated with genetic resources” are shared in a fair and equitable way with indigenous and local communities holding such knowledge. Article 7 provides that “in accordance with domestic law, each Party shall take measures, as appropriate” with the aim of ensuring that TK associated with genetic resources that is held by indigenous and local communities is accessed with the prior and informed consent or approval and involvement of these indigenous and local communities, on the basis of mutually agreed terms. Article 12.1 of the Protocol requires Parties in implementing their obligations “in accordance with domestic law” take into consideration indigenous and local communities’ customary laws, community protocols and procedures, as applicable, to TK associated with genetic resources.

As with the UNESCO Conventions, the CBD and Nagoya Protocol are dependent for effectiveness upon national implementation both in source and exploiting countries. The failure even of the UNESCO/WIPO Model Provisions for National Laws on the Protection of Expressions of Folklore Against Illicit

Exploitation and Other Prejudicial Actions to be implemented in any Member State suggests the unlikelihood of national implementation in the absence of a binding multilateral agreement.

Obviously, when WIPO began to address the issue of TK, it had some idea of the range of matters that fell within the notion of TK. The fact-finding missions on IP and TK it conducted between 1998 and 1999 had to have some idea of the subject on which facts were to be found. In the report on the missions it was explained that

WIPO currently uses the term “traditional knowledge” to refer to tradition-based literary, artistic or scientific works; performances; inventions; scientific discoveries; designs; marks, names and symbols; undisclosed information; and all other tradition-based innovations and creations resulting from intellectual activity in the industrial, scientific, literary or artistic fields. ... Categories of traditional knowledge could include: agricultural knowledge; scientific knowledge; technical knowledge; ecological knowledge; medicinal knowledge, including related medicines and remedies; biodiversity-related knowledge; “expressions of folklore” in the form of music, dance, song, handicrafts, designs, stories and artwork; elements of languages, such as names, geographical indications and symbols; and, movable cultural properties.⁴⁸

This definition included both tangible and intangible matters, as well as embracing both TK and TCEs. As will be seen below, the process in the IGC of defining the subject matter of protection in its TK text has been one of separating TK from TCEs and in narrowing the definitions of each.

A useful introduction to the work of the IGC on TK is the definition of the term in the glossary of terms that has been prepared by the WIPO Secretariat to assist the deliberations of the Committee. The idea of a glossary of terms had occurred to the sixteenth and seventeenth sessions of the IGC, held from May 3 to 7, 2010 and from December 6 to 10, 2010, respectively. Those sessions requested the WIPO Secretariat to prepare, as information documents, three glossaries of key terms related to intellectual property and genetic resources, traditional knowledge and traditional cultural expressions⁴⁹ and to make them available to the IGC. At its 19th session, the IGC “invited the Secretariat to update the glossaries and to combine them in a single document and to publish

⁴⁸ WIPO, above n 1, 25.

⁴⁹ Report of the Sixteenth Session of the Committee (WIPO/GRTKF/IC/16/8) and Report of the Seventeenth Session of the Committee (WIPO/GRTKF/IC/17/12).

that glossary as an information document for the next session of the IGC.”⁵⁰ The updated, consolidated glossary was made available as an information document for the twentieth, twenty-first and twenty-second sessions of the IGC and was further revised for subsequent sessions.

It should be emphasised that the glossary has no legal status. The selection of key terms was based on the terms used most frequently in the various documents relevant to the drafting of the TK and related texts. The definitions contained in the glossary are said to be “without prejudice to any other glossary or definitions of key terms contained in previous documents of this IGC or in any other international, regional or national instrument or fora.”⁵¹ The glossary was prepared as “an information document and the IGC is not requested to endorse or adopt either the selection of terms or their proposed definitions.”⁵² The most recent version of the glossary is dated May 19, 2014.⁵³

This version confirms that “there is as yet no accepted definition of traditional knowledge (TK) at the international level.”⁵⁴ It draws a distinction between TK “as a broad description of subject matter” which

...generally includes the intellectual and intangible cultural heritage, practices and knowledge systems of traditional communities, including indigenous and local communities (traditional knowledge in a general sense or *lato sensu*). In other words, traditional knowledge in a general sense embraces the content of knowledge itself as well as traditional cultural expressions, including distinctive signs and symbols associated with traditional knowledge.⁵⁵

And TK in “international debate” where TK “in the narrow sense” refers to

knowledge as such, in particular the knowledge resulting from intellectual activity in a traditional context, and includes know-how, practices, skills, and innovations. Traditional knowledge can be found in a wide variety of contexts, including: agricultural knowledge; scientific knowledge; technical knowledge; ecological knowledge;

⁵⁰ Report of the Nineteenth Session of the Committee (WIPO/GRTKF/IC/19/12).

⁵¹ ‘Glossary of Key Terms Related to Intellectual Property and Genetic Resources, Traditional Knowledge and Traditional Cultural Expressions’ WIPO/GRTKF/IC/28/5. May 19, 2014, [6].

⁵² Ibid.

⁵³ WIPO/GRTKF/IC/28/5.

⁵⁴ Ibid at 40.

⁵⁵ Ibid.

medicinal knowledge, including related medicines and remedies; and biodiversity-related knowledge, etc.⁵⁶

The overview document presented to the seventh session of the IGC had acknowledged that the “highly diverse and dynamic nature” of TK made it difficult to formulate “a singular and exclusive definition of the term.”⁵⁷ It suggested that “a singular definition may not be necessary in order to delimit the scope of subject matter for which protection is sought.”⁵⁸

However, for the eighth session of the IGC a working definition of TK was contained in Art 3.2 of the revised objectives and principles for the protection of TK.⁵⁹ It provided that

For the purpose of these principles only, the term “traditional knowledge” refers to 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. It is not limited to any specific technical field, and may include agricultural, environmental and medicinal knowledge, and knowledge associated with genetic resources.

Article 3.1 noted that these principles concerned the protection of TK against misappropriation and misuse beyond its traditional context, and “should not be interpreted as limiting or seeking externally to define the diverse and holistic conceptions of knowledge within the traditional context.”

The commentary on this requirement explained that “if intangible subject matter is to constitute traditional knowledge for the purposes of these provisions, it should be ‘traditional’, in the sense of being related to traditions passed on from generation to generation, as well as being ‘knowledge’ or a product of intellectual activity.”⁶⁰ In a footnote to Art 3.2 in the ‘Revised Outline of Policy Options and Legal Mechanisms’ presented to the ninth session of the IGC⁶¹ it was argued that the expression “resulting from

⁵⁶ Citing, WIPO Report on Fact-finding Missions on Intellectual Property and Traditional Knowledge (1998-1999), above n 1, 25.

⁵⁷ WIPO/GRTKF/IC/7/5, [40].

⁵⁸ *Ibid.*

⁵⁹ WIPO/GRTKF/IC/8/5, April 8, 2005.

⁶⁰ *Ibid.*

⁶¹ WIPO/GRTKF/IC/9/INF/5, March 27, 2006.

intellectual activity” had “a long established, clear usage in Article 2 of the WIPO Convention”.⁶² However, the element of “intellectual activity” is not insisted upon in the copyright-related IP rights. The closest equivalent is the notion of originality which is notoriously placed at a very low level, mutating in database related rights to a mere “sweat of the brow”. Trademarks do not necessarily involve much intellectual activity, particularly where they are the names of persons.

At the ninth session of the IGC it was pointed out that the Committee had generally made use of the term ‘traditional knowledge’ at two levels: “as a general, umbrella term (*lato sensu*) and as a specific term denoting the subject of specific IP protection focused on the use of knowledge (*stricto sensu*).”⁶³ As a broad characterization, TK *lato sensu* was defined as “the *ideas and expressions thereof* developed by traditional communities and Indigenous peoples, in a traditional and informal way, as a response to the needs imposed by their physical and cultural environments and that serve as means for their cultural identification.”⁶⁴ Thus TK *lato sensu* was an umbrella term covering both aspects of protection of TK *stricto sensu* and TCEs. It was acknowledged that some objects of protection touched simultaneously upon these two fields such as technical creations that have an aesthetic character. The IGC referred to handicrafts with a utilitarian function but with an additional aesthetic quality which would “embody TK *stricto sensu* or may be viewed as expressions of TK or TCEs.”⁶⁵

Comments on the definition of TK were invited for the 11th session of the IGC which met July 3 to 12, 2007. In the absence of an internationally accepted definition of TK, the European Community and its Member States and Switzerland endorsed the definition adopted by the ninth session of the IGC as a useful starting point.⁶⁶ However, by the 17th session, which met December 6 to 10, 2010, delegations were still lamenting the absence of an adequate definition of TK.⁶⁷ For the 18th session, which met May 9 to 13, 2011, the subject matter of

⁶² Ibid at 35..

⁶³ WIPO/GRTKF/IC/9/INF/5, March 27, 2006, [70].

⁶⁴ Ibid at [71].

⁶⁵ Ibid..

⁶⁶ WIPO/GRTKF/IC/11/5(a), May 19, 2007.

⁶⁷ WIPO/GRTKF/IC/17/5, September 15, 2010, at 23 The Delegations of Italy and Nepal observed that kind of definition included in Article 3(2) was insufficient. The Delegations of Japan, Kenya, Morocco and Nigeria noted that there was no clear understanding among members on the fundamental term “TK” and that the definition should be dealt with before entering substantive discussion on respective articles. The Delegation of Norway highlighted a need for greater

protection was shifted to Art 1 of the text. It stated that the protection of TK should ensure (a) the safeguarding and preservation of traditional knowledge, but in square brackets was:

(b) the recognition and respect for traditional knowledge, including through the dignity, cultural integrity and intellectual and spiritual values of the traditional knowledge holders who conserve and maintain those systems, the contribution which traditional knowledge has made in sustaining the livelihoods and identities of traditional knowledge holders, the contribution which traditional knowledge holders have made to the conservation of the environment, to food security and sustainable agriculture, and the progress of science and technology.⁶⁸

The term “traditional knowledge” considered by the eighteenth session referred to:

...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 and continuously developed following any changes in the environment, geographical conditions and other factors. It is not limited to any specific technical field, and may include agricultural, environmental and medicinal knowledge, and any traditional knowledge associated with cultural expressions and genetic resources.

It was explained that in its general structure, but not its content, the paragraph was modelled on Art 2(1) of the Berne Convention “which delineates the scope of subject matter covered by that Convention by first providing a general description and then an illustrative list of elements that would fall within its scope.”⁶⁹ The IGC explained that “a single, exhaustive definition might not be appropriate in light of the diverse and dynamic nature of TK, and the differences in existing national laws on TK.”⁷⁰ However, a number of

clarification of what actually was the subject matter for protection, namely how TK should be defined for this purpose. The Delegation of Australia noted that the definition of TK required further consideration.

⁶⁸ WIPO/GRTKF/IC/18/5, January 10, 2011.

⁶⁹ *Ibid* at 21.

⁷⁰ *Ibid*.

delegations remained unhappy with this definition. The Delegation of Spain, on behalf of the European Union and its Member States, stated that TK had different meanings for different people in different fora and that the current definition and the criteria for eligibility “would benefit from an in-depth debate aiming at a better qualification, drawing a line between what would fall under the scope of the international instrument and what will be left outside.”⁷¹

For the 28th session of the IGC it was decided to place the definition of TK in an explanation of the “use of terms” at the beginning of the text.⁷² This provided:

Traditional knowledge [refers to]/[includes]/[means], for the purposes of this instrument, know-how, skills, innovations, practices, teachings and learnings of [indigenous [peoples] and [local communities]]/[or a state or states].

A square bracketed addition explained that:

[Traditional knowledge may be associated, in particular, with fields such as agriculture, the environment, healthcare and indigenous and traditional medical knowledge, biodiversity, traditional lifestyles and natural resources and genetic resources, and know-how of traditional architecture and construction technologies.]

In the body of the text, Art 1 provided that the “subject matter of [protection]/[this instrument] is traditional knowledge”. It then went on to list a number of qualifying criteria:

- (a) that is created, and [maintained] in a collective context, by indigenous [peoples] and local communities [or nations] [,whether it is widely spread or not];
- (b) that is [directly] [linked]/[distinctively associated] with the cultural [and]/[or] social identity and cultural heritage of indigenous [peoples] and local communities [or nations];
- (c) that is transmitted from generation to generation, whether consecutively or not;
- (d) which may subsist in codified, oral or other forms; and [or]
- (e) which may be dynamic and evolving.

⁷¹ Ibid.

⁷² WIPO/GRTKF/IC/28/5, June 2, 2014, 5.

This text was presented to the General Assembly of WIPO held in September 2014.

VII TERMINATION OF THE WIPO NEGOTIATIONS ON TK AND TCEs?

At the 28th session of the IGC in July 2014, Kenya, on behalf of the African Group, urged that the WIPO General Assembly should convene a diplomatic conference in 2015, and provide three sessions, and a possible fourth inter-session meeting, to further refine the TK, TCEs and GRs texts in advance of the diplomatic conference.⁷³ This was supported by the Asia and Pacific Group.⁷⁴ However, the Delegation of Japan, speaking on behalf of the Group B (industrialised countries) did not think that the texts were mature enough to justify a diplomatic conference.⁷⁵ The Delegation of China noted with regret the failure of the IGC to reach “any consensus on the recommendations and the future work program.”⁷⁶ The Delegation of the USA proposed that the IGC be requested to submit to the 2015 General Assembly the text(s) related to the protection of GRs, TK and TCEs “as well as a recommendation as whether or not the objectives, principles and text are sufficiently defined so as to schedule a Diplomatic conference and the need for further work.”⁷⁷ The 2014 WIPO General Assembly did not make a decision on the work program of the IGC for 2015. Therefore, the calendar of the provisional dates for the principal committees and bodies of WIPO for 2015 did not include any IGC sessions.⁷⁸ In this situation of the apparent collapse of the WIPO negotiations, great emphasis will have to be placed on regional and national solutions.

VIII REGIONAL PROTECTION OF TK AND TCEs

Concern has periodically been expressed, particularly by developing countries about the slow progress in WIPO in the formulation of international instruments dealing with TCEs and TK. The African group of countries at WIPO were in the forefront of agitation there to accelerate the international negotiations, but probably a true reflection of their appreciation of the realistic likelihood of action in WIPO was a diplomatic conference held on 9-10 August

⁷³ ‘Draft Report’, WIPO/GRTKF/IC/28/11 prov. 2, September 29, 2014 at [94].

⁷⁴ *Ibid* at [95].

⁷⁵ *Ibid* at [96].

⁷⁶ *Ibid* at [100].

⁷⁷ *Ibid* at [103].

⁷⁸ See <http://www.wipo.int/tk/en/igc/>.

in Swakopmund, Namibia, organised by the African Regional Intellectual Property Organization (ARIPO) for the promulgation of a *Protocol on the Protection of Traditional Knowledge and Expressions of Folklore*. The Protocol was meant to “protect creations derived from the exploitation of traditional knowledge in ARIPO member states against misappropriation and illicit use through bio-piracy.” The protocol was also intended to prevent the “grant of patents in respect of inventions based on pirated traditional knowledge ... and to promote wider commercial use and recognition of that knowledge by the holders, while ensuring that collective custodianship and ownership are not undermined by the introduction of new regimes of private intellectual property rights.”

The slowness of the developments at WIPO, as in Africa, activated Pacific considerations for a regional solution. In March 2007, at a high-level meeting of the executives of the Pacific Islands Forum Secretariat (PIFS), and the SPC, it was decided that lead agency responsibility relating to the Model Law would move from the SPC to the PIFS. As a first step the PIFS convened a Workshop in June 2007 to determine member countries’ technical assistance needs with regard to progressing the Model Law’s implementation at the national level. The conclusions and recommendations of that Workshop were subsequently endorsed by Forum Trade Ministers in August 2007. A Traditional Knowledge Implementation Action Plan (hereafter ‘the Action Plan’) was formulated as a response to member countries’ requests for technical assistance as conveyed to the PIFS at the Workshop.

The decision was also taken for the Pacific Island states to avail themselves of technical assistance which was being made available by the EU as part of the Partnership Agreement between the members of the African, Caribbean and Pacific (ACP) Group of States and the European Union (EU) signed on 23 June 2000 (“Cotonou Agreement”) and concluded for a twenty-year period from March 2000 to February 2020. Two EU projects were initiated under this Agreement. The first, entitled: “Technical Assistance to the Pacific Regional Action Plan for Traditional Knowledge Development”⁷⁹ has as its specific objective the provision of technical assistance for the establishment of national systems of protection for TK in six of the member states of the Pacific Islands Forum, namely Cook Islands, Fiji, Kiribati, Palau, Papua New Guinea and Vanuatu.

⁷⁹ Project No: 9.ACP.RPR.007.

A second project provided technical assistance to study the “Feasibility of a Reciprocal Recognition and Enforcement Mechanism” for TK/CEs between Fiji, PNG, Solomon Islands and Vanuatu, the so called Melanesian Spearhead Group (MSG) countries.⁸⁰ The Terms of Reference for this latter project recognised that a regional approach would operate as a parallel, viable and faster alternative to the international developments. It was pointed out that any future collective arrangement would not preclude other countries from the wider Pacific region to participate in the system. These developments would instruct and inform global treaty making processes currently taking place in institutions such as WIPO and possibly lead to engagement with other like-minded regions given the slow impetus to conclude a global regime for TK at WIPO, WTO and CBD.

The MSG Framework Treaty on the Protection of Traditional Knowledge and Expressions of Culture was signed by Fiji, PNG, Solomon Islands and New Caledonia’s Front de Libération National Kanak et Socialiste (FLNKS) on 2 September 2011. The Treaty imports elements of the Pacific Model Law for the Protection of Traditional Knowledge and Expressions of Culture, as well as the access and benefit sharing provisions of the Convention on Biological Diversity which was updated by the Nagoya Protocol.⁸¹ The Treaty took into particular account the documents that were prepared for the 17th session of the IGC and incorporated some of the principles of the Swakopmund Protocol. The Treaty was designed to act as a template for national to the TK and TCEs legislation in MSG Members and to be available for adoption by other Pacific Island States.

IX AUSTRALIAN CONSIDERATIONS OF THE PROTECTION OF TK AND TCEs

Discussion of Possible Federal Legislation

The history of Australian consideration of the protection of TK and TCEs has been one of failed opportunities. In 1974, the Commonwealth Government set up a Working Party on the Protection of Aboriginal Folklore. Its 1981 report recommended the enactment of an Aboriginal Folklore Act to prohibit uses of Aboriginal arts and cultural material that were offensive to Aboriginal people

⁸⁰ “Technical Assistance to Study the Feasibility of a Reciprocal Recognition and Enforcement Mechanism for TK between Fiji, Papua New Guinea, Solomon Islands and Vanuatu” TradeCom Facility Program, AOR.162-P177.

⁸¹ For details of the Treaty see M. Blakeney, ‘Protecting traditional knowledge and expressions of culture in the Pacific’ (2011) 1(1) *Queen Mary Journal of Intellectual Property* 80.

and their traditions.⁸² The report's recommendations were neither implemented nor followed up.

In 1986 the Australian Law Reform Commission in a report on Aboriginal customary laws recommended legislative protection for secret/sacred material and the prohibition of the mutilation, debasement or export of items of folklore and the use of items of folklore for commercial gain without payment to traditional owners.⁸³ This recommendation was not implemented.

In *Yumbulul v. Reserve Bank of Australia*⁸⁴ Mr Justice French, as he then was, had to consider whether the Yolgnu People could enjoin the use by the Reserve Bank of the design of a Morning Star Pole created by Terry Yumbulul, a Yolngu artist on a \$10 banknote, to commemorate the 1988 bicentennial of white settlement in Australia. Evidence was presented which established that Morning Star Poles had a central role in Yolgnu ceremonies commemorating the deaths of important persons and in inter-clan relationships. In ruling that Australian copyright law did not recognise communal rights, French J observed that “the question of statutory recognition of Aboriginal communal interests in the reproduction of sacred objects is a matter for consideration by law reformers and legislators.”⁸⁵ More than twenty years after this case, legislation addressing Aboriginal interests in protecting communal rights has not been enacted.

In 1994 the then Keating government released an Issues Paper: *Stopping the Rip-Offs: Intellectual Property Protection for Aboriginal and Torres Strait Islander Peoples*.⁸⁶ The paper analysed the limitations of the current Australian regime in protecting the intellectual property rights of Aboriginal and Torres Strait Islander Peoples and identified several possible approaches to improve the situation, including amendments to the *Copyright Act 1968* (Cth), a mark to authenticate Aboriginal and Torres Strait Islander creations and special legislation. An Inter-Departmental Committee on Indigenous Arts and Cultural Expression (IDC) was established to evaluate the submissions and to make recommendations to the government. The IDC indicated that it favoured the enactment of specific legislation but that further consultation was required

⁸² Australia, Department of Home Affairs and Environment, Report of the Working Party on the Protection of Aboriginal Folklore, Canberra, December 1981.

⁸³ Australian Law Reform Commission, *The Recognition of Aboriginal Customary Laws*, Report No 31, Canberra, AGPS, 1986, vol 1, [470].

⁸⁴ (1991) 21 IPR 481.

⁸⁵ Ibid at 492.

⁸⁶ Australia, Attorney-General's Department, *Stopping the Rip-Offs: Intellectual Property Protection for Aboriginal and Torres Strait Islander Peoples*, Issues Paper, Canberra, AGPS, October 1994.

with Aboriginal peoples. The Aboriginal and Torres Strait Islander Commission (ATSIC) conducted consultations seeking the views of Aboriginal and Torres Strait Islander Peoples on the form and content of any proposed legislation.⁸⁷ With the accession of the Howard government in 1996 no further action was taken on this initiative and no responses were made to the submissions to the Issues Paper.

In 1997, ATSIC established an Indigenous Reference Group on Indigenous Cultural and Intellectual Property (IRG). ATSIC also commissioned the Australian Institute of Aboriginal and Torres Strait Islander Studies to work with the IRG to report on practical reforms, which would improve protection and ensure recognition of Indigenous cultural and intellectual property. A report, *Our Culture: Our Future*⁸⁸ produced by a team led by Aboriginal lawyer, Terri Janke, in June 1997 addressed methods for protecting indigenous knowledge under the patents and copyright systems. The main recommendation of the report was for sui generis legislation to recognise Indigenous peoples' rights to their cultural and intellectual property.

The *Moral Rights Act 2000* (Cth) amended the *Australian Copyright Act 1968* (Cth) to include the protection of the moral rights of attribution and the right to not have a work treated in a derogatory manner. In 2001, the Coalition Federal Government, in its arts policy for the general election of that year, promised that amendments to this moral rights regime would “give Indigenous communities a means to prevent unauthorised and derogatory treatment of works that embody community images or knowledge.”⁸⁹ On July 23, 2001, the Government announced an independent Inquiry (“Myer Review”) into the contemporary visual arts and craft sector to recommend actions for governments and the sector to enhance their future.⁹⁰ The inquiry found that the communal rights of Aboriginal Peoples were ignored in the current moral rights law and that “the right to integrity and prohibition of derogatory treatment of an artistic work embodying traditional ritual knowledge should be

⁸⁷ See Michael Davis, ‘Indigenous Intellectual Property Consultations With Aboriginal and Torres Strait Islander Peoples’ (1997) 90(3) *Aboriginal Law Bulletin* 22.

⁸⁸ Terri Janke, *Our Culture, Our Future: Proposals for the Recognition and Protection of Indigenous Cultural and Intellectual Property*, Canberra: AIATSIS, 1997, 54-65.

⁸⁹ Liberal Party of Australia, *The Howard Government: Putting Australia’s Interests First: Election 2001 - Arts for All* (2001) 21, quoted in Aboriginal Education Board of Studies, NSW, ‘Indigenous Communal Moral Rights (ICMR)’ available at <http://ab-ed.boardofstudies.nsw.edu.au/go/aboriginal-art/protecting-australian-indigenous-art/background-information/proposals-for-change/indigenous-communal-moral-rights-icmr/>.

⁹⁰ Report of the Commonwealth by the Contemporary Visual Arts and Craft Inquiry, Canberra, Commonwealth Government, 2002, 21.

extended to include a treatment that causes cultural harm to the clan” and that there should be amending legislation.⁹¹ In December 2003, a draft Copyright Amendment (Indigenous Communal Moral Rights) Bill 2003 was distributed for comment to a number of organisations.⁹² The Bill was criticised for its complexity and the ambiguity of its language⁹³ and, in February 2006, it was announced that a revised version of the Bill would be made available later that year. But, this Bill languished, and in 2006, the 215-page *Copyright Amendment Act 2006* (Cth) was enacted to give effect to the copyright provisions of the *Australia–United States Free Trade Agreement* of 2004.⁹⁴ In 2007, a change of government took place. While in opposition, the Labor Party had indicated that it would consider implementing the recommendations of the Myer Review,⁹⁵ but this was not carried into action during its 2007-2013 rule.

On September 13, 2007 the General Assembly of the United Nations adopted the *United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP)*⁹⁶. 143 member states voted in favour of *UNDRIP* as a non-binding text which sets out the rights of indigenous peoples to “maintain and strengthen their own institutions, cultures and traditions, and to pursue their development in keeping with their own needs and aspirations.”⁹⁷ Relevant to the protection of the spiritual beliefs of indigenous peoples is Art 11(2) which requires that “States shall provide redress through effective mechanisms, ...developed in conjunction with indigenous peoples, with respect to their ... religious and spiritual property taken without their free, prior and informed consent or in violation of their laws, traditions and customs” and Art 12 which recognised the right of indigenous peoples to “... maintain, protect and develop the past, present and future manifestations of their cultures, such as ...artefacts, designs, ceremonies, ... and literature....”

Article 31 of *UNDRIP* recognises the rights of indigenous peoples to

⁹¹ Ibid at 152.

⁹² See J Anderson, ‘Indigenous Communal Moral Rights: The utility of an ineffective law’ (2004) 30(5) *Indigenous Law Bulletin* 8 and J. Anderson, ‘The Politics of Indigenous Knowledge: Australia’s Proposed Communal Moral Rights Bill’ (2004) 27 *University of New South Wales Law Journal* 585.

⁹³ See, for example, Lindgren, J. President of the Australian Copyright Tribunal, see: Christopher Sexton, ‘In Conversation with the Honourable Justice Lindgren’ (2004) *Intellectual Property Forum: Journal of the Intellectual Property Society of Australia and NZ* 6 at 8 -10.

⁹⁴ See Kimberlee Weatherall ‘Of Copyright Bureaucracies and Incoherence: Stepping Back From Australia’s Recent Copyright Reforms’ (2007) 31 *Melbourne University Law Review* 967

⁹⁵ *Federal Labor Arts Policy Discussion Paper* (30 July 2006), <http://www.alp.org.au/download/now/federal_labor_arts_policy_discussion_paper.pdf>, accessed 12.9.12.

⁹⁶ U.N. GAOR, A/61/L.67/Annex (2007).

⁹⁷ Ibid at Preamble.

maintain, control, protect and develop their intellectual property over their cultural heritage, traditional knowledge and traditional cultural expressions.

Australia, together with New Zealand, Canada and the United States, voted against the Resolution adopting *UNDRIP*. Senator Marise Payne explained the various reasons for the Australian Government's opposition to the Declaration. She pointed out that 'as our laws here currently stand, we protect our Indigenous cultural heritage, traditional knowledge and traditional cultural expression to an extent that is consistent with both Australian and international intellectual property law, and we are not prepared to go as far as the provisions in the text of the draft declaration currently do on that matter.'⁹⁸ In other words, Senator Payne seemed to indicate that the Australian Government was opposed to any *sui generis* protection of TK. She also indicated the Australian Government's opposition to 'the inclusion in the text of an unqualified right of free, prior and informed consent for indigenous peoples on matters affecting them' because the text did 'not acknowledge the rights of third parties — in particular, their rights to access indigenous land and heritage and cultural objects where appropriate under national law.'⁹⁹ With the change of government in Australia, Prime Minister Kevin Rudd announced on 3 April 2009 Australian support for the Declaration.¹⁰⁰

A *IP Australia Consultation*

In November 2013 IP Australia, the federal intellectual property office, launched a public consultation on Indigenous Knowledge. It asked "How should Australia protect Indigenous Knowledge?"¹⁰¹ However, the breadth of this question was qualified by the explanation that "We want your views about how Indigenous Knowledge can work with the intellectual property (IP) system."¹⁰² Further IP Australia explained that

⁹⁸ Senator Marise Payne, Commonwealth, Parliamentary Debates: United Nations Declaration on the Rights of Indigenous Peoples (2007) 53
<http://parlinfo.aph.gov.au/parlInfo/genpdf/chamber/hansards/2007-09-10/0075/hansard_frag.pdf
fileType=application%2Fpdf>.

⁹⁹ *Ibid.*

¹⁰⁰ United Nations News Centre, *Experts Hail Australia's Backing of UN Declaration of Indigenous People's Rights* (2009) <<http://www.un.org/apps/news/story.asp?NewsID=30382>>.

¹⁰¹ <<http://www.ipaustralia.gov.au/about-us/public-consultations/indigenous-knowledge-consultation/>> accessed 1.2.15.

¹⁰² *Ibid.*

There's no point making change for change's sake. The IP system should be useful and fair for all Australians. The IP system needs to work for you. That's why we want to hear your views.¹⁰³

In other words the consultation has been framed from an IP perspective although a soft law solution is suggested by the observation that

Many communities and their representative bodies have protocols for managing Indigenous Knowledge. Some cultural, government and research organisations also have protocols. Do these protocols provide sufficient protection for Indigenous Knowledge? Can IP better protect Indigenous Knowledge?¹⁰⁴

To date ¹⁰⁵ the consultation has attracted six submissions. The most comprehensive of these is by Terri Janke¹⁰⁶, who also contributed a background paper for the Law Reform Commission of Western Australia's inquiry into Aboriginal customary laws in Western Australia.¹⁰⁷ Janke's point of departure is the obligation of Australia to implement the TK and TCEs provisions of *UNDRIP*.¹⁰⁸ She endorsed the observations of the Aboriginal and Torres Strait Islander Social Justice Commissioner, Mick Gooda, who demanded that "[w]e must insist on an intellectual property regime that recognises and enforces the right of Aboriginal and Torres Strait Islander peoples to determine the nature and extent to which their cultural expression and heritage is used."¹⁰⁹ Janke's submission identifies the deficiencies of the current intellectual property framework in protecting Aboriginal and Torres Strait Islander knowledge and cultural expression and repeats the call in her background paper for the WA Law Reform Commission¹¹⁰ "for a new standalone law to provide rights to Indigenous people over their cultural knowledge." This also repeated the

¹⁰³ See <<http://www.ipaustralia.gov.au/about-us/public-consultations/indigenous-knowledge-consultation/have-your-say/>>, accessed 1.2.15.

¹⁰⁴ Ibid.

¹⁰⁵ As of 1 February 2015.

¹⁰⁶ Terri Janke, *New tracks: Indigenous knowledge and cultural expression and the Australian intellectual property system*, 31 May 2012, available at http://www.ipaustralia.gov.au/pdfs/Submission_-_Terri_Janke_and_Company_IP_Lawyers.pdf, accessed 1.2.15.

¹⁰⁷ Terri Janke & Robynne Quiggin, 2005 *Indigenous Knowledge and Customary Law*, Law Reform Commission of Western Australia, Project No 94, Background Paper No 12, pp. 9-10, available at, <http://www.lrc.justice.wa.gov.au/2publications/reports/ACL/BP/BP-12.pdf>, accessed 1.2.15.

¹⁰⁸ Janke above n 100, 4-5.

¹⁰⁹ Ibid at 7-8 citing M. Gooda, 'Australian Human Rights Commission, *Commissioner says enjoy the richness of Indigenous culture* (Tuesday 9 August 2011)

<http://www.hreoc.gov.au/about/media/news/2011/68_11.html>.

¹¹⁰ Janke and Quiggin, above n 101, 328.

submission that she had made in 1998 in response to the Commonwealth Attorney-General's Department inquiry into intellectual property protection for Aboriginal and Torres Strait Islander Peoples.¹¹¹ Janke submits that the standalone law "should aim at providing rights that are not currently protected under intellectual property" and she identifies as some potential features:

- Rights to Indigenous people to control and manage their Indigenous Knowledge as it is recorded, used, commercialised.
- The powers to initiate legal proceedings and seek remedies for contravention of the rights contained within the legislation.
- Criminal sanctions for certain uses of Indigenous Knowledge, particularly for secret and sacred material.
- Create a register of protocols or codes of conduct developed by Indigenous communities, and provide a mechanism for compliance.
- Prohibit misrepresentations, wilful distortion and destruction of cultural material.
- Allow remuneration for commercial uses.
- Establish a central coordination body (a National Indigenous Cultural Authority) to educate the community about Indigenous Cultural and Intellectual Property rights, administer the legislation, mediate and assist in negotiations, collect license fees, investigate alleged breaches and institute proceedings against offending parties.
- Prohibit the use of Indigenous Knowledge without adequate documentation of the free, prior and informed consent of the Indigenous owners to an arrangement which contains the sharing of ownership, control, use and benefits.
- Prohibit the use of secret/sacred Indigenous Knowledge other than in a customary context by customary users.
- Provide for the communal moral right of attribution
- Protect Indigenous Knowledge that has not been expressed in material form.
- Recognise and protect rights in perpetuity.

¹¹¹ Terri Janke, *Our Culture : Our Future*, Canberra, Australian Institute of Aboriginal and Torres Strait Islander Studies and the Aboriginal and Torres Strait Islander Commission, 1998, 179 – 194.

- Protect Indigenous Knowledge that is not novel or original under existing legislation such as traditional ecological knowledge that has not been converted in to some new form.¹¹²

X CONCLUSION

It remains to be seen whether the IP Australia consultation will bear the sort of fruit for which Janke and other Aboriginal Australians advocate. The apparent collapse of the WIPO IGC negotiations and IP Australia's apparent satisfaction with the existing intellectual property regime to protect TK and TCEs, as well as Australia's concern not to privilege a section of the community suggest that the sort of legislation that Janke seeks is unlikely. Her previous submissions seem to have had little influence upon the governmental institutions that have sought them. The decision of the High Court in *Ward*¹¹³ is equally unpromising. Proponents of sui generis protection for TK and TCEs would seem to require a *Mabo* equivalent to do for intellectual property what that decision achieved for real property.

Peter Johnston in describing the history of human rights in Western Australia emphasised the key role of human rights advocates in achieving the advantages which Aboriginal Peoples can now take for granted.¹¹⁴ The human rights dimension of the protection of the TK and TCEs of Aboriginal Peoples calls for appropriate advocacy into the future.

¹¹² Janke, above n 100, 23-24.

¹¹³ (2002) 213 CLR 1.

¹¹⁴ Discussed in Peter Johnston, 'Litigating Human Rights in Western Australia: Lessons from the Past' (2013) 15 *UNDALR* 111 at 118.