



**Department of the Environment, Water, Heritage and the Arts,
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**Submission on the Hawke Interim Review of the
*Environment Protection and Biodiversity
Conservation Act 1999 (Cth)***

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Executive Summary

Comments on the Interim Report for the Independent Review of the *Environment Protection and Biodiversity Conservation Act 1999* (EPBC Act)

Summary

There are currently no regulatory mechanisms, laws or policies that specifically provide rights to Indigenous peoples over their Indigenous knowledge and intellectual property. We strongly recommend that the commonwealth take the lead to ensure that national sui generis laws are developed (perhaps to operate initially in areas of Cth jurisdiction, such as IPAs and national parks). The development of such laws should be in tandem with practical guidelines to assist their implementation. A comprehensive, nationally consistent scheme for access to genetic resources, which offers meaningful protection of traditional knowledge and substantive benefit-sharing with Indigenous communities, has to be developed. There are already a range of reports/resources that urge these same reforms and that we direct the Enquiry to again; these include the Voumard Report (2000) – especially Fourmile’s Appendix 10 – “Indigenous Interests”, and Terri Janke “Our Culture, Our Future (1998).

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Which chapter(s) of the interim report are you commenting on?

Chapter 16 – ‘Access to Biological Resources’ and Chapter 17 - ‘Indigenous Information and involvement under the EPBC Act’.

Key points of submission

This submission has eight main recommendations:

- 1) The inquiry should be informed by the principles of the *United Nations Declaration on the Rights of Indigenous Peoples* – most notably, the rights of Indigenous people to “maintain, control, protect and develop their intellectual property over such cultural heritage, traditional knowledge...” (Article 31.1).
- 2) The inquiry should take note of the guidelines developed by NCIS in respect of ecological knowledge in the Northern Territory (see the NRMB (NT) or shortly NCIS website).
- 3) The inquiry should develop national Guidelines to manage Indigenous knowledge in NRM. These Guidelines would ensure a systematic approach to working with Indigenous knowledge in NRM across Australia
- 4) The inquiry should be informed by previous investigations into access to genetic resources – particularly the Fourmile appendix in the Voumard report.
- 5) Assessment of state and territory legislative developments is crucial as many states are currently revising their approach to regulating biodiversity. We are concerned that the Federal, Queensland, and Northern Territory regimes provide minimalist protection of Indigenous traditional knowledge.
- 6) The inquiry should develop sui generis legislation to protect Indigenous intellectual property, and support Indigenous engagement with the WIPO IGC
- 7) The inquiry should provide for a comprehensive, nationally consistent scheme for access to genetic resources, which offers meaningful protection of traditional knowledge and substantive benefit-sharing with Indigenous communities;
- 8) The inquiry should recommend for amendments to the *Native Title Act 1993* (Cth) to provide for traditional knowledge and Indigenous IP within native title rights.

Do you want this submission to be treated as confidential?

No – it can be published on the website.

These comments contain personal information of third party individuals. The third party individuals **consent** to the publication of their information.

The National Centre for Indigenous Studies

The National Centre for Indigenous Studies (NCIS) was established in January 2005. The head of NCIS is Professor Mick Dodson, current Australian of the Year, and co-drafter of the *United Nations Declaration on the Rights of Indigenous Peoples*. NCIS's charter is for it to be recognised as a leading academic institute for interdisciplinary research in fields of relevance to Indigenous Australians, especially in relation to the enrichment of scholarly and public understandings of Australian Indigenous cultures and histories. NCIS works collaboratively with the nine main research and teaching areas of relevance to Indigenous Australians within the ANU. NCIS's research priorities include *Indigenous engagement, Indigenous governance and Indigenous public policy; International Indigenous issues; Law, rights and social justice issues; and Education on Indigenous issues*. The Centre has a longstanding interest in the intellectual property rights of Indigenous peoples.

Dr Sarah Holcombe is a social anthropologist with twenty years research experience with Aboriginal peoples in remote and very remote areas of the Northern Territory, Western Australia and western Queensland. This research has been a balance of applied and academic anthropology. Holcombe's PhD (1998) research was in the central Australian community of Mt Liebig. Before joining the NCIS, Sarah was a Research Fellow at the ANU Centre for Aboriginal Economic Policy Research (CAEPR). The final project Sarah was engaged in at CAEPR was as Social Science Coordinator for the Desert Knowledge CRC where she developed a range of ethical research tools, including an Aboriginal Knowledge and IP Protocol. Dr Holcombe has published widely in a range of areas, including Indigenous engagement with the mining industry, Indigenous community governance and the socio-politics of contemporary Indigenous land tenure.

Dr Matthew Rimmer is a senior lecturer and the associate director of Research at the ANU College of Law, and an associate director of the Australian Centre for Intellectual Property in Agriculture (ACIPA). He holds a BA (Hons) and a University Medal in literature, and a LLB (Hons) from the Australian National University. Rimmer received a PhD in law from the University of New South Wales for his

dissertation on *The Pirate Bazaar: The Social Life of Copyright Law*. He is a member of the Copyright and Intellectual Property Advisory Group of the Australian Library and Information Association, and a director of the Australian Digital Alliance. Rimmer the author of two books, *Digital Copyright and the Consumer Revolution: Hands off my iPod*, and *Intellectual Property and Biotechnology: Biological Inventions*, and the editor of the collections, *Patent Law and Biological Inventions*, and *Incentives for Global Public Health: Patent Law and Access to Essential Medicines*. He has published widely on copyright law and information technology, patent law and biotechnology, access to medicines, clean technologies, and traditional knowledge.

Terri Janke is the Solicitor Director of Terri Janke & Company Pty Ltd. As an Indigenous lawyer with a real understanding of how the legal system affects Indigenous people, Terri brings a unique perspective to the sound, effective resolution of legal issues and negotiations involving Indigenous culture and heritage. Terri is a prolific author and energetic public speaker on issues relating to Indigenous cultural and intellectual property (ICIP). She has spoken to enthusiastic audiences in London, Geneva, Phuket, Auckland, Vancouver, Noumea and throughout Australia, including many remote Indigenous communities. Terri's pre-eminence as a lawyer and adviser in the specialist area of ICIP has been recognised through awards including: the John Koowarta Reconciliation Law Scholarship by the Law Council of Australia in 1994; the British Council Bursary to The University of Warwick in 1996; the Evolving Business Winner 2001, NSW Aboriginal Employment and Business Awards; the NSW Women of the Year Honour Roll 2005; and the Highly Commended, Aboriginal Justice Award, Law and Justice Foundation of NSW, in 2007/

Terri was born in north Queensland and has family connections to Cairns, the Torres Strait Islands (Meriam) and Cape York Peninsula (Wuthathi). Her novel *Butterfly Song* was published by Penguin Books in 2005. Terri's appointments include The Australian Institute of Aboriginal and Torres Strait Islander Studies (appointed in 2007); National Indigenous Television (NITV) (appointed in 2007); Premiers Women's Council (appointed in June 2008); and Tourism Australia (appointed in July 2008). Terri is also completing a PhD in law at the Australian National University (National Centre for Indigenous Studies).

1. International Law

This submission builds on a recent submission the same authors made in relation to Australia's Biodiversity Conservation Strategy 2010-2020. That submission focused on "Priority for Change 3: Knowledge for all" and "Priority for Change 5: Involving Indigenous Australians". Our particular focus in this submission is on Chapter 16 – 'Access to Biological Resources' and Chapter 17 - 'Indigenous Information and involvement under the EPBC Act'.

Our interest here lies with ensuring that Indigenous knowledge holders are engaged with in a manner that recognises their prior rights over their own knowledge and intellectual property. As the Preamble of the recently endorsed *United Nations Declaration on the Rights of Indigenous Peoples* states, we need to; "Recognis[e] that respect for Indigenous Knowledge, cultures and traditional practises contributes to sustainable and equitable development and proper management of the environment".

We further draw the Review's attention to the following relevant clauses from the *United Nations Declaration on the Rights of Indigenous Peoples*:

Article 29 (1). Indigenous peoples have the right to the conservation and protection of the environment and the productive capacity of their lands or territories and resources. States shall establish and implement assistance programmes for Indigenous peoples for such conservation and protection, without discrimination.

Article 31 (1). Indigenous peoples have the right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions, as well as the manifestations of their sciences, technologies and cultures, including human and genetic resources, seeds, medicines, knowledge of the properties of flora and fauna, oral traditions, literatures, designs ... They also have the right to maintain, control, protect and develop their intellectual property over such cultural heritage, traditional knowledge, and cultural expressions.

Article 31 (2). In conjunction with Indigenous peoples, States shall take effective measure to recognise and protect the exercise of these rights.

Article 32 (1). 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.

It is crucial that the sentiment within these Articles begins to be translated into action in the Australian context. This Review is an opportune moment to ensure that this occurs. This submission offers suggestions and recommendations as to how the Commonwealth (Cth) can take such “effective measure[s]” in the recognition and protection of these rights. To this effect, it is laudable that there is an increasing recognition of Indigenous people’s particular interests in conservation and biodiversity, and indeed that Indigenous people’s access to, and presence on, land and their use of its natural resources are regarded as essential elements of management of country.

However, there is systemic failure in *enabling* this recognition; that is, there is **no framework through which Indigenous knowledge can be both protected and managed**. S. 17.14 states that the “use of Indigenous traditional knowledge is addressed in the intergovernmental agreement that governs access to Australia’s genetic resources for scientific research and development”. We are here referred to the “Nationally Consistent Approach for access to and the utilisation of Australia’s native genetic and biochemical resources” (2002).¹ However, this is not a regulatory mechanism, but rather an aspirational document. Already 7 years old it lays out the general principles that should underpin the “development or review of legislative, administrative or policy frameworks in Australian jurisdictions” (2002:5). However, no Australian jurisdictions have developed such regulatory frameworks, or law, or policy to specifically provide rights to Indigenous peoples over their Indigenous knowledge and intellectual property. Indeed, as we note in the following section, Janke has recently advised the Northern Territory government to do exactly this.

¹ <http://www.environment.gov.au/biodiversity/publications/access/nca/pubs/nca.pdf>

We note that the recent Submission (May 2009) by the Indigenous Advisory Committee to Dr Allan Hawke in response to the *Independent Review of the EPBC Act* (1999) also notes that:

“The current arrangement where state/territory jurisdictions are responsible for consultation with Indigenous peoples is failing to provide for effective processes and outcomes. It is our view that establishing a process that is applied consistently across all jurisdictions is of paramount importance” (clause 33. p.7)²

It is clear that the Commonwealth needs to take the lead in developing any framework as a standard, along with practical guidelines to achieve it. Nevertheless, we recognise that for constitutional reasons, the federal government is cautious about setting nationwide standards. For this reason we suggest that the Cth begin with developing Indigenous knowledge management guidelines and standards for Indigenous Protected Areas (IPA's), Heritage listed areas and joint management arrangements for Commonwealth national parks, for instance. That is; for regions over which they have jurisdiction. In this way, the Commonwealth can take the lead in developing best practise standards in a range of contexts across the nation, then state and territory jurisdictions would be encouraged to follow the lead.

We draw the Review's attention to the International Society of Ethnobiology (ISE) Code of Ethics.³ This code recognises that “culture and language are intrinsically linked to land and territory, and cultural and linguistic diversity are inextricably linked to biological diversity” (2008:4).

It is unfortunate that the “Nationally Consistent Approach” (NCA, 2002) document, referred to above, begins the Foreword with the following statement; “For centuries people have utilised plants, animals and micro-organisms ...” If this document is to have relevance for the Indigenous peoples of Australia it must acknowledge that they have been utilising Australia's natural resources for **many thousands of years (circa 50,000)**. It is this knowledge, of countless generations, that requires management and

² <http://www.environment.gov.au/epbc/review/submissions/pubs/210-iac.pdf>

³ http://ise.arts.ubc.ca/common/docs/ISE%20COE_Eng_rev_24Nov08.pdf

protection by a rigorous and consistent Australian wide standard informed by the Declaration on the Rights of Indigenous Peoples (cited earlier) that actively respects this deep history and continuing prior ownership.

2. Resources Developed for the Natural Resource Management Board of the Northern Territory

This submission is closely informed by recent work that Holcombe and Janke (and Michael Davis) have undertaken in the Northern Territory for the Natural Resource Management Board of the NT. Over the course of a year we were tasked with developing a suite of resources to assist in systematic management of Indigenous Cultural and Intellectual Property (ICIP) rights. These resources are:

- 1) Guidelines for Indigenous Ecological Knowledge Management (including archiving and repatriation) – for all researchers. (Holcombe)
- 2) Handbook for Working with Indigenous Ecological Knowledge and Intellectual Property (Maintain and Strengthen your Culture) – for Aboriginal NRM practitioners. (Davis)
- 3) Report on the Current Status of Indigenous Intellectual Property – for policy and lawmakers. (Janke)

Although the principles, ethical engagement practices and the IP management advice these resources espouse are transferrable, their limitation is that they are Northern Territory specific. And even within the NT, without legislative reform, consistency of application cannot be guaranteed. Currently the strongest mechanisms are the use of local protocols (as these include ICIP rights) and their enforcement by contract. Hence, we are also conscious of the need to respect the range of local protocols and management tools that already exist within some Indigenous organisations (such as representative bodies). Any new resources should be complementary to these and would provide an architecture for compliance for all researchers (within government, universities and NGOs). They would also aim to offer higher level advice and direction as necessary.

To reiterate, there is currently no linkage provided in any Australian law, including the EPBC Act, between Traditional knowledge systems and their treatment and protection under Common Law.

3. Guidelines for managing Indigenous knowledge and IP (or ICIP):

We suggest that the development of any national guidelines or guidelines specific to IPAs, for instance, would have to be underpinned by the Principle of “Active Protection”. This principle promotes the support of: 1) engaging with the knowledge holders and relevant community 2) ensuring that any data generated from Indigenous knowledge holders is returned in an accessible form; and 3) fostering opportunities for inter-generational knowledge transmission.

Such active protection ensures engagement with, and respect for, local protocols as these manage customary knowledge. Crucially, it has to be recognised that Indigenous knowledge of biodiversity is as much about practise, as it is about content. That is; it is about the *activity* of cultural transmission, as much as it is about the knowledge that is taught. Thus, the sharing of this knowledge has to be managed in such a way that respects Indigenous customary knowledge protocols. Knowledge is *not* for all in the Indigenous knowledge ‘economy’.

Thus, we suggest that such Guidelines should be pre-eminently directed at managing intangible Indigenous knowledge. Currently, the focus of state based legislations, such as heritage acts, the NT Aboriginal Sacred Sites Act (2004), etc is focused on tangible heritage. We direct the Hawke Review to the UNESCO Convention for the Safeguarding of Intangible Cultural Heritage 2003.⁴ This has not yet been adopted by the Australian government.

4. Commonwealth Public Inquiry (Voumard, 2000)

Since the early 1990s, the dominant philosophy underpinning the Commonwealth’s approach to environmental regulation has been one of ‘cooperative federalism,’

⁴ <http://unesdoc.unesco.org/images/0013/001325/132540e.pdf>

informed by the principle of subsidiarity. The approach is encapsulated in the attitude being taken to genetic resources.

The Commonwealth Public Inquiry (Voumard, 2000) that was held in relation to “Access to Biological Resources in Commonwealth Areas” is of direct relevance to the Hawke Interim Report and is important to re-visit. Of particular value is “Appendix 10: Indigenous Interests in Biological Resources in Commonwealth Areas – synthesis of submission and related information” (Henrietta Fourmile).

Fourmile noted that;

While the EPBC Act addresses the important provisions contained in Articles 8(j), 10(c) and 18.4 of the Convention on Biological Diversity, it falls short of providing intellectual property-style protection for community-held traditional knowledge. While prior informed consent procedures and contractual provisions can give a degree of legal certainty to protecting traditional knowledge, recognition of such knowledge as intellectual property will provide a higher degree of certainty for all parties and attract greater recognition in court proceedings” (2000:224).

Hence, Fourmile recommends that

“the Commonwealth Government commission a study, to be carried out in conjunction with the Indigenous community, to draft sui generis legislation to protect Indigenous intellectual and cultural property. Such a study should take particular account of recommendations 18.1-21 of the *Our Culture: Our Future* report [Janke 1998], as well as existing models developed for this purpose together with sui generis laws in force in other countries” (2000:225).

The sections, and subsequent recommendations, from Fourmile’s Appendix on Applying Principles of prior informed consent (pp228-232) and Benefit Sharing Arrangements (pp232-255) are also especially pertinent to the current inquiry. **We direct the Hawke Review to consider Fourmile’s submission in particular.**

We would encourage the inquiry reconsider the Voumard report, and its recommendations for a stronger recognition of Indigenous traditional knowledge and control over genetic resources.

5. The NCA and ‘cooperative federalism’

In 2002, a Ministerial Council – an inter-governmental administrative body – agreed to the non-binding *Nationally Consistent Approach for Access to and Utilisation of Australia’s Native Genetic and Biochemical Resources* (the NCA) – see above. There are indications, however, that the accord is already being undermined. The Australian Government candidly testified to this effect in its submission to the *Ad Hoc Open-ended Working Group on Access and Benefit-sharing* under the CBD: ‘Countries with federal structures of government such as Australia face very specific challenges when introducing national access laws.’

At the state level, the Queensland government has passed the *Biodiscovery Act 2004* (Qld). The Explanatory Memorandum proclaims that there is ‘no alternative’ to legislation of this kind if Queenslanders are to share the benefits of biodiscoveries in Queensland – scientific knowledge, royalties, investment, jobs and training. The interaction between state and federal legislative action in controlling access to genetic resources is unexplored territory. The Queensland Act and the proposed national scheme provide the first opportunity to consider whether there is potential for conflict.

In 2006, the Northern Territory established the *Biological Resources Act 2006* (NT).

Assessment of these legislative developments is crucial as many states are currently revising their approach to regulating biodiversity.

We are concerned that the Federal, Queensland, and Northern Territory regimes provide minimalist protection of Indigenous traditional knowledge.

6. Intellectual Property laws and Indigenous Knowledge

It is unfortunate that Australian courts and the Federal Parliament have failed, thus far, to provide comprehensive protection in respect of Indigenous traditional knowledge.

It is true that von Doussa J of the Federal Court of Australia has shown judicial innovation in a number of cases – most notably, the “Carpets” case, and the “Bulun Bulun” decision. However, there have been limits to the extent of judicial innovation in Australia – as illustrated by the refusal of the High Court of Australia to recognise the linkage between native title rights and traditional knowledge in the case of *Ward v Western Australia*. The case law has demonstrated that there is a need for a more fundamental legislative reform of laws with respect to traditional knowledge in Australia.

Unfortunately, the Australian Parliament has thus far failed to heed the recommendations of Terri Janke’s landmark report, *Our Culture, Our Future*. The previous Howard Government showed little interest in the protection of traditional knowledge. A Federal bill on the recognition of communal moral rights in respect of copyright works created by Indigenous communities has not been implemented. Thus far, there have only been piecemeal reforms. The authenticity trade marks scheme, which was set up in 2000, has collapsed.

The new Rudd Federal Government has yet to establish its priorities in respect of the protection of traditional knowledge. It has expressed an interest in establishing a right of resale – which would have the potential to benefit Indigenous artists and communities. However, this legislative bill has been contentious and will have to be amended, partly because it was based upon questionable constitutional assumptions.

Ideally, there is a need to **develop sui generis protection** in respect of Indigenous intellectual property in Australia. Public servants have been prone to scoff at such a suggestion. We think that it is an entirely reasonable and sensible approach. We note that the Australian Parliament has seen fit to provide sui generis protection in relation to such specific areas as geographical indications, circuit layouts, plant breeder’s

rights, lending rights, and performers' rights. We think that it is discriminatory to provide such industrial areas with special intellectual property rights protection, but to deny similar privileges to Indigenous traditional knowledge holders.

We are of the belief that the United Nations *Declaration on the Rights of Indigenous Peoples* provides an important blueprint for law reform in Australia. See especially Article 31 (1) and Article 31 (2), outlined earlier. If sui generis legislation is not enacted, at the very least, there needs to be a comprehensive reform revision of existing intellectual property laws. The *Intellectual Property Laws Amendment Bill 2008*⁵ (South Africa) provides a possible model for such an approach.

We strongly suggest that the government representatives who attend the WIPO Inter-Governmental Committee (IGC) on intellectual property, genetic resources, traditional knowledge and folklore consult with Indigenous people, regarding IGC work.⁶ This includes inviting Australian Indigenous expertise to comment on the draft provisions for the protection of traditional knowledge. This includes resourcing for this Indigenous expertise. We also suggest that the government representatives provide information to Indigenous people or their representatives on the work of WIPO in this area.

7. Access to Genetic Resources

We are of the strong view that Indigenous communities in Australia are poorly served by the existing environmental laws with respect to access to genetic resources.

We are concerned that Australian Governments have implemented the obligations with respect to access to genetic resources under the *Rio Convention on Biological Diversity* 1992 in a partial and fragmentary way.

⁵ <http://www.thedti.gov.za/ccrd/ipbills.htm> The site for the South African notice, policy and bill.

⁶ <http://www.wipo.int/tk/en/igc/> and http://www.wipo.int/tk/en/consultations/draft_provisions/draft_provisions.html

We are of the view that the access to genetic resources scheme established by *Environmental Protection and Biodiversity Conservation Amendment Regulations (No 2) 2005* has a number of significant limitations and deficiencies, in terms of its form and practice.

The regime fails to fulfill the objective stated in Division 8A.01 of the *Environment Protection and Biodiversity Conservation Regulations 2000* (Cth) of “recognising the special knowledge held by indigenous persons about biological resources.”

Critically, the provisions in Division 8A.2 and 8A.3 of the *Environment Protection and Biodiversity Conservation Regulations 2000* draw a distinction between access to genetic resources for commercial and non-commercial purposes.

We note the **absence of permits on the register in respect of commercial benefit-sharing** in Australia:

<http://www.environment.gov.au/biodiversity/science/access/permits/apply.html>

In practice, this means that the regime is not generating commercial benefits to be shared with Indigenous communities and groups. As a result, the regime has not achieved any capacity for meaningful benefit-sharing.

The lack of commercial permits also indicates a significant level of non-compliance with the regime by the large number of public and private bio-prospecting entities in Australia.

There are problems with the process established in Division 8A.4 of the *Environment Protection and Biodiversity Conservation Regulations 2000* (Cth). The relevant Minister should undertake greater scrutiny of both commercial and non-commercial applications affecting Indigenous communities and groups.

Notwithstanding Australian and international controversies over biopiracy of Indigenous genetic resources, 8A.06 of the *Environment Protection and Biodiversity Conservation Regulations 2000* (Cth) provides for paltry remedies in the event of non-compliance with this regime. We note, too, that there has been no enforcement action taken under the regime thus far. We think that the Commonwealth regime

should follow the lead of the Queensland regime for access to genetic resources, which provides for meaningful remedies. Consequently, the access to genetic resources scheme will need to be established in a legislative form, and not left to the regulations.

There is a **lack of national harmonisation with respect to access to genetic resources regime**. The *Environment Protection and Biodiversity Conservation Regulations* 2000 (Cth) establish a regime, which is quite different in substance from both the *Biodiscovery Act* 2004 (Qld) and *Biological Resources Act* 2006 (NT). Moreover, the failure of other states and territories to implement specialist regimes in respect of access to genetic resources has resulted in very patchy coverage across Australia. Consequently, Indigenous groups and communities enjoy varying degrees of rights and interests in respect of access to genetic resources.

There is also a pressing need for **regional harmonisation in respect of access to genetic resources**. The Sorcerer II Expedition demonstrated that major multi-national bioprospecting projects can involve a range of nation states in Australasia and the Pacific. Many neighboring countries to Australia have not established regimes to provide for protection in respect of access to genetic resources. Indeed, New Zealand has not yet implemented a regime – it has been waiting for the ruling in the WAI 262 Treaty of Waitangi claim.

8. Native Title Law

We are concerned that the Hawke Interim Report pays insufficient attention to the inter-connections between native title law, environmental law, and intellectual property law.

The *Environment Protection and Biodiversity Conservation Regulations* 2000 (Cth) recognizes that native title holders can be considered to be holders of genetic resources; and that benefit-sharing agreements can also include Indigenous Land Use Agreements.

However, Australia's native title system has been unduly circumscribed in its operation to merely dealing with tangible property, rather than intangible property.

The High Court case of *Western Australia v Ward* related to the native title claim by the Miriuwung-Gajerrong peoples⁷ primarily considered the nature and principles of extinguishment of native title.⁸ The High Court also considered, in passing, the important issue of whether there was a connection between native title rights and cultural knowledge.⁹ The key provision under scrutiny was s 223 (1) of the *Native Title Act* 1993 (Cth), which defines the expression "native title" and "native title rights and interests" as meaning "the communal, group or individual rights and interests of Aboriginal peoples or Torres Strait Islanders in relation to land or waters".

The majority of the High Court doubted that "a right to maintain, protect and prevent the misuse of cultural knowledge is a right in relation to land of the kind that can be the subject of a determination of native title."¹⁰ First, the majority refused to provide sui generis protection for "cultural knowledge" because the limits and boundaries of such subject matter has been ill-defined: "The first difficulty in the path of that submission is the imprecision of the term "cultural knowledge" and the apparent lack of any specific content given it by factual findings made at trial".¹¹ Second, the majority dismissed the argument that native title rights were linked to cultural knowledge rights. These judges supported the remarks of Justice von Doussa, and it is here that the second and fatal difficulty appears.

⁷ *Western Australia v Ward* (2002) 191 ALR 1

⁸ Such issues are considered elsewhere: Strelein L, "Western Australia v Ward on Behalf Of Miriuwung Gajerrong: Summary of Judgment" (2002) 2 (17) *Land, Rights, Laws: Issues Of Native Title*; Clarke J, "Recent Native Title Decisions In The High Court", *Australian Policy Online*, 12 August 2002, <http://law.anu.edu.au/CIPL/Publications/Clarke.pdf>; and Dodson M, "Native Title on the Precipice: The Implications of the High Court's Judgment on the *Ward* Case", ANU Institute for Indigenous Australia, 17 October 2002, <http://ni.anu.edu.au/docs/dodson.pdf>

⁹ For a discussion of these issues in the Federal Court in the *Ward* case, see Malcolm R and Meyers G, "Native Title Rights And The Protection Of Indigenous Cultural Knowledge" (2002) 50 *Intellectual Property Forum* 12-25.

¹⁰ *Western Australia v Ward* (2002) 191 ALR 1

¹¹ *Western Australia v Ward* (2002) 191 ALR 1

In *Bulun Bulun v R & T Textiles Pty Ltd*, von Doussa J observed 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. That is the case, but the essential point for present purposes is the requirement of "connection" in para(b) of the definition in s 223 (1) of native title and native title rights and interests. The scope of the right for which recognition by the common law is sought here goes beyond the content of the definition in s 223 (1).

That is not to say that in other respects the general law and statute do not afford protection in various respects to matters of cultural knowledge of Aboriginal peoples or Torres Strait Islanders. Decided cases apply in this field the law respecting confidential information, copyright, and fiduciary duties. Provision respecting moral rights is now made by Pt IX (s 189 - s 195AZO) of the *Copyright Act 1968* (Cth).¹²

The judges asserted that Federal Court precedents demonstrate that current intellectual property laws provide sufficient protection of Indigenous cultural property.

In his dissenting judgment, Justice Kirby seeks to rebut the comments of Justice von Doussa that recognition of native title rights analogous to intellectual property rights would fracture a so-called "skeletal principle" of the common law of Australia, by contravening the "inseparable nature of ownership in land and ownership in artistic works" and that therefore such recognition would be contrary to s 223 (1) (c) of the *Native Title Act*. His Honour notes that the assertion of such a "skeletal principle" in that case was *obiter dictum*.¹³ Justice Kirby offers the critique:

An application of Brennan J's statement regarding "skeletal principles" should consider his Honour's reasoning in its entirety. Skeletal principles are not immutable. When they offend values of justice and human rights, they can no longer command "unquestioning adherence". A balancing exercise must be

¹² *Western Australia v Ward* (2002) 191 ALR 1

¹³ That is; not binding as a precedent on that particular point (Latin: "by the way" – incidental).

undertaken to determine whether, if the rule were overturned, the disturbance "would be disproportionate to the benefit flowing from the overturning".¹⁴

Justice Kirby also notes his previous consideration of the "skeletal principle" enunciated by Justice Brennan in *Mabo [No 2]*.¹⁵ Justice Kirby acknowledged that the protection of some aspects of cultural knowledge might have such a consequence. However, in his view, such repugnancy has not been demonstrated in the facts of the appeals.

In his dissent, Justice Kirby recognises that it is difficult to define a native title right to maintain, protect and prevent the misuse of cultural knowledge of the native title holders: "The right to protect cultural knowledge was not well defined in submissions before this Court".¹⁶ Nonetheless, Justice Kirby believes that it is possible to define the scope of cultural knowledge. His Honour elaborates: 'If this cultural knowledge, as exhibited in ceremony, performance, artistic creation and narrative, is inherently related to the land according to Aboriginal beliefs, it follows logically that the right to protect such knowledge is therefore related to the land for the purposes of the *Native Title Act* 1993 (Cth).'¹⁷

The recent Federal Court decision of *Neowarra v Western Australia* concerned a native title claim in respect of the land and waters in the northwest of the Kimberley in Western Australia.¹⁸

As part of their claim, the Wanjina-Wungurr community sought the recognition of a right to use, maintain, protect, and prevent the misuse of cultural knowledge of common law holders. The community also claimed possession of painted images on rock surfaces within the claim area, in particular in relation to Wanjina and Gwion images. Justice Sundberg considered the decision of the High Court in *Western Australia v Ward* that native title rights did not extend to cultural knowledge:

¹⁴ *Western Australia v Ward* (2002) 191 ALR 1

¹⁵ *Mabo v Queensland* (1992) 175 CLR 1.

¹⁶ *Western Australia v Ward* (2002) 191 ALR 1

¹⁷ *Western Australia v Ward* (2002) 191 ALR 1

¹⁸ *Neowarra v Western Australia* [2003] FCA 1402.

As I understand the joint judgment, the claim to reinstate par 3(j) in the determination was ultimately rejected on the ground that there could be no recognition of the right claimed under s 223(1)(c) because it would be a new species of intellectual property right which could not be recognised for want of a connection with land. The examples given of what might fall within the right were the restraint of visual or auditory reproductions of what was to be found at Aboriginal sites or took place there or elsewhere.¹⁹

However, Justice Sundberg also considered whether the community could claim possession of painted images on rock surfaces within the claim area, including the Wanjina images and Gwion images. His Honour held: 'In my view claimants with a traditional right to freshen or repaint a particular painting site may have access to pastoral land in order to exercise that right'.²⁰

The Chief Justice of the High Court of Australia, Robert French, recently expressed the view that there was a need for greater progress in the development of native title laws in Australia:

From Federation to the present day, the battle for the advancement of Australia's indigenous people has been almost uniformly uphill.... However, the acceptance of indigenous land title agreements by governments and by pastoral and mining industries, the increasing sophistication of such agreements to ensure that their benefits flow to those who should benefit from them and the increasing awareness of indigenous culture and customary land rights in Australia - indicate that there has been progress and that progress continues although at a pace which is far too slow for many involved in and observing the process.²¹

¹⁹ *Neowarra v Western Australia* [2003] FCA 1402.

²⁰ *Neowarra v Western Australia* [2003] FCA 1402.

²¹ French, R. 'Native Title – A Constitutional Shift?', The University of Melbourne Law School, 24 March 2009, <http://www.hcourt.gov.au/speeches/frenchcj/frenchcj24mar09.pdf>

There most needs to be greater progress in native title jurisprudence recognising the inherent link between native title rights, traditional knowledge, and Indigenous intellectual property. There is also a need to recognise that native title rights do not just affect activities such as pastoral use and mining – but also new technological and scientific disciplines, such as biodiscovery and bioprospecting.

Accordingly, the Federal Government should amend the *Native Title Act* 1993 (Cth) to expressly provide that native title rights include traditional knowledge and Indigenous intellectual property.

Recommendations:

This submission has eight main recommendations:

- 1) The inquiry should be informed by the principles of the *United Nations Declaration on the Rights of Indigenous Peoples* – most notably, the rights of Indigenous people to “maintain, control, protect and develop their intellectual property over such cultural heritage, traditional knowledge...” (Article 31.1).
- 2) The inquiry should take note of the guidelines developed by NCIS in respect of ecological knowledge in the Northern Territory (see the NRMB (NT) or shortly NCIS website).
- 3) The inquiry should develop national Guidelines to manage Indigenous knowledge in NRM. These Guidelines would ensure a systematic approach to working with Indigenous knowledge in NRM across Australia
- 4) The inquiry should be informed by previous investigations into access to genetic resources – particularly the Fourmile appendix in the Voumard report.
- 5) Assessment of state and territory legislative developments is crucial as many states are currently revising their approach to regulating biodiversity. We are concerned that the Federal, Queensland, and Northern Territory regimes provide minimalist protection of Indigenous traditional knowledge.
- 6) The inquiry should develop sui generis legislation to protect Indigenous intellectual property, and support Indigenous engagement with the WIPO IGC
- 7) The inquiry should provide for a comprehensive, nationally consistent scheme for access to genetic resources, which offers meaningful protection of traditional knowledge and substantive benefit-sharing with Indigenous communities;
- 8) The inquiry should recommend for amendments to the *Native Title Act 1993* (Cth) to provide for traditional knowledge and Indigenous IP within native title rights.

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