Producing a Critique: Writing about Indigenous Knowledge, Intellectual Property and Cultural Heritage

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CERTIFICATE OF AUTHORSHIP/ORIGINALITY

I certify that the work in this thesis has not previously been submitted for a degree nor has it been submitted as part of requirements for any other degree except as fully acknowledged within the text.

I also certify that the thesis has been written by me. Any help that I may have received in my research work and in the preparation and writing of this thesis itself has been acknowledged.

In addition, I certify that all information sources and literature used are indicated in the thesis. I also certify that none of the published works included as part of this PhD have previously been submitted for a qualification at this or any other tertiary institution.

Signature of Candidate

Michael Davis

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Acknowledgements

My journey through the making of this PhD has been both exhilarating and at the same time, tinged with some sadness. The exhilaration was because of the opportunity it presented for me to engage critically with the body of work I had already produced, and also with an area of thinking and scholarship with which I have been fascinated for many years. I carried out the research and writing of this PhD under rather difficult conditions, both personal and professional. As a result what should have been a relatively short project became one that took a longer time to complete. I would like to thank my supervisor Professor Alastair Pennycook for his patience and encouragement. Conversations with Alastair always helped me focus my arguments, and inspired me in the development of this Essay. Professor Larissa Behrendt, Director of Research at Jumbunna Indigenous House of Learning at UTS, was supportive, both during the period I spent employed as a Researcher with Jumbunna, and after I completed my contract there. Professor Nicky Solomon, then in the Education Faculty at UTS, was encouraging in her reading of my application for entry into this PhD program. I also thank the UTS Faculty of Arts and Social Sciences for providing me with a space to complete the PhD, and Printing Services for efficient copying and binding. Finally, I would not have been able to complete this PhD without the support and love of people close to me.

Abstract

Indigenous knowledge as a subject for discussion and analysis has become more prominent in academic literature and in public policy debates in the past decade or more. In my own published works, one of my main themes has been to review and critique Western legislative regimes' attempts to define, protect, and regulate Indigenous knowledge, especially in terms of what is often called 'indigenous intellectual property'. As a consequence of this interest in critique of legislation, I have also explored questions around the intersection between Indigenous knowledge and other kinds of knowledge, particularly that sometimes termed 'Western science'. This latter interest has led me to consider the ways in which Indigenous knowledge and other forms of Indigenous heritage have been represented in 'Western' texts, language and discourses, including legislative and administrative developments and discussions, and in anthropological and historical writings.

This Essay presents a critical review of my published works, discussed within the context of the particular circumstances (political, bureaucratic/administrative and legislative) in which they were written. I explore the ways in which the sum of my writings have contributed to, and at the same time have formed a critique of, prevailing State authorised discourses relating to Indigenous knowledge that are entrenched primarily in intellectual property rights law.

In this Essay I suggest that, as a consistent body of critique, my writings taken as a whole are positioned outside, or between the borders of several discourses and bodies of knowledge. This 'cross-border' position of my writings has, I argue, created the possibility for a critique of Western discourses centred on intellectual property rights. I discuss these aspects within a theoretical framework of colonial discourse studies and postcolonial criticism.

List of Published Works Submitted

1 **Davis, M. 1997**. *Indigenous Peoples and Intellectual Property Rights.* Research Paper No 20. Canberra: Department of the Parliamentary Library.

2 **Davis, M. 1998**. *Biological Diversity and Indigenous Knowledge*. Research Paper No. 17. Canberra: Department of the Parliamentary Library.

3 **Davis, M. 1999**. Indigenous Rights in Traditional Knowledge and Biological Diversity: Approaches to Protection. *Australian Indigenous Law Reporter*, 4(4), pp. 1-32.

4 **Davis, M. 2001**. Law, Anthropology, and the Recognition of Indigenous Cultural Systems. In René Kuppe and Richard Potz (eds). *Law and Anthropology: International Yearbook for Legal Anthropology*, 11. The Hague: Martinus Nijhoff, pp. 298-320.

5 **Craig, D., and Davis, M. 2006**. Ethical Relationships for Biodiversity Research and Benefit-sharing with Indigenous Peoples. *Macquarie Journal of International and Comparative Environmental Law*, 2(2), pp. 31-74.

6 **Davis, M. 2006**. Bridging the Gap or Crossing a Bridge? Indigenous Knowledge and the Language of Law and Policy. In Fikret Berkes, Doris Capistrano, Walter V. Reid, and Tom Wilbanks (eds). *Bridging Scales and Knowledge Systems: Concepts and Applications in Ecosystem Assessments*. Washington DC: Island Press, pp. 145-182.

7 **Davis, M. 2007**. *Writing Heritage: The Depiction of Indigenous Heritage in European-Australian Writings*. Melbourne: Australian Scholarly Publishing, in association with the National Museum of Australia Press.

8 **Davis, M. 2008**. Indigenous knowledge: Beyond Protection, Towards Dialogue. *Australian Journal of Indigenous Education.* Vol 37S, pp. 25-45.

Chapter One: Introduction

Indigenous knowledge has, over a period of some decades, become a subject of increasing attention and interest across a wide range of domains and disciplines including governmental, administrative, scientific, ethnographic, legislative and activist. Areas for discussion have included the role of Indigenous knowledge in development and in science (e.g. Briggs, 2005; Briggs and Sharp, 2004; Sillitoe, 1998, 2002, 2007), questions about the intersections between, and 'cultural politics' of, Indigenous knowledge and law (e.g. Anderson, 2009; Brown, 2003; Davis, 1997, 1998; Gibson, 2005; Whitt, 2009), and the relationship between Indigenous, and other forms of knowledge (e.g. Agrawal, 1995a, 1995b; Davis, 2006), as well as a burgeoning literature (mostly in the anthropological and ethnographic fields) on using, collecting and documenting Indigenous knowledge.

As well as discussions on Indigenous knowledge that fall within the disciplines of anthropology, ethnography, political science and development studies, a major area of scrutiny is conducted within a legal framework, in regard to the regulation, recognition, and protection of that knowledge. Related to those inquiries, yet another focus is on the classification of Indigenous knowledge and questions of definition. It is discussed in the literature using a range of terms including 'Indigenous ecological knowledge', 'traditional ecological knowledge', 'traditional environmental knowledge', 'traditional knowledge' and 'indigenous knowledge'. This problem of nomenclature is itself sometimes a topic for discussion (e.g. Heckler, 2009; Zent, 2009). The variety of terms used reflects the variety of disciplines within which Indigenous knowledge is located as a subject for discussion. More significantly, it indicates a sense of unease that many writers about this subject perhaps experience – albeit unconsciously – in the subject matter's unwillingness to be readily categorised or labelled within a specific discipline or approach.

While discussions about Indigenous knowledge tend to be scattered across many disciplines and areas of methodological, theoretical and applied policy interest, in general, it is constructed in some of the literature (more often in policy and legislative texts, than in writings of a more 'academic' kind) as though it is a unitary,

homogenous entity or subject for analysis. The focus in many of those discussions is on the relationship between Indigenous knowledge and legislative regimes for protection, predominantly intellectual property rights. In much discussion about Indigenous knowledge there is an assumption that it is a type of property, and therefore can be considered in a context of Western intellectual property rights. Copyright law has been the legal framework most commonly engaged with for consideration of 'protection' for Indigenous knowledge, in regard to its expressions in art and design. Other aspects of Indigenous knowledge are considered within legal and policy discourses relating to environment and biodiversity conservation. This has produced a particular type of discourse predominantly in government and administrative arenas, and in the legal and academic professions. I identify this as an official, State authorised discourse, embedded in a framework of understanding and interpretation founded predominantly in the Western legal concept of intellectual property rights. This 'State-authorised' discourse consists of official statements, laws and legislative amendments, commentaries and discussions, government and parliamentary documents, reports and submissions, and academic texts and debates. In using the term 'State authorised', I will in this Essay refer not necessarily, or even to a unitary, centralised entity of government or 'State', but to various practices, representations, and networks that contribute to formulations of 'technologies of government' (Miller and Rose, 1990; Rose and Miller, 2010).

At the same time as that official discursive production, there has emerged at least one parallel discourse, which, while having been developed as a distinct alternative to the official one, also draws from, and intersects with that in important ways. For this latter discourse, I refer here to what has been termed Indigenous cultural and intellectual property rights – a term used to denote Indigenous peoples' cultural heritage in both its physical and intangible aspects (Janke, 1998). This discourse of Indigenous cultural and intellectual property rights, formulated initially (though not articulated as such) in international texts within the United Nations, has been discussed and advocated most recently in Australia by Terri Janke, an Indigenous legal expert. The discourse on Indigenous cultural and intellectual property rights has influenced my own work, and it is also increasingly being taken up in a wider domain of research, writing, and policy development.

The emergence of an official, State authorised discourse based predominantly in Western intellectual property rights, and also of an alternative discourse such as that of Indigenous cultural and intellectual property rights, provides a context in which to examine my own production of published writings. The particular ways in which these discourses intersect and relate to one another, and the role of my published works in this milieu, requires some discussion of the processes and tactics of the government's management of matters concerning Indigenous heritage. I turn to this in considering aspects of 'governmentality' later in this Chapter. In reflecting on the overall production of my published works in these contexts, I argue in this Essay that my work is created in an 'in between space', between the two kinds of discourses outlined above, and that this 'in-between-ness' has enabled the possibility of my work developing a critique of the dominant discourse.

My publications began with a survey of Western legal and policy attempts to 'protect' Indigenous 'intellectual property'. I then moved through the production of critical evaluations of particular forms of Western intellectual property insofar as they relate to Indigenous knowledge, to more recent works concerned with epistemological questions about the intersections between Indigenous, and Western knowledge. Over the course of producing these writings, I have worked toward developing a position that recognises a diversity of different kinds of knowledge claims. My work has attempted to develop a critical and reflective position on State sanctioned or authorised discourses, and on the consequences of these for understanding and engaging with Indigenous knowledge, cultural heritage, and intellectual property. The development of my work as critique is detailed in subsequent chapters of this Essay.

Taken as a whole, the 'in-between' nature of my work has meant that it does not sit easily within either the Indigenous cultural and intellectual property rights discourse, or the discourses of Western intellectual property rights. My work is also set apart from the formal disciplines of law and anthropology, while developing a critique of one (law), and having been influenced to some extent by the other (anthropology). I frame my discussion of this positioning of my work outside of, or apart from prevailing discourses and disciplines by drawing on some of the post-colonial literature such as Mignolo's (1993) development of the concepts of 'locus of enunciation' and 'border thinking' (Mignolo, 2000, p. 18). A locus of enunciation is a

'place of speaking' that displaces and dislodges previous loci of enunciation. This allows new and different perspectives to be articulated, and critique of established orders of knowledge and discourse to be advanced (Mignolo, 1993, pp. 123-124). I am arguing in this Essay that my published works over the past decade have developed as a kind of locus of enunciation that enables a critique of established official discourses and knowledges that are embedded in Western intellectual property rights. In this sense I am suggesting that, as a discourse that sits outside the borders of other knowledges and discourses, my writings taken together have functioned to provide a critique of the particular kinds of governmental regimes, techniques, processes and statements (i.e., the forms of 'governmentality' – see for example Foucault, 1991; Gordon, 1991) - that have regulated and managed Indigenous heritage in Australia. In developing this critique, I am also suggesting that my works have enabled consideration of creating an alternative space in which different knowledges can be juxtaposed in dialogue and plurality. I explore this idea a little more in later parts of this Essay.

A PhD by Publication, a relatively recent approach at the University of Technology Sydney, presents an opportunity for an author to review and reflect on a corpus of published writings and to demonstrate how they operate together as a coherent, integrated body of work. Importantly, the PhD by Publication also enables a critical discussion on the factors, politics and circumstances in which the works have been produced. In this light, I situate my critical discussion on my published works within a context of Australian national policy formulation, decision-making, and government administration concerning Indigenous intangible heritage during the main period of my published works, 1997 to 2008.

By 'intangible heritage' I refer to the definition under Article 2 of the 2003 UNESCO *Convention for the Safeguarding of the Intangible Cultural Heritage*, which is

> 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. 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 …

Before the introduction of this Convention, one of the few key international instruments for governing and regulating (and defining) cultural heritage was the 1972 *Convention Concerning the Protection of the World Cultural and Natural Heritage* (World Heritage Convention – WHC). Smith and Akagawa (2009, p. 1) state that the 2003 Intangible Heritage Convention 'has been characterised by some as a counterpoint to the WHC, an attempt to acknowledge and privilege non-Western manifestations and practices of heritage'. They suggest that this Convention 'marks a significant intervention into international debate about the nature and value of cultural heritage'. They go on to add 'certainly, debates about the utility of the Convention have continually reinforced its relevance to Asian, African and South American countries and Indigenous heritage practices' (2009, p. 1). While acknowledging the value of international protection for intangible heritage, in my 2008 paper *Indigenous Knowledge: Beyond Protection, Towards Dialogue,* I began to develop a critique of the 2003 UNESCO Convention in terms of its over-reliance on an encyclopaedic or museum-like classificatory approach to intangible heritage. Under the Intangible Heritage Convention, 'manifestations' of this 'intangible cultural heritage' include 'oral traditions and expressions, including language as a vehicle of the intangible cultural heritage' and 'knowledge and practices concerning nature and the universe'. In this Essay, where I have used the term 'intangible heritage', I have implicitly assumed that this embraces Indigenous knowledge. Later in this Essay I discuss some of the issues and considerations around intangible heritage/Indigenous knowledge in regard to its governance and legislation in Australia, and the location of my published works in that context.

The subject matter of my published works reviewed in this Essay is concerned with concepts, definitional issues, and discursive and textual representations of Indigenous knowledge vis-à-vis dominant or 'Western' knowledge systems. As such, my review is informed by two main themes. For the first of these I consider how, and in what ways my body of work has contributed to, and in turn, been shaped by, existing discourses relevant to Indigenous knowledge and intellectual property. The second theme considers my work in terms of what I refer to as kind of 'border thinking', a

concept developed by theorist Walter Mignolo (2000). In this context I explore the possibility that by virtue of my works being located on the margins of, or set apart from, various other discourses (e.g. Western intellectual property rights) and disciplines (e.g. law and anthropology), they create a kind of interstitial space that allows for the 'border thinking' that Mignolo discusses. Located in this interstitial, or transitional space, I suggest, my work has allowed the possibility of producing a critique of prevailing forms of governmentality. These forms of governmentality have tended at best to accommodate Indigenous knowledge within dominant discourses of intellectual property, and at worst, to marginalise or render those knowledges virtually invisible.

I contextualise my discussion of my published works by a brief consideration of the governance and regulation of Indigenous heritage in Australia. That part of my discussion is influenced by Foucault's writings on governmentality and power (e.g. Foucault, 1991; Gordon, 1991), by related notions of 'technologies of government' (Rose and Miller, 2010; Miller and Rose, 1990), and by reference to these concepts in the context of Australian cultural heritage (Smith, 1999, 2000, 2001, 2004, 2007; Smith and Campbell, 1998).

I referred earlier in this Essay to an already existing (and developing) discourse that is State authorised, and is primarily manifested or articulated in legislative frameworks, especially those centred on Western intellectual property rights. That discourse operates as, and/or is formed from, ideas about 'government' as practices, processes and networks, and 'how to govern' (see Gordon, 1991; Dean,1999). In this view 'government' is seen not as some centralised entity known identifiable as 'the State', but instead is viewed as 'techniques of power' (Gordon, 1991, p. 3), or of systems of 'power/knowledge, designed to observe, monitor, shape and control the behaviour of individuals situated within a range of social and economic institutions such as the school, the factory and the prison' (Gordon, 1991, pp. 3-4). Building on Foucault's theories of governmentality, a notion of government as process has been developed further to embrace ideas about the 'micro-physics' of power and governmentality as expressed or articulated by 'technologies of government' (e.g., Miller and Rose, 1990; Rose and Miller, 2010), and in a specific context of cultural heritage governance in Australia by Smith (1999, 2000, 2001, 2004, 2007), and Smith and Campbell (1998).

The discourse of Western intellectual property is a feature of governmentality that has been developed and maintained to regulate Indigenous heritage in Australia, during the period in which my publications were produced. Governmentality here is defined by Dean as a process that 'seeks to distinguish the particular mentalities, arts and regimes of government and administration that have emerged since "early modern" Europe' (Dean, 1999, p. 2). The relationship of forms of government to power is important, as, in Foucault's characterisation, governmentality must consider:

> The ensemble formed by the institutions, procedures, analyses and reflections, the calculations and tactics that allow the exercise of this very specific albeit complex form of power, which has as its target population, as its principal form of knowledge political economy, and as its essential technical means apparatus of security (Foucault, 1991, p. 2).

More specifically, the laws, policies, administrative acts, and processes that as a whole have fashioned a discourse of intellectual property, may be seen to constitute 'technologies of government', in the sense that this notion is articulated by Rose and Miller (2010). These 'technologies of government' are described as 'the complex of mundane programmes, calculations, techniques, apparatuses, documents and procedures through which authorities seek to embody and give effect to governmental ambitions' (Rose and Miller, 2010, p. 273). As these authors state:

> 'Government is a domain of strategies, techniques and procedures through which different forces seek to render programmes operable, and by means of which a multitude of connections are established between the aspirations of authorities and the activities of individuals and groups. These heterogeneous mechanisms we term *technologies of government* (Miller and Rose, 1990a). It is through technologies that political rationalities and the programmes of government that articulate them become capable of deployment' (Rose and Miller, 2010, p. 281, authors' emphasis).

The official discourse I have identified in this Essay comprises technologies of government that embrace or incorporate, or are articulated by dominant (e.g. 'expert',

and ‘authoritative’) knowledges and legislative regimes based in intellectual property rights, as well as in archaeology, cultural heritage management and planning. These have the effect of limiting the capacity of the State to effectively allow for the expression and articulation of alternative knowledges of Indigenous people. But all these discourses considered together – the State sanctioned official ones, Indigenous discourses, and my writings – do not exist in clear oppositional relations. Rather, they are always already in relations of tension, contradiction and complementarities.

A central focus for analysing my writings is their concern with exploring the language and discourse of law and policy-making in regard to Indigenous knowledge and other aspects of cultural heritage. Rose and Miller (2010) have identified language and knowledge as crucial components in the complex matrix of governmentality and technologies of government. They write:

> An analysis of government takes as central not so much amounts of revenue, size of the court, expenditure on arms, miles marched by an army per day, but the discursive field within which these problems, sites and forms of visibility are delineated and accorded significance. It is in this discursive field that ‘the State’ itself emerges as an historically variable linguistic device for conceptualising and articulating ways of ruling. The significance we accord to discourse does not arise from a concern with ‘ideology’. Language is not merely contemplative or justificatory, it is performative. An analysis of political discourse helps us elucidate not only *the systems of thought* through which authorities have posed and specified the problems for government, but also the *systems of action* through which they have sought to give effect to government (2010, p. 275, authors’ emphasis).

They characterise the role of knowledge in this complex, referring to ‘the vast assemblage of persons, theories, projects, experiments and techniques that has become such a central component of government’ (Rose and Miller, 2010, p. 275).

These language/knowledge/power aspects of discourse and discursive productions lead into the second and related theme for this review of my publications. That is concerned with how my works as a whole have developed a critique of Western

discourses and technologies of government based on Western intellectual property rights, and specific formulations of what constitutes 'heritage', and the implications of this in terms of both the subject matter of my body of work and its relationship to other discourses and disciplines. By attending to the language of dominant law and policy texts and discourses, I am arguing that the production of my works operates as a critique of governmentality, wherein the specific technologies of government are deployed to establish and maintain a hegemonic discourse centred on Western ideas of intellectual property rights.

In my review of my works in this Essay, I am acknowledging the different levels at which this Essay and its subject matter operates. At one level, my discussion contained in the works that I am submitting for this PhD recognises the existence of Indigenous knowledge as an epistemology, a philosophy, set of practices, and as ways of knowing, that is an alternative to dominant knowledge systems (Santos, Nunes, and Meneses, 2007). At another level, the discussions in my published writings have been *about* other texts and discourses about Indigenous knowledge. My writings then, have a distinct identity and role in that they comprise knowledge *about knowledge of* Indigenous knowledge and intellectual property. Within this multilayered context, this Essay therefore forms a 'meta-discussion' or critique that contributes to the accumulated complexity of the body of knowledge that I am forming. In sum then, taken together, this Essay combined with my publications work toward developing a critique of official discourses on intellectual property that sits apart from, or outside of various discursive and disciplinary borders. By this strategy of positioning my published works as a kind of 'outsider-ness', I am thus allowing a space for considering critical issues such as pluralities of knowledge, relative speaking positions in writing about other, non-Western forms of knowledge, and contested representations of knowledge systems.

The Structure of this Essay

The central chapters of this Essay (2 to 4) present a critical review of my published works. I discuss key themes, identify some gaps and questions raised by the works, and contextualise them in terms of the historical particularities, situations and conditions in which they were produced. In this context I explore policy and decision-

making developments in Australia concerning the governance and regulation of Indigenous heritage during the decade or more during which the works discussed here were written. The final Chapter of this Essay presents an argument about the ways in which the body of my writings 'sits among' other kinds of discourse, including formal discipline-based discourses, and the role played by my writings in developing a critique.

An Overview of my Writings

My writings on Indigenous knowledge and heritage have been produced with three broad aims in mind. The first is to provide information and create awareness in the public arena about the nature of Indigenous rights in intangible cultural heritage, especially that element that I refer to as 'Indigenous knowledge'. The second is to explore the limitations of Western law and policy in providing for recognition and protection of those rights. The third is to consider conceptual issues in some of the perceived differences and commonalities in the intersection between Indigenous, and 'non-Indigenous' forms of knowledge. Cutting across these three themes is my interest in considering the ways in which Western law and policy as discourse have represented textually concepts that broadly have to do with Indigenous intangible heritage. My interest in the language of law and policy as it pertains to Indigenous heritage has been a consistent thread throughout my work. The role of discourse in the governance of cultural heritage in Australia has been noted by Smith (2004), who also highlights law as one of the important technologies of government that has been underemphasized in the literature on governmentality (2004, p. 73).

While my writings over the past decade or more have focused on some consistent themes and questions, they also illustrate a shift in the ways I have thought, and written about Indigenous knowledge over this period. Much of my writing presents a critique of analyses of Indigenous knowledge that base their discussions on an assumption that such knowledge is a form of property, and therefore is amenable to consideration within intellectual property rights laws (see also Gibson, 1995; Brown, 2005; and Anderson, 2009 for critiques on using intellectual property to understand Indigenous knowledge). Over the years I have been producing my work, other writers have also presented critical analyses of the relationship between Indigenous

knowledge and Western legal regimes. For example, Anderson has explored the way that Indigenous knowledge is represented as a distinct category in the field of intellectual property law, and she critically examines some of the cultural and political factors in this construction (Anderson, 2009). Gibson argues that intellectual property law is an inappropriate framework within which to discuss protection for those Indigenous communities for whom indigenous knowledge is an essential part of their management of resources (Gibson, 2005). These two writers both approach their critiques from positions as academics working within the discipline of law. As I will discuss in my final Chapter, my work sits in a different place, in that it traverses several disciplinary boundaries, but does not 'fit' clearly within any one of those.

Over the period during which the publications under review in this Essay were produced, it became increasingly apparent to me that debates, discussions and policy and legislative developments in the Australian public policy arena did not adequately articulate or understand the intangible dimensions of Indigenous heritage. I also began to develop a view that what I perceived as a top-down approach by the Australian government to protecting and recognising Indigenous peoples' knowledge and other elements of their heritage was an inappropriate way to achieve real reforms for Indigenous people in this area. As I discuss in my book *Writing Heritage*, my concern is with the way that government regulation and management of Indigenous heritage has tended to fragment or compartmentalise that heritage according to the logic of bureaucratic, legislative and administrative agendas. These technologies of government (Miller and Rose, 1990, p. 8) enable a micro-management regime in which intellectual property based discourses – laws, policies, administrative and bureaucratic procedures – have bounded and limited the potential for alternative conceptualisations of Indigenous knowledge.

My published works have provided me with the opportunities to articulate these concerns within a public arena. Over time, my writing has moved from the production of papers that functioned largely as information resources, through critiques of language and discourse in law and policy dealing with Indigenous heritage, to reflections on the relationships between different knowledge systems (Indigenous, and 'other' – i.e. 'Western'). Eventually, in 2000, when I ceased working in the public policy arena and began pursuing my interests from a different base – primarily that as

an independent consultant, researcher and writer – I developed further dimensions to my thinking and writing about Indigenous knowledge. I became more interested in trying to understand the complexities of Indigenous knowledge, not as something that is 'reduced' within the regulatory machinery of government law and policy, but as a body of values, beliefs and practices with its own intrinsic logic, meaning and rationality. This direction is more explicit in my paper *Indigenous knowledge, beyond protection, towards dialogue* (2008).

As my work has progressed, I have become more interested in examining the relationships between Indigenous knowledge and concepts of place, memory, identity and history. It was not, however, until work on my paper *Indigenous knowledge: beyond protection, towards dialogue* (2008) that I began to include some of my beginning ideas about these linkages in a published work. My several months experience during 2005 to 2006 working with Aboriginal people in the far north west of Australia (the Kimberley region) reinforced my growing sense of the significance of the multiple dimensions of Indigenous knowledge, and of its expressive and performative aspects. I grew increasingly interested in this system of knowledge that is not something primarily viewed, from the perspective of 'the West', as an entity or subject matter in need of legislative protection and management. Instead, my interest has developed to considering Indigenous knowledge as a more complex and dynamic system profoundly embedded in place, person and society.

My writings have been produced in a variety of contexts and situations, including while working as an employee in bureaucratic/administrative settings, in academic milieus, and from a position as an independent writer and researcher. Despite having been at times written from a position within specific institutional settings, I have maintained an 'outsider-ness' in terms of the particular ways that I have approached the development of my critique in these works. In part at least, this 'outsider-ness' derives from my identity formation which in itself, as I argue later in this Essay, can be viewed as a complex site of multiple, contestable (or fractured?) features. In this context, my published works have developed from a starting point of reviews of legislative, policy and administrative measures, standard setting developments, and bureaucratic systems that appear to offer 'protection' for Indigenous knowledge, and of Indigenous rights in biodiversity and 'intellectual property' (what I call Groups I &

II works), through to more critical analyses of the relationships between Indigenous and other knowledge systems (Group III). I present an overview of the works below, and a full discussion in the following chapters.

Group I: Developing Information Resources

(IPIPR) Davis, M. 1997. *Indigenous Peoples and Intellectual Property Rights*. Research Paper No 20. Canberra: Department of the Parliamentary Library.

(BDIK) Davis, M. 1998. *Biological Diversity and Indigenous Knowledge*. Research Paper No. 17. Canberra: Department of the Parliamentary Library.

These two works were produced as background research papers designed for use mostly internally within the Australian Parliament. As they are posted on the Parliament's website, they have also become resources that are read and used more widely. This includes their use as reading materials in courses taught through Macquarie University's Centre for Environmental Law. The Parliamentary Library and Information Services area within Parliament functioned to provide a resource for all parliamentarians, staff, and policy-makers. The production of research papers was one aspect of the role of the Parliamentary Library and Information Branch. My two research papers were produced as reviews or surveys of law and policy in Australia and internationally relevant to the recognition and protection of Australian Indigenous 'intellectual property' rights and 'traditional' knowledge. They became useful resources for a wider audience than the Parliament at the time of their production, for those wishing to gain up to date information on past, current and emerging legal and policy developments relevant to Indigenous knowledge, biodiversity and intellectual property rights.

I wrote the two papers that I have here designated as Group I from a position as an independent consultant, although at the time I was also employed in a senior policy position with the then Aboriginal and Torres Strait Islander Commission (ATSIC) in Canberra. My reason for writing them was to make a contribution to the public debates and discussions on Indigenous knowledge in the late 1990s, during a period when Aboriginal people, governments and institutions were grappling with a growing

concern about the exploitation of Aboriginal 'intellectual property' in designs on art works. At that time, the dominant discursive framework within which remedies were sought, was the Commonwealth Government's copyright act, and to a lesser extent, other intellectual property laws. My aim was to encourage that discourse to be widened beyond a focus on intellectual property rights, and indeed beyond purely legal considerations, as I considered those to be limited in terms of thinking about understanding and protecting Indigenous knowledge.

The first of these two papers surveys current developments internationally and in Australia on Indigenous intellectual property rights; the other, a complementary piece, examines Indigenous rights in traditional knowledge and biological diversity. This latter was written out of my sense that developments and writings on what is often referred to as Indigenous 'cultural and intellectual property' were giving relatively insufficient attention to biological diversity-related aspects of Indigenous knowledge. For these two papers, and the rest of my works, the question of terminology (e.g. 'Indigenous knowledge', Indigenous intellectual property' and other terms) and the related one of definition is critical. While these papers do not interrogate, or provide a critical analysis of concepts used, as my later works do, they nonetheless provide a useful basis for my subsequently embarking on these kinds of strategies. In their presentation of legislative and policy developments they provide a framework, or foundation for the central focus in my work on critiquing language and terminology in legal, policy and other discourses relevant to Indigenous cultural heritage. I was, in these writings, in a sense illuminating, or making aware the 'borders' in terms of established laws, policies and governmentality based on Western intellectual property regimes, as a strategy for enabling a 'border thinking' (Mignolo, 2000) and critique of the established orders.

Group II: Policy Analysis and Critique

(IRTK) Davis, M. 1999. Indigenous Rights in Traditional Knowledge and Biological Diversity: Approaches to Protection. *Australian Indigenous Law Reporter*, 4(4): 1-32.

(LARICS) Davis, M. 2001. Law, Anthropology, and the Recognition of Indigenous Cultural Systems. In René Kuppe and Richard Potz (eds). *Law and Anthropology:*

International Yearbook for Legal Anthropology, 11. The Hague: Martinus Nijhoff: 298-320.

(ERBR) Craig, D., and Davis, M. 2006. Ethical Relationships for Biodiversity Research and Benefit-sharing with Indigenous Peoples. *Macquarie Journal of International and Comparative Environmental Law*, 2(2): 31-74.

These papers build on the compilations and overviews of those in the preceding Group of papers, to develop more of an analysis and critique of some legislative and policy developments. They move towards stepping outside the discursive framework of 'conventional' intellectual property rights and other legal regimes, to develop my critique from outside the borders of other discourses and disciplines. Following the release of my two Parliamentary Research Papers, I developed a growing interest in producing a critique of the language, terms, concepts and categories employed in 'Western' discourses on policy and law, that are typically used in laws to describe, determine and regulate (or 'protect') elements of Indigenous heritage. It can be suggested that this Group of writings began to develop the kind of 'border thinking' discussed by Mignolo (2000), and thereby to enable the conditions for a critique to become more fully established in my subsequent works, of the prevailing dominant regimes of governmentality.

In this Group of papers I consider the relationships between policy and legislative developments and Indigenous intangible heritage. I argue for a need to explore new approaches to understanding rights, in order to more fully engage with the concept of collective, or communal rights that are based in distinct Indigenous relationships with land, and are founded on Indigenous concepts of custom, tradition and spirituality. These papers examine the gaps and inadequacies in current legal and policy relevant to heritage and culture, as they pertain to Indigenous cultural systems and epistemologies.

This phase of my work pursued several inter-related and developing strands of inquiry and critique. It identifies a need for a deeper understanding of the use of terms in law and policy concerned with 'regulating' Aboriginal and Torres Strait Islander heritage, with a particular focus on the intangible dimensions of that heritage. I have focused

on terms such as ‘tradition’, to explore the ways in which the use of this term sometimes promotes an ‘essentialised’ view of Aboriginal culture as frozen in time, re-enacting age-old traditions, and which thereby diminishes a sense of cultural dynamism, innovation and adaptation.

Group III: Beyond Critique

(BTG) Davis, M. 2006. Bridging the Gap or Crossing a Bridge? Indigenous Knowledge and the Language of Law and Policy. In Walter V. Reid, Fikret Berkes, Thomas J. Wilbanks, and Doris Capistrano, (eds). *Bridging Scales and Knowledge Systems: Concepts and Applications in Ecosystem Assessments*. Washington DC: Island Press: 145-182.

(WH) Davis, M. 2007. *Writing Heritage: The Depiction of Indigenous Heritage by European-Australians*. Melbourne: Australian Scholarly Publishing, in association with the National Museum of Australia Press.

(IKBP) Davis, M. 2008. Indigenous knowledge: Beyond Protection, Towards Dialogue. *Australian Journal of Indigenous Education.* Vol 37S, pp. 25-45.

In these works I am interested in the nature of categories (such as ‘Indigenous knowledge’ and ‘other knowledge’ or ‘Western science’, and ‘cultural heritage’). These works elaborate on themes that had begun to emerge in my earlier ones, in which I interrogated previously held assumptions about the relationships between and among categories such as ‘Indigenous knowledge’ and other forms of knowledge (such as Western discourses about Indigenous heritage). In these publications I also pursue my continuing interest in the language and discourses used in ‘Western’ legal, policy, anthropological, administrative and other regimes, frameworks, and writings to describe, define, and to regulate what is termed ‘Indigenous heritage’. I am using the terms ‘Indigenous knowledge’ and ‘Indigenous heritage’ here interchangeably, although more strictly, I would see the former as a sub-set, or component of the latter. The relationship between these two terms becomes more important perhaps in the context of discussing my major publication, my book *Writing Heritage*. This is because in that work I have taken a ‘wider’ view, to conduct an analysis of discursive

representations of Indigenous heritage in European-Australian writings, rather than the more specific focus on Indigenous knowledge that has been the case with the rest of my published work.

My recent works explore further the relationships and intersections between Indigenous, and non-Indigenous knowledge systems and epistemologies, and the interpretations of Indigenous knowledge in policy, practice and law. In considering the way in which Western discourses have sought to understand, and to regulate and govern the 'content' of Indigenous knowledge, these works develop a critique of 'encyclopaedic' or classificatory approaches to defining such knowledge. Thus, in this Group of my publications I am leading towards considering the problematics of articulating non-Western systems of knowledge solely within specific, conventional 'disciplines' such as law. In this group of publications I have begun to interrogate more explicitly the continuities and disjunctions between 'Indigenous' and other (e.g. 'Western', 'scientific') knowledge traditions. I attempt to destabilise these categories to expose the uncertainty and fluidity that underpins them. With this increasing emphasis in my work on discourse and textual representation, these latter works are, at least implicitly, influenced by the writings of Foucault (1974, 1980), Said (1985) and the literature of colonial discourse studies and post-colonial critique. In this Group of my writings I am also pursuing a related interest in the notion of 'different' knowledge systems and epistemologies, and contemplate their intersecting, inter-locking relationships, convergences and differences. My paper *Bridging the Gap* for example, considers the particularities of a perceived 'divide' between 'Indigenous knowledges', and 'Western' or 'scientific' knowledge systems, and argues for an understanding of the complex relations between these knowledge systems.

As well as the works I have submitted for this PhD, it is also important to mention two other pieces I produced in 1996, as they are elements in my developing body of work. The first of these is 'Intellectual Property Rights as Knowledge? European Discourses and the Recognition of Indigenous Rights' which was published in the *Northern Analyst* (No. 1, March to July 1996: 15-18), a journal of the North Australia Research Unit (NARU). NARU is a part of the Australian National University based in Darwin, which has a specific focus on research and policy for the Northern Territory. My paper for the *Northern Analyst* was followed by 'Competing

Knowledges? Indigenous Knowledge Systems and Western Scientific Discourses', a paper I presented to a conference called Science and Other Knowledge Traditions held at James Cook University in Cairns during 23 to 27 August 1996. The latter conference paper was based on ideas I had written about in the earlier published one. What is important to point out at this point in my discussion is that those two papers predated my 1997 and 1998 research reports produced for the Australian Parliamentary Library, yet presented more critical analytical approaches to the subject of Indigenous knowledge, with a particular emphasis on the role of language, discourse and terminology – themes that were to become more dominant in my work much later on.

The Uptake of My Work

I argue in this Essay that the body of my writings, located as they are outside the boundaries of other discourses, have worked towards the development of a critique of existing official and State authorised discourses based in intellectual property rights. As such, it is important to review to what extent this objective of my writings has been achieved, and how this might be evaluated. Indications about how, and in what ways my works have been used may be gained in a variety of ways, including anecdotally, and by verbal communication with colleagues and others who have used and/or cited my work. Through these channels, I am aware for example, that some of my work has been used in tertiary teaching. The two parliamentary papers (Group I publications) have been used in a course in environmental law at Sydney's Macquarie University, and my book *Writing Heritage* was a text for use in the University of Canberra's teaching of a course on 'Indigenous Societies and Heritage'. The book has been distributed and taken up in bookshops, universities, other teaching and research institutions, government departments, and libraries. The uptake of all my works in these various ways, over time, contributes to the public consciousness, and influences debate and discussion as well as policy and legislative formulation in the subject area. While it is difficult to conduct a systematic 'measure' of the uptake and use of my works, it is possible to give one example of this. In her book *Science, Colonialism, and Indigenous Peoples* Laurelyn Whitt (2009), a scholar of Indigenous studies, has engaged with my paper *Bridging the Gap* (the unpublished conference presentation version). I had suggested in my paper that Indigenous knowledge, 'far from being

considered a unitary, homogenous entity', should instead be thought of as being 'contingent, historically situated, and particular to the specifics of locality...' (Davis, 2006, p. 149). While agreeing that 'it is crucial to acknowledge the specific circumstances that have shaped and differentiated the knowledge systems of indigenous peoples', Whitt commented that it would be 'historically and politically myopic to see only differences' (Whitt, 2009, p. xvii). This debate is an indication of what may be hoped will be a steady process of incorporation of my works into discussions in the literature, as well as in the tutorial and lecture rooms, and public policy forums. Finally, engagement with my writings has also occurred through critical reviews, of which there have been several produced in response to my book *Writing Heritage*. Most of these were 'positive', while pointing out some gaps, and aspects of my approach that needed some rethinking. For example, Schaffarczyk (2009) drew attention to the problem of my work in that book having been 'shaped by the collectors and investigators selected by the author'. She says that this means 'to some extent, Davis cannot himself escape the "component parts" approach to Indigenous heritage that structures his account'. Despite this, she concludes in her review that 'Davis has interpreted a rather comprehensive historical collection of written European-Australian depictions of Indigenous people and heritage that will provide a useful addition to the bookshelf of anyone interested in the history of Australia'. Similarly, Lennon (2008, p. 203) writes 'this book is a fine introduction to the raising of European consciousness of Indigenous heritage from the later 19th century'. Rothwell, a writer and journalist with Australia's national newspaper *The Australian* (24 May 2008) wrote that 'in his comprehensive, clear-eyed survey of Australia's engagement with Aboriginal culture, Michael Davis traces the history of a vexed fascination' (Rothwell, 2008). Other reviews of my book have been produced in the monthly *Australian Book Review* in 2008 (Issue 301/33), and in *Australian Aboriginal Studies* in 2009. All these reviews, while useful in themselves as one indicator of the general reception of my work, do not tell us what has been the substantive impact of my work on discourse, discussion and policy formulation. For that, we need to look more for the kind of detailed critical engagement that is illustrated in the work by Whitt cited above.

As this discussion on the reception of my work illustrates, writing about Indigenous knowledge, and of course, that knowledge itself, has great pedagogical value. It can

be harnessed towards the goal of redressing enormous inequalities and disparities in understanding about diversity and difference. Globally, historically, and in continuing ways, Indigenous peoples' knowledge continues to be variously subordinated and subjugated, or assimilated within the hegemonic and dominant discourses. The State legitimates the devaluing of Indigenous knowledge as Battiste (1998), for example, has noted. She has pointed to the 'cognitive imperialism' wherein the dominant discourses tend to be validated 'through public education', while at the same time devaluing alternative knowledges such as those of Indigenous and local peoples (Battiste, 1998, p. 20). Yet, as Semali and Kincheloe argue, Indigenous knowledge has 'transformative power' and 'can be used to foster empowerment and justice in a variety of cultural contexts' (Semali and Kincheloe, 1999, p. 15). While I did not produce my published works intentionally as educational tools, or with the express intention of foregrounding in them the pedagogical power of Indigenous knowledge, it is useful to consider future ways in which such writings could be produced towards those goals.

Some Theoretical and Conceptual Considerations

The discussion in this Essay is framed by some key theoretical and conceptual considerations. The first of these concerns ideas about discourse, discursive practices and discursive formations. The writings I have produced over the past decade have entered into the debate by showcasing the limitations of Western laws and policies in recognising and 'protecting' (a concept I destabilise in my later work) Indigenous knowledge, In this way, my work has contributed to an already existing, and developing State sanctioned, official discourse underpinned by Western legal notions of intellectual property. Yet at the same time, my work also began to develop a critical stance, eventually resulting in the formation of a discourse/knowledge with its own character and functions; that is, to critique prevailing discourses on intellectual property as those have sought to regulate and 'construct' Indigenous knowledge. The second main theoretical consideration relates to the idea of knowledge production, and the ways in which particular kinds of knowledge become located amongst other knowledges. Elaborating on this latter theme, I suggest that my publications work together not only to critique official discourses, but also to advance an argument for acknowledging a plurality of knowledges – Indigenous and Western – that are of

equal validity. Although I refer here to a 'plurality' of knowledges, I want to problematise this notion by drawing attention to critiques of plurality, particularly of 'legal pluralism'. These critiques are based on the notion that the different systems of knowledge, law, or culture for which a plurality is sought, founded upon equality, cannot ultimately escape the very different epistemological (customary, cultural, societal) institutions or paradigms that inform them. Indigenous and Western knowledges, and the associated cultural/political/legal systems or philosophies on which they are founded, derive from fundamentally different bases. To what extent, if at all, can a plural system adequately establish a system of equal validity and rationality? Over a decade ago, scholars were already interrogating the concept of legal pluralism, to argue that greater attention should be given to the dynamics and power shifts of these systems, to account for more locally grounded specifics of culture and society (see for example Merry, 1988). Over the years, thinking around concepts of pluralism, whether legal, political or cultural, has considered these more in terms of how they might be formulated in ways that expose and interrogate power relations and inequalities (Guillet, 1998). In this way, rather than being viewed as formations of inherent stability, stasis and equality, a rethinking of plural systems has paid attention to the heterogeneous inequalities and tensions that render them more complex. If we pose a notion of a plurality of knowledges that is inherently harmonious and egalitarian, this risks masking the kinds of differences, tensions and contradictions within such a system that may have analytical utility. As with my discussion of identity and position in writing, I am suggesting here that a plural system should be seen not as an essentialised, absolute one, but rather, as one that can expose the shifting and contested knowledges and power relations that comprise it. This could render such a system ultimately of more analytical value.

My purpose – albeit implicitly in some of my work - in producing this body of writings has been to disrupt, challenge and critique prevailing discourses relevant to Indigenous knowledge that are entrenched in State based legislative and policy domains of intellectual property. The final Chapter elaborates in more detail on the theme of my writings as a particular type of discourse that resides apart from other discourses.

A Note on Terminology and Definitions

There are various terms and phrases used in the literature to describe and define that body of Indigenous intangible culture that I refer to throughout much of my writing as 'Indigenous knowledge'. I also use various terms in my own writings. In this Essay I shall use the terms as I have employed them in my writings when discussing those particular writings, though where relevant, taking a critical perspective on my use of those terms. An example is my use of the term 'Indigenous intellectual property' used when discussing my paper *Indigenous Peoples and Intellectual Property Rights.* Although I used that term uncritically in some places in my early writings, as my work has progressed, and as a pointer to future work, I have become increasingly keen to interrogate that term, and related ones such as 'intangible heritage'. Apart from employing the usage I provided in my publications where it is necessary, in my discussion in this Essay, when using terms and concepts I will qualify or explain them as far as possible within the specific contexts of their use.

Colonial/Postcolonial Discourses, Indigenous Knowledge and Intellectual Property Rights

I have mentioned above, my argument that my published works submitted for this doctorate have formed part of, and at the same time developed a critique of, existing State sanctioned and authorised discourses entrenched in Western intellectual property laws. My work has achieved this by developing, over the course of producing this work during the past decade, a close analysis and interrogation of presumed categories and concepts deployed by Western law and policy to refer to aspects of Indigenous heritage. This critique has been made possible by the 'outsider' status or position from which I have produced much of my work.

I am using the term 'discourse' in this Essay in the Foucaultian sense to mean:

> ...dispersed and heterogeneous statements, the system that governs their division, the degree to which they depend upon one another, the way in which they interlock or exclude one another, the transformation that they undergo, and the play of their location, arrangement and replacement ... (Foucault, 1974, p. 34).

In Foucault's view discourse is, in a sense, 'more than', or 'above' language, and consists of:

> … practices that systematically form the objects of which they speak. … discourses are composed of signs; but what they do is more than use these signs to designate things. It is this more that renders them irreducible to the language (*langue*) and to speech (Foucault, 1974, p 49).

This conceptualisation of discourse seems particularly apt as a way of thinking about my writings since they are closely interwoven with each other, with the conditions of their production, and the institutional and political settings in which they were written and distributed. Loomba has emphasised this understanding of discourse as 'a whole field or domain within which language is used in particular ways. This domain is rooted ... in human practices, institutions and actions' (Loomba, 1998, pp. 38-39). She goes on to say that 'discursive practices make it difficult for individuals to think outside them – they are also exercise in power and control' (1998, p. 39). This multivocality of colonial discourse is also noted by Kress, who states that 'discourses do not exist in isolation but within a larger system of sometimes opposing, contradictory, contending, or merely different discourses' (1985, p. 7). These aspects of discourse are useful for considering as an organising framework for this review of my published writings, and how they have functioned in the context of Australian developments in Indigenous heritage and intellectual property.

If we extend the concept of discourse to that of *colonial* discourse, this implies a situation, or relation of colonialism, or colonisation, with its attendant modalities of power relations between colonised and coloniser. The field of inquiry about colonial and postcolonial discourses, and studies and critiques of those, offers useful insights into questions about authority structures, relations of power, and inequality and subordination. These in turn can provide a context in which to explore aspects of the relationships between Indigenous knowledge and other forms of knowledge, and my review of my writings in this area. In the relations between colonisers and colonised, as with the relationship between Indigenous and other knowledge systems, there is a tension between dominant forms of knowledge, and of rule, and subject 'others'. The

discourses produced by, and about these relationships, and which in turn produce these relationships and create those tensions, are expressed through multiple modes, including the production of texts. An approach to colonial discourse analysis that emphasises the complex, intertwined histories and situations of colonisers and colonised, and attributes greater agency to colonised peoples, has informed the works of writers such as Mary Louise Pratt (1992) and Nicholas Thomas (1994) among others. Pratt employs the term 'contact zone' in her study of imperial travel writing in order to 'invoke the spatial and temporal copresence of subjects previously separated by geographic and historical disjunctures, and whose trajectories now intersect, [and to] ...foreground the interactive, improvisational dimensions of colonial encounters so easily ignored or suppressed by diffusionist accounts of conquest and domination' (Pratt, 1992, p. 7). Mills (1997) has also alerted us to the wider set of concerns in colonial discourse, saying that this 'does not ... simply refer to a body of texts with similar subject-matter, but rather refers to a set of practices and rules which produced those texts and the methodological organisation of the thinking underlying those texts' (Mills, 1997, p. 107).

The phrase 'colonial discourse' needs to be well understood and clarified, as does its relationship with colonialism as a process and way of thinking. Similarly, I argue that 'Indigenous knowledge' also needs to be interrogated as a concept, in order to avoid reifying it as an essentialised category or concept, reinforcing mystique rather than encouraging understanding. The textual productions that result from entanglements between colonisers and colonised both are constitutive of, and in turn, constitute colonial and post-colonial discourse. Colonial discourse can either entrench and reinforce the racialised narratives of colonised/coloniser; or it can provide critiques of, these and expose the colonising process for its complex mix of attributes, including negative and prejudicial ones. In this sense, it is important to distinguish between colonial discourse which is produced by, or flows from colonialism, and colonial discourse as a field of study that provides a basis from which to provide critiques of colonialism. To make this distinction, I shall use the term 'colonial discourse studies' to refer to the latter.

Colonial discourse study is a field that is concerned with exposing relations of power between colonisers and the colonised in the discourses and experiences of

colonialism. Although the representations and tropes in colonial discourse itself, are complex and diverse, in some views such discourse constructs the Indigenous Other predominantly in derogatory terms. Edward Said's classic study of Orientalist discourse (1985) is an example of this. Said's study has been the subject of criticism for, among other problems, being unable to move outside a hegemonic view of Orientalist discourse, its emphasis on negative aspects of this discourse (Porter, 1983; Hulme, 1986; Mills, 1997, pp. 118-121; Thomas, 1994, pp. 26-27), and its lack of attention to the agency of the 'native Other' (e.g. Hiddleston, 2009, pp. 90-91). Dirks points to the emphasis on negative aspects in many colonial discourse studies, highlighting the unequal relations of power in colonial situations. He wrote that colonial discourse studies 'has come to stand for a field of studies in which the writings of colonial officers and agents portray vivid examples of domination'. As such, 'colonial texts are read to reveal the ways in which language inscribes, both in its fundamental categories and its florid expressions, the topoi of worlds made up of masters and slaves, colonizers and colonized' (Dirks, 1992, pp. 175-208). Bhabha has also at one point in his writings highlighted colonial discourse as having produced primarily pejorative images of the colonial subject, stating that such discourse is:

> an apparatus that turns on the recognition and disavowal of racial/cultural/historical differences... It seeks authorisation for its strategies by the production of knowledges of coloniser and colonised which are stereotypical but antithetically evaluated. The objective of colonial discourse is to construe the colonised as a population of degenerate types on the basis of racial origin, in order to justify conquest and to establish systems of administration and instruction (Bhabha, 2004, pp. 100-101).

This statement by Bhabha seems somewhat at odds with much of his other work, which has been influential in highlighting the ambivalences in colonial discourses. This odd statement by Bhabha has been commented on by Nicholas Thomas, another writer who himself has teased out in greater detail the complexities and subtleties of colonial discourses, and argued that these should not be considered purely as perpetuating negative representations (Thomas,1994). Thomas has argued against 'the notion that colonial ideology is an assemblage of negative distortions' (1994, p. 41). Instead, he suggests a 'pluralization and historicization of "colonial discourse", and a

shift from the logic of signification to the narration of colonialism – or rather, to a contest of colonial narratives' (1994, p. 37). Hulme also offers a more nuanced view about colonial discourses that does not assume a negative stance. In his scheme, colonial discourses are 'an ensemble of linguistically-based unified by their common deployment in the management of colonial relationships...'. These discourses, argues Hulme, are underpinned by the 'presumption that during the colonial period large parts of the non-European world were *produced* for Europe through a discourse that imbricated sets of questions and assumptions, methods of procedure and analysis, and kinds of writing and imagery, normally separated out into discrete areas of military strategy, political order, social reform, imaginative literature, personal memoir and so on' (Hulme, 1986, p.2).

Colonial discourse then generally refers to strategies employed by, or resulting from or produced by colonising projects, which may result in the subjugation and domination of colonised peoples, or in a variety of other kinds of depictions, tropes and representations of the colonised. Taking another level, *analysis* of colonial discourses (or colonial discourse studies as I shall deploy the term) seeks to deconstruct the dominant discourses, to expose spaces wherein the voices of the colonised can be more easily recognised and articulated. In this sense, Young argues that colonial discourse analysis can have a powerful role in challenging conventional forms of knowledge, since this kind of analysis 'is not merely a marginal adjunct to more mainstream studies, a specialised activity only for minorities or for historians of imperialism and colonialism, but itself forms the point of questioning of Western knowledge's categories and assumptions' (Young, 1990, p. 11). There are many and growing examples of studies of colonial discourse for particular colonial situations and historical contexts. India, for example, has been a site for much of this literature and interpretation, with the colonising process and its resulting forms and modes of colonial knowledge having become an intense arena for study by the Subaltern Group of scholars and others (such as Cohen, 1996).

I have outlined some aspects of these relations, colonialism/colonial discourse and coloniser/colonised as a context for my discussion of a parallel set of relations; that is between Indigenous knowledge and Western knowledge, the latter being the subject of my writings being reviewed in this Essay. The hegemonic knowledges (scientific,

governmental, legislative) produced by colonising projects have tended to subjugate and/or utilise Indigenous and other local knowledges to further their own agendas. My analysis in this Essay is conducted in the context of an exploration of the intersections between these relations of knowledge, power and discourse.

Theories of discourse have also been crucial in the literature on governmentality, and in exploring technologies of government associated with governmentality (Rose and Miller, 2010; Miller and Rose, 1990), and in exploring the specific dynamics of governmentality and technologies of government in regard to cultural heritage and archaeology in Australia (Smith, 2004). Smith argues that there has developed in Australia a scientific discourse of Cultural Resource Management (CRM), managed through archaeology, which has been deployed as a technology of government to regulate the claims of others – including Indigenous people – to identity and to their own heritage and knowledge (2004, p. 93). She states:

> Archaeology, offering itself up as possessing scientific and technical expertise in managing heritage, renders 'heritage' issues, via CRM, as a series of technical problems about preservation and conservation, and thus allows the use of archaeological knowledge in regulating and de-politicizing issues of identity (2004, p. 93).

I am arguing that, like archaeology in Smith's discussions, the dominant discourse of legally based Western concepts of intellectual property has also established a managerial and governmental regime that creates power/knowledge inequalities in regard to Indigenous knowledge.

The Development of Discourse on Indigenous Intangible Heritage

Debates and discussions on Indigenous knowledge must necessarily be considered in terms of the relationship between that knowledge, and the notion of 'intangible heritage. I referred earlier in this Essay to a 'definition' of intangible heritage as constructed through international law (the 2003 UNESCO *Convention on the Safeguarding of the Intangible Heritage*). Despite the entry of that instrument, which has facilitated some discussions in Australia about intangible heritage, there remains a

disjunction between those discussions, and considerations about Indigenous knowledge. The latter is often still discussed and debated in terms of intellectual property rights.

I have outlined earlier in this Introduction the emergence of several strands of discourse. Two of these have dominated for the purposes of my analysis: an official, State authorised discourse that is embedded within a context of Western intellectual property rights, and which seeks to define, interpret and regulate Indigenous knowledge within that context; and an alternative discourse about Indigenous cultural and intellectual property rights. This latter, while in some ways offering a challenge to the State authorised discourse, is nonetheless still based largely within the Western regime of intellectual property laws. As developed most recently mainly by Janke (1998), this discourse has produced discussions concerned with finding ways in which Western intellectual property law can be used by Indigenous peoples and others 'creatively', to help provide recognition and protection for their cultural products, knowledge and expressions. Where this discourse has departed significantly from the official discourse, has been in the way it has (re) formulated a description of the range of subject matter that constitutes Indigenous cultural and intellectual property. Janke's work was influenced by some earlier work on Indigenous cultural heritage that had been produced under the auspices of the United Nations, which resulted in a series of reports examining the cultural heritage of Indigenous peoples (e.g. United Nations, 1993, 1996). Janke's report used these reports by United Nations Special Rapporteur Erica-Irene Daes, and her own work including discussions and public consultations, to formulate a 'working definition' of Indigenous cultural and intellectual property (Janke, 1998, p. 11):

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

A 'definition' of Indigenous cultural and intellectual property was said to embrace the following subject matter (Janke, 1998, pp. 11-12):

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

In recent and emerging work being carried out by various United Nations bodies, including UNESCO and the World Intellectual Property Organization (WIPO), to develop international approaches and standards for the recognition and protection of Indigenous peoples' intangible heritage, there continues to be a focus on formulating definitions of the subject matter. For example, a WIPO report *The Protection of Traditional Knowledge: Revised Objectives and Principles for the Protection of Traditional Knowledge* (2006) has put forward a 'definition' of what it terms 'traditional knowledge' as follows:

> 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.

One of the themes of my writings, particularly the later ones, has been to develop a critique of definitional, classificatory and typological approaches to thinking and writing about Indigenous knowledge. In a strategic move over the decade during which the works submitted here were produced, I have developed yet another type of discourse/knowledge which resides in a different space to those other discourses. I have advanced a critique of at least two aspects of both of these other discourses: their focus on intellectual property; and their concerns with seeking definitions, typologies and classifications for 'Indigenous knowledge'. The prevailing State sanctioned official discourse (particularly that embedded in the intellectual property system) has sought ways to accommodate (typically involving regulation, control and definition) Indigenous concepts of cultural heritage. I discuss how the governance of Indigenous heritage over the past decade has resulted in the formation of this official discourse, and the implications of that for my writings as they have developed a critique.

Governing Indigenous Heritage

To understand more fully the conditions in which my publications were produced, I outline here the external policy and legislative contexts concerning Indigenous intangible heritage in Australia both prior to, and during the years in which they were written. The governance and regulation of Indigenous heritage in Australia illustrates the tensions between imposed, authoritative State based regulatory regimes, and the assertion of rights in control, management and decision making over their own heritage by Indigenous peoples and their supporters and advocates.

My reference to 'State based regulatory regimes' is informed by the ideas of Foucault on governmentality, and also by the elaboration of Foucault's concept in terms of the ways in which governmentality is enacted through diverse processes, systems, networks and strategies, in what have been characterised as 'technologies of government' (Rose and Miller, 2010; Miller and Rose, 1990). These authors explain this idea:

> We use the term 'technologies' to suggest a particular approach to the analysis of the activity of ruling, one which pays great attention to the actual mechanisms through which authorities of various sorts have sought to shape,

> normalize and instrumentalize the conduct, thought, decisions and aspirations of others in order to achieve the objectives they consider desirable. ... The analysis of such technologies of government requires a 'microphysics of power', an attention to the complex of relays and interdependencies which enable programmes of government to act upon and intervene upon those places, persons and populations which are their concern (Miller and Rose, 1990: 8).

In a number of papers and a monograph Smith (e.g. 1998, 2001, 2004) has explored in detail the ways in which archaeology in Australia has been mobilised as a 'technology of government' and, through the practice of Cultural Resource Management, serves to establish a scientific discourse that has particular implications for Indigenous peoples' heritage in terms of power and the politics of identity (Smith, 2004). Other writers have also drawn on Foucault's notion of discourse to discuss the construction of Indigenous heritage in a discourse of Australian national heritage (Byrne, 1996), representations of 'the past' in the formation of museums in Australia (Bennett, 1988, 1995), and the appropriation of Indigenous peoples in discourses of archaeology (McNiven and Russell, 2005). It is within this context that my writings have been produced over the past decade. They have developed a way of 'border thinking' in the sense of Mignolo's (2000) formulation, that has created the conditions in which my work has been able to critique the dominant forms of governmentality concerning Indigenous knowledge, cultural heritage and intellectual property rights.

The government and regulation of cultural heritage in Australia is also seen in a context of tensions and contradictions over 'whose' heritage it is. These tensions occur at many levels, one of the most prominent of which is in the realm of legislation. At a global level, international treaty bodies govern matters such as heritage (UNESCO) and intellectual property (the World Intellectual Property Organisation or WIPO), and Australian domestic discourses are framed within this milieu. Tensions in the governance of cultural heritage focus around notions of this as universal or world heritage, vis-a-vis the claims of others such as Indigenous peoples. In other ways, these contrasting ideas of heritage have sometimes converged, An illustration of this is the way in which an Indigenous 'past' in Australia as represented by archaeology was 'appropriated' by universal discourses. As Smith claims,

‘ultimately this past was appropriated as “universal” in the form of ‘World Heritage’ when in 1974 Australia became a signatory of the *Convention of the Protection of World Cultural and Natural Heritage 1972*’ (Smith, 2004, p. 95).

Over the decade (1998 to 2008) during which I produced the publications discussed in this Essay, a discourse became increasingly apparent, that was centred on the relevance, and/or applicability of Western intellectual property rights to the protection of Indigenous knowledge. That discourse had its antecedents, at least partly, in earlier discourses around ‘protection’ of heritage framed in terms such as ‘preservation of antiquities’, or protection of ‘folklore’. I have discussed this latter discourse in my book *Writing Heritage*, and referred to it elsewhere in this Essay. This emerging discourse that was shaped, or constructed by intellectual property rights, was dominated by the machinations of centralised Australian Federal government departments, especially those (e.g. the Attorney General’s Department) that administered copyright law, as well as by Department of Prime Minister and Cabinet, which promulgated a ‘whole-of-government’ approach to law and policy considerations. The technologies of government concerning the regulation, administration and control of laws and policies relevant to Indigenous heritage were concentrated in the arena of a few Commonwealth government departments and agencies, and were also enacted through various State and Territory jurisdictions and laws. In general, these official government discourses have perpetuated a notion of heritage as variously ‘belonging to’ global or universal entities, and/or to ‘the state’. In many Australian laws, ‘Crown’ ownership of ‘resources’ is the norm, with ‘resources’ sometimes being interpreted to include biological materials (plants and animals), and associated knowledge. Indigenous peoples’ claims and interests figure importantly in these contexts, generally by being construed by dominant interests as marginalised or non-valid.

My writings, as will be detailed more fully in the next chapters, have in part, formed an element of the ‘technologies of government’, but at the same time, especially my most recent works, were produced as interventions or disruptions designed to interrogate and challenge them. My early works (especially the two Parliamentary Papers that constitute what I have designated as Group I works) operate largely within the domain of the received discourse around ‘intellectual property’. In those papers, I

had not as yet clearly separated my own emerging discourse on Indigenous knowledge from the technical rational instrumental discourse of intellectual property. As I developed my writings over the ensuing years, I became increasingly interested in interrogating the latter. The most recent works, as exemplified by *Bridging the Gap or Crossing a Bridge* (2006), and *Indigenous Knowledge: Beyond Protection, Towards Dialogue* (2008), moved further away from working within the discourse of intellectual property. Here, I develop a more critical discourse in order to challenge what I perceived to be the hegemonic knowledge formations that marginalise Indigenous knowledge. It is in these later works that I begin to outline an approach that, like Mignolo's (2000) 'border thinking', enables a space in which to contemplate a plurality among knowledges. I take up this theme later in this Essay.

Concerns about the preservation of Indigenous cultural heritage were beginning to be articulated many decades ago, as I have discussed in my book *Writing Heritage*. Some early writers had identified a need for legislative protection of what was sometimes referred to collectively as Indigenous 'antiquities', but more rigorous attempts to develop preservation legislation did not occur until around the 1950s. Those moves were still conducted in a milieu in which the predominant notion of Indigenous heritage was as primarily physical, or object based. The shift during the 1950s towards a growing awareness of the sacred as a dimension of Indigenous heritage was a significant development. However, as I illustrated in *Writing Heritage*, in Europeans' discourses, the 'sacred' in Aboriginal heritage was thought of in terms of specific places, locations or sites – i.e. the sacred site. This growing awareness of the sacred did not yet extend to a greater understanding of the intangible component to Indigenous heritage in a more inclusive sense. It was not until the 1970s that awareness developed of the close interdependence between physical, object based Indigenous heritage, and other elements, including the intangible. This latter component or dimension came to the consciousness of Europeans, not so much through their awareness of the sacred, but by their growing perception of the need to 'protect' Indigenous peoples' artistic expressions. Also around this time, Europeans began to form an idea that Indigenous peoples had certain kinds of property rights; the growth of the land rights movement during the 1960s attested to this realisation. In a move that seemed to be 'ahead of its time', in 1969 a proposal was developed by prominent bureaucrat Herbert ("Nugget") Coombs that sought to recognise

Indigenous property rights in art, sites, ceremony, and elements of material culture (Davis, 2007, pp. 281-284). The proposal for 'Traditional Aboriginal Property' legislation did not progress, but it did signal future developments in official discourses that would articulate concerns about lack of recognition for Indigenous property rights.

Laws and regulations for the protection of Indigenous heritage, in various forms, had already been introduced by some state and territory governments through the 1950s and 1960s (such as the Northern Territory's *Native and Historical Objects and Areas Preservation Ordinance* 1955-1960). Subsequently, legislation was developed at the Commonwealth level, with two pieces of legislation being particularly relevant: the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984*, and the *Protection of Movable Cultural Heritage Act 1986*. However, none of this legislation provides recognition or protection for Indigenous knowledge, whether considered as a component of cultural heritage, or as a form of 'intellectual property'.

Concerns about the misuse of what came to be referred to in official discourses as 'Indigenous intellectual property rights' began to be articulated during the 1970s. Attention was being drawn to the unlawful appropriation of Aboriginal peoples' designs on works of art, which led the Australian Federal Government to attempt to reform what they thought were relevant laws. In the 1970s the government established a Working Party to 'examine the nature of legislation required to protect Aboriginal artists in regard to Australian and international copyright' (Davis, 2007, p. 252). At that time, as I discuss in *Writing Heritage*, the debate was couched in terms of Aboriginal 'folklore', that term having been explained as pertaining to a recognition 'that traditions, customs and beliefs underlie forms of artistic expression, since Aboriginal arts are tightly integrated within the totality of Aboriginal culture' (Davis, 2007, p. 295, quoting the Report of the Working Party on Aboriginal Folklore). It was a brief moment in that discourse formation in which there was some acknowledgement of the close interconnections between the intangible and physical elements of Indigenous heritage. Unfortunately, once again it did not result in any legislative framework. One flaw in this approach was its emphasis on arts based cultural expressions. Another problem was that these developments were framed in a context of intellectual property laws, which constrained an understanding of

Indigenous knowledge as property, rather than as heritage. Despite these occasional attempts to provide for the inclusion of intangible Indigenous heritage, legislative activity generally established an authoritative discourse for the regulation of Indigenous heritage, primarily if not exclusively in regard to its physical aspects.

Indigenous Control over Cultural Heritage

A turning point in the governance of, and formation of, a discourse about Indigenous cultural heritage was the establishment in 1989 of the Aboriginal and Torres Strait Islander Commission (ATSIC). ATSIC had sole responsibility for much of the legislative and policy based protection of Indigenous heritage – administered largely by means of the Commonwealth Government's *Aboriginal and Torres Strait Islander Heritage Protection Act* 1984. ATSIC was established under specific legislation, the *Aboriginal and Torres Strait Islander Commission Act 1989*, as a Commonwealth statutory authority and the peak body representing Australia's Indigenous peoples at the national level. A 2000 brochure described ATSIC as 'Australia's principal democratically elected Indigenous organisation'. The brochure, purporting to represent the voice of Indigenous peoples, states 'ATSIC's vision is of Aboriginal and Torres Strait Islander people and communities freely exercising our legal, economic, social, cultural and political rights' (ATSIC At a Glance, Canberra 2000). Among the tasks for ATSIC, the brochure claims, is to advocate 'Aboriginal and Torres Strait Islander issues at the regional, national and international level'. Given that one of ATSIC's stated aims was to ensure that the Australian Government introduced measures for recognition and protection of Indigenous cultural rights in cultural heritage, and that intangible heritage constitutes a significant component of this heritage, a major question is how well was this aim being achieved. Despite a comprehensive review of the heritage protection act in 1996 by Justice Elizabeth Evatt (1996), one of the consistent gaps in that legislation that remained was its lack of provisions for the recognition and protection of the intangible component of Indigenous heritage. The introduction and operation of the *Aboriginal and Torres Strait Islander Heritage Protection Act* 1984 and of ATSIC were key developments in the official discursive production relating to Indigenous heritage that eventually prompted me to pursue the development of my writings as a critique.

Developments by Australian governments to regulate Indigenous heritage through the machinery of law, government and bureaucracy resulted in a dominant managerial discourse - what Smith has called an 'authorized heritage discourse' (Smith, 2007). She has characterised this discourse as emphasising 'the material, or tangible, nature of heritage, along with monumentality, grand scale, time depth and aesthetics' (Smith, 2007, p. 163). This authorised heritage discourse is, says Smith, 'informed by archaeological concerns with materiality and assumptions about the representational relationships between material culture and identity, [and it] obscures or marginalizes or misrecognizes those identities created using conceptualizations of heritage that sit outside of the authorized heritage discourse' (2007, p. 164). Smith has drawn on Foucault's theory of governmentality to argue that archaeological knowledge – a significant constituent of the authorised heritage discourse - is among those forms of knowledge that form a 'technology of government'. Here, Smith is drawing from ideas developed by Miller and Rose (1990), also following Foucault on governmentality, in which 'attempts to instrumentalize government and make it operable also have a kind of 'technological' form' (1990, p. 8). Here, 'technologies of government', 'seek to translate thought into the domain of reality, and to establish 'in the world of persons and things' spaces and devices for acting upon those entities of which they dream and scheme' (1990, p. 8). Miller and Rose use the term 'technologies' to 'suggest a particular approach to the analysis of the activity of ruling, one which pays great attention to the actual mechanisms through which authorities of various sorts have sought to shape, normalize and instrumentalize the conduct, thought, decisions and aspirations of others in order to achieve the objectives they consider desirable' (Miller and Rose, 1990, p. 8). Archaeology is, in Smith's view, one such technology of government. She writes that archaeological knowledge is 'a body of knowledge that the State deploys to help policy makers and legislators understand, make sense of, regulate and govern demands and claims based on appeals to the past'. The 'archaeological governance of knowledge', argues Smith, 'and the claims to identity associated with that heritage, disallows any acceptance of the legitimacy of *difference* – rather all things must be understood through the lens of archaeological science' (Smith, 2007, p. 163). It is in this context that I have produced my writings as a body of critique. My aim has been to develop this body of critique to challenge and question the dominant, official discourses on Indigenous heritage, and to provide for a recognition and validation of Indigenous knowledge as a different

form of knowledge in its own right. My body of works has also functioned to argue for dialogue in and amongst a plurality of Indigenous and other knowledge traditions.

Over the period in which I have produced the works being reviewed in this Essay, there have been developments at government level that in various ways have influenced, or been influenced by, and contributed to the formation of this authorised heritage discourse. Many of these developments occurred (during 1996-2007) under the administration of a conservative Federal Government led by Prime Minister John Howard. They have, at least indirectly, had the effect of limiting the capacity or willingness of the State to effectively hear, and act upon, the legitimate claims by Indigenous people to have their cultural rights (including in heritage) recognised and supported. These have included the abolition of ATSIC in 2004, a refusal to advance the agendas on reconciliation and recognition of Indigenous rights, and a major government intervention in Australia's Northern Territory intended to 'address' chronic community problems. At non-government levels, the past decade has seen Indigenous people and others concerned about lack of progress on cultural recognition shift to a more local and community focus for action for change. The following summary and review of my writings will highlight some of the challenges in maintaining a constant theme (critique) in the midst of this rapidly changing external context.

Chapter Two: Entering the Discourse (Group I Publications)

1 Indigenous Peoples and Intellectual Property Rights (IPIPR, 1997)

2 Biological Diversity and Indigenous Knowledge (BDIK, 1998)

The production of the papers in this Group, and others written earlier (mentioned above), marked the formal beginning of my entry into what I have identified as a State sanctioned discourse relating to Indigenous knowledge, that is embedded in Western intellectual property rights regimes. I have identified that official discourse as having been formed from a number of strands having to do with relations of power, knowledge, and governmentality (Foucault, 1980, 1991). I am arguing that this discourse was formed, and is in the process of continued development, through the formulation and operation of various government policies, legislative processes, debates, discussions and administrative activities having to do with intellectual property rights and a perceived view of Indigenous intangible heritage. These policies, laws, and administrative procedures constitute elements of what Miller and Rose have termed 'technologies of government' (Miller and Rose, 1990). This official discourse is largely fashioned and enacted through the nation State (Australian Commonwealth Government) and its machinery of legislative and executive-administrative powers, underpinned by a dominant and entrenched knowledge based in intellectual property rights schemes as one strand of Western law. I suggest that this discourse on Indigenous heritage that is based in intellectual property, is in the same category as what Porter (2006) refers to as a 'sites discourse' and Smith as an 'authorized heritage discourse' (2006, 2007, pp. 159-171)..

The dominant official discourse of governmentality during the period in which this group of my published works was produced, was enacted, or expressed through various technologies - laws, policies and administrative approaches - that largely upheld, or reinforced a view that Indigenous knowledge was an entity to be 'managed' or even constructed within the domain of Western intellectual property rights. These early works of mine, in contrast to my later writings, remained predominantly within this official discourse. By this I mean that my works reviewed in this Chapter interrogated possible 'remedies' or ways of protecting Indigenous

knowledge by surveying existing intellectual property laws, and other law and policy in the realm of biodiversity and heritage. They were written with an implicit acknowledgement that the prevailing technologies of government could provide means for recognition and protection for Indigenous knowledge. But at the same time, they made evident the limitations of existing technologies of government (law, language, discourse, procedures, analyses and so on) that were being deployed in relation to the regulation and management of Indigenous heritage, and therefore developed a strategy by which these technologies could then be exposed to the critique that was developed in my subsequent works. In other words, I am suggesting that the production of this Group of papers was a necessary phase for my writing and thinking, in order to develop the critique that became more clearly articulated in my subsequent writings.

The works in this Group were produced during 1997 to 1998 as background research papers for the Australian Parliamentary Library. They functioned partly as compilations or reviews of current policy developments relating to the 'protection' of Indigenous knowledge. In them, I also began the theme that I was to pursue throughout my work, that is, a critique of a discourse of intellectual property that had emerged as the prevailing approach to protecting Indigenous intangible cultural heritage. These papers were written largely as responses to developments in the government and political arenas concerning Indigenous artistic designs and infringement of copyright. The second paper was written on the basis of a concern I had that those developments were not adequately including discussion of Indigenous biodiversity-related knowledge insofar as this also intersected with intellectual property laws. Those developments, and a growing public consciousness about the infringement of copyright in Aboriginal artists' designs, and the inadequacies of intellectual property laws, together contributed to the formation of the official discourse I have delineated above. In my usage of the term 'discourse', I envisage it encapsulating debates, discussions, utterances and statements, regulatory processes, and policy decision making relating to law, Indigenous peoples' growing concerns and interests in protection of their intangible heritage, and a set of questions and emerging interests in Indigenous peoples' inherent rights.

At about the same time as a discourse concerning Indigenous heritage (primarily as expressed in art and designs) and copyright/intellectual property was being formed, a parallel strand of discourse was also emerging in Government and public policy arenas, which had as its focus an interest in Indigenous rights. One of the visible expressions of this interest in rights was a report released in 1995 by the then Labour Government led by Prime Minister Paul Keating entitled *Rights, Recognition and Reform* (Recognition, Rights and Reform: A Report to Government on Native Title Social Justice Measures). Among the proposed reforms outlined in that report was the recognition of Indigenous cultural and intellectual property rights. A *Social Justice Package* was part of that Government's response to the 1992 High Court Decision in *Mabo* and the 1993 *Native Title Act*. The *Social Justice Package* was intended to introduce a range of policy initiatives that would encourage the full participation of Indigenous Australians in the economic, social, economic and cultural life of the nation. The Government's interest in Indigenous rights was also influenced by discussions and debates at the international level on Indigenous cultural heritage rights, including cultural and intellectual property.

The two papers in this Group had begun as ideas I developed to produce papers detailing my critique on current approaches to protecting Indigenous intangible heritage. I offered the idea to a personal contact I had then in the Australian Parliamentary Library, and they were accepted as reports that would be commissioned by the Australian Parliament's Library and Information Services Branch. Drafts of these papers were prepared, and then subjected to a workshop discussion process. When completed, they were placed on the Parliamentary Library's website. The first paper, completed in 1997, was produced as a way of entering the discourse on 'Indigenous intellectual property', and provides an overview of laws and policies that were seen as having the potential to protect Indigenous knowledge (as a form of 'intellectual property', to employ the language of the discourse I am critiquing). The second paper, completed in 1998, was designed to complement the first and focused on Indigenous rights in biodiversity and associated knowledge. That second paper responded to what I saw as a gap in the Indigenous intellectual property discourse, in which there had been inadequate consideration those aspects of 'Indigenous intellectual property' having to do with environment and biodiversity. My view at the time that the discourse was over emphasising arts-related elements of Indigenous

intangible heritage, to the detriment of an understanding of Indigenous heritage as a more inclusive concept.

These Group I papers were produced while I was employed (up to the year 2000) in the Aboriginal and Torres Strait Islander Commission. As an employee in a policy development role in an organisation that was essentially a Commonwealth bureaucracy, I was required to work within understood parameters of government and public service expectations concerning policy and legislation. For many years I was working in areas in ATSIC that were concerned with administering the Commonwealth Government's national Indigenous heritage protection legislation (the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984*). I was also involved in policy formulation and advice more widely on Indigenous land, heritage and environment issues in ATSIC. In my work during some years of that period (1989 to 1996) I maintained an implicit sense of confidence in the potential capacity, or at least in a willingness of the Australian Commonwealth Government and its relevant departments and agencies, most especially ATSIC, to exercise full responsibility for ensuring recognition and protection of Indigenous peoples' rights in their cultural heritage. After 1996, with the change to a conservative government in Canberra, there was a significant shift in the approach by the national government, to abandon support for ideas about Indigenous rights and self-determination. ATSIC was to ultimately be abolished in 2004, and in the years leading up to that, any autonomy the organisation may have had in regard to Indigenous rights in heritage and related issues was rapidly eroded, so that it became quite quickly little more than a part of the mainstream Commonwealth bureaucracy.

The existence of ATSIC posed something of a paradox in terms of Indigenous peoples' opportunities to contest the dominant official discourses and knowledges that were founded in Western intellectual property rights, and in notions of universal heritage. As an agency of the Commonwealth government, ATSIC constituted one of the central sites for the development and operation of technologies of government (Miller and Rose, 1990) that were founded upon dominant Western discourses and knowledges. The administration of Commonwealth heritage legislation, and of intellectual property laws – the two main arenas in which Indigenous knowledge protection might be considered – was performed largely through authoritative bodies

of expertise (such as archaeological and legal) mobilised by the State (see Smith, 2004).

Yet ATSIC was also established in order to provide a 'voice' for Indigenous peoples, to enable them to represent and advocate their own claims regarding their culture and heritage. ATSIC then, was at once a kind of site for the production and maintenance or expression of dominant discourses and technologies of government, while at the same time also constituting a channel for challenging those discourses, In my role as an employee of ATSIC, and also for some of my time as an independent writer, my work was informed by my implicit assumption that 'the State', articulated through the machinery of government agencies, would be the primary vehicle for bringing about the realisation of Indigenous peoples' self-determination in regard to their cultural rights – especially for Indigenous knowledge and other forms of intangible heritage. This was despite the notion that self-determination, conceptually at least, was not something that should be bestowed on the people by a benevolent government, but was, rather, for the people themselves to bring about. In this regard, although ATSIC was stated as being, among other things, a vehicle for self-determination for Indigenous people, in effect, this was not a realistic goal given the close relationship between ATSIC and the Commonwealth Government. At the same time as I was working broadly in support of the policy and legislative goals of ATSIC and the Commonwealth Government, I was also beginning to pursue my own independent writings in which I began to question the capacity or relevance of existing laws and policies in their applicability to Indigenous heritage – especially the intangible aspects of that heritage.

My emerging critique had developed from my reading of the prevailing discourse in legislation and policy in Australia concerning Indigenous intangible heritage that was primarily entrenched in intellectual property rights, especially copyright. Throughout the 1970s to 1990s there were several cases of infringement of Aboriginal peoples' copyright in designs on artworks, which were of increasing concern to many government officials, politicians, academics and activists, and of course, Indigenous peoples themselves. Partly in response to these instances of infringement, in 1994 the Federal Government released an Issues Paper called *Stopping the Rip-Offs: Intellectual Property Rights for Aboriginal and Torres Strait Islander People*. That

Issues paper was developed to review the adequacy of existing Australian intellectual property laws – principally copyright law – in providing protection for Indigenous peoples' artistic designs. *Stopping the Rip-Offs* was released by the Attorney General, and called for responses from the wider public. Working in ATSIC at the time, I had submitted a policy recommendation to the Board of Commissioners and the Executive, to develop a response to the *Stopping the Rip-Offs* paper, and formulate more widely an approach to protecting the cultural and intellectual property rights of Indigenous peoples. In that policy recommendation, I had made reference to a Decision that had earlier been agreed to by the ATSIC Board on this subject. The Board of Commissioners comprised Aboriginal and Torres Strait Islander people who had been elected through an electoral system devised specifically under the ATSIC model, to represent local communities and organisations. As such, under the relatively autonomous system that was ATSIC at that time, the Board was able to exercise its decision-making responsibility for Australia's Indigenous people, and present advice to the Government.

That ATSIC Board Decision was informed by emerging standards being developed in the United Nations, especially in regard to cultural heritage. Through the mid-1990s a Special Rapporteur to the UN had provided reports (United Nations, 1993, 1996) urging the protection of Indigenous cultural heritage, taking the view of that heritage as 'holistic' and comprising both intangible and intangible dimensions. Those reports have remained an important resource and influence in policy formulation both internationally, and in some sectors of Australian critical debate and practice on Indigenous heritage. Drawing from all these debates, reports and developments, I was increasingly coming to the view that, given the limitations in existing intellectual property laws to protect Indigenous intangible heritage, what was needed was what were called *sui generis* measures. This means the development of distinct or unique approaches – both legislative and non-legislative – to protection for Indigenous cultural and intellectual property rights. It seemed to me that a fundamentally new and different approach was essential, and this was what formed the basis for my writing and publishing. My developing critique of the intellectual property discourse being used in regard to Indigenous heritage, and my interest in developing new approaches grew in two, inter-related ways. One of these was to work within the ATSIC bureaucracy, to assist that organisation to develop a response to the *Stopping the Rip-*

Offs paper. The other element of my critique was to pursue my own independent research and writing.

In the ATSIC context, I managed an external consultancy project that was to ultimately result in the report *Our Culture, Our Future*: *Australian Indigenous Cultural and Intellectual Property Rights*, written Terri Janke, a leading Indigenous advocate and scholar in this field (Janke, 1998). That report became an important reference point in developing a critique in Australia of the lack of legislative protection for Indigenous intangible heritage. It was instrumental in introducing a discourse into Australia on Indigenous cultural and intellectual property rights. The production of *Our Culture, Our Future* was also supported by the Australian Institute of Aboriginal and Torres Strait Islander Studies (AIATSIS), a leading research organisation founded in 1964. The emerging discourse in Australia on Indigenous cultural and intellectual property was shaped by further reports, publications, debates and discussions. For example, the Australian Copyright Council, an independent, non-profit organisation dedicated to informing the wider public about developments in copyright law, contributed an important component to this discourse by releasing a Discussion Paper in 1998 entitled *Protecting Indigenous Intellectual Property* (Australian Copyright Council, 1998).

Notwithstanding the centrality of the report *Our Culture, Our Future* in debates and discussion around Indigenous intangible heritage, I was keen to pursue the debate even further, beyond what I still saw as the limitations of the work being done by ATSIC and government. I had the view that there was a lack of real progress by governments in developing ways of recognising and protecting the distinct rights of Indigenous people in their intangible cultural heritage, and an over-reliance on arts related knowledge and use of conventional intellectual property rights – particularly copyright laws.

The Works in Group I

In the first paper in Group I, **Indigenous Peoples and Intellectual Property Rights (IPIPR)**, my main argument is that the existing laws in Australia, especially

intellectual property laws, 'had failed to meet Indigenous peoples' expectations and aspirations regarding protection of their cultures'. Given this, I wrote:

> The development of new *sui generis* legislative systems that provide recognition of the full range of Indigenous peoples' cultural products and expressions, and which enable community empowerment for the control of their cultures, is the only way to achieve a just solution to the problem faced by Indigenous peoples in their intellectual property rights. (ii)

IPIPR begins to take up my interest in terminology, in problems of definition, and in seeking a greater understanding of the content of Indigenous intangible heritage. It argues for an 'integrated' view of Indigenous culture; in other words, for a greater awareness about the interconnections between the intangible and the physical elements of that heritage. Throughout IPIPR I use the term 'intellectual property' to denote Indigenous cultural heritage. My later papers question that equivalence, and devote more space to examining the complex and often fraught relationship between Indigenous intangible heritage and Western notions of intellectual property.

IPIPR maps out an idea as to what might comprise the range and extent of what is termed Indigenous 'intellectual property'. This is a different, though related tactic to my subsequent listing, in the next publication (see below), of what I considered to be the main features of 'Indigenous knowledge'. While this attempt to define 'Indigenous intellectual property' was a useful device for that paper and for the time, in later writings I question the notion that Indigenous knowledge can, or should be 'defined' by listing its presumed contents. This encyclopaedic or classificatory approach to understanding, or defining aspects of Indigenous cultural heritage, whether referred to as 'Indigenous intellectual property', or 'Indigenous knowledge', is critiqued in my more recent papers, especially in *Indigenous Knowledge: beyond Protection, Towards Dialogue* (IKBP).

Although useful at the time, and in the context of developments then, IPIPR is problematic in its readiness to equate Indigenous IP with cultural heritage. In later papers I take up the question as to whether Indigenous cultural heritage can in fact be considered as a form of property in the Western sense of the term. As my writings

have developed, and especially in my recent and current work, I have moved increasingly away from using the terminology of 'intellectual property' or 'Indigenous intellectual property' to describe the subject matter of intangible heritage that is my central concern.

There are other assumptions I made in IPIPR that became the focus of more rigorous discussion and questioning in my later papers. One of my concerns is the emphasis, in the public policy arena at least, on a perceived need to manage Indigenous heritage in terms of its 'protection'. While I agree with an urgent need to protect this heritage (including Indigenous languages, which are rapidly disappearing), there are equally important needs for the maintenance of this heritage (by supporting intergenerational transfer, among other activities), and for recognition of Indigenous peoples' rights to it. By the 'maintenance' of this heritage, I mean the range of activities that encourage, support and facilitate the ongoing use by Indigenous people of their heritage, on their land and in their communities. If, as I had assumed in these early papers, Indigenous intangible heritage is in need of protection, the question is, what does it require protection from? These Group I publications take the view that Indigenous intangible heritage suffers from being appropriated and misused. IPIPR outlines three aspects, elements or components of this heritage, to illustrate the extent to which it has been appropriated by others (mainly, though not exclusively non-Aboriginal people). These are 'arts and cultural expressions', 'Indigenous knowledge and biological diversity', and 'human genetic material'. The first of these categories or classifications of 'Indigenous intellectual property' has most frequently been discussed in terms of the capacity or limitations of copyright law to protect Indigenous art based designs and images. The second category has been discussed in regard to the activity known as 'bioprospecting' (and referred to by Indigenous peoples and their advocates as 'biopiracy'), which is the search for potentially useful, commercially viable plants and plant products. The third category has often had as a major focus a global project called the 'Human Genome Diversity Project', the goal of which was 'to collect and analyse DNA samples from diverse, predominantly indigenous, populations and "to develop databases and resources that could be used to investigate new questions in the future"' (Whitt, 2009, p. 78). Each of these three areas of study and discussion has as a major focus, the problem of exploitation or misappropriation of elements of Indigenous heritage and knowledge. While the formation of these categories provided

a useful analytical frame for my discussion at that time, in the light of the way my work developed beyond IPIPR, it is important to point out that these are European constructs. Aside from any analytical value in using such constructs in discussions, they can also illustrate the way that Indigenous cultural heritage in its most inclusive sense risks compartmentalisation and classification for the purposes of State authorised regulation and management.

While I devoted some space in these early writings to discussing questions of definition of Indigenous intangible heritage, in IPIPR I acknowledge what were thought to be the views of Indigenous people in regard to their cultural heritage (this raises the question as to how this view was obtained or constructed in my writings). I assert that 'Indigenous peoples consider their intellectual property rights are an integral component of a "holistic" cultural heritage, which includes a wider range of subject matter than can be accommodated within existing intellectual property laws' (p. 38). Although my discussion in this paper is framed in the terminology of intellectual property, I question the applicability, or relevance of Western intellectual property laws to Indigenous intangible heritage. The paper outlines the fundamental differences between the Western concept of intellectual property, and Indigenous intangible cultural heritage, and argues that the former is 'based on the notion that ideas, innovations and inventions, expressed through various material forms, can be owned, and that individuals have distinct property rights to these forms of creative expressions and products' (p. 6). The paper emphasises the problem of endeavouring to use copyright law to protect Indigenous cultural heritage, stating that '…the need to rethink the fundamental bases of copyright and other intellectual property laws is created not only by advances in technology, but also by the increasing assertion by Indigenous peoples of their cultural rights' (p. 7).

There is a paradox in the relationship between copyright and Indigenous cultural heritage, which is apparent, though not fully explored in IPIPR. In some sectors of the community (mostly in government and legal sectors), copyright law is discussed and debated in terms of its potential to help protect Indigenous peoples' creative works from exploitation. But at the same time, as illustrated by some court cases, this law has failed to adequately protect Aboriginal peoples' designs on artworks. In the court cases referred to, Aboriginal people claimed that their copyright had been infringed in

the inappropriate uses by others of their clan designs, and sought redress for damages (Janke, 1998; Australian Copyright Council, 1998). IPIPR does not enter into a detailed discussion about the use, or relevance of copyright and other intellectual property laws for Indigenous cultural heritage. Instead, it raises the idea that Indigenous people have a distinct class of rights based on their unique cultures: what I refer to as their 'cultural rights'. The concept of Indigenous cultural rights recognition becomes a central theme in some of my later writings, notably *Law, Anthropology, and the Recognition of Indigenous Cultural Systems* (LARICS).

IPIPR refers to criticisms that Indigenous peoples themselves have made of Western intellectual property (IP) systems. This points to (though does not elaborate in this paper) the tensions and seeming contradictions, or paradox that intellectual property may be regarded as both an element of Indigenous cultural heritage (as defined in this paper), and also as a set of laws, or measures that can be used to exploit and misappropriate Indigenous heritage. In this, and other discussion papers (see for example Australian Copyright Council, 1998; Janke 1998), a view is presented to support the idea that IP can offer potential avenues for protecting aspects of Indigenous intangible heritage. Indigenous peoples themselves, given the right conditions and support, can also use IP in this way. Notwithstanding the potential for IPRs to be used by Indigenous people, in IPIPR I present briefly some of the reasons that Indigenous people have critiqued these. One reason cited is that IPRs promote the commercialisation or commodification of cultural products and expressions at the expense of Indigenous peoples' cultural rights and ownership. Another reason is that there is inadequate information and education available for Indigenous peoples about how they can use IPRs to protect their own cultural heritage. A third reason is that IPRs are essentially incompatible with Indigenous cultural heritage and 'ignore the complexities of such Indigenous systems' (p. 8). The IPR system, in this view, is based on Western notions of property that emphasise individual ownership and alienability. As I state in that paper 'the property rights established by these systems are essentially managed as commercial transactions, and are not designed to protect cultural products and expressions' (p. 8). In some views, Indigenous peoples have regarded intellectual property laws as posing an actual or potential threat to their 'systems of informal innovation, and communal rights and responsibilities in cultural products and expressions' (p. 8). In those views IPRs threaten, or impede Indigenous

peoples' opportunities to maintain their own, culturally based practices, laws, traditions and customary codes. In IPIPR I did not elaborate on what I thought those 'Indigenous systems' are, and precisely in what ways IPRs may threaten or impede those.

The paper IPIPR surveys a range of developments, laws and standards, including international ones based in the United Nations relevant to the recognition and protection of Indigenous intangible heritage, as a prelude to examining reforms that might be introduced in Australia to provide better protection. I argue in IPIPR that, rather than the over-emphasis on IP laws, it may be more useful to consider protection by looking to reform of Australian heritage laws, as that may imply a recognition 'that Indigenous peoples' intellectual property is a component of their cultural heritage' (p. 34). IPIPR also refers briefly to other developments such as the *Native Title Act 1993* as a possible avenue for potential recognition and protection of Indigenous cultural heritage, especially intangible heritage. I suggest that native title may offer possibilities for recognition of Indigenous 'customary rights', as the *Native Title Act* 'may be interpreted to include recognition of Indigenous knowledge as intellectual property rights within the meanings and definitions of native title' (p. 35). IPIPR also briefly surveys non-legislative reforms that endeavour to seek recognition of Indigenous rights in intangible heritage, such as guidelines, protocols and agreements. It also reviews are 'sui generis legislative options and community rights', and 'other models' such as 'traditional resource rights and intellectual integrity rights' (pp. 36-37). *Sui generis* means literally 'of its own kind' and these options consist of legislative and other developments (such as policies and statements and declarations) that are innovative and original rather than such measures based on use of existing laws or amendments of those. IPIPR elaborates a little on the kinds of legislative and other reforms that might be considered in providing more effective recognition and protection for Indigenous intangible heritage. I state:

> Reforms to existing laws are best accompanied by the formulation of a new *sui generis* legislative arrangement that provides for community controlled decision-making, and financial benefits to Indigenous communities for the use by the wider community of their cultural products, expressions and knowledge (p. 38)

The rhetoric of financial benefits ('benefit-sharing') for the use of Indigenous knowledge is modelled on that employed in the United Nations *Convention on Biological Diversity*. However, IPIPR does not consider the question as to whether, or to what extent Indigenous peoples themselves share the same, or similar ideas about benefit-sharing, or instead, whether that is a concept imposed on these peoples by the United Nations and other external bodies. Questions relating to benefit-sharing and the CBD as it relates to Indigenous knowledge is the subject of the second paper in this Group, discussed below.

The second paper in this Group, **Biological Diversity and Indigenous Knowledge (BDIK)**, continues my critique of the emphasis on intellectual property rights in debates and discussions on Indigenous intangible heritage. It extends the debate further by considering those aspects of Indigenous intangible heritage relating to environment and natural resources – what I have termed biodiversity (or biological diversity). BDIK begins by drawing attention to the close interdependence between Indigenous peoples' knowledge, and the lands and environments in which they live:

> They [Indigenous peoples] have established distinct systems of knowledge, innovations and practices relating to the uses and management of biological diversity on these lands and environments (p. i)

> These lands and environments are vital for their survival, providing a wide array of substances for food, shelter and implements … Together with Indigenous peoples' social, political and religious systems, lands and environments are interwoven into a tightly integrated cultural system that derive their meaning from the Dreaming. This integrated cultural system forms the basis for Indigenous knowledge. (p. 5)

The paper outlines the increasing loss of biodiversity in Australia 'due to industrialisation and urbanisation, land clearances, farming and agricultural activities'. At the same time as these threats:

> Biological diversity is increasingly becoming recognised as important beyond its purely scientific interest. Social and economic values of biodiversity are assuming greater significance as a range of different groups, including Indigenous peoples assert their claims and interests (p. 1).

As with the earlier paper, this one takes up themes of lack of recognition for Indigenous peoples' rights in their knowledge, and the problem of exploitation of that knowledge. Also as with the previous paper, BDIK reaffirms my view that IPRs have very limited capacity for recognising Indigenous peoples' rights in their biodiversity-related knowledge, and associated practices. I also argued that other laws such as native title, heritage and environment laws have limited scope for providing such recognition.

My earlier paper began to question the equivalence so often stated in the Indigenous intellectual property discourse, between Indigenous knowledge and intellectual property. BDIK shifts even further from considerations about Indigenous knowledge within the framework of IP, and has as its focus instead protection and recognition measures that may be introduced within the context of the United Nations *Convention on Biological Diversity*. Like its companion piece, BDIK presents a survey of laws, policies, and the development of standards at international levels, and within Australia 'as a context for discussing some possible measures for the protection of Indigenous knowledge' (p. i). This paper also marks an important move away from the survey of laws approach in the previous paper. Here I began to develop my thoughts around ideas of dialogue between Indigenous peoples and the wider community – a theme that was to become central to my later paper *Indigenous Knowledge: Beyond Protection, Towards Dialogue*. In BDIK I wrote:

> Ultimately, the most effective approach is to establish a dialogue with key interest groups such as industry, intellectual property organisations, Indigenous communities and organisations, governments and conservation groups. Discussions could then proceed towards developing an integrated conservation and benefit-sharing system based on a partnership between the key organisations and sectors (p. ii)

In BDIK I outline some of what as I refer to as the 'values' of biological diversity and its knowledge associated with it, referring to its growing importance 'beyond its purely scientific interest' (p. 1). Its social and economic values include those arising from the contribution this knowledge makes to the Aboriginal 'bush foods' industry. This part of the paper develops critical themes around ideas of ownership and rights in biodiversity and the natural environment, and the vexed issue of competing claims and interests. Contested notions of the natural environment as national heritage, versus the particular claims and interests in the environment by Indigenous peoples are mentioned here. This implies a question about the 'ownership' of knowledge itself, which returns to my theme about Indigenous peoples' having claims to a distinct class of rights in their 'knowledge of, and practices relating to the management, use and conservation of biological diversity' (p. 2). As with the previous paper (IPIP), in this one I maintain an interest in the notion of a distinct class of Indigenous rights:

> Indigenous peoples have for a long time advocated their wish to be recognised as having unique rights, based on their distinct Indigenous status. While the focus in the quest for Indigenous rights has been on land rights, Indigenous peoples assert that they also have rights in the biological resources on the lands, and in the knowledge they possess of these resources. (p. 8)

This question of Indigenous peoples' 'distinct rights' is little explored in BDIK, except to detail some of the ways in which those rights have been ignored or infringed. One example of this is through the activity called bioprospecting. This term was introduced in my previous paper as the 'search for potentially useful plants related substances [and plants] that can be developed into marketable commodities such as pharmaceuticals, pesticides and cosmetics' (p. 2). BDIK suggests that initiatives such as joint managed protected areas, and regional and local agreements can achieve a balance between conservation and recognition of Indigenous rights (p. 5).

My preoccupation with the problem of defining and classifying Indigenous intangible heritage (and with providing a critique of attempts to define and classify) is featured in this, as in the previous paper. In BDIK I drew attention to attempts in some of the

literature to ‘define’ Indigenous knowledge by listing what have been referred to as its ‘distinctive features’, which include:

- Collective rights and interests held by Indigenous peoples in their knowledge
- Close interdependence between knowledge, land, and other aspects of culture in Indigenous societies
- Oral transmission of knowledge in accordance with well understood cultural principles, and
- Rules regarding secrecy and sacredness that govern the management of knowledge (p. 5)

In my later works I offer a critique of what I considered to be an overemphasis in many debates and discussions about Indigenous knowledge on encyclopaedic approaches to that knowledge that endeavour to define it by classifying. Nonetheless, BDIK employs such a listing as an analytical device for emphasising the inclusiveness of Indigenous knowledge, its close interdependence with the physical aspects of Indigenous heritage, its sacred and secular dimensions, and its relationship to land. By thus highlighting these characteristics, I am taking a further step towards distancing my views from the prevailing Indigenous intellectual property discourse that is the subject of my ongoing critique throughout my writings. BDIK highlights the integration of the wide range of elements that make up Indigenous knowledge (including ceremonial and ritual objects, performances, artistic designs, works and expressions, song, dance and story, and subsistence and land and environment management activities) (p. 6). It is this inclusive whole of culture aspect of Indigenous knowledge that renders it incompatible with Western laws.

An important consideration in discussions and writing about Indigenous knowledge is that such knowledge does not exist ‘just by itself’, as knowledge for its own sake. It is as much about *practice*, and people who are the owners, holders and users of this knowledge, as it is about some ethereal concept that is out of time and out of place. BDIK outlines some of the ways in which Indigenous knowledge finds expression through various practices such as hunting, and fishing. Here is the beginning of my shift towards an interest in the dimensions of Indigenous intangible heritage that have

to do with its particularities in place and person – themes that become more of my focus in my later work.

BDIK argues that Indigenous peoples assert that bioprospecting activities take place largely without the free, prior informed consent of the Indigenous knowledge holders, and 'little or no provision for financial returns to Indigenous communities' (8). This concept of free, prior informed consent is one that is gaining increasing attention, especially in international standards. It is a principle that requires proponents of development, or those wishing to conduct research, or to obtain information from Indigenous peoples, to seek those peoples' agreement, or consent before any such development, research, or information gathering commences. That consent must, according to the principle, be obtained without any coercion, given freely by the peoples concerned, and on the basis of providing full and accessible information about the project or research to the peoples concerned. The principle of free, prior informed consent is emerging as a fundamental right of Indigenous peoples.

The 'challenge', I argue in BDIK, is 'to develop a system which satisfies the needs of industry, achieves conservation goals, and also recognises and protects the rights of Indigenous peoples'. Such a system would 'incorporate provision for financial and other benefits that flow from the uses of Indigenous knowledge and practices to be shared equitably with the Indigenous knowledge holders and innovators'. It would also 'provide incentives for the conservation and sustainable uses of biological diversity'. Challenges to designing such a system, that paper argues, are the need to recognise 'the distinct property rights held by Indigenous peoples in their knowledge', and the 'collective nature of Indigenous rights'. Other challenges are the requirement that a system for benefit-sharing should be able to establish 'the legitimacy of claims to knowledge and biological resources' and to clarify claims in a context of complex 'clan, family, and other types of group rights and interests in such items' (8). Here I drew attention to some of the other constraints to recognising Indigenous peoples' rights in ecological systems and associated knowledge. These include the 'complex nature of land tenure systems, and the dispersal and dispossession of Indigenous peoples resulting from the history of colonisation and dispossession impose constraints on identifying Indigenous biodiversity related knowledge systems' (p. 9). Another 'constraint' is the adaptation of 'modern' technologies by many Indigenous

peoples, which ‘makes it difficult to identify knowledge that is derived from distinctly Indigenous traditional systems and which [is] maintained according to traditional or customary practices, as distinct from knowledge that is everyday, “common” knowledge’. This begins to foreground the ‘problem’ of what is often termed “traditional” knowledge, and how such knowledge is situated within the context of understood modernity. That paper does not enter into the debate, as some of my later writings begin to do, concerning the nature of different kinds of knowledge, such as “traditional” and “modern”, and the complex inter-relationships between these and their juxtaposition and expression. An interrogation of some of the assumptions and intellectual underpinnings to a notion such as “traditional” emerges in my later writings. A further challenge or constraint to recognition of Indigenous knowledge, I state in BDIK, is the ‘dispersed nature of Indigenous decision making and authority structures in Indigenous societies’. This, I assert ‘will present difficulties when considering the introduction of measures for distributing benefits obtained from the uses of Indigenous knowledge back to those communities in which the knowledge holders belong’. I state that ‘it would be difficult to identify a unit or group that has the traditional authority to make decisions about uses of knowledge and practices, and responsibility for distributing any financial or other benefits that flow from the uses of these’ (p. 9).

BDIK takes the view that, as indicated in the previous paper (IPIPR), that IPRs are inadequate for protecting Indigenous knowledge. On this basis I survey a range of what I broadly refer to as ‘alternative approaches’ such as benefit-sharing arrangements and ‘traditional resource rights (pp. 14-16). The paper also surveys a range of relevant Australian developments, such as measures designed to implement the Convention on Biological Diversity, and other environment-related developments, such as government strategies for biodiversity conservation, ecologically sustainable development, coastal zone inquiries and reports, and a working group on access to Australia’s biological resources (p. 17). A discussion paper on reform to Australia’s Commonwealth environment legislation is also briefly reviewed. I conclude on a pessimistic note:

> Recommendations for greater control by, and participation of Aboriginal and Torres Strait Islander people in the management of environment and

> conservation, including national parks and protected areas have been made by many reports over the decades (p. 18)
>
> Despite this proliferation of reports and recommendations, there has been relatively little in the way of implementing environment and biodiversity related recommendations. (p. 19)

In my review of the role of IPRs in the protection of Indigenous knowledge in this paper, I reprise the theme of my previous paper by examining some recent government and other developments relating to IPRs and Indigenous peoples. These include the 1994 Issues Paper *Stopping the Rip-Offs*, and the response by ATSIC. I state in BDIK:

> ATSIC advocated that since Indigenous peoples considered that their intellectual property rights did extend to knowledge in biodiversity, then any reforms to protect Aboriginal and Torres Strait Islander intellectual property must necessarily also include consideration of knowledge and biodiversity. ATSIC's involvement in the formulation of a response to the *Stopping the Rip-Offs* paper therefore adopted a broader view, consistent with Indigenous peoples' aspirations. (p. 19)

In both these Group I papers, I held that although IPR laws cannot provide adequately for recognition of Indigenous rights in intangible cultural heritage, these laws, appropriately reformed, can nonetheless provide some protection. For example in BDIK (p. 20) I wrote:

> Reforms to existing intellectual property rights laws can extend the capacity of these laws to recognise and protect intangible cultural expressions such as knowledge, and to shift the balance in these laws from fostering commercial innovation, towards protecting cultural rights.

BDIK also reviews native title and regional agreements as possible avenues that can be pursued to achieve recognition and protection for Indigenous rights in biodiversity-related knowledge and practices. I state:

> Since native title is defined according to the customs and traditions of the claimant group, this by definition must imply the inclusion of Indigenous knowledge as a form of intellectual property, because to Indigenous peoples, their "knowledge of the properties of fauna and flora" is an important component of customary laws' (p. 20).

Here, drawing on academic writings by other 'experts' (using this term in a reflexive sense, to acknowledge that it is a contested category), I used the term 'intellectual property' once again to refer to what I had been describing as 'Indigenous knowledge' elsewhere in the paper. This illustrates that in these early writings I was still largely employing unquestioned the language of the dominant discourse. In this way, it could be seen that I was 'exposing' or 'laying bare' the 'borders' (terms, categories, language, concepts) of the dominant discourse as a prelude to my developing a critique of those. Other measures reviewed in BDIK as offering possible opportunities for Indigenous knowledge recognition and protection include land and heritage laws, and 'common law solutions' (p. 23). This latter refers specifically to some high profile court cases that have advanced the existing laws capacity to be interpreted beneficially for Indigenous intangible heritage recognition.

BDIK also returns to what has become a major theme throughout my work, that is the question of the relationship between Indigenous, and other knowledge systems. In BDIK I introduce the theme by stating the nature of the 'problem':

> One of the challenges to law and policy for the recognition and protection of Indigenous knowledge is to develop ways in which there can be integration, or a harmonising of Indigenous biological and environmental knowledge and practices with western scientific knowledge. In this way, rather than being considered as conflicting systems, Indigenous knowledge systems and western scientific knowledge can be combined in a way which utilises the characteristics of the two different systems in a complementary, mutually reinforcing way. Such an integrated knowledge system can be developed in order to pursue mutual goals such as land and ecosystem management. (p. 24)

This statement foreshadows what will become one of my main interests in subsequent and developing work, the notion of a dialogue between and among a plurality of knowledges. I use the term 'plurality' here, in the sense that I have discussed earlier in this Essay, to refer to a system that can expose the contradictions, differences, and inequalities between and among different systems, in order to provide the grounds for interpretation and analysis of power relations, and the specifics of place, histories, location and position.

A Summing Up of Group I Publications

The papers in this Group (especially IPIPR) have employed the term 'Indigenous intellectual property' to denote intangible heritage. However, in the light of my later writings, and my reflections in this Essay, my use of terms such as 'intellectual property rights' can be seen to be problematic, and requires further interrogation. As my work has progressed I have been more concerned about the adequacy or relevance of terms and concepts such as property as they are used in official documents and discourses and are thought to pertain to Indigenous cultures. My recent work has tried to interrogate more deeply some of the theoretical and philosophical issues surrounding what might be thought of as the 'content' of Indigenous intangible heritage and 'Indigenous knowledge'. My later works, as will be seen, questioned more deeply the apparent readiness with which many texts translated Indigenous peoples' categories, concepts and understandings of their heritage into the idioms and discourses of Western law and policy.

The two papers in this Group were useful in raising awareness, and in making public assertions about, the problems and challenges in recognising and protecting Indigenous intangible heritage within the context of Western laws. They provided a preliminary context for more analytical discussions in my subsequent papers, in which I interrogate some of the underlying assumptions in discussions about the relationships between Indigenous heritage and other forms of knowledge, especially those based in Western laws.

Chapter Three: Towards a Critique of the Discourse (Group II Publications)

3 Indigenous Rights in Traditional Knowledge and Biological Diversity: Approaches to Protection (IRTK, 1999)

4 Law, Anthropology, and the Recognition of Indigenous Cultural Systems (LARICS, 2001)

5 Ethical Relationships for Biodiversity Research and Benefit-sharing with Indigenous Peoples (ERBR, 2006)

I have described earlier in this Essay a type of official State authorised discourse that was fashioned over a period of years, which is formed from laws, statements, directives, and programs and policies relating to Indigenous knowledge, but which is entrenched primarily in intellectual property rights regimes. The Group I papers I discussed in the preceding Chapter were produced as the beginnings of my entry into that discourse, working largely within the prevailing technologies of government (Miller and Rose, 1990); at the same time, they were also part of a strategy in which I would develop my critique of the dominant discourse. Those papers presented compilations, syntheses and critical reviews of legislative, policy and other developments relevant to Indigenous knowledge/ intangible cultural heritage. The production of those works was, I have argued, a way of defining or acknowledging the 'borders' or the boundaries of the established discourse on Western intellectual property and cultural heritage, in order to establish the conditions in which my subsequent works were to formulate a critique.

In the years following the release of those earlier papers, I have advanced my critique of the official discourse more explicitly through a series of papers, categorised here as Group II works, published in 1999, 2001 and 2006. These papers extend my critique in several related directions. They examine the relationship between Indigenous knowledge and the intellectual property system by looking more closely at one example of the latter, the patent regime. They also extend my interest in considering more fully the question of Indigenous rights as a special type of right, explore the role of particular disciplines such as anthropology in better understanding of Indigenous

knowledge, and consider ethical issues in agreement making for the protection of Indigenous biodiversity-related knowledge.

The papers in this Group were produced during a transitional period, during which I left working in the formalised structure of the public sector in 2000, and began my independent work. This change in the position from which I was writing had some influence on the works since, now that I was working exclusively from outside the formal structures of government bureaucracy, the critique I was developing of official discourses relating to intellectual property rights could become more clearly articulated. In this way, I was becoming more aware in the production of my work, of my position as an 'outsider', and of the potential of that 'outsider-ness' as a strategy for forming a critique.

The first paper in this Group, **Indigenous Rights in Traditional Knowledge and Biological Diversity (IRTK)**, continues the theme of the previous two in exploring the limitations of intellectual property rights in regard to Indigenous intangible heritage. In this work, however, I wanted to explore in greater detail the relationships between that intangible heritage and one particular type of intellectual property law – that of patents. To do that, I proposed a paper to the Australian Commonwealth Government agency called IP Australia. That organisation has primary responsibility for patents, designs, trade marks and plant breeder's rights intellectual property laws. This formed part of my strategy (which was not always explicit or consistently planned) to 'engage' with those parts of the Commonwealth Government that I thought had responsibility for managing the different aspects of Indigenous intangible heritage. I therefore sought to engage with the appropriate parts of the Commonwealth Government that had responsibility for regulating biodiversity and environment matters as they relate to Indigenous peoples. By 'engage with' the relevant Government department or agency, I mean that I pursued a range of approaches, from seeking a better understanding of the department's activities and responsibilities, to monitoring its work, to a more active engagement of entering into discussions with individuals within that department. I had developed contacts with officials in several Commonwealth Government departments and agencies through my career in ATSIC. The Commonwealth Government agency IP Australia had accepted my proposal of a paper exploring the relationship between the patent system

and Indigenous knowledge. After I had produced that paper, and had held 'internal' discussions with staff from that office, I then approached the journal *Australian Indigenous Law Reporter* to adapt my paper to submit to that journal as a refereed publication.

IRTK begins by stating the 'problem' that I had identified in my earlier papers. That is, the growing interest being shown in Indigenous medicinal knowledge by pharmaceutical and other industries, and the concerns by Indigenous peoples to have their claims to rights in their knowledge heard and protected, and to receive proper compensation where those rights are being infringed. Where this paper departs from its two predecessors is in its attention to the details of a very specific legislative and policy problem: the lack of correspondence between Indigenous knowledge as a system of practice and innovation, and the conventional Western patent regime. As a way of highlighting this incommensurability, IRTK examines instances of the activity known as 'bioprospecting' – a concept introduced briefly in the previous paper. Like its predecessors, IRTK is also a certain type of genre. It is a review of law and policy, but goes further, suggest a proposal for action.

IRTK demonstrates continuity with the earlier works, and also a progression in my thinking about the question of Indigenous knowledge and Western discourses. This paper moves further away from an idea of accommodation between the Western IP system and that of Indigenous knowledge, and encourages instead a 'better understanding of indigenous concepts and systems of knowledge' (p. 1). This understanding, I wrote, could be enhanced by 'greater input from indigenous people, and also from disciplines such as anthropology, history and political science' (p. 1). It is interesting to reflect on this statement now, from the perspective of having published additional papers over the course of nearly a decade. For example, what does this comment imply about the role of disciplines such as law and anthropology? One of the themes in this Essay is that my body of writings, overall, has worked to develop a critique of prevailing official discourses, and technologies of government that frame 'Indigenous knowledge' predominantly in a context of intellectual property rights. Elements of these technologies of government include formal Western disciplines and expertise, including anthropology, law and political science. I further argue that my work has been able to develop a critique of existing State based

knowledge/discourse, and of official disciplines and expertise because it sits outside the borders of these. My final Chapter looks at this notion of my work being outside the disciplines in a little more detail.

In a continuation of some of the discussion from my earlier paper BDIK, this paper (IRTK) outlines what I perceived to be the connections between biodiversity, bioprospecting, and Indigenous peoples. I state:

> Although not all bioprospecting activity directly involves indigenous knowledge, given that indigenous peoples are increasingly claiming rights in natural environments, knowledge and resources, it is important to examine the relationships between bioprospecting and indigenous knowledge. There is likely to be an increasing focus on the potential or actual indigenous knowledge component in biological and genetic materials, products and processes derived from natural environments (p. 2).

The paper mentions the need for measures to ensure that Indigenous people share equally in any benefits that result from the wider use of their Indigenous knowledge, including through bioprospecting activities.

In order to consider more deeply these questions relating to rights, in this paper I move further into my critique of the discourse on Indigenous knowledge and intellectual property:

> While IPR systems are available to indigenous peoples, the conceptual differences between these and indigenous systems of knowledge and innovation create special challenges. The design of alternatives to IPR, the creative uses of contracts and agreements, the development of regional agreements for environmental and resource management and control, and the introduction of sui generis approaches and special legislation are among the approaches that could be considered to address these challenges.

As with BDIK, to consider ‘alternatives to IPR’, I refer again to the United Nations Convention on Biological Diversity (CBD) in terms of its potential opportunities and

limitations for providing recognition and protection of Indigenous knowledge. The CBD provides ‘an opportunity if used appropriately, for countries to introduce special national laws beneficial for the protection and conservation of indigenous knowledge, traditions, innovations and practices’ (p. 3). The paper reviews the CBD, and endeavours at its domestic implementation by Australia. In my brief review in IRTK I refer to measures such as the Commonwealth Government’s *National Strategy for the Conservation of Australia’s Biological Diversity* (1996) and its 1999 *Environment Protection and Biodiversity Conservation Act* in terms of their potential to provide for recognition and protection of Indigenous knowledge. I conclude that these measures represent ‘a missed opportunity to fully and effectively include provisions explicitly implementing the CBD, especially in relation to the recognition and protection of Indigenous knowledge’ (p. 4).

This paper IRTK also continues my interest in problems of defining and describing Indigenous knowledge. Again, consistent with the previous papers, this one reasserts my view about the integration of different elements of Indigenous cultural heritage. Here I suggest that ‘Indigenous systems of knowledge and innovation’ are ‘interconnected with other elements of Indigenous cultural systems’ (4). I go on to claim ‘as an integral part of these interconnected systems, Indigenous peoples have a vast knowledge of, and capacity for, developing innovative practices and products from their environments’ (p. 4). Listing features of Indigenous knowledge systems such as communally held rights and interests, close interdependence between knowledge, land and spirituality, intergenerational transfer of knowledge, and its oral transmission, I conclude that ‘these features not only serve as a working definition for Indigenous knowledge; they also preclude such knowledge from being subject to protection under existing IPR systems’ (p. 5). In this paper I acknowledge the diversity and local specificity of Indigenous knowledge, and that ‘more work is needed to explore’ these aspects. (p. 5). In some of my later works I explore the problem that many writings on Indigenous knowledge have, that is to codify and protect it by defining it.

IRTK also takes up the problematic issue of employing the term, and the idea of ‘tradition’ in relation to Indigenous knowledge that is common in many policy and legal discourses (such as the Convention on Biological Diversity). I began in that

paper to consider some of the complexities in the relationship between ‘tradition’ and ‘innovation’ as these pertain to Indigenous knowledge and its expression in the world of practice and modernity. (pp. 5-6). I then take up the matter of the *Native Title Act 1993*, to ask if it has the capacity to allow for recognition of Indigenous knowledge. This section looks to developments through court decisions and agreement making for their potential for Indigenous knowledge protection (pp. 6-9).

I also consider in IRTK the issue of secrecy, suggesting that since ‘some indigenous knowledge is subject to customary rules of secrecy, any regime for recognition and protection will need to respect this and make adequate provisions to prevent unauthorised revelation and uses of this knowledge’ (p. 10). I also briefly review ‘dispossession and loss of knowledge’ and its implications, and the relationships between Indigenous knowledge and what I refer to as ‘common’ or ‘everyday’ knowledge (p. 11).

Consistent with my theme on the relationship between intellectual property in the conventional ‘Western’ sense, and Indigenous knowledge, in IRTK my discussion hinges on an emphasis on some important differences between these two systems. Given this apparent incompatibility, I consider what may be more fruitful areas for protecting Indigenous knowledge, such as alternatives to IPRs. These may comprise expansion of existing IPR systems, or devising new and innovative approaches. In this regard the paper focuses its attention to the system of patents, to explore the relationship between this system and Indigenous knowledge, and problems in attempting to use patents to protect Indigenous knowledge. Mostly, these problems turn on the question of ‘innovation’ as it is found in, or thought to characterise Indigenous knowledge and practice, and ‘invention’ as it is defined as one of the criteria for patentability. Another problem concerning patents is the use of these by individuals and companies to obtain rights in a process or invention based on, or that incorporates Indigenous knowledge, without recognition of, or compensation to the Indigenous people who own or hold that knowledge. The issue of what have been called ‘bad patents’ is of great concern to Indigenous peoples and others, and ways are sought to oppose or challenge such patents, or to find ways of preventing them.

Another critical aspect of the relationship between Indigenous knowledge and patents, which I had introduced in my earlier paper, concerns the impact of bioprospecting (the search for commercially useful plants) on Indigenous peoples. Here, in IRTK I discuss aspects of this having to do with access to biological resources and equitable benefit-sharing (which are regulated under provisions in the United Nations Convention on Biological Diversity), contracts and agreements as offering 'potential for developing creative approaches to bioprospecting and protection of Indigenous knowledge' (p. 24), what are termed *sui generis* approaches, which refers to an approach or legal system that is newly developed for a specific purpose, and other approaches to protecting Indigenous knowledge, such as alternatives to patents, and model laws. I reaffirm my view that 'the existing system of intellectual [property] rights offers limited recognition and protection for Aboriginal and Torres Strait Islander peoples' knowledge, innovations and practices' (p. 31). As I suggest:

> the development of more effective systems to protect Indigenous knowledge could seek to integrate conventional IPR systems with alternative systems based in Indigenous law. The creative combination of IPR systems with contracts and agreements and the development of a community based sui generis system for recognition and protection of indigenous rights could form the basis for the development of a local or regional integrated knowledge and innovation system (p. 32).

This type of statement illustrates that this paper (IRTK) was further developing my critique of the prevailing discourse of Indigenous knowledge that was embedded in concepts of Western intellectual property rights. Here I advocated the need for an approach that would use existing IP laws, while also developing new and innovative legislative solutions. I was building my critique on the basis of both the *content* of my writings and equally importantly, through the ways in which I was producing them. In this latter regard, my strategy for developing my critique was to propose the ideas for the papers to the organisations (mostly government) that were responsible for administering those elements of the official discourse that I wished to critique, and then liaising with that organisation in the production of those papers. In this way, my writings as critique were more clearly coming to challenge the State based, authoritative discourse on Indigenous intellectual property.

My next paper **Law, Anthropology, and the Recognition of Indigenous Cultural Systems (LARICS)** continues to build my critique of the prevailing authoritative discourse of Indigenous intellectual property. In this paper I argue that, although there have been many developments in laws and policies relating to land and native title, 'the legal system has not demonstrated an adequate appreciation of the important and complex connections between land, "title" (or ownership or property rights), ecology, and culture that exist in indigenous societies' (p. 298).

In my earlier works I had begun to expose some of the problems I perceived in seeking to define Indigenous intangible heritage. In the previous paper BDIK I had outlined some characteristics I thought comprised Indigenous intangible heritage, as a way of discussing definitional problems. In this paper, ITRK I proposed what may be considered as a 'working definition' of Indigenous knowledge on the basis of certain 'unique characteristics'. I thus described it as being based in the 'close inter-dependence between indigenous people and the land', 'collective rights', having a 'spiritual as well as a corporeal dimension', and arising from the status of Indigenous peoples as distinct peoples.

Here I contemplate more on the nature of Indigenous knowledge as a component of Indigenous cultural systems, which in themselves have received insufficient attention in discourses on rights, protection and recognition. To explore further the 'nature of Indigenous cultural rights', I suggested that:

> Rights in natural resources and in the knowledge of them, arise from, and form part of indigenous peoples' profound relationships to land. These rights may be identified as a class distinct from other rights … (p. 299)

I outlined my view, based on my reading of anthropological and ethnographic literature, about the features of Indigenous rights:

> These rights and interests are controlled, managed, distributed and transmitted within and between indigenous societies in accordance with well-understood customary laws and protocols. These customary laws are underpinned by the

> cosmological system known as the Dreaming. The Dreaming is a framework for understanding and controlling the world in which ancestral deeds imbue the natural and social worlds with meaning and significance. (299)

In LARICS I contend that Indigenous rights generally arise, or become 'known' about in the public arena when they are perceived to be under threat, or when there are competing interests and claims. These rights often lack adequate recognition in international forums. On this latter point, there has been a major development since that paper was published, in the adoption in September 13, 2007 by the UN General Assembly of the United Nations *Declaration on the Rights of Indigenous Peoples*. That Declaration contains relatively strong provisions concerning recognition of Indigenous cultural rights. However, the UN's adoption of this instrument does not imply universal recognition, which requires ratification by UN member states, and effective implementation of the Declaration at nation-state level through incorporation into domestic laws. Although the Australian Government under the conservative Prime Minister John Howard did not support the Declaration, with the return of a Labor Government in 2007, the Declaration now has support by Australia.

It is possible to list and compile various international treaties, agreements and other developments (such as policy statements, informal and 'soft' laws and declarations), that contain direct, or indirect provisions for the recognition and protection of Indigenous intangible heritage, and marshal these as evidence of successful achievements in the international recognition and protection of these rights. LARICS briefly surveys such international developments as the (then) Draft Declaration, the International Labour Organisation Convention 169, UNESCO instruments, and UN environment related developments (pp. 300-302). Yet, the enumeration of these instruments and standards does not equate to their adoption or implementation.

LARICS does not elaborate a detailed analysis or interpretation of Indigenous cultural rights and international legal recognition of these. Instead, taking a slightly different tack, it suggests that 'a greater reliance on anthropological and indigenous insights can facilitate an enhanced legal recognition of indigenous environmental concepts and attachments' (p. 300). In reflecting on that statement, this is a debatable assertion, and I would now, several years hence, want to examine such a statement in some detail. I

would ask, for example, *how* did I then envisage that *anthropological* insights might 'facilitate' legal recognition of Indigenous rights? Would it not have made more sense to have suggested that anthropological insights could advance *understanding* first, before considering *recognition*? Reviewing the paper now, I am also troubled by the notion of privileging anthropological knowledge or understanding insofar as that might offer some greater insights regarding Indigenous rights. An interrogation of the notion of an anthropological knowledge, and of an *anthropology of knowledge* is needed in order to more fully contemplate these questions of different orders of knowledge. This is a troubled realm for many reasons, including the suggestion in some of the literature that the discipline of anthropology, rather than having held a facilitating or beneficial role in Indigenous rights and culture, has historically had a role in the colonisation, subjugation, denial and erasure of Indigenous cultures. My publications do not explicitly enter into the debates about the nature of anthropological knowledge. Once again, there is an ambiguity in my works, in the sense that, although they are at some implicit level influenced by anthropology, or at least acknowledge the relationship between anthropology and discussions on Indigenous knowledge, they nonetheless remain outside those debates. Overall then, in this light I have argued that my writings have moved toward a critique of prevailing discourses, enabled through their position outside, or on the margins and boundaries of, formal disciplines. The role of anthropology has a particular bearing on this, since that discipline creates a specialised knowledge of the Indigenous 'Other'. That has raised many epistemological and methodological problems about the role of the subject vis-à-vis the discipline, and the practice of constructing other cultures and societies through ethnographic recording and writing (e.g. Clifford and Marcus, 1986; Fabian, 1983; Thomas, 1994). This in turn has implications for considering the relationship between different modes of knowledge (for example, anthropology as knowledge, and Indigenous peoples' knowledge). For the purposes of this Essay I will confine discussion to my argument that my body of writings have worked to enable the conditions for a kind of 'border thinking' (Mignolo, 2000) that exists outside of, yet both draws from, and critiques the formal disciplines, including anthropology. The troubled relationship between anthropology, my published works, and my discussion in this Essay, can be contemplated by the notion that in various ways they are all concerned with the problematics of representations of 'the Other' (see for example Khare, 1992; Fabian, 1990; Said, 1989).

Another aspect of the discourse on Indigenous intellectual property subject to critique in LARICS is that of 'property', a concept that I had already begun to examine, or at least refer to in earlier papers. The concept of property as it is formulated in the Western tradition lies at the heart of the development and operation of the intellectual property system. In LARICS I question the applicability and relevance of this concept for Indigenous cultures. I wrote here that 'the uncertainty regarding the roles and definitions of "property" in indigenous societies ... highlight[s] the need for a serious consideration of anthropological insights and those gained from indigenous discourses' (LARICS, p. 302). I did not elaborate in this paper on what I meant by either 'anthropological insights' or by 'indigenous discourses'. Anthropology as a discipline and practice has a significant role in regard to Indigenous knowledge, and the formation of a particular type of anthropological knowledge needs to be interrogated. The notion of 'Indigenous discourses' as a particular 'standpoint' (Nakata, 2007) is also critical to the discussion. The development of this kind of standpoint can present the conditions for resistance, and/or opposition or challenges to, the prevailing dominant Western discourses and systems of knowledge (see for example Chakrabarty, 2000 and Prakash, 1999 on Indian forms of counter-knowledge, and Smith, 1999 and Muecke, 2004 on Australian and New Zealand/Maori Indigenous knowledges). I discuss standpoint further in Chapter Five.

Another aspect of 'property' as outlined in LARICS is the idea that Western systems of law, knowledge and order are inherently based in 'individuality', which is in contrast with Indigenous cultural systems that emphasise group and collective rights. In reflecting on this now, that kind of presumed binary opposition (individual versus collective) needs to be reconsidered and further explored. The management and politics of Indigenous knowledge by, and within Indigenous communities appears to comprise a more complex set of interrelated group and individual rights and interests.

In LARICS I also briefly introduce a theme that is to form part of my ongoing discussions in other works, around the notion of Indigenous cultural heritage being 'fragmented' and 'compartmentalised' by Western laws and policies. I wrote:

> The terminological debates concerning notions of 'property' and the applicability of this concept to indigenous cultures also illustrate the ways in which Western law and policy fragment indigenous cultures. (302)

LARICS begins to map out a problem concerning the relations between different knowledge systems, or as I term them in this paper, 'worldviews' regarding property. The paper suggests the possibility of 'plural systems of law and practice' (303). It does not interrogate the problematic of plural systems (cf. Merry, 1988; Guillet, 1998). The particular nature of Indigenous concepts of property (and property rights) is explored by reviewing the literature on Yolngu concepts and the relationship between these and land tenure, in the context of the developments leading to the introduction of the *Aboriginal Land Rights Act (NT) 1976* (pp. 304-05). That discussion is intended to illustrate some of the complexities and challenges of translating categories and concepts across cultures. The paper dwells on the problematics of cross-cultural translation, of concepts and ideas about such things as property, heritage, and resources. These concepts, which have accepted meanings within Western legal-policy and administrative settings and contexts, may not have the same sets of meanings and understandings to Indigenous people. I state the problem in the following terms:

> The western legal concept of property is underpinned by the notion of individual rights and ownership. Yet the terms 'cultural property' and 'intellectual property' are frequently used to denote aspects of indigenous cultural heritage. How can a legal system founded on principles of individuality accommodate a different system in which various kinds of group rights prevail? (p. 305)

While I did not expand on the general problems of cross cultural translation in this paper, the comment does raise some further questions. For example, should the problem be thought of as one knowledge and cultural system (i.e. the dominant Western one) seeking to *accommodate* other, very different systems (Indigenous ones)? I referred to the possibility of plurality earlier in LARICS, suggesting a scenario in which different knowledge and cultural systems can be seen to be juxtaposed alongside one another, without a hierarchy or one system

'accommodating' another. This idea of a plurality forms a subject for further discussion in my later paper *Indigenous Knowledge: Beyond Protection, Towards Dialogue*, which takes up this notion through the notion of a 'dialogue' between different cultural systems and knowledges. These concepts of dialogue and plurality warrant further elaboration and analysis, in order to more fully explore asymmetrical relations of power, and the contested, localised knowledges and political formations that may underpin dialogue and the formation of plural systems. My final Chapter in this Essay explores the relationships between the body of knowledge formed by my writings, and other systems of knowledge.

Although LARICS argues for greater recognition of Indigenous cultural rights in Western law and policy, and suggests a role for anthropology and Indigenous perspectives in achieving such recognition, it does not move towards interrogating the kinds of relationships, disjunctions and alignments that Indigenous, and non-Indigenous systems of knowledge might have. Some of my later works enter into a more considered exploration of these matters, in an endeavour to move beyond discussions about the need for recognition and protection (see in particular my *Crossing a Bridge*, and *Indigenous Knowledge; Beyond Protection, Towards Dialogue*). However, LARICS makes a valid point in asserting that 'a first step towards achieving recognition of indigenous rights in culture and heritage may require a fundamental shift in language, terminology and definitions' (p. 306). This point is illustrated by drawing attention to some contested notions of the term 'property' as it is used in the concept of 'cultural property'. Not only does usage of terms such as 'property', 'heritage' and 'resources', I suggest, render communication between Indigenous and non-Indigenous domains blurred. I also argue that these 'problems of terminology' highlight the ways in which 'Western legal discourses fracture the unity of indigenous cultures' (307). I state that 'the dominant legal and political system enacts separate laws and practices to govern and regulate land, natural resources, and cultural expressions respectively; but these are not dealt with as part of a single interlocking system'. I go on to say: 'a new conceptual approach is required if effective recognition and protection is to be achieved for a distinct class or category of cultural rights of indigenous peoples' (308). This question of fragmentation is a recurring theme in my subsequent works, especially in *Bridging the Gap*, and *Writing Heritage*.

LARICS argues that Indigenous peoples have rights in 'biological resources and traditional knowledge and practice' that form a distinct class of rights, and which 'form elements of their cultural heritage' (309). Here again, my reference to a 'distinct class' of Indigenous rights is a consistent theme throughout my writings, though one requiring greater elaboration and discussion. The problem enunciated in LARICS is that the Australian legal and political system is *ad hoc* and fragmented, and this results in 'a patchwork of ad hoc laws regulating natural resources, environmental protection, conservation and management, and land in each state and territory' (LARICS, p. 309).

I state that 'existing legal regimes generally give priority to state rights in resources' (310). I elaborate:

> The history of regulation and control over indigenous affairs is essentially one in which the dominant western legal-political system intersects with indigenous concepts and systems of meaning. It is a history of contested domains in which attempts at integrating different systems of thought have not adequately represented indigenous systems. Where one system benefits the commercial and the utilitarian, emphasises physical entities, and articulates in the language familiar to a long established legal tradition, the other system maintains a focus on totality and on the interrelationships between persons, things, and between tangible and spiritual.

This suggests an irreconcilable or incommensurable gap between Indigenous, and non-Indigenous systems of knowledge and thought – a notion that I subsequently question in my later papers, especially *Bridging the Gap*, and *Indigenous Knowledge, Beyond Protection, Towards Dialogue*.

LARICS presents a brief survey of some of the areas of law relating to land, environment and biological resources, to further illustrate my point about lack of recognition of Indigenous cultural rights. I conclude that:

> current laws and policies in Australia do not adequately incorporate an understanding of the intricate relationships between land, biological resources, and cultural products and expressions as these pertain to indigenous societies. Given the profound and complex inter-connections between land, environments, and cosmology in indigenous societies, these peoples' rights in natural biological resources in these cannot be reduced to one dimension such as a right in land, natural resources, or intellectual property (p.320)

My work presented in the above papers, IRTK and LARICs, is taking my writing further into a critique of the Indigenous intellectual property discourse, and is seeking to move towards a direction in thinking that can properly challenge the prevailing notions of law, property and individualism that underpin existing approaches to Indigenous knowledge.

The third publication in this Group **Ethical Relationships for Biodiversity Research (ERBR)** continues my critique, but from a perspective of human rights and ethical issues. Its emphasis is much more firmly on the area concerned with biological diversity in regard the formation of agreements for conservation of biodiversity, and associated ethical issues. This co-authored publication argues that international and national human rights standards are vital if the owners and holders of Indigenous biological resource related knowledge are to have their rights in this knowledge effectively protected. The paper provides an overview of developments in this area. A particular focus of that paper was on ethical relationships in the development of equitable benefit sharing arrangements with Indigenous people. This refers to the idea that agreements can be negotiated between Indigenous people who hold and own knowledge associated with biological resources, and those wishing to use that knowledge for wider purposes such as scientific, pharmaceutical, agricultural and cosmetic product research and development. The United Nations Convention on Biological Diversity (CBD), mentioned in several of my previous papers, offers a very important legal vehicle through which such arrangements might be developed.

ERBR reviews a range of laws and agreements developed throughout the world that have sought ways in which Indigenous peoples and others (such as governments, non-government organisations, and science and industry organisations) might share in

biological knowledge and resources, within the broad framework of the CBD. This paper has a focus on exploring ways that Indigenous peoples' human rights in their biodiversity-related knowledge can be recognised and protected. Issues such as informed consent are among those examined in the context of ensuring that research and other activities relating to biological resources and Indigenous peoples are carried out in accordance with ethical standards and principles. This paper refers to non-legislative approaches such as protocols – rules for appropriate behaviour in research – that are relevant to recognising and protecting Indigenous rights.

The subject matter of this paper is oriented more towards practical and empirical issues in regard to Indigenous knowledge, and moves significantly away from the concern over the relevance of intellectual property emphasised in my previous work. The reason for this more practical orientation in this paper is largely due to the circumstances in which the paper was produced. It was originally prepared as a discussion paper by researchers and academics at Sydney's Macquarie University, as part of a project funded by the University's Vice Chancellor to explore ethical issues in regard to Indigenous rights in biological resources. That project (referred to as 'Development of Ethical Approaches and Protocols for Cross-Cultural Research and Benefit Sharing with Indigenous Peoples') was funded during 2004-05 by a one year Development Grant from Macquarie University's Research Office and Vice-Chancellor's Office. At an early stage in the drafting of the discussion paper I was invited to contribute to the paper as a co-author with Professor Donna Craig, then with Macquarie University's Centre for International Environmental Law. The paper was then submitted to the Macquarie Journal of International and Comparative Environmental Law.

A Summing Up of Group II Publications

In this Group of publications my critique of the discourse of Indigenous knowledge that is entrenched within intellectual property rights is more fully developed. My writings have now, in this Group, shifted more clearly away from, or outside the borders of established discourses and governmentality, to formulate a critique of those. The works enter the discourse and challenge it by interrogating specific aspects. The papers consider some of the problems I have perceived in the relationship

between Indigenous knowledge and the patent system (in my paper IRTK), and more widely in the lack of fit I discern between Indigenous systems of knowledge, and Western laws relating to land, heritage and environment. In forming this detailed analysis and critique, I have in these papers suggested that there is a distinct class, or category of cultural rights, that is, Indigenous cultural rights in intangible heritage that are not recognised or protected by Western law and policy. The papers in this group also explore some other important aspects of Indigenous rights not fully discussed in my earlier works, relating to ethical considerations that need to be accounted for in working between Indigenous knowledge and Western concepts of biological diversity and environmental management (in my paper ERBR).

Chapter Four: Crossing Boundaries and Building Bridges (Group III Publications)

5 Bridging the Gap or Crossing a Bridge? Indigenous Knowledge and the Language of Law and Policy (BTG, 2006)

6 Writing Heritage: The Depiction of Indigenous Heritage in European-Australian Writings (WH, 2007)

7 Indigenous Knowledge: Beyond Protection, Towards Dialogue (IKBP, 2008)

My writings in this Group take a further shift away from a critique of intellectual property, to more a more reflective exploration of conceptual issues around the relationships between Indigenous knowledge and 'Western' knowledge. In this Group, my work has established more clearly a context that allows for the kind of critique that is possibility through 'border thinking' (Mignolo, 2000). The works I bring together for this part of my Essay comprise two more published papers and a book, all of which were produced under different circumstances and in different situations. These works bring another dimension to my critique on the authoritative, State based discourse on Indigenous intellectual property, as they deal more fully with my conceptual interests such as problems in classification and use of terminology, relationships between categories, and questions of difference in the interplay between different knowledge systems. I have labelled the theme for this Group 'Crossing Boundaries and Building Bridges' to capture the sense that these three works share a common interest in exploring commonalities and differences between and among categories and concepts such as 'Indigenous knowledge' and 'Western science'. 'Crossing Boundaries' refers to the idea of traversing lines of demarcation between disciplines, concepts and categories for analytical purposes; while 'Building Bridges' suggests a more strategic and permanent rapprochement between otherwise distinct entities.

Bridging the Gap (BTG) began as a presentation to an international conference held in March 2004, called 'Bridging Scales and Epistemologies: Linking Local Knowledge and Global Science in Multi-scale Assessments'. That conference, in

Alexandria, Egypt, formed part of a process known as the Millennium Ecosystem Assessment (MA), conducted between 2001 and 2005 by a group of non-government conservation and sustainable development organisations, research and academic institutions, and experts and advocates to 'assess the consequences of ecosystem change for human well-being and to establish the basis for actions needed to enhance the conservation and sustainable use of ecosystems and their contributions to human well-being' (Reid et al, 2006, pp. ix). The conference brought together Indigenous and local peoples, scientists, policy-makers, activists, and others involved and interested in ecosystems and human livelihoods, to review current projects, and to find ways of integrating Indigenous and local peoples' views, and those of the wider community. In this paper I was interested in exploring some of the more conceptual issues underlying the categories 'Indigenous knowledge' and 'Western science'. My previous works had highlighted the limitations in seeking to understand, regulate, and protect Indigenous intangible heritage within the domain of Western law and policy. In the papers in this Group I wanted to take the discussion further, to interrogate the received categories, concepts and terms that have been used throughout the discussion in my writings to date, and in the literature and legal and policy documents my works refer to. In this way my work takes up more fully my interest in language, textual representation, and questions about the epistemological foundations of discourses and discussions on Indigenous knowledge and its intersection with other kinds of knowledge.

The paper BTG took up these themes by calling for recognition of complexity and plurality as a way forward to developing a greater commensurability between and among disparate knowledge systems. The paper questions the relationships between epistemologies – Indigenous and non-indigenous - seeking to understand something of these relationships through the historical and anthropological contexts of their development. Where in my earlier papers I had used the categories such as 'Indigenous knowledge' and 'intellectual property' in relatively unexamined ways, here I am more interested in elucidating the contradictions, tensions and possibilities for engagement that arise in the intersection between Indigenous knowledge systems and dominant modes of knowledge (having specific reference to national and state legislative and policy regimes). In BTG I argue for the possibility of a 'space within national laws and policies for inscribing indigenous forms of cultural practice as well

as by using inter-disciplinary and multi-faceted approaches to legislative and policy development' (p. 160). In my references in BTG to creating a 'space ... for inscribing indigenous forms of cultural practice' I provide the foundations for an interest in a (re) positioning of alternative knowledge systems within the dominant paradigm. By considering forms of practice that can allow for such a re-positioning, it is necessary to think beyond the received categories and systems of thought that constitute the dominant set of knowledges, towards the kinds of oppositional standpoint argued in postcolonial critiques such as Mignolo's 'border thinking' (Mignolo, 2000). Border thinking is a modality in which critiques can be developed of several discourses from situations on, outside, or in between borders, thus enabling a destabilisation of hierarchies and oppositions. I take up this theme in more detail in my final Chapter.

My writings have produced a body of work that interrogates the notion of 'Indigenous knowledge' as a discrete, homogeneous category or subject matter. In BTG, for example, I argued that the dual categories 'Indigenous knowledge' and 'Western knowledge (or science)' are not mutually exclusive; nor are they discrete, homogenous entities. The paper argued for the importance of acknowledging a plurality and complexity within each of these systems of knowledge, to demolish the 'we/them' divide. This destabilising of the 'grand narratives' of hegemonic knowledge systems in order to create a 'persistent recognition of heterogeneity' (Spivak, 1987, p. 211), in principle at least, is intended to create a space in which the multiplicity of voices of the 'native Other' can find articulation. Yet in producing my work, am I not also, unwittingly complicit in establishing an authoritative position, which has implications for 'who has the right to speak'? Is my work, at least implicitly, purporting to 'speak for the Other', and by virtue of this, therefore contradicting the very strategy (that of allowing 'the narratives of the Other to be heard') that I am seeking to develop in my works? The problem of representing the 'Other' in Western writings and other discourses is taken up by Spivak, for example, who offers an 'alternative analysis of the relations between the discourses of the West and the possibility of speaking of (or for) the subaltern woman' (1988, p. 271) to highlight the problematic of the subjugated position of the subaltern. In her paper 'Can the subaltern speak?, Spivak alerts us to the problem of endeavouring to 'rescue' the voice of the oppressed and subjugated (subaltern) peoples from the texts and discourses of the colonisers. She argues that the task of allowing the subaltern to be

properly represented, or allowed to 'speak' is always likely to be at risk of being 'complicit with the further production of the subaltern' (Childs and Williams, 1997, p. 163). In other words, the question is can we ever enable representations of the Other that are not constrained by the texts and discourses from which we are seeking to liberate them? Alcoff (1991-92) too has examined the problem of 'speaking for others', arguing that the social location of the speaker is a critical factor. Although my writings are not *about* 'the Other', but rather, are about textual representations about 'the Other', they do nonetheless demand that I examine my own voice in the production of my work. I elaborate on this below.

Writing Heritage (WH) is a major component in my whole body of work, in which I explore as a historical narrative, how Indigenous cultural heritage has been textually represented in European writings. This book retains many of my interests and themes developed in previous works, but also takes a major shift from those works in that it is based more clearly in a formal discipline – that of history. For this work I wanted to place my interests in the intersections between Indigenous knowledge and other concepts of cultural heritage, and Western discourses on law and policy, into a historical context. In this way, I could draw on my interest in use of primary historical materials, and also explore changes and continuities in the textual representations of Indigenous heritage (including intangible heritage) over a period of time in Australian history. My focus on textual and discursive interpretation had grown out of my previous publications, and the production of this book presented an opportunity to pursue my interest in these themes in a more extended piece of work.

Another important move in this work is in my use of the more general, and perhaps more appropriate term 'Indigenous heritage' to refer to what I had called in many places in some of my previous writings 'Indigenous intellectual property'. That signals two themes. It articulates my view espoused in this book reaffirming that 'Indigenous knowledge' is an element of Indigenous heritage as a more inclusive subject matter. It is also an implicit strategy to use a less fraught term, especially in the light of my previous writings in which use of terms such as 'Indigenous intellectual property' may be contested and debated.

In WH I continue to pursue my interest in the ways in which non-Indigenous discourses, texts, policy and legal documents and other writings have portrayed the intangible dimensions of Indigenous heritage. Among the themes in this work is a discussion about the notion that Europeans formed of 'authenticity' and 'originality' in Indigenous culture and heritage, and on the ways in which their texts represent these presumptions. The book presents a close examination of the language used by Europeans who encountered, recorded, collected or observed the various elements of Indigenous heritage. Another of the book's themes is that Europeans' representations of Indigenous heritage tended to emphasise physical aspects, to the neglect of intangible heritage. *Writing Heritage* examines the concept of Indigenous heritage in a unique historical context, paying particular attention to European discourses, and themes of authenticity.

This work originated with an idea I had about setting the term 'Indigenous heritage' in a historical context, to explore how, over the period of approximately 100 years, this term has been constructed though the diverse ways in which Europeans have observed, engaged with, and sought to understand the different aspects of Indigenous cultural heritage. My initial plan was to produce a relatively brief 'discussion paper', using funds I received from a National Council for the Centenary of Federation History and Education Grant in 2001. It seemed appropriate to situate this study in a context of celebrating the 1901 federation, since my interest was also in examining the representation of Indigenous heritage in discourses of law and policy at federal, state and territory levels since federation. Another reason for linking my interest in representations of Indigenous knowledge and heritage to federation was the dominance of the Northern Territory (NT) in the narrative I was researching about a history of European representations of Indigenous heritage. The NT became a Commonwealth territory in 1911, and remained so until 1978 (Horne, 2007). This region of Australia played a large role in the history of representations of Indigenous peoples and their heritage, as it was viewed as a kind of 'living laboratory' for Europeans' notions of an 'authentic' Aboriginal culture. My production of this work was a departure from previous writings in that I wanted to situate my discussion more within a historical context. In part, my reason for this was in order to examine the possibility that for European Australians, there has been a long history of representing Indigenous heritage in a relatively limited way. My argument in *Writing Heritage* is

that there has been a persistence of representations of Indigenous heritage as fragmented and dispersed. Many observers and writers on Indigenous heritage over the past century and more have depicted this heritage in terms of only one of its many forms and expressions, generally neglecting, or omitting to regard that heritage as having multiple, interconnected elements. In the latter Chapter of *Writing Heritage* I pay some attention to the intangible aspects of Indigenous heritage – what I have called throughout my discussion in this book 'Indigenous knowledge' – pointing out that this aspect has generally been neglected or misunderstood in European depictions.

In *Writing Heritage* I argue for a rethinking of the way Indigenous heritage is depicted or represented in European writings, including in legal and policy discourses, so that it is understood more as an inclusive concept. Such rethinking, I suggest, would enable a (re) connection of all the diverse elements of Indigenous heritage, to consider it as a whole, integrated body of practices, values, beliefs and expressions. Although I did not pursue this idea in the book, a more integrated way of viewing Indigenous heritage could open up a greater possibility for giving voice to Indigenous peoples' own views and perspectives on their heritage.

Preparation and production of *Writing Heritage* was based on extensive primary research in archives and libraries. The narrative of this book is a journey through textual representations by European collectors, ethnologists, anthropologists, archaeologists, administrators, politicians and policy makers over the past century. It is structured in three parts. While the narrative is chronological, the discussion is also thematically oriented. It presents ideas about European's presumptions about an 'authentic' Indigenous heritage that were based in classical representations of noble savagery, tensions and contradictions in the concept of innovation and aesthetics as important factors in the production of Indigenous material culture, rivalries between 'amateur' and professional collectors, and the shift in depictions and displays of Indigenous cultural objects from ethnographic curiosity to fine art.

In the first chapters I take the reader through a narrative presenting samples of writings by early ethnologists, administrators, collectors and artists, in which the dominant focus was on collecting and displaying objects of Aboriginal culture. This

collecting activity was guided by a prevailing notion that Aboriginal culture was ‘disappearing’ or ‘dying out’. Europeans’ notion therefore was that the remnants (stone tools, bark paintings and the like) needed to be collected and displayed in order to ‘rescue from oblivion’ knowledge of the people who made these things (Davis, 2007, ch. 1). Although the main emphasis in collectors’ pursuit was on the tangible or physical objects, there was also a great interest in the recording and documenting of Aboriginal expressive and performative culture as in ceremony and ritual. Another theme that persists throughout my discussion in the book also concerns Europeans’ interests in classification and typology of Indigenous heritage.

My argument in *Writing Heritage* was that most European collectors, observers and recorders of Aboriginal culture did not perceive that culture as a totality in which the expressive, performative, and physical and intangible elements all formed part of the whole. Certainly, as I noted in this book, ethnographers did record the roles played by objects such as the sacred *Tjurunga* in ceremony, but in general, there was very little if any attention paid to the connections between performance, objects, and the intangible elements that are now termed ‘Indigenous knowledge’ or ‘Indigenous intellectual property’. The sacred dimension of Aboriginal culture was among the aspects studied and documented by observers during the period I discuss in *Writing Heritage*, but it did not appear that Europeans were aware of, or at least they did not document an awareness that features of the sacred could be construed as some kind of ‘property’ akin to Western intellectual property.

The second part of *Writing Heritage* continues the narrative, extending into the period (1930s to 1950s) during which there was a growing interest by Europeans in the need for conservation or preservation (these were the terms used at that time, instead of ‘protection’) of Indigenous heritage. This part of the discussion leads into the third and final section of this work, which brings the book back closer to the subject matter and approach of my previous publications, that is, discussion on legislative and policy developments relating to Indigenous intangible heritage. Here, taking up some of the ideas from my previous works, I argue for a need for an integrated view of Indigenous heritage to be adopted by observers, recorders and, importantly, by decision makers and those developing policy and legislation.

Where my previous works were based primarily on critiques and reviews of legislative and policy documents, *Writing Heritage* deploys a wider range of material for its discussion, with historical archival sources being dominant. Much of the historical material comprises private correspondence, journals and diaries. The book also makes extensive use of historical photographs. This work therefore builds on my previous papers, and extends the discussion into broader aspects, to take a historically based approach to representations of Indigenous heritage. The focus in this work on textual representations continues my interest from earlier papers, and is the main approach in *Writing Heritage*.

While *Writing Heritage* was influenced by a reading of the literature on colonial discourse studies and post-colonialism, my aim was to create a style and narrative structure with minimal explicit theoretical discussion. This approach may be useful in enabling the book to be accessible to a wider reading public. However, in reflecting on this work some three years after its completion, I now consider that the book would have benefited from more analysis and interpretation of the texts I survey, and a deeper engagement with relevant theoretical and other literature, as well as a more self reflexive approach. This latter point is important, since, as one reviewer of *Writing Heritage* (Schaffarczyk, 2009) pointed out, the problem in this kind of study is that I am to some extent, trapped in the discourse that I seeking to critique. The book would have been enhanced if I had written my own voice into the text, to position myself among the various texts and writers that I discuss.

Indigenous Knowledge: Beyond Protection, Towards Dialogue (IKBP), as with some of the earlier ones, began as a presentation to a conference, Indigenous Studies and Indigenous Knowledge, held at the University of Technology Sydney from 11 to 13 July 2007. The paper was a departure from previous papers, in that I drew for part of the discussion on some of my experiences in the far north-west Kimberley region of West Australia, where I had worked with Aboriginal people and an Aboriginal language centre at Halls Creek during 2005-06 to develop measures for protecting Aboriginal knowledge. Although, as with my earlier works, IKBP presents a critique of some specific legislative approaches to protection of intangible heritage, discussion in this paper takes a shift in direction, to question the emphasis on protection of heritage in much legislation. The paper uses the example of the 2003 UNESCO

Convention on the Safeguarding of the Intangible Heritage to discuss what it sees as limitations in approaches based on protection and notions of property. In the early parts of that paper I refer to my experiences talking with, and listening to Aboriginal Elders in the Kimberley, to situate the discussion about Indigenous knowledge more within a context of place and person. While IKBP maintains consistency with all my earlier works, it extends my interests into aspects of Indigenous knowledge that have had little attention in the literature on protection, property rights and legislative regimes. I explore some of the dimensions of Indigenous knowledge that are based in Aboriginal peoples' expressions of their relationship to country and place. My approach was aimed at moving from discussions and analyses of Indigenous knowledge that seem to reify such knowledge as a disembodied entity subject to discourses on property, legislative and administrative regimes. Instead, I was interested in what might be termed the 'human dimensions' of Indigenous knowledge: ways in which it is expressed, performed, and situated in a context of specific locality, place and person. My paper sought to question how those essentially human qualities of Indigenous knowledge relate, or refer to legislative regimes that emphasise codification, classification and documentation of such knowledge.

A Summing Up of Group III Publications

The writings in this Group have moved beyond the critique of intellectual property and other laws that characterised my previous writings, and developed a more engaged interrogation of the nature of the relationships between the categories or concepts 'Indigenous knowledge', 'Western science' and law and policy. These works have as their focus an interest in language, text and discourse, and in the ways these have constructed aspects of Indigenous heritage. These three works represent an important phase in my writings, as they are critical in further developing my critique of official State authorised discourses on Indigenous knowledge and intellectual property, but also move beyond this. The works in this Group have demonstratred a shift more clearly to developing my position outside the established discourses, and to producing the kind of critical analysis of prevailing technologies of government made possible by the interstitial 'border thinking' articulated in the work of Mignolo (2000).

The major work in this Group, *Writing Heritage,* pursues a wider theme in which I link my previous work on the theme of Indigenous knowledge/intangible heritage to a more inclusive sense of Indigenous heritage. I explore, in a historical context, the discursive construction of that heritage in European-Australian texts. This enables me to further develop the argument, which I had begun to map out in *Bridging the Gap,* for a dialogue in which Indigenous heritage in its inclusive sense – both tangible and intangible – can be understood as having an equal validity within a plurality of texts, knowledges and discourses. The final paper *Indigenous Knowledge: Beyond Protection* maintains these themes, but also shifts my interest further still towards seeking ways in which an appreciation of other dimensions of Indigenous knowledge such as its connections to place, person and memory, might be understood within Western legal and policy discourses.

Chapter Five: A Conclusion: My Publications on the Borders

In this Essay I have critically reviewed a series of my published writings on Indigenous knowledge, intellectual property and cultural heritage produced over the period 1997 to 2008. I have shown that these writings as a whole body of work, form a critique of what I have described as an authorised State sanctioned discourse entrenched within conventional Western legal concepts of intellectual property rights. In this Chapter I want to advance the argument that in order to develop this critique, my body of work is characterised by certain distinct features. The first of these has to do with the particular identity formulation, position, or standpoint from which I have written the works in question. A second feature concerns the position of my writings in the context of being outside or apart from existing discourses and technologies of government, and formal disciplines. A third feature is shaped by the function or purpose of my later writings in particular, which have argued for a plurality of knowledges and the creation of a space for dialogue within and among this plurality.

My Writings on the Borders

As a body of critique, my body of published works sits apart from the different types of knowledge/discourse that I have been discussing in this Essay. It is separate from formal discipline-based knowledges such as anthropology, law, archaeology and history. While it draws from the authorised State-based discourse shaped by Western concepts of intellectual property that I have referred to throughout this Essay, it is also separate from that, since my central task has been to develop a critique of that discourse. My writings are also distinct from, or outside of, that discourse that I have referred to as one of Indigenous cultural and intellectual property rights. Although I have, in my own work, been influenced by all these other discourses, my writings reside in a difference space. It is this positioning of my writings – on the borders of, and outside of (or in-between) other discourses and disciplines – that has enabled me to develop the critique that is a central feature of my work.

Standpoint as Author of my Writings

A critical feature of my writings is that they are positioned outside various disciplines such as anthropology and law. They are also outside, or in between the borders of other discourses such as that formed by Western concepts of intellectual property, and that constituted as Indigenous cultural and intellectual property rights. This 'outsider – ness' of my work is both a function of, and in turn has influenced, my own position as author of these works. The implication of my 'speaking position' in which I write about a subject matter that concerns Indigenous others invites some attention. In reflecting on my role as author of my works, the role of the subject matter of my writing requires that I acknowledge the standpoint of the peoples whose knowledge and culture is being referred to (albeit 'mirrored' through the lens of other texts – policies, laws, and so on) as the subject matter of my work. There are multiple layers to my position as author of these works.

I construct my identity as a 'white', English born male of European-Jewish descent. In my writing and thinking on Indigenous peoples, and in my work with Aboriginal communities and individuals in Australia, I am informed – at least subconsciously - by my feelings of 'outsider-ness' or of being 'other'. In this context, my work is influenced by what Grosz refers to as an 'ethics of Otherness', in an exploration of, as she puts it, 'the ways in which the lived experience of Jewishness contributes to understanding that position of social marginality or exile which the Jew shares in common with other oppressed groups' (1993, p. 57). In my case, this Jewishness does not derive from a religious or devout basis in practice, as my family have been separated from the religious tradition for at least a generation, and 'assimilated' into English and Australian society. My outsider-ness stems instead from what I might describe as a cultural Jewish identity based in ideas and feelings about difference, and a sense of being apart. There is also the sense of shared histories of oppression or of vulnerability. However, I want to argue that identities and positions are not absolutes: they too are contested categories. It is worth elaborating a little on this point, as it forms the critical basis upon which I have produced my body of published works 'on the borders', or 'in-between' borders.

My sense of self-identity is not an essentialised, or absolute. In a similar way, the relationship between my 'self', and the 'others', whose textual representations form

the subject matter of my writings, must be viewed as multi-faceted and complex. By this, I mean that I do not see either my position, however I have defined this in terms of my identity, *or* the category of 'others' (Indigenous peoples and their knowledge), as immutable categories, based on some given or absolute qualities. These positions (self and other) are not somehow 'found', or 'discovered', but are constructed in the contexts of the specifics of place, historical situation, and political circumstances, governmentalities and power relations.

Feminist critic Linda McDowell writes that:

> one of the most striking features of contemporary social theory is the coincidental rejection by feminism and postmodernism of the idea of universality. Both reject the doctrine of a unity of reason, of a universal subject striving towards common moral and intellectual aims, and hence the notion of humanity as a unitary subject. (1992, p. 61).

The idea of identities and subject positions as constructed, contestable entities, in what McDowell refers to a 'crisis of representation', has several repercussions, one of which is a 'repositioning of the author as one of the many voices clamouring to be heard in the text (more common in anthropology)' (1992, p. 62). This challenge to static, immutable and universalistic understandings of the 'I' of subject identities is also taken up by New Zealand critic Wendy Larner in her study of identity formations in the context of Pakeha/Maori women's identities. She writes:

> Rather than understanding 'women' as a pre-constituted identity, or even identities, these works [some of the feminist literature] explore the notion that women are multiply organised subjects whose identities are actively created and recreated in response to contested political, economic and social power relations (1995, p. 178).

She asserts that 'not only can such an approach facilitate a more rigorous analysis of the specificities of the New Zealand context, but it may also allow for a 'politics of difference' which will 'enable more effective political practice given the complexity of contemporary economic, political and social changes' (Larner, 1995, p. 178). This

destabilising of the category of ‘woman’, in Larner’s scheme, has profound implications for the role of knowledge, and the relationship between and among different forms of knowledge. She argues that identity, or positionality, is constituted on the basis of, among other things, locality or place, where this latter refers to multiple senses of ‘place’ – as both a physical, geographical or territorial category - as well as a ‘theoretical and ideological place’ (1995, p. 186). An implication of this is that identity or position must therefore necessarily be influenced by ‘the politics of that place’, since, as Larner points out, ‘the relationship between knowledge and place is one characterised by contestations’ (1995, p. 186). Her personal summing up reflects my own view, in that she states:

> The theoretical and political challenge for me, therefore, is to recognise the situatedness of my own knowledge, and to engage ethically with the knowledge of others. This involves paying close attention to the sites within which knowledges are named, and how the person or group is situated when making their claims. It means entering into an ongoing dialogue, which acknowledges the differences, as well as exploring the interrelationships between these knowledges. This process is one that will require openness, respect and the ability to live with apparent contradictions (1995, p. 187).

Consideration of the politics of position and place then, requires an interrogation of the binary oppositions of ‘I’ and ‘Them’ or ‘Other’, so that these are not unitary, fixed categories, but are situated and localised in the specificities of power relations and governmentality. This destabilising enables a fluidity in approaches to thinking about the relationships between different knowledges, supporting my notion of developing a space in which a plurality of knowledges is possible. However, I am referring here to a plurality in which ideas about difference can be maintained. As Gupta and Ferguson (1992) put it:

> As an alternative to this way of thinking about cultural difference, we want to problematize the unity of the “us” and the otherness of the “other”, and question the radical separation between the two that makes the opposition possible in the first place (1992, p. 14).

Thus an understanding of contested categories allows, in Gupta and Ferguson's scheme, for an exploration of 'the processes of *production* of difference in a world of culturally, socially, and economically interconnected and interdependent spaces' (1992, p. 14, authors' emphasis).

Others have also questioned the notion of essentialised positions. Fuss for example, argues that there are many 'essentialisms', and that the important question is to consider the particular 'purpose or function essentialism might play in a particular set of discourses' (1989, p. xii). Her view is that 'essentialism is typically defined in opposition to difference; the doctrine of essence is viewed as precisely that which seeks to deny or to annul the very radicality of difference' (1989, p. xii). She goes on to say that 'the opposition is a helpful one in that it reminds us that a complex system of cultural, social, psychical, and historical differences, and not a set of pre-existent human essences, position and constitute the subject' (1989, p. xii). However, she claims, 'the binary articulation of essentialism and difference can also be restrictive, even obfuscating, in that it allows us to ignore or to deny the differences *within* essentialism' (1989, p. xii). Anthropologist Khare (1992) also argues for a destabilising of categories, of the idea of the 'Other', as that has been constructed in opposition to 'Us'. He suggests recognising the diversity of 'the Other', so that no single 'voice' (i.e. that of 'Us', or of 'the Other') is privileged. Khare states that 'an earnest dialogue not only recognizes the Other's voice; it also accords intrinsically equal authenticity to the Other's existence and epistemology' (1992, p. 15). He offers a suggestion for an alternative, 'reciprocal anthropology' in which there is a 'genuine dialogue', that 'consciously maintains a sense for *reciprocating advantage at all levels* of representation and communication (whether oral, descriptive, analytical, critical, or synthetic)' (1992, pp. 15-16, Khare's emphasis). These reflections on the politics of positionality have been necessary in order to more adequately capture some sense of my claim that my writings as a whole, over the decade of their production, have moved towards an increasing destabilising of absolutes, thereby enabling a space for greater dialogue and movement among and between different knowledges and voices.

The direct object of my studies and writings has not been Indigenous knowledge and Indigenous peoples *per se*. Rather, my writings are about a discourse and textual

production that is comprised of laws, policies, statements and discussions *about* or that *refer to* Indigenous knowledge and intellectual property. I write at a 'meta-level'; that is, about how the category 'Indigenous knowledge' and *its* subject matter is represented in legal, administrative and policy discourses. The dynamics and relative power relations in my role as author (in the contested sense I have tried to convey above) have important implications in terms of the body of knowledge I have produced, and its relationship both to its subject matter and to other bodies of knowledge.

The discussion and review I present in this PhD Essay adds yet another layer to my authored standpoints or subject positions that are in juxtaposition. According to Toorn and English, 'to use the notion of a positioned speaker may be to invoke essentialist assumptions of identity, or it may involve locating a discursively and institutionally situated subject…' (1995, p. 1). These assumptions come into play when considering the specific role I have when producing particular writings. For example, did my role as an independent consultant invoke an assumed speaking position as an 'expert' with some claims to authority? How has this subject or speaking position influenced my writings and their reception?

Questions of subject positions are examined by feminist theorists such as Harding, who states that these 'standpoints':

> …are critically and theoretically constructed discursive positions, not merely perspectives or views that flow from their authors unwittingly because of their biology or location in geographical or other such social relations (Harding, 1998, p. 17).

Harding claims that her 'study is only a standpoint, not *the* postcolonial and/or feminist standpoint. The standpoint of this book is itself historically locatable in just the way that are the cultural histories, their practices and meanings, that it examines'. She continues:

> [this book] ... does not speak *for* others, for peoples from non-European cultures, though it is informed by their accounts. It does not "study down,"

> sympathetically describing for metropolitan audiences the beliefs and practices of peoples located at their peripheries, though it uses such accounts as evidence for its claims. (1998, p. 18).

Bhambra suggests that 'standpoint epistemology does not apply only to women's position, but to any position of subordination' (Bhambra, 2007, p. 28). However, 'standpoint theory' need not only refer to positions of subordination; it enables an interrogation of any speaking, writing and thinking position in relation to the dominant framework from within which one seeks to develop a critical stance. Alcoff (1991-92) argues that, in considering the 'problem of speaking for others', the social location of the speaker is one of the factors that is most 'epistemically salient'.

The works I have submitted for this PhD have been produced from a diverse range of positions, including from within established bureaucracies and governmental arenas, and also from a position outside formal institutional structures. The diversity of these 'speaking positions' must also necessarily take into account the diversity *within* my own identity, constructed as it is from multiple and sometimes shifting cultural/ethnic senses of self. My writings have also been developed in response to, and in engagement with, the prevailing policy and legal developments, discussions and discourses in Australia concerning Indigenous knowledge, cultural heritage and intellectual property. However, from whichever structural/organisational vantage point I have written, in my relationship to Indigenous peoples and their knowledges, my own subjectivity has remained constant as 'non-Indigenous' (a term that, in my view, requires some interrogation). Thus, at least in this sense, my position or standpoint is as outsider – outside the culture (Indigenous) which is the subject matter of the other texts I am critiquing. This outsider-ness, in combination with my writing outside formal disciplines, I suggest, has contributed to, or has been responsible for, the formation of my set of writings as a body of critique. My 'outsider-ness' has provided the conditions from which I have been able to develop a critique of concepts, terms, categories and assumptions underpinning analyses and interpretations in other texts concerned with Indigenous knowledge and intellectual property rights. The critique developed throughout my published work has been enabled by my standpoint as outsider, because my own understandings and interpretations have been

not been embedded in, aligned with, or developed solely from any one of the formal disciplines or subject fields that I write about.

The question of standpoint figures importantly for writing and thinking across cultures, disciplines, geographies, and localities. Nakata, for example, from the perspective of a Torres Strait Islander, writes about what he terms an 'Indigenous standpoint', in which the challenge is to 'develop an intellectual standpoint from which Indigenous scholars can read and understand the Western systems of knowledge' (1998, p. 1). In the context of education, Nakata is interested in 'developing an Indigenous standpoint from which Indigenous students can view their position as viewed by others as a legitimate academic practice' (1998, p. 5). Indigenous standpoint theory, Nakata argues, 'is a method of inquiry, a process for making more intelligible "the corpus of objectified knowledge about us" as it emerges and organises understanding of our lived realities' (2007, p. 215).

In a discussion on authorial position and standpoint, another question becomes apparent. Writing from within the dominant epistemological system – academic, bureaucratic, governmental, and 'expert' or specialist – how is it possible to critique the dominant knowledge systems while writing – and therefore producing knowledge – from within these systems themselves? As Bhambra argues, following Fabian, '… we must be aware of finding ourselves in the contradictory predicament of seeking to criticize hegemonic interests while working within "relationships that are determined by the context of those … interests"' (Bhambra, 2007, p. 21, quoting Fabian, 1991, p. 257). The apparent contradiction here is that, as I have suggested throughout this Essay, in my own production of writings I have attempted to establish a position of being outside, and apart from the dominant positions, epistemologies and discourses. The paradox remains though, how, or indeed whether it is feasible to develop a truly effective critique when writing, since I have inevitably had to draw on, or at least be informed mostly by, dominant knowledges and discourses. My writing position then, can be said to be a complex one in which I have developed my works from both 'within', yet also 'apart from', dominant discourses and technologies of government.

The multiple, intersecting layers of discourse, textual productions, and peoples and their heritage within which I have produced my work, raise questions about

representation and power. In Said's classic study on discourse and representation, *Orientalism*, he drew attention to the problematic of representations:

> The real issue is whether indeed there can be a true representation of anything, or whether any and all representations, because they *are* representations, are embedded first in the language and then in the culture, institutions, and political ambience of the representer.
>
> …a representation is *eo ipso* implicated, intertwined, embedded, interwoven with a great many other things besides the "truth," which is itself a representation. (1985, p. 272, original italics).

The writings I have produced and submitted for this PhD are in this sense, perhaps themselves representations of representations. By this I am suggesting that my writings have 'represented' (while also critiquing) the texts of laws and policies that have formed the bases of an authorised State sanctioned discourse relating to Indigenous knowledge; and those texts have in some ways sought to represent a perceived European notion of Indigenous culture and heritage (tradition, knowledge, and so on). The problem of representations of Indigenous culture is one that underpins much of my work, and becomes most explicit in *Writing Heritage*. That work, as do some of my others (notably *Bridging the Gap*) attempted to show the diversity and multiplicity of textual representations of Indigenous culture, that move beyond those negative tropes of primitivism, to embrace others such as cultural creativity and innovation.

Position of my Writings in Relation to Formal Disciplines

Perhaps central to my work has been my critique of law, particularly intellectual property law. My work has offered a critical reading and analysis of legal discourse, with a focus on the ways in which the language of law represents textually the specific concepts used to designate aspects of Indigenous culture and heritage. My writing thus engages with law in a critical reading of the discipline, yet does not itself originate in or derive from that discipline. There is a similarly ambiguous relationship between my writings and the discipline of anthropology. This discipline has an

important role in the field of studies on Indigenous culture and heritage, presenting a framework from which Indigenous peoples are the object of (and participants/collaborators in) ethnographic inquiry and interpretation. Anthropological knowledge about Indigenous cultural heritage, including its intangible dimensions, therefore constitutes a very significant body of knowledge against which my publications might be compared, contrasted, or critically interpreted. Anthropology and ethnographic practice constitute a particular kind of knowledge (Fabian, 1983) that contains its own problems, contradictions and challenges. The notion of ethnographic knowledge and writing as constituting an 'authoritative' account of the Other continues to be a subject for much debate and discussion (e.g. Clifford, 1983; Khare, 1992).

The coherence of my work thus operates as an ongoing practice in working outside of, as well as across and between disciplines. I have always taken the view that analysis, interpretation and discussion of the content of the category 'Indigenous heritage' must of necessity traverse, or perhaps subvert the conventionality of the 'disciplines' This is because the nature of the subject matter ('Indigenous knowledge') cannot be readily interpreted or understood within discrete, compartmentalised academic disciplines such as anthropology, archaeology, law, and history. In a similar way, as a kind of analogy or parallel, my body of published work about Indigenous intangible heritage can also be seen as located mainly outside existing discourses and disciplines.

Purpose of My Writings as Critique and Arguing for Dialogue in a Plurality of Knowledges

Considered as a whole then, my published works possess certain characteristics, and fulfil a defined purpose. This purpose is to formulate a critique of other discourses, technologies of government, language and text, as I have outlined above. My work has also functioned to develop an idea for the recognition of Indigenous knowledge as both a distinct body of knowledge in itself, and also as one that exists in important relationship within a plurality between and among different knowledges and traditions. As my work has developed over the decade, it has become more firmly focused on presenting a critique of established concepts, discourses, texts and categories relating to Indigenous knowledge, cultural heritage and intellectual

property. This critique has paid particular attention to the language of law and policy and, as my work developed, has formed a critique of 'essentialised' categories (such as 'Indigenous knowledge' and 'Western science') and of classificatory and definitional aspects concerning Indigenous knowledge and heritage. This reflection on my writings has revealed the particular trajectory in the nature of my analysis and interpretation of the subject matter of Indigenous knowledge and Western law and policy. The early writings were works based mostly in compilations and surveys of law and policy, but which they also began to discern some significant limitations in the prevailing discourse of intellectual property and other conventional legal regimes as they relate to Indigenous intangible heritage. As my work has progressed it has been increasingly concerned with questioning underlying concepts, categories and relationships, thus showing a more reflective orientation. My works *Law, Anthropology, and the Recognition of Indigenous Cultural Systems*, *Bridging the Gap*, *Indigenous Knowledge: Beyond Protection*, and *Writing Heritage* in particular display this more critical stance. It is in these works that I have also begun to map out an idea about greater recognition of Indigenous knowledge as a distinct form of knowledge, while at the same time arguing for a plurality of different knowledges.

Critique, Essentialism, and Strategic Essentialism

A major aspect of the critique that I have developed through the course of my publications relates to the notion of constructed homogenous entities such as those denoted 'Indigenous knowledge' and 'Western science'. In Western legal and policy discourses, 'Indigenous knowledge' as a category of analysis, interpretation, and regulation and management may be perceived to possess its own 'essence', or internal properties. As my writings have progressed I have become increasingly interested in questioning the notion of a single, unitary category such as 'Indigenous knowledge', seeking instead to emphasise the heterogeneity and diversity that underlies such a category. My papers in Group III are more interested in this problem, and have begun to map out some of the critical questions.

My works have endeavoured to raise awareness of the validity of Indigenous knowledge, as an epistemology that should not be subsumed within Western discourses of intellectual property. There is a risk however, of creating, or at least

perpetuating or validating the very kind of ‘essentialist’ discourse about Indigenous knowledge that I have sought, through my writings, to interrogate and oppose. I am suggesting the idea of an ‘essentialist discourse’ here that refers to an assumption that Indigenous knowledge, and the peoples who hold and own that knowledge, are defined on the basis of an ‘essence’ of defined features. This distinguishes them in absolute terms from others and their knowledges. The notion of essentialism is one that is debated at length in some of the literature on post-colonial theory (e.g. Ashcroft et al, 1998). It poses the problem of potentially emphasising the very binary oppositions that colonial and post-colonial discourse criticism is intended to challenge. In discussions and debates on this, Spivak (1984-85, pp. 183-84; Ashcroft et al, 1998, p. 79) has referred to what she has termed ‘strategic essentialism’, as an alternative way of thinking about essentialism. This is an argument that ‘in different periods the employment of essentialist ideas may be a necessary part of the process by which the colonized achieve a renewed sense of the value and dignity of their pre-colonial cultures, and through which the newly emergent post-colonial nation asserts itself’ (Ashcroft et al, 1998, pp. 79-80).

Different Knowledges: Situating My Work among Other Forms of Knowledge

I want to now explore further some of the implications of my writings in the context of relationships between and among different knowledge traditions more generally. In this context, the concept of ‘border thinking’ in the work of Walter Mignolo, provides a useful framework for discussion. ‘Border thinking’ is related to what Mignolo has termed an ‘other way of thinking’ (borrowed or adapted from Moroccan philosopher Abdelhebir Khatibi), in which a space is opened up for critique from positions outside of particular ways of knowing. As a mode of postcolonial critique, border thinking in Mignolo’s scheme, recovers subjugated and subaltern knowledges by forming a ‘double critique’ that is ‘beyond’, or ‘outside’ the established discourses (Mignolo, 2000, pp. 66-67). In Mignolo’s scheme, referring to critiques of Western and Islamic ways of thought, or traditions, a ‘double critique’ implies to ‘think from both traditions and, at the same time, from neither of them’ (2000, p. 67).

These notions of ‘border thinking’ and ‘an other thinking’ offer useful frames for understanding how my writings have developed a critique of specific discourses, and

modalities of governmentality and of technologies of government, while residing on, in between, or outside the borders of those. In this context, my writings, considered as a particular discursive production, can be examined in terms of their relationship to other discourses. Of particular interest are those formal discipline-based kinds of knowledge, especially legal and anthropological, that have influenced my own writings. The body of my published works sits both outside of, and in juxtaposition with, these disciplinary knowledges. It exists outside these because my writings have not been produced within the boundaries of a particular discipline; instead, I have worked with reference to several disciplines. All my published works submitted for this PhD were written from outside the formal structures of supporting research or academic institutions.

There is a clear movement in my writings towards a search for an alternative space in which Indigenous knowledge might be considered more inclusively, while also acknowledging its distinctiveness, both in terms of its relationship with other aspects of Indigenous heritage (as discussed particularly in the final sections of *Writing Heritage*), and also in its relationship to other knowledge traditions (such as those sometimes referred to as 'Western science'). I am suggesting here that it is my particular position, and the situations from which I have written, that have created the conditions in which my writings have formed a critique of State authorised discourses and knowledges. To further explore this idea in which my writings-as-critique have been produced outside borders, I return to cultural critic Mignolo, to consider his use of the notion of 'locus of enunciation'. In Mignolo's scheme, this refers to 'the significance of the place of speaking' (1993, p. 123), a place, location or position from which knowledge is created and articulated. For Mignolo, the task is with 'dislodging or multiplying' the centre of the locus of enunciation (1993, p. 124). This enables the development of 'new perspectives on colonial and postcolonial discourse' (1993, p. 124). Somewhat similar to the concept of standpoint, this locus of enunciation refers to a position, place, or referent from which critique, analysis and interpretation of other kinds of discourse might be conducted. It is a useful concept to further understand the position from which my writings have been developed, and the particular purpose they fulfil as a critique. The concept of locus of enunciation is one of the critical methodological considerations in the study of subjugated, or what is called 'subalternised' knowledge. As Mignolo puts it, the 'long process of

subalternization of knowledge is being radically transformed by new forms of knowledge in which what has been subalternized and considered interesting only as an object of study becomes articulated as new loci of enunciation' (Mignolo, 2000, p. 13).

I am drawing on these ideas about 'locus of enunciation' and 'border thinking' as a context for thinking about my argument for a plurality of knowledges (in the sense of a problematised, and contested relationality) in which my body of writings can be located. To further explore this, a starting point might be to consider the position of dominant knowledges (imperial, colonial, State authorised knowledge) vis-à-vis other, alternative knowledges (e.g. subjugated, colonised, and subaltern). The relative positioning of alternative kinds of knowledge figures as a central subject for discussion in post-colonial studies. In this literature, alternative ways of knowing, which may be glossed variously as local knowledge, Indigenous knowledge, or 'Southern knowledge' (e.g. Connell, 2007), are explored in the context of considerations about the interplay between different knowledge systems, and the hierarchies, power relations, histories and disciplinary configurations of diverse knowledge systems. I am arguing that my body of writings has produced a critique, based on the particular character and functions of the works. In producing this body of work I have articulated my own speaking or writing position, as a challenge to what I regarded as hegemonic knowledge produced by prevailing legal discourses as those have sought to manage and regulate Indigenous intangible heritage. My work in this sense, has a particular character that is defined by it having been produced outside of existing disciplines and discourses. Its character is shaped by the fact that, while certainly being *influenced* by other disciplines and discourses (such as law), it does not retain a particular allegiance to those in forming the critique. This character of my work has enabled it to exhibit some of the tendencies toward what Mignolo (2000) has termed 'border thinking', to interrogate and challenge the received homogeneous categories and concepts such as 'intellectual property', which have broadly shaped dominant discourses on Indigenous knowledge.

I have referred to those discourses in this Essay as State authorised and sanctioned discourses embedded in Western intellectual property rights regimes. By contrast, the production of an alternative set of discourses and a knowledge that challenges and

critiques the State authorised discourse might also provide a space that allows for the 'representation of', or articulation of a 'voice for' Indigenous peoples and their systems of knowledge and culture. My later writings have begun to explore this possibility, as, for example in *Indigenous Knowledge: Beyond Protection, Towards Dialogue*, where I conclude with a suggestion for developing a space in which a dialogue is possible between Indigenous, and non-Indigenous systems, knowledges and epistemologies.

I want to explore a little more here, how the body of work formed by my writings has established the conditions in which I have been able to develop a critique of authoritative, State sanctioned and formal discipline-based knowledges. The concept of 'border thinking' articulates a space for a new kind of thinking (or the re-emergence of older, existing ways of thought). Border thinking, as Mignolo puts it, is:

> working toward a critique of colonial categories; it is also working toward redressing the subalternization of knowledges and the coloniality of power. It also points toward a new way of thinking in which the dichotomies can be replaced by the complementarity of apparently contradictory terms (2000, p. 328).

This is a way of producing a critique of colonising or authorised narratives and discourses from a position neither within the dominant knowledge system, nor from alternative (subaltern or marginalised) knowledge. Drawing on this idea, I have suggested that my production of writings, together with this Essay, can be seen to provide a space for a kind of 'border thinking'. This can be illustrated by placing my body of writings in the context of the following sets of discourses or knowledge/power formations:

1. Dominant, or centralised modes of knowledge production and 'technologies of government' for 'managing' and regulating Indigenous heritage. These are expressed as global, national, and metropolitan, together with their concomitant structures of control, regulation and surveillance. These dominant forms of knowledge, practice and discipline are articulated through the nation-

state and its various apparatus (including bureaucratic, governmental and state sanctioned laws, policies, plans, strategies and structures and processes).

2. Formal or institutional bodies of knowledge that derive from, and are legitimised by academic and discipline based knowledge and expertise. Those that are of particular relevance and interest to my work are anthropology, law, and perhaps political science.

3. Alternative modes of knowledge as articulated, expressed and practised by Indigenous peoples.

4. A discourse of Indigenous cultural and intellectual property rights outlined earlier in this Essay.

Arguing for a plurality of knowledges, I would envisage these sets shifting and intertwining, rather than as being discrete types or forms of knowledge. This complexity is what provides the particular character of a plural formation that, I would argue, must attend to the inequalities and asymmetries of power between and among its constitutive elements. The totality of my published works reviewed in this Essay have in turn derived from, and have also produced a critique of, all of these other types of knowledge/discourse.

The first of these types of knowledge formations outlined above can be said to emerge or flow from 'Europe', or from an idea of Europe as a mode, or locus of origin for authoritative forms of knowledge production that are based on certainty, scientific notions of 'truth' and 'validity' (see for example Barker et al, 1985). In my own work I have begun to formulate a critique of dominant forms of knowledge (which include disciplinary forms of knowledge such as anthropology and law), and to pose an equal validity for alternative knowledges, such as Indigenous. Some recent literature has argued for the re-instatement (or re-assertion, 're-recognition', or validation) of other kinds of knowledge, such as Connell's (2007) concept of 'Southern knowledge', and the 'emancipation' of difference and other knowledges in the work of Santos and others (Santos, Nunes, and Meneses, 2007; see also Chakrabarty, 2000).

These tensions and contradictions between different knowledges have been the subject matter most prominent throughout my published work, and have been more explicitly explored in my most recent papers (especially in *Law, Anthropology, and the Recognition of Indigenous Cultural Systems*, *Bridging the Gap*, and *Indigenous Knowledge: Beyond Protection*). In those I have interrogated some of problems in the engagement, or intersection between Indigenous knowledge (as understood from within the constraints of my own 'Western' paradigm), and 'Western' modes of knowledge and practice as embodied within the disciplines such as law and anthropology, and practices such as policy development and implementation. Overall, in much of my published work, what I refer to as 'intellectual property' and other legal mechanisms (such as 'heritage protection') employed by the machinery of government and bureaucracy to regulate, 'protect' and 'manage' Indigenous cultural heritage – including intangible heritage – might be seen to correspond in some way to the kinds of totalising, dominant knowledge systems produced at (by, or from) 'the centre' ('Europe'). In opposition to these globalising forms of knowledge, stand those alternative forms of knowledge and practice that I have called collectively 'Indigenous knowledge'. But I do not want to limit my discussions to scenarios in which these two types of knowledge are seen as simply existing alongside one another, always and forever in opposition, and with the problem being to find ways in which the dominant system ('Western law and policy') can 'protect' Indigenous knowledge and other forms of heritage, or to accommodate it, integrate it, or incorporate the expressions (categories, concepts, classificatory regimes) of Indigenous knowledge into the dominant modes of knowledge. Rather, my interest is more in forming a critique of the underlying assumptions about differences between Indigenous forms of knowledge, and Western forms as the latter are articulated through law, policy, and various regulatory mechanisms.

Equality Among Knowledges

Another feature of the critique I have developed throughout my writings has been to interrogate ideas about hierarchies of knowledge based on presumed validity. There is a persistent theme in debates, discussions and management regimes in which 'Indigenous knowledge' is thought to be of less validity than Western forms of knowledge. These schemes privilege Western legal, policy and governmental regimes

over alternative knowledge production such as Indigenous and local. In *Bridging the Gap*, I move beyond the compilations and reviews that comprise my earlier pieces (especially those in what I have labelled my Group I writings), to develop a more critically engaged reflection on the complex relationships between Indigenous knowledge and other knowledge traditions. To explore these ideas further in this Essay, I turn to some of the growing literature on colonial and post-colonial discourse, modernism and post-modernism. Bhambra (2007), for example, provides a critique of the so-called movement between modernity and its perceived counterpart, the 'pre-modern', based on notions of rupture and difference. She questions the assumption of 'a temporal rupture that distinguishes a traditional, agrarian past from the modern, industrial present; and a fundamental difference that Europe from the rest of the world' (2007, p. 1). There is an equation between modernity, ideas about Europe, and the production of forms of knowledge. Bhambra considers 'the relationship between colonialism and the politics of knowledge production, looking, in particular, at the processes by which particular forms of disciplinary knowledge came to be authorised under colonialism and the concomitant marginalisation of "other" forms of knowledge' (2007, p. 15).

Drawing analogies from Bhambra's scheme, I am suggesting that "Indigenous knowledge" and "Western science" may be seen as standing in similar relationships to those of "coloniser" and "colonised". The formation of imperial and colonial knowledge has at the same time created the circumstances in which Indigenous knowledges have often been subjugated, marginalised, and exploited (in some views the creation of imperial or "Northern" knowledge has been based on the exploitation of Indigenous, local and Third World knowledge – for example, Santos, Nunes, and Meneses, 2007). In producing my critique from the borders, or outside the margins of formal disciplines and other established discourses, I have developed a body of work that can move towards contributing to a dislodgement or dissolution of the dichotomies of Indigenous knowledge/Western science and law and policy.

The growing body of work on colonial and postcolonial discourse studies and criticism presents certain epistemological and methodological problems of its own. Nicholas Thomas for example, critiques analyses of colonial discourse that reinforce or legitimate (albeit subconsciously) dominant colonisers' discourses, and suggests

that colonial discourse is too often 'evoked as a global and transhistorical logic of denigration, that has remained impervious to active marking or reformulation by the "Other"; it has figured above all as a coherent imposition, rather than a practically mediated relation' (Thomas, 1994, p. 3). This critique is particularly useful for my examination of my own writings on Indigenous knowledge. As my writings have progressed, I have increasingly become concerned to interrogate the assumptions underpinning the received categories 'Indigenous knowledge' and 'Western knowledge'. These questions and interrogations are most apparent in my more recent works, especially *Bridging the Gap*, which discusses in some detail the complex understandings and historical and anthropological assumptions at play in debates concerning Indigenous and other forms of knowledge. Following Thomas I argue against discussions (critiques, analyses, and reviews) of colonial discourse, and by extension, of Indigenous knowledge/Other knowledge, that construct totalising, unitary views in which colonised/coloniser (Indigenous/non-Indigenous) relations are predominantly perceived in terms of a series of binary oppositions (e.g. civilised/savage) that consistently present derogatory stereotypes. Instead, I support the view that colonial discourses are complex, pluralising, particularistic, and historically situated arenas in which the site of relations between colonised and colonisers are contested, fluid and heterogeneous. Drawing from this view, a critique of received categories, dualities and oppositions of knowledges runs throughout my writings. I have argued for what in Nygren's terms, is the need for all knowledges to be understood as 'situated'. In other words, I refer to the necessity of 'analysing local [and Indigenous] knowledges as heterogeneous ways of knowing that emerge out of a multidimensional reality in which diverse cultural, environmental, economic and socio-political factors intersect' (Nygren, 1999, p. 282). As Nygren suggests, 'all knowledges are derived from the interaction of multiple social actors, that are differentially empowered and move in a terrain characterized by contradictory, competitive and complementary relations' (1999, p. 282).

In the context of these themes, all my writings – either explicitly or implicitly – explore the tensions between Indigenous knowledges and 'other' knowledges, and the problems in creating discourses on the basis of unexamined categories and classificatory regimes. These tensions and contradictions - the multiple intersections and engagements between and among knowledge systems, epistemologies, practices -

find echoes in critiques on the concept of 'Europe' as a homogenous, received category. The 'problem' of 'Europe' as an idea, or as a metaphor for a dominant epistemological and knowledge regime, with its attendant hierarchies and subordinated knowledges, voices, experiences and narratives (e.g. feminist/native/southern epistemologies) is a subject for considerable discussion in post-colonial literature and critique. In the experiences and aftermath of colonial encounters (the 'post-colonial' or perhaps 'postmodern' condition), the status of knowledge and of its production, circulation and reception is in question, or is contested or interrogated (see for example Bhambra, 2007; Chakrabarty, 2000). The implications of the intersections between Indigenous and other knowledge systems is replicated in the state of play regarding knowledge in the interstices between the metropole and the periphery; between 'Europe and its others', between the 'West and the rest', and between the North and the South (e.g. Chakrabarty, 2007; Connell, 2007).

Plurality and Ecology of Knowledges

> The ecology of knowledges is an invitation to the promotion of non-relativistic dialogues among knowledges, granting 'equality of opportunities' to the different kinds of knowledge engaged in ever broader epistemological disputes aimed both at maximizing their respective contributions to build a more democratic and just society and at decolonizing knowledge and power. (Santos, Nunes and Meneses, 2007, p. xxv)

The production of my writings over a decade has created a body of work that presents a critique of assumptions, categories, and concepts as they have been used in Western discourses to discuss Indigenous knowledge and cultural heritage. My work has developed to a point where I have outlined a scheme for considering a plurality of knowledges as a way towards greater understanding and cross-cultural interpretation. My writings have also moved towards discussing the idea of creating a space in which received categories such as 'Indigenous knowledge' and 'Western science' are understood as being heterogeneous, particularised and situated. I have also suggested the possibility, both in some of my writings, and in this Essay, of envisaging a dialogue, or 'ecology of knowledges' (Santos, Nunes and Meneses, 2007, pp. xix-xx)

between and among different discourses, texts and knowledges. In this sense, as I have discussed earlier, the kind of dialogue imagined is one in which the inequalities, irregularities, and asymmetries of power can be acknowledged, exposed and examined.

Bibliography

Agrawal, A. (1995a). Dismantling the divide between indigenous and scientific knowledge. *Development and Change*, 26(3), 413-439.

Agrawal, A. (1995b). Indigenous and scientific knowledge: some critical comments. *Indigenous Knowledge and Development Monitor*, 3(3), 3-6.

Alcoff, L. (Winter 1991-1992). The problem of speaking for Others. *Cultural Critique*, 20, 5-32.

Anderson, J. E. (2009). *Law, knowledge, culture: The production of Indigenous knowledge in intellectual property law*. Cheltenham, U.K: Edward Elgar.

Ashcroft, B., Griffiths, G., and Tiffin, H. (1998). *Key concepts in post-colonial studies*. London and New York: Routledge.

Australian Copyright Council. (1998). *Protecting Indigenous intellectual property*. (Revised edition B94v2m). Sydney.

Barker, F., et al (Eds). (1985). *Europe and its others: Proceedings of the Essex conference on the sociology of literature.* Colchester: University of Essex Press.

Battiste, M. (1998) Enabling the autumn seed: Toward a decolonized approach to Aboriginal knowledge, language, and education. *Canadian Journal of Native Education*, 22(1), pp. 16-27.

Bennett, D. (1988). *Out of which past? Critical reflections on Australian museum and heritage policy*. Cultural Policy Studies Occasional Paper No. 3, Institute for Cultural Policy Studies, Division of Humanities, Griffith University.

Bennett, D. (1995). *The Birth of the museum: History, theory, politics*. London and New York: Routledge.

Bhabha, H. K. (2004). The Other question: stereotype, discrimination and the discourse of colonialism. In H. K. Bhabha, *The location of culture* (pp. 94-120). London and New York: Routledge.

Bhambra, G., K. (2007). *Rethinking modernity: Post-colonialism and the sociological imagination*. Basingstoke, Hampshire: Palgrave, Macmillan.

Briggs, J. (2005). The use of indigenous knowledge in development: problems and challenges. *Progress in Development Studies*, 5(2), 99-14.

Briggs, J., and Sharp, J. (2004). Indigenous knowledges and development: a postcolonial caution. *Third World Quarterly*, 25(4), 661-676.

Brown, M. F. (2003). *Who owns native culture?*. Cambridge, Mass: Harvard University Press.

Brown, M. F. (2005). Heritage trouble: Recent work on the protection of intangible cultural property. *International Journal of Cultural Property*, 12, 40-61.

Byrne, D. (1996). Deep nation: Australia's acquisition of an indigenous past. *Aboriginal History* 20, 82-107.

Chakrabarty, D. (2000). *Provincializing Europe: Postcolonial thought and historical difference*. Princeton and Oxford: Princeton University Press.

Childs, P., and Williams, R. J. P. (1997). *An introduction to post-colonial theory*. Essex: Longman.

Clifford, J. (1983). On ethnographic authority. *Representations*, 1(2), (Spring), 118-146.

Clifford, J., and Marcus, G. E. (Eds.). (1986). *Writing culture: The poetics and politics of ethnography*. Berkeley: University of California Press.

Cohen, B. (1996). *Colonialism and its forms of knowledge: The British in India*. Princeton, New Jersey: Princeton University Press.

Connell, R. (2007). *Southern theory: The global dynamics of knowledge in social science*. Crows Nest, New South Wales: Allen & Unwin.

Dean, M. (1999). *Governmentality: Power and rule in modern society*, London, Sage.

Dirks, N. B. (1992). From little king to landlord: colonial discourse and colonial rule. In N. B. Dirks (Ed.), *Colonialism and culture* (pp. 175-208). Michigan: University of Michigan Press.

Evatt, Justice E. (1996). *Report of the review of the Aboriginal and Torres Strait Islander heritage protection act 1984*.

Fabian, J. (1983). *Time and the Other: How anthropology makes its object*. New York: Columbia University Press.

Fabian, J. (1990). Presence and representation: The Other and anthropological writing. *Critical Inquiry*, 16(4), 753-772.

Foucault, M. (1974). *The archaeology of knowledge*. London and New York: Tavistock Publications.

Foucault, M. (1980). *Power/knowledge: Selected interviews and other writings, 1972-1977*. C. Gordon (Ed.), New York: Pantheon Books.

Foucault, M. (1991). Governmentality. In G. Burchell, C. Gordon, and P. Miller (Eds.), *The Foucault effect: Studies in governmentality* (pp. 87-104)**.** London: Harvester Wheatsheaf**.**

Fuss, D. (1989). *Essentially speaking: Feminism, nature and difference*. New York & London: Routledge.

Gibson, J. (2005). *Community resources: Intellectual property, international trade and protection of traditional knowledge*. Aldershot, U.K: Ashgate Publishing.

Guillet, D. (1998). Rethinking legal pluralism: Local law and State law in the evolution of water property rights in Northwestern Spain. *Comparative Studies in Society and History*, 40(1), pp. 42-70.

Gordon, C. (1991). Governmental rationality: an introduction. In G. Burchell, C. Gordon, and P. Miller (Eds.), *The Foucault effect: Studies in governmentality* (pp. 1-51). London: Harvester Wheatsheaf.

Grosz, E. (1993). Judaism and exile: the ethics of Otherness. In E. Carter, J. Donald and J. Squires (Eds.), *Space and place: Theories of identity and location* (pp. 57-71). London: Lawrence & Wishart.

Gupta, A., & Ferguson, J. (1992). Beyond "culture": Space, identity, and the politics of difference. *Cultural Anthropology*, 7(1), pp, 6-23.

Harding, S. (1998). *Is science multicultural? Postcolonialisms, feminisms, and epistemologies*. Bloomington, Indiana: Indiana University Press.

Heckler, S. (2009). Introduction. In S. Heckler (Ed.), *Landscape, process and power: Re-evaluating traditional environmental knowledge* (pp. 1-15). New York and Oxford: Berghahn Books.

Hiddleston, J. 2009. *Understanding postcolonialism*. Stocksfield, U.K: Acumen Publishing.

Horne, N. (31 May 2007). *A chronology of Northern Territory constitutional and statehood milestones 1825-2007*. Australian Parliamentary Library Chronologies

Retrieved 26 November 2009, from http://www.aph.gov.au/library/Pubs/online/NTConstitutionalMilestones.htm

Hulme, P. (1986). *Colonial encounters: Europe and the native Caribbean, 1492-1797*. London: Methuen.

Janke, T. (1998). *Our culture, our future*: *Australian Indigenous cultural and intellectual property rights*. Canberra: ATSIC.

Khare, R. S. (1992). The Other's double – the anthropologist's bracketed self: Notes on cultural representation and privileged discourse. *New Literary History* 23, pp. 1-23.

Kress, G. (1985). *Linguistic processes in sociocultural practice*. Victoria: Deakin University Press.

Larner, W. (1995) Theorising 'difference' in Aotearoa/New Zealand. *Gender, Place & Culture* 2(2), pp. 177-190.

Lennon, J. (2008). Review of *Writing Heritage*. *Aboriginal History*, 32, 201-203.

Loomba, A. (1998). *Colonialism/postcolonialism*. London and New York: Routledge.

McDowell, L. (1992). Multiple voices: speaking from inside and outside 'the project'. *Antipode*, 24(1), pp. 56-72.

McNiven, Ian J., and Russell, L. (2005). *Appropriated pasts: Indigenous peoples and the colonial culture of archaeology*. Lanham, MD, and Oxford: Altamira Press.

Merry, S. E. (1988). Legal pluralism. *Law and Society Review*, 22(5), pp. 869-96.

Mignolo, W. D. (1993). Colonial and postcolonial discourse: cultural critique or academic criticism?. *Latin American Research Review*, 28(3), 120-134.

Mignolo, W. D. (2000). *Local histories/global designs: Coloniality, subaltern knowledges, and border thinking*. Princeton, NJ: Princeton University Press.

Miller, P., and Rose, N. (1990). Governing economic life. *Economy and Society*, 19, 1-31.

Mills, S. (1997). *Discourse*. London and New York: Routledge.

Muecke, S. (1992). *Textual spaces: Aboriginality and cultural studies*. Kensington, New South Wales: University of New South Wales Press.

Nakata, M. (1998). Anthropological texts and Indigenous standpoints. *Australian Aboriginal Studies,* 2, 3-15.

Nakata, M. (2007). *Disciplining the savages, savaging the disciplines*. Canberra: Aboriginal Studies Press.

Nygren, A. (1999). Local knowledge in the environment/development discourse: from dichotomies to situated knowledges. *Critique of Anthropology* 19(3), 267-288.

Porter, D. (1983). Orientalism and its problems. In F. Barker, P. Hulme, M. Iversen, and D. Loxley (Eds.), *The politics of theory: Proceedings of the Essex conference on the sociology of literature, July 1982* (pp. 179-193). Colchester: University of Essex Press.

Porter, L. (2006). Rights or containment? The politics of Aboriginal cultural heritage in Victoria. *Australian Geographer,* 37(3), 355-74.

Prakash, G. (1999). *Another reason: Science and the imagination of modern India*. Princeton, NJ: Princeton University Press.

Pratt, M. L. (1992). *Imperial eyes: Travel writing and transculturation*. London: Routledge.

Reid, W. V., Berkes, F., Wilbanks, T. J., and Capistrano, D (Eds.) (2006). *Bridging scales and knowledge systems: Concepts and applications in ecosystem assessment.* Washington DC: Island Press.

Rose, N., and Miller, P. (2010). Political power beyond the State: problematics of government. *The British Journal of Sociology*, 61, 271-303.

Rothwell, N. (24 May 2008). Clear-eyed survey in a crowded field: review of Writing Heritage. *The Australian*. Retrieved on 25 March 2010 from, http://www.theaustralian.com.au/news/clear-eyed-survey-in-a-crowded-field/story-e6frg8no-1111116392676

Said, E. (1985). *Orientalism*. Harmondsworth: Peregrine Books and Penguin.

Said, E. (1989). Representing the colonized: Anthropology's interlocutors. *Critical Inquiry*, 15, 205-225.

Santos, B de S., Nunes, J. A., and Meneses, M. P. (2007). Introduction: opening up the canon of knowledge and recognition of difference. In B de S. Santos (Ed.), *Another knowledge is possible: Beyond northern epistemologies* (pp. vii-lxii). London and New York: Verso.

Schaffarczyk, S. (October 2009). Review of Writing Heritage by Michael Davis. *reCollections: Journal of the National Museum of Australia*, 4(2), Retrieved 25 March 2010, from http://recollections.nma.gov.au/issues/vol_4_no_2/book_reviews/writing_heritage/

Semali, L. M., and Kincheloe, J. L. (1999). Introduction: what is Indigenous knowledge and why should be study it?. In L. M. Semali and J. L. Kincheloe (Eds.), *What is Indigenous knowledge? Voices from the academy* (pp. 3-57), New York & London: Falmer Press.

Sillitoe, P. (1998). The development of indigenous knowledge: A new applied anthropology. *Current Anthropology*, 39(2), 223-52.

Sillitoe, P. (2002). Globalising indigenous knowledge. In P. Sillitoe, A. Bicker, and J. Pottier (Eds.), *'Participating in development': Approaches to indigenous knowledge* (pp. 108-138). London: Routledge.

Sillitoe, P. (2007). Local science vs. global science: An overview. In P. Sillitoe (Ed.), *Local science vs. global science: Approaches to indigenous knowledge in international development* (pp. 1-22). NY & Oxford: Berghahn Books.

Smith, L. T. (1999). *Decolonizing methodologies: Research and Indigenous peoples*. London and New York: Zed Books Ltd., and Dunedin: University of Otago Press.

Smith, L. (1999). The last archaeologist? Material culture and contested identities. *Australian Aboriginal Studies* (2), 25-34.

Smith, L. (2000). A history of Aboriginal heritage legislation in south-eastern Australia. *Australian Archaeology* 50, 109-118.

Smith, L. (2001). Archaeology and the governance of material culture: A case study from south-eastern Australia. *Norwegian Archaeological Review* 34(2), 97-105.

Smith, L. (2004). *Archaeological theory and the politics of cultural heritage*. London & New York: Routledge.

Smith, L. (2006). *Uses of heritage*. London and New York: Routledge.

Smith, L. (2007). Empty gestures? heritage and the politics of recognition. In H. Silverman and D. F. Ruggles (Eds.), *Cultural heritage and human rights* (pp. 159-171). New York: Springer.

Smith, L., and Campbell, G. (1998). Governing material culture. In M. Dean & B. Hindess (Eds.), *Governing Australia: Studies in contemporary rationalities of government* (pp. 173-193). Cambridge: Cambridge University Press.

Smith, L., and Akagawa, N. (2009). Introduction. In L. Smith and N. Akagawa (Eds.), *Intangible heritage* (pp. 1-9). London and New York: Routledge.

Spivak, G. C. (1984-85). Criticism, feminism and the institution: An interview with Gayatri Chakravorty Spivak. *Thesis Eleven*, 10(11), 175-187.

Spivak, G. C. (1987). *In other worlds: Essays in cultural politics.* New York and London: Methuen.

Spivak, G. C. (1988). Can the subaltern speak? In C. Nelson and L. Grossberg (Eds.), *Marxism and the interpretation of culture* (pp. 271-313). Chicago: University of Illinois Press.

Thomas, N. (1994). *Colonialism's culture: Anthropology, travel and government*. Melbourne: Melbourne University Press.

Toorn, P van, and English, D. (1995). *Speaking positions: Aboriginality, gender and ethnicity in Australian cultural studies*. Melbourne: Department of Humanities, Victoria University of Technology Press.

United Nations. (1993). *Study of the protection of the cultural and intellectual property of Indigenous peoples*. Report by Special Rapporteur Erica-Irene Daes. Economic and Social Council Sub-Commission on Prevention of Discrimination and Protection of Minorities, Document E/CN.4/Sub.2/1993/28,28 July 1993.

United Nations. (1996). *Final report on the protection of the heritage of Indigenous peoples*. Report by Special Rapporteur Erica-Irene Daes. Economic and Social Council Sub-Commission on Prevention of Discrimination and Protection of Minorities, Document E/CN.4/Sub.2/1995/26).

Whitt, L. (2009). *Science, colonialism, and Indigenous peoples*. Cambridge: Cambridge University Press.

WIPO. (2006). *The protection of traditional knowledge: Revised objectives and principles for the protection of traditional knowledge*. WIPO/GRTKF/IC/9/5.

Young, R. (1990). *White mythologies: Writing history and the West*. London: Routledge.

Zent, S. (2009). A genealogy of scientific representations of Indigenous knowledge. In S. Heckler (Ed.), *Landscape, process and power: Re-evaluating traditional environmental knowledge* (pp. 19-67). New York & Oxford: Berghahn Books.

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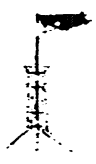

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Contents

Major Issues Summary

Indigenous peoples claim that existing intellectual property rights (IPR) systems do not provide adequate recognition and protection of their cultural products and expressions. Some critics consider IPR systems to be a threat to Indigenous peoples' cultural maintenance.

Western intellectual property rights systems create individual property rights, which can be subject to transactions, and which are designed to foster commercial and industrial growth. These systems are conceptually limited in their ability to afford recognition and protection of Indigenous intellectual property rights.

Internationally, the incorporation of Trade Related Aspects of Intellectual Property Rights (TRIPS) into the General Agreement on Tariffs and Trade (GATT) in 1994 has, in some critics' views, provided the impetus for further commercialisation by predominantly affluent industrialised countries of the knowledge and products of Indigenous and local communities.

Indigenous peoples' intellectual property rights extend to include a wide range of subject matter, beyond what is recognised within existing intellectual property rights and other protection systems. They are closely linked to land, cultural heritage and environment, and also to cultural property. In addition, Indigenous communities possess some unique features of their knowledge, creative expressions and innovations, which emphasise communal rights, in which many creative works are of an indefinable antiquity, and in which cultural products, expressions and manifestations are tightly integrated into all other aspects of society. These features are at odds with conventional western notions of intellectual property.

Indigenous peoples' intellectual property rights are being exploited in many and diverse ways. Works of art are misappropriated, and Indigenous peoples' biological resources, knowledge and human genetic materials are collected and patented without due recognition being given or benefits distributed to the Indigenous peoples concerned.

A growing body of declarations, statements, and other developments both within the United Nations and its agencies, and by Indigenous peoples, calls attention to the unique features of Indigenous intellectual property systems and provides potential opportunities for countries to introduce measures to recognise and protect these.

Discussions within the World Intellectual Property Organisation (WIPO) and UNESCO may provide some scope for expanding international copyright systems to embrace intangible expressions of culture (termed 'folklore' in these discussions).

The International Labour Organisation (ILO) Convention 169 provides potential opportunities for those countries which ratify the Convention to develop frameworks, partnerships, or other 'special measures' to protect Indigenous cultures.

Some international developments in the environment and conservation area can also provide avenues for introducing measures to recognise and protect Indigenous cultural knowledge. The framework provided by the outcomes from the 1992 United Nations Conference on Environment and Development (UNCED) is significant in this regard, especially the program statement Agenda 21. The Convention on Biological Diversity required countries to conserve and protect Indigenous peoples' knowledge, innovations and practices relevant to the conservation of biological diversity.

The standard setting activities currently being pursued by the United Nations and its agencies on Indigenous rights—though some way from being fully realised—also provide important opportunities for recognition and protection of Indigenous peoples cultural rights, including their rights to cultural and intellectual property. Key areas of work in this regard are the Draft Declaration on the Rights of Indigenous Peoples and the study on Indigenous Cultural heritage by U.N. Special Rapporteur Erica Irene-Daes.

A series of developments, legislation, reports and recommendations have been made in Australia over the last two decades, not only in intellectual property laws but across a range of land, heritage and environment issues. To date there has, however, been little action to provide recognition and protection for Indigenous intellectual property rights.

The development of new *sui generis* legislative systems that provide recognition of the full range of Indigenous peoples' cultural products and expressions, and which enable community empowerment for the control of their cultures, is the only way to achieve a just solution to the problems faced by Indigenous peoples in the exploitation of their intellectual property rights.

Introduction

Indigenous peoples claim the western system of intellectual property rights does not provide adequate protection of their cultures. Some Indigenous critiques go further, and oppose intellectual property rights systems as inherently antithetical to their interests.

In western legal systems intellectual property rights denotes a specific set of laws designed to foster commercial creativity and industrial innovation by protecting the rights of individual creators and innovators.

Indigenous peoples assert that intellectual property systems not only fail to provide adequate protection for their cultural forms, products and expressions; they serve the interests of the dominant, non-Indigenous cultures as against the distinct rights and interests of Indigenous systems of creativity and cultural products and expressions.

This paper outlines Indigenous perspectives on cultural protection, and discusses some of the ways in which their cultures are appropriated or exploited. The paper then explores where existing intellectual property laws fail to meet Indigenous peoples' expectations and aspirations regarding protection of their cultures.

The paper surveys a range of reports and developments internationally and within Australia that have either direct or indirect implications for Indigenous peoples' intellectual property rights and cultural protection. Some possible avenues for reform are then explored which may provide better recognition and protection for Indigenous cultural forms, products and expressions.[1]

Indigenous Peoples and Intellectual Property Rights

Indigenous Peoples and Cultural Appropriation

Recognition and protection of Indigenous intellectual property rights is not only relevant to arts or copyright issues. To Indigenous peoples artistic designs are an integral part of the cultural system that also includes language, dance, song, story, sacred sites and objects. The many elements that make up this system might also be thought of as cultural heritage, and are maintained and managed according to a complex set of rights and responsibilities, which are determined by customary rules and codes. In a general sense, these rights are considered to be 'owned', and managed communally, or collectively, rather than inhering in particular individuals. If an individual wishes to perform, transmit, or make manifest an aspect of culture—such as a design or motif—he or she will require the authority, consent or permission of others who may have rights and interests in the particular design or motif.

These rights and responsibilities, which might also be considered a system of law, are in turn informed by a knowledge system that is derived from, and integral to, the dreaming. This knowledge system links the diverse elements of culture with country, and also informs the ways in which culture is expressed and made manifest through material forms.

In conventional western legal terms, intellectual property rights refers to copyright, patents, trademarks, designs and trade secret laws, and breach of confidence. To Aboriginal and Torres Strait Islander peoples, however, the cultural products, forms and expressions for which protection is sought do not strictly conform to the limited provisions of intellectual property laws. This is because it is not only the material forms and created or invented products for which protection is sought. Indigenous peoples also consider that they have rights in the substance that underlies these cultural products. That is, the knowledge, innovations and practices that give rise to cultural products and expressions are significant elements of their culture. These intangible aspects are not considered within the scope of copyright and related laws. Indigenous knowledge is also essential to Indigenous peoples' rights and interests in medicinal substances, biological diversity, land and ecosystem management, and sacred sites and objects, as well as arts and other cultural expressions. The performance aspects of Indigenous cultures, such as language use, story, song, dance and ceremony are vital to Indigenous identity and cultural expression—and these are inextricably linked to land and sacred sites and objects, and religious, cultural and political systems. Given these connections, reforms to provide protection for Indigenous cultures cannot be purely confined to copyright and related intellectual property law systems. The rights in cultural knowledge, expressions and manifestations for which Indigenous peoples seek recognition and protection will ultimately require a wide

ranging system of law reforms, and legislative and administrative solutions that can better accommodate the holistic and collective nature of Indigenous cultural rights.

Examples of Appropriation of Indigenous Cultures

The scope of Indigenous peoples' intellectual property rights has become increasingly apparent as these people have raised concerns about infringements or exploitation of their cultures. To Indigenous peoples, intellectual property is part of their cultural heritage in its widest sense. This includes:

- moveable cultural property
- all literary and artistic works (including music, dance, song, ceremonies, symbols and designs, narratives and poetry)
- scientific, agricultural, technical and ecological knowledge
- human remains
- sacred sites, burials and sites of historical significance
- documents of Indigenous peoples' heritage (including film, photographs, video and audio recordings, and archival collections).

In all these components appropriation and exploitation may occur, and three examples are outlined below. Not only are art works and designs misappropriated, but we see exploitation of Indigenous peoples' rights in biological resources through 'bioprospecting', and of their rights in their own genetic and bodily material, notably through the Human Genome Diversity Project.

Arts and Cultural Expressions: Aboriginal Art and Copyright

Since at least the 1970s there have been instances of exploitation and misappropriation of Aboriginal peoples' artistic expressions, and artists have brought actions under intellectual property laws. These cases have shown that existing intellectual property laws can be of some, although limited, use in accommodating Indigenous peoples' perspectives. The most recent of these cases, *Milpurrurru v Indofurn Pty Ltd* (1995), known as the 'Aboriginal carpets case', has been considered a 'landmark' in Indigenous intellectual property protection. The case was significant for its recognition of the 'cultural harm' suffered by the plaintiffs in the awarding of damages, and its implied recognition of the communal ownership of Indigenous designs in the distribution of the damages.[2]

Indigenous Knowledge and Biodiversity: Bioprospecting

One of the most significant issues raised by Indigenous peoples is the collection, screening, and use for commercial and industrial purposes of their knowledge and of genetic and biological products which come from their lands or which are important to their societies. This 'bioprospecting', as its critics refer to it, raises some important questions about the nature of innovation, and of the relationships between natural resources, knowledge, and intellectual property rights.

The ecosystems within which Aboriginal and Torres Strait Islander peoples have lived, and which they have managed sustainably for millennia, are not only vital for their survival; they also figure significantly in their cultural, religious and social systems. These ecosystems also comprise some of the most biologically diverse areas in the world, and the products they yield are sought after by a large and growing biotechnology industry for use in a vast array of medicinal, cosmetic, industrial, and food and agricultural products. Biological products and Indigenous peoples' knowledge about these products and their properties form a vital contribution to the commercial products and processes that sustain the rapidly growing biotechnology industry. The industry isolates and modifies biological and genetic products, and registers patents for them; and in doing so it is dependent on Indigenous peoples' knowledge of these products and their properties.

The Indigenous communities from which these products and knowledge are obtained receive little or no recognition for their contribution, and generally do not share equitably in benefits resulting from uses of biological products and knowledge. The intellectual property laws which foster commercial and industrial uses of biological products and processes, and which protect the interests of the biotechnology industry, cannot effectively be used to protect Indigenous peoples' claims. This is because of the strict requirements for inventions registered as patents.[3] Products and knowledge from Indigenous communities are, in this way, increasingly being transformed into intellectual property in the western industrialised world.

The patenting of inventions derived from biological and genetic resources raises some critical questions for Indigenous communities. There are ethical concerns regarding the collection and use of such products and their derivatives without the informed consent or equitable participation of Indigenous communities who claim rights in the products and knowledge. There is also the concern that companies and researchers that collect such knowledge and products usually provide for few (if any) financial benefits to be returned to the Indigenous communities.

Another critical concern is the fundamental inappropriateness of patent laws to Indigenous peoples' ability to protect their own biological knowledge and resources. As a legal instrument, a patent confers exclusive rights on an inventor which for a fixed period prevent others from producing, using, or engaging in commercial transactions for the

invention. A patent requires that an invention should be useful: that is, it must have an industrial application. It also requires an invention to be novel, or recent and original, and not previously known. An invention can also only be accepted for patenting if it is non-obvious: that is, it must have been produced by a reasonable level of technical know-how, rather than having merely been a discovery of what already exists in nature.

These requirements create an essential incompatibility between patents and Indigenous knowledge and innovations. Innovation and knowledge in Indigenous societies generally does not fit the patent laws' requirement for novelty of invention, which hinges on the isolation and modification of biological and genetic products using highly technological processes. Moreover, patents confer rights in individuals or corporations, and are not applicable to communal rights which often pertain in Indigenous societies. Indigenous peoples' notions of property differ generally from those which form the basis of patent laws. Biological knowledge in Indigenous communities is generally regarded as being a community resource, and is shared and transmitted 'freely' within communities according to customary rights, rules and obligations.[4] The private ownership rights which patent laws confer for inventions are thus antithetical to Indigenous peoples' world views.[5]

Although, as with all intellectual property rights systems, patent laws are available for use by Indigenous peoples, the incompatibility outlined above means that Indigenous peoples are unlikely to use these laws to protect their knowledge and innovations. Moreover, use of such laws is usually costly and time consuming, and usually necessitates the services of skilled legal professionals. For these reasons, Indigenous peoples' access to patent laws, like copyright laws, is likely to be limited.

Although article 8(j) of the Convention on Biological Diversity may provide scope for countries to develop systems for recognition and protection of Indigenous knowledge and innovation, this is still a long way from becoming a reality in Australia. One potential problem is that, in its current form, and where there is no effective implementation of its provisions to actively preserve Indigenous knowledge and innovations, the Convention provides implicit support for contractual agreements between countries, which may disadvantage Indigenous communities within those countries.[6] Implementation of article 8(j) of this Convention may also be subject to some constraints, as discussed below.

Human Genetic Material: the Human Genome Diversity Project

Indigenous peoples have in recent years begun asserting that their rights in their bodily substances such as blood and genes are being violated. This problem has attracted attention since the early 1990s with the commencement of the Human Genome Diversity Project (HGDP). This project, dubbed the 'Vampire Project' by its critics, is being carried out by scientists throughout the world, with the aim of mapping the broad genetic diversity of humans. The HGDP involves the taking of genetic samples from a large number of

communities, including a significant proportion of Indigenous communities. These Indigenous communities are 'targeted' for sampling on the grounds of being considered 'rare' or 'endangered'.

The HGDP has serious implications for Indigenous peoples, as the blood and genetic samples that are collected can be modified and patented, and as such may potentially provide products and processes which are commercially valuable. Not only do Indigenous peoples receive no share in the benefits that might result from these products and processes, but the sampling itself, without their informed consent, represents a grave violation of their rights, and raises serious ethical questions. As with biological sampling, patent laws do not protect genetic or other human products unless these have been modified or altered. There are currently no laws to protect the rights of Indigenous communities to their bodily products.[7]

Intellectual Property Rights

The western concept of intellectual property rights is based on the notion that ideas, innovations and inventions, expressed through various material forms, can be owned, and that individuals have distinct property rights to these forms of creative expressions and products. Intellectual property laws are aimed at protecting rights to literary and artistic property, as well as industrial property. The 1967 Convention Establishing the World Intellectual Property Organisation (WIPO), at article 2(viii) defines 'intellectual property' to include rights relating to:

- literary, artistic and scientific works;
- performances of performing artists, phonograms and broadcasts;
- inventions in all fields of human endeavour;
- scientific discoveries;
- industrial designs;
- trademarks, service marks, and commercial names and designations;
- protection against unfair competition; and
- all other rights resulting from intellectual property activity in the industrial, scientific, literary or artistic fields.[8]

The western system of intellectual property law includes *Patents Act 1990*, the *Trademarks Act 1955*, the *Designs Act 1906*, the *Plant Breeders Rights Act 1994*, and common law areas of trade secrets and confidentiality. While all these intellectual property laws are available to Indigenous peoples, some, such as copyright and patent laws, are more potentially relevant or useful than others. The *Copyright Act,* for example, has

received most prominence, as it has been used by Aboriginal artists to seek redress for exploitation of their designs. As a result of these actions this Act has been tested to the extent to which it adequately protects the intellectual property rights of Indigenous peoples (see discussion above).[9]

The *Copyright Act 1968* is designed to protect copyright, defined by McKeough as 'a form of property, a personal right, or a combination of both'.[10] Golvan defines the copyright law as that which 'protects the form of expression of ideas, or the way in which ideas are expressed in a literary, artistic, dramatic or musical form, as well as in the form of cinematographic films and broadcast signals.' As such, Golvan states, the *Copyright Act 1968* 'thus founds the basis upon which creators of such forms of ideas can claim monopoly rights in them.'[11] Although there is no requirement for registering copyright works, works must be in material form, and must be original. The term for copyright protection is limited to the life of the author plus fifty years.[12]

Golvan claims that advances in technology (such as the facsimile, and computer and data based technologies) are providing a challenge for copyright, which is 'increasingly having to be protected on a collective basis, with copyright ownership, as such, providing an entitlement to the distribution of centrally collected fees'.[13] However, the need to rethink the fundamental bases of copyright and other intellectual property laws is created not only by advances in technology, but also by the increasing assertion by Indigenous peoples of their cultural rights.

The requirement that 'ideas expressed are in a tangible medium in order to attract protection under the *Copyright Act*', and the fact that operation of the Act is 'based on the concept of copyright as an individual property right that can be transferred or subdivided through commercial transactions', are, in McKeough's view, the primary impediments to proper protection for Indigenous peoples' cultural products and manifestations under existing copyright laws.[14] The requirement that works are 'original' is an additional limiting factor, since it is often argued that artistic and other cultural expressions in Aboriginal or Torres Strait Islander societies are not necessarily produced by a single, identifiable individual; rather, there may be various levels of rights and interests in a work of cultural production. A person who produces a painting in Aboriginal society is not necessarily thought to be the 'owner' of the work, but may have been given authority to produce certain designs or images by others within the community, who may be members of a clan to whom the designs or images are said to 'belong'. The case of rock art is often cited to illustrate the difficulties in conforming to the requirements for 'originality', and for the term of protection under the *Copyright Act.*

The *Patents Act* may also be considered in terms of its applicability to the protection of Indigenous cultural products, forms and expressions. As discussed above, the requirements under patent laws concerning the novelty, usefulness, and non-obviousness of inventions,

as well as the limited period for protection, and the individual nature of these rights, renders these laws incompatible with Indigenous peoples' interests.

The *Designs Act* is more limited than the *Copyright Act* in terms of Indigenous rights, as it requires registration, has similar requirements regarding originality, and offers a shorter term for protection.[15]

The use by Aboriginal people over the past decades of the *Copyright Act* (and to a lesser extent other laws such as breach of confidence) and the judgements resulting from those actions, have extended the boundaries of the interpretation of intellectual property laws. They have also emphasised the conceptual gaps between western notion of intellectual property and Aboriginal and Torres Strait Islander peoples' perspectives, derived from their cultural systems.

Although other intellectual property laws such as plant variety rights legislation are also relevant to Indigenous peoples, there is not scope in this paper for a discussion of these.

Indigenous Critiques of Intellectual Property Rights

Western intellectual property rights (IPR) systems have been criticised by Indigenous peoples (and Third world critics) as promoting the commercialisation and commodification of cultural products and expressions at the expense of Indigenous and local cultures. Although Indigenous people may have access to intellectual property laws, they are generally inadequately informed about these laws, and to bring actions under such laws is a costly and time consuming exercise, usually requiring the services of legal expertise.

Some Indigenous people argue that western intellectual property laws are fundamentally incompatible with Indigenous cultural systems and ignore the complexities of such Indigenous systems. The IPR system is based on western notions of property that emphasise individual ownership and alienability. The property rights established by these systems are essentially managed as commercial transactions, and are not designed to protect cultural products and expressions.[16] In some critics' views, IPRs pose a threat to Indigenous peoples' systems of informal innovation, and communal rights and responsibilities in cultural products and expressions.[17] There is a spectrum of views which range through arguments for the development by communities of their own *sui generis* systems, to include community empowerment rights; arguments advocating greater use by Indigenous peoples of a range of existing IPR systems together with land, heritage, and environment laws and statements and human rights regimes; support for the need for integration between Indigenous and western systems of innovation; and a position which claims the existing IPR system is adequate, requiring only minimal amendments.

International Developments

Setting Standards: International Instruments and Intellectual Property Laws

Western intellectual property laws have been developed from a context of international developments. These have set the terms and definitions for the concept of intellectual property, and established standards for its protection. The Berne Convention for the Protection of Literary and Artistic Works was formulated in 1886, and has been subject to several revisions. The most recent revision to this Convention, to which Australia became a signatory in 1928, was at Paris in 1971.[18] The scope of subject matter under this Convention is 'literary and artistic works', which is interpreted broadly to embrace 'any production whatsoever in the literary, scientific or artistic domain'.[19]

Extensions to copyright laws were introduced in 1989 to provide some protection of rights for live performers, and consideration is being given to amendments to protect moral rights. The inclusion of moral rights protection offers potential for better recognition of Indigenous peoples' rights, as it may shift the balance away from the focus on economic dimensions under present intellectual property rights systems and towards a system that recognises and protects the 'right of integrity' or 'right of attribution'—aspects that are fundamental to Indigenous peoples' claims regarding exploitation of their cultural rights. A moral rights provision within the terms of the Berne Convention would provide avenues for redress in cases of distortion, mutilation or modification of an author's work.[20] The inclusion of moral rights within amendments to copyright laws, and its implications for Indigenous people is discussed below.

Protection of folklore

The protection of cultural expressions of Indigenous peoples has been a developing area internationally. Recognising that copyright laws are not adequate for many aspects of Indigenous cultural protection, developments have occurred under the rubric of 'folklore'. The 1971 revision of the Berne Convention provided for countries to nominate a 'competent authority' to 'control the licensing, use and protection of national folklore'. Although the concept of 'folklore' is a potentially useful one for Indigenous concerns, as it embraces a more holistic notion of culture, the term is relatively contentious in its relevance, applicability or appropriateness to describe and define Indigenous cultures.[21] Moreover, the notion of state control over cultural products and expressions of the peoples within them is antithetical to Indigenous peoples' aspirations for self-determination.[22] It is useful to examine some developments that have considered this concept as a possible means of broadening the scope of what may be protected within copyright type regimes. These discussions have occurred mostly within the World Intellectual Property

Organisation (WIPO) and the United Nations Educational, Scientific and Cultural Organisation (UNESCO).

An early development that provides potential for recognition of 'folklore' is the 1976 Tunis Model Law on Copyright, developed through WIPO. This instrument defines folklore as:

> all literary, artistic and scientific works created on national territory by authors presumed to be nationals of such countries, or by ethnic communities, passed from generation to generation and constituting one of the basic elements of the traditional cultural heritage.[23]

The Tunis Model Law provides for protection of cultural expressions without the requirement for these to be 'fixed' (as required by copyright laws), and provides protection for an indefinite period of time. It also includes a provision for 'moral rights' to 'prevent the desecration and destruction of folklore works'.[24] While a number of African and other countries have adopted the Tunis Model Law, it has not as yet been considered in Australia.[25]

Both WIPO and UNESCO have also considered parallel developments to protect 'folklore', resulting in 1985 to the formulation of draft *sui generis* Model Provisions for National Laws for the Protection of Folklore Against Illicit Exploitation and Other Prejudicial Actions. The Model Provisions do not define 'folklore', but rather 'expressions of folklore' as

> productions consisting of characteristic elements of the traditional artistic heritage developed and maintained by a community of [name of the 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 action, 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, sculpture, pottery, terracotta, mosaic, woodwork, metalware, jewellery, basket weaving, needlework, textiles, carpets, costumes;
>
> (b) musical instruments;
>
> (c) architectural forms.'[26]

One of the central issues raised by these developments is whether such instruments should protect heritage as that belonging to the nation or state, and therefore the extent to which there is recognition of the heritage rights of distinct peoples within nation-states.

GATT—TRIPS

Intellectual property rights have recently become a component of international trade. The General Agreement on Tariffs and Trade (GATT), established in 1948 by mainly developed countries sets out a regulatory framework for trading between member countries. The GATT aims to promote free trading by allowing negotiation of, concessions on, or removal of tariff protection.[27]

The 1994 Uruguay Round of negotiations on the GATT resulted in the incorporation of intellectual property rights and the establishment of the World Trade Organisation as the administering body of the GATT. The incorporation into the GATT of intellectual property rights, known as the Trade Related Aspects of Intellectual Property Rights (TRIPS), has brought about an additional set of concerns for Indigenous peoples.

The TRIPS provisions in GATT have the general objective of harmonising intellectual property rights protection at the global level, and require countries without IPR systems to develop them in accordance with the GATT provisions. As Darrell Posey argues, the requirement in Article 27(3b) for the protection of plant varieties either by patents or by the creation of effective *sui generis* systems is viewed by some Indigenous and Third World critics as a threat to their community rights, as it 'would create legal monopolies on common resources'.[28] The TRIPS provisions in the GATT are regarded both as a threat and as creating potential opportunities. The new regulations place some pressure on countries without effective intellectual property rights systems to develop these quickly, thus creating a risk that the IPR systems that are introduced will be incompatible with local and Indigenous customary rights and practices. At the same time, there may be potential opportunities for countries currently lacking in effective IPR systems to create innovative *sui generis* systems that are in accordance with, and offer protection for, community based rights.

Some Indigenous and Third World critiques of the GATT/TRIPS have argued that this is a further development towards appropriation and control of the biodiversity rich south by the industrialised, affluent, yet biodiversity deficient north—a move which imposes additional constraints on recognition of the contribution made by Indigenous peoples to innovation and development. To these critics, the global integration of intellectual property rights regimes favours industrial innovation and discriminates against informal and communal knowledge systems and innovations.[29]

Statements and Standards Supporting Indigenous Cultural Protection

There have been a number of standard setting and other developments internationally which provide the basis for an understanding of Indigenous intellectual property rights within a wider concept of cultural heritage and Indigenous cultural systems, and which appear to reflect more closely Indigenous peoples' perspectives on cultural protection. Some of these developments are occurring within mainstream agencies of the United Nations and its agencies, while a parallel series of developments is being pursued by Indigenous peoples and Third World peoples, thus signalling a strongly emerging 'soft law' for Indigenous cultural protection.[30]

United Nations Statements and Developments

Developments within the United Nations and its agencies have generally adopted an integrated approach to Indigenous peoples' cultural protection. A 1992 Report of the United Nations Secretary-General on the Intellectual Property of Indigenous Peoples states that Indigenous peoples' intellectual property can, for analytical purposes, be 'usefully divided into three groups: (i) folklore and crafts; (ii) biodiversity; and (iii) Indigenous knowledge'.[31] This report concludes that, given the complexity of finding improved ways to protect the intellectual property rights of Indigenous peoples, 'a greater understanding of the concerns of Indigenous peoples ... may be needed before determining the specific legal remedies which might be appropriate'.[32]

The protection of Indigenous peoples' intellectual property rights has also been on the agenda of the United Nations Working Group on Indigenous Populations, established in 1982 by the United Nations Sub-Commission on Prevention of Discrimination and Protection of Minorities. The Draft Declaration on the Rights of Indigenous Peoples developed by the working group includes important provisions concerning intellectual property rights. Article 24 states that:

> Indigenous peoples have the right to their traditional medicines and health practices, including the right to the protection of vital medicinal plants, animals and minerals...[33]

Article 29 states:

> Indigenous peoples are entitled to the recognition of the full ownership, control and protection of their cultural and intellectual property.
>
> They have the right to special measures to control, develop and protect their sciences, technologies and cultural manifestations, including human and other genetic resources, seeds, medicines, knowledge of the properties of fauna and flora, oral traditions, literatures, designs and visual and performing arts.[34]

The comprehensive study on Indigenous Cultural and Intellectual Property prepared by Erica Irene-Daes for the United Nations Sub-Commission on Prevention of Discrimination and Protection of Minorities provides further discussion of the nature of Indigenous intellectual property and the need to consider it as a component of Indigenous cultural heritage. That study recommended that, consistent with the views of Indigenous peoples, intellectual property and cultural property cannot be considered in isolation from each other, as they are both integral components of Indigenous cultural heritage.[35] This holistic view is also supported by the principles in the Draft Declaration discussed above.

Indigenous cultural rights are also recognised in International Labour Organisation Convention 169, Concerning Indigenous and Tribal Peoples in Independent Countries.[36] As this Convention is primarily concerned with labour and employment, it contains only general provisions that are relevant to intellectual property rights. Article 4 states, for example, that:

> Special measures shall be adopted as appropriate for safeguarding the persons, institutions, property, labour, cultures and environment of the peoples concerned.

Article 5 states that:

> (a) the social, cultural, religious and spiritual values and practices of these peoples shall be recognised and protected, and due account shall be taken of the nature of the problems which face them both as groups and as individuals;
>
> (b) the integrity of the values, practices and institutions of these peoples shall be respected.

Article 8 states that:

> 1. In applying national laws and regulations to the peoples concerned, due regard shall be had to their customs or customary laws.
>
> 2. These peoples shall have the right to retain their own customs and institutions, where these are not incompatible with fundamental rights defined by the national legal system and with internationally recognised human rights. Procedures shall be established, whenever necessary, to resolve conflicts which may arise in the application of this principle.

Article 13 states:

> 1. In applying the provisions of this Part of the Convention governments shall respect the special importance for the cultures and spiritual values of the peoples concerned of their relationship with the lands or territories, or both as applicable.

Article 23 states:

> 1. Handicrafts, rural and community-based industries, and subsistence economy and traditional activities of the peoples concerned, such as hunting, fishing, trapping and gathering, shall be recognised as important factors in the maintenance of their cultures and in their economic self-reliance and development.

Although this Convention has been criticised by Indigenous peoples and others for providing insufficient recognition and protection of rights, and for its assimilationist orientation, unlike the Draft Declaration it provides binding obligations on countries that have ratified the Convention.[37] It is also argued that the Convention can be used to encourage governments to establish structures and processes for greater Indigenous participation in the political, economic and social life of that country.[38] It remains questionable, however, as to how rigorously countries fulfil such 'binding obligations' through legislative enactments or policy measures.

Developments in Environment and Conservation

Given that Indigenous peoples consider their intellectual property rights to include rights related to environment, biological diversity and knowledge, developments in international standard setting relating to environment and conservation have particular relevance in so far as these include provisions concerning the need to recognise and protect Indigenous peoples' rights. These instruments and statements are especially useful in that they build up a body of statements recognising, and advocating protection for Indigenous peoples' knowledge systems—aspects of Indigenous culture which are currently beyond the scope of conventional intellectual property laws. The most significant of these international developments have resulted from the 1992 United Nations Conference on Environment and Development (UNCED) held in Rio de Janeiro, Brazil (the 'Rio Earth Summit'). The principal statements are the Rio Declaration, Agenda 21, the Convention on Biological Diversity, and the Statement of Forest Principles—all of which contain provisions relevant to, or implications for, the recognition and protection of Indigenous peoples' intellectual property rights.

Perhaps the most comprehensive and potentially useful outcome of the Rio Earth Summit was Agenda 21, which provides a charter and programme for action for sustainable conservation and development into the next century. While there is much of relevance for Indigenous peoples throughout Agenda 21, Chapter 26 on Recognising and Strengthening the Role of Indigenous Peoples and their Communities contains some important provisions directly relevant to Indigenous peoples' intellectual property rights. Section 26.3 states that Governments should 'in full partnership with indigenous people and their communities' aim to fulfil objectives that include:

(a) Establishment of a process to empower Indigenous people and their communities that include:

(iii) recognition of Indigenous peoples' values, traditional knowledge and resource management practices with a view to promoting environmentally sound and sustainable development.

Section 26.6(a) contains a programme statement to implement this principle, stating that Governments, 'in full partnership with indigenous people and their communities should, where appropriate':

(a) Develop or strengthen national arrangements to consult with Indigenous people and their communities with a view to reflecting their needs and incorporating their values and traditional and other knowledge and practices in national policies and programmes in the field of natural resource management and conservation and other development programmes affecting them.

These statements in Agenda 21 are reinforced by similar principles in the Rio Declaration. Agenda 21 is currently being reviewed by the UN.

One of the binding statements resulting from the Rio Earth Summit, the Convention on Biological Diversity, contains a number of provisions relevant to Indigenous peoples' intellectual property rights. One of the most important is article 8(j) which requires countries (subject to their national legislation) to:

> ...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 approval and involvement of the holders of such knowledge, innovations and practices and encourage the equitable sharing of the benefits arising from the utilisation of such knowledge, innovations and practices.

The provisions in the Convention on Biological Diversity relating to Indigenous knowledge are subject to some discussion in the literature, in terms of the extent to which these provisions relate to conventional intellectual property systems, and matters regarding national, versus local and Indigenous rights in biological resources.[39]

While this Convention provides a potentially useful opportunity for countries to introduce *sui generis* systems to recognise and protect Indigenous knowledge and innovations, it also imposes some constraints. The requirement that implementation of article 8(j) should be subject to national legislation may be problematic for Indigenous peoples, especially if existing national laws take precedence, and where these might contravene or place limitations on any measures that may be introduced under 8(j). The use of 'traditional lifestyles' in the wording of this article may also be interpreted to exclude many

Indigenous communities who have not retained their direct connections with lands and resources, but who wish to protect and preserve their knowledge and innovations.[40]

Although a more comprehensive discussion of the recognition and protection of Indigenous knowledge and biodiversity is outside the scope of this paper, it is sufficient to point out that, given that Indigenous peoples regard their knowledge systems and rights in biological diversity to be components of their intellectual property, developments such as the Rio Declaration (and more particularly Agenda 21 and the Convention on Biological Diversity) present potentially significant means for recognition and protection measures to be formulated within the legal system.

Darrell Posey has written extensively on the ways in which relevant provisions in the Rio Declaration, the Convention on Biological Diversity, and a wide range of human rights and other instruments, in addition to emerging Indigenous and other standards and statements can be used by Indigenous peoples to achieve better recognition and protection for their 'intellectual property' rights (or what Posey terms 'traditional resource rights'). Posey's work on alternative solutions that go 'beyond intellectual property rights' is outlined below.[41]

Another outcome from the Rio Earth Summit was the establishment of a new body, the Commission on Sustainable Development (CSD), within the United Nations Environment Program. The CSD has established an ad hoc Intergovernmental Panel on Forests (IPF) to consider a range of matters concerning sustainable forest management. Part of the program of work of this body includes considering the role of 'traditional forest related knowledge', a significant area of work relevant to Indigenous peoples' interests. The recommendations and future actions arising from the work of the IPF are included in the agenda for a current United Nations General Assembly review of international environmental issues.

Other developments relevant to Indigenous peoples' intellectual property rights are being considered within the United Nations Food and Agriculture Organisation (FAO) and its agencies (such as the Commission on Plant Genetic Resources). In 1983 the FAO adopted an International Undertaking on Plant Genetic Resources as part of the establishment of a Global System to coordinate and regulate plant genetic resources relevant to food and agriculture.[42] This Undertaking has gone through several revisions, one of which in 1989 resulted in the inclusion of the recognition of a concept of 'Farmers' Rights'. These 'Farmers' Rights' are currently subject to debate, especially in terms of clarifying what is meant by the term, and its implications for the rights of local and Indigenous communities regarding food and agricultural knowledge and production, and access to, control and ownership of plant genetic resources. Current revision of the International Undertaking is also considering possible harmonisation with relevant provisions of the Convention on Biological Diversity.

Indigenous Statements

In addition to the standard setting developments surveyed above, there is a growing body of declarations and statements by Indigenous peoples concerning recognition and protection of intellectual property and related rights.

The Draft Declaration, which has now assumed the status of a well established process within the formal United Nations machinery, has been developed by Indigenous peoples and their representatives during the annual sessions of the United Nations Working Group on Indigenous Populations (WGIP). As such, this draft Declaration is a strong statement of Indigenous peoples' aspirations, and reflects their thinking on a wide range of cultural and associated rights. The Draft Declaration is currently being further considered by a special Working Group established by the United Nations Commission on Human Rights—a higher level body of the UN. This Commission is, however, a body comprised of government representatives. Government representatives that may oppose or be less supportive of the language in the Draft Declaration are therefore likely to be able to wield greater influence than was the case during the development of the Draft Declaration in the WGIP sessions. In any case, it is still many years before the Draft Declaration is to be considered for adoption by the United Nations General Assembly. Even when that occurs, as a Declaration it does not place binding obligations upon countries to uphold it as law, or to implement its provisions. It is more a statement of international customary law.

Indigenous peoples are also developing a series of statements proclaiming their rights in intellectual property. Usually such statements, consistent with the views expressed in the Daes report, reflect a more inclusive understanding of intellectual property, and incorporate variously 'cultural property', 'knowledge', and 'biodiversity'—components that are generally considered outside the scope of western thinking on intellectual property.[43] These include the following.

- In February 1992 an Open Forum held as part of the Seventh Asian Symposium on Medicinal Plants, Spices and Other Natural Products in Manila, Philippines, produced the Manila Declaration Concerning the Utilisation of Asian Biological Resources.

- A World Conference of Indigenous Peoples on Territory, Environment and Development, held in Kari-Oca, Brazil, in May 1992, produced a statement known as the Kari-Oca Declaration and the Indigenous Peoples' Earth Charter.

- In June 1993 a meeting of Indigenous peoples took place in Whakatane, New Zealand. This was the First International Conference on the Cultural and International Property Rights of Indigenous Peoples. The meeting produced a statement called the Mataatua Declaration on Cultural and Intellectual Property Rights of Indigenous Peoples. This Declaration was submitted to the 1993 Session of the UN Working Group on Indigenous Populations.

- In November 1993 an international conference on Indigenous intellectual and cultural property was held at Jingarrba in north east Queensland issued a statement, known as the Julayinbul Statement on Indigenous Intellectual Property Rights.

- A series of regional consultations and meetings of Indigenous peoples to discuss intellectual property rights took place in Bolivia, Malaysia and Fiji during 1994 and 1995. These meetings, sponsored by regional non-Government organisations, including the Coordinating Body for the Indigenous Peoples' Organisations of the Amazon Basin and the United Nations Development Programme, issued statements concerning the recognition and protection of intellectual property rights.

- The regional meeting in Fiji also produced a Treaty for a Lifeforms Patent–Free Pacific and Related Protocols, to prevent exploitation of local and Indigenous peoples in this region by biological prospecting and the collection of human genetic materials.

These Indigenous statements are generally more inclusive in their coverage than statements in western law, incorporating a wider range of subject matter which Indigenous peoples consider to be their cultural and intellectual property. They form an important emerging body of principles which ultimately must influence western legal systems to provide improved protection for Indigenous cultures.

Developments in Australia

There have been various developments in Australia that have proposed recommendations concerning protection for Aboriginal and Torres Strait Islander peoples' intellectual property rights.[44] Most of these have focussed on the protection of Indigenous intellectual property rights in artistic works; relatively little comprehensive consideration has been given to protecting other components of Indigenous intellectual property such as secret or sacred material, cultural heritage, knowledge, or biodiversity. This section surveys some of these developments.

Reports and Developments to 1996

Folklore, Culture, Customary Law, Arts and Crafts and Social Justice

Report of the Working Party on the Protection of Aboriginal Folklore, 1981

During the 1970s, partly as a result of the copyright cases brought by Aboriginal artists and the increasing entry of the works of Aboriginal artists into the national and international art markets, there was a growing recognition of the need to address inadequacies in legal protection for Aboriginal and Torres Strait Islander peoples' intellectual property rights. In May 1973 the first National Seminar on Aboriginal Arts, held in Canberra, resolved that the Aboriginal Arts Board of the Australia Council should initiate procedures which would 'enable each tribal body to protect its own particular designs and works and to strictly control the use of them by non-Aboriginals'.[45] The Copyright Committee of the Australia Council referred that resolution to the Government, with a recommendation that a committee be established to 'examine the nature of legislation required to protect Aboriginal artists in regard to Australian and international copyright'. This led to the establishment by the then Commonwealth Department of Home Affairs and Environment of a Working Party on the Protection of Aboriginal Folklore. The working party comprised representatives from the Attorney-General's Department, the Australia Council, the Australian Copyright Council, the Department of Prime Minister and Cabinet and the Department of Aboriginal Affairs. The working party's report released in 1981 recommended a draft law called the *Aboriginal Folklore Bill*, designed to establish an Aboriginal Folklore Board and a Commissioner for Folklore empowered to make determinations about uses of Aboriginal cultural items.

In deciding that the object of its study should be directed towards the protection of Aboriginal 'folklore', the report concluded that 'folklore' was a useful term if applied in an expanded sense, and that its use is also justified on the basis of its recognition in some international legal contexts. The report states that 'use of the term 'folklore' recognises that traditions, customs and beliefs underlie forms of artistic expression, since Aboriginal arts are tightly integrated within the totality of Aboriginal culture'. It argued that 'folklore is the expression in a variety of art forms of a body of custom and tradition built up by a community or ethnic group and evolving continuously.'[46] The Report draws on the Tunis Model Law which defines folklore as:

> all literary, artistic and scientific works created on national territory by authors presumed to be nationals of such countries, or by ethnic communities, passed from generation to generation and constituting one of the basic elements of the traditional cultural heritage.[47]

The recommendations from the working party report have not been implemented, although the model it outlines is one of the options for reform being considered by an interdepartmental committee. One potential difficulty posed by the model suggested in the folklore report is the centralised nature of the structure to be established; this is likely to be at odds with the concept of localised community decision making about uses of folklore.

A further difficulty is in the definition and scope of the term 'folklore'. Although this terminology is used in the WIPO/UNESCO discussions, it is not appropriate to uncritically impose it onto the Aboriginal and Torres Strait Islander context. As some writers have argued, although the term 'folklore' is used in some discussions about African societies, it is derived from an early European and British context, and when used to denote Indigenous cultures connotes an entity that is subordinate to culture or heritage.[48]

Report on the Recognition of Aboriginal Customary Law, 1986

In February 1977 the Australian Law Reform Commission (ALRC) was asked by the then Federal Attorney-General, the Hon. R.J. Ellicott, to inquire into the extent to which the existing system of laws might recognise Aboriginal customary laws.[49] The terms of reference for this inquiry were:

> (a) whether existing courts should be empowered to apply Aboriginal customary law and practices in the trial and punishment of Aborigines; and
>
> (b) to what extent Aboriginal communities should have the power to apply their customary law and practices in the punishment and rehabilitation of Aborigines.

The ALRC report discussed the definition of customary law, finding that there was some agreement among the many writers on this subject that 'there existed, in traditional

Aboriginal societies, a body of rules, values and traditions, more or less clearly defined, which were accepted as establishing standards or procedures to be followed and upheld ... [and] ... furthermore, these rules, values and traditions continue to exist, in various forms, today'. There remained some difficulties, however, in the ALRC report's discussion, about the extent to which this body of 'values, rules and traditions' may be considered, in the legal and anthropological tradition, as 'law'.[50]

The main focus in the ALRC report was on criminal law and justice issues, and it considered only very briefly other aspects of customary law.[51] With regard to cultural heritage, and intellectual property rights in art and cultural expressions, the ALRC touched briefly on these, but mostly stated that these matters were adequately covered in the report of the Working Party on the Recognition of Aboriginal Folklore, and that the Commonwealth Government was 'considering the implementation of the recommendations' of that report. The ALRC report recognised the inadequacies in existing copyright law for protection of Indigenous intellectual property, stating that 'the protection of traditional designs is difficult to reconcile with the law relating to intellectual property, which grants a short term monopoly to the artist on the condition that the design or idea will eventually be available in the public domain.' In the light of these incompatibilities, the ALRC report supports special legislative protection for Indigenous cultural items not adequately protected by copyright laws, stating that 'such special legislative measures, together with careful use of the general law, and greater use of existing by-law powers, offer greater assistance to Aboriginal people than the enactment of a broad range of customary offences as part of the general body of criminal law.'[52]

The relationships between Aboriginal and Torres Strait Islander customary law (defined as the body of rules, values and traditions in Aboriginal and Torres Strait Islander societies) and intellectual property rights as protected under existing copyright laws have been explored by various writers.[53] The general conclusion is that there is a fundamental difference between copyright laws, which exist to encourage creativity and investment by creating a private property right that can be transferred within a commercial market economy, and the 'production and regulation of imagery within Indigenous communities ... [which] ... is not based upon notions of talent or individual expression, but stems from systems of inherited rights and obligations'.[54]

The problem of recognising Aboriginal and Torres Strait Islander peoples' intellectual property rights has mostly been discussed as these relate to works of art. As such, a number of reports and other processes regarding what has come to be known as the Aboriginal and Torres Strait Islander 'arts and crafts industry' often have some regard to intellectual property issues. Most of these reports emphasise the need to support commercial and economic aspects of Indigenous 'arts and crafts', and focus on discussions about industry viability, improvement of marketing strategies, and funding initiatives for arts and crafts enterprise development. While the achievement of commercial success is undoubtedly an important component of the path towards self-determination for

Aboriginal and Torres Strait Islander peoples, so too is the recognition of their distinct cultural rights as Indigenous peoples. The promotion of Indigenous art as a significant industry must equally have regard to the 'cultural integrity' of the art.[55]

Report of the Review Committee on the Aboriginal Arts and Crafts Industry, 1989

In recognition of the increasing income generating potential of the Aboriginal arts and crafts industry, a committee appointed in 1989 by the then Aboriginal and Torres Strait Islander Affairs Minister, the Hon. Gerry Hand, was asked to conduct an inquiry into this industry. Although this committee's primary concern was with matters relating to the commercial viability of the Aboriginal arts and crafts industry, and the need for a more effective marketing strategy, in its report of 1989 it did recognise the importance of protecting Indigenous intellectual property rights, and the difficulties in achieving adequate protection within existing laws. The report's recommendations were more cautious than those of the Working Party on Protection of Aboriginal Folklore, but nonetheless supported the consideration of the latter report.[56]

Report of the Royal Commission into Aboriginal Deaths in Custody, 1991

The Royal Commission into Aboriginal Deaths in Custody included consideration of Aboriginal arts and crafts in its discussion on increasing economic opportunity. The Commission added its support to the recommendations of the Arts and Crafts Industry Review Report, which advocated the establishment of an Aboriginal and Torres Strait Islander arts and crafts industry strategy, improved coordination of activities relating to Indigenous arts and crafts development, increased support to Indigenous arts and crafts centres, and special programs to assist these activities. Copyright issues are included in the Royal Commission's discussion, supporting the views propounded in the previous Report.[57]

The central issue here is that a pattern is emerging wherein each report has merely reasserted what is already well known, and reinforced the need to implement recommendations advocated in previous reports. While there is some merit in reasserting the same recommendations, relatively little of substance has been added to the comprehensive analysis in the 1981 Working Party Report. The same recommendations are being recycled, with little regard to serious consideration of implementation.

The need to support arts and crafts industry development is certainly of great importance. Indeed, the increasing entry of Indigenous arts and crafts into commercial markets brings an increasing urgency to protect the cultural sensitivities and customary rights of the producers and their communities. It is clearly not viable to argue that Indigenous arts and

crafts are purely an industrial activity; the cultural dimensions are integral, and must be given added consideration as the industry continues to grow.

Creative Nation, 1994

The Keating Government released a Commonwealth cultural policy in October 1994. This document drew attention to the inadequate protection of Aboriginal and Torres Strait Islander peoples' intellectual property rights under existing laws, and added to the body of reports and statements advocating reforms to protect Indigenous peoples' intellectual property rights. *Creative Nation* stated that any measures should include consultations with Indigenous communities.

Discussion Paper, *Proposed Moral Rights Legislation for Copyright Creators*, June 1994

In June 1994 the Commonwealth Government released a discussion paper on moral rights. This paper examined the possibility of introducing the recognition of moral rights into the Australian legal system, to provide protection for creators. Moral rights, as distinct from the economic rights that are currently the focus of copyright law, comprise two components: 'the right to be identified as the author of a work (the right of "attribution"), and the right to object to distortion, mutilation or other modification of, or derogatory action in relation to, the work which is prejudicial to the author's honour or reputation (the right of "integrity")'.[58]

The introduction of moral rights would fulfil obligations under the Berne Convention, and would also enhance the ability of the *Copyright Act* to protect Indigenous peoples' rights. Moral rights would provide legal recognition of the 'use of works', and provide mechanisms for redress where works have been misused. As such, the discussion paper says, these rights might 'provide an additional and significant means of redress for some Aboriginal artists'. Since moral rights are 'personal' in nature, and therefore cannot be transferred, in the view of the authors of the discussion paper, they allow potentially greater control by Indigenous creators over their works.[59]

Issues Paper, *Stopping the Rip-Offs: Intellectual Property Protection for Aboriginal and Torres Strait Islander Peoples*, October 1994

One of the more comprehensive developments since the 1981 Report of the Working Party on the Recognition of Aboriginal Folklore was the release in October 1994 of the issues paper *Stopping the Rip-Offs: Intellectual Property Protection for Aboriginal and Torres Strait Islander Peoples*. This was prepared by the Commonwealth Attorney-General's

Department and issued under the auspices of three Ministers in the Keating Labor Government: Duncan Kerr, Minister for Justice; Robert Tickner, Minister for Aboriginal and Torres Strait Islander Affairs; and Michael Lee, Minister for Communications and the Arts.

This issues paper expanded on recommendations in *Creative Nation* and outlined the problems in achieving adequate protection for Indigenous peoples intellectual property rights under existing intellectual property laws. It surveyed some of the existing international and domestic laws relating to intellectual property, and suggested a range of possible options for improving protection for Aboriginal and Torres Strait Islander peoples' intellectual property rights.

The paper adopts the terms 'intellectual property', and 'arts and cultural expressions' to denote aspects of Indigenous cultures, and defines 'arts and cultural expressions' to 'encompass all forms of artistic expression which are based on custom and tradition derived from communities which are continually evolving'. Since this paper is bound within a conceptual framework of 'copyright', its discussion is limited to 'those aspects of the protection of arts and cultural expression that have a close connection with copyright law'. It therefore precludes consideration of 'other areas such as biodiversity and indigenous knowledge ... [which] ... are sometimes considered to be protected by intellectual property laws', since 'these areas often touch on aspects of intellectual property protection without involving property rights themselves'.[60] The paper is thus problematic in that it denies the potential for Indigenous rights and interests in biodiversity and knowledge to be considered as 'property rights'. As such, this paper does not adequately address Indigenous intellectual property rights: it deals only with one aspect.

An interdepartmental committee convened by the Department of Communications and the Arts is currently developing a response to the *Stopping the Rip-Offs* paper.

Social Justice Reports, 1995

Following the passage of the *Native Title Act* in 1993, and establishment of a body to administer the Indigenous Land Fund, the former Government proposed a series of additional measures to address Aboriginal and Torres Strait Islander peoples' disadvantage. The proposed social justice strategy recognised that not all Aboriginal and Torres Strait Islander peoples would be able to claim native title or other forms of land rights, and that there were many areas of Indigenous disadvantage that would not be addressed by these initiatives. In formulating its social justice strategy, that Government released a discussion paper and called for submissions. Among the most prominent submissions received were those by the Aboriginal and Torres Strait Islander Commission (ATSIC), the Council for Aboriginal Reconciliation (CAR) and the Aboriginal and Torres

Strait Islander Social Justice Commissioner of the Human Rights and Equal Opportunity Commission.

The submission from ATSIC, presented in 1995, consistent with United Nations statements and Indigenous perspectives, recognised that to Indigenous peoples 'intellectual property' and 'cultural property' comprise integral components of what this report termed 'cultural integrity and heritage protection'.[61] This report provided the following three specific recommendations for the protection of Indigenous intellectual property rights:

> The Commonwealth Government should amend statutes relevant to intellectual property rights to safeguard the integrity and ownership of indigenous cultural [and intellectual] property in a manner which recognises the particular features of Aboriginal and Torres Strait Islander ownership, including perpetual and communal rights. (Recommendation 81)
>
> The Commonwealth Government should introduce measures to regulate and ensure appropriate compensation for agreed use of indigenous intellectual and cultural property. (Recommendation 82)
>
> The Commonwealth Government must ensure that ATSIC and appropriate indigenous organisations are fully involved in negotiating the legislative reform and other aspects of the recommendations relating to cultural protection. (Recommendation 83)[62]

Similar recommendations were made in the submissions by the Council for Aboriginal Reconciliation and the Aboriginal and Torres Strait Islander Social Justice Commissioner.[63]

The social justice package is not part of the Coalition Government's agenda, although the Aboriginal and Torres Strait Islander Commission is carrying out some work on intellectual property.[64]

Coalition Government Policy, 1996

The policies of the Coalition Government support the need for improved protection for Aboriginal and Torres Strait Islander peoples' intellectual property rights. In its Aboriginal and Torres Strait Islander Affairs policy the Coalition says that it will 'ensure that relevant copyright laws fully recognise the cultural and economic rights of Indigenous artists.' It is not certain at this stage whether the Coalition's policies will be limited to reforms to the *Copyright Act* to provide better protection for Indigenous artists, or extend to recognising the full range of Indigenous peoples' intellectual property and include consideration of new *sui generis* legislation.

Australian Copyright Council Discussion Paper, *Indigenous Intellectual Property Rights: A Copyright Perspective*, March 1997

In March 1997 the Australian Copyright Council released a discussion paper on Indigenous intellectual property rights. This paper is a valuable contribution to the literature, and provides a very comprehensive coverage of the issue. As it openly states, this paper is working within a copyright framework, and its conclusions therefore remain cautious regarding reforms, suggesting that there may be sufficient remedies within existing copyright law to provide 'a measure of protection to the communities of individual indigenous creators'.[65]

Heritage, Biodiversity and Native Title

The protection of intellectual property is integral, in Indigenous peoples' views, to heritage and land. A number of legislative and other developments on heritage, biodiversity and land are relevant to Aboriginal and Torres Strait Islander intellectual property rights.

Protection of Indigenous Heritage

The *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* provides for the Commonwealth Minister to make declarations for protection over significant areas, sites or objects that are under threat of desecration. This Act is a 'last resort' to be used when State or Territory processes have failed. The Commonwealth Act does not include provisions for protection of non material aspects of heritage, but there is scope in Part IIA of this Act, enacted for Victoria. Part IIA includes 'folklore' in its definition of 'Aboriginal cultural property', which refers to:

> ...traditions or oral histories that are or have been part of, or connected with, the cultural life of Aboriginals (including songs, rituals, ceremonies, dances, art, customs and spiritual beliefs) and that are of particular significance to Aboriginals in accordance with Aboriginal tradition.[66]

The *Heritage Protection Act* was the subject of a review carried out in 1996 by the Hon. Elizabeth Evatt, AC. The Evatt Report has added to the growing number of reports and recommendations advocating the need to consider 'intellectual property' and other intangible aspects of Indigenous heritage in legislative and policy reforms.

This report made many recommendations aimed at improving the operation and effectiveness of the Act for protecting Indigenous heritage, and for achieving better coordination of heritage protection across all levels of government. Included in these recommendations are the need to include consideration of intangible components of

heritage (including intellectual property) in protection measures, and matters concerning the need to respect confidentiality, and customary restrictions on information in dealing with heritage protection. The report also recommended that, if State and Territory governments do not establish appropriate bodies, the Commonwealth Government should establish an Indigenous cultural heritage committee to ensure that Indigenous peoples have primary responsibility in deciding the significance of sites. This may allow the potential for the inclusion of intangible aspects of cultural heritage, including knowledge in frameworks for protection.

A discussion paper was released by the Aboriginal and Torres Strait Islander Commission in March 1997, on *Proposed Minimum Standards Framework for the Accreditation of State and Territory Aboriginal and Torres Strait Islander Heritage Protection Regimes.* This paper proposes that protection should be accorded to 'areas and objects which are culturally significant to Aboriginal and Torres Strait Islander people, including human remains, cultural property and historic and archaeological areas (including buildings).'. The paper considers that the 'significance of, and the nature of the threat or desecration to, an area or object is a matter for indigenous people to decide in accordance with their contemporary traditions'.

The *Minimum Standards* paper retains the emphasis on notions of physical places or objects as the primary (or only) manifestations of Indigenous cultural heritage, omitting any discussion of non-physical aspects. Although there may be some scope within the approach in this paper for Indigenous peoples to promote the non-physical dimensions of their heritage in ascribing significance, since the interpretation and management of heritage ultimately rests with government (the Commonwealth in this case), the focus appears likely at this stage to remain squarely on physical heritage.

The importance of incorporating Indigenous perspectives on heritage in Government approaches is recognised in some reports. This has been usefully discussed in a report by the Australian Heritage Commission released in February 1997, *Australia's National Heritage: Options for Identifying Heritage Places of National Significance*, which drew attention to the importance of knowledge:

> Indigenous people have a strong sense of heritage as including intangible aspects such as language, song, stories and art, and can be critical of a notion of heritage based too narrowly on 'place'. Protecting knowledge associated with a place may be equally or more important than physical protection of a place. Indigenous understandings of heritage will need to be acknowledged...[67]

Other developments which have raised the problems in protecting Aboriginal and Torres Strait Islander peoples' intellectual property rights have included an Inquiry into Aboriginal and Torres Strait Islander culture and heritage that was commenced by the House of Representatives Standing Committee on Aboriginal and Torres Strait Islander

Affairs, and which was discontinued with the change of government in March 1996. The full reference for that inquiry was:

> ...to inquire into and report on the maintenance and promotion of Australia's Indigenous arts, cultures and cultural identity. This encompasses the full range of artistic and cultural activities, both traditional and contemporary, including visual art, craft, language, design, dance, music, drama, storytelling, folklore, writing, sound, films, heritage, traditional cultural practices and spiritual beliefs.

Of those components that the inquiry was to pay 'particular attention to', was the inclusion of 'intellectual property rights, including the ownership and integrity of artistic work'. The inquiry received many comprehensive submissions, and conducted public hearings throughout several States before it was discontinued.

Indigenous Cultural Property

As advocated in international and Indigenous statements, to Indigenous peoples cultural property is inseparable from intellectual property, and these together comprise integral components of their cultural heritage.

Cultural property is generally considered to include a range of objects such as human remains, artefacts, items of a secret or sacred nature, and historical materials (including archival and other records). Much of this material is held in museums and other collecting institutions (both overseas and within Australia), for research and display purposes. Indigenous peoples claim their rights in this material, as it forms an essential component of their collective heritage, and is crucial to cultural identity.

Although many museums are actively working with Indigenous people to repatriate cultural property, there is little or no nationally consistent approach or policy, and no legislative obligation to repatriate. While the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* and some State laws may be used to a limited extent for this purpose, the Commonwealth Act provides only for protection orders of a limited duration to be placed over collections, while attempts are made to negotiate regarding repatriation.

Some progress towards the development of a national policy was made in the early 1990s following lengthy and difficult negotiations between Indigenous peoples, museums, and governments, but this ultimately fell short of achieving an agreed national policy. Limited success was achieved by the museums association and by the Aboriginal and Torres Strait Islander Commission, each of which independently finalised policy positions and guiding principles.

The challenges to successful achievement of a national policy include matters such as ownership rights and interests in cultural property, questions of access and provision of information about such material, and relative roles and responsibilities (including financial) of key stake-holders, including governments, museums and their organisations, and Indigenous peoples.[68]

Protection of Indigenous Secret or Sacred Information

Indigenous peoples consider information to be part of their intellectual property, and such information is regulated and managed according to strict cultural codes and rules. Matters of confidentiality and secrecy in Aboriginal and Torres Strait Islander societies are integral to the functioning of these societies, and are closely interconnected with religious, cultural, political and social systems.[69]

As with all their forms of intellectual property, knowledge is frequently obtained as information from Aboriginal or Torres Strait Islander people by researchers, scientists, government officials and a host of others, often without the consent of the people who 'own' the knowledge. As such, rules of confidentiality, often little understood or appreciated by the recipients of the information, are breached. Few actions have been brought by Indigenous people under western laws for breach of confidentiality, despite the fact that such information is very frequently sought. One case (*Foster v Mountford* (1976)) that has been documented is the action brought by members of the Pitjantjatjara Council who in 1976 sought to prevent information obtained by an anthropologist (Mountford) from being published in the Northern Territory. This action was taken using breach of confidence rules, and the court granted the plaintiffs an injunction to prevent sale of the book.[70]

The problems of confidentiality, especially with regard to Indigenous peoples' secret or sacred information, are particularly pertinent to the taking of evidence in courts, and to hearings and provision of evidence in land and heritage matters. These issues have been discussed in the 1986 Law Reform Commission's *Report on the Recognition of Aboriginal Customary Laws*, and were prominent in relation to claims that were made under the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* by Aboriginal people for heritage protection around the Hindmarsh Island Bridge area. The Hon. Elizabeth Evatt, AC, devoted some considerable discussion of secret and sacred information in her 1996 report of the review of the *Heritage Protection Act*, and produced a number of recommendations aimed at ensuring that heritage protection laws and procedures have respect for customary restrictions on information.[71]

Protection of Indigenous Knowledge in Biodiversity

Indigenous peoples assert that their intellectual property rights extend to protection for biological diversity. Although international developments are proceeding in the complex area of Indigenous cultural rights, there has been relatively little consideration of possible measures that may provide recognition and protection for Indigenous peoples' rights in biological diversity in Australia.

The most significant international development that provides potential for protection of Indigenous knowledge is the Convention on Biological Diversity, discussed above.

The Conference of Parties to the Convention on Biological Diversity and its technical advisory body, the Subsidiary Body on Scientific, Technical and Technological Advice, include in their programs of work consideration of the implementation of Article 8(j).[72] Issues raised by this work include the clarification of the relationship between Indigenous knowledge and intellectual property rights, and whether Indigenous knowledge can be construed as a property right.

Developments in Australia gained some momentum following the 1992 United Nations Conference on Environment and Development. In 1992 the then Commonwealth Government, with State and Territory governments, endorsed the Intergovernmental Agreement on the Environment, which includes an agreement to conserve biological diversity. Following that, in the same year a Task Force on Biological Diversity was established by the Australian and New Zealand Environment and Conservation Council (ANZECC) to oversee and report on the implementation of the Convention on Biological Diversity. Following recommendations from the Task Force, the Council of Australian Governments agreed in 1992 to implement a National Strategy for Ecologically Sustainable Development, which includes the conservation of biological diversity as one of its central objectives.

The Australian Government ratified the Convention on Biological Diversity in June 1993, and in 1996 the Commonwealth, State and Territory governments endorsed the National Strategy for the Conservation of Australia's Biological Diversity. Action 1.8.2 of this Strategy is to:

> Ensure that the use of traditional biological knowledge in the scientific, commercial and public domains proceeds only with the cooperation and control of the traditional owners of that knowledge and ensure that the use and collection of such knowledge results in social and economic benefits to the traditional owners. This will include:
>
> (a) encouraging and supporting the development and use of collaborative agreements safeguarding the use of traditional knowledge of biological diversity, taking into account existing intellectual property rights; and

(b) establishing a royalty payments system from commercial development of products resulting, at least in part, from the use of traditional knowledge.

The Commonwealth Government is also considering implementation of the Convention in various committees. The ANZECC Task Force on Biological Diversity recommended that a Commonwealth/State Working Group (CSWG) should be established to 'investigate and report on the strengthening of existing controls governing access to genetic resources'. This CSWG was established in May 1994, and an interdepartmental committee convened by the Department of Industry, Science and Tourism was subsequently formed to monitor the work of the CSWG and to develop a Commonwealth position on issues raised by the CSWG.[73]

The CSWG has prepared a draft discussion paper which includes a brief outline of Indigenous peoples' rights in biological and genetic resources, and the inability of existing intellectual property rights systems to adequately protect these. The paper concludes however that questions of Indigenous rights and ownership are too complex, are outside the scope of the Working Group's concerns and being dealt with in other forums. The paper therefore limits its discussion to the management of access to biological and genetic resources.

There are important implications particularly for Indigenous peoples post Mabo for ownership and control of biological and genetic resources. Given these implications and the multiple, intersecting and competing rights and interests in these resources, the CSWG's consideration of these aspects appears to be relatively inadequate.

Another intergovernmental committee convened by the Department of Environment, Sport and Territories is considering strategies for implementing the Convention; and a committee convened by the Department of Primary Industries and Energy is dealing with the FAO International Undertaking and related matters.

It remains to be seen how effectively these developments can incorporate consideration of Indigenous perspectives, including Indigenous intellectual property rights, particularly in the light of Australia's obligations under the TRIPS Agreement.

The links between protection and conservation of biological diversity, and the role of Indigenous peoples' knowledge, practices and innovations, are of more than academic interest. Indigenous peoples are increasingly concerned about exploitation of plants and animals, and other biological products and derivatives, and of the knowledge about them. Indigenous biological knowledge is being collected and utilised by pharmaceutical, cosmetic and other research companies, without regard to the custodians and holders of this knowledge, and with little or no financial returns to the Indigenous communities.[74] The protection of Indigenous biological and other types of knowledge is not within the scope of existing patent or other intellectual property laws.

Native title

The High Court's 1992 Mabo decision, the *Native Title Act 1993*, and the 1996 Wik decision carry potentially large implications for recognition of Indigenous intellectual property rights. Some writers have suggested that the recognition in common law of native title rights, could extend to recognising customary laws, including those related to ancestral designs.[75]

Given the close connections between intellectual property and land in Indigenous peoples' perspectives, it is feasible that claims could be made under the *Native Title Act*, using the Mabo Decision principles, to assert Indigenous peoples' rights in intellectual property. Whatever interpretations are made of these connections, there is no doubt that the Mabo Decision, the *Native Title Act*, and the more recent Wik Decision provide firm principles for the recognition of Indigenous customary laws within the western legal system.[76]

Possible Avenues for Reform

There are many possible ways in which reforms can be introduced to provide better protection for Indigenous intellectual property rights. These range from amendments to a range of existing laws, through more creative uses of these laws, a variety of common law and non-legislative approaches, to new *sui generis* systems which would be designed specifically for Indigenous peoples' intellectual property rights and which would provide greater community control over cultural products and expressions.

While a relatively comprehensive discussion of reforms is contained in the Australian Copyright Council's recent discussion paper, given the focus of that paper on a copyright approach it is ultimately cautious in its recommended solutions.[77]

Reforms to Existing Intellectual Property Laws

One possible avenue for providing improved protection for Aboriginal and Torres Strait Islander peoples' intellectual property rights is through amendments to existing laws. The problem with this 'minimalist' approach is that it will not go far enough to sufficiently address intellectual property rights from Indigenous peoples' perspectives.

Amendments to the *Copyright Act* might be usefully considered that extend, or waive the fifty year period for copyright protection, and expand the scope of the Act to include provisions for copyright protection of non-corporeal forms of work, such as performances. The provisions in the *Copyright Act* for performers' rights may offer some scope for protecting Indigenous ceremonial performances, but do not recognise the communal rights in these performances, and protection would still be subject to the limitations within the Act discussed above. The inclusion of moral rights protection would go some way towards better protecting Indigenous creators, and enabling them to seek redress for misuse of their works.

Ultimately, however, copyright and allied intellectual property laws are reactive. They operate retrospectively: persons who consider that their copyright has been infringed bring actions under the *Copyright Act* for redress. Effective use of the *Copyright Act* also requires sufficient knowledge of the workings of that Act, access to legal assistance, and adequate resources to cover costly litigation. These latter requirements may provide constraints on Aboriginal and Torres Strait Islander people seeking to use this legislative option.

The Australian Copyright Council has discussed the concept of *domain public payant* as a possible avenue for reform. This system would establish a system for the payment of

royalties to be made, for the commercial uses of works that are in the public domain. As that paper argues, however, this type of system would be likely to be antithetical to Indigenous peoples' interests, as it would depend for its operation on cultural products and expressions being in the public domain, and therefore freely accessible. This would increase the risk of exploitation of Indigenous cultural works. Since a *domain public payant* system also requires state control, this would deny Indigenous peoples' wish to control their own cultural products and expressions, and to receive benefits from the wider uses of these.[78]

Other Legislative Reforms Options: Heritage Protection and Native Title

Greater protection for Aboriginal and Torres Strait Islander intellectual property rights may be achieved by considering amendments to heritage laws. This avenue is particularly interesting, as it would be a recognition (consistent with international developments surveyed above) that Indigenous peoples' intellectual property is a component of their cultural heritage.

The principal Commonwealth law for protection of Indigenous heritage is the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984*. This Act is designed as a 'last resort' to enable the Minister to issue protection declarations over sites, areas or objects which are deemed to be of 'significance' and which are in threat or danger of desecration.

This Act currently does not include in its provisions scope for protection over non-tangible aspects of heritage. There is, however, increasing recognition of the fact that Indigenous heritage is a more inclusive entity, which incorporates the intangible and the expressive (i.e. song, dance, ceremony, etc) aspects of heritage as well as physical sites or places. A recent discussion paper produced by the Australian Heritage Commission in relation to the national heritage register drew attention to the importance of the intangible dimensions of heritage, and the knowledge associated with sites. Similar assertions have been made in the recommendations of the report by Elizabeth Evatt on the review of the *Aboriginal and Torres Strait Islander Heritage Protection Act*. Some writers have argued that amendments to the *Aboriginal and Torres Strait Islander Heritage Protection Act* may be a more fruitful way to better protection for Aboriginal and Torres Strait Islander peoples' intellectual property rights.[79] It is also significant to note in this regard the provisions of Part II of the *Heritage Protection Act* which were introduced for Victoria. These provisions go further than those in the Commonwealth Act, in that they allow for the inclusion of items of heritage other than purely physical places or objects in determining protection. This part of the Act also provides for a system of community control over heritage—an important aspect also absent from the Commonwealth law.

The *Native Title Act 1993*, as discussed above, establishes principles for recognition of Indigenous customary rights. This Act may also be interpreted to include recognition of Indigenous knowledge as intellectual property rights, within the meanings and definition of native title. One writer argues that since native title is defined according to the customs and traditions of the claimant group, this by definition must imply the inclusion of intellectual property rights, because to Indigenous peoples the 'knowledge of the properties of fauna and flora'—a component of their intellectual property—is determined according to customary laws.[80]

Non-Legislative Reform Options

There are options for considering common law reforms, using such mechanisms as 'blasphemy', and 'prerogative rights'. These are also canvassed in the Australian Copyright Council's discussion paper.[81] While they may establish some useful precedents, these approaches are of limited effectiveness in providing adequate recognition and protection for the full subject matter of Indigenous peoples' intellectual property rights, and incorporating their cultural perspectives in areas such as communal rights.

The development of guidelines, agreements, protocols, codes of conduct and similar arrangements are important areas for considering effective reforms. There are some significant emerging standards internationally, such as the *Principles and Guidelines for the Protection of the Heritage of Indigenous People* recommended in the 1995 study of Indigenous heritage prepared by the United Nations Special Rapporteur, Erica Irene-Daes.[82]

The development of regional agreements, either within the provisions of the *Native Title Act* or independently, provides scope for including for Indigenous control of, and full participation in, management—which could include management of natural and cultural resources, products and expressions. These regional agreement type developments are currently being negotiated in the Cape York Peninsula region of Far North Queensland and in the Kimberley region of West Australia.

One non-legislative measure with some potential to protect Indigenous intellectual property is the development by the National Indigenous Arts Advocacy Association of an authentication mark or trademark for Aboriginal and Torres Strait Islander art and cultural products. This is a label that will attach to cultural products, and which will be used to protect the origin and 'authenticity' of the products.[83] Although the authenticity label is essentially a 'marketing tool', designed to protect the consumer more than the Indigenous producer or community, by ensuring that products are 'authentic' it may in time act as an inducement for galleries, traders, and others in the commercial art and cultural products market to recognise and respect Indigenous art, and thereby mitigate the potential for

exploitation and misappropriation. It is also proposed that the development of the label be accompanied by an information and education strategy about Indigenous art and authenticity—an initiative that would also assist in protecting Indigenous peoples' intellectual property rights.

The development and introduction of effective reforms requires an active and committed approach throughout the entire machinery of government. A proliferation of committees, working parties and other bodies within the government bureaucracy may be an impediment to effective reforms. Conversely, with commitment and resources, these bodies can provide the impetus and the momentum necessary for meaningful and long term change.

Sui Generis Legislative Options and Community Rights

The inadequacies of existing intellectual property rights systems, and the challenges imposed by the GATT TRIPS are increasingly moving some communities to consider developing their own innovative solutions. One of the most potentially powerful is the development of *sui generis* systems for cultural protection, and community rights schemes. Some model legislation has been developed, notably by Third World countries, which seeks to establish a system for community control over cultural and resource rights. One such model, outlined by Nijar, suggests a conceptual framework and essential elements of a rights regime.[84]

Legislation has been introduced in India providing for community control over cultural items and resources. This Act, the *Provisions of the Panchayats (Extension to the Scheduled Areas) Act 1996* provides a model which, as well as that suggested by Nijar, could well be considered by other communities with a view to formulating approaches to recognition of their community rights. There are also debates among some Third World development scholars and advocates about *sui generis* systems for protection of biodiversity related community intellectual rights biological resources. Some writers have advocated such an approach, called the Model Biodiversity Related Community Intellectual Rights Act.[85]

Other Models: Traditional Resource Rights and Intellectual Integrity Rights

Some emerging developments suggest a potential for introducing a more integrated approach to provide recognition and protection of Indigenous peoples' intellectual property rights, and which incorporate the 'holistic' approach advocated by Indigenous peoples. For example, British ethnobotanist Darrell Posey is developing a model based on what he terms 'traditional resource rights'. Posey bases his model on a notion of rights

rather than on a model of commercialisation and commodification. 'Traditional resource rights' defines a 'bundle of rights', and Posey advocates an integrated process through which Indigenous peoples can employ a range of international human rights instruments and principles of equity and justice to assert their claims to property.[86] The advantage this approach offers is its foundational assertions about social justice, equity and self-determination: it embraces a more far-reaching set of Indigenous rights issues than more limited arguments for intellectual property reforms and other legislative measures.

Another model has been suggested in a 1994 Report by the Canadian based advocacy group Rural Advancement Foundation International (RAFI). In RAFI's report *Conserving Indigenous Knowledge: Integrating Two Systems of Innovation* the authors argue that Indigenous peoples have a number of options available to them for protecting their knowledge.[87] These include utilising existing intellectual property systems, developing a new *sui generis* legal regime, entering bilateral contractual arrangements, and establishing a system that combines each of these strategies. The RAFI report advocates an integrated system that combines all these approaches in what the authors term an 'intellectual integrity framework'.

The RAFI model and Posey's work are two emerging developments that move beyond simply restating the problem, towards attempting to develop some useful approaches based on a terminology largely free of value laden assumptions.

Conclusions

This paper has reviewed a range of international and national developments, legislation, policies, reports and recommendations concerning protection for Indigenous peoples' intellectual property rights. It is evident that existing copyright and other intellectual property protection laws do not provide a sufficient basis for protecting Indigenous peoples' intellectual property rights. Although the *Copyright Act*, and to a certain extent other intellectual property laws, have been used relatively successfully by Aboriginal people to obtain redress and compensation for misappropriation of their cultural products and expressions, there is a conceptual gap between Indigenous perspectives and western intellectual property laws.

The cases that have been brought by Aboriginal artists under the *Copyright Act* have demonstrated that this Act can be extended and interpreted in a way that is more accommodating of Indigenous interests, but there remain some fundamental problems with the conventional intellectual property approach.

There can be no doubt that amendments to the *Copyright Act* and other intellectual property laws are required to provide more effective protection for Indigenous peoples' intellectual property. The *Copyright Act* could, for example, be amended to extend the range of items for which copyright can attach. The term for protection under the *Copyright Act* could be extended beyond the current fifty year term to allow for Indigenous cultural products and expressions of some antiquity to be protected. A greater degree of information and education is required, so that Indigenous people especially are in a far better position to understand the laws that are available, and to have improved access to, and assistance in, using the existing legal framework.

There is a conceptual gap between existing intellectual property systems and the protection and recognition of Indigenous peoples' rights to their cultural knowledge, products and expressions. Indigenous peoples consider their intellectual property rights are an integral component of a 'holistic' cultural heritage, which includes a wider range of subject matter than can be accommodated within existing intellectual property laws. Given this, it becomes apparent that a different system is necessary to protect Indigenous peoples' rights, and it is for this reason that reforms to existing laws are best accompanied by the formulation of a new *sui generis* legislative arrangement that provides for community controlled decision-making, and financial benefits to Indigenous communities for the use by the wider community of their cultural products, expressions and knowledge. Although the terminology will need to be revised so that it is more appropriate to Indigenous concepts and perspectives, the model proposed in the 1981 folklore report offers a good basis for consideration of a suitable approach. The proposed model law could be harmonised with the provisions in the Convention on Biological Diversity, so as to provide a more integrated scheme for recognition and protection of Indigenous intellectual property. If a system for community decision-making and financial returns is devised, it could also pave the way for greater economic, as well as cultural self reliance.

Endnotes

1. A recent paper by the Australian Copyright Council provides an excellent comprehensive discussion: see Ian McDonald, *Protecting Indigenous Intellectual Property: A Copyright Perspective*, Australian Copyright Council, Sydney, March 1997.

2. There is a voluminous literature on Aboriginal art and copyright. For useful summaries of cases, see for example *Stopping the Rip-Offs: Intellectual Property Protection for Aboriginal and Torres Strait Islander Peoples*, Issues Paper, Canberra, October 1994: 4–6; McDonald, op. cit: 23–30; Aboriginal and Torres Strait Islander Commission (ATSIC), 'The application of copyright and other intellectual property laws to indigenous art and cultural expression: Cases, matters settled out of court and disputes that never went to court', paper prepared by Terri Janke, Michael Frankel and Company, Sydney, April 1996; Duncan Miller, 'Collective ownership of the copyright in spiritually-sensitive works: *Milpurrurru v Indofurn Pty Ltd*', *Australian Intellectual Property Journal*, 6(4), Nov. 1995: 185–207.

3. A full discussion of bioprospecting and Indigenous peoples is outside the scope of this paper, but see for example Josephine Axt, M.L. Corn, M. Lee and D.M. Ackerman, *Biotechnology, Indigenous peoples, and Intellectual property Rights*, Congressional Research Service, Library of Congress, Washington DC, 1993; Andrew Gray, *Between the Spice of Life and the Melting Pot: Biodiversity Conservation and its Impact on Indigenous Peoples*, IWGIA Document 70, Copenhagen, August 1991; Clark Peteru, 'Indigenous peoples' knowledge and intellectual property rights', consultation working paper for consultations in Suva, Fiji, April 1995, Pacific Concerns Resource Centre (Inc.); Michael Blakeney, 'Bioprospecting and the protection of traditional medical knowledge', paper presented to Symposium on Intellectual Property Protection for the Arts and Cultural Expression of Aboriginal and Torres Strait Islander Peoples, Perth, 1 October 1996; Jean Christie, 'Biodiversity and intellectual property rights: Implications for Indigenous peoples', conference papers and resolutions, Ecopolitics IX Conference, Northern Territory University, Darwin, 1–3 September 1995; Dinah Shelton, 'Fair play, fair pay: Laws to preserve traditional knowledge and biological resources', WWF Research Report, May 1995.

4. See for example, Howard Morphy, '"Now you understand": An analysis of the way Yolngu have used sacred knowledge to retain their autonomy', in *Aborigines, Land and Land Rights*, eds Nicolas Peterson and Marcia Langton, AIAS, Canberra, 1983: 110–133; Deborah Bird Rose, 'Whose confidentiality? Whose intellectual property?', in *Claims to Knowledge, Claims to Country: Native Title Claims and the Role of the Anthropologist*, ed. Mary Edmunds, Native Title Research Unit, Australian Institute of Aboriginal and Torres Strait Islander Studies, Canberra, 1994: 1–11; Stephen Brush, 'Indigenous knowledge of biological resources and intellectual property rights: The role of anthropology, *American Anthropologist*, 95(3): 653–671.

5. Darrell Posey and Graham Dutfield, *Beyond Intellectual Property: Toward Traditional Resource Rights for Indigenous Peoples and Local Communities*, International Development Research Centre, Ottawa, 1996: 76–81; Peteru, op. cit: 14–18.

6. Rural Advancement Foundation International (RAFI), 'Bioprospecting and indigenous peoples: An overview', paper prepared for the Asian Regional Consultation on the Conservation and Protection of Indigenous Knowledge in the Context of Intellectual Property Systems, Sabah, East Malaysia, 24–27 February 1995, para. 2.
7. RAFI communique, 'Patents, Indigenous peoples, and human genetic diversity', May 1993; Stephen Gray, 'Vampires round the campfire', *Alternative Law Journal*, 22(2), April 1997: 60–63; Michael Mansell, 'Barricading our last frontier: Aboriginal cultural and intellectual property rights', in *Our Land Is Our Life: Land Rights, Past, Present, and Future*, ed. Galarrwuy Yunupingu, University of Queensland Press, St Lucia, Brisbane, 1997: 195–209.
8. Jill McKeough, ed., *Blakeney and McKeough, Intellectual Property: Commentary and Materials*, 2nd edn, Law Book Company, North Ryde, NSW, 1992: 1–2.
9. Useful summaries of these actions are to be found in *Stopping the Rip-Offs* op. cit: 4–6; ATSIC, 'The application of copyright and other intellectual property laws to indigenous art and cultural expression', op. cit: 23–30.
10. ibid: 13.
11. Colin Golvan, *An Introduction to Intellectual Property Law*, Federation Press, Sydney, 1992: 1.
12. ibid: 4–12.
13. ibid: 1–2.
14. McKeough, op. cit: 16.
15. See Department of Home Affairs and Environment, *Report of the Working Party on the Protection of Aboriginal Folklore*, Canberra, 4 December 1981: 15.
16. Posey and Dutfield, op. cit: 60; Gray, *Between the Spice of Life and the Melting Pot*, op. cit: 51–3; Peteru, op. cit: 3; Axt et al, op. cit: 32–36; Darrell Posey, *Indigenous Peoples and Traditional Resource Rights: A Basis for Equitable Relationships?*, Green College Centre for Environmental Policy and Understanding, Oxford, 1995.
17. Vandana Shiva, Afsar H. Jafri, Gitanjali Bedi, and Rhadha Holla-Bhar, *The Enclosure and Recovery of the Commons: Biodiversity, Indigenous Knowledge and Intellectual Property Rights*, Research Foundation for Science, Technology and Ecology, New Delhi, India, 1997; Chakravarthi Raghavan, *Recolonization: GATT, the Uruguay Round and the Third World*, Zed Books, London, 1990.
18. See Sam Ricketson, *Intellectual Property: Cases, Materials and Commentary*, Butterworths, Sydney, 1994, especially ch. 8. Also, *Study on the Protection of the Cultural and Intellectual Property of Indigenous Peoples*, report by Erica Irene-Daes, Special Rapporteur to the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities, ECOSOC, E/CN.4/Sub.2/1993/28: 31–32.
19. Ricketson, op. cit: 350
20. ibid.: 360–362.

21. See Michael Davis, 'Competing knowledges? Indigenous knowledge systems and western scientific discourse', paper presented to international conference Science and Other Knowledge Traditions, James Cook University, Cairns, 23–27 August 1996.
22. Daes, op. cit: 32, Kamal Puri, 'Australian Aboriginal People and their Folklore', Ngulaig Monograph No. 9, University of Queensland, St. Lucia, Brisbane, 1992: 37–39.
23. Section 18(iv), cited in Puri, op. cit: 3, fn.14. Puri has a useful discussion about the term 'folklore' and its derivations and uses in international and domestic contexts.
24. ibid: 36.
25. ibid: 35–36; Blakeney, op. cit.
26. WIPO/UNESCO, *Model Provisions for National Laws on the Protection of Expressions of Folklore Against Illicit Exploitation and Other Prejudicial Actions*, Section 2, 'Protected Expressions of Folklore'. For discussion of the model provisions see Michael Blakeney, 'International protection of indigenous arts and cultural expressions', paper presented to Symposium on Intellectual Property Protection for the Arts and Cultural Expression of Aboriginal and Torres Strait Islander Peoples, Perth, 1 October 1996; Daes, op. cit: 31–32.
27. Peteru, op. cit: 23.
28. Posey and Dutfield, *Beyond Intellectual Property*, op cit.: 102.
29. See for example Posey and Dutfield, op. cit: 102–103; Vandana Shiva et. al, op. cit; Shelton, op. cit: 35–36; Chakravarthi Raghavan, op. cit: 114–138; Gurdial Singh Nijar, 'A conceptual framework and essential elements of a rights regime for the protection of Indigenous rights and biodiversity', Third World Network, Paper prepared for Intergovernmental Committee on the Convention on Biological Diversity, Nairobi, 20 June – 1 July 1994.
30. Posey defines 'soft law' as 'a variety of instruments, declarations of principles, codes of practice, recommendations, guidelines, standards, charters, resolutions, etc'. See Posey and Dutfield, op. cit: 120.
31. United Nations Economic and Social Council, Commission on Human Rights, Sub-Commission on Prevention of Discrimination and Protection of Minorities, Forty-fourth session, Discrimination Against Indigenous Peoples, *Intellectual Property of Indigenous Peoples: Concise Report of the Secretary-General*, E/CN.4/Sub.2/1992/30, 6 July 1992: 2.
32. ibid: 7.
33. United Nations Economic and Social Council, Commission on Human Rights, Sub-Commission on Prevention of Discrimination and Protection of Minorities, Forty-sixth session, Discrimination Against Indigenous Peoples, *Technical Review of the United Nations Draft Declaration on the Rights of Indigenous Peoples, Addition: Draft Declaration as Agreed upon by the Members of the Working Group at its Eleventh Session*, E/CN.4/Sub.2/1994/2/Add.1, 20 April 1994: 7.
34. ibid: 9.
35. Daes, op. cit: 708.

36. See Manuela Tomei and Lee Swepston, *Indigenous and Tribal Peoples: A Guide to ILO Convention No. 169*, International Labour Organisation, Geneva, July 1996.
37. For a critique of Convention 169 see Sharon Venne, 'The new language of assimilation: a brief analysis of ILO Convention 169', *Without Prejudice*, vol. II, no. 2, 1990: 53–57.
38. Arguments in support of ILO Convention 169 have been propounded by Lee Swepston, 'A new step in the international law on indigenous and tribal peoples: ILO Convention 169 of 1989', *Oklahoma City University Law Review*, vol. 15, 1990: 677–714, and Russel Barsh, 'An advocate's guide to the Convention on Indigenous and Tribal Peoples', *Oklahoma City University Law Review*, vol. 15, 1990: 209–253.
39. See for example, Donna Craig, 'Implementing the Convention on Biological Diversity: indigenous peoples' issues', contribution to IUCN Commission on Environmental Law Technical Paper on Legal and Institutional Issues Arising from the Implementation of the Convention on Biological Diversity, presented to Regional Conference on the Biodiversity Convention, Manila, 6–8 June 1994; and see Posey and Dutfield, op. cit., for discussions about the Convention on Biological Diversity and indigenous knowledge.
40. Craig, op. cit; Lyle Glowka, Francoise Burhenne-Guilmin and Hugh Synge, *A Guide to the Convention on Biological Diversity*, Environmental Policy and Law Paper No. 30, IUCN, Gland, Switzerland, 1994.
41. Posey and Dutfield, op. cit; Darrell A. Posey, *Traditional Resource Rights: International Instruments for Protection and Compensation for Indigenous Peoples and Local Communities*, IUCN/World Conservation Union, Gland, Switzerland, 1996
42. Glowka et al, op. cit: 76–84.
43. See Posey and Dutfield, op. cit. for a good summary of these developments.
44. There is a good overview and discussion of many of these developments (as they relate predominantly to protection of art) in the Copyright Council's Discussion Paper: McDonald, op. cit.
45. Department of Home Affairs and Environment, *Report of the Working Party on the Protection of Aboriginal Folklore*, Canberra, 4 December 1981: 2.
46. ibid., para. 502.
47. ibid: 3, 17 (citing the 1976 WIPO/UNESCO Tunis Model Copyright Law for Developing Countries).
48. See for example Davis, op. cit; MacDonald, op. cit: 10–11.
49. Law Reform Commission, *The Recognition of Aboriginal Customary Laws*, Report No. 31, Australian Government Publishing Service, Canberra, 1986, vol. I: 7. Note that this report did not specify whether 'Aboriginal' was taken to include 'Torres Strait Islanders'.
50. ibid: 76.
51. ibid: 153–155.
52. ibid: 337–338.
53. e.g. Davis, op. cit; McDonald, op. cit: 38–46.

54. ibid: 38.
55. ibid: 34.
56. Australian Government, Department of Aboriginal Affairs, *Report of the Review Committee on the Aboriginal Arts and Crafts Industry*, Canberra, 1989; McDonald, op. cit: 34
57. Commonwealth of Australia, Royal Commission into Aboriginal Deaths in Custody, *National Report*, vol. 4, Canberra, AGPS, 1991: 406–408.
58. Commonwealth of Australia, *Proposed Moral Rights Legislation for Copyright Creators*, Discussion Paper, Canberra, June 1994: 5.
59. ibid: 23–25.
60. *Stopping the Rip-Offs*, op. cit: 2.
61. Aboriginal and Torres Strait Islander Commission, *Recognition, Rights and Reform: Report to Government on Native Title Social Justice Measures*, Canberra, 1995: 99–125.
62. ibid., *Overview and Recommendations Report*, vol. 2: 30.
63. Council for Aboriginal Reconciliation, *Going Forward: Social Justice for the First Australians*, submission to the Commonwealth Government's Native Title Social Justice Measures, Canberra, 1995; Aboriginal and Torres Strait Islander Social Justice Commissioner, *Submission to the Parliament of the Commonwealth of Australia on the Social Justice Package*, Sydney, April 1995.
64. For a summary of current developments see Michael Davis, 'Indigenous intellectual property protection consultations with Aboriginal and Torres Strait Islander peoples', *Aboriginal Law Bulletin* 3(90), March 1997: 22–23.
65. McDonald, op. cit: 68.
66. See Hon. Elizabeth Evatt, AC, *Review of the Aboriginal and Torres Strait Islander Heritage Protection Act 1984*, Report, August 1996: 365.
67. Australian Heritage Commission, *Australia's National Heritage: Options for Identifying Heritage Places of National Significance*, Discussion Paper, Canberra, February 1997: 13.
68. A useful summary of events up to 1993 is in Michael Davis, 'Policy development on Aboriginal and Torres Strait Islander cultural property', paper presented to the international conference Post-Colonial Formations: Nations, Culture, Policy, Institute for Cultural Policy Studies, Griffith University, Brisbane, 7–10 July 1993; for museums policy see Council of Australian Museum Associations, *Previous Possessions, New Obligations: Policies for Museums in Australia and Aboriginal and Torres Strait Islander Peoples*, Melbourne, December 1993.
69. See Deborah Bird Rose, 'The public, the private and the secret across cultural difference', in *Heritage and Native Title: Anthropological and Legal Perspectives: Proceedings of a Workshop*, ed. Julie Finlayson and Ann Jackson-Nakano, Native Title Research Unit, Australian Institute of Aboriginal and Torres Strait Islander Studies, Canberra, 1996: 113–128; Deborah Bird Rose, 'Whose confidentiality? Whose intellectual property?', op. cit;

Morphy, op. cit: 110–133; James F. Weiner, 'Anthropologists, historians and the secret of social knowledge', *Anthropology Today* 11(5), October 1995: 3–7.

70. See ATSIC, 'The application of copyright and other intellectual property laws', op. cit: 5; McDonald, op. cit: 23–24; Miller, op. cit.

71. Evatt, oop. cit., especially recommendations 4.1 to 4.4, 6.7, 7.1 to 7.6, and 9.4.

72. See UNEP, Convention on Biological Diversity, Subsidiary Body on Scientific, Technical and Technological Advice, Second Meeting, Montreal, 2–6 September 1996, 'Knowledge, innovations and practices of indigenous and local communities', note by the Secretariat, UNEP/CBD/SBSTTA/2/7, 10 August 1996; UNEP, Convention on Biological Diversity, Conference of the Parties to the Convention on Biological Diversity, Third Meeting, Buenos Aires, Argentina, 4–15 November 1996, 'Knowledge, innovations and practices of indigenous and local communities: implementation of article 8(j)', note by the Executive Secretary, UNEP/CBD/COP/3/19, 18 September 1996.

73. There is a useful summary of developments in Blakeney, 'Bioprospecting and the protection of traditional medical knowledge', op. cit: 11.

74. There is an extensive and growing body of literature on indigenous knowledge, intellectual property, and bioprospecting; see for example Axt et al, op. cit; Stephen B. Brush, 'Indigenous knowledge of biological resources and intellectual property rights: The role of anthropology', *American Anthropologist*, 95(3), 1993: 653–671; Peteru, op. cit. and United Nations Development Program, Crucible Group, *People, Plants and Patents: The Impact of Intellectual Property on Conservation, Trade, and Rural Society*, International Development Research Centre, Ottawa, 1994.

75. Kamal Puri, 'Cultural ownership and intellectual property rights post-Mabo: Putting ideas into action', *Intellectual Property Journal*, vol. 9, 1994–95: 324–325; Kamal Puri, 'Copyright protection for Australian Aborigines in the light of Mabo', in *Mabo: A Judicial Revolution: The Aboriginal Land Rights Decision and its Impact on Australian Law*, eds M.A. Stephenson and Suri Ratnapala, University of Queensland Press, St. Lucia, Brisbane, 1993: 132–164.

76. *Mabo v State of Qld (No. 2) (1992)* 175 CLR 1; *Native Title Act (Cth) 1993*; *Wik Peoples v State of Qld (1996)* 141 ALR 129; McDonald, op. cit: 26, 56–7, 62–3.

77. ibid: 50–67.

78. ibid: 61–62.

79. Colin Golvan, 'Aboriginal art and the protection of Indigenous cultural rights', *European Intellectual Property Review*, vol. 7, 1992.

80. David Bennett, 'Native title and intellectual property', in *Land, Rights, Laws: Issues of Native Title*, ed. Paul Burke, Issues Paper No. 10, Native Title Research Unit, Australian Institute of Aboriginal and Torres Strait Islander Studies, Canberra, April 1996.

81. McDonald, op. cit: 56–59.

82. Erica Irene-Daes, *Annex to Protection of the Heritage of Indigenous People*, Sub-Commission on Prevention of Discrimination and Protection of Minorities, 48th Session, 28 August 1996, E/CN.4/Sub.2/1996/L.51.
83. Marianna Annas, 'The label of authenticity: a certification mark for goods and services of indigenous origin', *Aboriginal Law Bulletin*, 3(90), March 1997: 4–8.
84. Gurdial Singh Nijar, op. cit.
85. Vandana Shiva et al, op. cit.
86. Posey, op. cit. and Posey and Dutfield, op.cit.
87. Rural Advancement Foundation International, *Conserving Indigenous Knowledge: Integrating Two Systems of Innovation*, Ottawa, 1994.

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Biological Diversity and Indigenous Knowledge

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Contents

Major Issues Summary

Over the millennia, Indigenous peoples have developed a close and unique connection with the lands and environments in which they live. They have established distinct systems of knowledge, innovation and practices relating to the uses and management of biological diversity on these lands and environments.

Much of this knowledge forms an important contribution to research and development, particularly in areas such as pharmaceuticals, and agricultural and cosmetic products. In the context of these uses, Indigenous peoples claim that their rights as traditional holders and custodians of this knowledge are not adequately recognised or protected. They demand not only recognition and protection of this knowledge, but also the right to share equitably in benefits derived from the uses of this knowledge.

Existing intellectual property laws offer limited scope for the recognition of Indigenous peoples' rights in biodiversity related knowledge and practices. Similarly, native title, heritage and environmental laws and policies also provide insufficient means for addressing Indigenous rights in biodiversity-related knowledge and practices.

The challenge is to protect the rights of Indigenous peoples to their knowledge, while also conserving biological diversity. The Convention on Biological Diversity is one international instrument that has the potential to achieve both these objectives. Its primary objective is the conservation and management of biological diversity. It also provides opportunities for the protection of Indigenous knowledge practices and innovations related to biodiversity and for the introduction of measures for equitable sharing of benefits with traditional knowledge holders.

Following Australia's ratification in 1993 of this Convention, the introduction of initiatives need to be considered that specifically recognise and protect the rights of Indigenous peoples to their biodiversity related knowledge, innovations and practices.

The introduction of measures that ensure Indigenous peoples share equitably in benefits derived from the uses of their knowledge will not only protect knowledge, but can also act as incentives to environmental conservation.

This paper surveys a range of international developments as a context for discussing some possible measures for the protection of Indigenous knowledge. Successful measures could include a combination of creative legislative and policy responses to the Convention on

Biological Diversity, and the use of a range of other laws, policies and instruments. The integration of Indigenous knowledge and practices with other conventional approaches to land and environment is also a useful way of achieving recognition and protection for Indigenous knowledge systems.

Contracts, agreements and protocols are particularly useful for protecting Indigenous knowledge systems, as these offer the flexibility to include specific negotiated arrangements for equitable benefit sharing, and can be designed to meet the needs of all parties. Ultimately, the most effective approach is to establish a dialogue with key interest groups, such as industry, intellectual property organisations, Indigenous communities and organisations, governments, and conservation groups. Discussions could then proceed towards developing an integrated conservation and benefit-sharing system based on a partnership between the key organisations and sectors.

Introduction

Biological diversity, bioprospecting and Indigenous knowledge

This paper complements an earlier paper *Indigenous Peoples and Intellectual Property Rights*, Research Paper No. 20 (1996–97).

Biological diversity or biodiversity refers to the 'variety of all life forms—the different plants, animals and microorganisms, the genes they contain, and the ecosystems of which they form a part'. There are three levels of biodiversity—genetic, species, and ecosystem diversity, all of which form the total diversity of Australia's environments.[1] Australia is considered particularly rich in the extent of its diversity of flora and fauna. Some estimates are that of the 44 000 species of plants in Australia, about 90 per cent occur only in Australia.[2]

Australia's biological diversity is under increasing threat of loss due to industrialisation and urbanisation, land clearances, farming and agricultural activities. A recent World Conservation Union report has found Australia to have the second highest number of plant species threatened by extinction of any country in the world.[3]

The values of biological diversity

Biological diversity is increasingly becoming recognised as important beyond its purely scientific interest. Social and economic values of biodiversity are assuming greater significance as a range of different groups, including Indigenous peoples assert their claims and interests.

A diverse environment provides an important storehouse for the raw materials used in a range of products and processes, such as in agriculture, medicine, and cosmetics. Many species are also important in a growing 'bush food' industry. The pharmaceutical industry is arguably the largest commercial user of plant genetic species, and the development of these products can create significant opportunities for economic growth for this industry sector.

The diverse range of interests in biodiversity raises questions about how to reconcile what may sometimes be competing interests and values in the natural environment. For example, the conservation of biological diversity may be at odds with the potential economic values and uses of biological diversity. This then raises questions as to how we assign values to nature: can nature be measured in scientific or monetary terms? Who 'owns' nature? Is the natural environment to be preserved as the collective heritage of the nation, or is it to be subject to the various demands, claims and interests of particular individuals, communities or groups. Who ultimately stands to benefit most from the harvesting of natural resources—governments, communities, or others? Can there be a sound balance between the conservation and protection of biodiversity for its own sake, and the sustainable uses of it?

Among the diverse interests in the natural environment are those of Indigenous peoples. There are many aspects to Indigenous peoples' claims and interests in the natural environment and biological diversity. Indigenous peoples seek recognition and protection of their distinct rights in knowledge of, and practices relating to the management, use and conservation of biological diversity. They also seek the introduction of measures to prevent exploitation of their knowledge, and compensation or financial benefits from the uses of their knowledge, innovations and practices. At the same time, some customary Indigenous practices such as hunting, fishing and gathering—often little understood by non Indigenous people—provide potential conflict with conventional conservation and environmental management laws, programs and activities.

It is important to recognise that there is the same diversity of views among Indigenous peoples as there is in the wider community. Some Indigenous people may wish to preserve biodiversity related knowledge as their collective heritage, while others may see potential economic benefits to be gained by allowing the use by the wider community of their biodiversity related knowledge and practices. Some of these issues become apparent when considering the use of biological diversity for pharmaceutical and other products—an activity known as bioprospecting.

Bioprospecting

Bioprospecting is the name given to the search for useful plant related substances that can be developed into marketable commodities such as pharmaceuticals, pesticides and cosmetics. Increasingly sophisticated biotechnological processes are used to transform plant derived substances into commercially successful products with global markets. The patenting of products and substances derived from the natural environment has particular implications for Indigenous peoples' claims.

A patent is an important component of industrial property law that confers exclusive rights on the creator of an invention. The conditions required for a patent are that the invention—either a product or a process—should be new, non-obvious (i.e. it should involve an

inventive step), and industrially applicable. Another requirement for a patent is that the invention should be clearly described and documented and made available to wider society (e.g. through publications in books or journals).[4] The following examples of bioprospecting and the patenting of biological products raise important issues regarding the role of Indigenous knowledge, practices and innovations, and the applicability of patent laws to these.

The neem tree (*Azadirachta indica*) is found widely throughout parts of India. It forms a central part of Indian communities' culture and heritage. It is used by these communities for a vast range of purposes such as in medicines, toiletries, insecticides, fertilisers, and in agriculture.[5] The medicinal, pharmacological and therapeutic properties of neem have been known about and used for millennia, and it is known in Sanskrit as *Sarva Roga Nivarini*, 'the curer of all ailments'.

From the early 1970s, the neem tree began to attract the attention of United States and global markets. In 1971 a US timber importer noted the properties of the neem tree, and began importing it. Following testing for a pesticidal product derived from neem extracts, the importer received clearance for this product from the US Environmental Protection Agency in 1985, and in 1988 he sold the patent for the pesticide to the transnational chemical company W. R. Grace & Co.[6]

The patenting and marketing by Grace of products based on neem derived substances led to a debate about the appropriation of the intellectual property of Indian communities. Indian and Third world critics of Grace's approach claim that the preparation of neem based products has been part of the collective community knowledge of Indian societies for millennia, and should not have been patented by Grace. They refuted the assertions by Grace that its methods for developing neem based products were novel, non-obvious and based on extraction methods that constituted an innovative technique, and therefore amenable to patenting. Instead, the critics argued that the extraction and preparation of active substances from neem is a traditional innovation based on millennia of collective knowledge and practice. The critics state that:

> Patent claims on the various processes and products of the neem that are built on the vast cultural and intellectual heritage of the Indian people, reflect a total devaluation of the country's intellectual heritage and an arrogance based on the assumption of superiority of western sciences.[7]

The bioprospecting and patenting of the neem tree has parallels in Australia, as illustrated by the case of the smokebush.

The smokebush is the common name for *Conospermum*, a plant that is widespread throughout parts of western Australia and in parts of some other states. It was used traditionally by Aboriginal peoples for a variety of therapeutic purposes.[8] During the 1960s, the smokebush was among those plants that were collected and screened for scientific purposes by the US National Cancer Institute, under license from the West

Australian Government. In 1981, some specimens were sent to the US where they were tested for possible anti-cancer chemicals. No cancer resistant properties were found, and the samples were stored for several years. Later, in the late 1980s, these samples were again tested, but this time for potential substances that could cure AIDS. A substance called *Conocurvone* was isolated which, when laboratory tested, was found to destroy the HIV virus in low concentrations.

To develop this substance, in the early 1990s the WA Government granted a license to Amrad Pty Ltd, a Victorian based multinational pharmaceutical company. The US National Cancer Institute granted Amrad an exclusive worldwide license to develop the patent for this anti-AIDS substance. It has been suggested that Amrad provided $1.5 million to gain access rights to smokebush and related species. Some estimates state that the WA Government would receive royalties exceeding $100 million by the year 2002 if Conocurvone is successfully commercialised. Given these commercial values on smokebush and its derivatives, critics argue that there should be provisions for Aboriginal peoples to share equitably in benefits from this plant, given their role as first having identified and used the smokebush for its therapeutic and healing properties.[9]

The collecting and screening of smokebush by scientific interests has been facilitated by the Western Australian Government's use of its *Conservation and Land Management Act 1984*. This Act was amended in 1993 to include a clause specifically designed to encourage state control over biological resources. Some have argued that these amendments disadvantage Indigenous peoples who claim rights to species, or knowledge of species in Western Australia, favouring instead, state and industry interests in these.[10]

These examples of bioprospecting and patenting of biological and genetic products raise issues about what is patentable subject matter. Patent law generally defines subject matter that is deemed patentable in terms of what subject matter is excluded from patent applications. These exclusions usually comprise discoveries of materials or substances that already exist in nature, plants or animals or products from these, or biological processes (other than microbiological processes) for the production of plant or animal varieties or products.[11]

Biological diversity, cultural diversity and Indigenous peoples

The loss of rich biologically diverse environments (such as the Amazonian forests) through activities such as logging, land clearance and mining and development has profound consequences in its impact on the culturally diverse groups of Indigenous peoples whose livelihoods depend on these environments. There is in this sense, a direct relationship between biological diversity and cultural diversity; maintenance of the former can help preserve the latter. The reverse is also true, since Indigenous peoples are often the custodians and stewards of biological diversity, the maintenance of cultural diversity is an important factor in the conservation of biological diversity.

Despite these important links between cultural, and biological diversity, the recognition of cultural diversity does not necessarily always exist in harmony with the preservation of biological diversity. The preservation of cultural diversity is taken to include having a respect for, and maintaining Indigenous peoples' rights to hunt, fish and gather according to their customary laws and practices. These practices, as shown below, sometimes conflict with the interests of conservation and environmental protection.[12]

Ultimately, solutions need to be found that can provide a balance between the recognition and protection of Indigenous cultural rights, and the interests of conservation. Joint managed protected areas, regional and local agreements, and similar types of arrangements (discussed below) may provide some opportunities for this balance, based on a 'new Australian land ethic'.[13]

Indigenous knowledge

Indigenous peoples and the environment

Indigenous peoples have long had a significant interdependence with the lands and environments in which they live. These lands and environments are vital for their survival, providing a wide array of substances for food, shelter and implements. They also provide a source for a variety of objects for both ritual and everyday use. The land and environment is also significant in Indigenous peoples' cultural, religious and social systems. Indigenous peoples are custodians and stewards of their lands and environments, and have been entrusted by ancestral charters to care for these through successive generations.

The land, its features, environments and products form cultural landscapes, which are given significance by Indigenous belief systems. These cultural landscapes are both the result of, and provide the focus for, ancestral events. Together with Indigenous peoples' social, political and religious systems, lands and environments are interwoven into a tightly integrated cultural system that derive their meaning from the Dreaming. This integrated cultural system forms the basis for Indigenous knowledge.

What is Indigenous knowledge?

Indigenous people have a vast knowledge of, and capacity for developing innovative practices and products from their environments. The following distinctive features characterise indigenous knowledge:

- collective rights and interests held by Indigenous peoples in their knowledge

- close interdependence between knowledge, land, and other aspects of culture in Indigenous societies
- oral transmission of knowledge in accordance with well understood cultural principles, and
- rules regarding secrecy and sacredness that govern the management of knowledge.

Knowledge is a fundamental component of Indigenous culture, and must be considered in terms of both its sacred and secular dimensions. To Indigenous peoples, knowledge is not considered independently from its products and expressions, or from actions. These all form part of a closely integrated cultural system. The physical products and expressions of Indigenous cultures are intimately connected to the knowledge from which they derive, or with which they are associated.

Products and expressions of Indigenous knowledge systems include ceremonial and ritual objects and performances, artistic designs, works and expressions, and song, dance and story, and subsistence and land and environment management activities (such as hunting, fishing and gathering, and the use of fire).

Systems of knowledge, and their products and expressions are vital to ensuring the continuity of Indigenous cultures, and are important vehicles for enabling Indigenous peoples to adapt their societies and cultures to introduced societies, cultures and technologies.[14] By maintaining cultural diversity, recognition and protection of Indigenous knowledge can also benefit environmental conservation and sustainable management.

Expressions of Indigenous knowledge

Indigenous ecological knowledge is expressed in many ways. Some particularly important expressions are customary practices such as hunting, fishing and gathering. Since these activities require knowledge of customary ways of procuring these resources, the exercise by Indigenous peoples of their rights to carry out these activities in accordance with their laws and customs may be regarded as a demonstration of their assertion of their rights to their traditional knowledge systems. Indigenous customary hunting, fishing and gathering practices may therefore be considered aspects of rights relating to land:

> While caution needs to be exercised to avoid classifying the incidents of Aboriginal title in terms of English property law concepts, it seems clear that fishing, hunting and gathering rights can comprise part of Aboriginal title to land. However...while customary Aboriginal fishing, hunting and gathering rights may be part of the bundle of rights comprised in Aboriginal title to land, there is no necessary nexus between them.[15]

Another writer argues 'not only is the recognition of Aboriginal fishing and hunting rights compatible with common law concepts of interests in land, but may in fact act as a catalyst

for preserving those resources for their common enjoyment and use'.[16] This point is supported by Section 223(2) of the *Native Title Act 1993 (Cwlth)* which defines native title 'rights and interests' to include 'hunting, gathering, or fishing, rights and interests'. These statements support an argument that it is not only possible, but necessary to devise a system that can meet the objectives of both conserving biodiversity, and also protecting Indigenous customary uses of biodiversity.

Conservation and resources legislation varies in all jurisdictions in terms of whether provisions allow for Indigenous customary or traditional practices. In many cases, legislation includes some exemptions for Aboriginal people from regulations governing hunting, fishing and gathering. These exemptions provide limited recognition of Indigenous peoples' 'traditional' activities concerning land use.[17] Despite these beneficial provisions, there have been some cases in which conflict has arisen between the requirements of conservation legislation and Indigenous peoples' actions.

In 1987 an Aboriginal elder from the Gungalida people in Queensland was found to have contravened the *Fauna Conservation Act 1974 (Qld)* by taking bush turkey. The plaintiff had argued that his actions were carried out in accordance with his customary entitlement to take the animal. The High Court's decision was based on whether the action by the Aboriginal man had contravened *The Criminal Code (Qld)* through an 'offence relating to property'.[18] This case shows how the imposition of state conservation laws can sometimes provide impediments to Indigenous peoples' ability to exercise their customary rights regarding exploitation of particular species—rights that are based on the accumulation of ecological knowledge and customary practices.

The competing priorities and interests between Indigenous customary hunting, fishing and gathering activities, and conservation were among the issues considered in the Australian Law Reform Commission's 1986 report on *The Recognition of Aboriginal Customary Laws*. That report recommended some guidelines to be incorporated into legislation in all jurisdictions. These guidelines suggested:

- that priority is given to conservation over traditional hunting and fishing activities
- that access is provided to Indigenous people to their traditional lands for the purpose of hunting, gathering and fishing
- that sea closures are provided to allow for traditional fishing activities to be conducted in waters adjacent to Aboriginal land, and
- that measures are developed for improved consultation with Indigenous peoples, and for them to have greater control over land and marine management.[19]

Challenges to recognising and protecting Indigenous knowledge

Indigenous peoples have for a long time advocated their wish to be recognised as having unique rights, based on their distinct Indigenous status. While the focus in the quest for Indigenous rights has been on land rights, Indigenous peoples assert that they also have rights in the biological resources on the lands, and in the knowledge they possess of these resources.

Indigenous peoples are increasingly concerned that their knowledge of the natural environment is being exploited. They assert that the collection, screening, and patenting of plants and plant products by pharmaceutical, cosmetic and other research companies is being carried out without due regard for the rights of the Indigenous holders and custodians of knowledge about biological resources. This bioprospecting is, according to Indigenous claims, mostly being carried out without the prior informed consent of the custodians of knowledge, and with little or no provision for financial returns to Indigenous communities.[20] Although Indigenous peoples claim that their knowledge constitutes part of their 'intellectual property rights', the protection of biological, or other forms of Indigenous knowledge does not fall within the scope of existing intellectual property laws.

Indigenous knowledge of medicinal and other plants and practices is a significant contributor to scientific research and development in pharmaceuticals, cosmetics, foodstuffs, agricultural products, and a wide range of other biologically based products and processes. The challenge is therefore to develop a system which satisfies the needs of industry, achieves conservation goals, and also recognises and protects the rights of Indigenous peoples.

An effective system would incorporate provision for financial and other benefits that flow from the uses of Indigenous knowledge and practices to be shared equitably with the Indigenous knowledge holders and innovators. An equitable benefit sharing arrangement would recognise and protect Indigenous peoples' rights, encourage economic self-sufficiency for Indigenous peoples, and also provide incentives for the conservation and sustainable uses of biological diversity. The development of this kind of system poses a challenge in terms of how it might recognise the distinct property rights held by Indigenous peoples in their knowledge.

The collective nature of Indigenous rights makes it difficult to establish the extent of, and the precise social and political dimensions of rights and interests. Establishing the legitimacy of claims to knowledge and biological resources will require clarification of clan, family and other group rights and interests in such items.

The antiquity of customary systems of knowledge and practices, and their oral transmission through generations also present challenges to legislators and administrators in designing regimes for the recognition and protection of these knowledge systems.

Rules governing secrecy also pose challenges to those faced with the task of deciding Indigenous peoples' claims in knowledge. The complex nature of land tenure systems, and the dispersal and dispossession of Indigenous peoples resulting from the history of colonisation and dispossession impose constraints on identifying Indigenous biodiversity related knowledge systems.

Land clearances and erosion arising from farming, agriculture and urban development have led to an enormous loss of Indigenous customary knowledge and practices relevant to biodiversity. These, combined with a loss on biodiversity, and changes in growing patterns and habitats of flora and fauna, means it is difficult for Indigenous people to demonstrate their exclusive rights to biological species, and knowledge of these.

With the history of colonisation and dispossession, Indigenous peoples have adapted to modern technologies, lifestyles and cultural systems. This makes it difficult to identify knowledge that is derived from distinctly Indigenous traditional systems and which maintained according to traditional or customary practices, as distinct from knowledge that is everyday, 'common' knowledge.

Finally, the dispersed nature of decision making and authority structures in Indigenous societies will present difficulties when considering the introduction of measures for distributing benefits obtained from the uses of Indigenous knowledge back to those communities in which the knowledge holders belong. It would be difficult to identify a unit or group that has the traditional authority to make decisions about uses of knowledge and practices, and responsibility for distributing any financial or other benefits that flow from the uses of these.

In order to explore some possible solutions to protecting Indigenous knowledge in biodiversity, it is useful to review the context of international and Australian developments within which solutions might be proposed.

Protecting Indigenous knowledge and biological diversity—the international context

International developments provide a potential framework for discussions about the recognition and protection of Indigenous knowledge.[21]

Intellectual property rights

The effective implementation of the *Convention on Biological Diversity* requires the development of a clear framework for clarifying rights and responsibilities in biodiversity. It is argued that one factor in the loss of biodiversity is the 'lack of clear property rights

governing ownership and access to biodiversity'. To address this, 'in many cases better specification of property rights can encourage the holders of such rights to be responsible and accountable for the sustainable management of the resources in their control'.[22] Property rights that determine the management of biodiversity 'need to be well specified, context-specific and enforceable'.[23]

Consideration of property rights in biological resources is of importance to Indigenous peoples, who claim that their cultures and livelihoods depend on these resources, and that their knowledge and practices relating to the natural environment constitute part of their intellectual property. The problem with this is that existing intellectual property rights (IPR) systems do not provide for recognition of Indigenous peoples' collective rights in knowledge relating to biodiversity. IPR systems protect only material forms, and not the intangible ideas or knowledge associated with these.[24] While the *Copyright Act 1968* has been the subject of much of the discussion concerning Indigenous peoples' intellectual property rights, the *Patents Act 1990* is more relevant to Indigenous rights in biodiversity related knowledge.

To obtain patent rights, a product should be novel and not merely a 'discovery' of something that occurs naturally. It must also be 'non-obvious', resulting from the transformation of a natural substance using some technological process. Finally, as with other intellectual property laws, patents are used to confer property rights on individuals or corporations—and do not provide for the kinds of group, or collective rights that Indigenous peoples hold in knowledge and practices. There is also a fixed period for protection under patent laws, usually up to 20 years, which again does not provide for Indigenous knowledge that is often the result of millennia of innovation and transmission.

It is possible for 'joint inventors' to take out a patent. In this sense, it is possible in principle for Indigenous people, whose contributions based on their traditional knowledge and practices are significant components of patentable inventions and processes, to be included as 'joint inventors'. However, in practice, the particular types of knowledge and innovations of Indigenous peoples are not recognised for the purposes of the Patent Act.[25]

Other international developments

International standard setting developments and other processes provide a useful context within which measures for recognising and protecting Indigenous knowledge can be considered.

The *Draft Declaration on the Rights of Indigenous Peoples* being developed by a working group of the United Nations Commission on Human Rights provides, at Article 24, for Indigenous peoples' rights to 'their traditional medicines and health practices, including the right to the protection of vital medicinal plants, animals and minerals'. Article 29 provides

that Indigenous peoples are 'entitled to the recognition of the full ownership, control and protection of their cultural and intellectual property'. These peoples, this Article says:

> ...have the right to special measures to control, develop and protect their sciences, technologies and cultural manifestations, including human and other genetic resources, seeds, medicines, knowledge of the properties of fauna and flora, oral traditions, literatures, designs and visual and performing arts.

International Labour Organisation Convention 169 ('ILO 169') also contains various provisions (e.g. Articles 4, 5, 8, 13 and 23) relevant to the protection of Indigenous peoples' cultures, environments, and religious and political systems.

One international development that provides specific opportunities for introducing measures to protect Indigenous knowledge is the *Convention on Biological Diversity*, mentioned above. Article 8(j) of this Convention encourages countries, 'subject to national legislation' to:

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

The Conference of Parties to the Convention on Biological Diversity includes on its agenda for its annual meetings, consideration of Article 8(j) and related provisions. This work includes attempts to clarify, and define the nature and scope of Indigenous knowledge, innovations and practices, and the collection and synthesis of case studies.[26] In recognition of the importance of Article 8(j) and Indigenous peoples' interests, in addition to discussions of this subject at annual meetings of the Conference of Parties, a workshop on 'traditional knowledge' was held in Madrid in November 1997. At the fourth session of the Conference of Parties that was held in Bratislava, Republic of Slovakia in May 1998, a decision was made that there be an ad hoc, open ended intersessional working group to further consider Article 8(j) and related provisions.

While the *Convention on Biological Diversity* provides a potentially useful opportunity for countries to introduce new measures to recognise and protect Indigenous knowledge and innovations, it also imposes some constraints. The requirement that implementation of Article 8(j) should be subject to national legislation may be problematic for Indigenous peoples, especially if existing national laws take precedence, and where these might contravene, or place limitations on any measures that may be introduced under 8(j). Conversely, the Convention may encourage countries to introduce special national laws beneficial for the protection and conservation of Indigenous knowledge, traditions, innovations and practices.[27]

The use of the term 'traditional lifestyles' in the wording of Article 8(j) may also be interpreted to imply the exclusion of many Indigenous communities who have not retained their direct connections with lands and resources, but who wish to protect and preserve their knowledge and innovations.[28]

Another UN development important to the recognition and protection of Indigenous knowledge is the study of Indigenous peoples' culture and heritage by Special Rapporteur Erica-Irene Daes. This study is useful in its emphasis on the close interdependence in Indigenous societies between land, environment, and heritage. Daes suggests that to Indigenous peoples, 'cultural property', 'intellectual property', and biological resources are all components of their 'collective heritage'. She states:

> ...Indigenous peoples do not view their heritage in terms of property at all—that is, something which has an owner and is used for the purpose of extracting economic benefits—but in terms of community and individual responsibility. Possessing a song, story or medicinal knowledge carries with it certain responsibilities to show respect to and maintain a reciprocal relationship with the human beings, animals, plants and places with which the song, story or medicine is connected. For indigenous peoples, heritage is a bundle of relationships, rather than a bundle of economic rights.[29]

Although this report implies that Indigenous peoples are uniformly opposed to the commodification of heritage, in practice some Indigenous peoples may regard elements of their heritage as common property, and seek opportunities to reap benefits from its uses by the wider community. Any benefit sharing arrangements that may be introduced will need to provide for the diversity of views and approaches among Indigenous peoples regarding the economic values of their heritage.

Other developments in environment and conservation

A range of other developments in international standard setting relating to environment and conservation have particular relevance to the consideration of measures for protecting Indigenous biodiversity related knowledge. These instruments and statements are especially useful in that they build up a body of principles relevant to the recognition and protection of Indigenous peoples' knowledge systems, and may ultimately influence law and policy development. The most important of these international developments have resulted from the 1992 United Nations Conference on Environment and Development (UNCED) held in Rio de Janeiro, Brazil. In addition to the *Convention on Biological Diversity*, other outcomes from UNCED are the *Rio Declaration*, *Agenda 21*, and the *Statement of Forest Principles*.

Agenda 21 provides a charter and program for action for sustainable conservation and development into the next century. Chapter 26 of *Agenda 21* on Recognising and Strengthening the role of Indigenous Peoples and their Communities contains some important provisions directly relevant to Indigenous knowledge and management of

biodiversity. For example Section 26.3(iii) states that Governments should, 'in full partnership with Indigenous people and their communities', recognise Indigenous peoples' 'values, traditional knowledge and resource management practices with a view to promoting environmentally sound and sustainable development'. Section 26.6(a) contains a program statement to implement this principle.

The *Rio Declaration* states at *Principle 22* that:

> Indigenous people and their communities, and other local communities, have a vital role in environmental management and development because of their knowledge and traditional practices. States should recognise and duly support their identity, culture and interests and enable their effective participation in the achievement of sustainable development.

Another outcome from UNCED was the establishment of the Commission on Sustainable Development (CSD) within the United Nations Environment Programme. An ad hoc Inter-governmental Panel on Forests within the CSD considered a range of matters concerning sustainable forest management, including the role of 'traditional forest related knowledge', a significant area of work relevant to Indigenous peoples' rights to ecological knowledge.

In 1994, the United Nations released a final report on Human Rights and the Environment, which had been prepared by a Special Rapporteur commissioned by the United Nations Sub-Commission on Prevention of Discrimination and Protection of Minorities. As an appendix to this report, a draft *Declaration on the Right to the Environment* includes provisions relevant to the protection of Indigenous knowledge. Paragraphs 6 and 13 provide generally for biodiversity conservation, and for equitable benefit sharing from environmental conservation. Paragraph 14 provides for Indigenous peoples' rights:

> Indigenous peoples have the right to control their lands, territories and natural resources and to maintain their traditional way of life. This includes the right to security in the enjoyment of their means of subsistence....Indigenous peoples have the right to protection against any action or course of conduct that may result in the destruction or degradation of their territories, including land, air, water, sea-ice, wildlife or other resources.[30]

These developments provide an important body of statements and principles that can influence international laws and policies to recognise and protect the customary knowledge and practices of local and Indigenous peoples.[31]

Indigenous peoples' statements and declarations

The *Draft Declaration on the Rights of Indigenous Peoples* referred to above was developed mostly by Indigenous peoples and their representatives during many years of meetings of the UN Working Group on Indigenous Peoples.

Over recent years there has been a series of statements and declarations developed by, or on behalf of Indigenous peoples which provide specifically for their rights in cultural and intellectual property, and knowledge, innovations and practices. These developments generally provide an important emerging 'soft law' of principles for Indigenous rights which ultimately must serve to guide, and hopefully influence , law and policy.[32]

Approaches to protecting Indigenous knowledge

Earlier in this paper mention was made that conventional intellectual property rights systems provide an inadequate means of protecting Indigenous knowledge. Alternatives to intellectual property rights systems provide greater opportunities for recognition and protection of Indigenous rights relating to biological and ecological knowledge, innovations and practices. Some of these alternative approaches are surveyed here.[33]

Benefit sharing approaches, contracts and agreements

The search for, collection and use of products and derivatives from biological diversity takes its toll on the environment. Bioprospecting also presents challenges for the inclusion of provisions that recognise and protect the intellectual property rights of the traditional users and holders of biological knowledge and practices.

Where bioprospecting is carried out, by using the proceeds from these activities to develop mechanisms for equitable sharing of benefits by Indigenous knowledge holders, it may be possible to achieve the twin goals of conservation, and the protection of the rights of knowledge holders and innovators.[34] This type of approach would be consistent with the implementation of Article 8(j) and related provisions of the Convention on Biological Diversity. There are many examples of arrangements that have been introduced with the aim of benefit sharing for use of biodiversity. These types of systems are considered to be more effective than conventional intellectual property rights systems, as they offer greater flexibility and are not constrained by the limitations of IPR systems discussed above.

Benefit sharing arrangements that have been developed include various forms of contracts, agreements, and other mechanisms aimed at developing partnerships between different interest groups, and providing compensation and benefits to knowledge holders.[35] The advantages of contractual arrangements include their capacity to 'be designed to fit any conceivable relationship between collaborators', to 'define the types and amounts of benefits', and to be able to 'target recipient populations and conservation objectives'. The benefits offered by contractual arrangements also include the provision of royalties and advance payments.[36]

One example of an approach based on contractual arrangements is what is known as a system of International Co-operative Biodiversity Groups (ICBGs). These have been

developed from an 'integrated conservation and development program' wherein 'appropriately designed natural products research and development can bring both short and long term benefits to the countries and communities that are the stewards of the genetic resources'. The proponents of this system state that 'sharing benefits from both the research process and from any drug discoveries that are made down the road creates incentives for conservation and provides alternatives to destructive use'. The ICBG program includes, among other advantages, 'equitable intellectual property and benefit sharing arrangements'.[37] These systems are being developed in Peru, and in Nigeria.[38]

Another example of a contract is an agreement that was developed between the giant pharmaceutical company Merck & Co. Inc., and the National Biodiversity Institute known as INBio, a non-profit research organisation established by the Government of Costa Rica. In this agreement Merck provides up-front funding (an initial $US1 million) to INBio for screening plants for possible AIDS cures. INBio will receive a share of any royalties that may result from successful product development. A proportion of the up-front payment (10 per cent), and 50 per cent of any royalties will be fed directly into conservation activities.[39] This arrangement, which is primarily a contract for the screening of biodiversity, is celebrated by its supporters for its flexibility and the opportunities it provides for developing negotiated 'guidelines for collecting which can be adapted to meet the interests of both parties in a way which is unique to each particular situation'.[40]

The advocacy organisation Rural Advancement Foundation International (RAFI) has criticised the Merck/INBio type of bilateral bioprospecting contract, arguing that they 'are not likely to provide adequate compensation to either indigenous peoples or developing countries unless they are made within the framework of broader intergovernmental arrangements'.[41] While the Merck/INBIo agreement in Costa Rica is often described as a model partnership arrangement between a pharmaceutical company and a government, it may not be especially useful for considering the issue of Indigenous rights, since, as the authors of one report point out, 'Costa Rica has almost no indigenous people'. These writers go on to say:

> The agreement between Merck and INBio includes training individuals from the working class as parataxonomists, but they approach the forest as employees with institutional educations, not as traditional peoples with indigenous knowledge. As a result, there are no issues of patent rights or land ownership to consider.[42]

Another example of a contractual arrangement is one that has been developed by Shaman Pharmaceuticals Inc., which derives its research from collaboration with Indigenous peoples and the uses of their traditional knowledge. This company established a non-profit independent organisation called the Healing Forest Conservancy, which will receive a proportion of the profits, obtained from Shaman's products. Healing Forest Conservancy 'supports biodiversity conservation and protection of cultural diversity and will independently determine how resources can best assist indigenous communities and organisations'.[43]

Other types of agreements include 'know-how' licenses, material transfer agreements, trust fund mechanisms, conservation compensation initiatives, and an 'intellectual integrity framework'. These types of arrangements all provide alternatives to intellectual property rights systems, and offer, to varying degrees of effectiveness, opportunities to develop mechanisms for equitable sharing of benefits from bioprospecting with Indigenous knowledge holders and innovators.[44]

Rights based approach

One approach that offers scope for recognition of Indigenous knowledge is a system called protection of 'traditional resource rights' by its proponents. This approach is based on the systematic use by Indigenous peoples of all the existing instruments, laws and policies relating to human rights, land, heritage, culture, environment and intellectual property. Combined with the introduction of reforms to these, as well as the development and implementation of measures such as contracts, agreements and protocols, this approach provides Indigenous peoples with a rights based framework in which to pursue their wish for recognition and protection of intellectual property rights in knowledge and biodiversity.

The principal developer of this approach, British ethnobotanist Darrell Posey, has written extensively on the ways in which relevant provisions in the Rio Declaration, the Convention on Biological Diversity, and a wide range of human rights and other instruments, in addition to emerging Indigenous and other standards and statements can be used by Indigenous peoples to achieve better recognition and protection for their intellectual property rights.[45]

Protecting Indigenous knowledge and biodiversity—Australian developments

Implementing the Convention on Biological Diversity

In 1996 the Commonwealth, state and territory governments endorsed a *National Strategy for the Conservation of Australia's Biological Diversity*. Action 1.8.2 of this Strategy is to:

> Ensure that the use of traditional biological knowledge in the scientific, commercial and public domains proceeds only with the cooperation and control of the traditional owners of that knowledge and ensure that the use and collection of such knowledge results in social and economic benefits to the traditional owners. This will include:

(a) encouraging and supporting the development and use of collaborative agreements safeguarding the use of traditional knowledge of biological diversity, taking into account existing intellectual property rights; and

(b) establishing a royalty payments system from commercial development of products resulting, at least in part, from the use of traditional knowledge.

Other environment related developments

A number of other processes within the Commonwealth Government are relevant to biodiversity and Indigenous knowledge. Various developments arising from the 1992 United Nations Conference on Environment and Development provide a body of statements and principles recognising Indigenous knowledge. The 1992 *National Strategy for Ecologically Sustainable Development* included objectives relevant to the incorporation of Indigenous perspectives in environment and conservation management.

The 1993 *Coastal Zone Inquiry* conducted by the former Resource Assessment Commission included in its considerations Aboriginal and Torres Strait Islander issues. The resulting report recommended the enactment of Commonwealth legislation which, among other things:

- recognises Indigenous peoples' right to hunt, fish, gather and engage in other cultural practices according to tradition or custom
- provides mechanisms whereby the exercise of traditional rights to access and use of resources can be negotiated with other interests or interested parties (conservation, pastoral, etc), and
- provides mechanisms to ensure substantive Indigenous peoples' involvement in, and wherever possible control of, the management of their traditional environments and resources.[46]

Most of these were initiatives developed and introduced by previous governments. It remains to be seen whether they are to remain on the agenda of the present Government.

A Commonwealth State Working Group on Access to Australia's Biological Resources is developing a proposal for a framework regulating access to Australia's biological resources. A discussion paper released in October 1996 proposes a nationally consistent approach to managing access, and advocates a preferred 'multi-purpose contract system'. This system is based on the development of contracts between those wishing to collect biological resources, and the relevant owners of these resources. According to the report, these types of contracts would have the flexibility to be designed to suit specific circumstances and conditions, as well as the requirements of laws and policies in the particular jurisdictions in which they apply. Among the purported benefits of this system

is that it would 'ensure an equitable return to the jurisdiction of any financial benefits arising from exploitation of the resource, and to share benefits and other information about the resource which may assist its further conservation and management'.[47]

This report does not deal adequately with questions of ownership and control, preferring instead to limit its consideration to matters of access only.[48] It also gives inadequate consideration of the rights and interests of Aboriginal and Torres Strait Islander peoples in biological resources. Systems that provide return of benefits to jurisdictions will not necessarily include provisions for benefit sharing by Indigenous peoples within those jurisdictions.

Another discussion paper released recently entitled *Reform of Commonwealth Environment Legislation* discusses proposals to 'comprehensively reform the Commonwealth's environmental law regime', with the objective to 'deliver better environmental outcomes in a manner that promotes certainty for all stakeholders and minimises the potential for delay and intergovernmental duplication'.[49] Among the measures proposed is a Biodiversity Conservation Act, which will replace a number of separate conservation acts, and 'result in an improved, integrated framework for the conservation and sustainable use of Australia's biodiversity'.[50] There have been some concerns expressed that the proposed new Biodiversity Conservation Act will not incorporate any 'last resort' provisions for environmental protection by the Commonwealth, as are presently available under the existing *World Heritage Properties Conservation Act 1983*, which is among those Acts the proposed Biodiversity Conservation Act would replace.[51]

A further problem with the proposals, as detailed in the discussion paper, is the absence of any references to those components of either the *Convention on Biological Diversity*, or the *National Strategy for the Conservation of Australia's Biological Diversity* that deal with the preservation of Indigenous knowledge and practices. The only reference that has implications for Indigenous knowledge relates to controls over access to biological resources.

The discussion paper states that the proposed Biodiversity Conservation Act will empower the Commonwealth Government to control access to biological resources by 'allowing regulations to be made in relation to the management of access to biological resources on Commonwealth lands and in marine environments under Commonwealth control'.[52] The concern with this is that there is not an adequate discussion, or framework proposed—either in this discussion paper, or in the discussion paper on access to biological resources—for the protection of Indigenous knowledge, and the recognition and protection of Indigenous rights in regard to access, control and ownership of biological resources, whether on Commonwealth lands or elsewhere.

Recommendations for greater control by, and participation of Aboriginal and Torres Strait Islander people in the management of environment and conservation, including national parks and protected areas have been made by many reports over the decades. Some

noteworthy examples of these reports include the comprehensive and significant 1991 national report of the *Royal Commission Into Aboriginal Deaths in Custody* (especially Recommendation 315).[53]

Despite this proliferation of reports and recommendations, there has been relatively little in the way of implementing environment and biodiversity related recommendations. Another area in which recommendations and reports abound in large proportion relative to their implementation is that of intellectual property rights—which are also relevant to the protection of Indigenous knowledge.

Intellectual property rights

There has been some attention focussed recently on the issue of Indigenous intellectual property rights. This has largely been prompted by the release by the former Keating Government in 1994 of an issues paper called *Stopping the Rip-Offs: Intellectual Property Protection for Aboriginal and Torres Strait Islander Peoples*. To formulate its response to this paper, the Commonwealth Government established an interdepartmental committee chaired initially by the Attorney-Generals Department, and subsequently by the Department of Communications and the Arts. As a part of this process, the Aboriginal and Torres Strait Islander Commission (ATSIC) has sought Indigenous views regarding the recognition and protection of intellectual property rights.

The *Stopping the Rip-Offs* paper stated that its aim was to consider only the protection of what was termed 'arts and cultural expressions', and these only insofar as they related to the *Copyright Act 1968*. The principal focus was on finding suitable remedies to the appropriation of Aboriginal art that had been occurring for decades. The effectiveness of the Copyright Act in preventing these appropriations was a central consideration. The government view therefore expressly excluded the protection of Indigenous knowledge in biodiversity from this process.

Notwithstanding these limitations, ATSIC advocated that since Indigenous peoples considered that their intellectual property rights did extend to knowledge in biodiversity, then any reforms to protect Aboriginal and Torres Strait Islander intellectual property must necessarily also include consideration of knowledge and biodiversity. ATSIC's involvement in the formulation of a response to the *Stopping the Rip-Offs* paper therefore adopted a broader view, consistent with Indigenous peoples' aspirations.

ATSIC established an Indigenous Reference Group comprising Aboriginal and Torres Strait Islander people with expertise and experience in cultural heritage, the arts, and law, to provide advice and to manage the consultations with Indigenous peoples. ATSIC also funded the Australian Institute of Aboriginal and Torres Strait Islander Studies (AIATSIS) to further develop an Indigenous perspective. In 1997, AIATSIS released a discussion paper entitled *Our Culture, Our Future: Proposals for the Recognition and Protection of*

Indigenous Cultural and Intellectual Property. This paper includes consideration of possible reforms, legislative, policy and administrative to protect Indigenous rights in knowledge and biodiversity.

The final report of *Our Culture, Our Future*, released in mid-1998, makes some 115 recommendations covering a very wide range of law, policy, program and administrative subject areas. These recommendations include suggesting amendments to legislation dealing with cultural and intellectual property rights, land, environment and heritage. They also advocate a range of administrative and common law measures. Arguably the most far reaching recommendation calls for the introduction of *sui generis* legislation that specifically provides for recognition and protection of Aboriginal and Torres Strait Islander peoples' cultural and intellectual property rights—including rights in biodiversity and traditional knowledge.

Reforms to existing intellectual property rights laws can extend the capacity of these laws to recognise and protect intangible cultural expressions such as knowledge, and to shift the balance in these laws from fostering commercial innovation, towards protecting cultural rights. The introduction of moral rights provisions to the Copyright Act is a step towards these types of reforms. Similar moral rights provisions could also be considered for patent laws.

Native title and regional agreements

The *Mabo* decision and the *Native Title Act 1993*, as some writers have argued, provide an impetus for the recognition of Aboriginal and Torres Strait Islander peoples' rights in, and knowledge and practices regarding environmental management, and the incorporation of these into existing management regimes.[54] Flowing from the recognition of common law rights in land, both the *Mabo* decision and the *Native Title Act 1993* also establish principles for the recognition of other types of Indigenous customary property rights, including rights in knowledge.[55] The content of native title is defined as being based on the laws and customs of the Indigenous claimants although the precise nature of this content will ultimately be determined in the courts.

The content of native title 'has its origin in and is given its content by the traditional laws acknowledged by and the traditional customs observed by the indigenous inhabitants of a territory'[56], and may be shown to include Indigenous knowledge of country. Since native title is defined according to the customs and traditions of the claimant group, this by definition must imply the inclusion of Indigenous knowledge as a form of intellectual property, because to Indigenous peoples, their 'knowledge of the properties of fauna and flora' is an important component of customary laws.[57]

Another aspect of the native title process that potentially has the capacity to provide recognition of Indigenous rights in knowledge and biological diversity, is the process of

negotiated agreements, known as regional agreements or Indigenous Land Use Agreements. Negotiated agreements may be developed either within the provisions of the Native Title Act (the Preamble and Section 21), or as independent processes. Section 21 of the Native Title Act provides a potential stimulus for the negotiated settlement of claims, and a possible mechanism for the achievement of a measure of autonomy for Indigenous peoples.

A regional agreement may include negotiated arrangements covering virtually any aspect of government, delivery of services, access to, and management and control of areas, resources and sites, protocols regarding research, survey and development activities, and so on. They may also include negotiated arrangements for the integration of Indigenous knowledge, and customary uses and practices regarding land, environment, and biological materials into land and environment management plans and strategies.

A regional agreement 'denotes the concept of equitable and direct negotiations between Indigenous peoples, governments and other stakeholders in a region to recognise the rights of Indigenous peoples and to protect them under a contemporary legal system'. A regional agreement 'should not take any pre-ordained form...[but]...'is a means for Indigenous peoples to define our own solutions and obtain legal, administrative and political recognition for such definitions'.[58] One working definition of regional agreements is as:

> ...a way to organise policies, politics, administration, and/or public services for or by an Indigenous people in a defined territory of land (or of land and sea).[59]

A regional agreement could, in principle, provide for the recognition of Indigenous peoples' rights to control their own destinies.[60]

Discussions about Australian regional agreements are influenced by Canadian developments such as the James Bay and Northern Quebec Agreements. These types of agreements often include regimes for the management of environment and heritage. One commentator has suggested that 'the comprehensive claims process underway in Canada is often touted as the solution to issues of Indigenous land management, self-determination, management of public sector programs and services, and native title in Australia'.[61]

In Australia, the development of regional agreements is currently focussed on processes, rather than on the likely content of such agreements. The present amendments to the Native Title Act include several provisions relating to Indigenous Land Use Agreements (ILUAs). The term Indigenous land use agreements:

> encompasses agreements which may provide for recognition or transfer of the ownership of country which may or may not be coupled with the authorisation of mining, pastoral or other developmental activities by indigenous and non-indigenous interests acting jointly or separately. It covers vesting and joint management of parks and reserves and agreements for the co-existence of Aboriginal and non-Aboriginal interests or activities in forests and offshore and internal waters.[62]

Indigenous peoples and their supporters have argued that such land use agreements are the most appropriate way to develop shared approaches to managing access and other rights and responsibilities over pastoral leaseholds. These ILUA proposals provide more detail than the Section 21 provision in the Native Title Act, since they offer a 'flexible system to assist in the making of agreements which may affect native title', and 'represent a lasting and economical means of resolving native title issues'.

The main concerns in current negotiations regarding agreements are with the 'regulation of resource extraction and commercial use of the land', and as noted by one writer, 'conservation values are a latecomer to the equation, but of increasing influence and importance', since 'efficient exploitation and management of resources is one of the principal factors that has led to the need for comprehensive negotiated settlements whether native title is recognised or not'.[63]

Given the diversity of possible arrangements that may be relevant to the potential inclusion of Indigenous knowledge and practices, it is feasible to cite many examples of such arrangements. The Cape York Heads of Agreement, and the agreement between Quandamooka Land Council and Redland Shire in Queensland, are just two examples of agreements that have specific references to Indigenous knowledge, Indigenous cultural and intellectual property, or environmental management.[64]

Other contracts and agreements

Contracts and agreements can potentially offer powerful mechanisms for including recognition and protection of Indigenous knowledge and practices. Contracts that have been developed between the pharmaceutical company Amrad and some Aboriginal representative organisations for bioprospecting may be models for a wider national approach.

The Commonwealth Government's Indigenous Protected Areas Program is another initiative which offers a potential basis for developing systems for the recognition and protection of Indigenous knowledge and practices relating to environmental conservation and management. This program aims to develop partnerships between Indigenous landholders and government conservation agencies. Although still in its developmental stage, this program has the potential for incorporating in such partnerships agreed strategies for the protection and appropriate management of biodiversity related knowledge, and for equitable sharing of benefits with the Indigenous knowledge holders.[65]

Jointly managed national parks also provide good models for incorporating and protecting Indigenous knowledge, innovations and practices. One example is Uluru—Kata Tjuta National Park, which is a model of a negotiated sharing arrangement between the Aboriginal traditional owners, and conservation management agencies.[66] The management plan for this park incorporates Aboriginal traditional knowledge and environmental

management practices, based on the principle of Tjukurpa, which is the custom and law of Anangu people, the parks traditional Aboriginal owners.[67]

Land and heritage

Federal legislation such as the *Aboriginal Land Rights Act (NT) 1976 (Cwlth)* and the *Aboriginal and Torres Strait Islander Heritage Protection Act* 1986 provide potential avenues for incorporating reforms to include protection of Indigenous knowledge. Relevant land and heritage laws in state and territory jurisdictions may also provide opportunities for recognising Indigenous knowledge.

Existing Commonwealth heritage protection legislation is limited in its capacity to protect Indigenous knowledge, as it protects only physical heritage. This legislation, the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* has recently been the subject of considerable attention in the Hindmarsh Island case, which illustrated some problems regarding protection of secret knowledge. There has been considerable work carried out in recent years to review and assess the effectiveness of this Act. One such review, completed by the Hon. Elizabeth Evatt in 1996, made some recommendations to improve the operation of this Act.[68] These recommendations included advocating the implementation of measures to recognise and protect Indigenous secret and sacred knowledge relating to heritage. The Act is presently the subject of proposals for reform, which will, if implemented, effectively devolve responsibility for decision making over Indigenous heritage to state and territory governments.

Common law solutions

The potential for recognition and protection by statute law is given support by a number of common law cases in recent decades that have implications for recognition of Indigenous customary law and traditional knowledge. Some of these have been specifically brought under the Copyright Act, and the resulting decisions have gone some way toward extending the interpretation of copyright law to accommodate Indigenous cultural perspectives. Among the cases most significant for the potential recognition and protection of Indigenous knowledge, practices and innovations relating to biodiversity are *Milirrpum v Nabalco Pty. Ltd.* (1971), *Foster v Mountford* (1976), and *Milpurruru v Indofurn Pty. Ltd.* (1995). These are discussed in Research Paper No. 20 and elsewhere.[69]

Administrative and policy reforms

A range of administrative reforms are suggested in the report *Our Culture, Our Future*, which could provide protection for Aboriginal and Torres Strait Islander peoples' cultural and intellectual property rights. These include measures such as a Public Domain Royalties System, and Cultural Contracts.

Integrating different knowledge systems: Indigenous knowledge and western science

One of the challenges to law and policy for the recognition and protection of Indigenous knowledge is to develop ways in which there can be an integration, or a harmonising of Indigenous biological and environmental knowledge and practices with western scientific knowledge. In this way, rather than being considered as conflicting systems, Indigenous knowledge systems and western scientific knowledge can be combined in a way which utilises the characteristics of two different systems in a complementary, mutually reinforcing way. Such an integrated knowledge system can be developed in order to pursue mutual goals such as land and ecosystem management.

There are many examples of ways in which the integration of Indigenous knowledge systems and western scientific approaches can be integrated. These include ecological, botanical and faunal surveys using Indigenous knowledge, and the incorporation of Indigenous knowledge and practices regarding land and environmental management into national parks, and in the development of strategies for managing a variety of ecosystems such as rangelands, wetlands, and marine environments. The development of programs aimed at establishing Indigenous protected areas, and land and environment conservation activities such as landcare regimes are also ways in which Indigenous and non-Indigenous knowledge and practices can be harmonised.

Conclusions

The recognition and protection of Indigenous peoples' rights in their knowledge, innovations and practices relating to biodiversity is assuming an increasing urgency. Indigenous knowledge makes a significant contribution to the collection and screening of plant-related substances, and the development of commercial products such as pharmaceuticals from these. Often, however, the contribution made by Indigenous knowledge, innovations and practices is unacknowledged, and little or no financial benefits are returned to these knowledge holders and innovators for their contribution.

The *Convention on Biological Diversity* is the single most important international instrument that provides potential for developing measures for recognition and protection. Its provisions regarding benefit sharing are especially important.

While conventional intellectual property rights systems are largely ineffective in providing recognition and protection for Indigenous knowledge, there are some other avenues that have the potential to offer solutions.

Alternatives to intellectual property systems offer the most productive opportunities, especially the introduction of frameworks that provide specifically for the recognition and protection of Indigenous knowledge.

Contractual arrangements, agreements and partnerships for land and environment management and conservation offer considerable potential for incorporating mechanisms for recognition and protection of Indigenous knowledge, innovations and practices relating to biological resources. In designing these kinds of approaches, however, it is of primary importance to ensure that they provide for Indigenous peoples to share equitably in benefits derived from the wider uses of their knowledge, innovations and practices. The risk is, as highlighted by the Commonwealth State Working Group report, that the focus will be on supporting the provision of benefits to states and other powerful interest groups—at the expense of Indigenous peoples within state jurisdictions.

State and territory laws and policies relevant to conservation, and the recognition and protection of Indigenous rights are diverse and ad hoc. For this reason, the Commonwealth has an important role in developing a national approach to achieve recognition and protection of Indigenous rights in biodiversity related knowledge and practices, while at the same time providing for the interests of conservation, and of industry.

This system, modelled on successful local and international developments, could be developed to meet the interests of all participants. It would provide for the recognition and protection of Indigenous knowledge, innovations and practices, enable bioprospecting to occur, with prior informed consent of knowledge holders and custodians. It would provide for the equitable sharing of benefits—both financial and non-financial with knowledge holders and custodians, and it would provide incentives for the conservation and sustainable management of biological diversity.

Endnotes

1. Commonwealth of Australia, *Biodiversity and its value* (Biodiversity series, paper no. 1), Biodiversity Unit, Department of the Environment, Sport and Territories, 1993, p. 5.
2. Henrietta Fourmile, 'Protecting indigenous property rights in biodiversity' in *Ecopolitics IX: perspectives on indigenous peoples' management of environment resources*, conference papers and resolutions, Northern Land Council, Darwin, 1996, pp. 37–42; Michael Blakeney, 'Bioprospecting and the protection of traditional medical knowledge', *European Intellectual Property Review*, vol. 19, no. 6, June 1997, p. 298.

3. *Sydney Morning Herald*, Saturday 11 April, 1998.
4. World Intellectual Property Organisation (WIPO), (ed), *Introduction to intellectual property: theory and practice*, Kluwer Law International, London, The Hague, and Boston, 1997.
5. Vandana Shiva and Radha Holla-Bhar, 'Intellectual piracy and the neem tree', *The Ecologist*, vol. 23, no. 6, Nov/Dec. 1993, pp. 223–227; Vandana Shiva, Afsar H. Jafri, Gitanjali Bedi, and Radha Holla-Bhar, *The enclosure and recovery of the commons: biodiversity, indigenous knowledge and intellectual property rights*, Research Foundation for Science, Technology and Ecology, New Delhi, India, 1997, pp. 35–36.
6. ibid., p. 37.
7. ibid., pp. 35–36.
8. Michael Blakeney, op. cit.; Henrietta Fourmile, 'Protecting Indigenous property rights in biodiversity', *Current Affairs Bulletin*, vol. 72, no. 5, Feb/Mar 1996, p. 38.
9. ibid., also see Australian Institute of Aboriginal and Torres Strait Islander Studies, *Our culture, our future: proposals for the recognition and protection of Indigenous cultural and intellectual property*, Canberra, 1997, p. 28; Henrietta Fourmile, 'Protecting Indigenous intellectual property rights in biodiversity', op. cit., p. 39; Michael Blakeney, 'Bioprospecting and the protection of traditional medical knowledge', Paper presented to the Symposium on Intellectual Property Protection for the Arts and Cultural Expression of Aboriginal and Torres Strait Islander Peoples', Perth, 1 October 1996, p. 2; Cheryl Jones, 'Who owns traditional medicine?', *The Canberra Times*, 4 August 1996, p. 7.
10. Michael Blakeney, 'Bioprospecting and the protection of traditional medical knowledge', Paper presented op. cit., pp. 12–13.
11. WIPO, op. cit., pp. 124–125.
12. See for example Harriet Ketley, 'Cultural diversity versus biodiversity', *Adelaide Law Review*, vol. 16, 1994, pp. 99–160.
13. A. J. Brown, *Keeping the land alive: Aboriginal people and wilderness protection in Australia*, The Wilderness Society and the Environmental Defender's Office, Sydney, 1992.
14. See for example, Howard Morphy, '"Now you understand": an analysis of the way Yolngu have used sacred knowledge to retain their autonomy', in Nicholas Peterson and Marcia Langton (eds), *Aborigines, land, and land rights*, Australian Institute of Aboriginal Studies, Canberra, 1983, pp. 110–133.
15. Desmond Sweeney, 'Fishing, hunting and gathering rights of Aboriginal peoples in Australia', *UNSW Law Journal*, vol. 16, no. 1, 1993, pp. 104.
16. Gary D. Meyers, 'Aboriginal rights to the "profits of the land": the inclusion of traditional fishing and hunting rights in the content of native title', in Richard H. Bartlett and Gary D. Meyers (eds), *Native title legislation in Australia*, The Centre for Commercial and Resources Law, The University of Western Australia and Murdoch University, Perth, WA, 1994, p. 215; Also see Gary D. Meyers, 'Implementing native title in Australia: The implications for living resources management', *University of Tasmania Law Review*, vol. 14, no. 2, Oct. 1995, pp. 1–

28; Graeme Neate, 'Looking after country: Legal recognition of traditional rights to and responsibilities for land', *UNSW Law Journal*, vol. 16, no. 1, (1993), pp. 161–222.

17. Sweeney, op. cit; Maureen Tehan, 'Indigenous peoples, access to land and negotiated agreements: experiences and post-Mabo possibilities for environmental management', *Environmental Planning and Law Journal*, vol. 14, no. 2, April 1997, pp. 114–134.
18. Sweeney, op. cit., pp. 102–103.
19. The Law Reform Commission, *The recognition of Aboriginal customary laws, summary report* (Report no. 31), Canberra, AGPS, 1986, pp. 75–81.
20. There is an extensive, and growing body of literature on Indigenous knowledge, intellectual property, and bioprospecting; see for example Josephine R. Axt, M. L. Corn, M. Lee, and D. M. Ackerman, *Biotechnology, Indigenous peoples and intellectual property rights*, (Report for Congress, CRS 21), Congressional Research Service, Washington, DC, USA, 16 April 1993; Stephen B. Brush, 'Indigenous knowledge of biological resources and intellectual property rights: the role of anthropology', *American Anthropologist*, vol. 95, no. 3, 1993, pp. 653–671; Clark Peteru, *Indigenous peoples' knowledge and intellectual property rights consultation*, working paper for regional consultations, Suva, Fiji, 24–27 April 1995, Pacific Concerns Resource Centre (Inc) and United Nations Development Programme; The Crucible Group, *People, plants and patents: the impact of intellectual property on conservation, trade, and rural society*, International Development Research Centre, Ottawa, Canada, 1994.
21. See Michael Davis, 'Indigenous peoples and intellectual property rights', *Research paper no. 20, 1996–97*, Information and Research Services, Department of the Parliamentary Library, Canberra, 30 June 1997.
22. Michael Harte, 'Indigenous biological diversity and property rights', *Public Sector*, vol. 19, no. 3, 1996, p. 6.
23. ibid., p. 8.
24. For details see Michael Davis, op.cit.
25. Blakeney, op. cit, *European Journal of Intellectual Property*, p. 299.
26. See UNEP, Convention on Biological Diversity, Subsidiary Body on Scientific, Technical and Technological Advice, Second Meeting, Montreal, 2–6 September 1996, 'Knowledge, innovations and practices of indigenous and local communities', Note by the Secretariat, UNEP/CBD/SBSTTA/2/7, 10 August 1996; UNEP, Convention on Biological Diversity, Conference of the Parties to the Convention on Biological Diversity, Third Meeting, Buenos Aires, Argentina, 4–15 November 1996, 'Knowledge, innovations and practices of indigenous and local communities: Implementation of Article 8(j)', Note by the Executive Secretary, UNEP/CBD/COP/3/19, 18 September 1996.
27. See for example the introduction by the Philippines of a law, Executive Order No. 247, which regulates the research, collection and use of biological and genetic resources.
28. Donna Craig, 'Implementing the Convention on Biological Diversity: Indigenous peoples' issues', Contribution to IUCN Commission on Environmental Law, Technical Paper on Legal and Institutional Issues Arising from the Implementation of the Convention on Biological

Diversity, presented to the Regional Conference on the Biodiversity Convention, Manila, 6–8 June, 1994; Lyle Glowka, Francoise Burhenne-Guilmin and Hugh Synge, in collaboration with Jeffrey A. McNeely and Lothar Gundling, 'A guide to the Convention on Biological Diversity', *Environmental policy and law paper no. 30*, IUCN, Gland, Switzerland, 1994.

29 UN Economic and Social Council, 'Study on the protection of the cultural and intellectual property of indigenous peoples, by Erica-Irene Daes, Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities and Chairperson of the Working Group on Indigenous Populations, E/CN.4/Sub.2/1993/28, 28 July 1993. The final report by Daes included an Annex containing Principles and Guidelines for the Protection of the Heritage of Indigenous People, E/CN.4/Sub.2/1995/26.

30. UN Commission on Human Rights, Sub-Commission on Prevention of Discrimination and Protection of Minorities, *Human rights and the environment*, Final Report by Mrs Fatma Zohra Ksentini, Special Rapporteur, E/CN.4/Sub.2/1994/9, 6 July 1994.

31. A useful survey of these developments is provided in Johanna Sutherland, 'Representations of indigenous peoples' knowledge and practice in modern international law and politics', *Australian Journal of Human Rights*, vol. 2, no. 1, Dec. 1995, pp. 39–57.

32. Michael Davis, op. cit:17–18; Darrell A. Posey and Graham Dutfield, *Beyond intellectual property: toward traditional resource rights for indigenous peoples and local communities*, International Development Research Centre, Ottawa, Canada, 1996.

33. Refer also to Davis, op. cit for additional details.

34. See for example Joshua P. Rosenthal, 'Equitable sharing of biodiversity benefits: agreements on genetic resources', in OECD, *Investing in biological diversity*, 1996, pp. 253–274.

35. ibid; see also the range of initiatives, including alternative *sui generis* intellectual property rights systems discussed in Rural Advancement Foundation International (RAFI), *Conserving indigenous knowledge: integrating two systems of innovation*, Ottawa, Canada, 1994, pp. 48–54.

36. Rosenthal, op. cit., p. 253.

37. ibid., pp. 254–255.

38. See Brendan Tobin, 'Protecting collective property rights in Peru: the search for an interim solution', unpublished paper distributed at the fourth meeting of the Conference of Parties to the Convention on Biological Diversity, Bratislava, 4 to 15 May 1998; also see UNEP, 'Synthesis of case-studies on benefit sharing: note by the Executive Secretary', Conference of the Parties to the Convention on Biological Diversity, Fourth meeting, Bratislava, 4–15 May 1998, UNEP/CBD/COP/4/Inf.7, 4 May 1998.

39. Caroline Oddie, 'Bio-prospecting', *Australian Intellectual Property Journal*, 9(1), Feb. 1998, pp. 18–19.

40. ibid., p. 19.

41. RAFI, op. cit., p. 49.

42. Axt, et al., op. cit., p. 13.

43. Oddie, op. cit. p. 19.
44. Rosenthal, op. cit., pp, 270–271; RAFI, op. cit., pp. 48–54.
45. ibid; Darrell A. Posey, *Traditional resource rights: international instruments for protection and compensation for indigenous peoples and local communities*, IUCN—The World Conservation Union, Gland, Switzerland, 1996.
46. Dermot Smyth, *A voice in all places: Aboriginal and Torres Strait Islander interests in Australia's coastal zone*, Consultancy Report to the Resource Assessment Commission's Coastal Zone Inquiry, Canberra, November 1993, pp. 220–21.
47. Commonwealth-State Working Group on Access to Australia's Biological Resources, *Managing access to Australia's biological resources: developing a nationally consistent approach*, October 1996, p. 22.
48. ibid.
49. Commonwealth of Australia, *Reform of Commonwealth environment legislation: consultation paper*, Foreword by Senator the Hon. Robert Hill, Minister for the Environment, Canberra, 1998, p. i.
50. ibid., p. 21.
51. Murray Hogarth and James Woodford, 'Fears for heritage as law scrapped', *The Sydney Morning Herald*, Wednesday 11 March, 1998, p. 2.
52. Commonwealth of Australia, *Reform of Commonwealth environment legislation: consultation paper*, op. cit., p. 32.
53. See for example Susan Woenne-Green, Ross Johnston, Ros Sultan and Arnold Wallis, *Competing interests: Aboriginal participation in national parks and conservation reserves in Australia, a review*, Australian Conservation Foundation, Melbourne, 1994.
54. See Helen Ross, Elspeth Young, and Lynette Liddle, 'Mabo: an inspiration for Australian land management', *Australian Journal of Environmental Management*, vol. 1, no. 1, July 1994, pp. 24–41; Maureen Tehan, 'Indigenous peoples, access to land and negotiated agreements: experiences and post-Mabo possibilities for environmental management', *Environmental Planning and Law Journal*, vol. 14, no. 2, April 1997, pp. 114–134.
55. Ross et al, op.cit., Lisa M. Strelein, 'Indigenous people and protected landscapes in Western Australia', *Environmental and Planning Law Journal*, vol. 10, no. 6, December 1993, pp. 380–397.
56. Richard Bartlett, 'The source, content and proof of native title at common law', in Richard Bartlett (ed), *Resource development and Aboriginal land rights in Australia*, The Centre for Commercial and Resources Law, University of Western Australia, Perth, 1993 p. 39, citing Brennan J in Mabo, p. 429.
57. David Bennett, 'Native Title and Intellectual Property', in Paul Burke (ed), 'Land, rights, laws: issues of native title', *Issues paper no. 10*, Native Titles Research Unit, Australian Institute of Aboriginal and Torres Strait Islander Studies, Canberra, April 1996.

58. Michael Dodson, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Third Report*, AGPS, Canberra, 1995, p. 110.

59. Donna Craig and Peter Jull, 'Regional agreements—options for Australian indigenous peoples', Draft Working Paper prepared for the Office of the Aboriginal and Torres Strait Islander Social Justice Commissioner, 1994, p. 4, cited in Dodson, op. cit., Meyers, Gary D., 'Aboriginal rights to the "profits of the land": the inclusion of traditional fishing and hunting rights in the content of native title', in Richard H. Bartlett and Gary D. Meyers, eds, *Native Title Legislation in Australia*, The Centre for Commercial and Resources Law, The University of Western Australia and Murdoch University, Perth, 1994.

60. See for example Frank Brennan, Michael Davis, et al, *Controlling destinies: greater opportunities for Indigenous Australians to control their destinies*, (Key issue paper no. 8), Council for Aboriginal Reconciliation, AGPS, Canberra, 1994, pp. 42–45.

61. These agreements are discussed in Benjamin J. Richardson, Donna Craig, and Ben Boer, *Regional agreements for indigenous lands and cultures in Canada: a discussion paper*, North Australia Research Unit, The Australian National University, Darwin, 1995; Terry Fenge, Political development and environmental management in northern Canada: the case of the Nunavut Agreement, *Discussion paper no. 20*, North Australia Research Unit, The Australian National University, Darwin, October 1993; Benjamin J. Richardson, Donna Craig, and Ben Boer, 'Indigenous peoples and environmental management: a review of Canadian regional agreements and their potential application to Australia', Part 1, *Environmental and Planning Law Journal*, vol. 11, no. 4, Aug 1994, pp. 320–343; Benjamin J. Richardson, Donna Craig, and Ben Boer, 'Indigenous peoples and environmental management: a review of Canadian regional agreements and their potential application to Australia', Part 2, *Environmental and Planning Law Journal*, vol. 11, no. 5, Oct 1994, pp. 357–81; Michele Ivanitz, 'The Emperor has no clothes: Canadian comprehensive claims and their relevance to Australia', Regional agreements paper no. 4, Native Titles Research Unit, AIATSIS, Canberra, August 1997.

62. Justice R. S. French, 'Pathways to agreement', paper presented to Indigenous Land Use Agreements Conference, Darwin, 24–29 September 1995, p. 3.

63. Patrick Sullivan, 'Regional agreements in Australia: an overview' Issues paper no. 17, *Land, rights, laws: issues of native title*, Native Titles Research Unit, AIATSIS, Canberra, April 1997, p. 2.

64. A range of agreements is mentioned in Rick Farley, Tony McRae, and Patricia Lane, 'Outlook for regional development: opportunities for regional agreements', paper presented to the Northern Australia Regional Outlook Conference, Darwin, 24 September, 1997.

65. The Indigenous Protected Areas Programme is outlined in Dermot Smyth and Johanna Sutherland, *Indigenous protected areas: conservation partnerships with Indigenous landholders*, Consultants Report to Environment Australia, Commonwealth of Australia, Canberra, November 1996.

66. See David Lawrence, Managing parks/ managing 'country': joint management of Aboriginal owned protected areas in Australia, *Research paper no. 2, 1996–97*, Parliamentary Research Service, Department of the Parliamentary Library, Canberra, 1996.

67. Commonwealth of Australia, *Uluru (Ayers Rock—Mount Olga) National park plan of management*, National Parks and Wildlife Service, AGPS, Canberra, 1991; Jim Birckhead, Terry de Lacy, and Laurajane Smith, eds, *Aboriginal involvement in parks and protected areas*, Canberra, Aboriginal Studies Press, 1993; Woenne-Green, op. cit.

68. Hon. Elizabeth Evatt AC, *Report of the Review of the Aboriginal and Torres Strait Islander Heritage Protection Act 1984*, Sydney, 1996.

69. See AIATSIS, *Our culture, our future: report on Australian Indigenous cultural and intellectual property rights*, Canberra, 1998, Australian Copyright Council, *Protecting Indigenous intellectual property: a copyright perspective*, Sydney, March 1997, pp. 24–27.

Bibliography

Australian Institute of Aboriginal and Torres Strait Islander Studies, *Our culture, our future: proposals for the recognition and protection of Indigenous cultural and intellectual property,* Canberra, 1997.

Australian Institute of Aboriginal and Torres Strait Islander Studies, *Our culture, our future: report on Australian Indigenous cultural and intellectual property rights,* Canberra, 1998.

Axt, Josephine R., M. L. Corn, M. Lee, and D. M. Ackerman, *Biotechnology, Indigenous peoples and intellectual property rights*, Report for Congress, CRS 21, 16 April 1993, Congressional Research Service, Washington, DC, USA.

Bartlett, Richard, 'The source, content and proof of native title at common law', in Richard Bartlett (ed), *Resource development and Aboriginal land rights in Australia*, The Centre for Commercial and Resources Law, University of Western Australia, Perth, 1993, pp. 35–60.

Bennett, David, 'Native title and intellectual property', in Paul Burke (ed), 'Land, rights, laws: issues of native' title, *Issues paper no.10*, Native Titles Research Unit, Australian Institute of Aboriginal and Torres Strait Islander Studies, Canberra, April 1996.

Birckhead, Jim, Terry de Lacy, and Laurajane Smith, eds, *Aboriginal involvement in parks and protected areas*, Canberra, Aboriginal Studies Press, 1993.

Blakeney, Michael, 'Bioprospecting and the protection of traditional medical knowledge', paper presented to the Symposium on Intellectual Property Protection for the Arts and Cultural Expression of Aboriginal and Torres Strait Islander Peoples', Brisbane, September 1996.

Blakeney, Michael, 'Bioprospecting and the protection of traditional medical knowledge', paper presented to the Symposium on Intellectual Property Protection for the Arts and Cultural Expression of Aboriginal and Torres Strait Islander Peoples', Perth, 1 October 1996.

Blakeney, Michael, 'Bioprospecting and the protection of traditional medical knowledge', *European Intellectual Property Review*, vol. 19, no. 6, June 1997, pp. 298–303.

Brennan, Frank, Michael Davis, et al, 'Controlling destinies: greater opportunities for Indigenous Australians to control their destinies', *Key issue paper no. 8,* Council for Aboriginal Reconciliation, AGPS, Canberra, 1994.

Brown, A. J., *Keeping the land alive: Aboriginal people and wilderness protection in Australia,* The Wilderness Society and the Environmental Defender's Office, Sydney, 1992.

Brush, Stephen, J., 'Indigenous knowledge of biological resources and intellectual property rights: the role of anthropology', *American Anthropologist*, vol. 95, no. 3, 1993, pp. 653–671.

Commonwealth of Australia, 'Biodiversity and its value', *Biodiversity series, paper no. 1,* Biodiversity Unit, Department of the Environment, Sport and Territories, 1993.

Commonwealth of Australia, *Reform of Commonwealth environment legislation, consultation paper*, Canberra, 1998.

Commonwealth-State Working Group on Access to Australia's Biological Resources, *Managing access to Australia's biological resources: developing a nationally consistent approach*, October 1996.

Commonwealth of Australia, *Uluru (Ayers Rock—Mount Olga) National park plan of management*, National Parks and Wildlife Service, AGPS, Canberra, 1991.

Craig, Donna, 'Implementing the Convention on Biological Diversity: Indigenous peoples' issues', Contribution to IUCN Commission on Environmental Law, Technical Paper on Legal and Institutional Issues Arising from the Implementation of the Convention on Biological Diversity, presented to the Regional Conference on the Biodiversity Convention, Manila, 6–8 June, 1994.

Craig, Donna, and Peter Jull, 'Regional agreements – options for Australian Indigenous peoples', draft working paper prepared for the Office of the Aboriginal and Torres Strait Islander Social Justice Commissioner, 1994, cited in Dodson, op. cit., 1995, pp. 110.

Davis, Michael, Indigenous peoples and intellectual property rights, *Research paper no. 20, 1996–97*, Information and Research Services, Department of the Parliamentary Library, Canberra, 30 June 1997.

Dodson, Michael, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Third Report on Social Justice*, AGPS, Canberra, 1995.

Evatt, AC, Hon. Elizabeth, 'Report of the Review of the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984*, Sydney, 1996.

Farley, Rick, Tony McRae, and Patricia Lane, 'Outlook for regional development: opportunities for regional agreements', paper presented to the Northern Australia Regional Outlook Conference, Darwin, 24 September, 1997.

Fenge, Terry, Political development and environmental management in northern Canada: the case of the Nunavut Agreement, *Discussion paper no. 20*, North Australia Research Unit, The Australian National University, Darwin, October 1993.

Fourmile, Henrietta, 'Protecting Indigenous intellectual property rights in biodiversity' in *Ecopolitics IX: perspectives on Indigenous peoples' management of environment resources*, Northern Land Council, Darwin, 1996, pp. 37–42.

Fourmile, Henrietta, 'Protecting Indigenous intellectual property rights in biodiversity', *Current Affairs Bulletin*, vol. 72, no. 5, Feb/Mar 1996, pp. 36–41.

French, Justice R. S., 'Pathways to agreement', paper presented to Indigenous Land Use Agreements Conference, Darwin, 24–29 September 1995.

Glowka, Lyle, Francoise Burhenne-Guilmin and Hugh Synge, in collaboration with Jeffrey A. McNeely and Lothar Gundling, A guide to the Convention on Biological Diversity, *Environmental policy and law paper no.30*, IUCN, Gland, Switzerland, 1994.

Harte, Michael, 'Indigenous biological diversity and property rights', *Public Sector*, vol. 19, no. 3, 1996, pp. 6–11.

Hogarth, Murray, and James Woodford, 'Fears for heritage as law scrapped', *The Sydney Morning Herald*, Wednesday 11 March, 1998.

Ivanitz, Michele, 'The Emperor has no clothes: Canadian comprehensive claims and their relevance to Australia', Regional agreements paper no. 4, Native Titles Research Unit, AIATSIS, Canberra, August 1997.

Jones, Cheryl, 'Who owns traditional medicine?', *The Sunday Canberra Times*, 4 August 1996.

Ketley, Harriet, 'Cultural diversity versus biodiversity', *Adelaide Law Review*, 16, 1994, pp. 99–160.

Lawrence, David, 'Managing parks/ managing 'country': joint management of Aboriginal owned protected areas in Australia', *Research paper no. 2*, 1996–97, Parliamentary Research Service, Department of the Parliamentary Library, Canberra, 1996.

Meyers, Gary D., 'Aboriginal rights to the "profits of the land": the inclusion of traditional fishing and hunting rights in the content of native title', in Richard H. Bartlett and Gary D. Meyers, eds, *Native title legislation in Australia*, The Centre for Commercial and Resources Law, The University of Western Australia and Murdoch University, Perth, Western Australia, 1994, pp. 213–230.

Meyers, Gary D., 'Implementing native title in Australia: the implications for living resources management', *University of Tasmania Law Review*, vol. 14, no. 2, Oct. 1995, pp. 1–28.

Neate, Graeme, 'Looking after country: legal recognition of traditional rights to and responsibilities for land', *UNSW Law Journal*, vol. 16, no. 1, 1993, pp. 161–222.

Morphy, Howard, '"Now you understand": an analysis of the way Yolngu have used sacred knowledge to retain their autonomy', in Nicholas Peterson and Marcia Langton, eds, *Aborigines, land, and land rights*, Australian Institute of Aboriginal Studies, Canberra, 1983, pp. 110–133.

Oddie, Caroline, 'Bio-prospecting', *Australian Intellectual Property Journal*, vol. 9, no. 1, February 1998, pp. 6–20.

Peteru, Clarke, *Indigenous peoples' knowledge and intellectual property rights consultations*, working paper for regional consultations, Pacific Concerns Resource Centre Inc and United Nations Development Programme, Suva, Fiji, 24–27 April 1995.

Posey, Darrell A., *Traditional resource rights: international instruments for protection and compensation for indigenous peoples and local communities*, Gland, Switzerland, 1996.

Posey, Darrell A., and Graham Dutfield, *Beyond intellectual property rights: toward traditional resource rights for indigenous peoples and local communities*, International Development Research Centre, Ottawa, Canada, 1996.

Richardson, Benjamin J., Donna Craig, and Ben Boer, 'Indigenous peoples and environmental management: a review of Canadian regional agreements and their potential application to Australia', Part 1, *Environmental and Planning Law Journal*, vol. 11, no. 4, Aug 1994, pp 320–343.

Richardson, Benjamin J, Donna Craig, and Ben Boer, 'Indigenous peoples and environmental management: a review of Canadian regional agreements and their potential application to Australia', Part 2, *Environmental and Planning Law Journal*, vol. 11, no. 5, Oct 1994, pp. 357–381.

Richardson, Benjamin J, Donna Craig, and Ben Boer, *Regional agreements for indigenous lands and cultures in Canada: a discussion paper*, North Australia Research Unit, The Australian National University, Darwin, 1995.

Rosenthal, Joshua P., 'Equitable sharing of biodiversity benefits: agreements on genetic resources', in OECD, *Investing in biological diversity*, 1996, pp. 253–274.

Ross, Helen, Elspeth Young, and Lynette Liddle, 'Mabo: an inspiration for Australian land management', *Australian Journal of Environmental Management*, vol. 1, no. 1, July 1994, pp. 24–41.

Rural Advancement Foundation International (RAFI), *Conserving indigenous knowledge: integrating two systems of innovation*, Canada, 1994.

Shiva, Vandana, and Radha Holla-Bhar, 'Intellectual piracy and the neem tree', *The Ecologist*, vol. 23, no. 6, Nov/Dec 1993, pp. 223–227.

Shiva, Vandana, Afsar H. Jafri, Gitanjali Bedi, and Radha Holla-Bhar, *The enclosure and recovery of the commons: biodiversity, Indigenous knowledge and intellectual property rights*, Research Foundation for Science, Technology and Ecology, New Delhi, India, 1997.

Smyth, Dermot, *A voice in all places: Aboriginal and Torres Strait Islander interests in Australia's coastal zone*, consultancy report to the Resource Assessment Commission Coastal Zone Inquiry, Canberra, November 1993.

Smyth, Dermot and Johanna Sutherland, *Indigenous protected areas: conservation partnerships with indigenous landholders*, consultants' report to Environment Australia, Canberra, November 1996.

Strelein, Lisa, M., 'Indigenous peoples and protected landscapes in Western Australia', *Environmental and Planning Law Journal*, vol. 10, no. 6, December 1993, pp. 380–397.

Sullivan, Patrick, 'Regional agreements in Australia: an overview', Issues paper no. 17, *Land, rights, laws: issues of native title*, Native Titles Research Unit, Australian Institute of Aboriginal and Torres Strait Islander Studies, Canberra, April 1997.

Sutherland, Johanna, 'Representations of indigenous peoples' knowledge and practice in modern international law and politics', *Australian Journal of Human Rights*, vol. 2, no. 1, Dec 1995, pp. 39–57.

Sweeney, Desmond, 'Fishing, hunting and gathering rights of Aboriginal peoples in Australia', *UNSW Law Journal*, vol. 16, no. 1, 1993, pp. 97–160.

Sydney Morning Herald, Saturday 11 April 1998.

Tehan, Maureen, 'Indigenous peoples, access to land and negotiated agreements: experiences and post-Mabo possibilities for environmental management', *Environmental Planning and Law Journal*, vol. 14, no. 2, April 1997, pp. 114–134

Tobin, Brendan, 'Protecting collective property rights in Peru: the search for an interim solution', unpublished paper distributed at the fourth meeting of the Conference of Parties to the Convention on Biological Diversity, Bratislava, 4 to 15 May 1998.

The Crucible Group, *People, plants and patents: the impact of intellectual property on conservation, trade, and rural society*, International Development Research Centre, Ottawa, Canada, 1994.

The Law Reform Commission, *The recognition of Aboriginal customary law*, Summary Report No. 31, Canberra, AGPS, 1986.

United Nations. Commission on Human Rights, Sub-Commission on Prevention of Discrimination and Protection of Minorities, *Human rights and the environment*, Final Report by Fatma Zohra Ksentini, Special Rapporteur, E/CN.4/Sub.2/1994/9, 6 July 1994.

United Nations. Economic and Social Council, 'Study on the protection of the cultural and intellectual property of indigenous peoples', Report by Erica-Irene Daes, Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities and Chairperson of the Working Group on Indigenous Populations, E/CN.4/Sub.2/1993/28, 28 July 1993.

United Nations. Environment Programme (UNEP), Convention on Biological Diversity, Subsidiary Body on Scientific, Technical and Technological Advice, Second Meeting, Montreal, 2–6 September 1996, 'Knowledge, innovations and practices of indigenous and local communities', Note by the Secretariat, UNEP/CBD/SBSTTA/2/7, 10 August 1996.

United Nations. Environment Programme (UNEP), Convention on Biological Diversity, Conference of the Parties to the Convention on Biological Diversity, Third Meeting, Buenos Aires, Argentina, 4–15 November 1996, 'Knowledge, innovations and practices of indigenous and local communities: implementation of Article 8(j)', Note by the Executive Secretary, UNEP/CBD/COP/3/19, 18 September 1996.

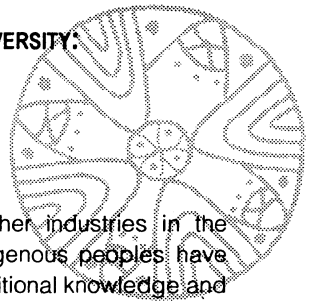
United Nations. Environment Programme (UNEP), 'Synthesis of case-studies on benefit sharing: note by the Executive Secretary', Conference of the Parties to the Convention on Biological Diversity, Fourth meeting, Bratislava, 4–15 May 1998, UNEP/CBD/COP/4/Inf.7, 4 May 1998.

Woenne-Green, Susan, Ross Johnston, Ros Sultan and Arnold Wallis, *Competing interests: Aboriginal participation in national parks and conservation reserves in Australia: a review*, Australian Conservation Foundation, Melbourne, 1994.

World Intellectual Property Organisation (WIPO), ed, *Introduction to intellectual property: theory and practice*, Kluwer Law International, London, The Hague, and Boston, 1997.

Indigenous Rights in Traditional Knowledge and Biological Diversity: Approaches to Protection[1]

Michael Davis[2]



In recent decades there has been a growing interest by pharmaceutical and other industries in the commercial potential of biological products and derivatives. At the same time, indigenous peoples have increasingly voiced their claims and interests in these resources, especially in their traditional knowledge and practices associated with the resources. These often competing claims and interests have stimulated debate about the implications for existing property rights in natural resources, and for the conservation, use and management of biological diversity. They also highlight the tensions between notions of natural resources as the common heritage of humankind, and local and specific claims to these resources by indigenous and other communities as part of their rightful heritage.[3]

This paper enters the debate by exploring the relationships between indigenous knowledge in biological resources and intellectual property rights (IPR) systems. In particular, the paper considers the role of the patent system in terms of its capacity to provide protection for indigenous rights in traditional knowledge related to the conservation and management of biological diversity.

There are diverse views about the capacity of IPR systems to provide effective recognition and protection of indigenous rights in biological resources and traditional knowledge. Some people believe it is possible to seek better protection for indigenous rights by working within the existing system to modify current laws. However, others argue that conventional IPR systems and indigenous knowledge systems are fundamentally different, and that an alternative system of recognition and protection is needed for the latter.

This paper examines some of the conceptual challenges in the search for common ground between these different systems. In reviewing both indigenous and non-indigenous systems of knowledge and innovation, the paper takes up some of the issues raised by the activity known as bioprospecting — the search for potentially useful products and processes from natural resources. Following this, the paper briefly considers some of the approaches being developed which offer the potential for recognising and protecting indigenous rights in traditional knowledge and biological resources.

Contracts and agreements are considered as potential mechanisms for integrating bioprospecting, conservation of biodiversity and protection of indigenous knowledge. Other approaches to protecting indigenous rights in traditional knowledge and biological resources will also be briefly reviewed, such as sui generis systems, regional agreements and national legislation. The paper will conclude with some suggestions for future directions.

In offering a critique of IPR systems, the paper argues in support of a better understanding of indigenous concepts and systems of knowledge. In order to gain this better understanding, the need for greater input from indigenous people, and also from disciplines such as anthropology, history and political science, is advocated.

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3 See, for example, Cunningham A B, 'Indigenous knowledge and biodiversity: Global commons or regional heritage?', *Cultural Survival Quarterly*, vol 15 no 3, Summer 1991, pp 4-8.

Biodiversity, bioprospecting and indigenous peoples

Biological diversity refers to the variety of species at the gene, species, and ecosystem level. The world's biological diversity is fast disappearing, mostly as a result of human activities and population growth. Biological diversity is valuable for several reasons: it supports and sustains diverse populations of indigenous and local peoples; it provides a storehouse of raw materials for use in industry, technology, science and commerce; and it also has important aesthetic and cultural values.[4]

Bioprospecting is the search for biological and genetic materials from the natural environment which have potential uses for pharmaceutical and other products and processes. This activity is conducted by commercially important industries involved in the manufacture of agricultural, cosmetic, pharmaceutical and food products. Successful bioprospecting requires an abundant and continued supply of biological diversity. While bioprospecting makes considerable use of natural resources, it can also, if carried out appropriately, provide an incentive for the conservation of these resources.

The biologically diverse environments that provide the raw materials for bioprospecting are often important to indigenous and local peoples as well. These peoples may assert claims to the lands and territories that support these environments, and also rights to the biological and genetic materials that make up the environments. The search for biological and genetic materials, and the development of pharmaceutical, cosmetic and agricultural products and processes from these materials, relies in many instances on indigenous peoples' knowledge of the environment and its products. Developed and used over a long period of time by indigenous and local peoples for a variety of medicinal, cultural and other purposes, this knowledge is sometimes known as 'traditional ecological knowledge'.[5]

Although not all bioprospecting activity directly involves indigenous knowledge, given that indigenous peoples are increasingly claiming rights in natural environments, knowledge and resources, it is important to examine the relationships between bioprospecting and indigenous knowledge. There is likely to be an increasing focus on the potential or actual indigenous knowledge component in biological and genetic materials, products and processes derived from natural environments.

The use of indigenous knowledge and the patenting of products and processes based on it raises issues both for indigenous peoples and for the research institutions and industries that use this knowledge. The full participation of indigenous peoples in bioprospecting, and effective recognition and compensation for their knowledge, poses a challenge for those developing effective systems for bioprospecting and conservation. In carrying out bioprospecting, there are increasing obligations to develop measures to protect indigenous rights in traditional knowledge, and to allow indigenous peoples to share equitably in any benefits that may result. These measures should also include provisions for obtaining prior informed consent from knowledge holders for the use of products and processes based on indigenous knowledge, innovations and practices. The Convention on Biological Diversity 1996 (the CBD) is the most important international instrument which, if implemented effectively, can allow the introduction of these kinds of measures.

The effective implementation of the CBD would involve, among other things, exploring the capacity of IPR systems to promote the protection of natural resources and to aid in the exchange of technology and biological and genetic resources. While IPR systems are available to indigenous peoples, the conceptual differences between these and indigenous systems of knowledge and innovation create special challenges. The design of alternatives to IPR, the creative uses of contracts and agreements, the development of regional agreements for environmental and resource management and control, and the introduction of sui generis approaches and special legislation are among the approaches that could be considered to address these challenges.

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4 See Axt J, Corn M L, Lee M and Ackerman D, *Biotechnology, Indigenous Peoples, and Intellectual Property Rights* Report for Congress, Congressional Research Service, Washington DC, 16 April 1993; Gray A, *Between the Spice of Life and the Melting Pot: Biodiversity Conservation and its Impact on Indigenous Peoples* IWGIA Document 70, Copenhagen, August 1991.

5 See, for example, Williams N M and Baines G (eds), *Traditional Ecological Knowledge: Wisdom for Sustainable Development*,Centre for Resource and Environmental Studies, Australian National University, Canberra 1993.

Convention on Biological Diversity

The CBD emerged from the 1992 United Nations Conference on Environment and Development (UNCED). Australia ratified the CBD in 1993. In providing for states to conserve and manage biological diversity, the CBD contains some important articles relevant to the interests of indigenous peoples. Article 8(j) encourages countries, 'subject to national legislation', to:

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

Article 10(c) states that Contracting Parties:

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

Articles 17(2) and 18(4) are also relevant, as these concern the exchange of information, and technical and scientific co-operation, which includes 'indigenous and traditional knowledge and technologies'.

The Conference of Parties to the CBD includes on the agenda of its meetings regular consideration of art 8(j) and related provisions. Much of the present focus of this work is on attempts to clarify and define the nature and scope of indigenous knowledge, innovations and practices, and to analyse case studies submitted by participating countries.[6] As part of its work on this issue, the CBD Secretariat convened a workshop in Madrid in November 1997. The fourth session of the Conference of Parties (COP4), held in Bratislava, Republic of Slovakia in May 1998, decided to establish an ad hoc open ended inter-sessional working group to further consider art 8(j) and related provisions.

While the CBD does provide a potentially useful opportunity for countries to introduce new measures recognising and protecting indigenous knowledge and innovations, it also imposes some constraints. The requirement that implementation of art 8(j) should be subject to national legislation may be problematic for indigenous peoples, especially if existing national laws take precedence, where these might contradict or place limitations on any measures introduced under art 8(j).[7] The CBD encourages but does not oblige countries to respect and preserve indigenous knowledge. It does, however, provide an opportunity, if used appropriately, for countries to introduce special national laws beneficial for the protection and conservation of indigenous knowledge, traditions, innovations and practices.[8]

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6 See UNEP, *Convention on Biological Diversity, Subsidiary Body on Scientific, Technical and Technological Advice, Second Meeting* Montreal, 2-6 September 1996; 'Knowledge, innovations and practices of indigenous and local communities', Note by the Secretariat, UNEP/CBD/SBSTTA/2/7, 10 August 1996; UNEP, *Convention on Biological Diversity, Conference of the Parties to the Convention on Biological Diversity, Third Meeting* Buenos Aires, Argentina 4-15 November 1996; 'Knowledge, innovations and practices of indigenous and local communities: Implementation of Article 8(j)', Note by the Executive Secretary, UNEP/CBD/COP/3/19, 18 September 1996.

7 See for example Craig D, 'Implementing the Convention on Biological Diversity: Indigenous peoples' issues', Contribution to IUCN *Commission on Environmental Law, Technical Paper on Legal and Institutional Issues Arising from the Implementation of the Convention on Biological Diversity* presented to the Regional Conference on the Biodiversity Convention, Manila 6-8 June 1994; Glowka L, Burhenne-Guilmin F and Synge H, in collaboration with McNeely J A and Gundling L, *A guide to the Convention on Biological Diversity* (Environmental policy and law paper no 30), IUCN, Gland, Switzerland 1994.

8 See, for example, the introduction by the Philippines of a law, *Executive Order No 247*, which regulates the research, collection and use of biological and genetic resources. This is discussed below.

Some examples of national laws and developments for regulating access to, and control over natural resources are surveyed below. Articles 10(c), 17(2) and 18(4) lack the explicit qualifying language of art 8(j), and could therefore possibly be given more emphasis when encouraging the effective implementation of the CBD to recognise indigenous interests. However, the language throughout the CBD generally retains a cautious flavour, stating that Contracting Parties 'shall' (rather than 'must' or 'should'), and using qualifying phrases such as 'as far as possible', and 'as appropriate'.

The use of the terms 'traditional lifestyles', 'traditional cultural practices', and 'traditional knowledge and technologies' in the CBD could be interpreted to imply the exclusion of many indigenous communities which have not retained their direct connections with lands and resources, but which nonetheless wish to protect and preserve their knowledge and innovations.[9] The implications of the use of the term 'traditional' in the context of discussions about indigenous ecological knowledge is a problematic one, as will be discussed below.

The use of the term 'customary' in art 10(c) possibly has a more appropriate sense than 'traditional', since it more typically implies a set of continuing and adaptive practices which are informed by cultural rules and which are transferable to a variety of situations and usages.

In 1996, the Commonwealth, State and Territory governments endorsed a National Strategy for the Conservation of Australia's Biological Diversity. This National Strategy is a key component in the Australian Government's program to implement the CBD. Action 1.8.2 of this Strategy is designed to:

> [e]nsure that the use of traditional biological knowledge in the scientific, commercial and public domains proceeds only with the cooperation and control of the traditional owners of that knowledge and ensure that the use and collection of such knowledge results in social and economic benefits to the traditional owners. This will include:
> (a) encouraging and supporting the development and use of collaborative agreements safeguarding the use of traditional knowledge of biological diversity, taking into account existing intellectual property rights; and
> (b) establishing a royalty payments system from commercial development of products resulting, at least in part, from the use of traditional knowledge.[10]

While both the CBD and the National Strategy provide sound principles and a framework for introducing measures to recognise and protect indigenous knowledge, innovations and practices, effective implementation has not yet been achieved. Some outstanding issues which need to be resolved include clarifying ownership of biological resources, and ascertaining Commonwealth, State and Territory relations and jurisdictional responsibilities over natural resources. The implementation of art 8(j), 10(c) and related provisions offers particular challenges. The design of an effective system for recognition and protection hinges on the need to better define, characterise and understand the nature and diversity of indigenous knowledge, innovations and practices.

The *Environment Protection and Biodiversity Conservation Act 1999* (Cth) recently passed by the Australian Parliament represents a missed opportunity to fully and effectively include provisions explicitly implementing the CBD, especially in relation to the recognition and protection of indigenous knowledge.

Indigenous systems of knowledge and innovation

Systems of knowledge and innovation in indigenous societies are interconnected with other elements of indigenous cultural systems. As an integral part of these interconnected systems, indigenous peoples have a vast knowledge of, and capacity for, developing innovative practices and products from their environments. Although it is inappropriate to generalise, the following features may be said to broadly characterise indigenous knowledge systems:

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9 Craig D, above note 7; Glowka L, Burhenne-Guilmin F and Synge H, in collaboration with McNeely J A and Gundling L, above note 7.

10 Commonwealth of Australia, *National Strategy for the Conservation of Australia's Biological Diversity* 1996, p 14.

- indigenous peoples often hold communal rights and interests in their knowledge;
- there is a close interdependence between knowledge, land, and spirituality in indigenous societies;
- knowledge is passed down through generations in indigenous societies;
- knowledge, innovations and practices are often transmitted orally in accordance with customary rules and principles; and
- there are rules regarding secrecy and sacredness that govern the management of knowledge.

These features not only serve as a working definition for indigenous knowledge; they also preclude such knowledge from being subject to protection under existing IPR systems. Although the above features are often thought of as defining characteristics of indigenous knowledge systems, as previously noted, such generalisations are problematic. More work is needed to explore the diversity of indigenous knowledge systems as these are ultimately specific to particular local communities and groups.

Although subject to further clarification and detailed local studies, some further general principles may be relevant. For example, indigenous knowledge has both sacred and secular dimensions, and both aspects should be accorded equal validity. For indigenous peoples, knowledge is not considered independently of its products, expressions, or actions. Instead, these elements all form part of a closely integrated cultural system. The physical products and expressions of indigenous cultures are intimately connected to the knowledge from which they derive, or with which they are associated. These products and expressions of indigenous knowledge systems include ceremonial and ritual objects and performances, artistic designs, works and expressions, song, dance and story, and subsistence and land management activities such as hunting, fishing and gathering, and the use of fire.

The protection, management and transmission of indigenous cultural and ecological knowledge, products and expressions is vital to ensuring the continuity of indigenous cultures, and for enabling indigenous peoples to adapt their societies and cultures to introduced societies, cultures and technologies.[11] One important way in which indigenous peoples maintain their cultural diversity is through the practice of indigenous knowledge. Recognition and protection of indigenous knowledge can also benefit environmental conservation and sustainable resource management.

Tradition and innovation in indigenous societies

The word 'tradition' is often used to denote lifestyles, cultures, knowledge and practices that were used in the past, or which belong to the time before the arrival of Europeans.[12] Reference to indigenous knowledge as 'traditional knowledge' should not imply that such knowledge belongs to the past. This knowledge is continuous, and it evolves and adapts to suit changes in living situations. The term 'tradition' is also sometimes used to contrast a type of knowledge which differs from modern science. In this sense, the term 'lore', or 'folklore' is sometimes employed to denote indigenous cultural knowledge and practices, and to distinguish these from Western 'science' or 'law'. These terms are, however, sometimes pejorative, and serve only to perpetuate the linguistic and discursive marginalisation of indigenous cultures.[13]

'Traditional' knowledge is defined as that which develops over a very long period of time, and is transmitted down through generations. It is based on a 'complex fabric of existing practices and understandings'.[14] To avoid the misconception that indigenous knowledge is unchanging and tied to the past, the term

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11 See, for example, Morphy H, '"Now you understand": an analysis of the way Yolngu have used sacred knowledge to retain their autonomy', in Peterson N and Langton M (eds), *Aborigines, land, and land rights* Australian Institute of Aboriginal Studies, Canberra 1983, pp 110-133.

12 Lewis H T, 'Traditional ecological knowledge: some definitions', in Williams N M and Baines G, above note 5.

13 On discourses of dispossession in Western legal and political terminology, see for example Davis M, 'Competing knowledges? Indigenous knowledge systems and Western scientific discourses', paper presented to conference on Science and Other Knowledge Traditions, James Cook University, Cairns 23-27 August 1996.

14 Hunn E, 'What is traditional ecological knowledge?', in Williams N M and Baines G, above note 5, pp 13-15.

'traditional' as employed throughout this paper is taken to mean a dynamic and evolving set of customs and practices.

There are some important considerations in the relationships between knowledge, and its tangible applications and practices. For example, where traditional practices such as customary burning, hunting, gathering and fishing activities are no longer carried out, this does not necessarily mean that there has been a loss of knowledge of these activities. In a slightly different scenario, if practices are carried out using new methods and technologies such as firearms and vehicles, this may not imply that the practices have no basis in traditional knowledge or activities. Rather, it is likely that there has been adaptation to modern demands and conditions. Taking all these kinds of situations into consideration, the knowledge that provides a source for and guides indigenous people's practice is a complex mixture of what might be called 'traditional', and 'new' knowledge. It is the result of living within a dominant society and developing survival technologies for adapting to the diverse situations in which indigenous peoples live, which have been accumulated through interaction with the wider community.

Indigenous knowledge and the Native Title Act 1993 (Cth)

The effective development of a system for the effective recognition and protection of indigenous knowledge poses some challenges to policy and decision-makers. Indigenous customary forms of property rights in land are now incorporated into Australian law through the *Mabo [No 2]*[15] decision and the *Native Title Act 1993* (Cth) (NTA). However, there is as yet insufficient clarity regarding indigenous rights in natural resources, or in the intangible heritage that may attach to, flow from, or form elements of native title rights in land. Among the matters which need to be further considered (more generally throughout all jurisdictions) is the relationship between indigenous claims in biological and genetic materials and land tenure. Also, the precise correspondence between indigenous claims in biological and genetic resources and property rights in Western law needs further analysis. Another important issue is the need to clarify the nature and distribution of rights and interests and decision-making processes in indigenous societies, in order to better understand situations in which there may be competing claims in biological and genetic resources. The connections between indigenous resource based rights, land rights and native title are other aspects that require further study.

Central to these considerations is the relationship between indigenous peoples' rights and interests in traditional knowledge relevant to the conservation and use of biological resources, and IPR systems. For products and processes to be protected under IPR systems, they must be shown to be the result of creative or intellectual endeavour which has substantially altered them from their original state. It is debatable whether indigenous peoples' claims to biological resources on this basis can be considered claims to rights in 'intellectual property', since the biological resources that are subject to claim have generally not been substantially modified for the purposes of protection under IPR systems. This issue is explored in more detail below in relation to patents.

In *Mabo and Ors v State of Queensland [No 2]* Brennan J stated that:

> native title has its origin in and is given its content by the traditional laws acknowledged by and the traditional customs observed by the indigenous inhabitants of a territory. The nature and incidents of native title must be ascertained as a matter of fact by reference to those laws and customs.[16]

The precise nature of the content of native title will ultimately be determined in the courts. Native title recognises that Aboriginal and Torres Strait Islander peoples have a special connection to the land. It recognises, in the common law of Australia, a unique form of property right that differs from conventional forms of title. However, to demonstrate that native title property rights extend to indigenous traditional

15 *Mabo and Ors v State of Queensland (No 2)* (1992) 107 ALR 1.

16 As above at 42.

knowledge provides a challenge, since proof of native title requires, firstly, proof of possession in order to establish ownership.[17] The emphasis in proving possession is on establishing a continuous link with the land in question, principally through genealogical continuity; that is, the claimants are required to establish an unbroken connection with those who held the land at the time of European occupation. It is an open question whether this connection can be demonstrated through the expression or practice of indigenous knowledge.

In examining the categories of proof required in order to establish native title, McIntyre suggests that 'unbroken physical presence on the land need not be proved'. He argues that native title may exist:

> so long as there is substantial maintenance of a traditional connection with the land; or occupation consistent with the 'relevant circumstances, including the nature, utility, value and location of the land, and the conditions of life, habits and ideas of the people living in the area'.[18]

A similar view is propounded by Bennett, who argues that the NTA may be interpreted to include recognition of indigenous knowledge as an intellectual property right within the meanings and definition of native title. In this sense, since native title is defined according to the customs and traditions of the claimant group, then by definition it must imply the inclusion of indigenous knowledge as a form of intellectual property. The rationale for this argument is based on the notion that indigenous peoples consider that 'knowledge of the properties of fauna and flora' is part of their intellectual property, and is an important component of their customary laws.[19]

Indigenous peoples' land related activities and customary practices provide additional insights into the ways in which indigenous knowledge is expressed. These practices include customary hunting, fishing and gathering activities. If these activities can be shown to constitute expressions of native title, then it can be argued that indigenous knowledge is also, by implication, a native title right.[20] Although indigenous hunting, gathering and fishing practices appear to be connected to native title, the precise legal nature of the connection is not clear. Do these activities flow from indigenous title in land, or are they separate incidents of title in natural resources, independent from title to lands or waters?[21] What is the relationship between these rights in natural resources, and the knowledge systems that provide the basis for indigenous peoples' uses of them?

These questions may be considered by exploring the relationship between indigenous knowledge and customary law. If indigenous knowledge is assumed to form the basis for customary law, then hunting, fishing and gathering, as customary activities, are also expressions of indigenous knowledge.[22]

In the *Mabo [No 2]* decision, Deane and Gaudron JJ stated that Aboriginal title:

> preserves entitlement to use or enjoyment under the traditional law or custom of the relevant territory or locality [and that] the contents of the rights and the identity of those entitled to enjoy them must be ascertained by reference to that traditional law or custom.[23]

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17 See McIntyre G, 'Proving native title', in Bartlett R H and Meyers G D (eds), *Native Title Legislation in Australia* The Centre for Commercial and Resources Law, The University of WA and Murdoch University, Perth WA 1994, pp 129-131.

18 As above p 156, quoting McNeil K, *Common Law Aboriginal Title*, Clarendon Press, Oxford, 1989, p 201.

19 Bennett D, 'Native Title and Intellectual Property', in Burke, P (ed), *Land, Rights, Laws: Issues of Native Title* Australian Institute of Aboriginal and Torres Strait Islander Studies, Canberra, Native Titles Research Unit, issues paper no 10, April 1996.

20 As above.

21 Sweeney D, 'Fishing, hunting and gathering rights of Aboriginal peoples in Australia', *UNSW Law Journal*, vol 16 no 1, pp 97-160 at p 103. Note that as this paper was going to press, further clarification of native title rights in fauna was provided by the High Court's decision in *Yanner v Eaton*. In this decision the majority judges upheld the appellant's native title right to hunt crocodiles: *Yanner v Eaton* [1999] HCA 53.

22 The relationship between hunting, fishing and gathering, and customary law is discussed in Fisher M, *Aboriginal customary law: the recognition of traditional hunting, fishing and gathering rights* Australian Law Reform Commission, research paper no 15, May 1984.

23 *Mabo and Ors v State of Queensland (No 2)* (1992) 107 ALR at 83.

Deane and Gaudron JJ also addressed the issue of 'tradition' by arguing that:

> the traditional law or custom is not, however, frozen as at the moment of establishment of a Colony. Provided any changes do not diminish or extinguish the relationship between a particular tribe or other group and particular land, subsequent developments or variations do not extinguish the title in relation to that land.[24]

Sweeney argues that 'there is little doubt that those rights include the right of the traditional owners to hunt, gather and forage on the land and to fish in its rivers and adjacent seas'.[25] He supports this argument by referring to the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) which at s 3(1) 'requires persons claiming to be the traditional owners of the land to, inter alia, establish that they are "entitled by Aboriginal tradition to forage as of right over that land"'.[26] Sweeney elaborates on this point by stating that:

> [w]hile caution needs to be exercised to avoid classifying the incidents of Aboriginal title in terms of English property law concepts, it seems clear that fishing, hunting and gathering rights can comprise part of Aboriginal title to land. However ... while customary Aboriginal fishing, hunting and gathering rights may be part of the bundle of rights comprised in Aboriginal title to land, there is no necessary nexus between them.[27]

The NTA supports this connection between customary practices and native title, as it defines native title 'rights and interests' to include, at s 223(2), 'hunting, gathering, or fishing, rights and interests'. Following on from this connection, Meyers predicts that:

> not only is the recognition of Aboriginal fishing and hunting rights compatible with common law concepts of interests in land, but may in fact act as a catalyst for preserving those resources for their common enjoyment and use.[28]

Despite these assertions, it will still need to be determined in law whether indigenous hunting, gathering and fishing rights are in fact property rights, and, if they are, whether they flow from, or are conditions of, native title property rights.

A recent native title decision by the Federal Court has some important implications for the connections between indigenous use and control of land based natural resources, and hence of indigenous rights in biological knowledge and practices. In *Ben Ward v State of Western Australia*,[29] handed down in the Federal Court in Perth on 24 November 1998, Lee J found that the Miriuwung and Gajerrong people hold native title rights to an area including parts of Western Australia and the Northern Territory. This case is useful for discussions about indigenous biological and environmental knowledge because the Court determined that the claimants held not only native title rights to occupation, use and enjoyment, but other rights relating to access, control and use of resources. These rights are:

- the right to control the access of others to the determination area;
- the right to use and enjoy resources of the determination area;
- the right to control the use and enjoyment by others of resources of the determination area;
- the right to trade in resources of the determination area;
- the right to receive a portion of any resources taken by others from the determination area;
- the right to maintain and protect places of importance under traditional laws, customs and practices in the

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24 *Mabo and Ors v State of Queensland (No 2) (1992)* 107 ALR at 83.

25 Sweeney, above note 21, p 104.

26 As above, p 104, note 36.

27 As above.

28 Meyers G D, 'Aboriginal rights to the "profits of the land": the inclusion of traditional fishing and hunting rights in the content of native title', in Bartlett R H and Meyers G D (eds) above note 17, p 215.

29 *Ben Ward on Behalf of the Miriuwung and Gajerrong People v State of WA and Ors* (1998) 1478 FcA. See (1999) 4 (1) AILR 59.

determination area; and

- the right to maintain, protect and prevent the misuse of cultural knowledge of the common law holders associated with the determination area.[30]

The precise definition of 'resources' is not clear from this determination, but they extend to natural living resources such as animal and plant species and products used for cultural and other purposes, then this might also imply a right in indigenous knowledge relevant to the management and conservation of these resources. The right to 'maintain, protect and prevent the misuse of cultural knowledge of the common law holders' appears in particular to offer a clear opportunity to introduce specific mechanisms for the native title holders in this region to protect their intellectual property rights in knowledge, innovations and practices relevant to the maintenance of the natural and cultural resources in the area.

Increasingly, courts are moving towards the recognition — within an IPR framework — that indigenous people's cultural and intellectual property rights may extend to rights in cultural knowledge held by collective land owning groups. For example, the relationship between intangible cultural knowledge — indigenous intellectual property — and the land owning group has been acknowledged in a recent decision relating to the *Copyright Act 1968* (Cth), handed down by the Federal Court on 3 September 1998. In *John Bulun Bulun v R & T Textiles Pty Ltd*, Von Doussa J upheld the rights not only of the individual Aboriginal artist, but also of the clan group that holds the ritual knowledge embodied in the artwork to seek redress under the Australian legal system.[31] This landmark decision recognises the communal rights in cultural knowledge of a land owning group, and allows the group to seek legal redress for the unauthorised use of their cultural knowledge in works of art.

Besides developments in IPR systems, another area of law and policy making which may offer opportunities for the recognition and protection of indigenous knowledge is the negotiation of regional agreements or Indigenous Land Use Agreements. The development of negotiated agreements can be pursued either within the provisions of the NTA[32] or as independent processes. Section 21 of the NTA provides a potential stimulus for the negotiated settlement of claims, and a possible mechanism for the achievement of a measure of autonomy for indigenous peoples. The recent *Native Title Amendment Act 1998* (Cth) also includes provisions for the negotiation of Indigenous Land Use Agreements.

Regional agreements provide significant opportunities for the development of partnerships between indigenous peoples, governments, corporations, companies and other organisations and bodies. In formulating such partnerships, there could be opportunities to develop specific approaches to recognising and protecting indigenous rights in traditional knowledge, natural and cultural resources, and land and environmental planning, management and control. These approaches potentially provide opportunities for indigenous peoples to introduce into the negotiations and planning their own concepts, based on their customary laws, codes of ethics and notions of sustainability and responsibility for looking after their country and its resources. Models such as those being pursued in Canada may provide useful insights.[33]

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30 As above at 89.

31 *John Bulun v R & T Textiles Pty Ltd* (1998) 3 AILR 547. See also Hardie M, 'The *Bulun Bulun* case', ILB, vol 4 issue 16 (November 1998), pp 24-26.

32 Preamble and s 21.

33 There is a large and growing literature on regional agreements. See for example Fenge T, *Political Development and Environmental Management in Northern Canada: The Case of the Nunavut Agreement* North Australia Research Unit discussion paper no 20 (October 1993), North Australia Research Unit, Australian National University, Canberra 1993; Richardson B J, Craig D and Boer B, 'Indigenous peoples and environmental management: a review of canadian regional agreements and their potential application to Australia', *Environmental and Planning Law Journal*, Pt I vol 11 no 4 (August 1994), pp 320-343; Richardson B J, Craig D and Boer B, 'Indigenous peoples and environmental management: a review of canadian regional agreements and their potential application to Australia', *Environmental and Planning Law Journal*, Pt II vol 11 no 5 (October 1994) pp 357-381; Richardson B J, Craig D and Boer B, *Regional Agreements for Indigenous Lands and Cultures in Canada: A Discussion Paper* North Australia Research Unit, The Australian National University, Darwin 1995; Jull P and Craig D, 'reflections on regional agreements: yesterday, today and tomorrow' 2 AILR (1997), pp 465-493;

Governments are also trying to define and clarify access to, control and ownership of biological resources in Australia more generally. In late 1996, a Commonwealth/State working group issued a discussion paper that explored some options for developing a framework to regulate access to Australia's biological and genetic resources. Further work is also being considered on the basis of submissions received in response to the discussion paper. Clarifying rights in biological resources is a difficult task, given the extent of laws, the diverse and somewhat ad hoc jurisdictional responsibilities, and the range of interests involved. Further work in this area will need to give a higher priority to gaining a better understanding of indigenous peoples' claims and interests, including their claims for ownership and control over biological and genetic resources.[34]

Gaining a deeper understanding of indigenous rights and interests in traditional knowledge and practices regarding biological resources will require a conceptual shift away from the IPR system. The IPR system is rooted in a eurocentric legal framework that encourages the dominance of monopolistic and commodity based approaches to creativity, and promotes the hegemony of legal specialists and commercial entrepreneurs. What needs to be encouraged is greater participation of indigenous peoples and the involvement of disciplines such as anthropology, political science, and history. More attention will need to be paid to indigenous discourses, concepts and understandings of land, heritage, culture and community.[35] Although researchers are beginning to acknowledge that there is insufficient understanding of the nature of indigenous knowledge systems and property rights,[36] it is still all too easy to make broad generalisations at the expense of recognising diversity and the specifics of locality.

For example, there is still no clearly developed concept of group rights within Western law, nor a clear view on how they could be legally recognised and protected. What is needed is a better understanding of how indigenous societies define, manage, and articulate their roles, responsibilities and rights in resources and knowledge. Gaining an appreciation of the diversity of these issues will require consideration of at least the following areas.

Secrecy

Given that some indigenous knowledge is subject to customary rules of secrecy, any regime for recognition and protection will need to respect this and make adequate provisions to prevent unauthorised revelation and uses of knowledge.

Sullivan P, 'Regional agreements in Australia: an overview paper' in Pyle A (ed), *Land, Rights, Laws: Issues of Native Title* issues paper no 17, Native Titles Research Unit, Australian Institute of Aboriginal and Torres Strait Islander Studies, Canberra, April 1997; French R, 'Local and regional agreements', in Pyle A (ed), *Land, Rights, Laws: Issues of Native Title* Regional Agreements Paper no 2, Native Titles Research Unit, Australian Institute of Aboriginal and Torres Strait Islander Studies, Canberra, August 1997; Smith D E, 'Indigenous land use agreements: new opportunities and challenges under the amended Native Title Act' in Strelein, L (ed), *Land, Rights, Laws: Issues of Native Title* Regional Agreements Paper no 7, Native Title Research Unit, Australian Institute of Aboriginal and Torres Strait Islander Studies, Canberra, December 1998; Thematic issue on Indigenous Land Use Agreements (1999) 4 (21) ILB.

34 Commonwealth-State Working Group on Access to Australia's Biological Resources, *Managing Access to Australia's Biological Resources: Developing a Nationally Consistent Approach* discussion paper, October 1996.

35 See for example Davis M, above note 13; Lofgren N, 'Common law Aboriginal knowledge', *Aboriginal Law Bulletin*, vol 3 no 77, December 1995, pp 10-12; Bird Rose D, 'Exploring an Aboriginal land ethic', *Meanjin*, 3, 1988, pp 379-387; Verran H, 'Imagining ownership: working disparate knowledge traditions together', in Papaellinas, G (ed), *Republica*, vol 3, Angus and Robertson, Sydney 1995, pp 100-107; Pask A, 'Cultural appropriation and the law: an analysis of the legal regimes concerning culture', *Intellectual Property Journal*, vol 8 no 1, December 1995, pp 57-86.

36 See, for example, Pinel S L and Evans M J in Greaves T (ed), *Intellectual Property Rights, A Sourcebook* Society for Applied Anthropology, Oklahoma City, USA 1994, pp 51-53; Posey D A, 'International agreements and intellectual property right protection for Indigenous peoples', in Greaves T (ed), as above, p 236.

Dispossession and loss of knowledge

The dispersal and dispossession of indigenous peoples as a result of colonisation has resulted in a significant loss of indigenous knowledge and practices. This makes it difficult to properly identify and document indigenous knowledge. Land clearances and erosion as a result of farming, urban development, tourism and industry have led to loss of biodiversity and of natural environments, and this has in turn exacerbated the loss of indigenous knowledge.

Distinguishing 'indigenous' knowledge from 'common' or 'everyday' knowledge

Many indigenous people have adapted to modern technologies, lifestyles and cultural systems. This provides challenges in identifying knowledge and practices that may be said to be distinctly indigenous and which are maintained according to customary rules, as distinct from knowledge that is everyday or 'common' knowledge. Examples might be indigenous peoples' use of firearms and four wheel drive vehicles for hunting purposes, or their use of power boats and commercial gear in fishing activities. In practice though, there is not a sharp distinction between 'traditional' and 'new' knowledge as these generally inform indigenous practices.

Indigenous knowledge and intellectual property rights

IPR laws are designed to provide monopoly rights to creators and inventors, and to encourage economic and commercial growth. This system of laws — which includes patents, copyrights, plant breeders' rights, designs and trademarks — is increasingly being challenged by new and emerging technologies. It is also being challenged by indigenous peoples themselves, who claim that their traditional knowledge, cultural products and expressions are not adequately protected by IPR systems.

Indigenous knowledge is an important component of indigenous peoples' cultural heritage, and is sometimes referred to as indigenous 'cultural and intellectual property'.[37] There is some debate — particularly in international standard developments — about how to formulate terminology to define the subject matter of intangible heritage in which indigenous peoples claim rights. For example, in the 1993 report on her study of indigenous cultural heritage for the United Nations, Special Rapporteur Erica-Irene Daes concluded that both 'intellectual property' and 'cultural property' should be considered integral elements of indigenous cultural heritage.[38] A 1992 statement by the UN Secretary General considered indigenous knowledge to be one of the three components of indigenous intellectual property (the others being 'biodiversity' and 'folklore and crafts').[39] Still other discourses use the term 'folklore', a term that in this paper is considered pejorative.[40]

Without entering into a substantial discussion about the relevance or otherwise of particular terminology, this paper does nonetheless question the appropriateness of the terms 'cultural and intellectual property' or 'folklore' to denote indigenous knowledge. For the purpose of the present discussion, it is important to note that indigenous rights in traditional knowledge form part of and are deeply enmeshed in an integrated system

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37 Daes E, *Study on the Protection of the Cultural and Intellectual Property of Indigenous Peoples* E/CN.4/Sub.2/1993/28 July 1993; also see Greaves T, 'Introduction' in Greaves, T (ed), above note 36, p ix.

38 Daes E, above note 37, pp 31-32.

39 United Nations Economic and Social Council, Commission on Human Rights, Sub-Commission on the Prevention of Discrimination and the Protection of Minorities, Forty-sixth session, Discrimination Against Indigenous Peoples, *Intellectual Property of Indigenous Peoples: Concise Report of the Secretary-General* E/CN.4/Sub. 2/1992/30, 6 July 1992, p 2.

40 The term 'folklore' has been used in the development of standards by UNESCO and WIPO for the protection of intangible cultural heritage. More recently, however, UNESCO has begun to acknowledge that indigenous and local peoples do not wish this term to be used to denote their heritage. This acknowledgment was explicitly articulated in a statement from the UNESCO/Smithsonian Conference on Traditional Knowledge and Folklore held in Washington DC on 27-30 June 1999. For a discussion of indigenous and non-indigenous discourses and the role of terminology, see Davis M, above note 13.

of interdependent rights that include land, environment, social relations and cosmology. In this sense, indigenous rights to knowledge form part of a more inclusive category of rights and interests than those that are generally considered within the meaning of the term 'intellectual property rights'.[41]

As in all societies, complex, well-defined rules and obligations govern the management of traditional knowledge and 'intellectual property' in indigenous societies. However, the nature of these rules may differ, as they are determined according to the customs and laws of particular groups and communities. Again, acknowledging the danger of generalising and of imposing an essentialised view of indigenous cultures, what is often not understood is that indigenous knowledge systems are more closely connected to cosmology and religion than are comparative knowledge systems in non-indigenous societies.

The distribution of rights and responsibilities in traditional knowledge and practices in indigenous societies differs from non-indigenous societies. There are conceivably similar patterns in the relationships between rights holders — for example, one could draw analogies with the relationship between lessee and landowner in the wider community. However, the nature of these relationships, and of their respective roles and responsibilities, will depend on locality and on the specificities of different groups and cultures. It is important to establish these details of the diversity and range of particular, localised political economies of knowledge ownership and management in indigenous societies if an effective system for protection is to be developed.

For example, some individuals may hold rights to the production of an object, performance of a ceremony, expression of a song, story or dance, the use of a design, technique or method of preparation, or the carrying out of a hunting or gathering expedition. Yet others in a community might have different kinds of rights, whether classed as 'ownership' rights or not, to the same knowledge, products or expressions. Still other members of a community might act on behalf of the owners as stewards, caretakers, custodians or managers. Knowledge, and its expressions and products, is transmitted through generations, with clearly defined rules regarding secrecy and who has the right to know. Often, cultural knowledge is restricted according to gender, age, ritual or social status, or other social markers.

In the context of this paper, perhaps the most significant arena for comparison is that between IPR systems and indigenous knowledge systems. The IPR system refers to the body of laws which protects the rights of individual creators, authors and inventors. It includes copyright, patents, designs, trademarks, trade secrets, and plant breeder rights legislation aimed at conferring rights upon individuals for works and inventions and creating monopoly rights in those works or inventions. IPRs promote a system based in ensuring that the rights of the few are protected, and encouraging wealth creation and generation. This has the effect of maintaining a disparity or tension between an enclosed domain in which ideas and resources are privatised and become commodities for economic gain, and a common realm that allows the free circulation of ideas and resources for the public good.[42]

By contrast, indigenous peoples' claims in intellectual property emphasise cultural over economic rights, and 'consist of efforts to assert access to, and control over, cultural knowledge and to things produced through its application'.[43] While there may be the appearance here of a correspondence with patenting in the IPR sense, indigenous systems are based in a notion of community, and the maintenance of culture. As Greaves notes, indigenous people wish to control their cultural knowledge in order to 'preserve meaning and due honour for elements of cultural knowledge and to ensure that these traditional universes, and their peoples, maintain their vitality'.[44] In practical terms, indigenous knowledge protection

41 I am indebted to Donna Craig for helping me clarify some of these thoughts.

42 For discussions of common property and resource ownership see Boyle J, *Shamans, Software and Spleens: Law and the Construction of the Information Society* Harvard University Press, Cambridge, Massachusetts and London 1996; Cunningham A B, 'Indigenous knowledge and biodiversity: global commons or regional heritage?' *Cultural Survival Quarterly*, vol 15 no 3, Summer 1991, pp 4-8; and various papers in Larmour P (ed), *The Governance of Common Property in the Pacific Region* National Centre for Development Studies, Pacific Policy Paper 19, and Resource Management in Asia-Pacific, Research School of Pacific and Asian Studies, the Australian National University, Canberra 1997.

43 Greaves T, above note 36, p ix.

44 As above.

may be partly achieved by extending IPR systems or by designing mutually compatible and complementary IPR/indigenous systems. Ultimately however, for many indigenous people, the primary concern is to ensure that their knowledge is adequately recognised as a distinct system in its own right, and that it is adequately protected.

In considering the protection and recognition of indigenous rights in knowledge and biological resources, a primary concern is providing benefits by way of compensation or royalties where indigenous knowledge or innovations are sought and used by the wider community. The benefits or compensation may be financial, and may consist of various forms, including royalty payments or other remuneration. Alternatively, they may be non-financial, such as rights to full and effective participation in environmental conservation and management or to improved education, employment, health, housing and community facilities. Provision of assistance with indigenous institution building and training are of particular benefit. Some other issues regarding benefit sharing are discussed further below.

The use of traditional knowledge by people outside indigenous societies raises some moral and ethical considerations. As well as the need to consider the types of benefits that should be provided, another crucial requirement is that prior informed consent should be obtained from the knowledge holders.[45] At the heart of these issues lies the fundamental notion of self-determination. The development of a truly effective system for the protection and management of traditional knowledge and biodiversity conservation must be carried out by indigenous people themselves. It is critical to ensure that indigenous people have control over decision-making about how their knowledge is applied, to whom it may be revealed, who has the authority to divulge knowledge, and which elements or types of knowledge should be protected from disclosure. In this regard, a system will need to provide adequate measures to ensure respect for confidentiality and to protect secret knowledge from public disclosure.

Alternatives to intellectual property systems

There is a rapidly growing body of work that explores alternatives to the IPR system for the protection of traditional knowledge. Some of this work seeks to develop an alternative, distinctly indigenous system that is separate from, but complementary to, the non-indigenous IPR system. Other approaches choose to remain within the existing legal framework, but aim to make better use of a wide range of existing laws, policies and protocols in order to establish indigenous IPR systems 'through various national and international mechanisms'.[46]

Whichever approach is adopted, there is no doubt that the interpretation of IPR continues to invite debate, and that the IPR system is understood in different ways by different interest groups. For indigenous peoples and their advocates, the term 'intellectual property rights' is not usually limited to the strict legal definition which embraces copyrights, patents and other monopoly rights. These groups prefer to think of 'intellectual property rights' in a broader, more encompassing sense that incorporates a range of additional subject matter beyond what is protected under conventional IPR systems, and which indigenous peoples consider important for the maintenance of their cultural identity. In this wider view, an IPR system can also be expanded to encompass different objects, subject matter, definitions and provisions for protection. For example, it might acquire the capacity to recognise communal rights, and provide for an unlimited period over which products and expressions should be protected. Greaves explains that:

> in the broader world of copyrights and patents, 'intellectual property rights' (IPR) refers to the legal rights of ownership that individuals and corporations have over the products of individual creativity and inventiveness.[47]

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45 See for example Fourmile H, 'Using prior informed consent procedures under the convention on biological diversity to protect indigenous traditional knowledge and natural resource rights', ILB vol 4 issue 16 (November 1998), pp 14-17.

46 Greaves, above note 36, p ix.

47 As above, footnote 1.

In its wider meaning, Greaves employs the term IPR to refer to 'the rights claimed by indigenous people over their traditional cultural knowledge'.[48]

Emerging standards and developments in the UN lend support to a broader definition of IPR which has the capacity to incorporate indigenous peoples' perspectives on their own cultural knowledge, products and expressions. For example, the Draft Declaration on the Rights of Indigenous Peoples calls for recognition of the cultural and intellectual property rights of indigenous peoples, defined as including a range of tangible and intangible subject matter not recognised within conventional legal systems. Similarly, the UN study on indigenous cultural heritage by Erica-Irene Daes defines indigenous heritage as a 'holistic' category that incorporates 'cultural property' and 'intellectual property', both in themselves inclusive of a wider range of cultural products and expressions than are accepted under Western laws.[49]

Intellectual property rights

The conventional system of IPR provides for certain limited monopoly rights for individuals for creation and innovation. The IPR system includes laws relating to copyright, patents, plant breeders' rights, designs, trademarks and allied rights.[50] Although all IPR laws are potentially relevant to the protection of indigenous knowledge, the focus in this paper is on patents, as these have the most direct application to the protection of traditional knowledge in biological resources. Although plant breeders' rights laws also warrant detailed analysis, this is outside the scope of the present paper. Copyrights will also be briefly reviewed, since these are used increasingly by indigenous peoples to claim compensation for unlawful use of their artworks. The term 'copyright' is used in some of the debates about indigenous rights in traditional knowledge. Indeed, use of the term 'intellectual property' is itself also questionable when referring to indigenous knowledge and innovation.[51]

TRIPS Agreement

Internationally, IPR systems are harmonised by the Trade Related Aspects of Intellectual Property Rights (TRIPS) Agreement that was developed during the final round of negotiations under the General Agreement on Tariffs and Trade (GATT) during the mid-1990s. The TRIPS Agreement provides the basis for a globally uniform system of IPR. The Agreement is the subject of considerable debate in terms of its capacity to provide for protection of indigenous rights in traditional knowledge. Among the issues being considered is the degree of consistency between TRIPS and the CBD. Some argue that, whereas TRIPS reinforces private monopoly rights, the CBD provides for the conservation of biological diversity as a universal heritage. Importantly too the CBD, in contrast to TRIPS, includes specific provisions for the protection of traditional knowledge, innovations and practices.

The debate about the TRIPS Agreement ranges from the view that TRIPS is fundamentally antithetical to indigenous rights in traditional knowledge to other views that TRIPS has the capacity, either through textual

48 Greaves, above note 37, footnote 1.

49 Daes, above note 36, pp 31-32.

50 World Intellectual Property Organisation (WIPO), *Introduction to Intellectual Property: Theory and Practice* Kluwer Law International, London, The Hague and Boston 1997, pp .3-5.

51 In this author's view, use of the term 'copyright' or 'intellectual property' to denote indigenous rights in innovation and knowledge is misleading, since the subject matter that indigenous peoples wish to protect that is often labelled 'intellectual property' comprises a wider range, and is a more 'holistic' category than that protected under Western IPR systems. Moreover, indigenous rights in traditional knowledge are embedded in a system of integrated and inter-related rights that include land, culture and cosmology. Recognition and protection of this system of rights therefore requires a different philosophical approach founded on an indigenous law system, rather than one based on 'copyright'. I am grateful to Donna Craig for helping me to clarify some of my thoughts about these aspects of indigenous rights.

revision or beneficial interpretation and implementation, to provide for protection of indigenous knowledge.[52] The provisions of the TRIPS Agreement relevant to indigenous rights to traditional knowledge include those dealing with patentable subject matter, the potential for introducing sui generis systems for protection, protection for secrecy, and the development of geographic indicators (that is, trademarks that identify a product, image or design by its geographical place of origin). There is not the scope in this paper for a detailed examination of the relevance of the TRIPS Agreement for the protection of traditional indigenous knowledge.[53]

Copyright

Copyright laws protect the tangible expressions of ideas in forms such as in works of art, recordings, and publications. As with all intellectual property right laws, copyrights provide only limited scope for protecting the rights of indigenous communities in their cultural and biological knowledge. In Australia, the *Copyright Act 1968* (Cth) has been used by Aboriginal artists to seek redress for unauthorised uses of their expressions and designs in works of art. Several court decisions and unreported cases over the decades have enabled the interpretation of the *Copyright Act 1968* (Cth) to be extended, to a limited extent, to provide improved recognition of indigenous peoples' rights in their intellectual property. These cases are well documented.[54]

Although copyright laws and other IPR laws are all of importance in discussing indigenous peoples' rights and interests in cultural and biological knowledge, the focus of this paper is on patents.[55] In considering ways of recognising and protecting indigenous knowledge and innovation, and providing compensation or benefits for its use, it is necessary to examine the formal system of patents, and to explore how this relates to indigenous systems of knowledge and innovation.

Patents

The Australian *Patents Act 1990* (Cth) provides a monopoly right to an inventor of a product or a process. The maximum term for grant of a patent was extended from 16 to 20 years in 1994.[56] This finite period for protection is one of the impediments to using patents to protect traditional indigenous knowledge and innovations. Traditional knowledge exists in perpetuity, and is not amenable to fixed periods for protection.

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52 For a brief indication of this range of views see Simpson T, *Indigenous Heritage and Self-Determination: The Cultural and Intellectual Property Rights of Indigenous Peoples* Document – IWGIA no 86, Copenhagen 1997; Nijar G S, *In Defence of Local Community Knowledge and Biodiversity: A Conceptual Framework and Essential Elements of a Rights Regime* Third World Network, paper 1, Penang, Malaysia 1996; Cultural Survival Canada, 'Colonizing creation' *Issues Brief*, Ottawa July 1997; Gaia Foundation & GRAIN, 'Global trade and biodiversity in conflict' *Issue No 1*, April 1998; Christie J, 'Biodiversity and intellectual property rights: implications for indigenous peoples' *Ecopolitics IX: Perspectives on Indigenous Peoples Management of environmental Resources* Northern Territory University, Darwin 1-3 September 1995, conference papers and Resolutions, pp 61-77.

53 For some discussion of the relevance of the TRIPS Agreement to indigenous rights in traditional knowledge see Dutfield G, 'Intellectual property rights, trade and biodiversity: the case of seeds and plant varieties', background paper provided for the Inter-sessional Meeting on the Operations of the Convention on Biological Diversity, Montreal, Canada, 28-30 June 1999, IUCN, June 1999; see also Posey D A and Dutfield G, *Beyond Intellectual Property: Toward Traditional Resource Rights for Indigenous Peoples and Local Communities* International Development Research Centre, Ottawa 1996, pp 90, 102-3.

54 Davis M, *Indigenous Peoples and Intellectual Property Rights* Research Paper no 20 (1996-97), Information and Research Services, Department of the Parliamentary Library, Attorney General's Department, Commonwealth of Australia 1997; *Stopping the Rip-Offs: Intellectual Property Protection for Aboriginal and Torres Strait Islander Peoples* issues paper, October 1994; Janke T, *Our Culture, Our Future: Proposals for the recognition and protection of Indigenous cultural and intellectual property* Australian Institute of Aboriginal and Torres Strait Islander Studies, 1997; McDonald I, *Protecting Indigenous Intellectual Property: A Copyright Perspective* Australian Copyright Council, March 1997.

55 For a discussion of IPR more generally as these relate to indigenous peoples see Davis M, above note 54.

56 Under s 4 of the *Patents (World Trade Organization Amendments) Act 1994* (Cth).

Under s 13 of the *Patents Act 1990* (Cth), a patent holder has an exclusive right to exploit his or her invention, and can also authorise another person to exploit the invention. In Sch 1 of the Act the term 'exploit' is defined as follows:

> (a) where the invention is a product — make, hire, sell or otherwise dispose of the product, offer to make, sell, hire or otherwise dispose of it, use or import it, or keep it for the purpose of doing any of those things; or
> (b) where the invention is a method or process — use the method or process or do any act mentioned in paragraph (a) in respect of a product resulting from such use.[57]

The owner of a patent may transfer his or her proprietary rights by assignment[58] or may permit another person to exploit his or her right by means of a licence. Often, a patent holder assigns his or her rights to a company or to some other corporate body. The Act also provides for co-ownership of patents, an arrangement that is usually made on the basis of agreement between the co-owners.[59] Section 16 of the Act also sets out the conditions for co-ownership, providing that:

> subject to any agreement to the contrary, where there are two or more patentees —
>
> (a) each of them is entitled to an equal undivided share in the patent; and
> (b) each of them is entitled to exercise the exclusive rights given by the patent for his or her own benefit without accounting to the others; and
> (c) none of them can grant a licence under the patent, or assign an interest in it, without the consent of the others.[60]

A patent is significant for the commodification and marketing of the products and processes of industry. Some important industrial and commercial applications of patents include those employed by pharmaceutical, agricultural and cosmetic industries. The role of patents in bioprospecting and the pharmaceutical industry is discussed below.

Criteria for patentability

Discussions about whether patents can protect indigenous knowledge hinge largely on the criteria by which applications for patents are assessed, and whether these are applicable to indigenous knowledge and innovations.

Section 18 of the *Patents Act 1990* (Cth) sets out the terms for assessing the validity of patentable inventions. The main criteria are that the subject of a patent application, when compared with 'prior art', is novel, involves an 'inventive step', is useful, and that it was 'not secretly used in the patent area' prior to the claim. This section excludes from patentability 'human beings, and the biological processes for their generation'.[61]

The concept of novelty means that an invention should not be merely a discovery of an existing or naturally occurring product or process. Thus, naturally occurring products or processes cannot be patented unless they have been substantially altered or modified in some way. This seemingly straightforward criterion has been subject to some discussion in terms of what precisely constitutes an alteration beyond what is a product of nature. Although each patent application must be evaluated in its own terms, on the basis of previous cases

57 *Patents Act 1990* (Cth), Sch 1.

58 Section 14.

59 Section 16.

60 Section 16(1).

61 Section 18.

a general rule may be that 'a new product must differ from the old, not only in degree but also in kind in order to be a patentable advance'.[62]

A patent application must also be able to demonstrate that the product (or process) will make a useful contribution to, and have an application in manufacturing, technology, medicine or other commercial or industrial fields. Finally, an important criterion for a patent application is that the invention must be clearly described and documented.

The existence of novelty as a quality in itself cannot be proved solely by an assessment of the patent application in isolation. Rather, novelty is determined by examining 'prior art', which can be described as 'all the knowledge that existed prior to the relevant filing or priority date of a patent application, whether it existed by way of written or oral disclosure'.[63]

Prior art and prior art information

Section 7 of the *Patents Act 1990* (Cth) establishes the criteria for novelty, based on what is termed the 'prior art base'. Both s 7 and Sch 1 to the Act provide details of the 'prior art base' and of 'prior art information'. Section 7(1) defines an invention as being 'novel' in comparison with the 'prior art base'. The term 'prior art base' is defined in Sch 1 as a means for deciding whether an invention is novel or involves an inventive step:

> 'Prior art base' means:
>
> (a) in relation to deciding whether an invention does or does not involve an inventive step:
> (i) information in a document, being a document publicly available anywhere in the patent area; and
> (ii) information made publicly available through doing an act anywhere in the patent area; and
> (iii) where the invention is the subject of a standard patent or an application for a standard patent – information in a document publicly available outside the patent area; and
>
> (b) in relation to deciding whether an invention is or is not novel:
> (i) information of a kind mentioned in paragraph (a); and
> (ii) information contained in a published specification filed in respect of a complete application where:
> (A) if the information is, or were to be, the subject of a claim of the specification, the claim has, or would have, a priority date earlier than that of the claim under consideration; and
> (B) the specification was published after the priority date of the claim under consideration; and
> (C) the information contained in the specification on its filing date and when it was published.

'Prior art information' is defined in Sch 1 to mean:

> (a) for the purposes of subsection 7(1) — information that is part of the prior art base in relation to deciding whether an invention is or is not novel; and
>
> (b) for the purposes of subsection 7(3) — information that is part of the prior art base in relation to deciding whether an invention does or does not involve an inventive step.

Referring to previous applications or 'prior art' includes 'information which has been published, by oral or written disclosure; or anything which has been in use in public, or which is part of common general knowledge'.[64]

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62 Axt et al, above note 4, pp 50-54. The discussion by these writers concerns US patent laws, and may not be entirely relevant to the Australian situation. It is beyond the scope of the present paper to compare US with Australian patent systems.

63 WIPO, above note 50, p 125.

64 Golvan C, *An Introduction to Intellectual Property Law* The Federation Press, NSW 1992, p 82.

Opposition and challenges to patents

A patent application may be opposed as an administrative action within the patent office prior to the granting of the patent. Objections can be made against a patent on the grounds that: an invention lacks novelty; does not involve an inventive step; is common knowledge; has not been adequately and fully described; or is merely a discovery of something that already exists. Even after having been granted, a patent can be invalidated or revoked, usually in the courts. Thus indigenous peoples, or indeed any members of the community, have the right to oppose or challenge a patent at the appropriate stage of the process.

Patents and indigenous knowledge

Indigenous peoples and their advocates have argued that the patent system does not protect the rights of indigenous peoples who are the custodians and stewards of much of the knowledge that contributes to patentable products and processes. Some critics have protested that products and processes that are the subject of patent applications in fact derive from or are based on indigenous and local peoples' knowledge and innovations, and that the patenting of these denies the rights of indigenous peoples to any benefits. This issue is explored further below.

IPR, the public domain and indigenous knowledge and innovation

The nature of innovation and knowledge management in indigenous societies is not generally considered to be compatible with the requirements of the existing patent system. The patent system, as with other forms of intellectual property, confers ownership rights on individuals, and has as its primary objective the encouragement of economic and commercial growth. Indigenous knowledge and innovations, by contrast, are often transmitted over generations, mostly by oral means. Indigenous innovation is thus a long term process, and is managed according to a complex system of collective rights and interests.

Notwithstanding the cautions against generalising discussed earlier, perhaps the most significant contrast between the two systems is the fact that, unlike IPR systems, indigenous knowledge systems tend not to involve the identification of a single author, creator or inventor. Given its specific features, indigenous knowledge is thought by proponents of IPR to be 'freely available' within the public domain, and therefore not amenable to protection by conventional IPR systems. In this view, indigenous knowledge is also thought to lack the requirements of 'novelty' or 'originality' that are the essential criteria for patents and copyrights. To be patented, an invention cannot be merely a discovery of what already exists. As Gray puts it:

> It is clear that the mere existence of genetic resources on land owned or formerly owned by indigenous people will not give the indigenous people any intellectual property rights in those resources, should they turn out to have some scientific or commercial value. In order to gain protection or to prevent others from gaining it, the indigenous people would have to 'discover' the resources, and put them to a new use with commercial significance.[65]

The notion that indigenous knowledge of and practices with regard to natural biological and cultural resources cannot be protected by patents is based on certain presuppositions about the characteristics of indigenous knowledge systems. It assumes a generalised, universal model of indigenous systems of innovation and knowledge management that renders these inherently unsuitable for protection under conventional IPR systems. The basis for this view is the belief that there is a dichotomy between IPR and the public domain. The IPR system of private, individual property rights which encourage commercial and economic gain is contrasted with collective, orally based knowledge lacking a single 'inventor' or 'creator'. Since the latter system is not centred on an individual author, inventor or owner, it therefore comprises a 'public domain' free from the protection of laws. This model has been challenged by Boyle, among others,

65 Gray S, 'Vampires round the campfire', *Alternative Law Journal*, vol 22 no 2, April 1997, p 61.

who argues that the concept of the public domain needs to be reconsidered in the context of current changes in the dynamics of socio-economic systems and a shift away from the centrality of a single individual author, creator or inventor. In *Shamans, Software and Spleens*, Boyle calls for an expansion of the concept of the public domain and for the creation of a new class of rights that can protect collective and 'folkloric' knowledge and expressions.[66] A number of writers and advocates for indigenous peoples' rights argue for the creation of regimes which recognise and protect these collective rights.[67]

Public knowledge and patentability

The patent system and the rights it confers for inventions raises issues about the nature and availability of public information. In claiming protection, the patent system requires an invention to be fully and adequately described in order to attract patent rights. There are some implications in this for indigenous peoples, in relation to the potential that exists within the present system for breaches of trust through disclosure of secret or sacred knowledge. There are currently no provisions within the patent system for protecting indigenous peoples' rights regarding secret or confidential knowledge by requiring full disclosure of the source of products or inventions at the point at which applications for patenting are submitted.

The effect on public knowledge of patenting has also invited some other criticisms. Arup suggests that the kind of property rights created by the patent system act against the public conservation of natural resources. Providing private property rights in commodities based on the natural world, he argues, denies the ability of the wider public to participate in conservation, and to gain access to the natural world. In this view:

> apart from its tendency to contribute to the concentration of economic power among producers ... the conferral of property rights promotes the commodification and commercialisation of essential resources.[68]

Arup asserts that this allows individuals, who are 'usually the holders of capital resources', to 'capture socially accumulated and significant knowledge', and that 'applications of the knowledge are then driven by a concern with commercial gain'. In his view therefore, patents 'may also provide a means to appropriate the properties of nature'. Arup expands on this theme:

> the selective economic incentive of the property right is said to encourage concentration on artificial processes and products at the expense of the maintenance of natural genetic diversity and sufficiency [and] raises the claims of the high technologies above the care and skill which traditional farming has applied to the land for many centuries ... the treatment of living things as mere commodities has the effect of detaching them from their complex spiritual and ecological dimensions.[69]

Patents and the nature of invention

One of the challenging features of patent law is its requirement that an invention must demonstrate that a significant alteration has been made from what was already found or known. As has been seen, some critics of the patent system argue that the complexities required to distinguish clearly between a natural product and one that has been fundamentally altered contribute to the conceptual difficulties of the patent system. The challenges in establishing precise boundaries between naturally occurring products and those that have been significantly altered, or in defining categorically where an innovation becomes an 'invention', have

66 See Boyle J, above note 42.

67 See, for example, Posey D A and Dutfield G, above note 53.

68 Arup C, *Innovation, Policy and Law: Australia and the International High Technology Economy* Cambridge University Press, Cambridge 1993, p 73.

69 As above, p 74.

profound consequences when comparing the nature of innovation in indigenous societies with conventional Western notions of scientific and technological processes.

Rubin and Fish detail some of the difficulties in using patent laws and other intellectual property rights to protect indigenous knowledge, innovations and practices. Among the issues they point to as contributing to these difficulties are the 'collective and folkloric nature of some indigenous knowledge, the "product of nature doctrine", and other standard requirements of patentability'.[70] Although these authors base their arguments on US patent law, the principles of their critique may also have implications for Australian laws. They state that:

> [t]he novelty requirement of US patent law prohibits the patenting of an invention that has been known, used, or published in the United States more than one year previous to the patent application. Inventors must also swear to an oath that they are the first inventors. Because much indigenous knowledge regarding plants and their medicinal uses has been published, it is likely unpatentable without significant alteration or no obvious improvement. Furthermore, it would likely be difficult for indigenous plant users to claim that they are the first to have invented a plant use, due to the knowledge having been part of their community for decades, if not centuries. The novelty of indigenous knowledge, therefore, may not be sufficient for patent law. This would not be as significant an impediment if patent law could accept the collective knowledge of an indigenous group as novel, at least when it is unknown outside of the community sharing the knowledge.[71]

The 'product of nature' doctrine represents another obstacle to patenting indigenous intellectual property. Generally, Rubin and Fish point out, patent law prohibits the patenting of products of nature, and 'the substance of a patent may not merely be the discovery of some natural phenomenon'. Rather, a product or process filed for patenting must be subject to some kind of substantial alteration. As Rubin and Fish detail:

> In essence, the success of an indigenous intellectual property claim under patent law would require that the knowledge involved be something beyond the use of a product of nature. It is possible that the preparations of plant remedies may satisfy this subject matter test. In this case the inventor would have produced a 'non-obvious' composition of matter derived from a product of nature by using their knowledge ... Even where indigenous knowledge appears to be a product of nature, there should be some improvement in existing patent law to protect such knowledge that contributes to other useful, novel, and non-obvious products.[72]

Some critics of the patent system base their arguments on the requirement that applications for patenting should be assessed in terms of qualities such as novelty. In this regard, Arup suggests that the administration of the patent system is too complex, and that the assessment of the novelty of a patent application requires decisions that go beyond the purely legal dimensions of patent law. He argues that behind the apparent clarity of patent legislation lie complex decision-making processes that require an 'elaborate administrative and judicial system'. Decisions concerning the validity of patent applications therefore involve unnecessarily 'complex considerations of law, science and economics'.[73] While it may be the case that the assessment of criteria such as 'novelty' and 'non-obviousness' requires 'complex' applications of inter-disciplinary expertise in 'law, science and economics', this does not necessarily impose an impediment on the application of the

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70 Rubin S M and Fish S C, 'Biodiversity Prospecting: Using Innovative Contractual Provisions to Foster Ethnobotanical Knowledge, Technology, and Conservation', *Colorado Journal of International Environmental Law and Policy* vol 5 no 1 (Winter 1994), pp 23-58 (quote, p 46).

71 As above, p 46.

72 As above, pp 46-47.

73 Arup C, above note 68, p 64.

patent system. Indeed, it could be argued to the contrary — that the multiplicity of socio-economic and cultural factors that contribute to the process of invention and innovation necessitate and may benefit from such interdisciplinary approaches. What may be more at issue is that the complexity involved in administering the patent system potentially renders the system inaccessible to certain sectors of the community. As with all IPR laws, those communities such as many indigenous peoples who live in powerless, marginalised and often impoverished situations may be excluded from gaining equitable access to the patent system.

The relationship between the patent system, and indigenous knowledge and innovations is of particular importance when considering uses of biological diversity such as bioprospecting.

Patents and bioprospecting

The importance of naturally occurring plants and plant products to pharmaceutical, cosmetic, agricultural and a range of other products and processes is well documented.[74] The role of patents in the pharmaceutical industry has also been the subject of much discussion. A patent 'gives its owner the opportunity to control the production and marketing of a drug for a designated period of years and thus reap economic benefit from it'.[75] The use of patents by pharmaceutical and research companies to protect their rights in products and processes based on naturally occurring biological resources highlights some issues of concern to indigenous and local peoples. The following examples take up some of these issues.

Endod is an African soapberry. A US patent was granted to the University of Toledo to use endod to kill zebra mussels.[76] The technique for this use of endod, developed by Ethiopian scientists with support from a Canadian research institution, was based on 'hundreds of years of innovation and use by Ethiopian communities'.[77] Those who opposed the patent claim asserted that the discovery of the use of endod was 'obvious' (and therefore not amenable to patenting), and that the 'real work was done by Ethiopians'.[78]

The neem tree (Azadirachta indica) is found widely throughout parts of India. It forms a central part of Indian communities' culture and heritage. It is used by these communities for a vast range of purposes such as in medicines, toiletries, insecticides, fertilisers, and in agriculture.[79] The medicinal, pharmacological and therapeutic properties of neem have been known and used for millennia.[80]

From the early 1970s, the neem tree began to attract the attention of US and global markets. In 1971 a US timber importer noted the properties of the neem tree and began importing it. Following testing for a pesticidal product derived from neem extracts, the importer received clearance for this product from the US Environmental Protection Agency in 1985, and in 1988, he sold the patent for the pesticide to the transnational chemical company W R Grace & Co.[81] It is estimated that there are now some 35 patents over neem.[82]

The patenting and marketing by Grace of products based on neem derived substances led to a debate about the appropriation of the intellectual property of Indian communities. Indian and Third World critics of

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74 See, for example, Blakeney M, 'Bioprospecting and the protection of traditional medical knowledge', *European Intellectual Property Review*, vol 19 no 6 (June 1997), pp 298-303; Davis M, *Biodiversity and Indigenous Knowledge* research paper no 17 (1997-98), Information and Research Services, Department of the Parliamentary Library, 29 June 1998; Axt J et al, above note 4.

75 Axt J et al, above note 4, p 1.

76 Rural Advancement Foundation International (RAFI), *Conserving Indigenous Knowledge: Integrating Two Systems of Innovation* Ottawa 1994, p 13.

77 As above, p 13.

78 As above, p 14.

79 Shiva V and Holla-Bhar R, 'Intellectual piracy and the neem tree', *The Ecologist* vol 23 no (6) (Nov/Dec. 1993) pp 223-227; Shiva V, Jafri A H, Bedi G, and Holla-Bhar R, *The Enclosure and Recovery of the Commons: Biodiversity, Indigenous Knowledge and intellectual Property Rights* Research Foundation for Science, Technology and Ecology, New Delhi, India 1997, pp 35-36.

80 Shiva V et al, above note 79, pp 35-39.

81 As above, p 37.

82 RAFI, above note 76, p 14.

Grace's approach claim that the preparation of neem based products has been part of the collective community knowledge of Indian societies for millennia and should not have been patented by Grace. They refuted the assertions by Grace that its methods for developing neem based products were novel, non-obvious and based on extraction methods that constituted an innovative technique and were therefore amenable to patenting. Instead, the critics argued that the extraction and preparation of active substances from neem is a traditional innovation based on millennia of collective knowledge and practice. The critics state that:

> Patent claims on the various processes and products of the neem that are built on the vast cultural and intellectual heritage of the Indian people reflect a total devaluation of the country's intellectual heritage and an arrogance based on the assumption of superiority of Western sciences.[83]

Several neem patents have been the subject of challenges by Indian scientific and ecological interests.[84]

Another example of opposition to patents by local and indigenous peoples and their supporters is the case of the development of coloured cotton. A US plant breeder was granted plant breeders' rights for varieties of coloured cotton, which she 'modified through conventional plant breeding to lengthen the staple for commercial weaving'. The cottons were promoted by textile companies as having come from 'the ancient peoples of the Americas'. Although the breeder acknowledged that the ancient Amerindians held the knowledge of breeding the cotton, these peoples are not being compensated for their contribution.[85] The breeder admitted that the original cotton seeds she used were collected in Mexico and Guatemala. At the same time, local organisations in Andean countries asserted that the coloured cotton varieties that were developed and promoted constituted an 'obvious extension of the original coloured cottons developed in South and Central America by indigenous communities'.[86]

In some of these cases there are continuing attempts by the local and indigenous peoples who claim rights in the patented products or processes to oppose the patents. If successful, such challenges may provide a precedent for possible challenges to other patents that relate closely to indigenous knowledge and practices.[87] They may also challenge preconceived notions about the nature of invention and innovation, and the extent to which modification or change to a process or a product may be classified as invention for the purposes of patent laws.

In considering these cases of patenting, one assertion that is often made (particularly by exponents of IPR systems) is that once a patent has been conferred on a product or process derived from naturally occurring products, this does not necessarily prevent the local people from continuing to use the product or substance in their own traditional ways. Defenders of the patent system also point out that IPR systems and traditional systems of innovation can co-exist without conflict or tension.

The patenting of these items that have been used by local and indigenous peoples over a long time does, however, raise some moral and ethical questions. For example, how was the knowledge about the product or process obtained, and to what extent, if any, did the local and indigenous innovators and users of the products and processes participate in the acquisition of product and its patenting? Clarification is needed of the extent to which the patented product or process actually involves indigenous knowledge and techniques. Also important is the need to ascertain whether adequate provisions (through compensation, protection, and benefit sharing) are made for recognising the contributions of local and indigenous peoples.

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83 Shiva V et al, above note 79, pp 35-36.

84 As above, p 39.

85 RAFI, above note 76, p 15.

86 The Crucible Group, *People, Plants, and Patents: The Impact of Intellectual Property on Trade, Plant Biodiversity, and Rural Society* International Development Research Centre, Ottawa 1994, p 10.

87 See, for example, Posey D A and Dutfield G, above note 53, p 80.

Access to biological resources and equitable benefit sharing

The CBD encourages Parties to develop measures for the fair and equitable benefit sharing of biological and genetic resources. There are provisions for access to genetic resources and equitable benefit sharing in many articles of the CBD.[88] Articles 8(j), 10(c), 17(2) and 18(4) are especially relevant for indigenous and local communities.[89] Articles 6, 7, 8, 9, 11, 13 and 14 are also relevant.[90]

Article 15 provides for the 'equitable sharing of benefits derived from the use of genetic resources with the Parties providing them'.[91] The basis of this article is the sovereign right of States over natural resources within their jurisdictions.[92] Article 15(1) allows governments to make decisions about physical access to genetic resources in their jurisdictions. This may include the introduction of national laws controlling such assess.[93] Although the CBD supports the rights of States over access to natural resources, it does not deal with ownership rights in these resources. The matter of proprietary rights is to be determined at the national level.

Access to genetic resources under art 15 is subject to certain controls. Article 15(4) provides the basis for 'access agreements' and encourages the providers of genetic resources, and potential users, to negotiate 'mutually agreed terms' for the provision of genetic resources.[94] Such access agreements are of particular importance when discussing indigenous peoples' roles in relation to genetic resources and knowledge of these. Access agreements may take the form of contracts, material transfer agreements, or research agreements. In Glowka's view, such agreements 'will likely become the primary means to (1) authorise access to genetic resources, (2) control subsequent use and (3) establish the return of benefits from their subsequent use'.[95] These provisions concerning access and use also have important implications for indigenous peoples' tenure over their lands and natural resources.

Article 15(5) provides that access to genetic resources should be subject to the prior informed consent of the providers of the resources.[96] Under this provision, potential users of genetic resources must obtain the consent of the government providing the genetic resources before they are obtained. This consent must be based on the user giving information about how they intend to use the genetic resources.[97] Although this provision is aimed at governments as providers, it also has significant implications for providers — such as indigenous communities — within national and state jurisdictions.[98] Although the principles of art 15 could be used to ensure that indigenous peoples benefit equitably from the uses of genetic resources, there is no specific requirement under the CBD that these principles be observed.

In general, the 'primary rationale for Article 15 is to create the broad international legal and policy framework for benefit sharing to take place between the Parties of the CBD'.[99] In this context, it is useful to review some approaches that are being developed or considered to achieve controls over access to biological resources, and provide mechanisms for benefit sharing.

The challenge for governments and policymakers is to develop systems of access to biological resources that can achieve several objectives at the same time. These include the conservation and

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88 For example, arts 1, 15, 16, 20 and 21; Glowka L, *A Guide to Designing Legal Frameworks to Determine Access to Genetic Resources* IUCN, Gland, Switzerland, Cambridge and Bonn 1998, p 3.

89 As above, p 15.

90 As above, p 18.

91 As above, p 3.

92 As above, p 4.

93 As above, pp 4-5.

94 As above, p 8.

95 As above, p 8.

96 As above, p 9.

97 As above. See also Fourmile H, above note 45, p 14.

98 Glowka L, above note 88, p 15.

99 As above, p 12.

sustainable use of biological diversity, the effective and sustainable conduct of bioprospecting, recognition and protection for indigenous knowledge, innovations and practices, and provisions for equitable benefit sharing by knowledge holders, owners and providers. One way of achieving these goals is through various forms of contracts and agreements. Another approach is to introduce an alternative sui generis system through measures such as special legislation. The latter approach is often advocated, as noted by Glowka:

> Special approaches to provide indigenous and local communities with control over the knowledge associated with genetic resources are particularly needed because, except in limited instances, current forms of intellectual property protection, such as patents and plant breeders' rights, cannot be applied for either technical reasons or because they are contrary to the practices and beliefs of some communities.[100]

In this view, sui generis systems 'should be designed to protect the knowledge associated with genetic resources separate from existing intellectual property rights systems'. Until such sui generis systems are introduced, various tools such as community registers, and the use of trade secrets and know how licences may be introduced to protect indigenous knowledge.[101] The development and introduction of an effective sui generis system beneficial to indigenous peoples' interests may take considerable time to complete. In the meantime, contracts and agreements are widely canvassed as useful approaches that offer some flexibility.

Contracts and agreements

Contracts and agreements offer the potential for developing creative approaches to bioprospecting and protection of indigenous knowledge, innovations and practices. Glowka considers that contracts and agreements 'will likely be the primary means to reflect an agreement for access and subsequent benefit sharing'.[102]

There are some well documented examples of contracts and agreements for bioprospecting and benefit sharing. Some of these were submitted as case studies to the Secretariat of the CBD for the fourth meeting of the Conference of Parties to the Convention, held in Bratislava, Republic of Slovakia in 1998.[103]

Possibly one of the best known examples of a benefit sharing agreement is that developed between the giant pharmaceutical company Merck, and the Costa Rican non-profit conservation agency INBio. Merck provides upfront fees to INBio for the screening of plants for substances that may assist in developing AIDS related cures. A proportion of the upfront fees and 50 percent of any royalties will be provided directly for conservation purposes. This arrangement is primarily a contract for the screening of natural products derived from a rich and biodiverse environment. Although this contract is described in some of the literature as a useful model for partnership arrangements between governments and pharmaceutical organisations, it apparently does not directly involve any indigenous knowledge providers.[104]

Another example of a bioprospecting agreement is one that has been developed between Shaman Pharmaceuticals and Healing Forest Conservancy. In contrast to the Merck agreement, Shaman derives its products directly through collaborative arrangements with indigenous peoples. The company established an independent non-profit organisation called Healing Forest Conservancy, which claims that it 'supports

100 As above, pp 38-39.

101 As above, pp 40-42.

102 As above, pp 39, 42-43.

103 UNEP, 'Synthesis of case-studies on benefit-sharing' Note by the Executive Secretary, Conference of Parties to the Convention on Biological Diversity, Fourth Meeting, Bratislava, 4-15 May 1998, UNEP/CBD/COP/4/Inf7, 4 May 1998.

104 There is an extensive literature on the Merck/INBio Agreement. See, for example, Axt J et al, above note 4; Oddie C, 'Bio-prospecting', *Australian Intellectual Property Journal* vol 9 no 1 (February 1998), pp 6-20; Reid W, et al (eds), *Biodiversity Prospecting: Using Genetic Resources for Sustainable Development* World Resources Institute, US 1993.

biodiversity conservation and protection of cultural diversity and will independently determine how resources can best assist indigenous communities and organisations'.[105]

Further examples of contractual arrangements for bioprospecting benefit sharing are those developed under the auspices of the International Cooperative Biodiversity Group (ICBG). The ICBG is a program sponsored jointly by the US National Institutes of Health (NIH), the National Science Foundation (NSF) and the US Agency for International Development (USAID). Its objective is to 'address the related issues of biodiversity conservation and the promotion of sustained economic development through drug discovery from natural products'.[106] ICBG projects being developed in Nigeria and in Cameroon aim to distribute benefits derived from the uses of biodiversity back to indigenous and local communities through independent trust funds.[107] In the Nigerian case, a Trust Fund operates under a Board of Management, which will 'consult and collaborate with village heads and professional guilds of healers in determining the nature of compensation to apply or projects to embark upon in any given locality'.[108] The Board of Management is the 'executive/administrative organ of the Fund', and will include among its membership traditional leaders, traditional medical practitioners, government representatives, a scientist and an ecologist.[109]

A similar ICBG project has been developed in Suriname, where the 'Suriname ICBG group works with local tribal people to conduct some of the bioprospecting activities'.[110] For the Suriname project, the development of a Forest Peoples' Fund is proposed, to 'ensure upfront benefits from bioprospecting go to Suriname and its tribal communities'.[111] In general, the ICBG program aims to:

> link and promote drug development with the 'interdependent issues' of biodiversity conservation, sustainable economic development, and the protection of the intellectual property of indigenous peoples.[112]

In their discussion of the relative merits of bioprospecting contracts, Rubin and Fish describe ways in which these can be used to 'facilitate patent protection for indigenous knowledge, whether it is currently patentable subject matter or not'.[113] These authors consider that bioprospecting contracts should include provisions for protecting indigenous knowledge 'in any sections dealing with the collecting, patenting, and licensing of local knowledge that leads to patentable inventions'. The authors outline some of these:

> ... to optimize the ability of local and indigenous plant users to secure patent protection, a bioprospecting contract should ensure that all indigenous knowledge collected is well-documented regarding its origin, processes and applications. Careful documentation, kept confidentially, will assist in later patent application and filing. Agreements should state that nothing stated within them will abridge the intellectual property rights of nationals and local people under the laws governing the contract. Parties may also stipulate that 'shamans' or 'local or indigenous peoples' may be inventors under the agreement. This is particularly important in anticipating a situation where a shaman and a

105 Oddie C, above note 104, p 19.

106 Iwu M and Laird S, 'The International Cooperative Biodiversity Group Drug Development and Biodiversity Conservation in Africa: case study of a benefit-sharing plan', Case Study submitted to the Secretariat of the Conference of Parties to the Conference of Parties to the Convention on Biological Diversity, February 1998.

107 As above, p 19.

108 As above, p 23.

109 As above, p 24.

110 Guerin-McManus M et al, 'Bioprospecting in practice: a case study of the Suriname ICBG Project and benefits sharing under the Convention on Biological Diversity', unpublished paper, 1998, p 3.

111 As above, p 8.

112 McGowan J and Udeinya I, 'Collecting traditional medicines in Nigeria: a proposal for IPR compensation' in Greaves T (ed), above note 36, p 39.

113 Rubin and Fish, above note 70, p 47.

> prospector are both responsible for an invention or where the contributions of local plant users are, by themselves, insufficient for patent requirements. An ideal position for this assertion of the rights of indigenous people would be in a provision regarding the ownership of inventions or patent rights of the contracting parties.[114]

One way in which a bioprospecting contract can be used to prevent unauthorised use of indigenous knowledge is through a licensing arrangement. Where there are joint inventors of a patented product, licensing rights are allocated to all inventors. In this way, indigenous knowledge holders and providers can be equal partners in a jointly held invention, and can therefore supervise the invention.[115] Contracts can also provide mechanisms for compensating indigenous people for the use of their knowledge. One way of achieving this is through royalty schemes. These 'present an opportunity for the remuneration of indigenous knowledge, the conservation of biodiversity, and the support of educational, commercial, and research efforts'.[116]

The advantages of benefit sharing are many. They can provide incentives for knowledge holders, local and indigenous peoples to conserve biological diversity. Benefits may also include non-financial components such as employment opportunities and skills and training programs. Benefits can also provide important incentives to local and indigenous peoples for full and effective participation in bioprospecting, and in biodiversity conservation. Provision of benefits — both financial and non-financial — can assist in building indigenous institutions and advancing political and economic autonomy, and contribute in important ways to indigenous peoples' cultural maintenance and survival.

There are also some aspects of developing benefit sharing arrangements that will require very careful consideration. For example, contracts should properly reflect the interests of indigenous peoples, and not be imposed through coercion by companies intent on securing their business interests. Contractual arrangements must also be developed by ensuring that all indigenous peoples with interests and authority are fully included in the negotiations. Further, these agreements should ensure that benefits are equitable, at appropriate levels, and fully reflect the requirements and interests of the intended recipients. Contracts and agreements must also incorporate effective mechanisms for the protection of knowledge and for preventing unauthorised disclosure. They may include provisions for penalties against misuse of indigenous knowledge. Contracts and agreements should be developed using fully participatory processes.

Sui generis approaches

Although contracts and agreements offer flexibility, and the potential for including negotiated terms, they are ultimately limited. These kinds of arrangements may tend to be ad hoc, lacking in consistency, and without adequate mechanisms for implementation and monitoring. They generally do not have the sanction of any state or national laws.

Potentially more effective, longer term solutions which ensure protection for indigenous knowledge, innovations and practices, and provide for equitable benefit sharing may be achieved through the development of sui generis systems such as national laws. Ideally, these kinds of laws would provide institutional recognition and protection for fundamental indigenous rights, while also regulating conservation and sustainable use of biological diversity and bioprospecting. Although many advocate sui generis systems as the preferred solution to effective recognition and protection for indigenous rights to traditional knowledge, these approaches should also be approached with some degree of caution. Ideally, sui generis systems would be developed to provide for beneficial recognition and protection of indigenous rights. However, there is also a risk that the introduction of sui generis systems could actually diminish or erode rather than uphold and strengthen indigenous rights.[117]

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114 As above, pp 47-48.

115 As above, p 48.

116 As above, p 51.

117 Henrietta Fourmile, personal conversation.

In considering the development of sui generis approaches it is instructive to consider some existing and emerging international standards and indigenous statements which provide a framework within which beneficial sui generis systems could be introduced. The Draft Declaration on the Rights of Indigenous Peoples (the Draft Declaration) was developed during more than a decade of discussions by the UN Working Group on Indigenous Populations. The Draft Declaration provides at art 24 for indigenous peoples' rights to 'their traditional medicines and health practices, including the right to the protection of vital medicinal plants, animals and minerals'. Article 29 provides that indigenous peoples are:

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

This Declaration, developed by indigenous peoples and their representatives, is a strong statement of the aspirations of indigenous peoples regarding their distinct rights. The Draft Declaration is currently being considered by a special working group of the UN Commission on Human Rights.

The International Labour Organisation Convention 169 (ILO 169), introduced in 1989 as a revision of an earlier convention, is currently the only international instrument on indigenous rights that provides obligations to signatory countries. Although ILO 169 is a weaker statement than the Draft Declaration, as a convention it has greater force, and it also requires countries that have ratified it to submit regular reports and to be subject to monitoring. ILO 169 contains several articles relevant to the protection of indigenous peoples' cultures, environments and religious and political systems.[118] The Australian Government has not yet ratified ILO 169.

There is some debate among indigenous and advocacy organisations regarding the relative merits of developments such as ILO 169 and the Draft Declaration. Although the text of ILO 169 is considerably weaker in its provisions for indigenous rights than that of the Draft Declaration, the ILO instrument is the only one that currently has a formal status in international law. As such, advocates for this Convention argue that it offers at least a level of minimum rights that can provide a foundation upon which further standards can be elaborated. Unlike the Draft Declaration, ILO 169 also provides a mechanism for reporting and monitoring, and therefore places some obligations upon countries that have ratified it to uphold and maintain a certain level of standards for indigenous peoples. As a declaration, the Draft Declaration does not have the obligatory provisions of a convention. The Draft Declaration is still only in draft form, and is subject to a process of debate and possible revision in the UN. Despite these uncertainties regarding the eventual status of the Draft Declaration and the non-binding nature of its provisions, it nonetheless offers in its present form a strong aspirational statement of indigenous rights.

Another area of work is being pursued by the UN specialised agencies of the Educational Scientific and Cultural Organization (UNESCO) and the World Intellectual Property Organization (WIPO). UNESCO is currently reviewing its 1989 Recommendation on the Safeguarding of Traditional Culture and Folklore. This Recommendation was the focus for discussions during a UNESCO/Smithsonian conference held in Washington DC on 27-30 June 1999, with a view to revising it in the light of developments in the decade since its adoption. Among the recommendations resulting from that conference was a decision to reconsider the term 'folklore' and to determine a more appropriate terminology on the basis of further studies and consultations with indigenous and local peoples. The 1989 Recommendation is currently the only international statement providing a sui generis approach to protecting intangible cultural heritage.

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118 For example arts 4, 5, 8, 13 and 23.

WIPO commenced a program of consultations with indigenous peoples in 1988, with the objective of exploring the implications for the IPR system of these peoples' claims and interests in intellectual property and traditional knowledge. WIPO is conducting a series of discussion forums and regional visits.

A growing body of indigenous statements and declarations also provides a framework within which sui generis systems for protecting indigenous knowledge may be introduced. These include the following:

- the Mataatua Declaration (June 1993);
- the Belem Declaration (1988);
- the Julayinbul Statement (November 1993); and
- the Kari-Oca Declaration (May 1992).[119]

Although these statements do not have binding force, they nonetheless provide an important discourse that can guide and ultimately influence international law.[120]

In addition to these treaties, statements and declarations providing specifically for indigenous rights, wider human rights instruments provide an additional source of support for indigenous rights. The Universal Declaration on Human Rights 1948 provides important foundational principles. The International Covenant on Civil and Political Rights (ICCPR), adopted by the UN in December 1966 and which came into force in March 1976, is a significant cornerstone for fundamental human rights and freedoms. Indigenous peoples have used the communication mechanisms under the Optional Protocol to the ICCPR to seek recognition of their self-determination rights under art 27 of this instrument.

A growing body of environment and heritage related instruments and developments provides additional incentives to the formulation of improved standards for indigenous rights.[121] These developments include Agenda 21, the Statement of Forest Principles, and the Rio Declaration — all outcomes from the 1992 UN Conference on Environment and Development. Chapter 26 of Agenda 21 is an important statement of principles, programs and actions for building and strengthening indigenous institutions and participation. There are also environment related standards being developed through various organs of the UN, such as the Commission on Sustainable Development. UN studies, such as the report on indigenous cultural heritage prepared by Special Rapporteur Erica Irene-Daes for the Sub-Commission on Prevention of Discrimination and Protection of Minorities and the Ksentini study on human rights and the environment, add to the list of developing standards.[122]

The development of sui generis approaches would ideally be based on new forms of legislation that provide specifically for the recognition and protection of indigenous forms of intellectual property. These may provide for recognition of the particular features, such as collective rights, that distinguish indigenous knowledge and intellectual property from conventional systems. There are many examples of sui generis systems, but these vary considerably in terms of the extent to which they incorporate indigenous rights, including benefit sharing and community forms of ownership.

There is much planning and activity across the world at national and sub-national levels to devise various legislative, policy and administrative schemes to regulate access to genetic resources. Glowka discusses some of these and identifies five groups of legislation, summarised here.[123]

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119 For discussion of indigenous statements see Posey D A and Dutfield G, above note 53; Posey D A, *Traditional Resource Rights: International Instruments for Protection and Compensation for Indigenous Peoples and Local Communities*, IUCN, Gland, Switzerland 1996.

120 For a discussion of the role of these statements and declarations in international law see Sutherland J, 'Representations of indigenous peoples' knowledge and practice in modern international law and politics', *Australian Journal of Human Rights* vol 2 no 1 (Dec 1995), pp 39-57.

121 Posey D A and Dutfield G, above note 53, especially Ch 11.

122 United Nations Commission on Human Rights, Sub-Commission on the Prevention of Discrimination and Protection of Minorities, Human Rights and the Environment, Final Report by Fatma Zohra Ksentini, Special Rapporteur, E/CN4/Sub2/1994/9, 6 July 1994.

123 Glowka L, above note 88, pp 23-71.

(1) General environmental framework laws

Examples of these exist in several African countries (such as Gambia, Kenya, Malawi, and Uganda) and in the Republic of Korea. These are 'only enabling in nature' and 'merely charge a competent national authority to examine the issue in order to provide more specific guidelines or regulations sometime in the future'.[124]

(2) Framework sustainable development, nature conservation or biodiversity laws

Examples of these, either as laws or in draft stages, are in some Central and South American countries (such as Costa Rica, Peru and Mexico), in Eritrea, Fiji and in the Seychelles. Glowka states that these 'tend to be more detailed' than the enabling legislation described above. They also 'clearly establish the Mutually Agreed Terms (MAT) and Prior Informed Consent (PIC) principles'.[125]

(3) Dedicated or stand alone national laws or decrees on access to genetic resources

This group comprises 'the most comprehensive pieces of access legislation surveyed'.[126] An example is that introduced in the Philippines, which comprises an Executive Order 247 (1995) and an Administrative Order 96-20 (Implementing Rules and Regulations on the Prospecting of Biological and Genetic Resources) (1996).

(4) Modification of existing laws or regulations to better reflect genetic resource access and benefit sharing issues

Examples of these are found, at the national level, in the US and Nigeria. In the US, these consist of proposals to control removal of research specimens from national parks; in Nigeria, the proposals aim to ensure prior informed consent prior to bioprospecting in Nigerian national parks. Similar examples have been identified at the sub-national level. In Western Australia, the government enacted legislation to:

> explicitly clarify the authority of the state government under the *Wildlife Conservation Act 1950* and the *Conservation and Land Management Act 1984* to enter into exclusive agreements for the removal of forest produce (including soil) or flora to promote the use of flora for therapeutic, scientific or horticultural purposes (Pt 3, *Conservation and Land Management Amendment Act 1993*).[127]

(5) Actions taken at the regional level

An example of these is Decision 391 of the Andean Pact which 'creates a common regime for access to genetic resources'. This Decision was published in July 1996 thereby becoming law in all five member states: Bolivia, Colombia, Ecuador, Peru and Venezuela.[128] Another regional approach has been developed in Southeast Asia between Malaysia, the Philippines, Thailand and Australia. In 1992 these countries endorsed the Manila Declaration, which is a set of guidelines to 'facilitate access to biological resources'.[129]

Some of these national, sub-national or regional laws contain important provisions regarding the rights of indigenous communities. For example, the Manila Declaration includes among its principles 'the establishment of implementation measures such as efficient licensing and prior informed consent processes as well as mechanisms to protect the rights of indigenous and local communities and ensure their compensation'.[130]

Andean Pact Decision 391 'confirms that biological resources which contain genetic resources or

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124 As above, p 23.

125 As above.

126 As above.

127 As above.

128 As above, p 24.

129 As above, p 25.

130 As above.

derivatives that are sought can be subject to the private or collective property rights of individuals or indigenous and local communities'.[131] In addition, Decision 391 also:

> recognises the rights of indigenous and local communities over their knowledge, innovations and practices associated with genetic resources and derivatives. The right to control access to indigenous and local knowledge, innovations and practices rests with the communities themselves, but is subject to national legislation (art 7).[132]

National laws are gradually being introduced by various countries (such as Costa Rica, Thailand and South Africa) and also at regional levels (such as by the Organisation of African Unity). It will be useful to maintain an inventory of these developments as they present opportunities for comparative assessment.

The development and introduction of these kinds of national and regional regimes for regulating access to biological resources provides important opportunities for countries to build on relevant international standards and treaties. They illustrate some of the possibilities for devising innovative approaches that combine sustainable use and conservation of natural and cultural resources with the recognition and protection of the distinct rights of indigenous peoples.

The development of regional agreements for land and environmental management, as noted earlier in this paper, also provides potentially useful sui generis approaches in which protection of rights in traditional knowledge and the conservation and management of land, environment and resources can be fashioned using indigenous law as a basis.

Other approaches to protecting indigenous knowledge

Approaches to protecting indigenous knowledge are well documented. One of these promotes a model for protection of what are termed 'traditional resource rights'.[133] This model seeks to integrate conventional intellectual property rights systems, human rights and other legislation and policy to provide a 'bundle of rights' as a tool for indigenous peoples to achieve recognition and protection of their knowledge, traditions, innovations and practices relating to the natural environment. Although useful, this approach is founded within the Western legal system. To develop a truly sui generis approach to protecting indigenous knowledge will require stepping outside the Western legal framework to explore ways in which indigenous law can be used as the foundation for protection and recognition.

The Canadian based advocacy organisation Rural Advancement Foundation International (RAFI) suggests a variety of approaches, including working within the present IPR system.[134] Some of the alternatives they propose are variations of copyright laws and trademark labels of authenticity. Suggested modifications to the patent system include the establishment of new deposit rules, documenting gene bank accessions to better reflect indigenous origins, and IPR ombudspersons and tribunals to decide cases of disputed patent claims.[135] RAFI has proposed a number of sui generis solutions, some of which are based on extensions to existing intellectual property rights regimes. These include better use of inventors' certificates to accommodate indigenous knowledge holders and innovators and further development of international standards such as the WIPO/UNESCO Model Law on Folklore. RAFI also suggests the use of bilateral contracts, which are encouraged under the CBD. These contracts could take the form of materials transfer agreements and bioprospecting agreements. Other initiatives suggested are conservation compensation mechanisms and the development of an 'intellectual integrity framework'.[136]

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131 At art 6.

132 Glowka L, above note 88, p 26.

133 Posey D A and Dutfield G, above note 53.

134 Rural Advancement Foundation International, *Conserving Indigenous Knowledge: Integrating Two Systems of Innovation*, Ottawa, 1994.

135 As above, pp 42-46.

136 RAFI, above note 134, pp 39-54

Another approach is based on establishing a conceptual framework for the recognition and protection of community rights in local natural and biological resources. One example of this is a model developed by Gurdial Singh Nijar and others of the Malaysian based Third World Network in 1994. Under this proposal a 'community intellectual rights Act' would establish a sui generis system for the 'protection of the innovations and the intellectual knowledge of local communities'.[137] Other community rights initiatives are being developed in India.[138]

There have been some developments in Australia aimed at recognising and better protecting Aboriginal and Torres Strait Islander peoples' rights and interests in cultural and intellectual property, including cultural and biological knowledge. In 1994, the Commonwealth Government released an issues paper called *Stopping the Rip-Offs: Intellectual Property Protection for Aboriginal and Torres Strait Islander Peoples.*[139] This paper recognised the longstanding problems of unauthorised use of Aboriginal and Torres Strait Islander peoples' designs, images and artistic expressions. It provided an overview of areas where the *Copyright Act 1968* (Cth) was unable to provide adequate protection for indigenous peoples against the misuse of their artworks.

Following the release of *Stopping the Rip-Offs*, several Commonwealth government departments and agencies began formulating responses, including recommendations for reform that would address the inadequacies in existing IPR laws to protect indigenous rights. *Stopping the Rip-Offs* did not consider the subject of indigenous ecological knowledge as it held that this area of indigenous rights was outside the scope of the paper, which was limited to matters within the *Copyright Act 1968* (Cth). However, this area is being considered by other agencies such as the Aboriginal and Torres Strait Islander Commission.[140]

Conclusion

The existing system of intellectual rights offers limited recognition and protection for Aboriginal and Torres Strait Islander peoples' knowledge, innovations and practices. The patent system confers monopoly rights to individual or corporate inventors and innovators and provides for these individuals or corporations to exploit their inventions. While indigenous peoples have the same access as any other citizens to patents and other intellectual property laws, these systems do not in themselves offer solutions to recognising and protecting indigenous knowledge systems and property rights and providing for indigenous peoples to share equitably in benefits derived from the wider uses of their cultural knowledge, products, expressions and practices.

Achieving the mutual goals of sustainable use and conservation of biological diversity, together with recognition and protection for indigenous rights, will require some creativity of approach. Recognising the unique contributions of indigenous peoples and protecting their cultural and biological knowledge poses particular challenges. Further work could include a pilot project in a selected area or region to assess the feasibility of a regional integrated system of knowledge and innovation. This could include the following components:

- further studies (including fieldwork, literature reviews, and compilations of ethnographic and ethnobiological literature) to gain better understandings of indigenous knowledge and innovations, and systems of ownership and rights in land and resources;
- negotiations with key local and regional indigenous communities and organisations to examine local and regional authority and decision-making processes and structures;

137 Nijar G S, above note 52.

138 Shiva V et al, above note 79.

139 Commonwealth of Australia, *Stopping the Rip-Offs: Intellectual Property Protection for Aboriginal and Torres Strait Islander Peoples* issues paper, Attorney General's Department, Canberra 1994.

140 See for example Janke T, above note 54.

- an assessment and analysis of local, regional and national laws, policies, programs and projects that would support access and benefit sharing; and
- negotiations with local and regional conservation (both government and non-government), industry and research organisations with a view to establishing a partnership arrangement.

The development of more effective systems to protect indigenous knowledge could seek to integrate conventional IPR systems with alternative systems based in indigenous law. The creative combination of IPR systems with contracts and agreements and the development of a community based sui generis system for recognition and protection of indigenous rights could form the basis for the development of a local or regional integrated knowledge and innovation system.

Informed by international standards and developments, an integrated knowledge and innovation system could be developed by bringing together key stakeholders and interest groups. These could include peak local and regional indigenous organisations and representative bodies, conservation organisations, industry, science and research organisations, government and non-government sectors.

Ideally, a system should be established to enable indigenous peoples to control their own traditional knowledge systems. To develop such a system will necessitate thinking outside the Western legal framework and exploring ways in which indigenous law can be used as the foundation for protection and recognition. ●

LAW, ANTHROPOLOGY, AND THE RECOGNITION OF INDIGENOUS CULTURAL SYSTEMS

Michael Davis

Indigenous rights, biodiversity and natural resources

Australia has some of the world's most extensive biological diversity. Yet this rich biological diversity is being eroded at an alarming rate by activities such as tourism and development. There is also a rapidly growing interest in Australia's biological resources for their actual or potential commercial and industrial properties and applications.

While Australia's biological resources are in demand by commercial and corporate interests, there is another dimension to this rich biodiversity. To Australia's indigenous peoples, the flora and fauna is not only a biological and genetic resource; it is also a very significant cultural resource. The plants, animals and ecosystems that make up this biological diversity form an important element of the collective cultural heritage of indigenous peoples. Not only are the physical biological materials important, so too is the knowledge of these. In the context of expanding commercial and scientific interests there is a growing acknowledgement of a need to accommodate the rights and interests of indigenous peoples in natural resources and traditional knowledge.

The Australian legal system has demonstrated a capacity to entrench some recognition of Aboriginal rights to land and native title. The *Aboriginal Land Rights (NT) Act 1976* was a landmark piece of legislation in this regard. More recently the 1992 Mabo decision by the Australian High Court recognised the existence in common law of indigenous native title.[1] The *Native Title Act 1993* gave formal recognition to this decision in statute law and established a process for determining claims to native title. The role of anthropology has been critical in elucidating and documenting indigenous land and native title claims, and the discipline contributes enormously to the formulation of legislation. Yet despite these developments in land and native title, the legal system has not demonstrated an adequate appreciation of the important and complex connections between land, 'title' (or ownership or property rights), ecology, and culture that exist in indigenous societies. There appears as yet

[1] *Mabo and Ors v State of Queensland (No. 2)* 1992 107 ALR 1.

R. Kuppe and R. Potz (eds.), Law & Anthropology, 298–320.

insufficient legislative recognition and protection of Aboriginal culture as a whole, integrated system.

The nature of indigenous cultural rights

Rights in natural resources and in the knowledge of them, arise from, and form part of indigenous peoples' profound relationships to land. These rights may be identified as a class distinct from other rights, whose distinctiveness and are defined by many unique characteristics, including the following:

- they are based on the close inter-dependence between indigenous people and the land;
- they are collective rights;
- they have a spiritual as well as a corporeal dimension; and
- they arise from the status of indigenous peoples as distinct peoples.[2]

These rights and interests are controlled, managed, distributed and transmitted within and between indigenous societies in accordance with well-understood customary laws and protocols. These customary laws are underpinned by the cosmological system known as the Dreaming. The Dreaming is a framework for understanding and controlling the world in which ancestral deeds imbue the natural and social worlds with meaning and significance.

Indigenous cultural rights and contested domains

Indigenous cultural rights often attract the attention of a wider public in situations of conflict, where there are competing interests, or where traditional sites, areas, or cultures are threatened with desecration or destruction. Sites of conflict have most commonly arisen over land, heritage or environmental concerns. A 1994 United Nations study on human rights and the environment found that human rights violations 'almost always arise as a consequence of land rights violations and environmental degradation and indeed are inseparable from these factors'.[3] The study also found that indigenous peoples have distinct claims to a 'right to the environment'. This is on the basis that:

[2] For elaboration of some of these features see Michael Davis, 'Traditional Knowledge and Biodiversity' Parliamentary Research Paper, 1998; Michael Davis, 'Indigenous rights in traditional knowledge and Biological Diversity: Approaches to Protection' *Australian Indigenous Law Reporter* 4, 4 (Nov 1999), pp. 1-32.

[3] UN Economic and Social Council, Sub-Commission on Prevention of Discrimination and Protection of Minorities, Forty-sixth session, E/CN.4/Sub.2/1994/9, 'Human Rights and the Environment: Review of further developments in fields with which the sub-commission has been concerned', Final Report by Mrs Fatma Zohra Ksentini, 6 July 1994, para 88 (p. 25).

> ... indigenous peoples have a special relationship with the land and the environment in which they live. ... The land is the home of the ancestors, the provider of everyday material needs, and the future held in trust for coming generations. ... Furthermore, indigenous peoples have, over a long period of time, developed successful systems of land use and resource management.[4]

In an earlier report (the 'Ksentini Report') on her study, in 1991, Special Rapporteur Ksentini stated that indigenous rights in land and the environment had not, at that time been recognised in any UN human rights instrument:

> The special relationship indigenous people have to the land and the environment has yet to be recognized by a human rights instrument of the United Nations. Nor have indigenous peoples and their practices in protecting the environment found a place in the emerging international law concerning the environment.[5]

A greater reliance on anthropological and indigenous insights can facilitate an enhanced legal recognition of indigenous environmental concepts and attachments.

International recognition of indigenous cultural rights

Notwithstanding the gaps identified by the Ksentini Report, existing and emerging developments at the international level do provide a useful context for the recognition of a distinct group of indigenous cultural rights. Since the early 1980s there has been a process to formulate a Draft Declaration on the Rights of Indigenous Peoples. Initially developed through annual meetings of the United Nations Working Group on Indigenous Populations (a specialised body of the Sub-Commission on the Prevention of Discrimination and Protection of Minorities), the Draft Declaration is currently being discussed at regular meetings of a Commission on Human Rights Working Group.

The Draft Declaration contains some important provisions for indigenous rights in cultural products and expressions, including biological resources. It also provides an implicit recognition of the relationship between these aspects of indigenous cultures, and indigenous lands and territories. The following Articles apply:

[4] Ksentini Report, E/CN.4/Sub.2/1991/8, p. 8.
[5] Ibid., p. 10.

> *Article 24*: Indigenous peoples have the right to their traditional medicines and health practices, including the right to the protection of vital medicinal plants, animals and minerals ...
>
> *Article 25*: Indigenous peoples have the right to maintain and strengthen their distinctive spiritual and material relationship with the lands, territories, waters and coastal seas and other resources which they have traditionally owned or otherwise occupied or used, and to uphold their responsibilities to future generations in this regard.
>
> *Article 26*: Indigenous peoples have the right to own, develop, control and use the lands and territories, including the total environment of the lands, air, waters, coastal seas, sea-ice, flora and fauna and other resources which they have traditionally owned or otherwise occupied or used. This includes the right to full recognition of their laws, traditions and customs, land-tenure systems and institutions for the development and management of resources, and the right to effective measures by States to prevent any interference with, alienation of or encroachment upon these rights.
>
> *Article 29*: Indigenous peoples are entitled to the recognition of the full ownership, control and protection of their cultural and intellectual property ... They have the right to special measures to control, develop and protect their sciences, technologies and cultural manifestations, including human and other genetic resources, seeds, medicines, knowledge of the properties of fauna and flora, oral traditions, literatures, designs and visual and performing arts.

International Labour Organisation Convention 169 ('ILO 169') is currently the only existing international instrument that sets a minimum standard for indigenous rights across a wide range of aspects of indigenous culture and livelihood. In contrast to the Draft Declaration, ILO 169 provides binding obligations on countries that have ratified it. It also has reporting and monitoring processes that enhance the capacity for this instrument to ensure standards are adhered to. This Convention has not yet been ratified by the Australian Government. As with the Draft Declaration, ILO 169 contains provisions (eg Arts 7, 13(1), 13(2), and 14(3)) upholding indigenous rights to lands, environments, and the biological and genetic resources on these. Both the Draft Declaration and ILO 169 provide important reference points for the consideration of indigenous rights to biological resources and traditional knowledge as elements of indigenous cultural rights. These instruments both emphasise the inter-relationships between lands, environments, and natural resources.

Other processes within the UN and its agencies provide an additional basis for supporting the development of a new class of indigenous cultural rights. These include the Ksentini study (mentioned above) on human rights and the environment, and the study of indigenous cultural heritage by Special Rapporteur Erica-Irene Daes.[6] The international legal framework developed by UNESCO offers protection of 'cultural heritage' in the wider sense, and may also assist in protecting indigenous rights. The 1992 United Nations Conference on Environment and Development (the 'Earth Summit') was a landmark in the elaboration of international standards for environmental conservation and sustainable development. Outcomes from that meeting that support indigenous rights in environment and natural resources include the Rio Declaration, Agenda 21, a Statement of Forest Principles and the Convention on Biological Diversity.[7]

Reconciling different systems: Pluralism and difference

Indigenous cultural rights also embrace concepts of 'property'. The term 'cultural and intellectual property' is often used to denote elements of indigenous culture. However, it is a vexed question as to whether the concept of 'property', if defined in the conventional western legal sense, is appropriately regarded as an element of indigenous cultural rights. The terminological debates concerning notions of 'property' and the applicability of this concept to indigenous cultures also illustrate the ways in which western law and policy fragment indigenous cultures. These debates, and the uncertainty regarding the roles and definitions of 'property' in indigenous societies, also highlight the need for a serious consideration of anthropological insights and those gained from indigenous discourses.

It is sometimes argued that there is a dichotomy between indigenous, and non-indigenous ('western') forms of property. Proponents of this view suggest that the specific characteristics of each of the two systems of property rights result in irreconcilable differences between them. For example Pask writes that 'the claims of Aboriginal peoples to cultural rights fall outside the parameters of Western legal recognition'. She states that 'their claims can be heard neither in the international regimes governing cultural property, nor in the domestic regimes governing intellectual property'.[8] Pask elaborates:

[6] UN Economic and Social Council, 'Study on the protection of the cultural and intellectual property of indigenous peoples', Report by Erica Irene-Daes, Special Rapporteur to the Sub-Commission on Prevention of Discrimination and Protection of Minorities, E/CN.4/Sub.2/1993/28, 28 July 1993.

[7] For a summary of some of these developments see Michael Davis, *Biological Diversity and Indigenous Knowledge*, Research Paper No. 17 (1997-98), Information and Research Services, Department of the Parliamentary Library, Canberra, 29 June 1998. This report is available on-line at www.aph.gov.au.

[8] Amanda Pask, 'Cultural appropriation and the law: an analysis of the legal regimes concerning culture' *Intellectual Property Law Journal* 8, 1 (Dec 1995), p. 64.

> The question is not reducible to one of the legal standing of groups, but rather demands to be understood a an interaction between different world-views – coming into conflict less over who owns what, or even who controls what, than over the character of culture, of community, and the nature of the relationship between the two. The situation can therefore be best understood as an interaction between legal systems with different organizing principles, rather than as a demand made of 'the law' by a special interest group.[9]

This dichotomy between different worldviews can, as some argue, be addressed by considering the feasibility of dual, or plural systems of law and practice.[10] It may be possible to accommodate different legal systems of property within the one dominant system. Tully has argued that although 'western theories of property don't allow recognition of Aboriginal property', there is indeed, for the Canadian or North American case at least, a space for the recognition of indigenous forms of property rights within the common law. He states that constitutional law does 'provide a form of recognition and negotiation of Aboriginal and European-American systems of property that meets the criteria of justice shared by both Aboriginal peoples and non Aboriginal peoples'.[11]

In Australia there have been calls over some considerable time for the recognition of indigenous customary laws within the prevailing legal and political system. The Australian Law Reform Commission produced a comprehensive report in 1986 on the recognition of Aboriginal customary laws. [12] Notwithstanding ad hoc developments in some state or territory jurisdictions, that report remains largely ignored by government.

One arena in which property rights, cultural systems and questions of difference have intersected is that of Aboriginal land rights. It is useful to explore some of the debates around property rights in the context of Aboriginal land rights, as these shed some light on the relative capacity of the dominant legal system to recognise a set of rights arising from a distinct cultural system.

[9] Ibid., pp. 64-65.

[10] See for example James Crawford, 'Legal pluralism and the indigenous peoples of Australia' in: Oliver Mendelsohn & Upendra Baxi, eds, *The Rights of Subordinated Peoples*, Delhi, Oxford University Press, 1994, pp. 178-220.

[11] James Tully, 'Aboriginal property and Western theory: recovering a middle ground' in: Ellen Frankel Paul, Fred D. Miller Jr. & Jeffrey Paul, eds, *Property Rights*, Cambridge, CUP, 1994, pp. 153-180, quote on p. 153.

[12] Australian Law Reform Commission, *Report No 31: The Recognition of Aboriginal Customary Law*, Canberra, Australian Government Publishing Service, vol I and II, 1986.

Property rights and indigenous land

The distinct features of indigenous 'property' rights as they pertain to land have been well documented. These were particularly critical in the context of the 1971 Federal Court decision on the 'Gove land rights' case.[13] In that decision Justice Blackburn found that the Aboriginal plaintiffs clearly had a profound relationship to their land, but that this was not construed as a 'property right' in the commonly understood western legal sense.[14] The judge also found that the clan - the primary Aboriginal land-owning group - could not be considered a corporate entity for the purposes of holding property rights. However, where the legal system was at that time unable to accept that Aboriginal land owning groups could hold property rights in land, the views of anthropology were somewhat different. Nancy Williams claims that the judge 'never saw the clan as more than an indeterminate collection of individuals, and no statute provided for the vesting of title in such a collectivity'.[15] Williams used the Blackburn judgment as a basis for her examination of the nature of indigenous property rights, drawing on her extensive work with the Yolngu people of Arnhem Land in the Northern Territory. She summarises the conditions required for compliance with western common law definitions of property:

> The conditions that most Australians usually believe need to be satisfied in order to establish an interest as proprietary and thus establish clear ownership are title (evidence of right), possession (which may include exclusiveness as a corollary), occupation and use (or use and enjoyment), and the right of alienation (that is the right to dispose of one's property as one sees fit).[16]

After examining Yolngu concepts relating to title, possession, and occupation and use, she concluded that 'the Yolngu system of land tenure is characterised by groups which, in terms that common law can comprehend, are corporate with respect to their interests in land, and that those interests are proprietary'.[17] In her analysis of Yolngu systems of land tenure, Williams also draws attention to the problem of cultural translation:

> Land is given to the Yolngu, so axiomatic that people without land are people without identity. Understanding the propositions based on that axiom requires translating concepts about people's relationship to land. In English (and from common law) those concepts are embodied in or related to 'property' and 'ownership'. ... Seen in historical context, English concepts of ownership, especially proprietary interests in land, suggest that the concepts themselves are at issue, rather than whether Yolngu concepts can or cannot be equated with common law concepts. Even a superficial look at Europeans' characterisations of hunters and gatherers during the past two hundred years reveals the root of anthropologists' and jurists' inadequate characterisation of Aboriginal systems of land tenure.[18]

This problem of translating indigenous concepts into the language that is familiar to western law and policy lies at the heart of my discussion about recognising indigenous cultural rights. The *Aboriginal Land Rights Act* illustrates some of the problematics in the cross-cultural translation of concepts, categories and behaviours (such as humans' relationships with land and environments).[19] The problem is in fact one of double translation. Not only does it involve translating indigenous terms and concepts into an approximation of their English equivalents. There is also a challenge in translating between disciplines (or discourses[20]) within the dominant politico-legal system.

Translating concepts cross-culturally: Property, heritage, resources and the problem of definition

The western legal concept of property is underpinned by the notion of individual rights and ownership. Yet the terms 'cultural property' and 'intellectual property' are frequently used to denote aspects of indigenous cultural heritage. How can a legal system founded on principles of individuality accommodate a different system in which various kinds of group rights prevail? Indigenous cultural rights also embrace rights in what are sometimes called 'living resources' or 'natural resources'. But in a conventional legal sense a 'resource' is something that is available for use by all. There is also an expectation that a 'resource' will be captured, extracted or mined for its commercial or industrial benefits; it is there to be used. One legal definition states that a resource 'usually connotes either a stock or reserve that can be made available when necessary or a means of supplying a want or deficiency'. In this sense, 'there is

[13] *Milirrpum & Others v. Nabalco Pty Ltd and the Commonwealth of Australia* (1971) 17 FLR.
[14] Ibid., pp. 272-273.
[15] Nancy Williams, *The Yolngu and Their Land: A System of Land Tenure and the Fight for its Recognition*, Canberra, Australian Institute of Aboriginal Studies, 1986, p. 201.
[16] Ibid., p. 101.
[17] Ibid., p. 104.
[18] Ibid., p. 232.
[19] For critical comments on the roles of law and anthropology in relation to the formulation and operation of the Aboriginal Land Rights Act, see Robert Layton, *Uluru: An Aboriginal History of Ayers Rock*, Canberra, Aboriginal Studies Press, 1989; Robert Layton, 'Relating to the country in the Western Desert' in: Eric Hirsch & Michael O'Hanlon, eds, *The Anthropology of Landscape: Perspectives on Place and Space*, Oxford, Clarendon Press, 1995, pp. 210-231.
[20] I use 'discourse' here in the sense employed in the works of Michel Foucault. See his *The Archaeology of Knowledge*, London, Tavistock Publishers, 1972. Layton discusses the role of discourse in the anthropological and legal aspects of the Aboriginal Land Rights Act 1976; see his 'Relating to the country ...' *supra* note 19, esp. pp. 212-217.

a very obvious economic perspective to the word "resource"'.[21] Again, this notion of resources' as a commodity with primarily utilitarian, economic meanings, is at odds with indigenous concepts pertaining to the natural world as a culturally significant universe. To glean a better understanding of indigenous cultural rights as a prelude to considering issues of recognition and protection, it is necessary to explore a little further the kinds of words and phrases used to describe indigenous heritage.[22]

A first step towards achieving recognition of indigenous rights in culture and heritage may require a fundamental shift in language, terminology and definitions. This can be illustrated with reference to the concept of 'cultural property'. Pask points to two competing views of cultural property:

> One justifies restrictions on private transfer of goods by reference to the claims of states to ownership of items made in their territory, or by their nationals, and which states consider significant. The other regards items of 'cultural' significance as being of universal value and therefore subject to a regime of preservation in which individuals or states have the role of trustees.[23]

She suggests that the 'interests of "universal humanity" are gradually replacing those of states in the justification of cultural property regimes'.[24] However, tensions remain between cultural heritage and its various components viewed as 'global commons', or as the particular heritage and 'property' of local and regional groups, including indigenous peoples.[25]

The ways in which laws and policies are interpreted with regard to matters such as 'whose heritage' is protected, or which elements of heritage are protected, depends in part on the language used by the particular instrument or policy statement. Pask discusses the capacity of international instruments such as the *1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Export and Transfer of Ownership of Cultural Property* to provide recognition of the intangible components of indigenous cultural heritage. She supports an argument which suggests that a shift in terminology from 'cultural property' to 'cultural heritage' might provide a context in which cultural property law becomes more amenable to providing protection for the intangible components.[26]

[21] Douglas Edgar Fisher, *Natural Resources Law in Australia: A macro-Legal System in Operation*, Sydney, The Law Book Company Limited, 1987, p. 3.

[22] This issue is discussed in Michael Davis, 'Indigenous rights in traditional knowledge and biological diversity: approaches to protection', *Australian Indigenous Law Reporter* 4, 4 (Nov 1999), pp. 1-32. For a discussion on terminology see Michael Davis, 'Competing knowledges? Indigenous knowledge systems and Western scientific discourses', unpublished conference paper, 1996.

[23] Amanda Pask, *supra* note 8, p. 68.

[24] Ibid.

[25] Anthony B. Cunningham, 'Indigenous knowledge and biodiversity: global commons or regional heritage?' *Cultural Survival Quarterly* 15, 3 (Summer 1991), pp. 4-8.

[26] Amanda Pask, *supra* note 8, pp. 66-67.

A shift from a concept of 'cultural property' to one of 'cultural heritage' highlights a debate about 'heritage' as something that is of universal, perhaps global interest versus the particular claims of nations, states and peoples. To illustrate this debate: if the accumulated indigenous ancestral remains and cultural objects currently held in museums and other collecting institutions are termed 'cultural property', then this presupposes that as 'property', they can be subject to various transactions and alienating processes. Such transactions may lie outside specific contexts of cultural meanings and significance. Conversely, by labelling these remains 'cultural heritage', they become transformed into objects that are intrinsically imbued with cultural significance transmitted through generations. But the term 'heritage' carries with it too, a sense of ownership, of a heritage that belongs to somebody. Again, anthropological analysis can assist in achieving a greater understanding of indigenous notions of heritage, of the relationships between heritage, land and culture, and in translating these into the language of law.

Pask suggests that the concept of 'heritage' implies more of a sense of a cultural whole, of a unity than does perhaps 'property'. In her view this unity, or 'community' is fractured and fragmented by western legal systems in which the various fragments, are denoted by labels such as 'cultural property':

> The unity of the issues with which this discussion began - the appropriation of Native intellectual property, cultural property, land and bodies - lies in the preservation and production of communities, indeed of nations. The blindness of the legal system to this unity, apparent in the fragmentary and fragmenting character of its responses, is both to Native peoples *as* communities, that is, the questions of standing at international law, and in domestic law the inability to account for anything between the individual and the universal 'public', *and* to the dynamic character of the links which constitute community, apparent in the refusal to see culture as communication rather than as information.[27]

Several other writers have also highlighted the ways in which western legal discourses fracture the unity of indigenous cultures.[28]

Indigenous rights and natural resources

The problems of terminology, fracture, and translation of indigenous cultural rights can be further illustrated by examining these rights as they pertain to natural, or

[27] Ibid., pp. 84-85.

[28] eg Henrietta Fourmile, 'Aboriginal heritage legislation and self-determination' *Australian-Canadian Studies* 7, 1-2 (Special Issue, 1989), pp. 45-61; Rosemary Coombe, 'The properties of culture and the politics of possessing identity: Native claims in the cultural appropriation controversy' *Canadian Journal of Law and Jurisprudence* VI, 2 (July 1993), pp. 249-285.

biological 'resources'.[29] To indigenous peoples, rights in biological resources are connected to rights in land, in spirituality, and in all the products, knowledge, and expressions of culture. It is precisely because of this holistic nature of indigenous rights, that they find some difficulty in gaining recognition or protection within the dominant legal and political system. The dominant legal and political system enacts separate laws and practices to govern and regulate land, natural resources, and cultural expressions respectively; but these are not dealt with as part of a single interlocking system. A new conceptual approach is required if effective recognition and protection is to be achieved for a distinct class or category of cultural rights of indigenous peoples.

Indigenous rights in natural resources: The challenges of competing interests

Indigenous peoples' claims in biological resources and traditional knowledge are often asserted in contexts of competing interests, or in situations of intervention by the dominant legal and political system. One activity that often provides an arena for competing claims is bioprospecting - in which pharmaceutical and other companies seek access to fauna and flora for their potential properties.

Corporations and companies seeking to gain access to biological resources are often faced with situations in which these resources either exist on indigenous land, or are subject to claims and interests by indigenous peoples. One such project has been developed during the last few years by a Melbourne based pharmaceutical research and development company. This company has entered into bioprospecting contracts with Aboriginal land councils in Australia's Northern Territory. These contracts are to ensure access to Aboriginal lands in order to collect plants for potential pharmaceutical uses. Much of the plant collecting negotiated with the Northern Land Council is carried out in Arnhem Land, a region of northern Australia noted for its rich biological diversity. The contracts negotiated between the company and the Northern Land Council provide, in general terms, for some form of royalty to flow to the Aboriginal owners, as a percentage of the benefits derived from the commercial uses of plant based pharmaceutical products. The contracts also provide for collector's fees. Under the terms of the agreements, the company claims that it will not seek to acquire any traditional knowledge of the plants that is Aboriginal peoples' intellectual property, nor will it disclose any information about the Aboriginal owners' traditions.[30]

Because the bioprospecting involves the collectors gaining access to traditional Aboriginal lands, the rights and interests of the Aboriginal people are critical. These people have rights in deciding on matters of access to the land and to its resources. Their knowledge of the country itself - of the landforms, the geography, the seasons

[29] For this part of the discussion, I will assume that my use of the terms 'property' and 'resources' are problematised, consistent with my earlier discussion, even though they may appear without the quotes.

[30] Telephone conversations with Northern Land Council, 1998.

and all the elements that comprise the country - is vital to the success of the bioprospecting. Their right to decide access, and to exercise their knowledge of the country as intellectual property, must be taken seriously in negotiations and contractual arrangements.

The Northern Territory bioprospecting agreements are just one example of the kinds of negotiations that are occurring between private and corporate interests, and indigenous peoples' organisations for control over, and access to Australia's enormous natural wealth. Many other corporate interests, and also government bodies looking for new 'naturally derived' products to satisfy a growing market demand, are seeking to enter into negotiations with indigenous communities.

In negotiating bioprospecting and benefit-sharing arrangements, many issues must be considered. These include questions about the extent to which the indigenous people have been able to effectively assert their full and equitable rights and interests in the plant materials and knowledge of these within the negotiations and in any resulting agreements. They also raise questions about whether the agreements effectively incorporate conditions such as prior informed consent, and the nature and extent of benefits flowing to the traditional owners. There is also an issue as to whether all the relevant traditional owners and custodians have had opportunities to participate fully and effectively in the negotiations and in the preparation and finalisation of the agreements.

Bioprospecting negotiations and the formulation of contracts and agreements that meet the aspirations of all parties provide critical arenas in which law, anthropology, and indigenous discourses intersect.

A patchwork of laws: Recognising indigenous rights in Australia's legal and political system

Indigenous peoples' claims to distinct rights in biological resources and traditional knowledge and practice relating to these are based on the notion that these resources, and the knowledge of them form elements of their cultural heritage. Yet many indigenous people are also aware of the enormous potential for commercial use of such resources, and often may wish to consider ways in which the resources might be shared with the wider community. In either case - whether indigenous peoples wish to seek protection of these resources, or to use them for various purposes - their ability to exercise their cultural rights in these resources are often constrained by the conventional legal and political system.

Australia's federal system of government has created a patchwork of ad hoc laws regulating natural resources, environmental protection, conservation and management, and land in each state and territory. Within this diversity of legislation there is inadequate recognition or protection of indigenous rights of ownership, control and use of biological resources and the knowledge of these. Despite the fact that the maintenance and use of biological resources and knowledge by indigenous peoples is

a significant element of their customary law, and an inherent cultural right, existing legal regimes generally give priority to state rights in resources.

The history of regulation and control over indigenous affairs is essentially one in which the dominant western legal-political system intersects with indigenous concepts and systems of meaning. It is a history of contested domains in which attempts at integrating different systems of thought have not adequately represented indigenous systems. Where one system benefits the commercial and the utilitarian, emphasises physical entities, and articulates in the language familiar to a long established legal tradition, the other system maintains a focus on totality, and on the interrelationships between persons, things, and between tangible and spiritual.

Indigenous peoples' claims and interests in biological resources relate to the physical items - the plants and animals, parts of these and products derived from them. They also refer to the intangible knowledge associated with these. However, for indigenous peoples the two are not considered as separate: the physical, and the non-physical are closely inter-connected as part of a whole entity in which they have a 'bundle of rights'. This 'bundle of rights' includes rights to their knowledge of the country in which the items grow and therefore may incorporate knowledge of topography, landforms, geographical features, seasons, climate, and a wide range of features. It also includes spiritual or cosmological aspects. To discuss environmental and ecological knowledge necessarily entails a discussion of the ways in which this knowledge is practiced and applied. It also requires some consideration of the spiritual dimension to the knowledge, as well as to its control, management, and transmission within and between indigenous societies.

The rights that indigenous people have in biological resources and in the associated knowledge are sometimes considered to be 'property' rights. If this is the case, then how does the dominant legal system accommodate these rights? The non-physical or intangible elements of indigenous knowledge are often classed as 'intellectual property' rights within the existing western legal system. Yet when we consider the capacity of conventional intellectual property rights (IPR) systems to protect indigenous rights in knowledge, we find significant limitations. As Stephen Brush argues, 'because anthropologists have played a major role in defining and describing indigenous knowledge, their advice and insights about the applicability of intellectual property rights to indigenous knowledge are critically important'.[31]

Indigenous rights in biological resources as cultural rights: A history of attempts at recognition in Australian law and practice

The cultural dimension to indigenous claims in land and resources is increasingly being asserted, especially since the high court's Mabo decision in 1992

[31] Stephen R. Brush, 'Indigenous Knowledge of Biological Resources and Intellectual Property Rights: The role of Anthropology' *American Anthropologist* 95, 3 (1993), pp. 653-671.

and the introduction of the *Native Title Act* in 1993. In Mabo the High Court rejected the long held notion that Australia was, at the time of colonisation, an empty land devoid of inhabitants (*terra nullius*). Instead, the court recognised that there exists in common law a distinct native title property right. This was a landmark decision that provided a basis for the Australian legal system to recognise a distinct indigenous property right. Despite this, the connections between indigenous native title rights in land, and in biological resources and traditional knowledge has still to be effectively demonstrated in the legal and political system. Native title processes have not as yet provided a clear indication that they can advance the recognition of indigenous cultural rights more generally.

Indigenous rights in biological resources and traditional knowledge have been articulated in case law, in determinations relating to native title, and also occasionally in decisions under the *Copyright Act 1968*. However, they have yet to be adequately entrenched as constitutional and statute rights. Although the Australian legal system has been relatively slow to recognise the existence of indigenous cultural rights, the writings of anthropologists, historians, and indigenous peoples have provided a consistent source for documenting these kinds of rights for many decades.

It was not until the 1970s that the Australian legal system began to accommodate the notion of indigenous peoples' rights in their cultures and societies. A significant landmark in this regard was the 1976 *Aboriginal Land Rights Act (NT)* which for the first time provided Aboriginal people with the opportunity to gain inalienable title to their lands in the Northern Territory.

In 1976, at around the time the Aboriginal Land Rights Act was introduced a case was heard in the Federal Court in Darwin concerning a breach of Aboriginal customary law. In this case, known as *Foster v Mountford*, anthropologist Charles Mountford was found to have breached Aboriginal peoples' trust by seeking to have published a book containing photographs of Aboriginal secret ceremonies in northern Australia.[32]

In 1940, Mountford travelled through Central Australia recording aspects of Aboriginal culture. He published the results of his studies in his 1976 book *Nomads of The Australian Desert*.[33] In that same year, in the Northern Territory Supreme Court, Justice Muirhead heard a case in which representatives of the Pitjantjatjara people sought an injunction to prevent Mountford's book being sold in the Northern Territory. The plaintiffs claimed that the publication and display of information they had given to Mountford in confidence during his visit to their country in 1940 was a clear breach of the trust with which they had provided the information. Mountford had been provided with information about religion, totemic and secret and sacred matters, and had recorded this information in the form of 'photographs, drawings, and descriptions of persons, places and ceremonies'. Justice Muirhead found that this information had 'deep religious and cultural significance' to the plaintiffs. He found that 'some of the matters hitherto secret are revealed in the book, and that this had

[32] *Foster v Mountford (1976)* 29 FLR 233.

[33] Charles P. Mountford, *Nomads of the Australian Desert*, Adelaide, Rigby Limited, 1976.

caused dismay, concern and anger'. The revelation of the secrets to the women, children and uninitiated men', Muirhead said, 'may undermine the social and religious stability of their [the plaintiffs] hard-pressed community'.[34] Since Mountford declined to withdraw the book from sale, the judge granted an injunction to the plaintiffs to allow them to prevent the sale of the book. The Federal Court upheld the plaintiffs' argument and ordered a restraint on the publication of Mountford's book.

Foster v Mountford was an important step forward in terms of recognition by the Australian courts of a deep and profound sacredness to Aboriginal peoples' cultural life. However, it did not significantly advance the formal recognition in statute law of the relationships understood by Aboriginal peoples between the land, their sacred and spiritual worlds, and of the natural biological materials that make up a significant part of their world. The case also illustrates the way in which anthropological practice has the potential to be *misused*. It was fortuitous that the judgement in this case upheld the right for the Aboriginal peoples' culture to be respected.

Despite a lack of effective legal recognition of indigenous rights in cultural knowledge and biological resources, for over a decade ethnographic and anthropological writings in Australia have recognised and described the existence of a significant indigenous cultural domain. We can trace an ethnographic discourse at least as far back as the turn of the century, with writings such as those by Spencer and Gillen about the Arrentje peoples of the Central Desert forming part of an important body of works documenting indigenous societies and cultures.[35] Through these writers and others, there has been a steady accumulation within ethnographic and anthropological discourses of an understanding of complex and profound Australian indigenous cultural concepts such as the Dreaming.[36] But despite this enduring ethnographic appreciation of indigenous cultural concepts, the legal system has not displayed such readiness to incorporate a notion of indigenous cultural systems as a whole category.

[34] *Foster v Mountford, supra* note 32 at p. 236.

[35] Walter Baldwin Spencer & Francis J. Gillen, *The Native Tribes of Central Australia*, London, Macmillan, 1899; Walter Baldwin Spencer & Francis J. Gillen, *The Northern Tribes of Central Australia*, London, Macmillan, 1904; Walter Baldwin Spencer & Francis J. Gillen, *The Arunta* (2 vols), London, Macmillan, 1927.

[36] For succinct attempts at 'defining' the concept of the Dreaming see William Edward Hanley Stanner, 'The Dreaming' in: William Edward Hanley Stanner, ed, *White Man Got No Dreaming: Essays 1938-1973*, Canberra, ANU Press, pp. 23-41. Some recent critical essays concerning the concept are Patrick Wolfe, 'On being woken up: the Dreamtime in anthropology and in Australian settler culture' *Comparative Studies in Society and History* 33, 2 (April 1991), pp. 197-224 and Howard Morphy, 'Empiricism to metaphysics: in defence of the concept of the Dreamtime' in: Tim Bonyhady & Tom Griffiths, eds, *Prehistory to Politics: John Mulvaney, The Humanities and the Public Intellectual*, Melbourne, MUP 1996, pp. 163-189.

Native title

Where the *Aboriginal Land Rights Act 1976* did not adequately clarify the situation concerning indigenous peoples' rights in natural resources and traditional knowledge, the introduction of native title rights nearly two decades later has provided a greater opportunity for the legal recognition of these rights. As with the administration and interpretation of land rights legislation, anthropology also plays a significant role in the operations of native title laws in Australia.

Indigenous peoples in Australia won a significant victory for recognition of their distinct rights to their country in 1992 when the High Court in its Mabo decision upheld the recognition of native title rights in Australian common law. The following year this was formally entrenched in statute with the passage of the *Native Title Act 1993* (the 'NTA'). This Act represents an advance in the potential capacity of Australia's legal system to uphold indigenous peoples' rights to biological resources. Although the NTA itself does not adequately define the content of native title to include biological resources and traditional knowledge, some Federal court determinations supporting native title included explicit references to rights to control resources and cultural knowledge.[37]

Indigenous rights to environment and resources

To assert their rights in traditional knowledge and natural resources indigenous people seek a greater say in broader environment and conservation management and planning. In this sense, to gain recognition of rights in natural resources, indigenous people are also seeking better opportunities for control and decision-making powers over these resources – ie over the environment more generally. By exploring such opportunities, indigenous people are also endeavouring to formulate their own definitions of environments and resources. The full participation by indigenous peoples in control and decision making over environmental and resource management will enhance the capacity of relevant legislation and policy to accommodate indigenous cultural concepts.

Many reports over the decades have noted the need for indigenous people to manage their own resources and knowledge of these. In 1991 a Royal Commission

[37] eg the Miriuwung Gajerrong decision, *Ben Ward on Behalf of the Miriuwung and Gajerong People v State of Western Australia & Ors* (1998) 1478 FCA. Native title rights upheld in that decision included the right to use and enjoy resources of the determination area, the right to control the use and enjoyment by others of resources of the determination area, the right to trade in resources of the determination area, the right to receive a portion of any resources taken by others from the determination area, and the right to maintain, protect and prevent the misuse of cultural knowledge of the common law holders associated with the determination area. However, subsequent appeal decisions raise questions about the extent of these rights.

inquiry into Aboriginal deaths in custody reported on the broad ranging factors contributing to these deaths. Loss of culture, and dispossession from lands were among these factors. The 1991 report included in its recommendations support for indigenous joint management of national parks, and their control and participation in environmental protection and conservation.[38]

In 1992 the Australian Commonwealth Government developed a strategy for ecologically sustainable development. Objective 22.1 of that strategy is:

> To ensure effective mechanisms are put in place to represent Aboriginal and Torres Strait Islander peoples' land, heritage, economic and cultural development concerns in resource allocation processes.

To fulfil this Objective the Strategy states that, among other things:

> Governments will encourage greater recognition of Aboriginal people and Torres Strait Islanders' values, traditional knowledge and resource management practices relevant to ESD.[39]

A 1996 report on indigenous use of wildlife added to the body of literature acknowledging indigenous peoples' rights in natural resources, stating that, 'growing recognition of indigenous people's rights to resources will remain a key policy issue and provide leverage for an increased indigenous voice in environmental management'.[40] Despite this proliferation of reports and recommendations, there remains a lack of clarity about the kinds of rights indigenous peoples have in traditional knowledge and biological resources, and especially how these rights might be asserted and upheld.

Towards some recognition: Indigenous rights in native fauna

The recognition of indigenous rights in native fauna was the subject of a case heard in Australia's High Court in late 1999. In *Yanner v Eaton*[41] the High Court dismissed a charge of illegal hunting that had been made against an Aboriginal man under the *Queensland Fauna Conservation Act 1974*. In that decision the High Court found that the taking of a crocodile for traditional purposes was found to be

[38] Royal Commission into Aboriginal Deaths in Custody, *National Report*, Canberra, AGPS, 1991, Recommendation 315; Susan Woenne-Green, Ross Johnson, Ros Sultan & Arnold Wallis, *Competing Interests: Aboriginal Participation in National Parks and Conservation Reserves in Australia: A Review*, Melbourne, ACF, 1994.

[39] Commonwealth of Australia, *National Strategy for Ecologically Sustainable Development*, December 1992, p. 82.

[40] Mary Bomford and Judy Caughley, *Sustainable Use of Wildlife by Aboriginal Peoples and Torres Strait Islanders*, Canberra, AGPS, 1996, p. 91.

[41] *Yanner v Eaton* [1999] HCA 53, 7 October 1999.

permissible under the Commonwealth's *Native Title Act 1993* (the 'NTA'). The High Court held that the taking of the crocodile was an appropriate exercise of a native title right permissible under the NTA, which could not be extinguished by the operation of a state's legislative regime.

As one analysis has stated, this judgment shows that 'the vesting in the Crown of property in natural resources cannot be assumed to extinguish native title'.[42] This case also shows that 'indigenous connection to land runs deep, and merely regulating surface manifestations of that connection, such as usufructory rights, will be as ineffective to destroy that connection in law as it is in reality'.[43] The *Yanner* case provides some guidance regarding the intersection between native title rights and conservation laws. It also establishes a useful precedent about the capacity for the Australian courts to recognise indigenous rights in natural resources.

In this decision the judges also dealt at some length with the concept of 'property', and the implications regarding property rights over fauna under the *Fauna Conservation Act 1974* (Qld), and the NTA. The majority judges noted that although 'the word "property" is often used to refer to something that belongs to another', the precise meaning of the 'concept of "property" may be elusive'. While in a general sense, they concluded that property is 'a comprehensive term [which] can be used to describe all or any of very many different kinds of relationship between a person and a subject matter', the question of property rights in wild animals (the subject matter of the court decision) was not a simple one. In essence, what this decision found was that the notion of Crown ownership of fauna under the *Fauna Conservation Act 1974* (Qld) was untenable in the context of the competing interests of rights to fauna under the *Native Title Act 1993*. It was not correct, these judges asserted, to claim that the Crown could 'own' wild animals – since in their analysis there can be no exclusive ownership over wild animals. This decision of property also has implications for a possible re-interpretation of the nature of indigenous property rights in the context of conventional legal systems more generally.

Native title is, in some sense, a distinct form of property rights that has its source in indigenous law and custom. But it is not only the property aspects of this form of title that were considered in Yanner. The judges ascribed particular importance to the non-physical dimension, asserting that 'Aboriginal ownership is primarily a spiritual affair rather than a bundle of rights ..'.[44] They claimed that native title rights and interests are multi-dimensional - that these rights and interests as recognised by the common law, comprise a 'spiritual, cultural and social connection with the land'.[45] If rights in natural resources and in ecological knowledge flow from native title rights, then the latter are also underpinned by a spiritual dimension. This spiritual dimension provides a critical element to indigenous cultural rights, and compels an analysis of

[42] Sean Brennan, 'High Court Upholds Bush Tucker Rights' *Parliamentary Library Research Note* 11, Canberra (19 October 1999), p.2.

[43] Ibid.

[44] Gleeson CJ, Gaudron J, Kirby J, and Hayne J in *Yanner v Eaton* [1999] HCA 53, 7 October 1999, p. 17, citing Brennan J in *R v Toohey; Ex parte Meneling Station Pty Ltd.*

[45] Gleeson CJ et al, ibid., p. 17.

these rights in terms of their distinctiveness. Encouragement for anthropological work, and for indigenous discourses will contribute in significant ways to such analyses.

Indigenous rights in traditional practices: The role of customary law

Indigenous rights in natural resources are at one and the same time elements of, and are also informed by customary laws. The relationship between these rights and customary laws may be understood by considering the connections between the rights themselves, and the exercise of these rights. One of the most frequently examined areas of the exercise of these rights concerns traditional hunting, fishing and gathering activities. These activities may also illustrate the practice, or application of traditional knowledge in natural resources. This is because if indigenous knowledge is assumed to form the basis for customary law, then hunting, fishing and gathering as customary activities, are also expressions of indigenous knowledge.[46] The practice or application of knowledge of traditional resources is carried out in accordance with well-defined and understood customary laws.

The relationship between indigenous hunting, fishing and gathering activities, and customary law was examined during the 1980s as part of a comprehensive study by the Australian Law Reform Commission on the recognition of Aboriginal Customary Law. That report contemplated some form of recognition of Aboriginal customary law regarding hunting, gathering and fishing. The report did not recommend any specific Commonwealth legislative action to support Aboriginal customary hunting, fishing and gathering. Rather, it made a number of recommendations to strengthen Aboriginal peoples' capacity to participate in, manage and control these activities.[47] Although the principle of recognition of customary law rights in hunting, fishing and gathering has since been reinforced by the *Native Title Act* and more recently by the Yanner decision, full recognition of customary law rights and entrenchment of these rights in Australian statue has yet to be achieved.

The recognition of indigenous customary rights in traditional hunting, fishing and gathering, and of the connection between these and native title is an important step towards recognition of indigenous rights in natural resources. However, there is still work to be done to clarify how these rights might be understood as a distinct class of rights, and whether they constitute 'property' rights within the meaning of western law. One commentator supports the notion that indigenous hunting, fishing and gathering activities constitute some kind of property right, but hesitates to describe these as equivalent to the western concept of property:

[46] The relationship between hunting, fishing and gathering, and customary law is discussed in Mary Fisher, *Aboriginal Customary Law: The Recognition of Traditional Hunting, Fishing and Gathering Rights*, Australian Law Reform Commission, Research Paper No. 15, May 1984.

[47] Australian Law Reform Commission, *supra* note 12, vol II, pp. 177-204.

> While caution needs to be exercised to avoid classifying the incidents of Aboriginal title in terms of English property law concepts, it seems clear that fishing, hunting and gathering rights can comprise part of Aboriginal title to land. However ... while customary Aboriginal fishing, hunting and gathering rights may be part of the bundle of rights comprised in Aboriginal title to land, there is no necessary nexus between them.[48]

This uncertainty reinforces my proposition that a new conceptual foundation is required to facilitate recognition of indigenous rights in biological resources and traditional knowledge as a distinct class of cultural rights.

Indigenous rights in biological resources as intellectual property rights?

If indigenous peoples' rights in natural biological resources are not considered clearly as elements of their rights in land or native title, nor are they necessarily 'property rights' within the western legal definition of property - then what kind of rights are they? Another area of western law that is usually invoked when discussing indigenous rights in biological resources, is that of intellectual property rights (IPR).

Intellectual property rights (IPR) laws are designed to protect individual rights in the products of the mind - inventions or creative works such as books, films, and works of art. The IPR laws most commonly discussed in the context of indigenous peoples' claims to biological resources and traditional knowledge are the *Copyright Act 1968* and the *Patents Act 1994*. IPR laws create a private, individual right, for a limited period of time, which encourages the holder of the right to exploit the product, invention or work, and to reap the benefits. By definition therefore, IPR laws do not protect collective rights in the cultural dimensions of property. There has been much debate in Australia about the capacity of IPR laws - particularly copyright - to protect what is called indigenous 'intellectual property rights'. As a result, it is now well established that IPR laws cannot provide recognition for collective rights in traditional knowledge, or indigenous customary rights in biological resources. IPR laws are designed to encourage commercial growth by exploiting individual rights in creative endeavours. They are not designed to protect cultural heritage - which is essentially that for which indigenous peoples seek protection.[49]

[48] Desmond Sweeney, 'Fishing, hunting and gathering rights of Aboriginal peoples in Australia' *UNSW Law Journal* 16, 1 (1993), p 104.

[49] See Michael Davis, *Indigenous Peoples and Intellectual Property Rights*, Research Paper No. 20 (1996-97), Information and Research Services, Department of the Parliamentary Library, Canberra, 30 June 1997; Australian Copyright Council, *Protecting Indigenous Intellectual Property: A Copyright Perspective*, Sydney, 1997. A comprehensive guide to IPR laws as they relate to Aboriginal and Torres Strait Islander peoples' cultural and intellectual property rights, with recommendations, is Terri Janke, *Our Culture, Our Future: Protection of Australian Indigenous Cultural and Intellectual Property Rights*, Canberra, AIATSIS and ATSIC, March 1997.

Indigenous versus western views of environmental knowledge and management

The recognition of indigenous rights to biological resources and traditional knowledge can be advanced not only by extending the capacity of native title rights, but also by considering the nature of indigenous approaches to land and environment management and conservation more broadly.

The Mabo decision provided recognition in the common law of Australia of the distinct, collective rights to country held by Aboriginal and Torres Strait Islander peoples. It turned back on what had been the prevailing notion - that Australia was an 'empty' land, without inhabitants before the coming of the British. The concept of *terra nullius* presumed that the people who were here had no political or religious system of their own, and that they therefore did not own the land. The Mabo decision is important in another sense; it provides an incentive for policy and decision-makers to incorporate indigenous perspectives on land and environmental management into their work.[50]

To take up the challenge offered by Mabo and native title, it will be necessary to promote the development of a deeper understanding within western law and policy of the nature of indigenous peoples' connection to their land. It will require an appreciation that to indigenous peoples, the land and environment is a 'holistic' entity, and includes not only the land as a physical object, but also the natural resources that are part of the land as living ecosystems. It also includes the intangible dimension: the cultural and spiritual knowledge that links land, society and cosmology.

A further dimension to this understanding of indigenous concepts of land and environment is that of the ancestral domain. Through indigenous cosmology - usually known as the Dreaming - the past deeds of the ancestors are intimately linked to the present, and also to future generations. The land and environment is thus not simply a physical entity that exists in the 'here and now'. It is multi-dimensional, and forms part of an intricate cultural system, having both sacred and secular elements. A more complete appreciation and understanding of this 'indigenous land and environment ethic' is vital to ensure better prospects for recognition of indigenous rights in natural resources as a distinct class of cultural or customary rights.[51]

[50] See Helen Ross, Elspeth Young, & Lynette Liddle, 'Mabo: An inspiration for Australian land management' *Australian Journal of Environmental Management* 1, 1 (July 1994), pp. 24-41.

[51] See for example Deborah Bird Rose, 'Exploring an Aboriginal Land Ethic' *Meanjin* 3 (1988), pp 379-386.

Collective rights in cultural heritage versus commodity rights: Indigenous rights and the Convention on Biological Diversity

Indigenous peoples' rights in cultural and natural resources are collective rights and, as such, they form a new and growing component of rights that are gaining greater prominence in international circles. One key international instrument that provides scope for recognition of these rights is the United Nations Convention on Biological Diversity (the 'CBD'). The primary objective of the CBD is to enable Contracting Parties to claim sovereign rights in biological diversity within their jurisdictions, and to introduce measures for the conservation and sustainable use of this biological diversity.

There is a tension played out in the operations of the CBD between the claims of those who argue that biological diversity is the global heritage of humankind, and those who assert the rights of particular groups or communities. The CBD includes some provisions for indigenous peoples' rights and interests. Article 8(j) encourages Parties to conserve 'knowledge, innovations and practices of traditional and local communities', and to introduce measures for equitable benefit sharing. Australia's implementation of the CBD is relatively slow, and so far has consisted of some policy statements and consideration of legislative developments.

In its efforts towards implementing the CBD, in 1996 the Australian Government introduced its *National Strategy for the Conservation of Biological Diversity*. Objective 1.8 of this National Strategy is to 'recognise and ensure the continuity of the contribution of the ethnobiological knowledge of Australia's indigenous peoples to the conservation of Australia's biological diversity'. While this is a useful statement, in practice it carries little weight without an effective implementation strategy or legislative support. There are other developments in Australia that have the potential to enhance indigenous peoples' capacity to exercise their rights in natural resources and knowledge. A Commonwealth Government program administered by the Department of Environment and Heritage provides for the establishment of designated Indigenous Protected Areas ('IPAs'). These IPAs are voluntary conservation agreements that would enable indigenous people to manage their own country, with support from conservation agencies, within a system of recognised protected areas.[52]

In June 1999 the Australian Parliament introduced the *Environment Protection and Biodiversity Conservation Act 1999* (the 'EPBC Act'). This Act replaces a number of separate pieces of environmental protection and conservation legislation, and provides for greater devolution of power over environmental protection to state

[52] Dermot Smyth & Johanna Sutherland, *Indigenous Protected Areas: Conservation Partnerships with Indigenous Landholders*, Commonwealth of Australia, Canberra, November 1996.

and territory governments. References to indigenous people in the Objects of the EPBC Act include:

> 3(f) to recognise the role of indigenous people in the conservation and ecologically sustainable use of Australia's biodiversity; and
>
> 3(g) to promote the use of indigenous peoples' knowledge of biodiversity with the involvement of, and in co-operation with, the owners of the knowledge.

This wording imports some of the terminology from the *Convention on Biological Diversity*. Although this acknowledgment of the role of indigenous peoples is a step forward in the legislative recognition of those peoples' attachments to the environment, it remains to be seen how effectively indigenous peoples' culturally specific systems of biodiversity and knowledge management will be incorporated into the administration and interpretation of the EPBC Act. Measures to provide for prior informed consent, and equitable benefit-sharing arrangements need to be considered.[53]

Conclusions

I have argued in this paper that current laws and policies in Australia do not adequately incorporate an understanding of the intricate relationships between land, biological resources, and cultural products and expressions as these pertain to indigenous societies. Given the profound and complex inter-connections between land, environments, and cosmology in indigenous societies, these peoples' rights in natural biological resources and in the knowledge and practices relating to these cannot be reduced to one dimension such as a right in land, natural resources, or intellectual property. Understanding and recognising indigenous peoples' cultural systems poses a challenge for legislators and policy makers. At the heart of this challenge is a realisation that these kinds of rights have as their foundation a system of law that is fundamentally different to what is usually denoted the 'western' legal system. To consider indigenous cultural rights in terms of fragments labelled by such terms as 'cultural property', or 'traditional resources' is to account for only a part of the whole system. Taking the natural world and its products as an example, indigenous people regard this as only one dimension of a complex system of cultural and spiritual values and practices. This system is not readily translated into conventional, western systems of law and meaning. The capacity of the legal system to appreciate the nature of this system can be facilitated by encouraging a greater inter-dependence between anthropology, law, and indigenous peoples' concepts.

[53] These provisions may be considered in Regulations to this Act, which had not been drafted at the time of writing this paper.

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ETHICAL RELATIONSHIPS FOR BIODIVERSITY RESEARCH AND BENEFIT-SHARING WITH INDIGENOUS PEOPLES

DONNA CRAIG* AND MICHAEL DAVIS**

I INTRODUCTION

Indigenous peoples hold responsibility for, manage, and own resources and knowledge about plant and animal use, including methods of preparation, storage and management, which is of global economic significance. These peoples' knowledge of biological and genetic resources already forms the basis for sizeable seed, pharmaceutical and natural product industries. Natural resource management, soil fertility maintenance, stream and coastal conservation and forest and agricultural system models provide viable, time-tested options for sustainable development adapted to microclimate variations and local socio-political ecosystems.

Yet Indigenous peoples confront increasing external pressures to provide information, contribute their knowledge and practices, and endorse developments involving their lands, territories, biological and genetic resources, and cultural products and performances. Even recognition of the contributions that Indigenous knowledge has made in the past to world food and medicinal sources, as well as Indigenous peoples' current significant contributions to agriculture, water and forest management, has done little to offset these peoples' political marginalisation.

The interests and concerns of Indigenous peoples often overlap with those of local communities in the developing world. However they are far from identical. Indigenous peoples typically comprise 'nations within nations', and those living in developing countries often suffer human rights abuses and political marginalisation from those countries' governments. The degradation and expropriation of Indigenous lands and resources continues without adequate legal protection in the

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developed and developing worlds. International standard-setting activities have addressed these problems to some extent, but much more remains to be done. Some of the more useful standard setting instruments are the International Labour Organisation (ILO) Convention 169 *Concerning Indigenous and Tribal Peoples in Independent Countries*, 1989, the *Convention on Biological Diversity*,1992 (CBD), the FAO *International Treaty on Plant Genetic Resources for Food and Agriculture*, and the *Draft United Nations Declaration on the Rights of Indigenous Peoples*.

Although these are all significant developments, the *Draft Declaration* and *ILO Convention 169* are currently the only instruments providing specifically for Indigenous peoples. Of these two, the *Draft Declaration* is a stronger document, but it is a long way from reaching consensus in the United Nations. Even when it does eventually reach the stage of being endorsed officially as a Declaration, this will not create the kind of binding obligations that a Convention would on member States.

The United Nations *Convention on Biological Diversity* is especially important for its provisions relating specifically to the protection of Indigenous rights and interests in biological and genetic resources, and the traditional knowledge and practices associated with these.

This paper argues that traditional ecological knowledge (TEK) relating to the conservation of biological diversity cannot be protected without international and national regimes that protect the human rights of the holders and owners of this knowledge, as well as their specific Indigenous integrated and comprehensive rights. The paper reviews a range of developments, existing and emerging, including both international and domestic, that provide, or have the potential to provide for Indigenous rights in traditional knowledge and biodiversity.

The task of protecting 'intangible' knowledge is especially challenging. Many of the current attempts at such protection are framed within contexts, legal regimes and policy developments concerning bioprospecting, access to genetic resources and benefit sharing, and intellectual property rights. Yet most, if not all these developments provide limited scope for recognising intangible knowledge.

As well as protecting TEK, the increasing interest in use of this knowledge also requires critical examination of ethical issues, and relevant legal and policy developments. There may eventually be financial profits resulting from products or processes that are based on TEK. However, although these 'profits' may be directly related to the access and use of TEK, in reality they are often far removed from Indigenous peoples, and have more to do with the structures and processes of corporations in a globalised economy. Another mechanism potentially available to Indigenous peoples as a means to derive monetary returns from, or to protect their TEK is the existing intellectual property rights regime. However, this is a limited option in the context of TEK, as discussed below.

Given the lack of capacity within conventional intellectual property rights regimes to protect TEK, it is useful to explore more productive avenues. The *Convention on Biological Diversity* (CBD) presents the potential for such opportunities. The Secretariat of the CBD has in recent years developed an important body of work to advance the implementation of provisions concerning Indigenous peoples. The CBD working groups on Article 8(j) and related provisions and on access and benefit-sharing are the key developments in this regard. The development of standards and guidelines for access to biological and genetic resources, especially with regard to benefit sharing and prior informed consent are particularly important. The introduction of the *Bonn Guidelines* has been an important step to evolve more appropriate regimes for Indigenous peoples.[1]

There have also been some worthwhile developments at regional and national levels. Examples include the *Andean Pact Decision 391 – Common Regime on Access to Genetic Resources* 1996, and national laws in a few developing, biodiversity rich countries such as Costa Rica that have attempted to recognise the distinct nature and values of TEK. Costa Rica's 1998 *Biodiversity Law* recognises and protects what it terms '*sui generis* community intellectual rights', comprising the 'knowledge, practices and innovations of Indigenous peoples and communities, related to the use of components of biodiversity and associated knowledge'.[2] Other useful regional developments are the Organisation of African Unity (OAU) Model Law, and the Pacific Model Law.

The OAU produced in 2000 the *African Model Legislation for the Protection of the Rights of Local Communities, Farmers and Breeders, and for the Regulation of Access to Biological Resources*. This Model Legislation provides a relatively comprehensive scheme for ensuring conservation and sustainable use of biological resources. Its objectives (Part I) include:

- support for the 'inalienable rights of local communities including farming communities over their biological resources, knowledge and technologies',
- access to biological resources subject to prior informed consent of local communities,
- fair and equitable sharing of benefits,
- effective participation of local communities 'with a particular focus on women', and

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1 Conference of the Parties to the Convention on Biological Diversity, Access and Benefit-Sharing as Related to Genetic Resources, Bonn Guidelines on Access to genetic Resources and Fair and Equitable Sharing of the Benefits Arising out of their Utilisation, UN Environment Programme, 6th meeting, UN Doc UNEP/CBD/COP/6/24 (2002); See also Michael Jeffery 'Bioprospecting: Access to Genetic Resources and Benefit-Sharing under the Convention on Biodiversity and the Bonn Guidelines' (2003), v. 6(2) *Singapore Journal of International,* 747-808

2 *National Legislation of Costa Rica,* Biodiversity Law, Article 82 Ley No 7788:1998. See also Charles V Barber *et al*, 'Developing and Implementing National Measures for Genetic Resources Access Regulation and Benefit-Sharing' in Sarah A Laird (ed), *Biodiversity and Traditional Knowledge: Equitable Partnerships in Practice* (2002) 393-6.

- 'appropriate institutional mechanisms for the effective implementation and enforcement of the rights of local communities'.

The OAU law has been described by Indigenous expert Henrietta Fourmile as offering 'perhaps the most powerful and comprehensive protection for TEK and the natural resource rights of Indigenous peoples formulated to date'.[3] Fourmile also states that this legislation 'provides a clear, concise and plain language model that can be used by Indigenous peoples in Australia ... to secure appropriate levels of protection for our TEK and traditional natural resources'.[4]

What is of particular note in the OAU is its provisions that recognise the 'community rights' of local communities – defined as 'those rights held by local communities over their biological resources or parts or derivatives thereof, and over their practices, innovations, knowledge and technologies' (Part II). The OAU Model Law sets out comprehensive provisions[5] providing for these community rights, including requirements for prior informed consent, the right to refuse consent and access, the right to traditional access, use and exchange, the right to benefit, and the recognition of 'community intellectual rights'.

The Pacific region *Model Law for the Protection of Traditional Ecological Knowledge, Innovations and Practices* is an innovative development (yet to be finalised and agreed), that offers useful guidance for introducing measures for protecting intangible knowledge. This Model defines 'traditional ecological knowledge' as follows:

> Generations-old knowledge whether embodied in tangible form or not, gained over generations of living in close contact with nature regarding:
>
> - living things, their constituent parts, their life cycles, behaviour and functions, their effects on and interactions with other living things (including humans) and with their physical environment;
> - the physical environment including water, soils, corals, weather, solar and lunar effects, processes and cycles; and
> - the obtaining and utilising of living or non-living things for the purpose of maintaining, facilitating or improving human life.

This Model Law contains provisions for ownership of 'traditional ecological knowledge, innovations and practices' by 'a group or an individual', and that reaffirm ownership rights in TEK as 'inalienable and non-transferable'.[6] Importantly, the Law states that such an ownership right is 'in addition to any other

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3 Henrietta Fourmile, 'Using Prior Informed Consent Procedures under the Convention on Biological Diversity to Protect Indigenous Traditional Ecological Knowledge and Natural Resource Rights' (1998) 16(4) *Indigenous Law Bulletin* 15.

4 Ibid 16.

5 Articles 16 to 23.

6 Section 8.

rights available under existing intellectual property laws'.[7] The Model Law also provides for prior informed consent to be sought if the wider use, or commercialisation of traditional ecological knowledge is proposed.[8]

The current debate about protection of TEK proceeds from very diverse perspectives and largely revolves around exploring the few legal 'niches' available to Indigenous peoples. Perhaps the most potentially useful of these is the CBD, but conventional intellectual property rights laws may also be considered. These legal mechanisms may provide opportunities not only for protection, but importantly also for equitable benefit-sharing, and the prospect of providing economic returns to Indigenous people. Where TEK and associated practices are utilised by the wider society, there is the potential for infrequent 'discoveries' to be made that may have a very high economic value, and ultimately return real benefits to Indigenous people. In the context of the CBD, the protection of TEK and associated practices contributes to the sustainable use, protection and management of biological diversity. In principle then, protection of TEK can contribute to the implementation of the CBD; and simultaneously, the effective implementation of the CBD will assist in protecting TEK.

The viable options for developing effective benefit-sharing arrangements based on wider utilisation of TEK will depend on Indigenous peoples' decisions as to how, when and to what extent they will allow this wider use. Benefit-sharing provisions may be very diverse, and often will relate to 'micro economies' of small-scale sustainable livelihoods, based on the use and management of biological resources and participation in research and monitoring.

Currently, most approaches to benefit-sharing involving traditional knowledge and biological resources remain largely unregulated. To achieve 'best practice' or 'adequate practice' requires the development and implementation of ethical standards and guidelines, codes of practice, and protocols. These must form the essential foundations of any 'private law making' processes that occur through contracts. This is discussed in more detail below.

II WHO ARE INDIGENOUS PEOPLES?

In discussing protection of traditional knowledge and equitable benefit-sharing, it is useful to consider the ways in which Indigenous people - as the knowledge owners and custodians – have been defined. The critical point to make here is that Indigenous peoples have the right – fundamental to their self-identity and self-determination – to define themselves. However, there have been some attempts in various international standard setting developments to derive a universal 'definition' of Indigenous peoples.

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7 Section 8(1)(a)
8 Section 10.

In a 1986 report, the Special Rapporteur of the United Nations Economic and Social Council Sub-Commission on the Prevention of Discrimination of Minorities defined Indigenous peoples in the following way:

> Indigenous communities, peoples and nations are those which, having a historical continuity with pre-invasion and pre-colonial societies that have developed on their territories, consider themselves distinct from other sectors of the societies now prevailing in those territories, or parts of them. They form at present non-dominant sectors of society and are determined to preserve, develop and transmit to future generations their ancestral territories, and their ethnic identity, as the basis of their continued existence as peoples, in accordance with their own cultural patterns, social institutions and legal systems.[9]

As Darrell Posey points out, a 'fundamental principle established by ILO 169 is that "self-identification as indigenous or tribal shall be regarded as a fundamental criterion for determining the groups to which the provisions of this convention apply"'.[10]

III OWNERSHIP AND PROTECTION OF TRADITIONAL ECOLOGICAL KNOWLEDGE (TEK)

Ownership and property are Western legal concepts that do not easily transpose onto traditional and Indigenous systems. The notion of transferability is the least compatible element of property. This is because traditional and Indigenous peoples identify themselves within communities who are tied to the land, typically based on spiritual connections and customary values and responsibilities. Moreover, there is often no single identifiable individual that could stand as the property owner of lands and biological resources. These characteristics of Indigenous societies and cultures provide a basis upon which Indigenous peoples' knowledge systems must be understood as being intrinsically different to Western systems of property and knowledge.[11]

In a recent handbook on traditional knowledge, Hansen and VanFleet argue that traditional ecological knowledge is usually collective in nature and is often considered to be the property of the community as a whole. They elaborate:

> [Traditional knowledge] is transmitted through specific cultural and traditional information exchange mechanisms, for example, maintained and transmitted orally through elders and specialists (breeders, healers, etc.), and often to only a select few people within a community. ...

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9 UN ESOSOC (1986) 'Study of the Problem of Discrimination Against Indigenous Populations, United Nations Economic and Social Council', E/CN.4Sub.2/1986/7 and Add.1-4.

10 D A Posey, 'Introduction: Culture and Nature – The Inextricable Link' (1999) *Cultural and Spiritual Values of Biodiversity* 4.

11 See Michael Davis, 'Bridging the Gap, or Crossing a Bridge?: Indigenous Knowledge and the Language of Law and Policy' in Fikret Berkes *et al*, (eds), *Bridging Scales and Knowledge Systems: Linking Global Science and Local Knowledge in Assessments* (2006 forthcoming).

> Traditional knowledge includes mental inventories of local biological resources, animal breeds, and local plant, crop and tree species. It may include such information as trees and plants that grow well together, and indicator plants, such as plants that show the soil salinity or that are known to flower at the beginning of the rains. It includes practices and technologies, such as seed treatment and storage methods and tools used for planting and harvesting. TK also encompasses belief systems that play a fundamental role in a people's livelihood, maintaining their health, and protecting and replenishing the environment. TK is dynamic in nature and may include experimentation in the integration of new plant or tree species into existing farming systems or a traditional healer's tests of new plant medicines.[12]

The rich and complex systems of traditional ecological knowledge protected and transmitted through customary law regimes are vulnerable to being undermined by dominant legal systems, especially intellectual property rights regimes. Attempts by Indigenous peoples to assert and protect their own approaches to managing their TEK have often given rise to discussions about the appropriateness, use and abuse of intellectual and cultural property rights. In this context, arguments about the need to develop a unique (*sui generis*) system of legal protection recognise the wide variety of situations in which TEK is held, transmitted and evolved. The emphasis in discussions about *sui generis* systems is that TEK should not be analogous to the 'public domain' as this concept is understood within the Western legal framework of intellectual property laws. Instead, protection should be provided through the recognition of customary laws that govern TEK. A system of this kind would result in legal pluralism – the operation of different legal systems in parallel with each other. Legal pluralism is well understood in other legal contexts (eg in Papua New Guinea); yet the reluctance to recognise Indigenous Law within the dominant Australian legal and political arena means that there can be no sound basis for effective protection or recognition of Indigenous and other human rights. Legal pluralism provides opportunities for the coexistence of separate, though complementary laws, and therefore allows for the recognition of Aboriginal customary laws.[13]

Recognition of Indigenous customary law should also recognise that Indigenous peoples' systems of knowledge management have been in place for a very long period of time before European colonisation. These systems of knowledge

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12 S A Hansen and VanFleet, 'Traditional ecological knowledge and Intellectual Property: A Handbook on Issues and Options for Traditional Ecological Knowledge Holders in Protecting their Intellectual Property and Maintaining Biological Diversity' (2003) *AAAS* 3.

13 Despite the comprehensive report on recognition of Aboriginal customary laws in Australia, released in 1986, the debate about legal pluralism and customary law recognition has not advanced to a great extent. See Australian Law Reform Commission, Report No 31, 'The Recognition of Aboriginal Customary Laws' (1986); also James Crawford, 'Legal Pluralism and the Indigenous Peoples of Australia' in Oliver Mendelsohn and Upendra Baxi (eds), *The Rights of Subordinated Peoples* (1994) 178-220. For a useful discussion on the relationship between legal pluralism and natural resource property rights, see Ruth S Meinzen-Dick and Rajendra Pradhan, 'Legal Pluralism and Dynamic Property Rights' (CAPRI Working Paper No 22, CGIAR Systemwide Program on Collective Action and Property Rights, International Food Policy Research Institute, Washington, DC, January 2002).

management – or what might be referred to as an Indigenous Domain, or customary economy,[14] enabled Indigenous communities to maintain viable, dynamic and sustainable livelihoods attuned to their environments, and which incorporated complex rules and codes regulating exchange, trade and appropriate use of knowledge and resources. It is important to appreciate that these systems continue to shape Indigenous peoples' relationships to their country and its natural resources.

IV ROLE OF TEK IN CONSERVING BIODIVERSITY

TEK plays a pivotal role in the conservation and sustainable management of biological diversity. Given that Indigenous peoples are the owners and custodians of TEK, they also have a critical role in biodiversity protection and management. As many Indigenous peoples live in areas of rich biodiversity, and fragile and vulnerable environments, the maintenance and transmission of their traditional knowledge and practices relating to these ecosystems is especially vital.[15] The special relationship between Indigenous peoples and their environments is well documented. Martha Johnson of the Canadian Dene Institute, for example, has defined TEK as:

> a body of knowledge built by a group of people through generations living in close contact with nature ... [and which] ... includes a system of classification, a set of empirical observations about the local environment, and a system of self management that governs resource use.[16]

Given the unique relationship between Indigenous peoples and the environment, to Indigenous peoples the notion of conserving biodiversity is not generally perceived as an activity that is separate from everyday life. As Posey argues, 'biodiversity is not an object to be conserved ... it is an integral part of human existence, in which utilisation is part of the celebration of life'.[17] This observation acknowledges that for Indigenous peoples, knowledge is as much about practice as it is about more intangible or spiritual concerns – indeed, these two dimensions are inseparable. Indigenous peoples' approaches to their environments include notions of stewardship, and spiritual dimensions that are fundamental to biodiversity conservation.

The recognition of, and development of mechanisms for protection of TEK in international law and policy is critical. Such protection and recognition will assist the preservation of traditional and local knowledge at local, regional and national

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14 J C Altman, 'Sustainable Development Options on Aboriginal Land: The Hybrid Economy in the Twenty-First Century' (Discussion Paper No 226. Centre for Aboriginal Economic Policy, Canberra, 2001) 5.

15 A useful paper exploring the important relationship between cultural diversity and biological diversity is Harriet Ketley, 'Cultural Diversity Versus Biodiversity' (1994) 16 *Adelaide Law Review* 99-283.

16 Martha Johnson (ed), *Lore:* Capturing *Traditional Environmental Knowledge* (1992) 4.

17 D A Posey, 'Introduction: Culture and Nature – The Inextricable Link' (1999) *Cultural and Spiritual Values of Biodiversity* 7.

levels, encourage participation by Indigenous communities in environmental management, and, with prior informed consent, provide a framework for fair and equitable access and benefit-sharing. The challenge is to develop ethical and legal frameworks that respect Indigenous TEK in the huge variety of contexts in which it is held and managed. It is also vital to develop appropriate and ethical terms under which wider application of traditional knowledge and practices may be allowed.

V SUSTAINABLE DEVELOPMENT STRATEGIES

The impacts on Indigenous peoples' lands, cultures and resources from developments and planning decisions cannot be underestimated. Given this, is it possible to achieve a just balance between the demands and requirements of sustainable resource development, while at the same time upholding Indigenous peoples' rights to self-determination (including their right to pursue their own development strategies)? As a first priority, it is fundamental that Indigenous peoples must have legally recognised title to their land, seas and natural resources, and the power to control their use and management in a way that they consider appropriate.

There are several international declarations that recognise the important connections between humans and planning. The 1972 Declaration of the United Nations Conference on the Human Environment stated that:

> The natural resources of the earth, including the air, water, land, flora and fauna and especially representative samples of natural ecosystems, must be safeguarded for the benefit of present and future generations through careful planning or management, as appropriate.[18]

Some declarations and statements recognise that development and planning should respect the diversity of human societies and cultures. For example, the 1974 *Cocoyoc Declaration* states that:

> Development should respect, maintain and enhance the diversity of natural life and human culture to maintain and expand the availability of options for this and future generations. ... This requires that homogenisation of land use and human lifestyles be avoided.[19]

The 1981 *Declaration of San Jose*[20] defines the right to 'ethno-development' as:

> the amplification and consolidation of ... a culturally distinct society's own culture, through the strengthening of its capacity to guide its own development and exercise self-determination ... and implying an equitable and proper organisation of power.[21]

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18 Declaration of the United Nations Conference on the Human Environment Stockholm, 1972, Principle 2.

19 *Cocoyoc Declaration* 1974.

20 *Declaration of San Jose* UNESCO, 1981, para 3.

21 *Declaration of San Jose* UNESCO, 1981.

The 1986 *Declaration on the Right to Development*, the 1992 Rio *Declaration* 1992, *Agenda 21*, the 2002 *World Summit on Sustainable development: Plan of Implementation*, the *UN Millennium Development Goals* (MDGs), and the *Millennium Project Report* 2005[22] have all supported the rights of Indigenous and local peoples to sustainable development, and equitable participation. Some of these statements also support the introduction of comprehensive and specific poverty reduction strategies, as a key to achieving sustainable development.

VI A RIGHTS BASED APPROACH TO TEK

There are many different values and perspectives that inform research and practice related to TEK. Much of the authors' work has been to locate TEK as part of the integrated and comprehensive rights of Indigenous peoples, including self-determination, at the international and national levels.[23] These comprehensive rights have been powerfully expressed by Indigenous peoples around the world in the 1993 *Draft Universal Declaration on the Rights of Indigenous Peoples*, which was the culmination of ten years of debate and drafting by the United Nations Working Group on Indigenous Populations (Sub-Commission on the Prevention of Discrimination and Protection of Minorities, Human Rights Commission). Other important expressions of Indigenous rights to TEK and biological resources are contained in the Convention on Biological Diversity (CBD – discussed below) and *ILO 169, Convention Concerning Indigenous and Tribal Peoples in Independent Countries*.

It is now evident that a 'rights-based' approach to sustainable development is particularly worth examining, as it draws together human rights and environmental rights. This relationship is demonstrated in the *Draft Declaration on Principles on Human Rights and the Environment*, which states

> 1. Human rights, an ecologically sound environment, sustainable development and peace are interdependent and indivisible.
>
> 2. All persons have the right to a secure, healthy and ecologically sound environment. This right and other human rights, including civil, cultural, economic, political and social rights are universal.[24]

Aboriginal and Torres Strait Islander people have human and citizenship rights by virtue of being Australian citizens. The universal system of human rights applies equally to all Indigenous peoples. As a consequence, Aboriginal and Torres Strait Islander people must be able to enjoy and exercise these rights. At the same time

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22 http://www.unmillenniumproject.org/reports/index.htm

23 Donna Craig, 'Biological resources, IPRs and International Human Rights: Impacts on Indigenous and Local Communities' in Burton Ong (ed), *Intellectual Property and Biological Resources* (2004) ch 10, 352-393; Michael Davis, 'Law, Anthropology, and the Recognition of Indigenous Cultural Systems' in René Kuppe and Richard Potz (eds), *Law and Anthropology: International Yearbook for Legal Anthropology* 11 (2001).

24 Meeting of Experts on Human Rights and Environment – Geneva, 16-18 May, 1994.

they also have Indigenous rights because of their distinct status as Indigenous peoples. These rights – whether human rights, citizenship rights, or Indigenous rights – are not *created* by international standards and norms, and *conferred* on peoples. Rather, they are inherent in people as humans, and the role of the international rights regime is to recognise, reinforce, and uphold these rights.

Perhaps the most important right that Indigenous peoples have under the international system is that of self-determination. They have this right, as do all peoples, under the international charter of human rights (International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, and the Convention and the Convention for the Elimination of All Forms of Racial Discrimination). Article 1 of both the Covenant on Civil and Political Rights (ICCPR), and the Covenant on Economic, Social and Cultural Rights provides a universal right for self-determination:

> All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

The ICCPR goes further, and at Article 27, contains an important provision that offers scope for Indigenous peoples to exercise their rights collectively to practice their culture:

> In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.

This provision forms the cornerstone of endeavours by Indigenous peoples globally to campaign for a more precise articulation of specific Indigenous peoples' rights, including especially collective, cultural rights.

Indigenous peoples' right to self-determination is articulated in the *Draft Declaration on the Rights of Indigenous Peoples*. The *Draft Declaration* includes the right to own, control, and manage their 'cultural and intellectual property', including cultural knowledge. By implication, this right therefore includes their right to determine the nature of, and to define their cultural and intellectual property and cultural knowledge.

A *Using International Law*

Indigenous peoples can use international law to advocate for recognition of their rights, including rights in traditional knowledge. For example, Australia's periodic reporting and monitoring obligations under international treaties provide an important avenue for Aboriginal and Torres Strait Islander peoples' concerns to be articulated where they believe their capacity to exercise and enjoy their rights has been diminished or restricted.

Complaint handling mechanisms are available under the First Optional Protocol to the International Covenant on Civil and Political Rights (ICCPR), and through similar arrangements under the Convention on the Elimination of All Forms of Racial Discrimination (CERD), and the Convention Against Torture (CAT). In 1991 Australia became a party to the First Optional Protocol to the ICCPR.[25]

In recent years there has been a number of comments, reports and observations by the CERD Committee, concerning Australia's performance with regard to rights of Indigenous peoples. For example, in March 1999 a Decision of the CERD Committee expressed concerns about the amendments to the *Native Title Act 1993 (Cth)*. The Decision states that:

> while the original 1993 Native Title Act was delicately balanced between the rights of indigenous and no-indigenous title holders, the amended Act appears to create legal certainty for governments and third parties at the expense of indigenous title.[26]

The Committee considered that some of the amendments were discriminatory, and that these amendments raised concerns about Australia's compliance with the Convention.[27] The Committee also expressed its concern about a 'lack of effective participation by indigenous communities in the formulation of the amendments' to the *Native Title Act*.[28]

These concerns highlight the need to ensure effective consultation and participation by Aboriginal and Torres Strait Islander peoples in law and policy, in accordance with rights established under international treaties. These participation rights were reinforced in a General Recommendation of the CERD Committee which highlighted the obligations that this Convention places on State Parties to the Convention to 'take all appropriate means to combat and eliminate racism against Indigenous peoples'.[29] Among the measures that this General Recommendation outlines, which States are encouraged to take, are to:

> Ensure that members of all Indigenous peoples have equal rights in respect of effective participation in public life, and that no decisions directly relating to their rights and interests are taken without their informed consent; and
>
> Ensure that Indigenous communities can exercise their rights to practice and revitalise their cultural traditions and customs, to preserve and practice their languages.[30]

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25 Aboriginal and Torres Strait Islander Social Justice Commissioner, First Report, 1993, 91.
26 CERD/C/54/Misc.40/Rev 2, 18 March 1999, para 6.
27 Paras 7 and 8.
28 Para 9.
29 Social Justice Report No 2/2003, 188.
30 CERD Committee General Recommendation XXII – Indigenous Peoples, UN Doc CERD/C/51/Misc.13/Rev 4, 18 August 1997, para 4, cited in Aboriginal and Torres Strait Islander Social Justice Commissioner, Social Justice Report No 2/2003, 188.

As Indigenous academic Larissa Behrendt points out, there are several ways to achieve greater protection and recognition of Indigenous peoples' rights. These include amendments to the Constitution, increased use of international law, and a Bill of Rights.[31]

VII ETHICS AND PURPOSES OF INDIGENOUS ENGAGEMENT

NGOs, governments, corporations and researchers engage with Indigenous peoples and nations from a wide variety of value perspectives and for different purposes. There is a need for greater transparency in revealing these values and purposes when negotiating relationships and projects with Indigenous peoples. A key element is to include the recognition of comprehensive rights of Indigenous peoples, and their needs and aspirations for sustainable development and poverty alleviation. In some situations there is desperate urgency to meet basic needs and alleviate poverty in Indigenous communities.

There are limited experiences with poverty reduction in the international arena that are specifically directed to Indigenous peoples.[32] The International Work Group for Indigenous Affairs (IWGIA) has discussed needs-based approaches versus rights-based approaches.[33] One IWGIA author, Maria Quispe, concludes that this dichotomy can be a trap when planning economic and social policy involving Indigenous peoples. A rights-based approach usually tries to:

1. Make People's needs become a right;
2. Promote peoples knowledge about the existence of their rights; and
3. Develop political strategies to make people's rights become reality.[34]

The argument continues that we should never be afraid to re-think certain rights, and the ways in which we try to make them mean something beneficial.[35]Traditional rights and development approaches have failed Indigenous peoples, and they are increasingly irrelevant to the effective realisation of Indigenous self-determination and sustainable development, as the IWGIA argues:

> There is a need to further develop an integrated approach to working with Indigenous Peoples' rights and development simultaneously as it would contribute to the on-going work on designing effective poverty reduction strategies.[36]

There is also a large discourse on ethics. This paper will not attempt to canvas this broader area. In general, the thrust of much contemporary research in, and

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31 Larissa Behrendt, *Achieving Social Justice: Indigenous Rights and Australia's Future* (2002) 132-133.

32 IWGIA, 'Indigenous Poverty: an Issue of Rights and Needs' (International Work Group for Indigenous Affairs, 1/2003) 46.

33 Ibid.

34 Ibid 38.

35 Ibid.

36 Ibid 46.

approaches to sustainable development involves attempts to construct ethical relationships between Indigenous and non-Indigenous peoples. The failure to recognise and understand the differences in values and culture may be a reckless act that jeopardises the ethics and the quality of research. This is pointed out in a set of guidelines developed by the Australian National Health and Medical Research Council, which states that:

> The responsibility for maintaining trust and ethical standards cannot depend solely on rules or guidelines. Trustworthiness of both research and researchers is a product of engagement between people. It involves transparent and honest dealing with values and principles, the elimination of 'difference blindness' and a subtlety of judgement required to eliminate prejudice and maintain respect and human dignity.[37]

A *Relationships of trust and the fiduciary obligation*

There is some discussion in Australian law about the nature of the legal relationship between the nation-state and Indigenous peoples. This discussion has been largely influenced by judicial cases and legal developments in Canada, where the common law 'recognises that the Crown owes a fiduciary obligation to Aboriginal people'.[38] This fiduciary, or 'trust-like' relationship, in Behrendt's view, 'derives from the nature of Aboriginal title', and remains 'even when that common law feature has been entrenched in legislation'. Although there is a fiduciary relationship in Australian Native Title law, 'the courts have to date recognised no such obligation owed by the Crown'.[39] Notwithstanding that there has been no recognition of a trust-relationship with Indigenous peoples in Australia, it is nonetheless an important principle, which should influence ethical approaches to engagement processes with Aboriginal and Torres Strait Islander people in regard to natural resources and biodiversity.

VIII THE CONVENTION ON BIOLOGICAL DIVERSITY

The CBD places Indigenous and local knowledge, as well as traditional technologies and biogenetic resources, under nation-state sovereignty. Thus, no matter how liberal or generous provisions might appear, Indigenous peoples are faced with a difficult conundrum. Their contributions, central role in sustainable development and conservation, and rights as decision-makers and beneficiaries are recognised beyond any previous international binding treaty. Yet despite this, Indigenous peoples are reluctant to accept that ultimate control over resources lies with nation-states. Few Indigenous groups are willing to allow this *a priori* usurpation of their fundamental rights of self-determination no matter what promises and favourable interpretations may arise.

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37 'Values and Ethics: Guidelines for Ethical Conduct in Aboriginal and Torres Strait Islander Health Research', Endorsed by Council at its 148th Session on 5 June 2003, 4.

38 Larissa Behrendt, 'The Protection of Indigenous Rights: Contemporary Canadian Comparisons' (Research Paper No 27, Parliamentary Library, Canberra, 1999-2000) 7.

39 Ibid 8.

Given this fundamental premise in the CBD concerning state sovereignty over biological resources, the CBD cannot significantly contribute to the resolution of basic issues raised in the *Draft UN Declaration on the Rights of Indigenous Peoples*, namely Indigenous peoples' calls for self-determination. However, it may help pave the way for the development of useful instruments that work towards more equitable partnerships with Indigenous peoples.

Unfortunately, the CBD does not in itself provide any explicit legal means to recognise, or to protect Indigenous peoples' rights in their TEK, or any mechanisms to compensate Indigenous peoples for use of their TEK. Neither are there mechanisms for such recognition or protection in any other global legal forum. The CBD does, however, provide a framework for Parties to develop protection mechanisms.

At national levels, the licensing arrangements provided for by intellectual and cultural property rights laws may have the potential to support the development of negotiated partnerships, based on the sharing and use of TEK and associated practices. IPR regimes may also offer some limited scope for Indigenous peoples to seek compensation for use of Indigenous technologies and knowledge. However, in general, IPR systems do not conceptually provide sufficient scope for the real recognition and protection of TEK, as outlined below.

With regard to the recognition and protection of TEK, and the development of equitable benefit-sharing arrangements, articles 8(j) and 10(c) are the most relevant provisions in the CBD for Indigenous peoples. Article 8(j) states encourages States, 'subject to national legislation', to:

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

The Explanatory Guide to the CBD notes that the proviso of subjecting these obligations in Article 8(j) to national legislation is unusual.[40] The objectives of this Article could be defeated, since the wording implies that existing national legislation will take precedence. This Article could also imply that the interests of Indigenous peoples regarding their traditional knowledge can be respected and preserved, without addressing outstanding issues of their rights to land and biological resources. It is clear that Indigenous people cannot continue these traditional practices in isolation from the land and biological resources that they need.[41] Recognition of the lands, territories and resources of Indigenous peoples, as

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40 IUCN Environmental Law Centre, 'The Convention on Biological Diversity: An Explanatory Guide', Bonn, IUCN Biodiversity Program, 1994, 48.

41 Ibid 93.

a foundation for their rights and interests in traditional knowledge, would be consistent with a growing body of international obligations such as *ILO 169* and the *Draft Universal Declaration on the Rights of Indigenous Peoples.*

If Article 8(j) is to be given legal meaning, which more fully addresses the concerns of Indigenous peoples, the following fundamental issues must be considered:

1. Indigenous concepts of conservation and sustainable use need to be much better understood by the wider national and international community. This should be facilitated by providing the resources, and access, for Indigenous peoples to express these concepts directly in their own words. It also involves recognition of wide cultural diversity, even within small groups of Indigenous peoples.[42]

2. Indigenous knowledge, innovation and practices are also poorly understood. Ethnographic and ethnobiological studies are limited and have not necessarily been undertaken for the policy purpose of conservation, and sustainable use of biological diversity. The knowledge and practice is deeply embedded in Indigenous culture, and appropriate research and policy development will need to be undertaken through Indigenous control or partnership.

3. The phrase 'Indigenous and local communities embodying traditional lifestyles' as used in the Convention on Biological Diversity needs to be critically considered. Many Indigenous peoples with strong traditional links, and involvement with their communities and lands, may be excluded from the provisions of Article 8(j), because the methods and techniques they use in regard to their knowledge may not be considered as 'traditional' in the meaning of the term as used by the CBD, or because they live in urban or semi-urban situations. In particular, this provision of the CBD fails to consider the realities of contemporary Indigenous culture.

4. Contracting parties are meant to promote wider application of Indigenous knowledge with the approach and involvement of relevant Indigenous people. The holder/s of the knowledge or technology may be an individual, group or community. This will make the participatory provisions difficult to implement without sound applied anthropological studies and co-operation from individuals and communities. It is unclear who can, or should, determine the issue of who are the 'holders' of knowledge and technology.

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42 For a discussion on the importance of better understanding Indigenous concepts, see for example Michael Davis, 'Bridging the Gap, or Crossing a Bridge? Indigenous Knowledge and the Language of Law and Policy' in Fikret Berkes, Doris Capistrano, Walt Reid, and Tom Wilbanks (eds), *Bridging Scales and Knowledge Systems: Linking Global Science and Local Knowledge in Assessments* (2006 forthcoming).

5. The provision in the CBD for the 'equitable sharing' of benefits from the wider application raises the same issues discussed above. Will 'equity' be determined from an Indigenous perspective, and does it imply the recognition of cultural and intellectual property rights held by Indigenous peoples? At the very least, Indigenous peoples will expect that the wider application of their knowledge, practices and technology would be preceded by recognition of Indigenous concerns in the first part of Article 8(j). The analogy is with the idea of a 'trust'. If national governments are to use Indigenous knowledge, innovations and practices for the wider public 'good', then there should be a clear obligation towards the Indigenous peoples who have developed them. It would be against the intent (as expressed in the CBD Preamble) of the Convention, to construe Article 8(j) purely as a means of appropriating Indigenous knowledge without reciprocity. The legal and practical forms of this reciprocity remain to be worked out under the Convention.

Article 10(c) requires Contracting Parties to 'protect and encourage customary use of biological resources in accordance with traditional cultural practices that are compatible with conservation and sustainable use requirements'. This Article is important, especially if read in conjunction with Article 8(j), since it explicitly acknowledges the critical aspect of *practice*, or *use* of biological resources that are characterised as *customary*, thus providing an opportunity to consider supporting traditional knowledge and practices that derive from, or are based in Indigenous customary law.

Article 6 of the CBD requires Contracting Parties to develop national strategies, plans or programmes for the conservation and sustainable use of biodiversity. This is one of the most important obligations for implementation, under the Convention.

The identification and monitoring provisions (Article 7) involve national surveys or inventories of biological diversity. Article 14 deals with environmental impact assessment and minimising adverse impacts. Those activities must involve affected Indigenous peoples in a significant way. These Articles will provide important bases for Indigenous participation in planning for biodiversity conservation at the national and local levels, and they complement the provisions articulated in Articles 8(j) and 10(c) of the CBD.

Most of the Articles in the Convention recognise that non-Indigenous laws, policies and practices will change as we learn more about biodiversity and develop more effective strategies to manage and protect it. Indigenous culture has always been subject to some change. Indeed, this is why some of their biodiversity strategies and protective systems have been so effective. If expressions such as 'customary use' and 'traditional cultural practices' are interpreted as protecting only past, or existing, uses and practices, this would deny contemporary Indigenous self determination and undermine many of the purposes of the Convention. The relevant focus is Indigenous sustainable use. Judgments about 'traditionality' will impede Indigenous co-operation on these issues.

The Conference of Parties (COP) to the CBD has developed an increasing focus on specific Indigenous peoples' issues, including the implementation of Article 8(j). The momentum on this work grew with the third meeting of the COP held in Buenos Aires, Argentina, in November 1996, which agreed that a workshop be convened to explore the development of a work plan on Article 8(j) and related provisions. Resulting from this decision, a workshop was held in Madrid in November 1997, and a report from that workshop submitted to the fourth meeting of the COP, which was held in Bratislava, Republic of Slovakia, in May 1998. The COP-4 decided (Decision IV/9) to establish an Ad Hoc Open-ended Inter-sessional Working Group to address the implementation of Article 8(j) and related provisions. The first meeting of this Working Group was held in Seville, Spain, in March 2000. The work programme of this working group has developed to increasingly more comprehensive levels over the ensuing years. The second Article 8(j) Working Group met in Montreal, Canada, in February 2002, and provided a report to the sixth COP. COP-6 met in The Hague, Netherlands, in April 2002, and reviewed the progress of work on Article 8(j). Among other aspects, the COP requested at its sixth meeting that the Working Group on Article 8(j) address *sui generis* systems for the protection of traditional knowledge. It identified the following issues on which to focus:

1. Clarification of relevant terminology;
2. Compiling and assessing existing Indigenous, local, national and regional *sui generis* systems;
3. Making available this compilation and assessment through the clearing-house mechanism of the Convention;
4. Studying existing systems for handling and managing innovations at the local level and their relation to existing national and international systems of intellectual property rights, with a view to ensure their complementarity;
5. Assessing the need for further work on such systems at the local, national, regional and international levels;
6. Identifying the main elements to be taken into consideration in the development of *sui generis* systems; and
7. The equitable sharing of benefits arising from the utilization of traditional knowledge, innovations and practices of Indigenous and local communities, taking into account the work carried out by the WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore, with a view to promote mutual supportiveness, and existing regional, subregional, national and local initiatives.[43]

The very significant literature, research and debate that is occurring both within the auspices of the CBD and elsewhere, relating to access to biological and genetic

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[43] Working Group on Article 8(j) and Related Provisions of the Convention on Biological Diversity, 'Conference of the Parties', UNEP/CBD/COP/6/20, Paragraph 34. <http://www.biodiv.org/programmes/socio-eco/traditional/decisions.asp> last accessed 18 November 2003.

resources and benefit-sharing, is critically important for Indigenous peoples, and often overlaps with the work being developed under Article 8(j).

IX ACCESS AND BENEFIT-SHARING

The *Convention on Biological Diversity* encourages Contracting Parties to develop legislation for access to biological resources and fair and equitable benefit-sharing.[44] The CBD has a Working Group on Access and Benefit-Sharing, which is developing standards and exploring the feasibility of international measures. This aspect of the work of the CBD has occupied as much attention as that concerning measures for protection of TEK.

The provision in Article 8(j) for access and benefit-sharing encourages Parties to 'promote the wider application of traditional knowledge, innovations and practices'. This must be done, the Article states, 'with the approval and involvement of the holders of such knowledge, innovations and practices'. This means that wider use should be subject to the consent of the knowledge holders. In Australia, as elsewhere, implementing these provisions effectively will require considerable thought being given to ensuring that Indigenous people are provided with opportunities and resources to negotiate on equal terms, and to participate as equal partners, in activities involving the use of their knowledge and practices. It is critical to ensure that sound approaches are developed to provide that the wider use of TEK is only carried out on the basis of free, prior and informed consent of the Indigenous knowledge holders.[45] Among the challenges in formulating good legislative regimes, is to ensure the effective participation by, and negotiation with, all relevant and appropriate Indigenous peoples. This will require, among other things, the identification of appropriate knowledge holders and custodians, and others in communities whose prior informed consent is necessary. The Commonwealth and some State and Territory governments (Queensland and the Northern Territory) are introducing, or considering legislative regimes for regulating access to biological resources. These developments vary considerably in the extent to which they include, or are considering provisions for prior informed consent, if at all.

Article 15 of the CBD provides for the rights of nation-states over their natural resources. This Article also encourages Parties to develop measures for facilitating access by others to their biological (or genetic) resources, in the interests of sustainable use and conservation of biodiversity. Article 15 also requires that access to biological and genetic resources shall be on the basis of mutually agreed terms,[46] and prior informed consent.[47] Article 15 also[48] provides for Contracting Parties to

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44 Articles 8(j) and 15.

45 See Lyle Glowka *et al,* 'A Guide to the Convention on Biological Diversity' (IUCN Environmental Policy and Law Paper No 30, Gland, Switzerland, and Cambridge, England, IUCN, 1994) 48-49.

46 Article 15(4).

47 Article 15(5).

develop measures for fair and equitable sharing of the benefits arising from the 'commercial or other utilization of genetic resources'.

Legislative enactment of these provisions of the CBD is based on the assumption that the Contracting Party (ie, the national government) is the provider of the biological and genetic resources in question. In practice, this needs to be reconsidered, especially to take into account Indigenous peoples' communal and customary rights and interests. To properly recognise Indigenous peoples' rights and interests, the implementation of Article 15, taken together with Article 8(j), will need to consider the question of Indigenous ownership, and/or custodianship of natural resources and associated knowledge and practices.

One of the ways to possibly resolve the tensions that seem to be apparent in the CBD regarding the rights and interests of Indigenous peoples,[49] vis-à-vis those of the nation-state as the Contracting Party, or owner of natural resources under Article 15, is through equitable partnerships. As Sarah Laird, a leading writer in this area, points out, 'although the CBD extends to national governments the rights to regulate access and benefit-sharing, existing relations between national governments and a range of domestic groups must be considered'.[50] It is of particular importance to consider the rights and interests of Indigenous peoples, as these peoples are typically the most powerless and marginalised in the development of partnership arrangements. The formulation of ethically sound benefit-sharing agreements will need to ensure equitable partnerships based on the recognition of Indigenous peoples as owners and providers of biological and genetic resources, knowledge and practices.

The concept of fair and equitable partnerships, and the many issues that must be considered in developing these in practice, have been the subject of much discussion in recent years. Laird states:

> Frameworks for equitable partnerships for biodiversity research and prospecting are emerging that promote principles and practices, such as the fair and equitable sharing of benefits, prior informed consent and ongoing consultation, and adherence to standards for best practice.[51]

The development of best practice in fair and equitable benefit-sharing partnerships will need to properly address issues such as Indigenous rights and interests, including protection measures for traditional knowledge, and codes of ethics and research guidelines.[52] At the heart of developing equitable research relationships

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48 Article 15(7).

49 Article 8(j).

50 Sarah A Laird, 'Introduction: Equitable Partnerships in Practice' in Laird, above n 2, xxix-xxx.

51 Ibid xxii-xxxvi.

52 Ibid xxiii. Note that Laird characterises 'best practice' in this context as 'standards of practice that are widely regarded by those in the field as representing the highest levels of conduct, and the practical implementation of core underlying principles such as conservation of biodiversity, sustainable use, and equitable benefit-sharing', ibid xxiv.

with Indigenous peoples are the issues of recognition of rights, and prior informed consent. As articulated by Posey, and reinforced by Laird and Noejovich, 'equitable research relationships are most likely to result when based on a bundle of basic rights, including rights to self-determination, autonomy and territory, as well as basic human and cultural rights'.[53]

The importance of prior informed consent cannot be underestimated, as these provisions are one way in which Indigenous peoples can exercise their rights to permit, or to veto research, developments, and other activities that impact on their lands, communities and livelihoods. Prior informed consent means:

> the consent of a party to an activity that is given after receiving full disclosure regarding the reasons for the activity, the specific procedures the activity would entail, the potential risks involved and the full implications that can realistically be foreseen.[54]

In the view of some writers on this subject, 'prior informed consent should be sought both prior to and throughout implementation of a research project, as part of dynamic consultations'. It is a 'process, rather than an event'.[55]

The concerns about prior informed consent, protection of traditional knowledge, and Indigenous participation, are most prominent in the context of biodiversity prospecting ('bioprospecting'), and in the commercial use of biodiversity and traditional knowledge. There is a large and growing literature on bioprospecting and benefit-sharing, and many developments occurring internationally.[56] For Indigenous peoples, one of the chief mechanisms that can be used to ensure that their rights and interests are fully incorporated in any bioprospecting activities, is equitable contractual agreements. Contracts can take many forms, and can be used to entrench a range of matters, including recognition of traditional knowledge.[57]

Although there are many advantages to developing good contracts regulating the management of traditional knowledge and bio-resources, there are also some potential concerns. A major concern is a relative lack of consistency and uniform standards in contract design and implementation. Contracts for traditional knowledge and biodiversity should be based on international standards, such as those being developed by the Conference of Parties to the *Convention on Biological*

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53 Sarah A Laird and Flavia Noejovich, 'Building Equitable Research Relationships with Indigenous Peoples and Local Communities: Prior Informed Consent and Research Agreements' in Laird, above n 2, 185.

54 Ibid 189-90.

55 Ibid 192.

56 See for example Walter V Reid *et al*, *Biodiversity Prospecting: Using Genetic Resources for Sustainable Development* (1993); Kerry ten Kate and Sarah A Laird, *The Commercial Use of Biodiversity: Access to Genetic Resources and Benefit-Sharing* (1999); Sarah A Laird (ed), *Biodiversity and Traditional Knowledge: Equitable Partnerships in Practice* (2002).

57 Brendan Tobin, 'Biodiversity Prospecting Contracts: the Search for Equitable Agreements' in Laird, above n 2, 287-309.

Diversity. There is also a general lack of accountability and transparency in contracts; since these are usually not subject to the same rigorous standards of regulation as government policy. There are also inevitably inequities in the power relationships between Indigenous peoples and those with whom they negotiate contracts and agreements. Indigenous peoples usually lack the same level of negotiating skills and resources, and access to technical and legal expertise as those they enter into negotiations with. Another concern about contracts is that they only oblige those who are parties to the agreement. Others who are not party to a contract, yet who may have vested interests therefore have no legal avenues to articulate and pursue their interests.

The concerns about the *ad hoc*, and unregulated nature of contracts and agreements can, at least in part, be alleviated by the introduction of sound national or regional laws to regulate biodiversity, provide for ethical conduct, and entrench Indigenous rights in TEK and bioresources. The *Bonn Guidelines on Access to Genetic Resources and Fair and Equitable Sharing of the Benefits Arising out of their Utilization*, produced in 2002 by the CBD Working Group on Access and Benefit-Sharing are a useful international development that could guide best practice. Australia's Regulations governing access to biological resources on Commonwealth lands, under Section 301 of the *Environment Protection and Biodiversity Conservation Act* 1999 establish domestic standards.

The development of sound protocols, codes of ethics, and guidelines may also form important elements to be incorporated into equitable benefit-sharing arrangements, that involve Indigenous peoples and their knowledge and practices.

X THE CBD AND INDIGENOUS CULTURAL AND INTELLECTUAL PROPERTY RIGHTS

A close analysis of the CBD reveals a serious risk that Indigenous peoples' traditional knowledge, innovations and practices will be seen as a 'resource' for the exploitation of biological diversity, rather than as the collective heritage of peoples who hold legal and cultural rights in relation to it. This poses ethical and practical questions in seeking to involve Indigenous peoples. TEK offers a potential source of wealth in the pharmaceutical and other industries and a constant focus of research activity. At the present time, virtually none of the profits are returned to Indigenous peoples. Several Articles in the CBD are primarily concerned with promoting commercial access to genetic resources, and promoting the commercial access and transfer of technology. The relevant articles[58] make no specific provisions for Indigenous peoples, and they have to be read in the context of the earlier articles.[59]

Articles 16, 17 and 18 provide for access and transfer of knowledge and technology. The term 'technology' in Article 16 can encompass Indigenous and traditional

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58 Articles 15 and 16.

59 Article 8(j).

knowledge and technology, which is explicitly referred to in Articles 17(2) and 18(4). The only basis for Indigenous 'control', 'participation' and 'benefit' as these might refer to traditional knowledge and technology is contained in Article 8(j). The scene is set for wide use of Indigenous knowledge and practices relating to biodiversity. However, few jurisdictions have developed legislation or codes of conduct that will ensure that some of the benefits are returned to Indigenous communities.

Much research is needed to understand the effectiveness of traditional technologies. Research, monitoring, and inventory criteria, priorities, and methods need to be guided and controlled by Indigenous and local communities. Finally, to successfully implement the provisions of the CBD, financial mechanisms will have to be made available to Indigenous and local communities.

XI PRINCIPLES OF FREE, PRIOR AND INFORMED CONSENT

The CBD attempts to establish a new approach to sustainable development by seeking to conserve biological diversity, the sustainable use of its components and the fair and equitable sharing of the benefits that result from the wider use of genetic resources. There has been a growing and important standards setting process concerned with establishing principles and guidelines for prior informed consent (PIC), associated with accessing genetic resources and TEK. For example, the *Bonn Guidelines* have established a clear international obligation relating to PIC when accessing genetic resources.[60] Although the CBD has been widely adopted by Nation States, the extent to which any provisions regarding PIC have been implemented and enforced through national laws is limited, and varies considerably around the world.

Biodiversity research and accessing biological resources encompasses a wide range of activities that should certainly be subject to PIC, at least as a means of developing and ensuring best practice. Parshuram Tamang, an Indigenous Expert Member of UN Permanent Forum on Indigenous Issues, has recently elaborated this broader approach to the principle of free, prior and informed consent[61]. He locates the early origins of principles for PIC in a context of the relocation of Indigenous Peoples from their lands, as articulated under *ILO Convention 169*, the *Draft Declaration on the Rights of Indigenous Peoples*, the policies of the World Bank, the UNDP, and the World Commission on Dams. This latter organisation has stated in a report that PIC should guide the building of dams that might affect Indigenous

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60 Conference of the Parties to the Convention on Biological Diversity, Access and Benefit-Sharing as Related to Genetic Resources, Bonn Guidelines on Access to genetic Resources and Fair and Equitable Sharing of the Benefits Arising out of their Utilisation, UN Environment Programme, 6th meeting, UN Doc UNEP/CBD/COP/6/24 (2002); See also Jeffery, above n 1, 786.

61 Parshuram Tamang, 'An Overview of the Principle of Free, Prior and Informed Consent and Indigenous Peoples in International and Domestic Law and Practices' (paper presented at the Workshop on Free, Prior and Informed Consent and Indigenous Peoples, organised by the Secretariat of UNPFII, UN Headquarter, New York, USA, 17-19 January 2005).

Peoples and ethnic minorities.[62] Tamarang also identifies intellectual property rights as a key area for consideration in the application and extension of the principles of free, prior and informed consent.

XII WORLD INTELLECTUAL PROPERTY ORGANIZATION INITIATIVES

The World Intellectual Property Organization (WIPO) Intergovernmental Committee (IGC) on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (IGC), was established in 2001 as an international policy forum.[63] This built on traditional knowledge work commenced by WIPO in 1998. The first steps involved consultations about the needs and expectations of some 3,000 representatives of TEK-holding communities around the world. WIPO's work ranges from the international dimension of TEK and cooperation with other international agencies, to capacity building and the pooling of practical experiences in this complex area.

The IGC's work on legal approaches to protecting TEK focuses on the use of knowledge such as traditional technical know-how, or traditional ecological, scientific or medical knowledge. This encompasses the content or substance of traditional know-how, innovations, information, practices, skills and learning of TEK systems such as traditional agricultural, environmental or medicinal knowledge. Their work distinguishes between the *positive* protection (recognition) of intellectual property rights in TEK using existing IP laws, innovative legal strategies and evolving *sui generis* measures for protecting TEK, and *defensive* protection to safeguard against illegitimate IP rights over TEK.[64]

XIII THE UNESCO CONVENTION ON THE SAFEGUARDING OF INTANGIBLE CULTURAL HERITAGE 2003

One of the more recent international conventions, the UNESCO *Convention for the Safeguarding of the Intangible Cultural Heritage* (2003) has as its purposes the safeguarding of intangible cultural heritage, ensuring respect for intangible heritage of communities, groups and individuals, raising awareness at the local, national and international levels of the importance of intangible cultural heritage, and providing for international co operation and assistance. Examples of subject matter falling within the definition of intangible cultural heritage include:

- oral traditions and expressions, including language as a vehicle of the intangible cultural heritage;
- the performing arts;
- social practices, rituals and festive events;

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62 See for example Marcus Colchester, 'Sharing Power: Dams, Indigenous Peoples and Ethnic Minorities' (paper prepared for the World Commission on Dams (WCD), Cape Town, Secretariat of the World Commission on Dams, November 2000).

63 www.wipo.int/tk/en/tk/index.html see WIPO Publication No 920(E).

64 Ibid 16-31.

- knowledge and practices concerning nature and the universe;
- traditional craftsmanship[65]

This Convention incorporates a provision for a 'national competent body' to oversee the protection of intangible cultural heritage. The ICH Experts Committee considered a proposal for 'Principles of Consultation', as an important way of limiting the adverse consequences occasioned by granting the State the sole discretion to decide how, and when to protect cultural heritage as found in the World Heritage Convention.[66] This is consistent with best practice in modern environmental law concerning participatory approaches between Indigenous and non-Indigenous communities. The intangible heritage convention does not explicitly mandate a duty to consult. However, it may be implied in the requirement on States to ensure the participation of communities, identification and management of intangible cultural heritage.[67]

XIV INTERNATIONAL INITIATIVES BY INDIGENOUS PEOPLES

There have recently been some initiatives by Indigenous peoples to establish and control their own organisations specifically aimed at protecting their cultural and intellectual property rights. One such initiative is the *Call of the Earth*, an independent, Indigenous controlled organisation bringing together leading native voices advancing Indigenous peoples' perspectives on intellectual property in the international arena.[68] This initiative received start-up support from the Rockefeller Foundation. The *Call of the Earth* Global Dialogue on Intellectual Property (2003-2006) brings together Indigenous experts from different regions and sectoral interests to explore common perspectives, engage in the analysis of emerging issues surrounding Indigenous peoples and intellectual property, identify needs and opportunities for organising the knowledge base, regional thematic dialogues and national round tables, and identify and foster synergy between various local initiatives.

XV TRADE RELATED INTELLECTUAL PROPERTY AGREEMENT (TRIPS)

The TRIPs Agreement sets the minimum level of intellectual property rights which must be provided by all State parties to the *General Agreement on Tariffs and Trade* (GATT), and subsumed by all member States of the World Trade Organization (WTO).[69] In the views of some, however, TRIPS is ill suited to the

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65 UNESCO Convention on Intangible Cultural Heritage, Article 2(2).

66 Paul Kuruk, 'Cultural Heritage, Traditional Knowledge and Indigenous Rights: An Analysis of the Convention for the Safeguarding of the Intangible Cultural Heritage' 1(1) *Macquarie Journal of International and Comparative Environmental Law* 111-135.

67 Ibid.

68 http://www.earthcall.org/en/.

69 *General Agreement on Tariffs and Trade*, 30 October 1947, 61 Stat A3, 55 UNTS 187.

protection of the knowledge of Indigenous and local communities, and the implementation of Article 8(j) of the CBD.[70]

Unlike States having the flexibility to decide whether or not they wish to ratify a specific international treaty or subsequent protocol adopted under a particular treaty, members of the WTO are obliged to adhere to and be bound by all agreements administered by the WTO by virtue of their membership in the WTO.

With respect to the *TRIPS Agreement*, members may implement more extensive protection provided that such protection does not contravene the provisions of the TRIPS Agreement. Intellectual property under the *TRIPS Agreement* is not defined in its own right. TRIPS refers to seven categories of IPRs, namely, copyright and related rights, trademarks, geographical indications, industrial designs, patents, layout designs of integrated circuits and protection of undisclosed information (including trade secrets or test data).[71]

Systems of IPR's seek to reward innovation, and promote access to the products arising from it by creating new property rights and seeking to balance the public interest. TRIPS arose out of the Uruguay Round of multilateral trade negotiations and established a global framework for the protection of specified IP, including many 'creations' linked to biodiversity. IPR's over biotechnology have been expanded, despite very serious ethical, environmental, economic and legal considerations that suggest moderation and caution in this regard.[72] Members are required to recognize patents over micro-organisms and microbiological processes for the production of plants and animals. However the *TRIPs Agreement* permits the exclusion of plants and animals from patentability. Article 27(2) also allows Members to exclude from patentability innovations in order to protect animal, plant life or health or to avoid serious damage to the environment.[73] In relation to plant varieties, Members are allowed to develop *sui generis* protection for new plant varieties.

Overall, the effect of TRIPS is to extend IP protection over areas of biodiversity that have not been previously provided for, and that sometimes extend into the realm of 'production processes'. The extent to which TEK can be subject to this regime is the subject of considerable debate. The increased 'harmonization' and international protection of IP is considered to be of great advantage to developed industrialised nations, with few reciprocal benefits to the developing world.[74]

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70 See for example Simon Walker, 'The TRIPS Agreement, Sustainable Development and the Public Interest' (IUCN Policy and Law Paper No 41, IUCN and CIEL, IUCN publication services, 2001) xii.

71 Article 1.2 of the TRIPS Agreement states that 'for the purposes of this Agreement, the term "intellectual property" refers to all categories of intellectual property that are the subject of Sections 1 through 7 of Part II'.

72 Walker, above n 69, xi.

73 Ibid.

74 Ibid x.

XVI WHAT ARE INDIGENOUS CULTURAL AND INTELLECTUAL PROPERTY RIGHTS?

The term 'Indigenous cultural and intellectual property' is often taken to include Indigenous knowledge, whether it is in the form of biological knowledge, customary knowledge or created tangible materials, that is passed on from one generation to the next. However, while the term Indigenous 'intellectual property' is often used to broadly denote a range of subject matter that includes TEK, it is also important to make clear the distinctions between Indigenous knowledge and the conventional, 'Western' concept of intellectual property.[75]

In her *Study on the Protection of Cultural and Intellectual Property of Indigenous Peoples,* UN Special Rapporteur Erica-Irene Daes argues that the distinction between 'intellectual property' and 'cultural property' is inappropriate when considering Indigenous peoples' interests. Instead, a holistic and integrated view of Indigenous heritage, encompassing all aspects of their lives, is essential. This is a more compatible view as it reflects Indigenous philosophies of integration between humans and lands and environments. Daes writes:

> ... heritage includes all expressions of the relationship between the people, their land and the other living beings and spirits which share the land, and is the basis for maintaining social, economic and diplomatic relationships – through sharing – with other Peoples. All of the aspects of heritage are interrelated and cannot be separated from the traditional Territory of the people concerned. What tangible and intangible items constitute the heritage of a particular Indigenous peoples must be decided by the people themselves ...[76]

With this in mind, in formulating the concept of property rights to protect Indigenous culture, it is important to recognise the needs and rights of Indigenous peoples under international and domestic law. In failing to do so, we will have a system of property rights that does not adequately address their needs, and furthermore may work to disintegrate their community.

The following is a list of some of the key rights that Indigenous peoples in Australia call for in relation to intellectual and cultural property:

- The right to own and control Indigenous intellectual and cultural property,
- The right to define what constitutes Indigenous intellectual and cultural property and/or Indigenous heritage,
- The right to ensure that any means of protecting Indigenous intellectual and cultural property is premised on the principle of self-determination, which

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75 Michael Davis, 'Bridging the Gap, or Crossing a Bridge?: Indigenous Knowledge and the Language of Law and Policy' in Fikret Berkes *et al*, (eds), *Bridging Scales and Knowledge Systems: Linking Global Science and Local Knowledge in Assessments* (2006 forthcoming).

76 Erica-Irene Daes, 'Supplementary Report of the Special Rapporteur on the Protection of Heritage of Indigenous Peoples', UN Sub-Commission on the Prevention of Discrimination and Protection of Minorities, 48th Session, E/CN.4/Sub.2/1996/22, 5.

includes the right and duty of Indigenous Peoples to maintain and develop their own cultures and knowledge systems and forms of social organisation,

- The right to authorise, or to refuse to authorise, the commercial use of Indigenous intellectual and cultural property in accordance with customary law,
- The right to benefit commercially from the authorised use of Indigenous intellectual and cultural property, including the right to negotiate terms of such usage,
- The right to protect Indigenous sites, including sacred sites,
- The right to control the disclosure, dissemination, reproduction and recording of Indigenous knowledge, ideas and innovations concerning medicinal pants, biodiversity and environmental management,
- The right to own and control management of land and sea, conserved in whole or part because of their Indigenous cultural values.[77]

The conventional 'western' system of intellectual property was developed to protect the marketable property of non-Indigenous individuals and corporations. This is a restricted form of property, which is severed from the original components of the 'invention', and from the societies that may have nurtured its initial stages. It is the modification or 'discovery' through non-Indigenous technology that is usually rewarded and protected by these intellectual property rights.

Indigenous peoples in contemporary society require an economic base. This is as much the case where many of their activities and lifestyles retain some 'traditional' aspects, as it is for those in urban and semi-urban situations. In many situations, Indigenous peoples' ecosystems have been altered, and their political circumstances changed to the extent that they cannot (or do not wish) to live a totally subsistence lifestyle. The sustainable use of resources, and derivation of economic benefits from this use, may be consistent with the maintenance of Indigenous lifestyles or cultural adaptation over time. Intellectual property rights regimes are one type of legal strategy that may be considered by Indigenous peoples to protect their biological resources and cultural practices. However, these have limited scope, especially with regard to their capacity to enable Indigenous people to develop an economic base that will better support them in contemporary circumstances.

It is difficult to formulate a version of intellectual and cultural property rights appropriate for recognising and protecting Indigenous peoples' cultural heritage at the present time. Some of the difficulties with using existing laws are as follows:

- Indigenous peoples are not given recognition, as legal 'persons', to enforce international conventions on intellectual property.

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77 Terri Janke, *Our Culture: Our Future: Report on Australian Indigenous Cultural and Intellectual Property Rights* (1998) 47-48.

- There is little experience with identifying the Indigenous knowledge or resource 'component' when it is modified by industrial users, and with placing an economic value on such a component. Such knowledge is usually part of a culture that cannot be segmented by Indigenous peoples or others.

- Intellectual property laws require an individual, or other legal entity, to make the claim. Indigenous knowledge is often communally held.[78] This is not an impediment in itself, if groups who control knowledge and resources can be identified. However, the boundaries of groups and the 'exclusivity' of knowledge and practice may be problematic.

- Intellectual property rights, in the form held by Indigenous peoples, may not be readily marketable. Large scale marketing may also impact on the cultures and lifestyles which produced the knowledge and technologies.

- Indigenous peoples would require greater resources and capacity building to avail themselves of intellectual property laws.[79]

- Western IPR systems predominantly protect 'inventions', and not the body of knowledge that led to the invention or provided the pre-conditions for it. This is usually considered to be part of the 'public domain'.

The intellectual and cultural property rights of Indigenous peoples require further consideration and development having regard to the specific provisions of the *Convention on Biological Diversity.*[80]

XVII INTELLECTUAL PROPERTY PROTECTION OPTIONS FOR TRADITIONAL KNOWLEDGE HOLDERS

The incapacity of conventional western intellectual property rights (IPRs) regimes to provide effective protection for Indigenous peoples' rights and interests in TEK is well documented.[81] However, notwithstanding these limitations, conventional

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78 F Yamin and D Posey, 'Indigenous peoples, biotechnology and intellectual property rights' (1993) 2(2) *Review of European Community and International Environmental Law* 143. Michael Davis, 'Indigenous Peoples and Intellectual Property Rights' (Research Paper No 20 (1996-97), Information and Research Services, Department of the Parliamentary Library, Canberra, June 1997); Michael Davis, *Biological Diversity and Indigenous Knowledge* (Research Paper No 17 (1997-98) Information and Research Services, Department of the Parliamentary Library, Canberra, June 1998); Michael Davis, 'Indigenous Rights in Traditional Knowledge and Biological Diversity: Approaches to Protection' (1999) 4(4) *Australian Indigenous Law Reporter* 1-32.

79 Ibid.

80 United Nations Conference, 'Environment and Development: Convention on Biological Diversity', 5 June 1992, UNEP/Bioprospecting.Div./N7BINC5/4, reprinted in 31 ILM 818 (1992) (entered into force 29 December 1993).

81 Darrell A Posey and Graham Dutfield, *Beyond Intellectual Property: Toward Traditional Resource Rights for Indigenous Peoples and Local Communities* (1996); Davis, above n 76, 1-32.

IPRs should not be overlooked in terms of what options they might offer for such protection. A useful overview of these options, as well as a critique of IPRs is provided in a recent handbook by Hansen and VanFleet, produced for the American Association for the Advancement of Science, and outlined below.[82]

A *Patents*

Patents 'provide a legal monopoly over the use, production and sale of an invention, discovery or innovation for a specific period of time (usually about 20 years)'.[83] There are usually three criteria for a successful patent application: novelty, non-obviousness, and industrial application. Although there are potentially considerable economic gains available through patents, there are also some negative aspects for the applicants and the patent holders. These include the requirement that full disclosure about the invention is to be provided to the patent authority, the fact that a temporary monopoly is created, and that the application process can be time-consuming and expensive. Of even greater concern is the fact that at the end of the monopoly patent period the invention becomes part of the public domain. The limitations that patents pose in regard to communally held or selectively held TEK that is governed by customary law are clear. Similar constraints apply to petty patent and plant patent legal regimes.[84]

B *Traditional Knowledge Registries*

Another mechanism that has been discussed as having the potential for protecting TEK is the use of traditional knowledge registries. These are described as 'official collections of documentation that describe traditional knowledge'.[85] A register for traditional knowledge can be developed and maintained by an Indigenous community and kept only within the community, or it can be established as an external registry. If it is a community registry, then there is greater scope for the community to control all aspects of it. If a registry is public, then it may be used as a means of 'defensive disclosure against inappropriate patents lodged by people outside the community and as a cultural education and preservation mechanism'.[86] A disadvantage of public registries is the lack of control that communities would have regarding access to, and use of such knowledge when it becomes part of the public domain.

If a registry is private, then the knowledge contained within it is not in the public domain, and therefore this registry can be effective as part of a *sui generis* Indigenous intellectual property rights system. This type of registry may also offer some protection for trade secrets (under certain circumstances), promote cultural and historic preservation, and provide a basis for access and benefit-sharing

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82 Hansen and VanFleet, above n 11.
83 Hansen and VanFleet, above n 11, 9.
84 Hansen and VanFleet, above n 11, 12-13.
85 Hansen and VanFleet, above n 11, 15.
86 Hansen and VanFleet, above n 11, 16.

agreements. Private registers have been very important in native title claims and negotiated agreements, particularly in Canada. The disadvantages of these registries relate to defensive disclosure problems (in the absence of *sui generis* legislation enabling this), concerns about using this novel and modern form of preserving and promoting TEK, and the effect that this may have on Indigenous cultures. Discussions about the role of registers, including intellectual property considerations are rapidly evolving, as indicated for example in a recent report by the United Nations University's Institute of Advanced Studies.[87]

C *Trade Secrets*

Trade secrets 'protect undisclosed knowledge through secrecy and access agreements, which may also involve paying royalties to knowledge holders'.[88] Among the requirements for knowledge to be classified as trade secret are that the subject matter must possess some commercial value, and not be in the public domain.

Trade secrets are usually combined with contractual agreements, which remain enforceable even if the trade secret happens to enter the public domain. Trade secrets have little legal protection that can ensure the continuation of 'secrecy'. It is also difficult to protect them against misappropriation, with the exception of 'cases of breach of confidence and other acts contrary to honest commercial practice'.[89] If TEK, considered as a 'trade secret', leaks into the public domain, then it will become vulnerable to misuse by the wider public.

D *Trademarks and Geographical Indicators*

The Australian *Trade Marks Act* 1995 (Cth) defines a trade mark as a 'sign used, or intended to be used, to distinguish goods or services dealt with or provided in the course of trade by a person from goods or services so dealt with or provided by any other person'.[90] The main requirements for registering a product as a trademark is that is must be 'distinct', and that there should be no confusion as to the source of the product.

Trademarks have the capacity to be used to identify products based on traditional knowledge. Examples are 'wild harvest' bush tomatoes in Australia, and 'wild rice' in Canada. An advantage of using trademarks for registering products based on TEK is that this adds value to the original product, and companies that use this

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87 UNU-IAS, *The Role of Registers and Databases in the Protection of Traditional Knowledge: A Comparative Analysis* (2003).

88 Hansen and VanFleet, above n 11, 18.

89 Hansen and VanFleet, above n 11, 18, citing World Trade Organization Report, 'Trading into the Future: The Introduction to the WTO, Intellectual Property Protection and Enforcement', Geneva, WTO, August 2002.

90 *Trademark Act* 1995, s 17.

product under license ensure its authenticity.[91] One of the disadvantages with using trade marks in this way is that it cannot restrict the wider use of TEK, thus making this knowledge vulnerable to exploitation.

A geographical indicator is a way in which a product can be identified as having originated in a specific locality, where the particular qualities or characteristics of the product are attributable to its geographical location.[92]

Bordeaux wine from France, Parma Cheese from Italy, and Stilton Cheese from England are well-known examples of geographical indicators. A geographical indicator may provide limited protection for products that are based on TEK, that are identifiable by location. However, they do not provide protection for a product such as 'wild harvest' bush tomatoes, where the TEK associated with these is used over a wide area, and is not closely identified with one particular location or region. Geographical indicators also do not protect against the use and abuse of TEK, if a product using this knowledge does not involve a claim of a geographical name.

E *Prior Art and Defensive Disclosure*

When a patent office is determining whether or not a patent application is novel, it examines the prior art base (ie, the public domain). Some confusion is caused by different legal definitions of prior art. For example, under US patent law prior art must be in a printed publication in the US or a foreign country. However, the European patent system does not limit prior art solely to printed publications.[93]

Defensive disclosure refers to information and documentation made available to the public as prior art, in order to render any subsequent claims of invention or discovery ineligible for a patent. Indigenous peoples may find themselves in a difficult situation with regard to using this measure to protect their TEK. They often need secrecy to maintain the integrity of their knowledge systems and to observe their customary law. However, if they wish to use intellectual property law for profit-making objectives (to enable their communities to benefit, as well as governments and corporations), then they must keep their TEK out of the public domain. It is very difficult to prevent 'leakage', and much TEK is already in the public domain through academic and scientific publications. If TEK is used as the basis for a patent application by parties outside their nation or community, then the only viable form of protection may be defensive disclosure, used to place the information in the public domain.

F *Contracts*

Contracts are legally binding negotiated agreements between parties. Contracts can clarify, or extend existing policy and regulatory provisions. In this sense, they

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91 Hansen and VanFleet, above n 11, 20-21.
92 Hansen and VanFleet, above, n 11, 21.
93 Hansen and VanFleet, above n 11, 24.

constitute what is called 'private law making'. One of the real advantages of using contracts for Indigenous knowledge is the flexibility they offer, and their potential to reflect the real needs and aspirations of Indigenous peoples. However, this advantage can often be undermined by a lack of Indigenous peoples' bargaining power, resources and negotiation skills. They can be used to entrench and support measures for access to biological resources and TEK, and equitable benefit-sharing, and set the terms and conditions for these kinds of arrangements.[94] Examples of the ways in which contracts that have been used, and which have applicability to protecting TEK are:

- For confidentiality and non-disclosure agreements;
- Exclusive licenses;
- Non-exclusive licensing arrangement; and
- Material Transfer Agreements[95]

Contracts will continue to play a crucial role in the development of measures for protection, and sustainable use of traditional knowledge and practices, and to support Indigenous peoples' rights and interests in biodiversity. Contracts developed in these contexts may be established either independently, or in association with other regulatory and standard setting processes. WIPO has established a contracts database: (http://www.wipo.org/globalissues/databases/databases/contracts/).

XVIII ETHICAL ISSUES IN AUSTRALIAN BIODIVERSITY RESEARCH INVOLVING INDIGENOUS PEOPLES

There have recently been some activities both internationally and in Australia that have highlighted the wider context, and the challenges involved in recognising the fundamental human rights, the specific Indigenous rights, and needs of Indigenous peoples when undertaking biodiversity related research, programs and projects. These activities include developing protocols, guidelines, and codes of ethics for research involving Indigenous peoples. The development of effective documents of these kinds is a critical step towards better ethical standards

The World Conservation Union (IUCN) Environmental Law Commission's Specialist Group on Indigenous Peoples, and the Desert Knowledge Co-operative Research Centre (DK-CRC) in Australia, are both examples of organisations with an interest in activities that seek to explore better ways of recognising and protecting Indigenous peoples' rights and interests in biodiversity and traditional knowledge.[96] Among the projects funded and supported by DK-CRC are some aimed at developing protocols and guidelines for recognition of Aboriginal peoples' rights in their 'intellectual property' and TEK.

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94 Hansen and VanFleet, above n 11, 30.

95 Ibid.

96 For the IUCN see http://www.iucn.org/themes/law/cel03A.html; for the Desert Knowledge CRC, see www.desertknowledge.com.au.

The research and academic sector in Australia is increasingly seeking to engage with Indigenous peoples for a very wide range of projects and purposes. It is especially critical to ensure sound ethical approaches in these research engagement processes. The current ethical protocols and approval processes in most universities in Australia are derived from the area of health research.[97] The many decades of experience in this area provide some useful guidance in general terms, but this has proved inadequate as a basis for developing ethical cross-cultural research relating to biodiversity and sustainable livelihoods for Indigenous peoples.

The *Guidelines for Ethical Research in Indigenous Studies* developed by the Australian Institute of Aboriginal and Torres Strait Islanders Studies (AIATSIS) are very useful.[98] These are based on several years of consultation with Indigenous communities and researchers by the peak Indigenous research body in Australia. However, these guidelines have not kept pace with contemporary developments in the area of Indigenous and environmental rights under the CBD, and the international and national standard setting processes relating to intellectual and cultural property. The most significant inadequacy of the guidelines, relate to their lack of scope to provide appropriate guidance and standards in regard to research partnerships with Indigenous peoples for access and benefit sharing, and potential commercial benefits that may result from such arrangements. Any inadequacies in these guidelines are highlighted in the context of an increasing focus internationally on the development of measures for access and benefit-sharing (particularly in relation to genetic resources), recognition of TEK, and the advent of activities such as bioprospecting.

Taking these developments into account, the Research Office and the Vice Chancellor at Macquarie University were concerned that the general ethics approval process for university research had also failed to keep pace with them. As a consequence, they provided funding for a one-year project entitled *Development of Ethical Approaches and Protocols for Cross-Cultural Biodiversity Research and Benefit Sharing with Indigenous Peoples* (2004-2005). At the same time, colleagues at Curtin University in Western Australia were facing similar issues in their longer term research project (funded by the Desert Knowledge Cooperative Research Centre, or DK-CRC) known as the *Plants for People,* which involves Aboriginal peoples in Western Australia, South Australia and the Northern Territory.

The DK-CRC is a collaborative research program with 28 partners including universities, NGO's, Indigenous organisations, and government. It commenced its research program in 2002 ($90 million research over 7 years). A Management Board was established with 50% Aboriginal membership. An objective of DK-CRC

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97 See the 'Review of the National Statement on Ethical Conduct in Research Involving Humans- First Consultation Draft', National Health and Medical Research Council Australian Research Council Australian Vice Chancellor's Committee, December 2004; Also of use is the 'Values and Ethics: Guidelines for Ethical Conduct in Aboriginal and Torres Strait Islander Health Research', Endorsed by Council at its 148th Session on 5 June 2003.

98 AIATSIS, 'Guidelines for Ethical Research in Indigenous Studies' (2000).

programs is to ensure that they specifically benefit Indigenous futures and livelihoods. This has been a difficult undertaking at a time when the peak national elected Indigenous organisation, the Aboriginal and Torres Strait Islander Commission (ATSIC) has been dissolved, and its roles and functions have been 'mainstreamed' across the whole of the government. The mandate of the DK-CRC is to promote, support, and develop sustainable livelihoods for desert communities. This is especially important for Indigenous people. Aboriginal Australians own nearly half of the land in the central desert region of the Northern Territory in Australia, but many live in remote settlements of less than fifty people. Sustainable development opportunities are very limited in these arid lands, and many relate to servicing the communities, and to developing sound strategies for environmental management. Aboriginal communities and organisations have usually been operating in crisis mode with little opportunity to develop long term policy and research options, and sustainable Indigenous livelihoods based on them.

The DK-CRC has developed a draft *Indigenous Intellectual Property Protocol*, intended to guide research projects across the whole organisation. This protocol will be subject to review as projects and research develops. Some DK-CRC funded projects will, it is hoped, further inform this *Intellectual Property Protocol.* These have included a project conducted by the Central Land Council to develop a set of protocols and guidelines for protecting Aboriginal Traditional Owners' rights and interests in their traditional knowledge and intellectual property, within the permit system that regulates activities on their lands under the *Aboriginal Land Rights Act* 1976. (see below, in Appendix). Another such project is a Scoping Project on Indigenous Knowledge that was conducted through Charles Darwin University.

These projects have been informed, at least implicitly, by a discourse associated with the CBD, which has revealed the inextricable links between cultural biodiversity and natural ecosystems.[99] It has also become clear that participatory and ethical engagement with Indigenous and local communities, prior informed consent, issues related to access to resources and knowledge, and equitable benefit-sharing are interrelated processes. These interconnections have been well identified by the collective known as the Crucible Group – a group of like-minded people concerned about the impacts that decisions made about plant genetic resources might have on food security, development, and local communities. [100] This group argued that the underlying rationale for focussing on Indigenous and local knowledge is based on several factors, including:

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99 See for example Darrell Addison Posey, 'Introduction: Culture and Nature – The Inextricable Link' in Posey (ed), *The Cultural and Spiritual Values of Biodiversity* (1999), 3-18.

100 The Crucible II Group, 'Seeding Solutions- Options for National Laws Governing Access to and Control Over Genetic Resources and Biological Innovations', Ottawa, Rome, and Uppsala, International Development Research Centre, International Plant Genetic Research Institute, the International Plant Genetic Resources Institute, and the Dag Hammarskjold Foundation (2001) especially 45-55.

- The quest to achieve Indigenous and local peoples' human rights, and the goal of self-determination
- concerns over unfair takings in regard to Indigenous knowledge
- prevention of loss of knowledge
- the need to ensure biodiversity conservation.[101]

The literature has often distorted this reality by focussing on one or a few of these processes in isolation. The development of protocols should be directed towards establishing a relationship embodying:

- Respect
- Trust
- Equity
- Empowerment[102]

This approach is also evident in the *NHMRC Values and Ethics: Guidelines for Ethical Conduct in Aboriginal and Torres Strait Islander Health Research* 2003 with additional emphasis on the traditions of spirit and integrity, survival and protection and responsibility.[103]

Research on ethics and protocols in participation and engagement with Indigenous peoples is of increasing global, regional and national importance. The Indigenous rights provisions in the CBD have provided a catalyst for research and action along with the programs of international organisations such as the WIPO, the United Nations Conference on Trade and Development (UNCTAD), and the World Trade Organisation. Within these organisations, areas of concern include the protection of TEK, international trade laws, and Indigenous and local peoples' issues in the context of the rapid growth of new forms of intellectual property rights (TRIPS), issues related to prior informed consent, and equitable benefit sharing (particularly through contracts and national legislative frameworks) relating to the access, use and development of biological and genetic resources.

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101 Ibid 36.

102 See Alan R Emery, 'Guidelines: Integrating Indigenous Knowledge in Project Planning and Implementation' (Worksheets Checklist of Best Practices, International Labor Organization, The World Bank, The Canadian International Development Agency, and KIVU Nature Inc, Washington, 2000) 36.

103 'Values and Ethics: Guidelines for Ethical Conduct in Aboriginal and Torres Strait Islander Health Research', Endorsed by Council at its 148th Session on 5 June 2003, 8.

APPENDIX A

EXAMPLES OF PROTOCOLS FOR CONDUCTING RESEARCH AND OTHER ACTIVITIES IN THE CENTRAL LAND COUNCIL REGION OF AUSTRALIA

This General Research Protocol provides general guidance for proposals to conduct research on Aboriginal lands. It should also serve as a guide for those wishing to visit and/or work in Aboriginal communities and areas in the Central Land Council region.

This Protocol is designed to be consistent with the standards set out in the *AIATSIS Guidelines for Ethical Research in Indigenous Studies*. (This Protocol is supplemented by several more specific Protocols related to environmental and anthropological research)

CENTRAL LAND COUNCIL: GENERAL RESEARCH PROTOCOL

1 PRIOR INFORMED CONSENT

1.1 All applications for research activities must have obtained, through the CLC, the prior informed consent of the Traditional Owners.

1.2 To assist the CLC in seeking prior informed consent from Traditional Owners, applicants who wish to obtain a permit to enter Aboriginal land in order to conduct research should provide to the CLC full details of the proposed project, as detailed in the attached application.

2 PARTICIPATION BY ABORIGINAL PEOPLE

2.1 All applications should acknowledge Aboriginal peoples' customary laws, practices and local expertise. Aboriginal people should be provided with opportunities to participate at all stages of project, where appropriate.

2.2 Aboriginal participation may be facilitated by utilising existing Aboriginal organisations. For major projects, the establishment of an Aboriginal steering committee should also be considered.

2.3 The employment and training of Aboriginal people should be considered in all aspects of the work, including as guides, interpreters, and informants, as well as in the collection and analysis of research data.

3 BENEFITS FOR ABORIGINAL PEOPLE

3.1 Aboriginal people have the right to expect that research conducted on their land, and in their communities, will be of benefit to them. One way of ensuring this is by designing projects in conjunction with Aboriginal people.

3.2 Aboriginal people working on the project must be paid at fair and equitable rates.

3.3 In ensuring that the project benefits Aboriginal people, applicants should consider the range of ways in which such benefits may be provided (please see Introduction). These may include both monetary, and non-monetary benefits such as skills and training, and capacity building for communities. Project budgets should include provisions for any financial and other benefits.

3.4 Aboriginal people value opportunities to visit country. In order to generate goodwill, you may wish to consider including extended family on any trips onto country.

4 ABORIGINAL CULTURAL AND INTELLECTUAL PROPERTY RIGHTS

4.1 The term 'Aboriginal cultural and intellectual property' is a general term which includes all aspects of Aboriginal peoples' cultural products and expressions, as well as their intangible cultural knowledge. Aboriginal cultural and intellectual property means the totality of cultural heritage of Aboriginal people, including, without limitation, their intangible heritage (such as songs, dances, stories, ecological and cultural knowledge), and cultural property, which includes Aboriginal human remains, artifacts, and any other tangible cultural objects.

4.2 Applications for research projects must demonstrate a commitment to respect and uphold the rights of Aboriginal people, under their Traditional Law, to full ownership and control over any Indigenous cultural and intellectual property that is in existence prior to the conduct of the project. This includes rights in Indigenous cultural knowledge.

4.3 Applications must demonstrate a commitment to negotiating fully and equitably with Aboriginal people who are involved in the research, and in protecting the rights and interests of Aboriginal people in any intellectual property that results from the research.

5 ETHICS APPROVAL

5.1 Research proposals should have obtained clearance from an appropriate ethics committee before commencing the project. Applicants are encouraged to discuss their project with the Central Australian Ethics Committee.

6 METHODOLOGY

6.1.1 Applications shall provide full details of the methodology to be used in the proposed research work. This should include information about how the applicant will manage outcomes and data from the project in accordance with Aboriginal peoples' rights and interests. For example, how will the project provide for Aboriginal community retention of research data.

...

CENTRAL LAND COUNCIL: PROTOCOL FOR ENVIRONMENT AND CONSERVATION ACTIVITIES

This Protocol applies to proposals for environment, conservation and biodiversity related activities. It applies to the survey, screening and/or collection of any plant or animal matter, parts and/or derivatives of these, germplasm and other biological and genetic materials, and knowledge and practices relating to these.

The Protocol has regard to relevant international, national, regional, state, territory and local laws and standards. It is consistent with Australia's obligations under the United Nations Convention on Biological Diversity, the Commonwealth *Environment Protection and Biodiversity Conservation Act* 1999 (especially the Regulations for Access to Biological Resources), and relevant Northern Territory laws. It is also informed by standards set out in the AIATSIS *Guidelines for Ethical Research in Aboriginal Studies*, and the Australian Science, Technology and Engineering Council (ASTEC) – *National Principles and Guidelines for the Ethical Conduct of Research in Protected and Environmentally Sensitive Areas.*

1 PRIOR INFORMED CONSENT

1.1 All applications for environment and conservation activities must have obtained, through the CLC, the prior informed consent of the Traditional Owners.

1.2 To assist the CLC in seeking the prior informed consent of Traditional Owners, applicants should provide full details of the proposed project, as detailed in the attached application.

2 PARTICIPATION BY ABORIGINAL PEOPLE

2.1 All applications should acknowledge Aboriginal peoples' customary laws, practices and the expertise that Aboriginal people have in relation to biological resources. Aboriginal people should be provided with opportunities to participate at all stages of project, where appropriate.

2.2 Aboriginal participation may be facilitated by utilising existing Aboriginal organisations. For major projects, the establishment of an Aboriginal steering committee should also be considered.

2.3 The employment and training of Aboriginal people should be considered in all aspects of the environment and conservation work, including as advisors, rangers, botanists, guides, interpreters, and informants, as well as in the collection and analysis of research data.

3 BENEFITS FOR TRADITIONAL OWNERS AND OTHER ABORIGINAL PEOPLE

3.1 Aboriginal people have the right to expect that research conducted on their land, and in their communities, will be of benefit to them. One way of ensuring this is by designing projects in conjunction with Aboriginal people.

3.2 Aboriginal people working on the project must be paid at fair and equitable rates.

3.3 In ensuring that the project benefits Aboriginal people, applicants should consider the range of ways in which such benefits may be provided (please see Introduction). These may include both monetary, and non-monetary benefits such as skills and training, and capacity building for communities. Project budgets should include provisions for any financial and other benefits.

3.4 Applicants are encouraged to develop, in negotiation with Aboriginal communities, access and benefit sharing agreements that:

a) Recognise Aboriginal peoples' rights in their traditional knowledge relating to biological and genetic resources;

b) Are based on the principles of prior informed consent; and

c) Are negotiated on a basis of mutually agreed terms and conditions.

3.4 Aboriginal people value opportunities to visit country. In order to generate goodwill, you may wish to consider including extended family on any trips onto country.

4 ABORIGINAL CULTURAL AND INTELLECTUAL PROPERTY RIGHTS

4.1 The term 'Aboriginal cultural and intellectual property' is a general term which includes all aspects of Aboriginal peoples' cultural products and expressions, as well as their intangible cultural knowledge. Aboriginal cultural and intellectual property means the totality of cultural heritage of Aboriginal people, including, without limitation, their intangible heritage (such as songs, dances, stories, ecological and cultural knowledge), and cultural property, which includes Aboriginal human remains, artifacts, and any other tangible cultural objects.

4.2 Applications for environment and conservation projects must demonstrate a commitment to respect and uphold the rights of Aboriginal people, under Aboriginal Traditional Laws, to full ownership and control over Aboriginal cultural and intellectual property that is in existence prior to the conduct of the project.

4.3 Applications must demonstrate a commitment to negotiating fully and equitably with Traditional Owners and other Aboriginal people who are involved in the research, and in protecting the rights and interests of Traditional Owners and other Aboriginal people in any intellectual property that results from the research.

5 ETHICS APPROVAL

5.1 Research proposals should have obtained clearance from an appropriate ethics committee before commencing the project. Applicants are encouraged to discuss their project with the Central Australian Ethics Committee.

6 METHODOLOGY

6.1 Applications shall provide full details of the methodology to be used in the proposed research work. This should include information about how the applicant will manage outcomes and data from the project in accordance with Aboriginal peoples' rights and interests. For example, will the project provide for Aboriginal community retention of research data.

7 PHOTOGRAPHY, FILM, RECORDING AND MEDIA

7.1 Proposed projects that involve media activities must provide full details. For greater detail refer also to the User-Specific Protocol for Photography, Film, Recording and Media.

8 PUBLICATION AND OTHER DISSEMINATION OF RESEARCH OUTCOMES

8.1 Applicants should uphold the rights and interests of Aboriginal people regarding control over publication and other dissemination of research outcomes. Applications to conduct research activities on Aboriginal lands must provide full details in their application of any plans for publication and dissemination, where known. This should include details of any collaborative approaches to publication with Aboriginal people.

8.2 For any ethnobotanical publications and/or reports, applicants should provide for either:

a) Aboriginal people to retain copyright control over all material produced or collected; or
b) To negotiate with Aboriginal people to use, through license, all or some material produced or collected during, and resulting from the project.

8.3 Copies of all research results and outputs shall be made available, in an appropriately accessible form, to Traditional Owners and other Aboriginal people upon request.

9 PROFESSIONAL CREDENTIALS

9.1.1 Applicants who wish to conduct environment and conservation activities must be registered members of the relevant professional bodies.

...

These protocols are attached to the research permit process administered by Central Land Council. CLC is an Aboriginal body represented Aboriginal peoples from the Central Desert of the Northern territory. The following *Guidelines for Evaluating Permit Applications* provide some practical suggestions about Indigenous perspectives on ethical research:

CENTRAL LAND COUNCIL: GUIDELINES FOR EVALUATING PERMIT APPLICATION

1 Project Priority

1.1 What degree of urgency does the proposed project or activity have to the CLC, to Traditional Owners, and to other Aboriginal people?

1.2 In what, if any, ways are the proposed results/outcomes from the project or activity likely to enhance the capacity of Traditional Owners and other Aboriginal people to sustainably manage their lands and resources?

1.3 How is the proposed project and/or activity likely to strengthen Aboriginal peoples' capacity to exercise their rights in cultural and intellectual property, traditional knowledge, biological resources and environmental conservation and management?

1.4 In what, if any, ways does the proposed project/activity have the potential to enhance Aboriginal peoples' capacity to protect their sacred sites and areas, other significant sites, places and areas, cultural objects, and other elements of their cultural heritage?

1.5 What, if any regional, national, and/or international implications and/or relevance does the proposed activity/project have?

2 Benefits To Aboriginal People

2.1 Have Traditional Owners and other Aboriginal people indicated a wish to participate in the project?

2.2 If this is the case, in what ways does the project demonstrate a commitment to ensuring their full and equal participation throughout the duration of the project?

2.3 What actual benefits will accrue to Traditional Owners and other Aboriginal people during the course of the project (e.g capacity building initiatives, skills and training, wages paid for expertise, or research that accords with community needs and priorities).

3 Project Management

3.1 What strategies are in place for continuous monitoring, reporting, and financial management of the proposed project/activity? Is this necessary?

3.2 How does the proposed project intend to make reports on progress available and accessible to Traditional Owners and other Aboriginal people (e.g., by means of a Plain Language report; other formats?).

4 Project Outcomes

4.1 What strategies are in place for full reporting of project results and outcomes?

4.2 What strategies are in place for full disclosure of distribution, promotion and dissemination of project results?

CHAPTER 8

Bridging the Gap or Crossing a Bridge?

Indigenous Knowledge and the Language of Law and Policy

MICHAEL DAVIS

In December 2002, Australia's High Court dismissed an appeal made by the Yorta Yorta Aboriginal people of Northern Victoria and New South Wales against an earlier federal court determination that had decided against their claim for native title under the Native Title Act 1993. These Aboriginal peoples' struggle for recognition of their enduring connections with their ancestral lands under Australia's native title laws had, in this hearing, depended solely on the outcome of complex legal deliberations regarding notions of tradition and custom.

The Yorta Yorta peoples' claim had been dismissed by a 1998 federal court decision on the basis, the judges held, that the "tide of history had washed away" the peoples' connection to lands and waters. The court's argument was that the traditional laws acknowledged and customs observed by Yorta Yorta today were not the same as they had been in the period before Europeans arrived. Laws designed to provide for indigenous peoples' rights and interests in land or native title, or for their participation in managing or protecting environment and biodiversity, incorporate terms and concepts intended to denote aspects of Aboriginal culture relevant to the particular law in question. Examples include *tradition, traditional knowledge,* and *law and custom.* Yet such terms are employed in legal texts in ways that present idealized, or fictive, notions of Aboriginal culture and society. They are derived not from indigenous ways of understanding and articulating the world but, rather, from Western intellectual worldviews and presuppositions.

This chapter explores some issues that flow from these problems in cultural translation by first examining and then challenging the often-held notion of a divide between indigenous knowledge and "Western" science. Although the term *Western science* refers in this context to all modes of knowledge and practice that form dominant epistemologies, have claims to truth or authority, and are said to be "derived from facts," this notion of scientific modes of knowing is as problematic as the construct of indigenous knowledge that is the subject of this chapter (Chalmers 1999).[1]

The idea of a divide between indigenous knowledge and Western science has been founded on a view that Western science and allied systems of knowledge have formed a dominant discourse that has obliterated, marginalized, or assimilated local, traditional, and indigenous traditions and discourses. In reviewing this divide, this chapter argues for a greater emphasis on the complexity, diversity, and plurality of indigenous knowledge and draws on some examples from the Australian literature to illustrate. The recognition of the "plurality of cultural systems and the diversity of environmental knowledge within and between cultures" (Grim 2001, liii) might also help with incorporating understandings of the dynamism and innovative and adaptive qualities of indigenous cultures into the dominant discourses of law, policy, and administration.

When advocating plurality in discourses and epistemologies, some caution is needed to avoid representing indigenous knowledge in law and policy either (1) as a set of essentialized or homogeneous entities that satisfy some stereotypical Western image or (2) as being utterly incommensurable, or radically other in an extreme relativistic position that renders cultural comparison untenable or negates any possibility of finding common ground or integrating different knowledge systems.

Indigenous knowledge and Western science are best regarded as complementary, or parallel, systems of knowledge, rather than as fundamentally incommensurable. As Turnbull points out, all knowledge systems can be regarded as localized, situated ways of making coherent systems of meaning from an array of heterogeneous, disorganized, and fragmented elements. The differences that can be observed cross-culturally among and between knowledge systems arise from their different power structures, modes of social and political organization, and the particular ways in which they seek to produce coherent systems (Turnbull 2000; also see Agrawal 1999).

Creating the Divide

Indigenous knowledge has historically been regarded in the dominant, Western society as inferior and marginalized, and as a devalued form of knowledge. This lowly status of indigenous knowledge is a result of the growth of dominant forms of knowledge concomitant with indigenous peoples' historical experiences of colonization and oppression. This marginalizing of indigenous knowledge also has resulted from the particular bureaucratic-administrative machinery of government, founded on the creation of hierarchies that privilege those forms of knowledge, such as science and law, that claim to purvey some truth and authority.

As Dei et al. (2000, 4) note: "The negation, devaluation, and denial of indigenous knowledges, particularly those of women, is the result of deliberate practices of establishing hierarchies of knowledge. . . . Institutions are not unmarked spaces of thought and action. Knowledge forms are usually privileged to construct dominance, and can be 'fetishized' so as to produce and sustain power inequities." Vandana Shiva (in Dei et al. 2000, vii) similarly asserts that "Western systems of knowledge in agriculture and medicine were defined as the *only* scientific systems. Indigenous systems of knowledge were defined as inferior, and in fact as unscientific."

Not only were indigenous knowledge systems seen as inferior, they were also "systematically usurped and then destroyed in their own cultures by the colonizing West" (Shiva, in Dei et al. 2000, vii). Within this framework of "knowledge hierarchies" (Dei et al. 2000), local and indigenous knowledge systems are rendered invisible or devalued by the dominant culture. This view is also seen in some conventional development approaches, wherein indigenous and local peoples are "developed" by those doing the developing. As a result, dependent relations are established and maintained through which indigenous systems of knowledge are usurped by the dominant developed discourses (Agrawal 1995; Antweiler 1993; Hobart 1993).

Knowledge systems and epistemologies may often be seen as jostling in apparent adversity and competition rather than striving for integration and mutual interdependence. There are many examples of competing systems, which are typically played out in contexts of claims for recognition. One example in recent years was the Hindmarsh Island case, in which Aboriginal women's knowledge relating to a certain place in South Australia was subordinated and denigrated by those advocating and supporting the proposed development of a bridge from the mainland across to Hindmarsh Island (Simons 2003).

The Tyranny of Dualism and Categories

Indigenous knowledges are subordinated not only through the formation of hierarchies but also by the perpetuation of binary oppositions of such categories as us/them, self/other, or we/they. The perceived dichotomies between "traditional" and "modern," and between "indigenous" and "nonindigenous," are further consequences of this pervasive dualism.

These dualities extend most significantly into discussions on modes of thought. In the history of anthropology and philosophy, a strand of debate has centered on the notion that differences exist between modes of thought of non-Western, "primitive" others and Western, "rational" modes of thought (Goody 1977). Allied to this is the Enlightenment idea of progress and the historically rooted shift from superstition to magic to religion to science. Indigenous peoples in this schema possess what have been regarded as exemplars of so-called primitive or irrational modes of thought. One problem in this debate over rationality and modes of thought is the specific categories that have been used to define and describe the binary oppositions flowing from us/them (Goody 1977; Lévi-Strauss 1966). Goody has noted that "the trouble with the categories is that they are rooted in a we/they division which is both binary and ethnocentric, each of these features being limiting in their own way." He goes on to suggest that "we speak in terms of primitive and advanced, almost as if human minds themselves differed in their structure like machines of an earlier and later design" (1977, 1).

Understanding different societies and cultures in terms of contrasts and binary oppositions is deeply embedded in European thought, both historically and institutionally. There persists in many discourses about indigenous involvement in and approaches to land, resource, and environmental management a perceived divide between "folk" systems of ecological knowledge, considered intuitive and informal, and scientific approaches, defined as rational, rigorous, and technically accurate. An example of how this kind of opposition has influenced interpretation and analysis is the use of fire for land management in Australia's Northern Territory. Aboriginal people had traditionally used fire as a management tool for maintaining or increasing natural resources. Fire is also used by cattle tenders for pastoral purposes, and by non-Aboriginal national park rangers in park management. Although Aborigines have in recent years become more involved in park management and ranger activities, perceived differences still exist in the worldviews of Aborigines, cattle tenders, and park rangers regarding burning practices (Lewis 1989).

Beyond Categories

Some of the literature on humans' knowing and interacting with landscapes and environments has emphasized or reinforced a divide between indigenous knowledge and Western science founded on the oppositional categories of indigenous/Western or indigenous/nonindigenous. However, the category of indigenous knowledge is formed from a complex intertwining of knowledge traditions and practices through the engagement of indigenous and nonindigenous peoples. Far from being considered a unitary, homogeneous entity founded in some perceived idea of indigeneity, indigenous knowledge must instead be understood as contingent, historically situated, and particular to the specifics of locality, group dynamics, place, and time. The term *indigenous knowledge* needs to be interrogated in order to shift from positing it as a reified, essentialized construct suspended in space and devoid of context, toward a more nuanced view. Simultaneously, the presumed sharp distinction between indigenous knowledge and other knowledge systems also needs to be reconsidered.

What is usually termed *indigenous knowledge* comprises complex interactions and relationships among peoples (indigenous and nonindigenous), situations, experiences, observations, and practices. In what way might we define a point at which "traditional" knowledge differs from, say, "new," "adapted," or "modernized" knowledge? There may be a continuum or spectrum of systems of knowledge across time, space, and locality, thus rendering difficult or irrelevant any attempts to create artificial distinctions or dichotomies between "indigenous" knowledge, "traditional" knowledge, and "science" (Agrawal 1995).

Ellen and Harris (2000, 2) are among those who have critiqued the sharp distinction between "indigenous" and "nonindigenous" knowledge systems claiming that such a distinction "has many highly specific regional and historical connotations which are not always appropriate to other ethnographic contexts." In this view, creating these distinctions makes comparative work difficult.

The Same and Yet Different

Indigenous and scientific systems of knowledge and practice share some common characteristics yet also reveal some important differences. One study illustrates some contrasts between the knowledge systems, or epistemologies, of Aborigines and pastoralists in the context of land management in the Kowanyama River catchment in Far North Queensland. Here, Strang (1997)

has noted fundamentally different discourses on land and environment that appear to reflect contrasting worldviews. Discussing Aborigines' perceptions of and approaches to land management, she comments that "the most important point about Aboriginal land use is that economic interactions with country are never wholly divorced from social and spiritual interactions." She goes on to argue that "land provides a central medium through which all aspects of life are mediated, and economic considerations are merely part of an intimate, immediate, fundamentally holistic relationship" (p. 84).

Strang describes some stark differences between pastoralists' worldviews and those of Aboriginal peoples in this region:

> Aboriginal cosmology is typically presented as the foundation for a primarily mystical, spiritual interaction with the physical world, while in the European or white Australian cosmos, scientific rationalism and crass materialism are largely believed to have marginalized spiritual life.
>
> The Aboriginal groups and the pastoralists experience quite different kinds of physical and emotional interaction with the environment. The traditional Aboriginal economy demands intimate and highly detailed knowledge of the local ecology and geography, with an intense focus of attention on the indigenous flora and fauna. Being integrated with the spiritual and emotional aspects of Aboriginal life, it is part of a deep engagement with a particular landscape, encouraging a continual investment of value in the land. The interaction based on traditional activities—walking, fishing, collecting resources and so on—is a very immediate, tactile engagement, lending itself to qualitative and affective responses to the land. (Strang 1997, 237)

Highlighting the different ways in which pastoralists engage with the land and environment, Strang (1977, 280) observes that "the pastoralists are focused on the foreign elements they have imposed on the landscape: the Western technology, the infrastructure and the stock. Their attention is firmly engaged by, and therefore invested in, their economic activities. On a daily basis, their adversarial efforts to control the cattle and the land are largely mediated by technology, separating them from a more gentle, intimate interaction with the landscape."

Whereas Strang's study emphasizes difference and incommensurability, others stress integration and complementarity between knowledge systems. An example of this latter group is a comparative study of landscape classification

and ecological knowledge of Anangu Aboriginal people in Central Australia, and scientific ecological approaches to land management (Baker and Mutitjulu Community 1992; Reid et al. 1992). This study shows that two quite distinct systems of taxonomy and classification of the natural world can be worked together toward the common goal of sustainable land and environmental management. It illustrates the ways in which indigenous and scientific systems of knowledge can find common ground and can be regarded as complementary or parallel systems. This complementarity can be explored further by examining what characteristics are shared by indigenous and scientific—indeed, by all—systems of knowledge. Slikkerveer (1999, 169) points out that both indigenous and what he terms "global" knowledge systems "are alternative pathways in the human/scientific quest to come to terms with the universe, and are the result of the same process of creating order out of disorder."

At the heart of both indigenous/local and scientific/global knowledge systems is the practice of making observations about local phenomena and interpreting patterns and trends. All knowledge systems, in their applications and techniques, consist of classifying the world and creating typologies, rules, and methods for understanding. They are based on experimentation and innovation. The practices, the techniques, and the applications are to be seen as somewhat distinct to the knowledge itself. All knowledge, in this sense, is concerned with the task of making sense of the world around us and of adapting to changes in the world or adjusting the world to achieve a balance between societies and their environments. The common elements underpinning all knowledge systems have been explored in some detail by Turnbull, who argues that "there is not just one universal form of knowledge (Western science), but a variety of knowledges" (2000, 1). Turnbull demolishes the notion of a hegemonic, authoritative Western science, proposing instead that the production of all kinds of knowledge is a process of assembling a vast array of heterogeneous components (2000, 4). He suggests that "all knowledge traditions, including Western technoscience, can be compared as forms of local knowledge so that their differential power effects can be explained without privileging any of them epistemologically" (2000, 6). Thus it is—in Turnbull's scheme—the particularized, localized social and spatial settings that we must look to if we are to engage in a cross-cultural exploration of differences between and among different knowledge traditions.

Agrawal (1999, 177) supports the view that different knowledge traditions are best understood by examining their contexts. He argues that relations of

power are the critical factors to consider in different knowledge systems: "Most scholars have now come to accept that there are no simple or universal criteria that can be deployed to separate indigenous knowledge from western or scientific knowledge. Attempts to draw a line between scientific and indigenous knowledge on the basis of method, epistemology, context-dependence, or content, are intellectually barren and have produced little that is persuasive."

In considering the contextualized nature of knowledge systems, Agrawal argues that it is important to consider the social and political contexts of knowledge, and the relationships between power and practice, if the study of indigenous knowledge systems is to serve the interests of indigenous peoples themselves. Since these peoples are usually poor and marginalized, we must consider the problem in terms of how the "institutions and practices sustained by different forms of knowledge" contribute to their plight (Agrawal 1999, 178). The differences, therefore, between indigenous and scientific knowledge systems are to be found not as intrinsic properties of the systems themselves but, rather, in terms of how the systems are formed, practiced, and applied. It is in the social and political relations between and among knowledge holders and transmitters, in the distribution of power and authority, and—crucially—in the contexts in which these knowledge systems are formed, maintained, and presented that we might discern some comparative cross-cultural and cross-disciplinary distinctions as well as seek commonality.

Considering both the problem of comparative engagement between and among different knowledge systems and the need to find common ground, should the distinctive aspects of indigenous knowledge systems also be emphasized? If we are to highlight the distinctiveness of indigenous knowledge, one suggestion could be to highlight its "traditional" nature. Although, as this chapter discusses, using the term *tradition* in reference to indigenous knowledge is highly problematic, the Canadian-based indigenous organization Four Directions Council (cited in Posey 1999a, 4) makes a useful point about this notion of tradition: "What is 'traditional' about traditional knowledge is not its antiquity, but the way it is acquired and used. In other words, the social process of learning and sharing knowledge, which is unique to each indigenous culture, lies at the very heart of its 'traditionality.'"

Indigenous writer Laurie Anne Whitt (1999, 69) emphasizes the distinctly indigenous nature of indigenous knowledge by referring to its "intimate" relationship to land and to the natural world. Barsh (1999, 73), too, has proposed

the features he believes distinguish indigenous systems of knowledge. While regarding the "traditional ecological knowledge" of indigenous and tribal peoples as "scientific in that it is empirical, experimental and systematic," he suggests some important differences. He states that indigenous knowledge differs in two respects from Western science:

> First, knowledge is highly localized. Its focus is the complex web of relationships between humans, animals, plants, natural forces, spirits and landforms within a particular locality or territory. . . . Second, local knowledge has important social and legal dimensions. Every ecosystem is conceptualized as a web of social relationships between a specific group of people (family, clan or tribe) and the other species with which they share a particular place.

In sum, the most distinctive feature of indigenous knowledge that sets it apart from scientific and other systems of knowledge is its holism, the way it functions as a complex set of interrelationships among the physical world, the world of humans, the natural world, and the unseen world of ancestors and cosmology.

Beware the Noble Savage

A growing recognition of the value of indigenous knowledge (Brush and Stabinsky 1996) provides a useful and much needed counterpoint to earlier discourses that denigrated such knowledge systems. However, it also brings with it a risk of constructing indigenous peoples as environmentalists par excellence. These noble-savage ecological warriors become, in some discourses, the saviors of the planet, standing as powerful symbols for those who oppose globalization and unfettered development (Sackett 1991). Ellen and Harris (2000, 1) note that "most of us will also accept that the claims made for the environmental wisdom of native peoples have sometimes been misjudged and naïve, replacing denial with effusive blanket endorsement and presenting an 'ecological Eden' to counter some European or other exemplary 'world we have lost.'" To avoid proliferating this kind of unexamined, essentialized view of indigenous knowledge, we must strive to develop plurality wherein a space is created for juxtaposing different systems of knowledge and actions in structures of complementarity rather than of competition and adversity—one that might also lead to a greater understanding of the complexity of indigenous knowledge systems and practices.

More informed, systematic understandings of indigenous knowledge, taxonomies, categories, and concepts may be gained through such rigorous, applied disciplines as anthropology, geography, and history. An example of such an endeavor is geographer Richard Baker's (1999) study of the Yanyuwa Aboriginal people around Borroloola in Australia's Northern Territory. Baker writes: "It is important to try and see Yanyuwa country through Yanyuwa eyes." He explains that "what can seem to European imagination to be an unproductive, strange and at times frightening landscape, is the known and bountiful home of the Yanyuwa" (1999, 45). Baker's study shows these Aboriginal peoples' environmental knowledge to be dynamic and responsive, changing and adapting over thousands of years through constant observation, experimentation, and transmission across the generations. Characterizing this type of innovative knowledge also helps refute the notion that what is often called "traditional" knowledge is fixed and immutable (Baker 1999, 45–50).

A better cross-cultural understanding of systems of thought and practice can also powerfully challenge the authority and hegemony of the dominant modes of thought, as Overing argues. She states (1985, 17): "An excellent antidote to the power of our Western hierarchical oppositions and the theory of knowledge upon which they ride is an acquaintance with other theories of knowledge and ontologies." Clearly, a need exists for greater understanding of other systems of knowledge and translation across categories and boundaries. However, this understanding should be approached with some degree of caution. Not all indigenous knowledge can or should be revealed to those outside the culture, or even to certain persons within the culture. It may be, in this sense, conceivable to appreciate the complexity and richness of a particular system of knowledge across cultural boundaries without having access to the details of that knowledge tradition. There is much that must remain confidential, and respect for the internal rules governing the management of knowledge in indigenous communities is an essential part of cross-cultural understanding.

Defining Indigenous Knowledge

Indigenous writer Winona LaDuke (1994, 127) has written that "traditional ecological knowledge is the culturally and spiritually based way in which indigenous peoples relate to their ecosystems." She states that "this knowledge is founded on spiritual-cultural instructions from 'time immemorial' and on

generations of careful observation within an ecosystem of continuous residence." Many writers have grappled with the terminology and definitions of "indigenous traditional knowledge."

Acknowledging the difficulties of defining indigenous knowledge, Howden (2001, 60) suggests the following working definition: "[Indigenous knowledge] is a living system of information management which has its roots in ancient traditions. It relates to culture and artistic expression and to physical survival and environmental management. It controls individual behavior, as it does community conduct. In short, it is a concept that essentially defies description in Western terms, but which lies at the heart of Indigenous society."

In this view, the problem in understanding indigenous knowledge within Western discourses lies in the kind of categorization that these discourses use to separate such categories as "law," "culture," "heritage," and "religion" (as discussed above in terms of the Western preoccupation with hierarchies of knowledge). Howden (2001, 62) writes: "Indigenous knowledge systems are better understood as practical, personal and contextual units which cannot be detached from an individual, their community, or the environment (both physical and spiritual)."

Working definitions of indigenous or "traditional" knowledge have also been proposed by others, including Davis (1999, 1), who bases such a definition on certain identifiable characteristics said to be common to all types of indigenous knowledge. These include the following:

- The holding of communal rights and interests in knowledge
- A close interdependence among knowledge, land, and spirituality
- The passing down of knowledge through generations
- Oral exchange of knowledge, innovation, and practices according to customary rules and principles
- The existence of rules regarding secrecy and sacredness that govern the management of knowledge.

Although some analytical use lies in formulating a working definition of indigenous knowledge, the risk also exists that such defining and classifying returns to the very problem argued against in this chapter: the reifying and essentializing of indigenous categories and concepts. Formulaic definitions, once established in the literature, become vulnerable to appropriation by dominant discourses, thus perpetuating the very problem we address here. Another concern with definitions

revolves around who is doing the defining and for what purposes. Finally, the formation of definitions places at risk the possibility of recognizing the diversity and plurality of indigenous knowledge. As Dei et al. (2000, 4) have explained this plurality: "All knowledges exist in relation to specific times and places. Consequently, indigenous knowledges speak to questions about location, politics, identity, and culture, and about the history of peoples and their lands." Is it possible then to represent such fluidity within a single definition? And even more important, what purpose would such definitions have and for whom?

Valuing Indigenous Knowledge

Indigenous knowledge has often been undervalued, or perceived to be of less worth than other forms of knowledge. This undervaluing has been discussed in the context of development. As Chambers and Richards (1995, xiii) point out: "In the past, indigenous knowledge was widely regarded among development professionals as an academic, if not dilettantish, concern limited largely to social anthropologists. Much of it was seen as superstition. In the dominant model of development, useful knowledge was only generated in central places—in universities, on research stations, in laboratories, then to be transferred to ignorant peasants and other poor people."

However, an increasing body of literature is recognizing the intrinsic value of indigenous knowledge systems and of the benefits of harnessing these systems toward sustainable development goals (Agrawal 1995).

Plurality, Complexity, and Understanding

Recognizing the value of indigenous systems of knowledge is a critical step toward greater appreciation of the plurality between and among different traditions. An appreciation of plurality rests on developing a sound comparative understanding across and within different cultural systems. Shiva (2000, viii) advocates a plural approach to knowledge systems, arguing:

> It is now generally recognized that the chemical route to strengthening agriculture and health care has failed, and must be abandoned. This provides us with an opportunity to re-evaluate indigenous knowledge systems and to move away from the false hierarchy of knowledge

> systems back toward a plurality. The pluralistic approach to knowledge systems requires us to respect different such systems—to embrace their own logic and their own epistemological foundations.

She elaborates (2000, viii–ix):

> It also requires us to accept that *one* system (i.e., the Western system) need not and must not serve as the scientific benchmark for all systems, and that diverse systems need not be reduced to the language and logic of Western knowledge systems.

If this plurality and complexity are better understood and respected, bridging the gap between different knowledge systems is more likely to occur.

Crossing the Divide

The divide—imagined, perceived, or invented—between indigenous and non-indigenous knowledge traditions can be crossed by considering different ways of thinking, talking, and writing about environmentally based practices. One such approach is "caring for country," a phrase that has been used to describe specific nurturing strategies and practices that "promote the well-being of particular types of ecosystems" (Rose 1996, 63). For Aboriginal people, caring for country might be considered a way of attaining a balance among environmental consciousness, pragmatic approaches to sustaining livelihoods, and spiritual or cosmological perspectives on food, living things, and being in the world.

However, the expression can also suggest a more thoughtful or considered way by which humans generally and collectively might approach the maintenance of the land and environment. In this way, a notion of "care" can be deployed as a metaphor for a regime of intercultural environmental ethics, practices, and epistemologies that are not derived from or dependent on specific historically or culturally based techniques and technologies. By promoting an "Aboriginal land ethic" (Rose 1988) and, more broadly, an "ecological ethic," it is possible to transcend divisive, conflict-based approaches to the environment and develop "attitudes of care, concern, respect, responsibility and perhaps awe for the value of all living things which compose the larger web of life" (Tully 2001, 150). The working together of multiple epistemologies—indigenous, "Western," scientific, and others—is central to such an approach.

The divide between so-called Western rational, instrumental, scientific

discourses and actions and indigenous epistemologies has been based on a perceived dichotomy between the scientific approach—with its emphasis on pragmatic, rational, and logical actions founded in measurement, accuracy, and technology—and indigenous approaches, thought to be more integrative and to juxtapose the physical and the pragmatic with the spiritual and the religious. However, if we focus not on imposed presuppositions about an indigenous knowledge–Western science divide but, rather, on collective approaches to caring for, nurturing, and maintaining land and ecosystems, then we may be able to integrate or harmonize different traditions and epistemologies. In Rose's view, good ecological management is achieved by working together different ways of "caring for" or nurturing country, such as meshing the "conventional" fire management regimes employed by rangers with the systems used by Aboriginal people. In this way, she proposes, "the congruence of two knowledge systems . . . offers models for how ecological knowledge more generally can be managed on the continent, and for how Indigenous and settler Australians can share in the work of life" (1996, 63; see also Rose 2004). An appreciation and incorporation of culturally different concepts and categories when forming laws and policies can provide the grounds for implementing the policies more ethically.

Translating Concepts: Tradition and Custom

Translating concepts and categories between different cultural systems requires reexamining and rethinking some key concepts of law, policy, and administration. One such concept is tradition, which recurs often in discourses on native title and heritage in Australia. As anthropologist Peter Sutton (2003, xviii) observes: "The focus of native title in Australia is on the translation of customary and traditional rights in country into legal "rights and interests.'" The concept of tradition as articulated in the legal arguments is rooted in Enlightenment ideas of progress and finds expression in a traditional/modern dichotomy. This historically situated concept of tradition within discourses of modernity further complicates the position of indigenous peoples as exemplars of tradition. In this sense, "tradition" is often regarded as some imagined construct that posits an "authentic" or "truthful" set of beliefs, values, customs, and practices, rooted in antiquity and reinforced by ancient and enduring mythic charters. This "tradition" predates modernity or rests in opposition to it.

In the history of anthropological and ethnographic work in Australia and

elsewhere, as well as in the forming and implementing of law and policy for indigenous peoples, there has been a tendency to search for or construct some perceived intangible, residual, and elusive "traditional culture" that is thought to underlie contemporary indigenous lives (Povinelli 2001). However, in the present argument concerning the dissolving of boundaries between "indigenous" and "Western" knowledges, it is more productive to posit a greater complexity in the relationships between "tradition" and "modernity." The tradition/modernity boundary can be blurred by adopting a view of "traditional culture" not as some immutable, fixed set of customs and practices but, rather, as a more malleable entity. Swain (1993, 178) provides a useful guide to this kind of approach: "The 'traditional Aborigine' is an academic fiction. We are dealing with an inherently dynamic ontological fabric, constantly being made relevant to an ever-changing world."

Traditions, argues Swain, are "entities which are forever becoming" (1993, 279). By taking this more pluralistic, dynamic understanding of tradition and extending it to suggest a multiplicity of traditions sharing a mutually compatible space, the traditional/modern dichotomy begins to fade. Instead, following Muecke (2004), there is a constant movement between ancient and modern wherein, if we equate the ancient with that which is "traditional," the ancient can be said to be always already present within the modern. If the concepts of "tradition" and "traditional culture" are deconstructed in this way, what then of "modernity"? Rather than positing a unitary or homogeneous modernity, which can be "understood as an attitude of questioning the present," Gaonkar (2001, 13–14) suggests it is useful to "think in terms of alternative modernities." Establishing a field containing a multiplicity of traditions and modernities creates a space wherein it becomes possible to reformulate relationships between and among different knowledge traditions.

Dissolving the binary opposition of tradition/modernity exposes the many levels of meanings, values, and contexts within which concepts such as "tradition" may be reexamined. The current use of terms and categories in legal, policy, and administrative discourses and practices has little to do with the historically, socially, and culturally situated actualities of indigenous communities. Such uses are generally divorced from the adaptive, dynamic processes of cultural systems in indigenous societies and reflect more the ideologies and presuppositions of the dominant legal and political machinery. The role of disciplines such as anthropology, grounded in field

observation and close engagement with indigenous communities, is important to consider here, as such disciplines might provide a more nuanced and complex understanding of indigenous cultural systems (see Brush 1993; Davis 2001; Smith 2003).

Conclusion

This chapter has argued that although there may be innate, fundamental, a priori principles underlying all systems of knowledge and epistemology, the application and practices stemming from these systems differ across, between, and within cultures. In other words, common principles or core elements are perceived and sensed differently by different cultures, which then construct their own classifications and taxonomies to describe the environment in ways that accord with their cultural systems. Dominant legal and sociopolitical systems delimit and bound indigenous cultural and epistemological systems in artificially constructed categories and concepts that have more reference to bureaucratization and program management than to specific, localized, and particularized cultural knowledge and epistemological systems.

While national policies and legislation serve the interests of the nation-state by legitimizing its dominance over marginalized and minority peoples through the use of essentializing language, the potential for engagement with indigenous forms of knowledge and practice also occasionally arises. Despite the totalizing tendencies of national discourse regarding indigenous epistemologies, there nonetheless remains the scope for a deeper, more engaged understanding of the complexities, malleability, and adaptability of indigenous knowledge systems within national policy and legislative discourse, as well as for a plural approach to help different traditions and epistemologies work together. This may be achieved by creating a space within national laws and policies for inscribing indigenous forms of cultural practice as well as by using interdisciplinary and multifaceted approaches to legislative and policy development. Such approaches can benefit from applied disciplines, such as anthropology and cultural criticism, that attend to the complexities of indigenous cultural systems. They will also be greatly enhanced by a commitment to engagement with indigenous peoples wherein these peoples can participate in, and contribute meaningfully to, policy and legislative development.

References

Agrawal, A. 1995. Dismantling the divide between indigenous and scientific knowledge. *Development and Change* 26:413–39.

———. 1999. On power and indigenous knowledge. In *Cultural and spiritual values of biodiversity,* ed. and comp. D. A. Posey, 177–80. London: United Nations Environment Programme/Intermediate Technology Publications.

Antweiler, C. 1993. Local knowledge and local knowing: An anthropological analysis of contested "cultural products" in the context of development. *Anthropos* 93:469–94.

Baker, L. M., and Mutitjulu Community. 1992. Comparing two views of the landscape: Aboriginal traditional ecological knowledge and modern scientific knowledge. *Rangeland Journal* 14 (2): 174–89.

Baker, R. 1999. *Land is life: From bush to town, the story of the Yanyuwa people.* St. Leonards, New South Wales: Allen and Unwin.

Barsh, R. L. 1999. Indigenous knowledge and biodiversity. In *Cultural and spiritual values of biodiversity,* ed. and comp. D. A. Posey, 73–76. London: United Nations Environment Programme/Intermediate Technology Publications.

Brush, S. B. 1993. Indigenous knowledge of biological resources and intellectual property rights: The role of anthropology. *American Anthropologist* 95 (3): 653–71.

Brush, S. B., and D. Stabinsky. 1996. *Valuing local knowledge: Indigenous people and intellectual property rights.* Washington, DC: Island Press.

Chalmers, A. F. 1999. *What is this thing called science?* 3rd ed. St. Lucia: Queensland University Press.

Chambers, R., and P. Richards. 1995. Preface. In *The cultural dimension of development: Indigenous knowledge systems,* ed. D. M. Warren, L. Jan Slikkerveer, and D. Brokensha, xiii–xiv. London: Intermediate Technology Publications.

Davis, M. 1999. Indigenous rights in traditional knowledge and biodiversity: Approaches to protection. *Australian Indigenous Law Reporter* 4 (4): 1–32.

———. 2001. Law, anthropology, and the recognition of indigenous cultural systems. In *Law and anthropology: International yearbook for legal anthropology,* vol. 2, ed. R. Kuppe and R. Potz, 298–320. The Hague: Martinus Nijhoff Publishers.

Dei, G. J. Sefa, B. L. Hall, and D. Goldin Rosenberg, eds. 2000. *Indigenous knowledges in global contexts: Multiple readings of our world.* Toronto: University of Toronto Press.

Ellen, R., and H. Harris. 2000. Introduction. In *Indigenous environmental knowledge and its transformations: Critical anthropological perspectives,* ed. R. Ellen, P. Parkes, and A. Bicker, 1–29. Amsterdam: Harwood Academic.

Gaonkar, D. P. 2001. On alternative modernities. In *Alternative modernities,* ed. D. P. Gaonkar, 1–23. Durham, NC: Duke University Press.

Goody, J. 1977. *The domestication of the savage mind.* Cambridge: Cambridge University Press.

Grim, J. A., ed. 2001. *Indigenous traditions and ecology: The interbeing of cosmology and community.* Cambridge, MA: Harvard Press for the Center for the Study of World Religions.

Hobart, M., ed. 1993. *An anthropological critique of development: The growth of ignorance.* London: Routledge.

Howden, K. 2001. Indigenous traditional knowledge and native title. *University of New South Wales Law Journal* 24 (1): 60–84.

LaDuke, W. 1994. Traditional ecological knowledge and environmental futures. *Colorado Journal of International Environmental Law and Policy* 5 (1, Winter): 127–48.

Lévi-Strauss, C. 1966. *The savage mind.* Chicago: University of Chicago Press.

Lewis, H. T. 1989. Ecological and technological knowledge of fire: Aborigines versus park rangers in Northern Australia. *American Anthropologist* 91 (4, December): 940–61.

Muecke, S. 2004. *Ancient and modern: Time, culture and indigenous philosophy.* Sydney: University of New South Wales Press.

Overing, J. 1985. Introduction. In *Reason and morality,* ed. J. Overing, 1–28. London: Tavistock Publications.

Posey, D. A. 1999a. Introduction: Culture and nature—the inextricable link. In *Cultural and spiritual values of biodiversity,* ed. and comp. D. A. Posey, 3–16. London: United Nations Environment Programme/Intermediate Technology Publications.

———, ed. and comp. 1999b. *Cultural and spiritual values of biodiversity.* London: United Nations Environment Programme/Intermediate Technology Publications.

Povinelli, E. A. 2001. Settler modernity and the quest for an indigenous tradition. In *Alternative modernities,* ed. D. P. Gaonkar, 24–57. Durham, NC: Duke University Press.

Reid, J., L. Baker, S. R. Morton, and Mutitjulu Community. 1992. Traditional knowledge + ecological survey = better land management. *Search* 23 (8): 249–51.

Rose, D. B. 1988. Exploring an Aboriginal land ethic. *Meanjin* 3:378–87.

———. 1996. *Nourishing terrains: Australian indigenous views of landscape and wilderness.* Canberra: Australian Heritage Commission.

———. 2004. *Reports from a wild country: Ethics for decolonisation.* Sydney: University of New South Wales Press.

Sackett, L. 1991. Promoting primitivism: Conservationist depictions of Aboriginal Australians. *Australian Journal of Anthropology* 2 (2): 233–47.

Shiva, V. 2000. Foreword: Cultural diversity and the politics of knowledge. In *Indigenous knowledges in global contexts: Multiple readings of our world,* ed. G. Sefa Dei, B. L. Hall, and D. Goldin Rosenberg, vii–x. Toronto: University of Toronto Press.

Simons, M. 2003. *The meeting of the waters: The Hindmarsh Island affair.* Sydney: Hodder.

Slikkerveer, L. J. 1999. Ethnoscience, "TEK" and its application to conservation. In *Cultural and spiritual values of biodiversity,* ed. and comp. D. Posey, 169–259. London: United Nations Environment Programme/Intermediate Technology Publications.

Smith, B. R. 2003. "All been washed away now": Tradition, change and indigenous knowledge in a Queensland Aboriginal land claim. In *Negotiating local knowledge: Power and identity in development,* ed. J. Pottier, A. Bicker, and P. Sillitoe, 121–54. London: Pluto.

Strang, V. 1997. *Uncommon ground: Cultural landscapes and environmental values.* Oxford: Berg.

Sutton, P. 2003. *Native title in Australia: An ethnographic perspective.* Port Melbourne, Victoria: Cambridge University Press.

Swain, T. 1993. *A place for strangers: Towards a history of Australian Aboriginal being.* Cambridge: Cambridge University Press.

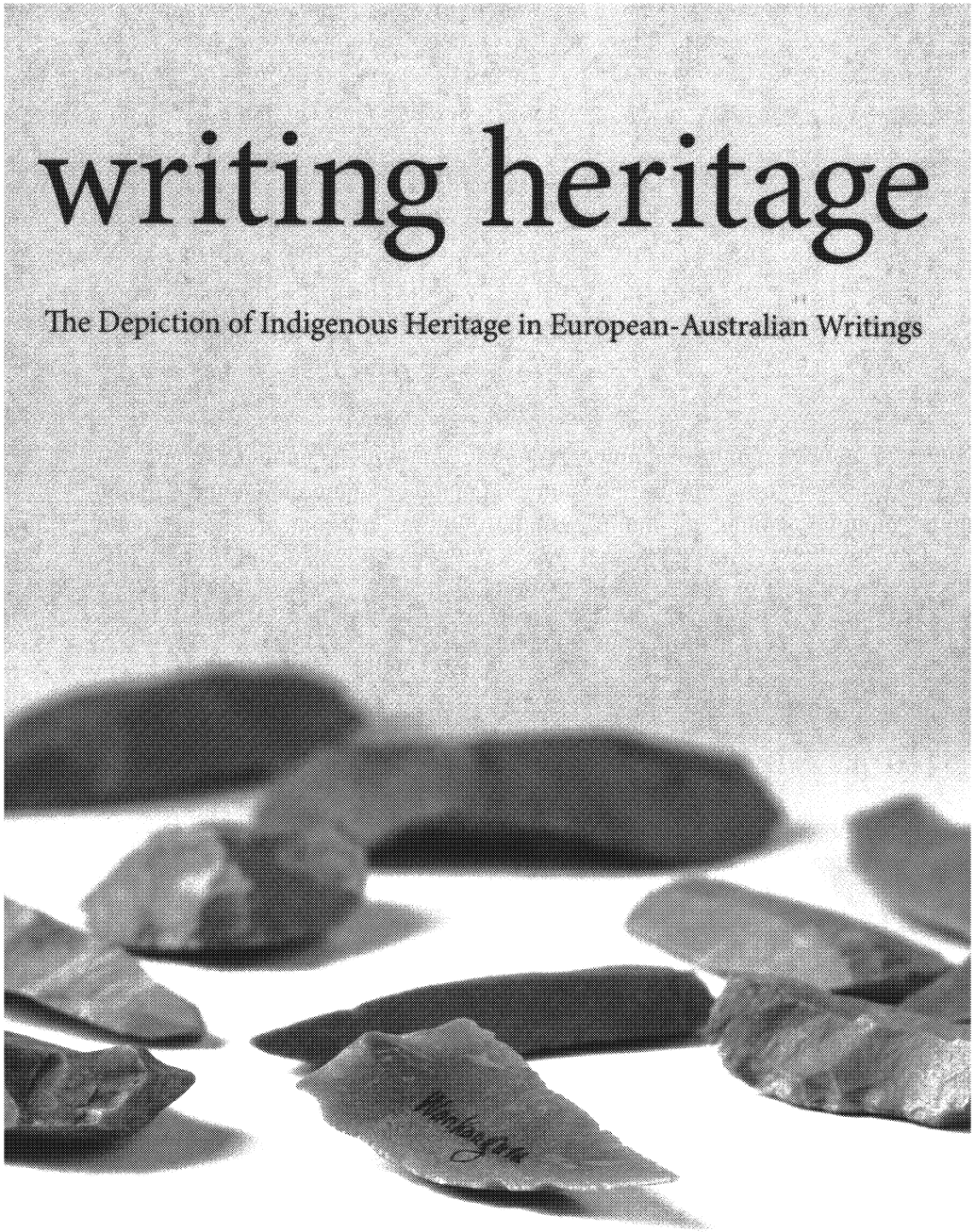
Tully, J. 2001. An ecological ethics for the present: Three approaches to the central question. In *Governing for the environment: Global problems, ethics and democracy,* ed. B. Gleeson and N. Low, 147–64. Basingstoke, England: Palgrave.

Turnbull, D. 2000. *Masons, tricksters and cartographers: Comparative studies in the sociology of scientific and indigenous knowledge.* Amsterdam: Harwood Academic.

Whitt, L. A. 1999. Metaphor and power in indigenous and Western knowledge systems. In *Cultural and spiritual values of biodiversity,* ed. and comp. D. A. Posey, 69–72. London: United Nations Environment Programme/Intermediate Technology Publications.

writing heritage

The Depiction of Indigenous Heritage in European-Australian Writings



Michael Davis

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&
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Readers should be aware that this publication contains names and images of people now deceased. Wherever possible, approval for the use of such material was sought from the community concerned.

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Contents

Foreword

All peoples have a fundamental right to the protection of their heritage. This right includes Indigenous peoples. Our heritage is central to our capacity to maintain our culture and identity. It flows from our status as first peoples. Laws and policies in Australia have had mixed results in recognising and protecting our Indigenous heritage. Generally, they have dealt with the visible manifestations and expressions of culture rather than the whole body of our heritage, including both the visible, and the intangible cultural knowledge. Indigenous heritage must be recognised and protected in both its tangible and intangible aspects.

In order to develop effective approaches for the recognition and protection of Indigenous heritage, we need to understand its history in the consciousness of Europeans. This book helps us to do this. It reviews some of the ways in which non-Indigenous Australians, and some early visitors to this country, described our heritage. By drawing on writings by a variety of observers, travellers, collectors, administrators, ethnologists and other Europeans since the middle of the nineteenth century, it charts the range of perceptions held by these people. Whether these writers were commenting on stone tools, bark paintings or ceremonial performances, most did not see these things or activities as being interconnected, as parts of a whole, living cultural system. It was only by about the 1950s that some began to realise this vital point – that the tangible aspects of culture were intimately connected to sacred sites and the spiritual elements of Indigenous culture. What is also all too apparent, as the history presented in this book shows, is that many Europeans – particularly administrators and politicians – were not cognisant of the fact that

Indigenous peoples themselves should have control over decision-making with regard to their Indigenous heritage.

Writing Heritage presents the views of non-Indigenous people who wrote about Indigenous heritage in their own words. This allows us to examine in a historical context the kind of language used by non-Indigenous people to denote aspects of this heritage. An understanding of this perspective will, I am sure, provide an important reference point for those who are concerned today with policy formulation, legislation, and the protection and management of Indigenous heritage.

Professor Mick Dodson AM
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Prologue

There is growing interest in the ways in which museum collections have been formed, in the people who made these collections, and in the journeys the objects have taken in assuming their present status as museum collections.

The formation of collections of Indigenous cultural objects has been of particular interest, partly as a result of the major transformations taking place in the role of museums, and in their new approaches to the collection, display and interpretation of Indigenous cultures.

The National Museum of Australia holds many important ethnographic collections, acquired over the decades by a diverse range of individuals who together helped shape and influence the history of anthropology and Indigenous studies in Australia. These collections comprise an important component of the nation's heritage; they also remain a vital part of the cultural heritage of Indigenous Australians. It is because of the Museum's role in communicating and in being a custodian of Indigenous heritage that we are pleased to be associated with the publication of this timely book, *Writing Heritage*.

Writing Heritage explores in narrative form, using the words of the individuals themselves, how non-Indigenous Australians and occasional visitors to Australia portrayed the various facets of Indigenous heritage that they encountered, observed, recorded or collected.

The many themes in *Writing Heritage* include a critique of the notion of authenticity – the idea that there was an authentic, or genuine, Aboriginal culture and heritage. The book also explores

ways of collecting, and the various priorities that individual collectors and their correspondents gave to the form, function, use and meaning of Aboriginal cultural objects.

Importantly, *Writing Heritage* presents a fresh perspective on the making of Indigenous heritage, and one that will contribute to an understanding of the role of individuals, museums, heritage institutions and others in the interpretation and representation of that heritage.

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Michael Davis
Canberra, August 2006

Introduction

> Bones, stone artifacts, and wooden implements will remain in our museums for ever, but the habits, laws, beliefs and legends are doomed to rapid extinction.[1]

The ethnologist and administrator Herbert Basedow wrote this in his 1925 book *The Australian Aboriginal*. Basedow's gloomy opinion epitomised much white Australian thinking about Aboriginal culture for many decades. His remark also highlights an important theme of this book. That is, that what is today called 'Indigenous heritage' was often thought of by outsiders – by people who are not Indigenous and therefore cannot be said to have an insider's view – as comprising essentially the *physical* aspects of Indigenous culture, the 'bones, stone artifacts, and wooden implements' of Basedow's list. To Indigenous people, however, their heritage is also the 'habits, laws, beliefs and legends', and much more besides. It is this fragmentation of Indigenous cultural heritage that underpins much of the way in which non-Indigenous Australians perceived it.

European-Australians tend to regard Indigenous heritage in terms of its particular elements, rather than as a whole body of culture. Observers, travellers, ethnologists, administrators and collectors were often fascinated, puzzled, concerned and even repelled by aspects of Indigenous culture. Most often, they focused on what was visible, especially material culture such as stone and wooden tools and implements, bark and rock paintings, but also public displays of ceremony. Often, especially in later decades, 'Indigenous heritage' was defined in contexts of adversity or conflict, or through contests over land, sites or objects. Eroded rock carvings caught the

attention of observers, who called for their preservation. Or significant sites entered the public imagination as contested domains, as arenas for competing claims. Even today, legislation and policy, and the administration and management of Indigenous heritage, commonly break this heritage up into discrete elements.

I have long been interested in the concept of heritage, although I did not necessarily articulate it as heritage until my adult working life. I tended to see it more in terms of some kind of unknown, nostalgic past. I recall that during my childhood years in England I had a strong sense of wonder at a past that seemed to be so powerfully imbued in the landscape of rural Kent, where I lived. I still retain fond memories of wandering through London's museums, enthralled at the seemingly endless displays of objects before me. I also recall my delight at finding fossils, coins, and even a small bronze Greco-Roman statue in the soil, chalk valleys and woodlands that surrounded our village. This euphoria of discovery was almost matched by a vague reflection on the mystery of these objects. Where had they come from? Who had made them? Why were they there? These objects, with all their associated memories, nostalgia and entangled histories now lie scattered around my house in Canberra, mute witnesses to some romantic notion of an imagined past.

My interest in heritage was later developed through my work in Australia in policy formulation for the recognition and protection of Indigenous heritage. That work stimulated my interest in exploring how non-Indigenous Australians have written about Indigenous heritage over time. In surveying these writings, from the past one hundred years and more, I have pondered the ways in which people responded to, described or engaged with that concept we now call 'Indigenous heritage'.

Although the term 'Indigenous heritage' is commonly used in laws, policy documents and planning and administrative contexts, in practice it and its underlying concept remain subject to considerable

debate and speculation over meaning, validity and viability. For those European-Australians who described the material products of Indigenous societies and ceremonies, songs and dances, the term was rarely if ever used. Rather, they described the various aspects of the culture that they saw, recorded and collected in terms of separate entities; to them this was not 'heritage', but 'stone tools', 'implements', 'bark paintings' and so on. If collective terms were used, these were 'relics', 'curios' or 'monuments' – terms that implied a distanced curiosity about matters that were thought to belong to the world of science and empire, rather than to living Indigenous cultures.

Throughout this narrative I have used the terms 'European-Australian' or 'European' to denote 'non-Indigenous' people. Although 'Aboriginal' and 'Indigenous' are used interchangeably, and implicitly include Torres Strait Islanders as well as Australian Aboriginal peoples, the diversity of Aboriginal peoples and cultures is acknowledged, as is the distinctiveness of Torres Strait Islanders.

My broad argument is that the concept of an Indigenous heritage was fragmented by those who observed, collected or variously managed it in order to render it amenable to European-Australian law, policy and administration. My aim in this book is not to discuss Indigenous cultural heritage as such, nor to describe a history of heritage protection; rather, it is to describe textual representations of this heritage. That is, the ways in which Indigenous heritage was written about, and the kind of language used to describe, define and classify it.

One of the themes apparent throughout the writings examined is the notion held by Europeans of an 'authenticity' in Indigenous heritage. Other themes include the influence of ideas about primitivism, and the engagement between European-Australians and Indigenous heritage as manifested through the development of markets, museums and exhibitions, and fieldwork practices involving photography, film and recording.

For much of the time many writers maintained an idealised model of pristine 'traditional' Indigenous societies. They held the view that one could find a 'true' or 'authentic' Aboriginal culture that was 'untouched' by European influence. Many thought that this 'authentic' Indigenous culture and heritage was only to be found in remote regions, away from the 'corrupting' influences of European civilisation. Therefore, these remote regions – 'the outback' – were the areas most subject to the intense gaze of the European eye. The Northern Territory in particular was a region most associated in many Europeans' minds with remoteness, as a place where the 'real' Australian Aboriginal was to be located.

In sampling writings by European-Australians I have selected works that illustrate a range of perceptions about Indigenous cultural heritage, and that have been made by a variety of actors, in terms of their professions, disciplines, gender, and perceived status as 'professional' or 'amateur'. The narrative of *Writing Heritage* is informed by my view that there is no homogeneous, essentialised 'European-Australian' viewpoint, but rather, a diversity of opinions, perceptions and representations of Indigenous heritage. I have also sought to illustrate different European representations in what I call 'private discourses' and 'public discourses'. The former category includes diaries, journals and personal correspondence; the latter consists largely of published works. In addition, I have examined some 'official discourses' – those writings that comprise policy documents, official correspondence and reports, and legal materials.

The term 'heritage', like 'culture', is complex and multilayered. It is concerned with memory, reflection and the transmission of culture. It encompasses the way that communities maintain their culture and identity through time by means of oral performance, re-enactment and other forms of expression. Referring to this community identity, the term also denotes a body of laws, beliefs, practices or values transmitted through generations. In this sense, heritage is often thought of as 'tradition' or 'custom', in some

discussions connoting a body of fixed, unchanging rituals maintained and performed in some agreed or prescribed form.

Heritage has close associations with notions of 'the past', of antiquity and origins. The past is a very powerful concept, as various writers remind us.[2] It has attributes of nostalgia, and of a desire for things gone or that are old. American historian David Lowenthal writes that 'formerly confined in time and place, nostalgia today engulfs the whole past'.[3] Another aspect of the past is the concept of 'antiquity', which in Lowenthal's scheme involves qualities such as 'remoteness', 'the primordial' and 'the primitive'.[4] These discourses of primordialism and primitivism are also important in European constructions of Aboriginality (or Aboriginalism) that posit an imagined construct of a universal, essentialised 'Aboriginal'.[5] This essentialised 'Aboriginal' is often perceived as having an affinity with nature, an origin in some imagined, timeless tradition, and as being somebody who habitually re-enacts age-old customs in prescribed ways. A notion of a presumed 'authentic Aboriginality' informs many of the writings surveyed in this book.

In other contexts, heritage is also something that can be 'owned'; it is a kind of property. Thus it is referred to variously as 'shared', 'global' or 'world' heritage, 'national heritage', or as heritage that 'belongs' to particular peoples, ethnic groups or communities. It is within this context that heritage is sometimes defined by competing claims, in a contest between different groups or individuals. This contested domain of heritage becomes more complex when other factors enter into it, such as different kinds of 'ownership' claims, which might include moral or legal dimensions. Other ways of associating with heritage, such as custodianship or stewardship, add further layers of complexity. The notion of a global or national heritage suggests not 'ownership', in the sense of an individual property right, but some kind of shared or collaborative stewardship.

The term 'heritage', say Davison and McConville, 'is an old word, drawn from the vocabulary of those old societies in which

primary values derived from ancestral relationships'. These authors observe that 'in its original sense, heritage was the property which parents handed on to their children, although the word could be used to refer to an intellectual or spiritual legacy as well'.[6] Davison and McConville suggest that, as national heritage emerged with the formation of nation states, it came to refer to 'that body of folkways and political ideas on which new regimes founded their sense of pride and legitimacy'.[7] Originally having references to a pioneering past, the term 'heritage' has only more recently acquired a meaning associated with notions of preservation. Since about the 1970s, it has acquired a specialised usage 'as the name we give to those valuable features of our environment which we seek to conserve from the ravages of development and decay'.[8] In this sense, heritage 'has come to refer to things both more tangible, and more fragile, than the imperishable ideals of our ancestors' and is typically used in a context of preservation and protection.[9] Heritage can be said to be 'the things we want to keep'.[10] This sense of the vulnerability and fragility of heritage persists as a preservationist discourse, which recurs throughout the history of European writings explored in this book.

The concept of Indigenous cultural heritage was not used specifically in European writings until recent decades. The notion that Indigenous peoples have special interests (such as ownership, custodianship and stewardship) is an even more recent development (and indeed is still not accepted by some). Throughout the long history of European writing about Aborigines, various terms have been used – such as 'relics', 'antiquities', 'curiosities' and 'monuments'. Terms including 'heritage', 'culture', 'art' and 'artifacts' are used in today's language of policy and administration, but are often employed so widely that they lose precision in meaning. These terms may also become problematic when applied unquestioningly to both Indigenous and European contexts. For example, the term 'art' is debated in terms of its use in reference to Indigenous designs and cultural

products and expressions. The subjectivity of a term such as 'art' can be illustrated, for example, by Sutton and Anderson who argue against the notion that 'art is a concept alien to Aboriginal culture', claiming that 'one person's art may be another person's junk or kitsch.' They elaborate:

> Speakers of Aboriginal languages are in this sense very similar. Each of the various languages has a term that essentially means sign, design, pattern, or meaningful mark. It is used to describe paintings and other designed things made by people, but it may also describe the patterns of honeycombs, spiders' webs, the wave-marked sand of the beach, variegated butterfly wings, and a host of other manifestations of similar formal properties. These usually include a combination of repetition, variation, symmetry, and asymmetry; and, like the designs of human artifacts, they are seen as ultimately derived from the Dreaming, the power-filled ground of existence.[11]

While there may be differences of opinion as to the relative meanings of the term 'art' in Indigenous and non-Indigenous societies, there are nonetheless some common themes. Sutton and Anderson argue that 'what is shared ... is a common conception of intentionally meaningful forms, or signs'. They elaborate:

> None of these signs, in the Aboriginal cultures of the precolonial past, were part of an art market in a commercial sense, but they were currency in a competitive political economy. Rights in them could be traded, bequeathed, and, at times, even stolen for their high value. Human artifacts were also subject to similar transactions.[12]

These authors conclude:

> As long as we restrict our sense of the English term *art* to that elementary level at which it connotes visible and intentional signs made by intelligent beings, we are not stretching a point when we say that Aboriginal paintings, carvings, and other works are art, not 'by metamorphosis' and not merely because they now are in the global art market, but because they share with similar artifacts the act of representation and a particular potential for meaning.[13]

The narrative in this book follows the ways in which Europeans constructed their notions of Indigenous heritage, from the early nineteenth century up to the present day. I present this narrative by using many of the actual words of the writers themselves, in an attempt to convey the flavour of the writers' own voices, perspectives and language.

The history of these writings highlights the fact that in many Europeans' consciousness, Indigenous people were absent as intentional actors who were engaging with their own heritage. If Indigenous people were present at all in these texts, they were often represented as passive objects of Europeans' gaze or amusement, or as bystanders in an ongoing process of collecting, recording and commenting. In later decades, some writings appeared to show Indigenous people as being engaged in the collecting and recording process, but in this they were at best marginalised and at worst, denigrated. By presenting a discourse of Indigenous heritage in terms such as 'curiosities', 'relics', 'antiquities' or 'monuments', as was the case for a considerable part of the period discussed, writers were in effect masking or denying Indigenous heritage as a living force. These terms were more than merely convenient semantic labels. They denoted a prevailing perception of Indigenous heritage as a remnant of a bygone era, or as museum-like traces of extinct or near-extinct people whose primitiveness was anathema to the writers' various modernising projects. These labels also provided a charter for the imposition of dominant colonising, appropriating or legislating regimes and practices upon Indigenous culture and heritage.

The writings presented here were for much of the period reviewed underpinned by powerful themes, such as the idea of progress and of a presumed authenticity. They were also informed

by the diverse, idiosyncratic personal agendas of professional rivalry and disciplinary authority. The book briefly explores, too, the shift in Europeans' perceptions of Indigenous objects as ethnographic items to works of art, and the emergence of markets for items such as bark paintings and other cultural objects. The work is set within the wider contexts of the growth of anthropology in Australia and the developing interest in remote locations, especially in the Northern Territory.

Part I

1

'To Rescue from Oblivion'

The latter part of the nineteenth century saw a growth in Europeans' interest in collecting, compiling and documenting Indigenous cultural heritage. This was motivated by several factors, not least of which was the Europeans' intense curiosity and fascination at the diversity of, and variation among, the objects they saw and acquired. For these early decades, observers, collectors and compilers regarded the objects they found and observed as curiosities, or as antiquities that in some way epitomised the decline of the Aborigines who produced them. Europeans were, during this period, also beginning to express some concerns about the need to preserve these objects, and some collected and recorded Aboriginal culture with this in mind. But this concern with preservation was not because they necessarily understood or appreciated the value or importance of heritage for the Aborigines. Rather, it was driven by a regard for the role that this heritage might have for European science, or in the formation of 'national monuments'. Many collectors were also zealously intent on building up their own personal collections, or in stocking the cabinets of ethnology museums and universities. In many of the writings of these people we can read a rich narrative of possession, discovery, and the excitement of acquiring treasures and trophies. This was another form of conquest. In this chapter I chart the early years of European depictions of Indigenous heritage, as writers sought to come to terms with the immense variety of forms of this heritage, and began to ponder the implications of aspects of material culture such as innovation and tradition, design, decoration, and function.

Wonder and curiosity: brief encounters

European Australians have been fascinated with Aboriginal cultures since they first arrived. The Northern Territory – especially Arnhem Land – seemed to attract the interest of visitors, who saw it as the place where a presumed 'authentic' Aboriginal culture could be found. This region was also popular because of the visibility of Aboriginal material and expressive culture there. Many Europeans made brief visits to the continent during exploratory voyages from passing vessels, short survey visits, or as stopovers en route to some other destination. Often, in the course of these sojourns, a visitor would encounter Aboriginal people or traces of their presence, either by chance or intention. In their narratives of their expeditions, visitors often wrote of their encounters with Aborigines using expressions of wonder and curiosity.

Among early visitors to northern Australia were James Charles Cox, Captain F. Carrington, and P. W. Bassett-Smith. Cox was a medical practitioner and lecturer in Sydney, and he had a great interest in natural history and ethnology. He was a fellow of the Royal Society of New South Wales, a trustee of the Sydney Museum, and the president of the Linnean Society of New South Wales (formed in 1874).[1] In 1879 he presented some bark paintings he had collected from Port Essington, on the northern tip of Australia, to a meeting of the Linnean Society of New South Wales.[2] Describing these paintings he commented that, 'owing to the perishable nature of the bark and to the pigment used, commonly

pipeclay, being easily defaced, few of these illustrations have been saved'.[3]

Cox's bemoaning the perishability of the paintings suggests a preoccupation with a notion of permanence in regard to material objects. A desire for permanence underpinned Europeans' interests in preservation, and was expressed through their production of records of Aboriginal cultural expressions in written accounts, photography, film, sound recordings and drawings. By collecting cultural objects, Europeans could also ensure permanence by removing these objects from their contexts as elements of living cultural systems. This emphasis on permanence contrasted with an alternative view of cultural objects in many Indigenous societies, where they were seen to have transient or ephemeral states (as in sand and body images), or to exist as temporary or semi-permanent entities (as in objects designed solely for use in ceremony).

The presentation of Aboriginal cultural objects to the learned societies also highlights a notion of heritage as a public entity in European eyes. European interest in the collection and display of Indigenous cultural objects, and the production of written and visual records of Indigenous cultures for mass circulation and consumption, was likely to have been at odds with the ways in which Indigenous peoples might approach their culture. To Indigenous people, the use, display and circulation of performances and objects was regulated in accordance with well-defined cultural codes. There are also many aspects of objects and performances that are secret – the use, participation or observation of which are restricted to certain prescribed groups or individuals. Europeans' collecting, display and recording of Indigenous culture was a manifestation of their desire to produce trophies of conquest, to demonstrate their perceived notion of the superiority of European culture and civilisation by parading the products of what they saw as inferior societies.

These lofty themes were not articulated in the narratives of early explorers and travellers; their writings exhibited a more benign sense of the curious. Cox, impressed by the use of bark, wrote in his account of his Arnhem Land visit:

> I have on several occasions seen in caves, drawings of various objects made by the natives, with outlines of lizards and kangaroo, &c, these latter invariably on a small scale, and all associated with the well-known 'red-hand' – but I have never met with, until now, such large drawings of animals on sheets of bark, as those I now place before the Society. I have indeed seen even larger sheets of the same material, but these were ornamented by the natives with angular figures painted with red, white, and yellow clay, and a colouring matter, which is obtained from the inside of lumps of ironstone, similar to that used in former times by the aborigines to cover their bodies with. I fancy the only use made of such drawings as these must be to render their meetings more attractive when dancing before the fire in the wild gesticulations of a corrobboree, or they may be drawn for amusement when confined to their caves by the inclemency of weather, certainly not made to ornament their gunya's as we, our rooms, with pictures.[4]

Cox's speculations on these bark paintings were limited to the possible uses of their aesthetic qualities as decoration or for amusement or ornament. His narrative reveals nothing of the possibility of a spiritual dimension to the designs and images on the bark; the emphasis is exclusively on the physical, and the practical.

The sense of curiosity about Aboriginal culture evident in Cox's account occurred in many writings of this era. In November 1886 Captain F. Carrington read a paper to the South Australian Branch of the Royal Geographical Society of Australasia in which he described aspects of Aboriginal culture seen during a journey through the region of the Macarthur River and other rivers of the Northern Territory. In examining the Sir Edward Pellew group of islands, Carrington's party found, in a cave in a sandstone hill,

'a couple of very curious weapons' which he thought 'appear to be a boomerang and a battleaxe combined'. Carrington emphasised the unusual, commenting, 'I have not met with weapons like them anywhere else in the Territory, and several friends who have seen them, and who are well acquainted with the natives of Australia generally, have informed me that they have not met with the same kind of weapon elsewhere'. Later, near the western mouth of the Macarthur River, Carrington met with some Aboriginal people. Observing their bark canoe, he was 'much struck with its beauty as a shapely seaboat', adding that 'the science of the shipwrights have not yet produced a vessel of finer lines and proportions than this frail 12-ft. canoe'.[5] As was often the case, the description is made in terms of familiar European images and techniques. Exploring the region in the vicinity of the South Alligator River, Carrington noted that 'the native drawings on bark, that were shown at a late meeting of this society, were obtained in this district'. He described a ground sculpture he had seen in this area:

> In walking across the plains, a part of which had lately been burnt clear of grass, we came upon what may be called a very curious drawing. At first sight it looked like a gigantic cartwheel; but after careful measurements were taken, and a sketch of it made in my pocket-book, it was manifest it was an excellent representation of a spider's web. It measured fourteen yards in diameter, and its production involved an immense amount of labour. The plains are at this part subject to inundation, and it appeared that after the water had subsided, and the ground still damp, the artist, or artists, for I can scarcely think it was done by one man, had taken a flat stone and patted the ground, and thus made it smooth, and leaving the various radial lines and their concentric circles as plainly visible as if it had been done with a pavior's dolly. Outside this large circle were depicted, in outline, a man in the act of throwing a spear, and two or three animals that were possibly intended for kangaroos in the act of feeding. The sketch taken has, unfortunately, been lost. I had been very careful with the measurements with a view to reproduce it drawn to scale; but I can now only remember the diameter.[6]

In this description Carrington focuses on the process by which this ground sculpture was made and he is impressed by the 'immense amount of labour' that contributed to the production of this cultural image. His methodical description suggests an engineer's or draughtsman's eye for craftsmanship and detail, as in his comment about having taken careful measurements for a scale drawing. His comment that he could 'now only remember the diameter' evokes regret, loss and nostalgia. All he has left to convey his wonder and fascination at the craftsmanship of what he saw is his recollection of a single dimension – the diameter – which reduces the body of the ground design to a simple, one-dimensional element framed in the language of European geometry.

Like Cox, Carrington attached importance to the permanent, the enduring and the visible. Had he been able to present the sketch he had made to the learned gathering, Carrington would presumably have provided the physical evidence that seemed so vital to Europeans' encounters with, and writings about, Indigenous societies and cultures. This sketch, carefully executed by the surveyor's steady hand, in which the living culture of the Aboriginal ground drawing had been neatly set out in linear detail by measurements, was now sadly lost. It was to have stood as testimony, as witness to the observer's encounter with the otherwise strange and inexplicable ground drawing.

Another visitor to northern Australia was Royal Navy surgeon P. W. Bassett-Smith who wrote of his observations of Aborigines in an article in 1894 in the *Journal of the Royal Anthropological Institute of Great Britain and Ireland*:

> For rather over three months after joining H.M.S. Penguin, a surveying ship employed on the Australian Station in 1891, it was my good fortune to see many of the aboriginal natives of that

country, who, in the north-west part, are and have been less in contact with civilized or western man than in any other portion.[7]

This illustrates a view held by many writers and observers that Aboriginal people in the northern parts of Australia were in a more 'natural' state. Like Carrington, Bassett-Smith paid particular attention to the Aborigines' weapons:

> Their weapons consisted of very long wooden spears, about 12 feet long, ornamented with red and yellow ochre, and white bands, being strongly barbed either on one side, both sides, or three [?] pronged and barbed, or else having a quartzite head fixed on by gums and fibre; short spears either partially of bamboo or wholly of hard wood; these were not barbed, but occasionally pointed with bone; these latter are mostly used for kangaroo hunting. ... Besides their weapons, the only articles they make seem to be coarse baskets and creels for carrying shell-fish, fruit, &c; they apparently felt the want of nothing (except tobacco, an artificial craving), and have no money or trading instincts.[8]

The impression this text conveys is that although these Aborigines possessed a strong weapons tradition, their society was otherwise self-sufficient, without the need for much in the way of material culture. As with much writing of this period, this text promotes a discourse of lack; as well as lacking in many aspects of material culture, the Aborigines were also thought to lack need. Bassett-Smith paints a picture of a closed society, of a people without unnecessary wants and needs, thus they 'have no money or trading instincts'. This hints at the European ideal of the 'noble savage', who was thought to have lived in harmony with the environment and maintain a sustainable society within existing resources. As did many Europeans in their narratives of encounter with Aborigines, Bassett-Smith remarked on what he described as the Aborigines' 'artificial craving' for tobacco. Tobacco was an

important trading item, and became a common currency used in the process of acquiring bark paintings and other cultural products.

Bassett-Smith's comments on the 'specimens' he obtained of the Aboriginal peoples' drawings are particularly revealing of his attitude to their abilities in representation:

> During my stay there, I gave paper and chalks to them, and obtained a number of specimen drawings, for the representation of natural objects is much practised among the Australians, and is one of the lowest intellectual developments; some of the figures are particularly grotesque, but the meaning was generally evident.[9]

Here, Bassett-Smith's assumption that Aborigines possessed merely an ability to represent natural objects places them in a hierarchical–evolutionary scheme in which more creative abilities are found in more 'highly developed' societies. This view contrasts with those of other writers, especially in later years, who saw Aboriginal creativity as an important aspect of their adaptive and innovative strategies. It is also interesting to note Bassett-Smith's use of paper and chalks to obtain 'specimen drawings' – a practice that was used by Charles Mountford, among others, later in the next century.

On making collections: natural history and ethnology

A theme that was common to many visitors' accounts was that of collecting. To Europeans, Aboriginal culture presented untold possibilities for the formation of ethnological collections for museums and research institutions, and for filling the homes of individuals and corporations. For some writers, the collection and recording of Aboriginal cultural objects was synonymous with the collection and documentation of natural history. Often too, collecting Aboriginal cultural objects was part of a process of documenting the culture along with 'collecting' customs and manners. Norwegian zoologist Carl Lumholtz, for example,

explained that the purpose of his expedition to Queensland in the 1880s was to make 'collections for the zoological and zootomical museums of the University, and of instituting researches into the customs and anthropology of the little-known native tribes which inhabit that continent'.[10] Lumholtz's project epitomises the tendency common among many writers at this time to regard Aboriginal people as part of Australia's flora and fauna.

From compilers to collectors

Curiosity and a zeal for collecting were important motivations for the many people who compiled generalised accounts of Aboriginal culture from throughout the continent. Indeed, to some, recording and collecting Aboriginal culture seemed almost an obligation. These compilers and collectors often relied for their information on existing notes by missionaries, explorers and antiquarians, and on correspondence with a wide range of individuals. Robert Brough Smyth was one such compiler, who published his 'notes relating to the habits' of the Aborigines of Victoria in 1878.[11] He explained that 'when, sixteen years ago, I was appointed Secretary of the Board for the Protection of the Aborigines, it seemed to me to be my duty to collect information respecting the customs of the people who had formerly owned the soil of Australia, and to make accurate drawings of their weapons and ornaments'.[12] In contrast with Bassett-Smith, Brough Smyth was impressed with Aboriginal peoples' capacity for ornamentation and their artistic skills, as he observed that:

> they roughly carve their weapons with the stone tomahawk and stone chisel, but the ornamentation is effected by a very neat tool, formed of one side of the under-jaw and tooth of the opossum. This, when fixed to a wooden handle, is a most useful cutting instrument ... Their shields, their clubs, their throwing-sticks, and their cloaks, are often profusely ornamented.[13]

Brough Smyth compared the Aborigines' skill in producing designs with western artistic creativity, and he extolled their creative abilities, stating that 'without culture, without refinement, the Australian is an artist'. He expounded on their techniques:

> He paints in caves, in places where he has access to caves; and, where there are none, he bends a sheet of bark, smokes the inner surface until it is blackened, and then depicts with the nail of his thumb or a bone-awl, pictures of birds, and beasts, men, and scenes in his life. He decorates the smooth rocks that front the sea, and finds in the representations that have been made by others and in his own efforts the same kind of delight that fills the mind of the civilized mind when he sits before his easel.[14]

Brough Smyth appears surprised that the Aborigines were able to demonstrate such artistic skills 'without culture or refinement', illustrating a tendency for many writers to compartmentalise aspects of Aboriginal culture (i.e., 'art', 'culture', 'technology'). Like many writers he is keen to accurately detail and classify Aboriginal 'customs':

> The customs of the natives of Australia are so like, in many respects, those of other existing savage or barbarous races and those of the people of ancient times, that one feels more and more the necessity of a classification, in which would appear every known custom and the place where it is practised, exactly after the manner that the geologist elaborates his system of the classification of rocks.[15]

His comparison of the classification and documentation of Indigenous 'customs' with geological classification again links ethnology to the natural sciences. As with many writings of this period, his focus is on classification and order, constructing Indigenous cultures and societies within a western framework of measurement and science. In this comparative sense he draws analogies with ancient Europe, noting that 'the modes of ornamenting the shields, clubs, and other weapons of the Aboriginal natives of Victoria are similar

to those of the people who fabricated the urns of baked or burnt clay found in tumuli in England and Scotland'.[16] In discussing stone implements, Brough Smyth asserts that those used by 'uncivilized races are necessarily regarded by archaeologists and geologists with great interest'.[17] Here again is the sense of the exotic, wherein Aboriginal cultural items are the subject of the curious gaze of European 'experts'. This notion that Indigenous heritage was of particular interest and importance to European scientists and other 'experts' denied the primary importance of this heritage to the Indigenous peoples themselves.

In these last years of the nineteenth century there was much activity by Europeans in describing aspects of Aboriginal heritage, and in circulating these descriptive accounts in journals and proceedings. Many of these descriptions were produced as brief notes, comments or reports, often simply signalling a new 'find' or 'observation' of some item of Aboriginal culture, such as a stone implement, stone circle or rock image. These accounts filled the pages of the journals of learned societies such as the Linnean Society of New South Wales, the Royal Society of Victoria, and the memoirs and transactions of museums, geological and geographical societies, among others. They were often written in a matter-of-fact, 'objective' or 'scientific' style, offering little more than a narrative description, devoid of any substantial analysis. They were, however, often imbued, at least implicitly, with a sense of wonder, and some were marked by the occasional intrusion of a personal view or opinion, such as the Rev. John Mathew's remark concerning graffiti on some Aboriginal rock paintings:

> The difficulty of copying has been increased through the ambition of white people to secure a cheap fame by scribbling over the aboriginal work with charcoal. One feels indignant that so rare a relic of aboriginal art should be wantonly desecrated and defaced.[18]

This is an early statement of the problems Europeans increasingly noted regarding cave and rock paintings and engravings – their often poor state of preservation, high degrees of erosion or, in this case, damage from graffiti or other activities by Europeans. Although Mathew did not explicitly call for measures for preserving the paintings, his expressed indignation at the damage and comment on the distinctiveness of this art ('so rare a relic') implies a view on the need for preservation. His use of the term 'relic' suggests an idea of Aboriginal art and heritage as something left behind, a trace or memory of a people no longer existing. The preservation of 'relics' was therefore sought not for the purpose of protecting Aboriginal peoples' rights in their heritage, but for the sake of Europeans' own interests in science, empire and classification. Art works, stone tools, bark paintings and other items of portable Indigenous heritage were sought as museum objects, as additions to growing collections for display, or as mementos of a former race. Where items of Indigenous heritage were seen 'in-situ' – such as rock and cave paintings or engravings, these were similarly regarded as objects for advancing Europeans' interests in science and natural history, as new 'discoveries'.

Another compiler was Thomas Worsnop, the South Australian Town Clerk who, in 1897, produced a compilation of available descriptions of Aboriginal artifacts and their descriptions. He titled his work *The Prehistoric Arts, Manufactures, Works, Weapons, etc., of the Aborigines of Australia.* Worsnop wrote in his Preface:

> The antiquities of prehistoric man in Europe, Asia, Africa, and America have been fully investigated and carefully described by various learned men. With respect to Australia, however, it has been considered until lately that she has no antiquities, and consequently little attempt has hitherto been made to collate the discoveries that from time to time have been made of the prehistoric arts, manufactures, and remains of her various aboriginal tribes.

> I trust therefore that in this effort to rescue from oblivion the primeval antiquities of Australia some interest may be awakened in the public mind in regard to them. This may have the result of inducing others more minutely and systematically to examine and describe the vast store of pictographic records still existing in this continent, embracing so much yet to be deciphered and understood; thus let me hope that these native productions may be permanently recorded and explained.[19]

Worsnop has created an image of a long-lost domain of 'primeval antiquities' awaiting discovery by Europeans; his writing is marked by a powerful sense of the absence of Aborigines. The makers of the 'antiquities' have, in Worsnop's view, long departed, leaving only their traces, the enigmatic remains of their former lives. He sounds a call to others to record and explain this otherwise 'lost' heritage, in what might be seen as an early promotion of the idea of preservation of heritage. By 'rescuing from oblivion' these lost antiquities, and 'awakening' an interest 'in the public mind' about them, Worsnop creates a sense of wonder. His writing is also notable for its affirmation of the 'artistry' of the Aborigines:

> In collecting these pictorial and other monuments of Australian art and work I had in view the extended information thus made available not only to the archaeologist and the ethnologist, but to the general reader also. I have endeavored to show that Australia is not barren in pictography in order to excite a more general interest in its preservation, and by comparison with the works of other nations to secure for our aborigines a due appreciation of their undoubted artistic nature.[20]

Worsnop had a high opinion of Aboriginal art, comparing it favourably with that of other countries. He was, according to authors Peter Sutton, Philip Jones and Steven Hemming, 'the person who first drew attention to the innovative and less well-known forms of Aboriginal art'. These writers claim that as

Worsnop was 'not bound by the taxonomic rigidities of nineteenth-century ethnography', he 'sought to explore the many variations of Aboriginal art across the continent'.[21] Worsnop emphasised the 'uniqueness' of Aboriginal art and culture by placing it within a comparative framework with the artistic works of Indigenous peoples in other countries. He wrote:

> I do not hesitate to affirm that many of these artistic productions, which without question are genuine emanations of the Australian aboriginal mind, will bear very favorable comparison with those of prehistoric man in any other part of the world.[22]

He regarded Aboriginal peoples' cultural expressions as having an Indigenous origin, but one that may have originated outside of Australia:

> The customs of one tribe may be taken as the customs of all, with slight variations or modifications, and these rather encourage the idea that all of them have sprung from one distinct body of emigrants who reached these shores ... .[23]

This view of the homogeneity of Aboriginal cultures across the continent did not accord with that of other writers such as Spencer, as will be seen.

Among the Aborigines: the Horn Expedition

Brief visits and surveys, and broad compilations, were some of the means by which Europeans acquired information about Aborigines and their cultures. At the same time there were also many research expeditions whose specific purpose was to gather such information. One such expedition, organised by South Australian financier W. A Horn, travelled to Central Australia in 1894. Horn declared the object of this expedition in his narrative:

> Travellers' tales ... of the manners and customs of the natives, and the varieties of plants and animal life in these remote regions, had aroused a widespread interest, and at the solicitation of a few scientific friends I resolved to organise and equip a party, composed of scientific men, to thoroughly explore this belt of country.[24]

Like Lumholtz, Horn saw the collection of ethnographic information as central to the study of natural history. He elaborated on the tasks proposed for the expedition:

> ... the scientific examination of the country from Oodnadatta to the McDonnell Range; the collection of specimens illustrative of the fauna, flora, and geological structure and mineralogical resources of that region, and the illustration by photography of any remarkable natural features of the country traversed; the securing of photographs of the aborigines in their primitive state, the collection of information as to their manners, customs, and language, and the reproduction of their mural paintings.[25]

'These rare and interesting stones'

Among the aspects of Aboriginal culture that interested the members of the Horn Expedition were those sacred objects known as *tjurunga*. Baldwin Spencer introduced readers to these objects (referred to in his narrative as 'churiña') in the context of their use in ceremonies. He declared that 'intimately associated with these [sacred ceremonies] are the sacred stones and sticks which have been referred to in the Anthropological section by Mr. Gillen and Dr. Stirling'.[26] Spencer later recognised the significance of *tjurunga* in Aboriginal society, and the consequences of inappropriately revealing these objects to the wrong persons. Another expedition member, E. C. Stirling, highlighted the lack of knowledge that Europeans had of the *tjurunga*, as well as the apparently secret nature of these objects among the Aborigines. He wrote that 'concerning them a good deal of secrecy and mystery exists amongst

the blacks, and very little has been said, or seems to have been known, of their true significance'.[27] The Aborigines kept their knowledge relating to *tjurungas* closely guarded, and this heightened the sense of mystery these objects conveyed to Europeans. It also strengthened the latter's desire to obtain 'specimens' of *tjurungas*. Stirling declared that he had 'been for some time familiar with the objects in question, from the fact that during recent years the South Australian Museum has received a good many examples from various parts of Central Australia'. He understood prior to the expedition that 'special value was attached to them [the *tjurungas*], that they were made objects of mystery and concealment, and that they had some kind of connection with important sites and ceremonies'. 'These facts' he wrote, 'made me very anxious to gain further information concerning them'.[28]

It was not only information about *tjurungas* that the members of the Horn Expedition were keen to acquire; the objects themselves were also collected, as is well documented in the expedition reports.[29] In fact it could be said that these expeditioners – or some of them at least – saw the collection of *tjurungas* as a goal of their journey. They sought to hunt these prized objects as trophies, as treasures that would enhance their cabinets of curiosities. Expedition surveyor Charles Winnecke had 'cajoled an Aboriginal guide, Racehorse, into revealing the location of a *tjurunga* storehouse near Haast Bluff', and the sacred objects were taken by the expedition members.[30] Winnecke's *Journal* entry for Friday, 22 June, records that accompanied by 'the black boy Racehorse' and Dr Stirling, he went 'in search of two corrobboree stones said to have been hidden here by the natives'. Winnecke claims that he was 'not aware of the doctor's object in wishing to visit this spot' before setting out. He had accompanied Stirling, he claimed, because 'I desired to sketch in the northern portions of the range and connect my present traverse with my previous work of 1878'. Although the 'directions for finding them [the 'corrobboree stones'] were most explicit' and, the

writer asserts, 'we followed them out to the letter', they did not locate them, and 'returned to the camp without the longed for curiosities'. Winnecke sought information from Racehorse 'and, after a vast amount of evasion, elicited the information that a large number of corrobboree stones were hidden in a cave in the ranges to the eastward'. The author, satisfied with this information reported that:

> I obtained knowledge of the exact position of this cave, and as these rare and interesting stones are of especial interest and value to the ethnological department I have determined to visit this spot to-morrow.[31]

The following day Winnecke resumed his search, despite the resistance of his guide, Racehorse. Having finally located the cave in which the *tjurungas* were deposited, Winnecke describes the almost mechanical precision with which the intruders removed the sacred items:

> The entrance to the cavern was partly filled up with loose fragments of rocks and the interior with gum and wattle boughs. On removing [them?] an enormous number of wooden corrobboree sticks, varying in size and shape, were first exposed. Some appeared to be very ancient, and exhibited signs of frequent use. ... Many expeditions have started in search of this cave, but hitherto all have failed to find it, as nothing would induce the local natives to betray its whereabouts. We first removed sixty wooden tablets (or so-called sticks), all being elaborately carved or marked on both sides with a number of concentric lines, which appeared to be perfectly intelligible to both our black boys. Underneath these we obtained fifteen stone tablets, carved in like manner. This latter discovery is the most important yet made of these rare specimens of native skill, and will materially enhance the value of the ethnological collection. Selecting some thirty-three wooden, opossum, emu, euro, sugar ant, and other corrobboree sticks, and taking all the stone ones, I left a number of tomahawks, large knives, and other things in their place, sufficient commercially to make the transaction an equitable exchange. ... After carefully packing our trophies on the camels we started at sundown, intending to return to the main camp if possible to-night.[32]

Winnecke's narrative is laden with the language of possession and discovery, referring to the *tjurungas* as 'treasures' and 'trophies'. In his account, the desire to expand the ethnological collection took precedence over any regard for the interests that Aboriginal people were likely to have had regarding their cultural objects. Although this was certainly not the first instance in which Europeans had taken these sacred objects, according to Philip Jones 'it was Edward Stirling's "Anthropology" chapter in the Report of the Horn Expedition, published in 1896, which first brought *tjurunga* to the attention of scholars, collectors, and the public'.[33] John Mulvaney comments on this instance of 'collecting' *tjurungas*:

> Sacred objects had been taken by Europeans previously, more as curios and probably not in such number. This episode involving a major storehouse and the subsequent publicity served as a challenge. Europeans collected specimens like geological fossils, the size of a collection and the intrigue and bluff which went into the hunt added spice. Their monetary value only became a factor much later.[34]

The *tjurungas* continued to mystify and fascinate Europeans. Descriptions of these objects abounded in the combined works by Spencer and Gillen.

Custom and variation

Ideas about Australian Aboriginal cultural heritage were formed by prevailing views about the nature of Indigenous societies and cultures more generally. Writers' interests in the extent and nature of innovation in – and the diversity of – Indigenous heritage

became, in their views, the defining features of Aboriginal cultures and societies. The works of Spencer and Gillen dominated the first two decades of the twentieth century, and these workers articulated particular views about innovation and variation. In *The Native Tribes*, they posited a society that was conservative and bound by custom:

> As amongst all savage tribes the Australian native is bound hand and foot by custom. What his fathers did before him that he must do. If during the performance of a ceremony his ancestors painted a white line across the forehead, that line he must paint. ... Any infringement of custom, within certain limitations, is visited with sure and often severe punishment.[35]

In the context of this 'rigid conservatism of the native', Spencer and Gillen pondered how it was possible that the changes they noted occurring in Aboriginal societies 'can possibly even be mooted'.[36] Many writers were similarly fascinated by the apparent inherent capacity of Aborigines to adapt and innovate, especially in a context of rapid change as was occurring with increasing European encroachment.

Spencer and Gillen also had some comments to make on the question of variation among Aboriginal peoples:

> In many works of anthropology it is not unusual to see a particular custom which is practised in one or more tribes quoted in general terms as the custom of 'the Australian native'. It is, however, essential to bear in mind that, whilst undoubtedly there is a certain amount in common as regards social organisation and customs amongst the Australian tribes, yet, on the other hand, there is great diversity.[37]

This view of diversity contrasted with that of some other writers, such as Worsnop, who thought Aboriginal culture to be homogeneous throughout the country.

Decorative and creative aspects

The notion that the Aborigines possessed a creative life intrigued observers and commentators as they pondered the extent to which this was 'art' in the western sense and debated the relative aesthetic and decorative qualities of these artistic works. Spencer and Gillen were among those who contemplated decorative aspects of Aboriginal cultural life. They declared that the Central Australian Aboriginal peoples' 'weapons and implements are of a very simple nature', and contained relatively few decorative features.[38] Writing within an evolutionary idiom, these authors placed Aborigines relatively low on the scale of humankind in regard to the quality of their decorative art – below that of the peoples of Papua New Guinea. Nonetheless, they thought that 'the designs and decorations concerned with his ceremonies are of a very definite and often elaborate description, revealing considerable appreciation not only of form but also of colour'.[39] Commenting further, they wrote:

> ... no implement or weapon is ever really carved, or has painted upon it anything but the simplest form of design. This is all the more strange because the native is capable of such work as may be seen by an examination of work of this kind which he does in imitation of what he sees the white man doing; but it must be remembered that in their natural condition the members of the Central tribes do not make anything in the way of carved ornamentation. This should be borne in mind as various objects, such as sticks with knobs, carved so as to resemble natural objects, are occasionally manufactured by members of some of the very tribes with which we are here dealing, who have been in contact with white men, and are even finding their way into museum collections.[40]

Many writers agreed with the assumption in this extract that Aboriginal peoples' innovations were the result of these peoples' encounters with, or knowledge of, Europeans. To some writers,

Aboriginal peoples' imitative skills were a corollary of the Aborigines' lowly place on the scale of humankind. To others, Aborigines' capacity to imitate was a more positive attribute related to creativity, adaptation and innovation.

Although Spencer and Gillen saw Central Australian Aboriginal culture as generally lacking in complex decorative and innovative features, any such elaboration that did occur was explained as the result of European influence:

> Cut off from contact with outside peoples there has been no stimulus leading to the development of decorative art beyond a certain point, and most probably their most elaborate decorations are the much modified representatives of designs which once had a very definite meaning.[41]

As with many writers, Spencer and Gillen astutely recorded the replacement of traditional implements with introduced iron and steel, observing that 'since the advent of the white man the iron axe and knife are rapidly supplanting the stone weapon'.[42] This theme of replacement, common in writings throughout the following century, was expressed in a variety of ways, including nostalgia over the 'loss' of stone implements, or denigration at what was considered the tainted influence of Europeans. This preoccupation with European influence was also central to discussions about rock art.

Early writings on rock art: George Grey and the *Wandjina*

Of all the elements of Indigenous heritage that drew the attention of Europeans, among the more popular were stone tools, and rock and cave markings. Fascination with these latter – called variously rock or cave 'art', 'engravings', 'paintings', 'drawings', or 'markings' – resulted in a considerable amount of activity concerned with description, debate and discussion, which continues to form an

important element to archaeological and anthropological studies and writings. In the view of one archaeologist, Andrée Rosenfelt, 'rock art, or art on natural surfaces, is arguably the most enduring of Aboriginal artistic productions'. Rosenfelt argues that rock art 'is the only source of evidence for Aboriginal art predating the collection of Aboriginal objects by European observers [and] it is evidence for a long tradition that shows strong continuities in its essential forms and structure throughout the entire continent'.[43] For the purposes of this discussion, I will be referring to designs and images on 'cave' walls and on 'rock walls' as aspects of a similar practice.

One of the earliest recorded descriptions of 'cave art' was by George Grey, who, in his 1841 publication, described what he had seen on his expeditions through Western Australia in 1837–39. In late March 1838, encountering 'numerous remains of native fires and encampments', Grey describes the moment of seeing these figures:

> ... at last, on looking over some bushes, at the sandstone rocks which were above us, I suddenly saw from one of them a most extraordinary large figure peering down upon me. Upon examination, this proved to be a drawing at the entrance to a cave, which, on entering, I found to contain, besides, many remarkable paintings.[44]

Conveying a sense of awe, Grey described the drawing of the 'principal figure' in graphic terms:

> ... in order to produce the greater effect, the rock about it was painted black, and the figure itself coloured with the most vivid red and white. It thus appeared to stand out from the rock; and I was certainly rather surprised at the moment when I first saw this gigantic head and upper part of a body bending over and staring grimly down at me. ... It would be impossible to convey in words an adequate idea of this uncouth and savage figure.[45]

Grey made some sketches of these figures, and described them in some detail. In another cave nearby he observed a rock carving of a human head and face 'cut out in a sandstone rock which fronted the cave'. He commented on this:

> ... this rock was so hard, that to have removed such a large portion of it with no better tool than a knife and hatchet made of stone, such as the Australian natives generally possess, would have been a work of very great labour.[46]

Summing up his impression of this carving, Grey commented that 'the whole of the work was good, and far superior to what a savage race could be supposed capable of executing'.[47] Like many writers, Grey was also intrigued by the age of these rock images. He suggested that 'the only proof of antiquity that it bore about it was that all the edges of the cutting were rounded and perfectly smooth, much more so than they could have been from any other cause other than long exposure to atmospheric influences'.[48] He then conjectured poetically on the ultimate fate of the Aborigines and their culture:

> I sat in the fading light, looking at the beautiful scenery around me, which now for the first time gladdened the eyes of Europeans; and I wondered that so fair a land should only be the abode of savage men; and then I thought of the curious paintings we had this day seen, – of the timid character of the natives, – of their anomalous position in so fertile a country, – and wondered how long these things were to be.[49]

Grey could not reconcile the utter savagery he saw in the Aborigines with these fine rock images. As he wrote:

> ... whatever may have been the age of these paintings, it is scarcely probable that they could have been executed by a self-taught savage. Their origin, therefore, must still be open to conjecture.[50]

Grey's curiosity about the origin and authorship of the rock paintings prompted some debate in the literature. In 1925 Herbert Basedow wrote of the images seen by Grey that 'there is perhaps no other Australian drawing, old or modern, which has been so freely discussed and criticized'. Basedow thought one of the paintings was 'unquestionably that of a human being, although it measured fully nine feet in length'. This figure, he noted, 'reminded one forcibly of a Buddha in a Ceylonese temple'.[51] Like Grey, Basedow imagined these paintings to have been created or at least influenced by people other than the Aborigines, asserting 'there is no doubt about these curious drawings, now more or less adopted by the local tribe, having originated under some exotic influence'. Among those who might have influenced or produced these images, he speculated, were Macassans, Papuans or shipwrecked sailors.[52] Other writers had attributed the creation of these images variously to Sumatran or Malayan, Moorish, ancient Japanese or Hindu visitors.[53] Faced with the challenge of describing and defining, and a felt need to 'explain' elements of a culture vastly different to anything they had encountered previously, Europeans often sought analogies with the familiar repertoire of their own or other better-known imagery. The cultures of the ancient world and the east provided them with a lexicon and terminology for building analogies and comparisons with the Aboriginal cultural products and expressions that they encountered.

Writing in 1930 anthropologist A. P. Elkin was similarly struck by the distinct character of these paintings, claiming that these rock shelters 'have been quite famous for many years on account of the peculiar type of paintings found in them, so unlike anything found elsewhere in Australia'.[54] Elkin's account was based on several weeks field research, during which he 'was able to discuss the pictures with the natives'. Unlike Grey, however, Elkin understood these images to be part of the Aboriginal tradition for this region. Elkin wrote that he eventually hoped to 'fully understand what they mean to the

people', and to 'endeavour to interpret their meaning and function, as far as I was able to ascertain this from the natives who use the galleries'.[55] He concluded that he could 'throw no light on the origin of these paintings', and explained:

> The natives say that they do not make the wondjina [sic] figures, but only repaint them. Further, they say that blackfellows did not originally make them, but that the picture, wondjina, '*lalan wondiauina*', that is, made itself. If some of the wondjina paintings could be shown to be beyond the powers of the natives, or to depict subjects of which they could have, or could have had, no knowledge, then we could be certain that this type of painting has been introduced in some way or other. The distribution in a narrow strip along the western part of the North Kimberley might suggest that they are a recent invention or introduction, and yet the condition of some of the paintings undoubtedly points to a somewhat high antiquity. They must at least go back for a considerable time before Grey's visit in 1839.[56]

> Omitting the hands and feet of the wondjina figures sketched by Grey there is nothing in the workmanship of any of the paintings, which is beyond the skill of the present natives, or indeed, of a child.[57]

> Therefore, as far as workmanship goes, the natives of the district could have originated this form of art.[58]

The *wandjina* paintings of the Kimberley have continued to attract the attention of archaeologists, historians, travellers and others.[59] In 1965 archaeologist and historian Ian Crawford 'visited sites first recorded by Sir George Grey in 1837', and described in his 1968 work, *The Art of the Wandjina*, how he thought the *wandjina* paintings were an integral part of the complex artistic and mythological heritage of the Aboriginal people of this part of the Kimberley.[60]

The ethnocentric views of Grey and others who argued for 'foreign' origins of *wandjina* paintings have been dismissed by Ryan and Akerman, writing in a 1993 exhibition catalogue on Kimberley Aboriginal art that 'these fanciful explanations betray a total ignorance of the original Kimberley inhabitants and serve to reinforce what was then the supremacy of the invading culture'.[61]

In the many years since Grey's narrative, other writers have continued to puzzle over and debate the images that they encountered on rock and cave walls. In 1894 the Rev. John Mathew noted the 'art of painting' among the Aborigines:

> The art of painting has been so little practised by the aborigines of Australia, that to say they were ignorant of it altogether would not be far from the truth. Some of them after contact with Europeans have given evidence of considerable imitative power, but usually native pictorial art has not risen higher than rude conventional sketches of men, kangaroos, emus, turtles, snakes and weapons, done mostly in charcoal and occasionally cut out on trees or graven on rocks. The linear designs scratched on the inner surface of opossum rugs or carved on weapons, and sometimes coloured red, black or yellow are of the simplest patterns. But at a few places, very widely apart, specimens of art have been discovered immeasurably superior to the ordinary aboriginal level.[62]

Mathew's bleak summary of what he considered Aboriginal peoples' 'limited creative abilities' is typical of many whose views of Aboriginal people were fashioned within an evolutionary framework that defined Aborigines as primitive, and low on the scale of human progress. Mathew's comment that European influence had, in some cases, led to 'evidence of considerable imitative power' among Aborigines also foreshadows a discourse about the nature of 'imitation' in the context of work such as that of Albert Namatjira some decades later.

Other writers on rock art

Towards the end of the nineteenth century, and in the early years of the new century, other workers were acquiring information on Aboriginal art, heritage and culture through more sustained periods spent in a particular location. One of these was ethnologist Walter Roth, who spent some time among Aboriginal people in north and central Queensland. As well as being an ethnographer, Roth also had a career as an administrator and medical officer. In 1898 he became the 'first northern Protector of Aborigines' based at Cooktown, and was Chief Protector at Brisbane from 1904 to 1906.[63] Among the elements of Aboriginal heritage that Roth observed were rock markings, which he termed 'mural painting'. He detailed the images depicted in them:

> The only two localities where examples of mural painting have been met with, to my knowledge, in these North-West-Central Districts are on Oorindimindi Station, and at a small waterhole on the old Normanton road, about six miles from Cloncurry. At the latter, these consist of a saurian type of figure, varying from about 12 inches to over 6 feet in length, and hence possibly representing a lizard, an iguana, or crocodile, painted in red ochre upon the blocks of granite I counted seven or eight of these figures in January, 1896. They are nearly all weather-worn, and except under very careful scrutiny the majority of them would pass unnoticed. ... The local aboriginals knew nothing of these paintings or their significance.[64]

Roth's fascination is palpable as he lists the ochre creatures and proudly proclaims, 'I counted seven or eight of these figures'. His description in the first person amounts to a statement of possession, by which the author establishes his claim in the 'discovery'. He has described the images in some detail, and then stated that they are, in general, very difficult to see – 'except under very careful scrutiny the majority of them would pass unnoticed'. However, the fact that he has noticed them and carefully scrutinised them implies his proprietary interest. To strengthen his domination over these images, Roth adds that the 'local aboriginals knew nothing of these paintings or their significance'. This completes the charter that Roth uses to establish his self-proclaimed right as, in a sense, 'guardian' of these paintings. In this scheme, it was assumed that the Aborigines did not own or control the paintings since they knew nothing about them. Therefore the ethnologist has proclaimed his own right to them on the basis of his 'discovery' of them, and his expertise in detailing the subject of these images. The theme of personal claim or authority over what they see and encounter is one that underpins much European writing about Aborigines. As the first Europeans to witness, or to find, record or collect some ceremonial performance or cultural object, they assert this as a basis for their presumed right to keep, display, describe, publish or record in other ways that image, performance or object.[65]

Another writer at this time who commented on Aboriginal creative expressions was Robert Henry Mathews, who produced voluminous writings on Aboriginal culture. In December 1899, R. H. Mathews read his paper, 'Pictorial art among the Australian Aborigines', to the Victoria Institute.[66] He began by declaring:

> Most of the drawings of the Australian aborigines are very primitive in execution, and conventional in type, but they are nevertheless of unquestionable value to the student of archaeology.[67]

Mathews pointed out that he had 'made accurate copies of a large number of these pictorial representations, which have not hitherto been recorded', and that he proposed 'to treat the subject under the following divisions, namely: Rock Paintings – Rock Carvings – Marked Trees – Drawings on the Ground – Images – and Carvings on Wooden Implements.' Here, again, is the proprietorial tone: Matthews proclaims his authority or expertise in these images by noting he was the first to record them. That this was executed in accurate detail reinforces his authorial claims. This division in

Mathews' paper of Aboriginal cultural products into separate units that were manageable and amenable to description and analysis was the most common way of presenting material in written accounts. Often in these descriptive accounts there was little or no explicit discussion of the relationships between the different components, or of the connections between them, and Aboriginal culture as a whole. Mathews' remark about the value of the drawings of the Aborigines to 'the student of archaeology' implies that Aboriginal heritage generally was seen by him not as the heritage belonging to the Aboriginal people themselves, but rather, as something that was of objective, scientific interest to Europeans. This notion of heritage as being of value to 'science', as a discipline apart and distinct from Aboriginal cultural systems, was a theme commonly found in much European writing. Here, the tone of Mathews' description of the Aborigines' drawings as 'primitive' and 'conventional' suggests a sense of limitation, and is in contrast with his assertion of their 'unquestionable value' to the scholarly community.

Writers continued to muse over the vast array of markings on rocks, cave walls and other surfaces that they saw. These markings commonly prompted speculation on their origins, antiquity and meanings. Another writer interested in rock markings was surveyor W. D. Campbell, who published one of the first surveys of rock markings in the Port Jackson and Broken Bay regions of New South Wales in 1899.[68] Campbell's work was the result of his having spent many years between 1886 and 1893 'in his private time' scouring the 'area of country between Botany Bay and Middle Harbour'.[69] He wrote that the fertile harbours, bays and creeks, 'wooded hills and rugged mountains' of Port Jackson and Broken Bay had enabled the Aboriginal populations to 'become both numerous and powerful, and individually robust and of large stature'.[70] This abundant country had also facilitated their creative life, as he elaborated:

> The leisure time and exuberant vitality evidently enabled them to devote special attention to their ceremonies and amusements judging from the numerous rock-carvings and cave-drawings that are to be found in this district.[71]

Campbell expressed surprise that these people had evidently devoted some considerable time to activities beyond mere subsistence:

> When it is considered what a small amount of labour they devoted to their habitations or anything relating to their personal comfort, it must be surprising that such considerable and sustained efforts were made for the cutting of these figures, sometimes sixty feet long, with a grooved outline, in the solid rock.[72]

Campbell pondered the lost meaning of these rock images:

> The meaning of much of what is thus drawn and cut must inevitably be lost in oblivion with the rapid disappearance of the native races, no effort having been made, in the early days of settlement, to put on record the folklore of the blacks.[73]

This passage is reminiscent of Worsnop's writing, with its idea of a disappearing culture and call to record it. Campbell advocates recording by means of drawings:

> It is, however, within our power to make reliable drawings of these relics of the past, that surely cannot be without interest to the most casual observer, and must be of priceless value to the student of science in years to come, when the natural decay of the rock surfaces, unless artificially preserved, will have obliterated them for ever.[74]

This is familiar language, with its references to these sites as 'relics of the past' and to their value to science. Even in these early years, near the end of the nineteenth century, Europeans were keen to ensure preservation of the rock markings, and Campbell expressed his

concern at the rapid deterioration, erosion and destruction from the effects of encroaching European settlement:

> A considerable proportion of the carvings now illustrated occur within the Kuringai Chase, and include some of the finest figures. It is satisfactory, that in at least that public reserve, there is an opportunity for their being protected from destruction. Special measures will no doubt be required to suit particular cases. The enclosure by iron railings is not always possible, but there are no localities where the durability of the stone might not be greatly increased by applying a transparent solution of silica to the surface in the same way as building stone is treated.[75]

The reference to the need for 'special measures' presages later discussions and debates about proposed new legislative approaches to preserving and protecting Indigenous heritage. Campbell's mention of the benefits of protecting these sites by their location within a 'public reserve' also foreshadows later views regarding the role of Aboriginal reserves in preserving heritage objects and sites. The question of antiquity and origins of the rock markings perplexed Campbell:

> In regard to the age of these markings it is plain that the practice of marking the rocks goes back further in time than the rocks can give evidence upon. The rate of decay must be unequal in different strata and different localities, but many hundreds of years must have elapsed since most of these rock-carvings were made, and they range down to quite recent times, as evidenced by the figures of rabbits being carved at Woy Woy. ... There is hardly sufficient evidence collected as yet, however, to be able to form any very clear idea regarding the antiquity of either the carvings or paintings.[76]

Value judgements about aesthetic quality, and the search for the 'meaning' of images and designs produced by Aborigines, were among those aspects of Aboriginal cultural heritage that most preoccupied Europeans. The many remarks by writers that the

aesthetic quality of Aboriginal 'art' was low on the scale of human cultural productions was consistent with the prevailing evolutionist view of the lowly place on the scale of humankind occupied by Aborigines as a people. In the midst of this generally negative view of Aborigines and their cultural products, we do find exceptions where surprise is expressed at the 'superior' level of craftsmanship observed. Yet among those writers who occasionally noted more 'advanced' instances of workmanship in Aboriginal cultural objects, some believed this to be the result of 'foreign' influences.

Those who wrote about Aboriginal heritage were from diverse backgrounds, engaged in a variety of projects. Some, such as Worsnop, Mathew and Brough Smyth, may be regarded generally as 'collectors and compilers'.[77] Others wrote narratives or comments based on their brief encounters with, or observations of, Aboriginal people during shipboard voyages. Many writers based their accounts on previous knowledge, earlier travel and missionary narratives, and the gleaning of information through correspondence with a wide range of others. The learned societies and organisations also played important roles in that they fostered interest in Aboriginal culture, and the meetings and journals of those organisations provided valuable forums for the dissemination and accumulation of information. At the same time there were also people who began to spend extensive periods of time among Aboriginal people, and produced more comprehensive accounts as distinct from the travel or discovery narratives of earlier workers. This latter group included Baldwin Spencer and Frank Gillen, Walter Roth and Alfred Howitt – each of whom worked in different regions of Australia.

Classifying objects: Stirling and Kenyon on stone tools

One subject that continued to provide much interest to Europeans was that of stone tools. These durable and often curious objects could, it was thought, provide clues not only to Aboriginal peoples'

lifestyles, but also to the deeper questions about antiquity and racial affinity. Stone tools were, in this sense, cultural or racial markers: they could be classified to correspond with racial typologies, and provide indicators to comparative ethnologies or cultural or geographic affinities. Many workers devised classificatory schemes, and these then provided a reference for further debates and discussions. Later, with the advent of systematic archaeological work based on excavation, the debates on stone technology acquired different levels of complexity as writers and observers grappled with the critical roles of chronology and stratigraphy.

One early endeavour at stone tool classification was by Victorians A. S. Kenyon and D. L. Stirling, who presented a paper in 1900 to the Royal Society of Victoria. They wrote of the need for such classification to assist those studying and collecting stone tools:

> It is hardly necessary to enlarge on the need for a classification of the stone implements of the Australian Aboriginal. All investigators, as well as collectors, have experienced difficulties through such want.[78]

Kenyon and Stirling cast a critical eye over those 'non-collectors' who, without the attention to detail and special knowledge of the collector, usually acquired the more easily recognisable and visible 'ground cutting edged implements, generally known as "Blackfellow's axe or tomahawks"'.[79] The authors claimed that 'the less distinctive implements have not been described, and when occurring in collections, are frequently wrongly labelled'. We shall be seeing more on this theme of accuracy of description and labelling later, when discussing the collection of Stan Mitchell. Elaborating on the types of implements in collections, Kenyon and Stirling wrote:

> A further reason for the undue preponderance of axes or tomahawks in collections is that they are found scattered over the whole country, while almost all the other implements are found at the sites of camps only, being chiefly used in domestic operations.[80]

Kenyon and Stirling's concerns about the places where stone implements are found foreshadows another theme that was subject to ongoing debates and discussions – not only in published accounts, but also in the private correspondence of collectors and ethnologists. This theme concerned the relationship between stone implements and the locations where they are found, which had implications for more inclusive approaches to understanding Indigenous heritage. The emerging recognition of the role of place in Aboriginal material culture was also important for those people who collected in a context that they thought devoid of 'living' Aboriginal communities, since it was considered that the specific provenance of a stone implement might reveal some clues regarding the uses, meanings, functions and origins of these objects. It should be remembered, too, that these debates occurred before the advent in Australia of archaeological excavations, which introduced a more rigorous understanding of the significance of depth, and with it, the critical factor of chronology and associated implications for antiquity.

Writing in 2000, Aboriginal academic Marcia Langton has summed up nineteenth-century collecting as follows:

> The enthusiasm displayed by successive colonists in the collection of Aboriginal objects belied the contempt in which they were held; the objects were appropriated for purposes of study only. There was little or no reference to their beauty or to the technical and aesthetic complexity of their manufacture. They were not perceived as 'art', or viewed in any way aesthetically until the twentieth century.[81]

Although Langton's comment may pertain to many Europeans' narratives of this period, from my sampling so far it would appear that there is a greater diversity of perceptions of Indigenous heritage than her summary might allow. Where some writers might have had little or no appreciation of the 'beauty or technical and aesthetic

complexity' of Indigenous cultural objects, there were others (such as Carrington) who apparently did have such an appreciation.

The next chapter follows some of the debates and discussions on stone tools, their classification, uses, functions and meanings as these occurred in writings by collectors and others in the 1920s and 1930s. Europeans' interests, concerns and anxieties about change, innovation and adaptation are also examined, as these applied to both stone tools and to Aboriginal artistic expressions and products.

2

'Nothing to be Discovered'

During the first decades of the twentieth century there was an increase in the rate of accumulation of information about Aborigines. It was not only information about Aboriginal material culture that was collected, however; there was growing interest by Europeans in the recording, documentation and display of many other aspects of Aboriginal culture, such as ceremony, song and dance. This collecting and recording activity was informed by a notion that Aboriginal societies were 'disappearing' or 'dying' in the face of European intrusion and influence. The idea of Aborigines as a 'dying race' stimulated a sense of urgency in Europeans' collecting activity, which was also seen as a way of preserving the 'remnants' of the disappearing Indigenous cultures.

Many people heeded the exhortation by Worsnop in 1897 to 'minutely and systematically examine and describe' the vast array of Aboriginal cultural material. One of these was Baldwin Spencer, perhaps the leading ethnographer of Aboriginal culture and society during the first part of the century. Spencer's pioneering ethnographic work in central and northern Australia was also instrumental in the development of the ethnological collection at the museum in Melbourne. Like many other scientists and researchers, Spencer was keen not only on collecting and recording Aboriginal heritage, but

also in exhibiting it. He set out his ideas for the Victorian Museum exhibition in his *Guide to the Australian Ethnographical Collection in the National Museum of Victoria,* the first edition of which was published in 1901:

> In consequence of the peculiar interest which attaches to the Australian aborigines a special gallery has been devoted to the exhibition of their weapons, implements, and ceremonial objects. These have been arranged so as to show, as far as possible, series of objects belonging to tribes from the various parts of the continent. For example, the forms of shields used in different tribes are shown in one case, boomerangs in another, sacred and ceremonial objects in another.[1]

Spencer's remark concerning the 'peculiar interest which attaches to the Australian Aborigines' constructs the Aborigines as objects of curiosity, exoticising them and serving as a marker for difference. This exoticism in Spencer's text implicitly provided a charter for a special gallery to display objects of Aboriginal material culture, which in turn highlighted the diversity of objects from all parts of the continent. Spencer did not seek to arrange Indigenous cultural objects within the imposed classificatory framework of the Old World, as he claimed that artifacts were 'of such variety and yet were used contemporaneously, that European concepts of typology and terminology were confounded'.[2] Instead of antiquity and racial affinity being the determinants for Indigenous cultural objects, Spencer's view (influenced by A. S. Kenyon) was that form and function were dictated by the availability of material. His scheme for ordering Aboriginal cultural objects was, in Mulvaney and Calaby's view, devoid of a sense of time or chronology, and it indicated a 'failure to appreciate archaeological possibilities'.[3] These authors claim that Spencer 'treated Aboriginal society as ancient and its ceremonies and institutions as survivals from remote savagery'. They assert that 'as a stone tool collector, however, he envisaged some

timeless, unitary technology which embraced most Old World types, including recent Neolithic techniques'.[4] These authors describe Spencer's views as 'negative dogmas', perceiving them as being antithetical to archaeological interests:

> ... Spencer's prestige and the influence of his museum guidebook reinforced those notions which inhibited the development of systematic field archaeology. These included the belief that there were no stadial or chronological phases in stone technology; that because caves were avoided, it was pointless to excavate for stratified deposits, and even rock-shelters seem to have been included in this assumption; that the nature of the raw material was the controlling factor in the form or size of an implement.[5]

Like many people at the time with an interest in Aboriginal culture, Spencer also had a sense of nostalgia about the effects of encroaching European influence on Aboriginal material technology, regretting the demise of the stone axe in favour of iron and steel tools. He wrote in the *Guide*:

> Most unfortunately the opportunity was not taken in the early days, before the iron tomahawk had replaced the native stone axe, of bringing together a collection illustrative of implements in daily use amongst the Victorian tribes, and now, owing to the practically complete extinction of the tribes, it is of course impossible to secure them. However, despite this the Australian collection is a fairly representative one and is especially rich in regard to various articles connected with magic and in what are usually designated as 'sacred' objects, such as are used during initiation ceremonies, and which of all things possessed by the aborigine are the most difficult to procure, while at the same time they are of the deepest interest.[6]

Spencer's classification of Aboriginal cultural objects in his description of the museum did not reflect Indigenous peoples' own ordering of their cultural products. It was instead informed by the typological and classificatory preoccupations of the collectors and

displayers of Indigenous cultural objects. The establishment of the 'special gallery', and the focus on acquiring objects and displaying them in terms of 'a series of objects belonging to tribes from the various parts of the continent', suggests that Europeans had a museum-based approach to Indigenous heritage. In their fascination for collecting, ordering, classification and display, Europeans exhibited a predisposition towards the methodical, scientific arrangement of cultures as specimens. In this scheme, the Aborigines, like their material objects, were ordered in terms of series, patterns, typologies and hierarchies.

Spencer's remarks in the *Guide* on the substitution of the 'native stone axe' with the 'iron tomahawk', and on the scarcity of the former objects, illustrates Europeans' preoccupation with authenticity. This notion presumed that there was an 'authentic' Aboriginal culture – defined according to some vaguely articulated ideas about traditional native societies – that was fast disappearing and being substituted with a 'fabricated' culture of introduced ideas and materials. The resulting loss of 'authentic' or 'traditional' objects and cultural expressions was, to many observers, a clear mandate for Europeans to intensify their efforts in 'rescuing' Aboriginal culture by collecting and recording it.

As Baldwin Spencer had noted with sadness the demise of the stone axe as metal tools were introduced, so too did Frank Gillen, who, during an expedition to Central Australia, observed in his diary of 1901:

> ... Added to our collection 5 stone tomahawks, 3 stone knives and 1 stoneheaded fighting pick (*Kulungu*). It is not at all an easy matter to get hold of stone implements even here and in a few years stone tomahawks especially will be very valuable. Old knife blades, pieces of scrap iron, shear blades and even telegraph line wire are being used instead of stone by the natives, who also make use of glass bottles for manufacturing spear heads. They chip the glass beautifully but it is too brittle to be of much service.[7]

While this use of introduced materials to replace stone clearly indicates the capacity of Aborigines to adapt to new ways, to some European observers it instead indicated decay and degeneration. In one manifestation of this 'degeneration' view, the quest for a perceived 'authentic' Aboriginal cultural life and cultural objects was so powerful that there was a deliberate effort made to '(re-)invent' what was thought to be an authentic culture. For example, C. E. Cowle, a mounted police constable who worked with Spencer and Gillen in Central Australia, proudly wrote to Spencer from Illamurta in August 1900 that 'I also got four or five of their curved adzes but all had *iron* tips which I am getting replaced with flints'.[8]

In pursuing the urgent task of 'rescuing' Aboriginal cultural heritage by documenting it during these early years, some Europeans were also asking questions about the 'origins' or the 'antiquity' of the objects and images that they were finding and recording. In a 1901 article in *Science of Man*, one writer thought that some unknown non-Aboriginal culture had been responsible for much of the heritage that was observed:

> Many persons think there is nothing to be discovered in Australia, except what belong to the black tribes, now or lately found there. But to the more experienced there are many evidences that other peoples, quite different to the blacks, have been in Australia, they having left undisputable proofs of their presence and residence there. ... Although much has been written upon these antiquarian objects, we are yet awaiting a satisfactory explanation as to who made them, and why they were made.[9]

This suggestion that non-Aboriginal visitors were responsible for producing visible heritage echoes the views of Grey (writing in 1841), and other writers who thought rock paintings and other cultural expressions too sophisticated to have been created by Aboriginal people.

As well as arguing for the preservation of the relics left by these mysterious visitors, the *Science of Man* writer also called for the recording, collection and preservation of Aboriginal cultural heritage:

> It should be at once recognised that in the west, north, and other places are many of the antiquities of the blacks and also of other peoples who have been in Australia, and it would be well to collect and forward to us, full particulars of all such things, or they may be destroyed and forever lost.[10]

Once again we meet the idea of permanence as the author encourages the collection of 'the antiquities of the blacks' to prevent further loss and destruction. Europeans' notion of heritage as something that demands permanence, stability and solidity seems at odds with some views espoused today, especially by Indigenous peoples, of heritage as a 'living tradition'. In this sense, the designs, images and objects that Europeans so coveted for their museums, galleries, universities and private collections are seen not as remnant trophies of a lost people, but rather as elements vital to the ongoing maintenance and performance of cultural traditions.

While there continued to be many writers producing brief, predominantly descriptive accounts of Aboriginal culture, these early years of the twentieth century were also notable for the number of more substantial studies – many of which were based on extensive fieldwork. These works included ethnographic accounts of Queensland Aboriginal peoples by Walter Roth, studies of southeast Australian Aboriginal peoples by Alfred Howitt, and further works on the people of central and northern Australia by Spencer and Gillen. These works continued to debate the themes of 'authenticity' and the changes in technology with introduced materials.

In his 1904 ethnological notes on the Aboriginal peoples of the north Queensland region, Walter Roth made frequent references to

the use of introduced European materials. Commenting on the working of wood, he wrote:

> What with the introduction of scrap-iron and modern tools, and their consequent trade and barter, the working of timber wholly by aboriginal appliances is so rare nowadays that it is no easy matter to collect reliable information concerning the methods formerly, and sometimes still, employed.[11]

Roth's comment about the difficulty in collecting 'reliable information' illustrates a theme often found in Europeans' writings about Aborigines, in which the Aboriginal peoples' capacity for 'truth' is questioned. This question about reliability speaks to a larger view that was often expressed by writers working within an evolutionary framework wherein Aboriginal people were thought to possess low standards of morality, especially when compared with the Europeans' own values.

In discussing stone tool technology, Roth accepted the fact that introduced materials were increasingly being used, as he commented that:

> As might have been expected, with the advance of European settlement, scrap-iron filed or ground down is rapidly replacing stone for scrapers ... Amongst aboriginals out of reach of European settlement, even sometimes amongst civilised ones, an ordinary pocket-knife or table-knife is employed rather as a scraper than as a cutting instrument.[12]

Roth's observation on the Aboriginal peoples' use of a pocket or table knife as a scraper also suggests innovation, rather than simply replacement. His account, like many of those who spent some time 'in the field', conveys a sense of authority; the ethnographer was witness, and is therefore qualified to speak knowledgeably. In the following extract Roth observed Aborigines in the arduous but exacting process of manufacturing stone implements:

> The Camooweal blacks maintain that pebbles from the neighbouring Nowranie Creek provide the best native-gouge heads, while the stones lying along the bed of the Georgina River here (as compared with those found on the Gregory River, at Lawn Hills, etc.) are too short and too full of flaws to manufacture good knife-blades from. It was at Camooweal that, during the course of one afternoon, four of the old men must have struck off in my presence quite 300 flakes before a passably suitable one for a good knife was obtained. A large majority of the flakes and chips so produced could of course have been utilised for future use as scrapers, etc.[13]

Roth's detailed observation of this process of making stone tools represents an important shift away from the generalised, distanced descriptions of 'weapons and implements' found in the accounts of many early writers. While the latter compiled their accounts from existing sources such as travellers' tales and the records of missionaries, officials and explorers, Roth's narrative, by contrast, has a freshness of first-hand observation. His description suggests that these Aboriginal people had a sharp eye for quality and accuracy in their manufacture of stone implements, as they struck a considerable volume of stone before those suitable for use were obtained. The description of tool making, and speculations as to origins, functions and purpose of stone tools, are themes that recur in many Europeans' writings. So too is a fascination with typology and classification, already encountered in Spencer's writings. Stone technology in particular lent itself to this fascination with typologies, as illustrated in Roth's discourse on 'stone-celts':

> I am afraid that too much importance has been hitherto attached to the differentiation of stone-celts into axes, adzes, wedges, scrapers, etc.: the savage most certainly does not recognise the fine distinctions embodied on the labels attached to these articles in an ethnological museum. In the absence of actual observation, is any one competent, for instance, to give a definite opinion as to which of such implements the special use of any stone-celt under consideration most particularly conforms to? ... We are ... faced with a series of objects that may, at one time or another, have been put to at least four different uses. The phrase 'stone-tomahawk' seems for the most part to have been a popular Australian misnomer, since it implied that these celts – even if their use as axes be taken for granted – were employed mounted, an implication which was certainly not always the case. Aboriginal evidence also points to the conclusion that these celts were not fighting implements, but articles utilised for purposes of domestic use, especially in the way of cutting timber, either in the log or tree, and particularly in the cutting of notches or toe-holes in climbing. Furthermore, to name any of the larger kinds of celt, for want of a better term 'ceremonial-stones' is, in my opinion, only to beg the question. It also seems to me too much of an assumption to suppose that the definitive uses of such a specialised implement as an axe, adze, chisel, wedge, etc., are, as a matter of course, known to the savage by intuition.[14]

In this extract Roth articulates some of the anxieties that continued to preoccupy Europeans concerning Aboriginal stone tools. Some writers formed their views from afar, speculating about the form and function, purpose and meaning of stone tools that they found on the ground or removed from their contexts as part of a living culture. In contrast, Roth used his experience in observation to argue against imposing preconceived classifications and labels on Aboriginal implements. He concluded that the shape of an implement did not determine the type of use:

> Where celts have been manufactured from water-worn pebbles, and these apparently constitute the majority of examples discoverable ..., it seems to me futile to base any rational classification upon the shape: the savage, other things equal, will certainly not give himself the extra labour of altering the general contour of such a stone beyond that involved in producing a cutting edge.[15]

Roth's comment here also indicates his view that Aborigines' cultural productions were solely utilitarian; these people were not,

he thought, given to imparting a sense of aesthetics or decoration to their technology. There continued throughout much of the century a tension in Europeans' writings, between those who viewed Aboriginal material cultural objects as having solely functional or utilitarian purposes, and others who perceived Aborigines as having aesthetic sensibilities.

While Roth was observing cultural activities among Aboriginal peoples in parts of Queensland, the Adelaide-based medical specialist and ethnographer Herbert Basedow was writing about the peoples he encountered in the northern regions of South Australia and areas of central and northern Australia. His remarks on material culture in a 1903 report of an expedition to north-western South Australia are replete with the language of absence:

> In the making and use of implements and weapons the tribes encountered during the expedition were particularly primitive, more so, apparently, than in any other part of Australia.[16]
>
> Boomerangs, waddies, shields, and other important weapons recorded for different tribes are not known, as far as observation went, to any of the tribes that inhabit the north-western ranges.[17]

Basedow examined 'native cave drawings and primitive rock scratchings' and observed that these were made:

> by simply scratching an angular fragment of rock upon the surface of a larger outcrop in such a way as to result in the formation of crude designs and imitative reproductions from nature.[18]

He then used pencil and paper to obtain 'original drawings', reminiscent of a similar technique used some years earlier in 1894 by Bassett-Smith:

> Upon teaching some members of the Karkurrerra Tribe, in the vicinity of Erlywanyewanye Waterhole, south of the Musgrave Ranges, the use of a pencil, I succeeded in obtaining a few original drawings on paper .... These, during the time that they were constructing the designs, would repeatedly ejaculate their respective meanings.[19]

Basedow, like many, was interested in obtaining the 'meanings' of the art works, and his methods for doing so foreshadowed similar methods used by Charles Mountford and others decades later.

These early years of the new century were productive ones for the making of detailed ethnographies. The collaboration between Gillen and Spencer continued, with their publication in 1904 of a further ethnographic account of their extensive work among the peoples of Central Australia, in what they stated was a 'sequel' to their 1899 work *Native Tribes of Central Australia.*[20] In this new work, *The Northern Tribes of Central Australia,* they succinctly re-state their conservative view of Aboriginal culture:

> Without in any way disturbing the natives, who still, to the north of the Macdonnell Ranges, practise the customs and retain unchanged the beliefs of their fathers, the few widely scattered telegraph officials, by their consistent kindly treatment of the natives, have come to be regarded by the latter as their friends, and this fact served us in good stead.[21]

Spencer and Gillen, renowned for their interest in producing visual records, 'were provided with a phonograph, and so were able to secure records of native songs associated with both the ordinary corroborees and sacred ceremonies'.[22] They claim authority for their account on the basis of being the first to 'fill a gap' and produce a study of these particular peoples:

> Up to the present time there has been no reliable and detailed account published of the organisation, customs, and beliefs of the tribes inhabiting the wide extent of country lying between the Macdonnell Ranges in the centre of the continent and the Gulf of Carpentaria. Practically nothing is known of their customs ... The present work is an attempt to fill this gap in our knowledge of the Australian aborigines.[23]

Consistent with their view of Aboriginal culture as inherently conservative, they invoke geographical isolation as an explanation for this lack of change:

> Taking every class of evidence into account, it appears to us to be very difficult to avoid the conclusion that the Central tribes, which, for long ages, have been shielded by their geographical isolation from external influences, have retained the most primitive form of customs and beliefs.[24]

Spencer and Gillen made a particular study of Aboriginal ceremonial life, and their ethnographies provide considerable detail of this aspect of culture. Despite what we have come to regard as these authors' unusual ability to gain an understanding of the depths of Aboriginal religious and cultural life, their work surprisingly is, in parts, underpinned by a notion of Aborigines as crude savages, as the following passage shows:

> A word of warning must, however, be written in regard to this 'elaborate ritual.' To a certain extent it is without doubt elaborate, but at the same time it is eminently crude and savage in all essential points. It must be remembered that these ceremonies are performed by naked, howling savages, who have no idea of permanent abodes, no clothing, no knowledge of any implements save those fashioned out of wood, bone, and stone, no idea whatever of the cultivation of crops, or of the laying in of a supply of food to tide over hard times, no word for any number beyond three, and no belief in anything like a supreme being. Apart from the simple but often decorative nature of the design drawn on the bodies of the performers, or on the ground during the performance of ceremonies, the latter are crude in the extreme.[25]

This is a discourse of what historian Bernard Smith calls 'hard primitivism', which had associated with it notions of 'austerity and fortitude' and defined Indigenous peoples who 'in their natural state' were thought to be 'depraved and ignoble'.[26] In this scheme,

the Australian Aborigines, in contrast to the 'soft primitivism' of the Polynesians, were exemplars of hard primitivism.[27] The brutish Aborigines were 'ignoble savages', while their more refined Pacific counterparts were 'noble'.[28] Spencer's depiction, in the quote above, of the Aborigines as lacking in many aspects of their lives, paints them as primitive indeed, yet there is also here a sense of the 'austerity' in Smith's characterisation of 'hard primitives'. Austerity in itself cannot be assumed to be a negative quality or a pejorative judgement; rather, it may suggest a state of being in which there is an intentional desire to do without many of the trappings of modernity. The description of Aborigines in Spencer's account (and in those of many other Europeans) as lacking in 'permanent abodes', 'clothing', and in many kinds of implements, in itself need not necessarily define people in a pejorative or racist way. Indeed, simplicity and restraint can also be a virtue, suggesting an efficient lifestyle, resourceful, without waste or undue abundance, and unencumbered with material goods beyond those necessary for sustaining a community. Multiple readings and interpretations are possible for all the texts surveyed in this book.

Spencer and Gillen had much to say on the performance of ceremonies, and their description again is couched in terms of simplicity and crudeness:

> It is difficult, if not impossible to write an account of the ceremonies of these tribes without conveying the impression that they have reached a higher stage of culture than is actually the case; but in order to form a just idea the reader must always bear in mind that, though the ceremonies are very numerous, each one is in reality simple and often crude. It is only their number which causes them to appear highly developed.[29]

Spencer and Gillen's ethnography is arranged into chapters with headings such as 'weapons and implements' and 'decorative arts', following what was a fairly typical format for ethnographic accounts

of the time. In their account of stone tools, the imminent demise of stone technology in favour of introduced materials such as steel is once again a subject of interest:

> At the present day the making of stone implements threatens to become rapidly a thing of the past, over practically the greater part of the Central area. Even amongst tribes which have had very little intercourse with white men, iron is beginning to replace stone, and it will be only a matter of comparatively few years before, at all events, stone hatchets will cease to be made and used. Iron tomahawks pass from tribe to tribe. Odd bits of hoop iron are laboriously ground down to a sharp edge and are beginning to replace the stone axe or spear-head. Prongs of stout wire take the place of the old wooden ones. When once these innovations make their appearance, it is wonderful with what rapidity they spread from group to group.[30]

As well as the sense of nostalgia in this description at the imminent replacement of stone tools with steel ones, there is also an admiration at the creative ways in which the new materials were adapted and incorporated into new kinds of tools and implements. This praise of the Aborigines' innovative skills, and of their capacity to transmit innovations between groups, contrasts with the views of some of the earlier writers who saw in Aborigines' cultural products only imitation and derivation. In Spencer and Gillen's account, however, Aboriginal peoples' incorporation of new materials was limited to those communities close to, or living on, European settlements; away from those settlements the 'old ways' continued. They noted:

> Up to the present time, however, except in the immediate neighbourhood of settlements which are fortunately too small and too far between to affect large numbers of the natives, the latter have lived in blissful ignorance of the age of iron, and have continued to fashion their weapons and implements with the old flaked and ground, or, more rarely, chipped stone knives and hatchets.[31]

Here again is the conservatism that underpins much of Spencer and Gillen's writing on Aboriginal culture. It is as though with some relief that they observe Aboriginal people far from European settlements continuing 'blissfully' to maintain their old stone tool traditions. There is a judgmental tone in this writing, in which the authors' disdain at the use of introduced iron and steel is transferred to the Aborigines; thus, those remote people who do not use these new materials are 'fortunate', as they retain a 'blissful ignorance' of those innovations.

In the writings of Spencer and Gillen, as in those of many Europeans, depictions of Aborigines often contained imagery of romanticism, alongside that of primitive wretchedness. There was, in this sense, nearly always a notion of the Aborigines as 'other' – either in a positive or a negative way.[32]

Spencer and Gillen shared the preoccupations of many Europeans in classifying the Aborigines on the basis of their material culture. Maintaining Spencer's opposition to the uncritical imposition of preconceived classificatory labels on Aboriginal material culture, these writers argued that the juxtaposition of different types of stone implements defied any typology based on Old World nomenclature:

> The Central Australian natives make and use stone implements which are usually described as typical, respectively, of both the Palaeolithic and Neolithic periods. Some of their flaked knives are practically as crude as those of the extinct Tasmanians, while the chipped ones which exist side by side with the former are as well made as those found in European barrows. Amongst the Central Australian aborigines it is simply a question of the material available. If they have a supply of quartzite, then they make flaked or flaked and chipped implements. As a matter of fact they always have this material available, and therefore every tribe uses it. In

some parts they also have stone, such as diorite, which is suitable for grinding, and then they make, in addition to the flaked knives, the so-called Neolithic ground axe. Had such a tribe as the Arunta or the Warramunga become extinct, leaving behind it, in the form of stone implements, the only traces of its existence which would have persisted, the modern ethnologist would have been not a little puzzled by finding side by side the most crudely and the most beautifully flaked and chipped stone implements and at the same time ground axes.[33]

This confusion of types led Spencer and Gillen to surmise that the Central Australian Aborigine, 'so far as his stone implements are concerned, is a member of both the so-called Palaeolithic and Neolithic stages in the development of the human race'.[34] Their view of these peoples' 'decorative art' was similarly based in a notion of evolutionary progress:

> The Australian savage has long ago got beyond the stage of decorative art which consists mainly in the emphasising, usually by the addition of pigment, of some peculiarity, such as a knot or a node, in the material out of which he makes his implements.[35]

Spencer and Gillen's work was to become an important reference point during the early years of the twentieth century for future anthropological and historical work on Aboriginal culture and society. Other such writings included those by A. W. Howitt, who was well known for his early work on the Aboriginal peoples of southeast Australia. He was a government official in the Gippsland region of Victoria, and a correspondent for the Aboriginal Protection Board. In this latter role particularly he was able to collect information from a wide range of correspondents, including Aboriginal people.[36] Like many others of this period and subsequently, Howitt believed that by documenting details about the Aborigines, he was preserving for posterity details of the cultures and societies of

a people who had disappeared. He wrote in the Preface to his 1904 publication *Native Tribes of South-East Australia*:

> By far the greater part of the materials for this work was collected and recorded before 1889. Since then the native tribes have more or less died, and in the older settlements of South-East Australia the tribal remnants have now almost lost the knowledge of the beliefs and customs of their fathers.[37]

Howitt's social and political contextualisation of material cultural heritage enabled him to offer some unusual insights into these integrated aspects of Aboriginal life. In the following extract concerning a stone axe quarry at Mount William in Victoria he details the connections between social and political organisation, land, and material culture:

> The right to hunt and to procure food in any particular tract of country belonged to the group of people born there, and could not be infringed by others without permission. But there were places which such a group of people claimed for some special reason, and in which the whole tribe had an interest. Such a place was the 'stone quarry' at Mt William near Lancefield, from which the material for making tomahawks was procured. The family proprietorship in this quarry had wide ramifications, including more than Wurunjerri people.[38]

Here, the interplay of social and political relationships with the distribution and management of rights, and the association of these with activities such as food procurement and hunting, displays an intuitive notion of the integration of 'heritage' and culture in Howitt's writing, that seems to have eluded many other writers of his time.

While there was an increasing number of close-grained, detailed studies of particular Aboriginal cultural and language groups, at the same time there was also a continuation of the kind of generalised compilations of the type we saw with the writings of Worsnop and

Brough Smyth. Another writer in this latter tradition was Northcote W. Thomas, a Cambridge graduate, described as an 'eccentric', who in 1908 became British Government anthropologist in Nigeria.[39] Thomas published an 'armchair study of Australian kinship' in 1906, in which he argued for cultural variability:

> It must be understood ... that a description of a tribe in one district is not necessarily true of a tribe in another or even in the same district.[40]

In his brief discussion of Aboriginal art, Thomas referred to 'drawings on rocks, trees, sand, and other objects, which stand in no close personal relationship to man' as 'elaborate representations, consisting of circles, patches, and sinuous lines'. He claimed 'inasmuch these diagrams are used in the totemic ceremonies of the emu totem, it may be doubted how far they are technically art; probably they are better described as magical designs'.[41] Where these drawings used by 'Central and Northern tribes during their initiation ceremonies' could not, in Thomas's view, be defined as 'art', neither could the images and designs of other Aboriginal groups, as he wrote:

> Among the Eastern tribes drawings on bark and figures moulded in earth or made of wood were in use; and we can hardly distinguish the ground-drawings of the Central tribes from these other products, which do not obviously come within even a popular definition of artistic products.[42]

Continuing his 'survey' of Aboriginal art, Thomas eventually 'finds' some designs used among Central Australian peoples that, in his estimation, warrant the label 'art':

> Occasionally designs are found on rocks similar to those in use at the totemic ceremonies; they have, according to the natives, no meaning; here we seem to be in the presence of real artistic productions.[43]

Here, despite the apparent absence of meaning of these designs, Thomas was impressed by the artistry in them. Although he seems to have appreciated the diversity of Aboriginal cultures, his writing displays an evolutionary approach, wherein he accords some Aboriginal societies as producing 'art', while others' cultural expressions are merely 'magical designs'.

Thomas summed up his views on the diversity of Aboriginal expressive culture, writing that:

> To describe in detail the arts and crafts of even a single Australian tribe would be a work of some magnitude. A survey of the whole field might be interesting to the technologist; but the ordinary reader might fight shy of a systematic treatment of the manufacture of stone weapons alone, not to mention other industries. ...

He had some comments as well on the use of metals to replace stone and other materials:

> Although the Australian has learnt to use metals, in his native state he was guiltless of any acquaintance with them. His knives, his axes, his spearheads were of stone, bone, shell, or wood. The manufacture of stone implements has always been a great feature in the culture of peoples unacquainted with metals, and the Australian is no exception to this rule.[44]

Thomas' observation of the Aborigines' rights in stone quarries was possibly a reference to Howitt's remarks:

> Before leaving the subject of stone implements it may be mentioned that, according to some authorities, the tribes which had no suitable stone within its own boundaries was [sic] at liberty to send tribal messengers to a quarry and procure what they wanted without molestation. On the other hand, we hear of private ownership of quarries at which axes were procured, but possibly customs differed.[45]

This brief description of tribal boundaries and of the rights that Aboriginal people asserted regarding stone materials is an important acknowledgment of the connections between people, material items and place.

While writers such as Roth, and Spencer and Gillen discussed the manufacture and use of stone tools, and the production of art and ceremony, as integral to Aboriginal peoples' lived culture, this approach was not common in European writings at this time. The references in Howitt's and briefly in Thomas's writings to the quarry and ownership rights are an important reminder that all material objects associated with Aboriginal people must be considered within particular contexts of time, place and cultural milieu. Recognition of this contextualisation is often absent from writings by Europeans, many of whom discussed physical objects such as stone tools devoid of any sense of the connection between these objects and the Aboriginal people who made and used them. This separation of things from humans is particularly striking in the writings of some of the amateur collectors of stone tools discussed later. It is also a critical factor informing many Europeans' views about the objects that were taken from Aboriginal societies and landscapes and placed in museums, universities and private collections.[46]

Items such as bark paintings and stone tools were portable, and were often removed by Europeans from their original cultural, geographical and social contexts, and circulated and discussed within entirely new, European contexts. Apart from the ethnographic writers who recorded details of stone tools and art in their cultural contexts as part of their work, there were other writers who noted the presence of objects – stone tools, bark paintings and the like – in the landscape. Observations of these tools situated in place, or the evidence of their manufacture, indicated recognition of Aborigines as living in the land. Making and using objects, creating and using art sites, and conducting ceremonial performances were all ways in which Aboriginal people marked the land, and maintained their

connections to the land and to their spiritual worlds of ancestors and totemic figures. These were all, in turn, part of the bundle of objects, beliefs, practices and actions that may be broadly termed Indigenous 'heritage'.

Marking the landscape

A frequently observed mode of marking out features of the landscape that was practiced by the Aborigines was the inscribing on rock surfaces and cave walls. Aboriginal peoples' markings on rock and cave surfaces were of enduring fascination to Europeans who sought to record, classify, explain and preserve these markings in a variety of different ways. Many Europeans who travelled through or visited areas in the pursuit of some non-ethnographic project – such as geological work, natural history, geographical or scientific surveys, or in the application of policy and administration – observed signs of Aboriginal occupation or presence through markings in the landscape. One such person was Stuart Love, who noted the presence of Aborigines during his 1910 prospecting expedition through Arnhem Land. On 18 August he wrote of his impressions of their iron tools:

> Traces of blacks – fresh tracks, recently felled trees, old 'wet camp', and fire-places of all ages – were numerous all day; the natives here evidently have iron tomahawks and good ones at that.[47]

In this brief observation Love conveys an impression of the living, active presence of Aborigines – a striking contrast to many of the writers surveyed earlier, whose narratives were imbued with a profound sense of a people long gone. His praise of the Aborigines' iron tomahawks also presents a counterpoint to the common tendency of many writers to bemoan or condemn the Aborigines' adoption of iron and steel materials and tools.

Other rock markings: New South Wales sites

It was not only stone and iron tools that signalled the presence of the daily activities of Aborigines in the landscape. Art sites also continued to provide interest. As well as art sites in remote northern, central and Western Australia, those in metropolitan and rural areas of southeastern Australia captured Europeans' attention. One of those who wrote about New South Wales rock engravings was W. W. Thorpe, founding curator of ethnology at the Australian Museum in Sydney, and predecessor to Fred McCarthy.[48] In 1909 Thorpe described a visit to some of these sites:

> While on a collecting visit to Bundanoon in October of last year, my attention was directed to the existence of two Rock-Shelters which contained Aboriginal pictographs. ... Both are of the usual form found wherever the Hawkesbury Sandstone occurs and frequently used by the Aborigines for camping in, the cooking of food, and sometimes for burial.[49]

Like many of his contemporaries, Thorpe wrote of an absence of Aboriginal people in these areas:

> The shelters and drawings have been known for forty years. Aborigines have not been resident in the district during that period, though parties of them have been known to pass through.[50]
>
> Special attention may be directed to the following. Shields occur frequently as carvings, likewise fish and turtle, whilst gravings of the human figure are freely made along with other objects of natural history.
>
> As far as the Bundanoon pictographs are concerned, I do not think the objects have any ritual significance or esoteric meaning. Their presence may be accounted for in the following manner. 'Art,' we are told, 'is the expression of human emotion in drawing, music, ornamentation, &c.' Perhaps in the personnel of a tribe one or more of its members possessed a penchant for drawing, and the artistic taste has expressed itself on these rough walls.

> Some of the objects are fairly true to nature, others again are below the average of Aboriginal art.[51]

Thorpe's description presents a dry, dispassionate account, in which the rock images of these Aborigines are described as at best 'fairly true to nature', and at worst, 'below the average of Aboriginal art'. Nonetheless, he has no doubts about designating these figures as 'art'. In his discussion on the 'meaning' of these engravings, there is a clear sense that he considers 'art' as separate from 'ritual'.

A somewhat different voice is that of Dr Alan Carroll, a Sydney-based anthropologist and medical practitioner, who founded the Royal Anthropological Society of Australasia in 1885, and was editor of its journal, *Science of Man*, until 1911. Writing in 1911 in *Science of Man*, Carroll praised the rock art of the Sydney Aborigines:

> Very few persons, even in Sydney, and less numbers in more distant places, are acquainted with painted and carved rocks in their own neighbourhoods. These real antiquities, left them by the former inhabitants of Australia, previous to the white colonists reaching these shores, are still to be seen in the forests and on the sea shores. There, on the highest hills, on the most precipitous cliffs, the pictures, symbolical of the myths relating to the earliest beliefs of the Australian blacks, are carved, and when it is remembered that they had no iron or other metal tools to make these carvings with, but only pieces of shell, quartz obsidian, or their equally breakable stone axes, to carve these works with, the time and patience to make these pictures, carved upon the compact sandstone rocks, must have been very great.[52]

Carroll's writing is more poetic than Thorpe's, as he offers an evocative picture of these images. Yet there is also a discourse of lack, where Aborigines were described as having 'had no iron or other metal tools to make these carvings with'. Their own materials, in Carroll's view, were seemingly fragile and delicate – barely

sufficient to inscribe the kinds of images seen on these rock faces. Two interrelated themes are illustrated by both Thorpe's and Carroll's writings. One concerns the relationship between 'art' and other elements of Aboriginal culture, such as ritual and religion; the other theme is the evident interest expressed by many writers in the purposes, functions and meanings of Aboriginal designs and images.

The rock images in the Sydney and New South Wales region were of interest on the basis of their proximity to closely settled and urban centres, and also as a consequence of their fragile and much eroded condition. Perhaps these markings, in contrast to the more immediately visually striking rock images in northern and western Australia, also captured the imagination of European observers because of the presumed elusive nature of their makers. Many Europeans were intent on gathering information from the more closely settled areas of Victoria and New South Wales. For these regions, they constructed an image of a long-departed people whose former existence could only be speculated from fragments of stone, traces in the landscape, or enigmatic markings on trees or rocks.

Different perspectives: experience versus speculation

The diversity of views on Indigenous heritage in Europeans' writings demonstrates that there is no single, homogeneous 'European view', just as it is false to suggest a unitary, essentialised notion of Indigenous societies. This diversity encompassed writings by those who were 'in the field' and wrote from experience and observation, and writings from others in urban centres. Some Europeans thought that an understanding of Aboriginal society could only be truly gained by working and living among Aboriginal peoples in the regions in which they lived. This ranking of experience over speculation and theorising informed many writings. It occasionally resulted in rivalries and conflicts between those whose claims to authority in their knowledge of Aboriginal society were based in their extensive

experience in remote locations with Aboriginal communities, and others who wrote from metropolitan centres and underscored the theoretical basis to their knowledge claims. These differences in perspective were further complicated by the persistent notion held by many Europeans that there was an 'authentic' Aboriginal culture that was to be found in remote or 'outback' locations; and they used this image of an 'authentic culture' to inform their views on Aboriginal culture and society generally. Such presumed 'authentic' Aboriginal communities, living an idealised 'traditional' lifestyle and untainted by European impact, were posited as the norm, against which all other 'versions' of Aboriginality were compared. These idealised 'authentic' communities typically inhabited the remote regions of northern, central and Western Australia – regions that increasingly became the focus for travellers, visitors, and anyone wishing to study or to observe 'real' Aboriginal peoples. Some writers who ventured into these remote regions to conduct field studies, or to reside there for long periods of time, developed a notion of their own authority. They held that their understanding of Aborigines was more accurate than that of others who either made only brief visits to Aboriginal communities, or who formed their views solely from the work of others.

Expressive culture: the corroboree

Europeans' desire to collect and document Aboriginal culture was not limited to material objects; writers and observers were also interested in the expressive aspects of Aboriginal life. The apparently ubiquitous 'corroboree' was one Indigenous cultural expression frequently observed, recorded and commented on. In his 1896 report on the Horn Expedition, Spencer noted the wide use of the term 'corroboree':

> The term corroboree is usually applied indiscriminately by white people to any one of the so-called dances of the aborigines; but

there are in reality at least two very distinct classes of corroborees or, as they are called by the McDonnell blacks themselves, 'quapara.' One set may be called ordinary corroborees, such as are held at any time, and which women and children may watch; but in addition to these there is another and a very distinct series, which may be spoken of as sacred quapara, which no woman or child is permitted to see, and which are intimately connected with certain Totemic subdivisions of the tribe ...[53]

Europeans were keen to obtain visual and aural records of these activities, as well as written ones, and they made good use of still and moving photographic equipment and sound-recording devices. One of the implications of these aural and visual technologies was their impact on the ways in which Europeans sometimes imposed their own notions of time and space on Aboriginal societies. An illustration of this juxtaposition of European and Indigenous understandings of time is from the journal of Frank Gillen, the long-time collaborator of Baldwin Spencer. Gillen's entry for 4 May in his diary of Spencer and Gillen's 1901 fieldwork in Central Australia records that the ethnographers were summoned by the promise of a corroboree:

At the Station by 8 o'clock Spencer had just fixed up his apparatus for enlarging quarter plates when a nigger arrived summoning us to the corroboree ground, where several men were about to dance the Ilyarnpa so that we might get snapshots. When we reached the ground we found them only half-decorated and as it meant waiting another hour to get them in full rig-out, we gave them some tobacco and flour and told them we could not spare time to photograph them today.[54]

Here, Gillen's comment about having no time to photograph the impending ceremony suggests a tension between the demands of Europeans' timeframes and priorities, and those of the Aboriginal people. The comment also draws attention to the role of photography in Spencer and Gillen's ethnographic work. The making of a visual record played a significant part in, and was integral to, their Central Australian work.[55] Anthropologist Nicolas Peterson has argued that Spencer and Gillen's commitment to photography 'arose out of the intersection of the limits that face verbal communication in general, when in the presence of complex performance, and the significance of visual information within the emerging natural science fieldwork orientation'.[56]

The photographing of Arrernte ceremonial life by Spencer and Gillen was part of a complex process of their engagement with these Aboriginal people. Although, as Peterson argues, 'the photography cannot, necessarily, be assumed to have been imposed on [Aboriginal] people', this technology, and the social processes associated with its use, certainly were not without effect on the Aboriginal people. Invariably, photographing ceremonies would have involved Spencer and Gillen in complex negotiations and trading relationships with Arrernte, the latter usually comprising payments of food. In some instances, too, ceremonial performances were 'staged' – at least in part – perhaps for the specific purpose of obtaining a visual record, but also for a range of other reasons having to do with the local politics of Aboriginal–European relations at that place and time. Gillen, apparently, had a particularly prominent role in arranging such performances. In 1896 for example, he helped to arrange for the holding of a major ceremony in Alice Springs, called the Engwura. Mulvaney and Calaby claim that 'Gillen's prompting, his tribal prestige and official status, probably turned the balance and ensured that a ceremony actually took place at all'.[57]

Policy and administration

Studies and observations on Aboriginal culture and heritage were not conducted in isolation from the politics of administration and

control of Aborigines. The early years of the twentieth century were significant in terms of the growth of this administration and control by the Commonwealth Government. The formulation and implementation of policy through the introduction of new laws and administrative measures had wide-reaching implications for the ways in which European-Australians viewed, interacted with and wrote about Aboriginal people. This expansion in bureaucratic and administrative control also impacted on the means by which Europeans conducted their fieldwork and recorded their observations of Aborigines, with consequences for their perceptions of all aspects of 'cultural heritage', including notions of preservation and protection.

Anthropologists, missionaries and settlers were all instrumental in the formulation and implementation of laws and policies relating to Aborigines. Much of this control and administration activity was focused on the Northern Territory, which became a Commonwealth Territory in 1911 and was one of the regions most subject to the Europeans' scrutiny. The Commonwealth introduced the *Aboriginals Ordinance 1911*, which established a role for a Chief Protector of Aborigines.[58] The first appointee to this position, which also combined the position of Chief Medical Officer, was Herbert Basedow, the Adelaide-based medical expert, anthropologist and geologist. Basedow was familiar with the Northern Territory, had participated in previous expeditions, and had published reports on ethnology and geology for that region. He resigned, however, after only a short time in the position, and was replaced by Baldwin Spencer. With Commonwealth control over the Territory, the new administrative structure provided, among other things, for the appointment of officials who would perform inspection, monitoring and reporting roles. As a first step in its administration, the Commonwealth dispatched a group of experts to examine and report on the Territory's 'prospects for development of its human, pastoral and geological resources'.[59] This *Preliminary Scientific Expedition* included experts in geology, medical and health issues,

and also the anthropologist Baldwin Spencer. As well as advocating control of Aboriginal peoples' relations with intruders, and the need for various 'civilising' measures, the report of this expedition recommended further studies of the Aboriginal people in the Territory. This highlighted that writings on Aboriginal heritage were enmeshed in the wider issues of race relations, and subject in many ways to bureaucratic administration and the control of Aborigines. One important control measure which had implications for Aboriginal studies was the establishment of reserves.

Protection in reserves

A focus for attention in the Northern Territory was the question of how to 'control' the effects of rapid encroachment of Europeans on Aboriginal people. The fraught racial and gender issues resulting from the impact of missions and governments, and the expansion of pastoralism, mining and development, necessitated an expansion in governmental and administrative machinery for control and regulation. One way of regulating the impact of white settlement was through the creation of reserves, and the nature, extent and purpose of these reserves was the focus for much debate and discussion. These reserves also had implications for the control and preservation of Aboriginal 'heritage' – typically designated as 'antiquities' at this time.

Various State administrations had already created reserves as a means of controlling and regulating Aboriginal peoples' lives.[60] The declaration of reserves was enshrined in legislation regulating Aborigines in the Northern Territory with the introduction of the South Australian *Aborigines Act 1910*. That, and successive laws, also sought to regulate employment and to restrict sexual relations between Aborigines and whites.[61] Baldwin Spencer had recommended the establishment of reserves in his 1912 *Preliminary Report*, in order to control contact between Aborigines and Europeans.

Arguing that the creation of reserves would assist in the 'care and uplift' of Aborigines, Spencer wrote:

> In view of the settlement of the country for which provision is now being made, there is no other practicable policy but that of the establishment of large reserves, if the aboriginals are to be preserved, and if any serious effort is to be made for their betterment.[62]

Subsequent Ordinances and reports provided further for the establishment of Aboriginal reserves; and some church and missionary bodies, humanitarian organisations and anthropologists also supported the formation of reserves as a means of 'protecting' Aboriginal people from the rapidly encroaching impact of European settlement.[63] Reserves, it was argued, would be the key to educating and 'civilising' the Aborigines. The establishment of reserves was also a response to a series of events involving conflict between Aborigines and intruders in Arnhem Land.[64] In 1935 the Commonwealth Government commissioned Melbourne anthropologist Donald Thomson to conduct an investigation and report into these conflicts. Thomson argued in his reports for 'absolute segregation' of Aboriginal people.[65] Other specialists who strongly advocated segregation for Aboriginal people in reserves included Olive Pink and Frederic Wood Jones. Pink was a consistent critic of the pervasive influence of missions and missionaries on Aboriginal people, and argued for a 'secular reserve' in Central Australia for the Walpiri people.[66] Another promoter of reserves was Frederick Wood Jones, professor of anatomy at Melbourne University, who argued in 1934 for complete segregation of Aboriginal people 'still living under full tribal conditions' in reserves to prevent 'contamination' by European civilisation. He concluded that 'no solution will ever be found for the problem of the uncontaminated native save that of preserving him from contamination by the establishment of inviolate reserves for his sole occupation'.[67] Wood Jones believed

such reserves should serve to maintain Aboriginal peoples' 'traditional lifestyle':

> Moreover, since all ceremonial and tribal life depends upon the integrity of certain topographical features connected with the totemic beliefs of the people, these reserves must be established in the traditional hunting-grounds of the tribes concerned.[68]

This view resonates with that of another expert, Adelaide physical anthropologist John Burton Cleland, who wrote to the government in 1936 urging the protection of waterholes he believed to be of spiritual significance to Aboriginal people living in Central Australia, discussed later in this book. The gradual realisation by Europeans of the importance of place as a component of Aboriginal heritage is discussed in more detail later.

This linking of Aboriginal peoples' land-based activities and spiritual beliefs with ideas about protection – albeit by means of segregation in reserves – was an important basis for later considerations of protection of Aboriginal culture and heritage. Indeed, the Aboriginal reserves were promoted by some politicians as providing protection for cultural heritage, as will be seen in later years with the discussions on heritage protection in the Northern Territory.

3

'Just Like a Civilised Artist'

Change and innovation

From 1911, with the Northern Territory now a Commonwealth Government possession, there was a heightened focus on that region as one where Europeans could, in their view, experience 'traditional' Aboriginal culture. The European concept of a 'traditional' Aboriginal culture was problematic, as some writers have pointed out, since this implied a society unchanged since before the advent of Europeans, and denied the possibility of change.[1] Nonetheless, writings by anthropologists, scientists, administrators, and other Europeans who visited, studied, observed or commented on Aboriginal societies continued to illustrate a tension between this notion of 'tradition' and the very real presence of change, innovation and adaptation that the writers were witnessing in Aboriginal societies. These processes of change were in part initiated or exacerbated by the presence of Europeans.

Where some writers maintained an image of Aborigines as remote, timeless, and bound by 'custom', others explicitly commented on the changes and innovations that they observed. The former kinds of writings portrayed Indigenous peoples within an idiom of sentimentality and nostalgia, constructing an image of a

carefree 'noble savage' lacking needs and desires beyond those necessary for survival. Other writings, by contrast, represented Aborigines as 'ignoble savages', a people who were rude, degenerate and untrustworthy.[2] In many of the former kinds of writings the predominant mode of representation is of people living in harmony with their environments, content with using the raw products of nature. In these schemes, Aboriginal societies were presented as fossilised remnants from some former age, resistant to change, and whose exoticism and lack of adaptability was leading to their disappearance or extinction. In contrast with this view, other writers presented images of Aboriginal societies as inherently innovative and adaptive, creatively integrating introduced materials such as iron and steel into their technology. Writings of this kind often commented favourably on Aboriginal peoples' creative and innovative capacities in their manufacture and use of stone tools, and also in their production of decorative designs and images on rock surfaces, cave walls, bark sheets or in personal adornment.

There is not a sharp dichotomy between writings that represented conservative, 'traditional' societies and those that represented innovative, creative societies, since the same writer may portray varied images. For example, there might be a number of different images within a single text; or a writer might portray conservatism in his or her private correspondence and diaries, yet admire innovation in public writings. The specific ways in which writers commented on conservatism or innovation also varied considerably. A writer could portray an Aboriginal society as inherently conservative and, where change is observed – such as with the use of iron in stone tools – judge this innovation harshly, presenting it as the result of corruption or 'contamination' by European ideas and influences. Alternatively, a writer might regard this innovation as indicative of a creative and adaptive society.

Related to innovation, an idea of 'value' was attached to the creative products of Aboriginal societies and this was crucial as

increasing interest in cultural items saw them destined for commercial markets. Such 'artistic' products as bark paintings and works on other media, including paper, typified this change. Concurrently with the emergence of art and craft industries, Europeans' desire for objects, including sacred items such as *tjurungas*, gathered pace. At the same time as notions were developing of the value of, and market for Aboriginal cultural objects, there was an emerging idea that the collection of these objects was not an end in itself but part of a process. In addition to collection, this process embraced circulation, exchange and display. It also played a crucial role in the transformation of these objects from a category designated as 'ethnographic objects' or items of heritage – which were commonly referred to as 'curiosities', 'specimens' or 'antiquities' – into the categories of modernity: the commodity and the fine art object.

Images on bark and rock

As the collecting of bark and other cultural objects gathered pace, Europeans continued to debate whether decorative features on wooden and stone weapons, domestic implements and utensils, as well as on rock and cave walls, bark sheets, and on the human body, constituted 'art' in the same sense as 'western' art. This debate also focused on the nature of creativity that was demonstrated in these designs, as Europeans pondered whether this creativity was an innate quality, springing from an inherent capacity for originality, or whether it was more imitative and derivative. Underpinning these concerns and anxieties were the intellectual schemes of evolutionism and primitivism that informed Europeans' questions as to whether Aborigines – who were often thought of as 'primitive man' – were indeed capable of refined creative and artistic expression. Some of these themes can be seen in the writings of Baldwin Spencer, as he described his encounter with Aboriginal painters of designs on bark.

Spencer's barks, Oenpelli 1912

In 1912 while at Oenpelli, in west Arnhem Land, Spencer found himself admiring some Aboriginal artists at work preparing images on bark:

> This morning a native brought in a little bark-drawing. They are very fond of drawing both on rocks and the sheets of bark of which their Mia-mias are made. The drawings are quite unlike anything that the Arunta and Central tribes attempt. There is a complete absence amongst them of the conventional designs, with concentric circles and spirals, that are so characteristic of the Arunta, indeed these are completely wanting amongst the Kakadu and all the Coburg Peninsula tribes, as well as amongst the Melville Islanders. The animal and plant drawings amongst the Central tribes are extremely crude, and so conventionalised as rarely to be recognisable, but, on the other hand, their geometrical designs are wonderful, especially those associated with their totems and sacred ceremonies.[3]

Spencer's description forms a discourse of comparative ethnology, and his comments contribute to a debate about the nature or extent of cultural diversity within, and between, Aboriginal groups throughout the country. Some Europeans thought that all Aborigines were a culturally homogenous group, and that deviations from uniformity in material culture could be explained by local variations in the nature or the availability of raw materials. Substantial differences were explained by the intrusion of foreign elements, or innovations introduced externally. Yet others thought the Aborigines capable of relatively wide local variation within, and between, cultural groups as they responded and adapted to change. Spencer's appreciation of variability among Aboriginal people was informed by his wide experience in Central Australia and the northern regions.

A significant aspect of Spencer's comments on the Oenpelli bark paintings is his comparison of the work of the Aboriginal person with European artists, and his focus on the artist as individual. He wrote:

> To-day I found a native who, apparently, had nothing better to do than sit quietly in the camp, evidently enjoying himself, drawing a fish on a piece of stringy-bark about two feet long and a foot broad. His painting materials were white pipe clay and two shades of red ochre, the lighter made by mixing white pipe clay with pure ochre, and a primitive but quite effective paint-brush, made out of a short stick, six or eight inches long, frayed out with his teeth, and then pressed out so as to form a little disc, shaped like a minute, old-fashioned, chimney-sweep's brush.[4]

Spencer's comments here speak powerfully to European perceptions about leisure, and questions of labour, productivity and the relative uses of time amongst subsistence-based hunter-gatherer societies. Spencer's finely detailed observation of the Aboriginal people carrying out bark painting, framed as though this were a leisure activity divorced from the everyday concerns of the communities' survival needs, conjures up the notion of what American anthropologist Marshall Sahlins has termed an 'affluent society'. Sahlins critiqued stereotypical views of hunter-gatherer societies that portrayed these as impoverished by their need to labour long and hard in order to merely survive. Instead, Sahlins posits that these societies find as much time to devote to creative and ceremonial pursuits as they do to subsistence activities.[5]

Spencer's description of the process of bark painting emphasises the individuality of the artist:

> It was most effective, and he held it just like a civilised artist sometimes holds his brush or pencil, with the handle between the thumb, then crossing the palm and out below the little finger, so that all four finger-tips rested on it, or sometimes it passed out of the hand above the little finger. Held in this way, he did line work, often very fine and regular, with very much the same freedom and precision as a Japanese or Chinese artist doing his more beautiful wash-work with his brush.[6]

Here Spencer draws on a familiar comparative mode, likening the Aboriginal bark painter to 'civilised' artists, whether European, Japanese or Chinese. This equation of Aboriginal creative expression with the already familiar concept of 'art' in its western and Oriental forms represents a shift away from the perception, held for a long time by many Europeans, that the creative expressions and products of Aboriginal peoples were little more than 'primitive' works, and did not warrant categorisation as the refined expressions and products of 'civilised' societies. In this primitivist sense, 'native' peoples' designs on bark, along with their cultural objects generally, were considered as ethnographic items, and as objects of curiosity, to be collected and displayed in museums and scientific organisations. The people who produced these were not perceived as individual 'artists' with particular creative abilities. Rather, the designs and objects were regarded as the products of unnamed 'primitive' societies, whose work was the collective result of age-old adherence to unchanging 'custom' and 'tradition'.

Spencer extols the virtues of the bark paintings:

> They are so realistic, always expressing admirably the characteristic features of the animal drawn, that anyone acquainted with the original can identify the drawings at once.
>
> On further acquaintance with them and, after inspecting the paintings with which they had decorated the walls of their wurlies, I found that there was a notable range of ability amongst the artists. There was relatively, in proportion to the limited scope of their work, very much the same difference between them as between British artists, not so much, however, in regard to subject and conception as to execution, though indeed there was some hint of

the former, one artist in particular specialising in mythological subjects.[7]

Spencer was so impressed with the artistry of these Aborigines that he decided to commission some of the works for the National Museum of Victoria:

> They were so interesting that, after collecting some from their studios, which meant taking down the slabs on which they were drawn, that formed, incidentally, the walls of their Mia-mias, I commissioned two or three of the best artists to paint me a series of canvases, or rather 'barks,' the price of which was governed by size, varying from one stick of tobacco (a penny halfpenny) for a two-feet by one-foot 'bark,' to three sticks (fourpence halfpenny) for 'barks' measuring approximately three feet by six feet and upwards. The subject-matter I left entirely to the artist's choice. As a result I was able to secure some fifty examples that illustrate the present stage of development of this aspect of art amongst the Kakadu people. It was interesting to find that the natives themselves very clearly distinguished between the ability of different artists and that my own non-expert opinion in regard to their relative merits coincided with their own. The majority of those that I collected and that now hang in the National Museum at Melbourne are regarded as first-rate examples of first-rate artists. The highest price paid was actually fourpence halfpenny but, as the artists are now unfortunately dead, the market value of the 'barks' is considerably higher than when they were originally purchased in the Kakadu studios at Oenpelli.[8]

The barks that Spencer collected continue to form an important part of the collection of the Melbourne Museum. It was some time before bark paintings and other cultural objects moved out of the cabinets of museum ethnographic displays onto the walls of homes, shops and corporate buildings, and into the galleries of fine art institutions, to be displayed explicitly as 'art' objects.[9] Although Spencer was by no means the first to collect bark paintings, this may

have been one of the first instances in which these paintings had been purchased using money as currency rather than the more usual tobacco or other trade goods.

Spencer had earlier remarked on decorative aspects in his 1914 ethnography, *Native Tribes of the Northern Territory*. He wrote that 'there is, of course, much that is common, in regard to their Decorative Art, to all the tribes of Central and Northern Australia, especially in respect of the ornamentation of their commoner weapons and implements'.[10] Within this broad homogeneity, however, he noted the variation among individual artists, explaining that:

> In the Kakadu, Umoriu, Geimbio, Iwaidji and other tribes excellent rock and bark drawings are met with. There is a great deal of difference in the capacity of various men in this respect, some of them being much better than others.[11]

Referring to the pieces illustrated here, Spencer noted that they 'will serve to give a very fair idea of these bark drawings which are amongst the most highly developed and interesting of any made by Australian aboriginals'.[12]

Anthropologist Luke Taylor suggests Spencer's purchase of the Oenpelli pieces played a significant role in the emergence of an art market:

> Spencer's influence on the development of a market for bark paintings outlasted his own short stay at Oenpelli in 1912. Cahill continued to purchase paintings for Spencer until 1920, and the returns to some artists were substantial for the times. ... The publication of Spencer's work (1914 and 1928) and donation of his collection to the National Museum of Victoria introduced the outside world to the art of this region. While his work did not immediately stimulate a demand, Spencer himself was energetic in creating an awareness of its aesthetic value. His influence also lasted in a more direct way in that subsequent collectors have read his

works and some have shown them to more contemporary artists as a means of commissioning 'traditional' works.[13]

Despite the importance of Spencer's bark collection, Taylor notes that the full development of a market did not occur until some time later.[14]

Collecting bark paintings: from ethnographic curiosity to art market and cultural industry

There is a long tradition of Europeans acquiring bark paintings from Arnhem Land that predates Spencer's Oenpelli visit. What is of interest in Spencer's collecting in 1912 is his emphasis on the Aboriginal as individual artist, and that he paid for the barks with currency – a shift from the more usual form of payment using tobacco. The references in Spencer's text to the Aborigines as artists raises again the question about use of the terms 'art' and 'artist' in Europeans' writings to refer to Aboriginal creative works. Some recent commentators have questioned whether the term 'art' is appropriate to denote Aboriginal cultural products and expressions.[15] Peter Sutton and Christopher Anderson suggest that Aboriginal languages do not possess a word with the exact equivalent meaning to 'art' in the western sense, though they do have a range of words and expressions that refer to 'sign, design, pattern, or meaningful mark'.[16] Anthropologist Nancy Williams has a similar view, as she wrote in her study of the bark painting industry at the eastern Arnhem Land mission settlement of Yirrkala:

> There is no 'artist' role, nor is there a word indicating such a role in the Aboriginal dialects spoken at Yirrkala. The artist is a recent phenomenon, an English-labeled role referring to those men designated by artists, that is, to those whose paintings appeal aesthetically to whites and sell well.[17]

As well as anthropologists, traders, missionaries and administrators also participated in the trade and acquisition of bark paintings and other Indigenous cultural objects. At Oenpelli, for example, Spencer was assisted by Paddy Cahill, long-time resident and sometime administrator of the reserve, who continued to acquire bark paintings for Spencer long after the latter had departed.

Europeans did not acquire bark paintings only for their aesthetic and ethnographic qualities. These objects were sometimes offered (either willingly or reluctantly) by Aborigines in order to negotiate with Europeans, or for other purposes such as economic transactions. In his study of art among the Yolngu people at Yirrkala, anthropologist Howard Morphy states that 'art objects entered transactions between Europeans and Yolngu early in the history of contact'.[18] Morphy outlines the beginnings of Europeans' collecting of art from this region:

> In the mid-1930s, within months of the establishment of Yirrkala mission station, the Reverend Wilbur Chaseling had commissioned paintings and carvings from the Aborigines who moved into the settlement. The paintings were sold to museums in the southern states, and a few objects were marketed in Sydney through the Methodist Overseas Mission. On both sides there were dual motives for the transactions. Chaseling saw craft production as a means of earning money to provide Aborigines who moved to the mission station with luxury items, in particular with tobacco. ... In this respect the production of craft was integral to the mission's overall objective of achieving economic self-sufficiency. ... Thus artwork and handicrafts became commodities sold by Yolngu to obtain tobacco and resold by the mission as a small but necessary part of its overall economic strategy.[19]

The role played by bark paintings in political and economic transactions between Europeans and Aborigines came to prominence several decades later, in the 1960s, when Aboriginal people

from Yirrkala used these objects to petition the Government in relation to proposed mining developments.

A reflection on collecting

Europeans' fascination with collecting has a long history. Collecting satisfies many urges including curiosity, desire and wonderment; it is a means of ordering the world in a microcosm wherein the small comes to represent the large. Collecting also fashions self, nation and identity.[20] The preoccupations and anxieties of Europeans about the exotic and the different provide a rationale for collecting that persists today. Anthropologists and others have sought to develop a 'theory' of collecting. James Clifford writes on forming collections that 'some sort of "gathering" around the self and the group – the assemblage of a material "world," the marking-off of a subjective domain that is not "other" – is probably universal'.[21] He says, 'In the West ... collecting has long been a strategy for the deployment of a possessive self, culture, and authenticity.'[22] Clifford outlines the history of collecting in western societies, from the early formation of 'cabinets of curiosity', through various schemes of taxonomy and classification, to evolutionism and exoticism.[23] The changing ordering of objects over time (which broadly mirrors the development of anthropology), in Clifford's view, illustrates the ways in which objects change categories, as he explains:

> While the object systems of art and anthropology are institutionalized and powerful, they are not immutable. The categories of the beautiful, the cultural, and the authentic have changed and are changing. ... The widely publicized Museum of Modern Art show of 1984, '"Primitivism" in Twentieth Century Art', made apparent (as it celebrated) the precise circumstance in which certain ethnographic objects suddenly became works of universal art.[24]

Nicholas Thomas writes, too, of the ways in which objects change contexts, observing that:

> As socially and culturally salient entities, objects change in defiance of their material stability. The category to which a thing belongs, the emotion and judgement it prompts, and the narrative it recalls, are all historically refigured.[25]

Commenting on the correlation between terms used to refer to collected objects, and the categories these objects occupied within the collecting milieu, Thomas suggests:

> The artifacts of non-Western peoples were known over a long period as 'curiosities.' Occasionally, this term, or 'curios,' also embraced certain kinds of antiques and classical relics, and (in the absence of the qualifier 'artificial') even natural specimens – coral, bones, and mineral samples. ... The connotation of such labels shifted, and in some contexts the words arguably do not tell us much about either the cultural construction of the things collected or the notion of the process of collecting.[26]

For much of the century, objects produced by Aborigines were collected, admired or speculated about as Europeans readily assimilated these objects into their pre-determined classificatory schemes. These were objects of ethnology; they were curiosities, antiquities or specimens. Often destined for the museums of the empire and its peripheries, these objects formed the basis for ethnology displays that served to satisfy the seemingly insatiable curiosities of observers as well as collectors. They were also objects of science – strange, wondrous objects certain to mystify their collectors, and inviting endless discussion and speculation as to their origins, purposes and meanings. These objects were perfectly suited to the Europeans' fascination for classification and the creation of typologies and analogies. By creating order from these objects, order could be similarly established for their presumed makers.

Collecting stone tools

A lot of collecting activity was focused on stone tools, the presence of which prompted collectors to engage in debates and discussions about the origins, uses, manufacture, form, function and meaning of these ubiquitous cultural items. In the field, Europeans observed Aboriginal people making and using these items, as seen earlier in the narratives of people such as Roth. Other aspects of stone tools that invited Europeans' interest were their use in trade and exchange; the extent to which they were decorated, or simply produced for use; and the incorporation of introduced materials, such as iron and glass, into the manufacture of these implements.

Some collectors confined their activities to obtaining their 'specimens' through an extensive network of correspondents and collectors in rural areas; others ventured out and collected these items for themselves. Tools were usually picked up from the surface, and were often found in quarries or at the sites of presumed former Aboriginal camping grounds. In their correspondence collectors compared, contrasted and described their collections, new additions, or specific features that drew their attention. There was a particularly active group of these stone tool collectors in Victoria, as historian Tom Griffiths describes:

> ... it was European Victorians who led the collecting mania for stone. Their side of the country was one of the areas of Australia most completely settled by Europeans, rapidly impoverished of organic Aboriginal presence; only the stone residue endured, it seemed, and it was for many decades more discussed than were the surviving people.[27]

Griffiths refers to the period of intense stone tool collecting activity in Victoria and elsewhere, as 'the stone age'. The 'stone age', he asserts, 'was a phrase commonly used to label Aboriginal culture, but it could more appropriately describe this early twentieth-century period of artefact collecting by Europeans'.[28]

One of the most influential writers and collectors was Baldwin Spencer, who had already made an important contribution to the discourse on stone technology and collecting in his ethnographies of Central Australia, and also in his 1901 *Guide to the Australian Ethnographical Collection in the National Museum of Victoria* (subsequently revised in 1918, and again in 1928). In a 1914 paper Spencer claimed that the 'the nature and form of the implements is not a question of the stage of culture, but depends primarily upon the material available'.[29] This notion of material availability dictating form and function was to influence many collectors over some period of time. An important feature in the debates and discussions about material cultural heritage was the tension between those who wrote from experience and observation, and those who resided in the urban and metropolitan centres and wrote more from theory and speculation. This dichotomy is well represented in the correspondence between George Aiston and W. H. Gill.

From the field: George Aiston and his correspondents

In June 1920 the Sydney *Bulletin* carried an article entitled 'A cry from W. H. Gill, of East Camberwell'. In this call for a debate on stone tools Gill wrote:

> In Australia we are living within the Palaeolithic stone age of Europe. As the primeval men lived with the aid of their stone knives and axes in prehistoric times, so the Australian natives in Central and Northern Australia are living within this 20th century. This in itself is a wonderful fact to realise.[30]

The reference to the palaeolithic is a familiar discourse of European 'Old World' evolutionary categories, and highlights the struggle by writers and collectors to fit new objects into their known categories. With this palaeolithic or 'old stone age' context in mind, Gill

pondered the manufacture of stone tools by the Aboriginal people of Victoria. He continued his 'open' letter in the following tone:

> Australian abos. [sic] chipped and ground their stone axes and knives, while the abos. [sic] of Tasmania only chipped their stone implements. So far as the aboriginals of Victoria are concerned, it is only within the last five years that we have had any knowledge that they made and used the miniature stone chipped knives and scrapers which are common also to the Palaeolithic and Neolithic ages of Europe.[31]

In Gill's comparative perspective, he distinguishes between an Australian Aboriginal stone technology and Tasmanian and Victorian types on the basis of form and mode of manufacture. He refers to a local find in elaborating his views on comparative Aboriginal material culture:

> A fortunate find on the sea coast of South Gippsland, on one of the ancient native camping grounds, disclosed the fact that the natives of Victoria used miniature tools, which were found in large numbers, made of diorite, flint, chert, quartz and fine rock crystal.[32]

Gill's invoking of a local South Gippsland implement as a reference point for defining a 'Victorian' Aboriginal stone industry led him to speculate about the purposes of these small tools:

> Collectors here are much concerned, and a good deal of controversy exists as to the purposes for which the natives used these stones. That they were made for a positive use is certain, for there is a constant repetition of identifiable types and shapes. And, singular to state, the majority of these knives and scrapers bear a marvellous resemblance to the Neolithic types of ancient Europe and Egypt.[33]

Like many observers and collectors, Gill drew on the familiar repertoire of classical 'Old World' archaeological terminology of 'Neolithic' and 'Palaeolithic' to categorise Australian Aboriginal stone tool technology. Also like other writers, Gill could not –

implicitly, at least – reconcile how these two tool types could be found contemporaneously. Thus his apparent surprise at the presence of neolithic-like implements in south-east Victoria, within what he considered to be generally a 'Palaeolithic stone-age' Australia. He called for readers' views on these stone tool traditions, indicating a particular interest in regional variation:

> What I want to do now is invite correspondence with persons living in close touch with the natives, and who take a keen and intelligent interest in the life and customs of the tribes of North and Central Australia ...[34]

Gill's article initiated two decades of correspondence with George Aiston. Unfortunately, the unevenness of the historical record has meant that we are left only with Aiston's letters to Gill – creating a rather one-sided conversation. Nonetheless, Aiston writes in considerable detail, such that we can glean a picture of his particular views on material culture and related aspects of Aboriginal life.

George Aiston was born in South Australia and he was a keen observer of Aboriginal societies and collector of Aboriginal artifacts. He had an active career as a soldier and policeman, having served in the South African war.[35] Through his police work in remote locations he developed a lifelong interest in Aboriginal culture, which formed the basis for his correspondence and writings.[36] In addition to his private letters, in 1924 he published a work on Central Australian Aborigines in collaboration with Melbourne writer Dr George Horne. His wide circle of correspondents included, in addition to Gill, Robert Henderson Croll, C. C. Towle and Stan Mitchell.

In the *Australian Dictionary of Biography*, Philip Jones says that Aiston 'encouraged the view that Aboriginal stone-tool technology was an entirely Indigenous development'. Jones describes Aiston as having 'belonged to a generation of scientists and self-taught natural

historians who gathered material objects for data'. Jones states that Aiston's 'ethnographic collection and knowledge increased as the local Aboriginal population dwindled ... [and] he retained the Aborigines' trust and fought for their interests'.[37]

In August 1920 Aiston introduced himself in a letter to Gill, writing that 'I am the Constable in charge of the Diamantina Police District, and am stationed at Mungeranie'. He explained that 'I have been here for nearly 8 years now – and have been practically living with the blacks all that time'. His remark about 'practically living with the blacks' typifies the views he espoused in much of his correspondence, in which his claims to expert knowledge of Aboriginal culture were based on his experience among the Aboriginal people. He explained to Gill his developing curiosity in Aboriginal life:

> I joined the Police Force 19 years ago ... I had only recently returned from South Africa and was curious to find out whether they had any customs in common with the African negro. In 1904 I went to Tarcoola and my curiosity had got me keenly interested in the blacks – and the ancient drawings that I saw on the granite rocks in the vicinity of Tarcoola took me off trying to find a connection between the African blacks to studying our own blackfellow for his own interest.[38]

Here Aiston promotes his view about the autochthonous origins of Aboriginal culture and heritage – a view at odds with some writers who argued that Aborigines were not sufficiently 'advanced' or 'creative' to have produced the designs and images that Europeans found. As Aiston put it, '... I have never heard anything in the blacks' traditions that would hint at them ever having lived in any other country but this'.[39] Like many observers and commentators, Aiston often noted the changes in Aboriginal uses of materials, especially the replacement of stone with steel in their technology. He wrote:

> ... of course nowadays [sic], these stone tools are not used much, a piece of bottle make [sic] a better scraper than the best stone, but the bush blacks still make stone tools – bottles are almost as scarce away from the tracks as steel knives – the ambition of a blackfellow now is to get a broken buggy spring, this sharpened on the thin end makes a splendid tuhla.[40]

Aiston's notion that 'bush blacks' only availed themselves of materials that were within a certain vicinity – i.e., at a distance from the infrastructure of 'civilisation' such as railway and buggy tracks, suggests a dichotomy between 'remote' and 'fringe' Aborigines. Here, the reference to the 'bush black' conforms to (or contributes to) an essentialised stereotype of the 'stone age' Aboriginal, who, remote from the influence of Europeans, resists or is distant from the pressures of cultural innovation and the inevitable encroachment of European society.

Aiston had a particular interest in observing Aboriginal people making and using stone tools and other implements, and was didactic in imploring others to base their views not on speculation but on experience and observation. His acute observations of Aboriginal manufacture and use of stone tools enabled him to form firm opinions on processes of change and innovation that were taking place in Aboriginal societies. For example, while admiring the Aborigines' decorative skills displayed in their stone tool manufacture, he despaired at the replacement of their 'traditional' tools with introduced metal ones:

> ... the tiny leaf-shaped scrapers are used for decorative purposes, some blacks take a great pride in the decoration of their tools, but unfortunately, here a steel pronged fork has taken the place of these fine tools in most cases.[41]

In this extract there is a tone of sadness that permeated many Europeans' writings on the changing stone tool traditions and introduction of European materials.

Aiston relates to Gill his keen observations of Aborigines' use of stone tools, illustrating the kind of meticulous and closely observed detail that runs throughout his correspondence:

> I[n] the Abo. Column of the Bulletin of June 10th, I read an article by you on the stone tools used by the black in Gippsland.
>
> I have been keenly interested in these things for many years, but have been unable, though living among the blacks here, to find out how these tools were made ... I have seen a blackfellow chip a stone into a rough knife, to serve a temporary purpose, such as to scalp a wild dog, in these cases the blackfellow has simply picked a stone that would break as he desired, wedge [sic] it between other stones, and tap it with a stone until he got the edge he wanted, the whole process and result were crude.[42]

Aiston viewed the Aborigines as having a very pragmatic approach to the ways in which they made tools to suit particular purposes. He saw these people as inherently adaptable, able to find materials as and when they needed them, and to accommodate these for immediate purposes. Aiston's comment also reinforces his argument for observation over theory and speculation.

Collections of stone tools at this time were derived mostly from surface finds. Collectors scoured what they presumed were old Aboriginal camping and midden sites, river banks, quarry sites and other localities likely to yield the tools. As this activity predated the advent of systematic archaeological excavations, there was as yet no sense of depth as a factor in stone tool locations, nor of the stratigraphic layers in which artifacts might be found. Gill and Aiston corresponded about the subject of surface finds, and Aiston's reply in September 1920 provides an interesting insight into his thinking on this important aspect of Aboriginal heritage:

> ... you speak of all the things that are only found on the surface in Australia, but what is the surface, I have been at the various bores in this country and they have brought up sea shells and fossils from 4000 feet ... In Adelaide I was shown strata at the back of the old Police Barracks and was assured by the Government Geologist that it was the oldest strata in the world – this was practically on the surface. In this country one can not help feeling the age of the world – miles of packed stones in one place that look as if seas has [sic] washed over them for ages and packed them in their places – in other places twisted melted stones that looks [sic] as if they had been vomited out of the earth ... and when going south through the Flinders Range one sees the hills reared up on end – the strata is vertical instead of horizontal – I was at Andrewilla near the Queensland border a couple of months ago – and on a little peninsula jutting out into the water there were thousands of fossilized roots, animal dung, fish and bird bones ... I have seen fossilized diprotodon bones on the surface at the Kallakoopa ...[43]

This poetic discourse presents a powerful image of the unpredictability of geology, with wonder at the endless surprise and variety at all the things found on the surface. The text compels us to abandon preconceived ideas about surface versus depth, and erodes any assumptions about a direct correspondence between depth and age. It also provides a convincing image of an archaeology profoundly shaped by natural forces of geology, climate and topography. Aiston's letter shows a man able to move between ruminating philosophically on the vagaries of geology, and expressing the uninhibited joy of 'discovery':

> ... I walked over the creek here yesterday just for exercise – and before I came back I had filled both pockets with good specimens of all sorts – I thought of how you enthusiasts would enjoy yourselves among these stones – I wonder that someone does not come up here and have a look at them.[44]

He also demonstrates humility in the face of a vast knowledge to be gained about stone tools:

> ... I have been thinking over the possibility of my writing up all that I know of the Aboriginals and their use of stone tools – but the subject is vast – ever since I have been corresponding with you I have had stone tools shown to me that I had never before heard of, I am beginning to feel that I just know enough to know how little I know ... [45]

Although humble in tone, Aiston's prose nonetheless suggests that he held firm views on innovation and change in Aboriginal stone technology. In October 1920 he wrote to Gill outlining again his conservative view of Aboriginal culture:

> ... the great trouble with most writers it seems to me – is that they assume that the aboriginal has a progressive brain, and that he has improved his tools from time to time – I hardly think this is so, as all the blacks I have seen never seem to think at all, give them any tool, say a steel chisel, it is sharp when they get it, they will use it for all purposes – rough work and smooth – and when it gets blunt they will drop it and take to the old stone tools again – I do not think that they go to much trouble with their stone tools.[46]

This comment contrasts starkly with Aiston's earlier view, cited above, that 'some blacks take a great pride in the decoration of their stone tools', in reference to decorated leaf scrapers he saw. Perhaps he struggles to come to terms with the process of innovation in what he regards as an inherently conservative culture? In any case, the Aborigines' preferred reliance on their familiar tools suggests more a soundly entrenched sense of material technology than a lack of progressive capacity. Aiston took the opportunity to opine against those who based their views on theory and speculation:

> ... the great mistake most theorists make is that they credit the blackfellow with a more educated brain than he actually possesses – they [the Aborigines] are very conservative, very, what was good enough for 'my old man' – is good enough for me, is the blackfellow's religion, he will misuse tools, but would never think of doing a job unless he had the right tool for it – I have tried for years to get some of them to put handles in my stone axes – but they will not do it because they cannot get the proper wood – they reckon a makeshift handle is no good and I cannot explain that I want them for show only.[47]

In this passage, Aiston's observation conveys an acute understanding of Aboriginal 'tradition'. Although his comment implies that the Aborigines were resistant to change, it is also a striking reference to the notion of 'heritage', if this is defined as a body of traditions, practices, techniques and knowledge that is handed down through the generations.

Aiston's writing suggests his admiration and respect for the Aborigines and their cultural traditions. Yet at the same time his language occasionally also promotes pejorative views shaped by evolutionary notions of racial hierarchies. His writings can be read in multiple ways. For example, his description of tool use might suggest rigid tradition, as he would have it, or alternatively, a notion that the Aborigines had a fastidious concern for accuracy and perfection in craftsmanship. Aiston's comments can also be read as suggesting that the Aborigines sought the best correspondence between form and function in their selection of stone for tool making and use. Although Aiston's writing suggests that Aborigines were selective in their choice of materials, there is also the sense of spontaneity in their approach to the development and use of stone tools. Whatever choices and decisions they made in regard to material technology, the Aborigines faced the inevitability of transformation with the introduction of European materials and techniques. Like many writers, Aiston despaired at these changes, maintaining an idealised view of an unchanging 'stone age' culture. He wrote on this to Gill in 1920:

> Re. Boomerangs. It is very hard to get one that one is sure that some steel or iron tool has not been used on, this country has been

> settled so long, and every station has had a blacksmith shop from the start that nearly all their weapons are made with white man's stuff. I have a tuhla inside with a stone one end, on the other a scrap of what look[s] like a piece of iron troughing, this is fixed on with animal sinews. I am keeping it as a curiosity – to mark the transition stage.[48]

This description encapsulates the kind of tension present in Europeans' writings when the writer is faced with the seemingly endless range of innovative practices by Aboriginal people in making use of introduced materials. Aiston's reference to his having kept a tool displaying an ingenious combination of both 'traditional' and introduced European materials – a kind of 'transition' tool – emphasises his keen sense of the curious.

Aiston frequently returned to his argument against those who theorised about stone tools:

> ... your remark of the squabbling among the theorists reminds me of my experiences in Adelaide – I can't argue, it goes against my grain somehow – but I told different people in town of the use of stone tools that I had seen actually in use and some of them argued to such good purpose that they almost convinced me that they knew more about them than I did – even though their knowledge was only theoretical.[49]

From private reflections to published work: Aiston and Horne's *Savage Life*

Aiston's views on tool manufacture and use articulated in his private correspondence were given a more formal voice in his book *Savage Life in Central Australia*, written in collaboration with Melbourne doctor George Horne in 1924.[50] In contrast to the earlier works on Central Australian Aborigines by Spencer and Gillen, *Savage Life* was more a compilation of anecdotes and snippets of information than it was a rigorous ethnographic study. Horne was the primary

writer, having composed this work largely from Aiston's letters. He introduces the work:

> Many of his [Aiston's] letters have been incorporated almost verbatim, and this has led to some repetition. But I have let it stand rather than alter the drift of the narrative.[51]

To further enlist readers' confidence, the narrator then establishes the credentials of Aiston, whose knowledge of the matters contained in the book was based on living closely with Aborigines and becoming their 'friend and protector':

> For the last eight or nine years Mr. Aiston has dwelt at Mungeranie, although more than twenty years he has spent in aborigines' haunts. His position led him to become their friend and protector, and many were the stories told to him by those who were boys when the first explorers penetrated the country. The opportunity to collect this information must soon pass, for it is stored with men eighty or ninety years of age and their confidence is not easily won.[52]

This technique by which the writer's authority is established by virtue of *having been there amongst the Aborigines* was a device often used by ethnologists in their published works, although it was not always articulated explicitly in this way. This passage indicates the trust accorded to Aiston by his Aboriginal informants, and also suggests that the authors of this book held a respect for the wisdom of the old men. At the same time it reminds us of Europeans' zeal for collecting information, objects and other records from the Aborigines as a means of 'preserving' the Aborigines' culture, while the people themselves were seen to be dying out. This theme of loss of tradition is apparent throughout *Savage Life*, as illustrated by the following passage:

> The superiority of his [the white man's] tools has forced from the field the stone tomahawk and the wooden digging-stick. ... The sharpened steel from a shear-blade or buggy spring is bound with

sinews on to a stick, making an adze; but some few strictly conservative workers remain who use stone even for the rough hewing of the boomerang and discard the glass fragments when smoothing down the ridges.[53]

Here the authors' description clearly articulates the capacity of the Aborigines for innovation. However, the replacement of stone with introduced materials also led these writers to sadly declare that the Aborigines could no longer be studied in their 'pristine' condition:

> The time, therefore, has gone by for obtaining knowledge of the blacks' mentality uncontaminated. Many years of contact with the whites have robbed them of the freshness of their native customs.[54]

Aiston's frequent observations on the Aborigines' apparently casual approach towards the use of their tools and implements are reiterated:

> In describing these tools it must always be remembered that the casual nature of the black does not allow him to keep any tool for the one purpose. ... He is just as likely to use his best stone knife to scrape a weapon as he is to use any flake that he may pick up.[55]

This passage could also be read to suggest that Horne and Aiston regarded the 'casualness' they observed among the Aborigines as an inability or unwillingness of these people to set standards of quality in the selection, manufacture and use of tools. However, if their writing was read in this way, then it would necessarily raise questions about cultural relativity: whose standards are used to make judgement on the way other cultures make and use technology?

Horne and Aiston employ their argument about the casual nature of Aboriginal tool use to support a point about the difficulties of classifying tools:

> At the same time he may get an affection for a certain tool and only keep it for the purpose for which it is most suitable. For example, it often happens that a blackfellow will work for a month to get a white man's razor. He will shave himself, usually without soap, and as many friends as he can persuade to let him operate upon them; and then he will try the razor on a piece of wood, with the result that the face of the razor is broken out. He will then light-heartedly throw it away. This casualness is what makes it so hard to say specifically that a tool is used for any one purpose, but in describing them I have carefully watched and asked until I could arrive at what was aimed at in each particular tool, and so have classed them.[56]

This text shows the same kind of detailed, descriptive first-person narrative that Aiston used in his personal correspondence. There is the same keenness for classifying that permeated many Europeans' writings about material culture. In his comment about classifying stone tools based on close observation and questioning, Aiston departs from the more rigid classifying practices of some collectors – particularly the early ones. These latter were more likely to have emphasised form in their classification of these objects, in other words, the intrinsic attributes (such as shape, size, etc.) of the objects themselves.[57] Cultural and environmental factors – such as how these objects may have functioned in society, where they were found, and their relationships with other aspects of Aboriginal culture (such as ceremony) – sometimes of secondary importance to other writers, were often a focus in Aiston's writings.

Aiston also described his observations of the division of labour and specialisation associated with tool-making and tool-use. With Horne again as narrator these aspects are described in *Savage Life*:

> Mr. Aiston tells me that in the old days, before the advent of the whites in this country, practically all of the stone tools and weapons were made by the old men. The young men and the women looked after the finding of food for the camp. The old men sat down at some convenient water-hole where there was a supply of stone tools and wood for weapons, and put in their time in keeping the young men supplied. Not all were good weapon-makers. Some specialised

> in the making of the stone tools and usually confined themselves to that alone. Very often a man specialised in only one tool, and made nothing but that.[58]

A sense of nostalgia pervades the above passage, where the stone tools and their makers evoke a lost culture that has all but disappeared with the coming of the Europeans.

The correspondence between Aiston and others suggests that some Europeans' views on what we now call 'Indigenous heritage' were not so much predetermined, but rather, were shaped gradually through their observations, and formulated through their private writings and reflections. By engaging with others, ideas took shape, possibly changed over time, and were then articulated in more public forms such as published works.

Aiston's ideas about collection seem to have been shaped through his correspondence with others. He explained in 1929 to Sydney collector Towle:

> I collected my first lots of stone tools from those that I actually saw in use, and did not pick up any from the old camps for some years after I started collecting.[59]

This focus on collecting tools actually in use is in marked contrast to the methods of Stan Mitchell and some other Victorian collectors (such as Kenyon) who acquired tools predominantly from old Aboriginal camping grounds. Aiston continued to argue his point about the need to study tool use, as he explained to Towle on 10 March 1930:

> I would suggest that a careful study of the types of wooden weapons and utensils made by the blacks of any district should be carefully studied – then the type of stone found in the district should be studied – this would give you some idea of the type of tool that would be used.[60]

This rather convoluted prose illustrates Aiston's keen interest in the total environment – including cultural and geological aspects – that informs Aboriginal tool use.

Consistent with his experience-based views on Aboriginal tool use, Aiston wrote to Towle arguing against the possibility that aesthetics or an 'artistic sense' were factors in the manufacture of tools:

> But really, brother blackfellow did not make tools for show, he made them for use, they lasted as efficient tools for such a short time that he did not waste any more time on them than was necessary to give them a sharp cutting edge, directly the tool became blunted it was thrown away and another flake chipped off. Where stone was plentiful, as in the immediate vicinity of this place, the tools were discarded very soon, but in places where the stone was scarce the worn out tool would be used until there was not a scrap left ...[61]

Aiston's reference to 'brother blackfellow' may be read in several ways. It conveys a patronising, somewhat pejorative tone not uncommon in some Europeans' attitudes towards Aborigines at the time. It also contains a hint of sarcasm, especially with the precursor 'but really', perhaps indicating exasperation that his correspondent dared to suggest that Aborigines employed decorative features in their stone tools. Finally, the reference possibly suggests Aiston's feeling of camaraderie with the Aborigines in his district. This passage also reprises Aiston's familiar themes that Aborigines' stone tool use was pragmatic, situated and localised, and dependent upon the availability of raw materials (the latter point drawing on the influence of Baldwin Spencer). Aiston expanded on this latter theme, criticising those people who based their analyses of tools from collections that were made devoid of any context of 'living societies', as he wrote to Towle on 16 May 1930:

> Unfortunately, nearly all of the collections I have seen are more or less worthless. It is unfortunate that the tools were not collected while the blacks were still living and using them.[62]

This is an important point, especially in the context of today's debates about ownership, rights and interests in archaeological and ethnological collections (often referred to as 'cultural property') held in museums and other collecting institutions. To Aiston, the 'value' of Aboriginal material culture resided not so much in its importance to scientific study and ethnological display, as in its context within Aboriginal culture and society. Drawing on this point he again elaborated to Towle on the importance of cultural and environmental context for understanding tool use and function:

> It is impossible to give an opinion on any stone tool unless one can see a lot of them in position on the camping sites, to see the stone supply from which the stone was got, and to know the type of weapons that were used and the nature of the wood used in them.[63]

In addition to his fascination for stone tools, Aiston was also a keen observer and commentator on other aspects of Aboriginal culture, such as ceremony and stone circles. He discussed these prolifically with his various correspondents, taking firm stands on every subject. Writing to Towle in 1931 he argued that stone circles, which were 'very common in this district', were not for ceremonial purposes but 'here they were only built by the children in play'. He expounded on this, once again basing his views on observation:

> I investigated some many years ago, they were on the Diamentina [sic], and at that time some of the down country. Scientists stated that they had some ceremonial significance, but the old men assured me that they were only made in play, and several times they showed me rings and patterns that they themselves had made as children. Since then I have seen the children, dozens of times, building these places ...[64]

Here there is an interesting interplay in Aiston's correspondence, between what he thought were the views of 'scientists' who argued for some 'ceremonial significance' of these stone circles, and those of 'the old men' among the Aborigines. It is significant that Aiston chose to support the latter's views that these formations were for 'play'. Once again, this illustrates Aiston's consistent emphasising of 'lived experience' over armchair theories and speculations from afar. While Aiston was always ready to voice an opinion about the cultures of the Aborigines in 'his region', he was reluctant to offer an explanation for stone circles in other parts of the country, as he explained to Towle in March 1932:

> I am a wee bit nervous about venturing an opinion on the stone circles of your people. They had so many differing customs from our people that it is not safe to dogmatize. ... The old blacks have assured me hundreds of times that the circles were nothing more or less than playgrounds and I have been shown circles that some old grey headed buck assured me he had made in his childhood.[65]

Here Aiston's distinction between 'our people' and 'your people' shows his recognition of regional and cultural diversity, albeit using the patronising idioms of the time. He resists making Australia-wide generalisations, opting instead for local variation. It is also a comment on Aiston's sense of 'owning' the Aboriginal people with whom he spoke around the area he lived.

Aiston's somewhat idealised notion of Aboriginal culture, and his aversion to fully acknowledging the processes of change that he was witnessing, extended beyond commenting on stone tool technology into the realm of other aspects of Aboriginal culture, such as 'art'. Writing again to Towle, he described the changes in art designs:

> With us pictorial drawings are only just coming in, I did not see any weapons decorated with native animals until recently and now nearly every weapon that is brought to me is carved with all sorts of animals, this was not a characteristic of the old blacks and they

express contempt for the younger blacks who so degrade their boomerangs. The old men had their own markings, which were to a certain extent their trade mark, but they were always conventional lines and curves.[66]

This comment importantly foreshadows much later debates around issues of ownership of Aboriginal and Torres Strait Islander designs, artworks and 'cultural property'. Aiston's use of the term 'trade mark' is a perceptive observation on the complexities of clan, and other group-based rights in markings and designs, and recognition of the existence of these rights within and among Aboriginal cultures.

More on collecting: missions, tourists and the disappearing *tuhla*

Aiston echoed some of the other concerns of collectors, writers and observers about the disappearing knowledge of methods of stone working among Aboriginal people, and the changes wrought by the influence of missionaries and other Europeans on Aboriginal cultural production. He wrote to Towle about some of these concerns:

> I have been trying to get these *kundi tuhlas* ever since. I have had several but none of them were any good. Some had wrong stones in them and all of them were so set that they were useless for Ethnological purposes.
>
> There is no one in the country now who knows anything about them. All that are left are those born on the old Mission and they did not know anything at all about their ancestral weapons or the methods of making them. ...
>
> I think all of the churingas have been collected by the Mission people and have gone to Germany and America ... the Abos of near Hermannsburg have been doing a thriving trade for some years in making fakes for the Scientists, slate is plentiful there and a few smears of grease gives them an appearance of age and there you are, five bob, please.
>
> The tourists and missions have spoilt them absolutely, the tourists will not buy their genuine things and insist on getting some thing else, directly the blackfellow understands what they want they will make them. Those return boomerangs collected along the east west line are all fakes, the blacks of those parts did not know or use the return boomerangs thirty years ago, in fact the boomerang was very little used over there, the thick timber rendered it practically useless, their principal weapon was a spear, the occasional boomerang was used mostly as a club to finish off game brought down with the spear.[67]

Here, Aiston's moaning at implements having 'the wrong stones in them', and at the rampant collecting by missionaries and tourists, illustrates powerfully the theme of authenticity once again. He despairs at what he sees as the erosion of an authentic Aboriginal culture and its replacement with fakery and demand-driven tourist artifacts. Aiston continued to despair at this disappearing 'authentic' culture, as he wrote again to Towle in December 1934:

> 15 years ago I could have got you a hundred kundi tuhlas in a week, they would have cost me a stick of tobacco each, now it is a month of hard work to persuade a black to make one.[68]

Other collectors: Kenyon and Towle

Aiston's advocacy for studying implements in the locations in which they were found and used suggests he had a relatively sophisticated approach to understanding Aboriginal material and cultural heritage. This interest in geographical and spatial factors was also apparent in the writings of some others, such as the Victorian-based collector, writer and naturalist A. S. Kenyon, an engineer who spent his working life with the Victorian waterways department. As with other amateur collectors, Kenyon's full-time occupation, though not

directly relevant to the anthropology or archaeology of Aboriginal Australia, nonetheless did provide a useful context for his collecting work. Waterways are the arteries of a nation, and they also chart the histories and stories of the landscapes and the peoples within them. Kenyon's work with waterways enabled him to travel along these seams of life, finding among them a congruence with his interest in Aboriginal stone culture that he could perhaps not have otherwise imagined. Kenyon was one of a number of people keen on natural heritage, and was an avid walker and naturalist – interests that inevitably led him to an intense interest in Aboriginal heritage. He was influenced by the teachings and writings of Spencer, and was drawn to the latter's evolutionary view of human society. As with a number of collectors, Kenyon's career in collecting stone tools spanned several decades. Like Aiston, Spencer and others, Kenyon demonstrated an intense interest in the classification of stone tools. Writing to Towle in 1929, he warned against imposing European notions of material culture onto Aboriginal use and manufacture patterns:

> When you have had more experience in coastal work you will realise that the blackfellow who was quite unacquainted with anthropology, excavation and stratification did not leave implements behind unless he had been using them on the spot, and did not carry implements to a place where he had no use for them. ... Ergo Kitchen middens are not necessarily receptacles of culture – another instance of the grossly misleading influence of the European workers – unless water, shelter and food are all in the vicinity and the first two emphasised ...[69]

Clifton Cappie Towle, like Kenyon, was an 'amateur' collector of stone tools, who devoted his spare time to this activity. New South Wales-born Towle had studied music before becoming an accountant with the New South Wales railways, where he remained until his death in March 1946. In his obituary, Fred McCarthy described

Towle as 'a man of serious nature [who] devoted many years of his life to a study of anthropology, geology, astronomy and botany as well as to literature and music'.[70] Towle began to collect stone tools in 1922, and 'pursued this hobby so assiduously that he finally accumulated a magnificent collection of approximately fourteen thousand specimens of all types of implements from many sites in New South Wales'.[71] In 1928 Towle wrote enthusiastically to Kenyon of the potential for 'finds' around Sydney:

> There are many camping grounds near Sydney and Newcastle which have hardly been touched, as yet. Only last Saturday I came upon a midden at Port Kembla, which is almost entirely hidden from view by the great sandhills which are gradually overwhelming it. So far as I can ascertain, collectors do not know of it. This indicates the amount of exploratory work that is necessary even near Sydney.[72]

Towle here evokes the kind of possessiveness that imbued many collectors' writings: the desire to be first to find something, and the ever-present excitement of the possibility of 'discovery' of a new object or collection. Such new finds were invariably a subject for discussion, and among many themes, the question of function versus aesthetics in the design of Aboriginal stone tools provoked intense debate. Discussing the form and function of an axe, Towle disagreed with Kenyon that Aborigines had no sense of aesthetics or refinement in tool design:

> ... I do not believe that these implements were hafted. But I do think that the thick side of the implement was chipped into shape so that the user could handle it in comfort. But, you say the aboriginals were too primitive a people to waste time over matters of this sort. Why, then, did the people of the N.W. of Australia go to the trouble of making such delicate spear heads that would be broken at the first throw? Would not a mere flake have done just as well, and think of the saving to them in labour? ... I do not, in few

words, believe that the aborigines were so primitive that they did not possess a well developed artistic sense, and some common sense.[73]

Here, the question of 'artistic sense' is again present – this time in relation to stone tools rather than rock or bark paintings. Like Aiston, Towle had a pragmatic approach to stone tools, believing that the form of chipped stone tools was determined by the material used.[74] This dependency on raw material did not, however, prevent Aborigines from imparting an aesthetic sensibility to the design and manufacture of their stone implements.

Local innovation versus imported developments

So conservative were some writers' views on Aboriginal peoples' capacity for innovation and development that any observed changes in material or other aspects of culture were explained by the introduction of ideas or technologies from outside Australia. Towle and others argued for imported innovations, while Kenyon thought new technologies were entirely local developments. Towle wrote to Kenyon on this:

> ... In this letter, I am about to make some bold statements, and I shall not mind if you reply that I do not know what I am talking about. ... Radcliffe Brown and others state that the ground axe was imported into Australia some time after the arrival of the aborigines. I am inclined to this view. Where did the lanceolate spear head come from? Was it also introduced? The preparation of the stone by burning may suggest some extra-Australian source.[75]

Kenyon disagreed, maintaining that the Aboriginal people had developed their cultures entirely within Australia:

> ... There is no evidence that the ground axe was imported into Australia either before or after the arrival of the abos [sic] if that implies that it came in as an inoculation [sic] into or as an addition to an existing culture. Wood Jones is now pretty definite as to the outstanding purity of this race – in fact quite pure – which means very early arrival and no outside inoculations or successive waves, so if he is right, that theory goes. Why not face the simple fact that man with his brain supplies his needs with the material available, whether food material, or implement ditto, and thereby arrives at the same result everywhere without any interchange of ideas. ... The fact that the same tribe formed completely different types of implements within its own boundaries as the stone available justified, seems to me sufficient answer to the diffusionist heresy.[76]

Here Kenyon refutes the views of those who thought that new innovations were more likely to result from the diffusion of ideas, technologies and materials from elsewhere, rather than the product of local, independent invention and innovation. His remarks also imply a recognition of the variability within and among Aboriginal groups.

Towle later explained his views on external influence and the importation of ideas and technologies to Elkin:

> ... There are some who believe that the aborigines developed all their stonework in Australia to meet their needs. These investigators in my opinion are too thorough-going. They will not admit an importation of any kind. They undoubtedly have much in their favour: local material and local needs explain in general the stonework found in the different areas. But I cannot believe that no importations from outside Australia took place after the arrival of the aborigines. The ground axe, for instance, I believe to be a later importation.[77]

More on the classification and typology of material culture

Another enduring interest of Europeans was in classifying the stone tools and other 'specimens' (as they often called them) of Aboriginal

culture. Stone tools in particular were regarded as indicators of cultural progress and of the status of particular groups in the evolutionary hierarchy. One aspect of classification that elicited debate concerned whether Australian Aboriginal culture was essentially one culture, or many. Although Aiston argued against generalisations, wanting to emphasise local variation, he nonetheless proposed a common origin for all material culture. Explaining this to Towle, he wrote:

> I do not like to venture into the realms of theory, because one's imagination can carry one a long way, but I am convinced myself that there was only the one culture, all tools evolved from a sharp edged flake and only the differing material made the slight difference in shape in the various periods and countries.[78]

Aiston was conscious, too, of the disparities between collecting strategies by different individuals, as well as the likely differences between Europeans' notion of typologies and Aboriginal views on tool use and function. He outlined this view to Towle:

> I have often thought that there are the two types of collectors, the one, who delights in collecting as many varieties of any one tool that he can ... and the collector who only wants one of each type, it would be possible, as for instance in Stan Mitchell's collection, he has side scrapers, end scrapers, double ended scrapers, all of interest to a man who wants a series, but from the point of view of the Abo. craftsmen they were all scrapers, but one happened to have a sharp edge on one end and another had two sharp ends and another had a sharp edge on one side, they would all possibly be used to do the same work, and are not as a set of carpenters chisels would be, different tools.[79]

This notion that Europeans had a different way of classifying tools, and sought to categorise and label variation to a greater extent than may have existed in Aboriginal society, is reminiscent of the comments made by Walter Roth several decades earlier in relation to north Queensland Aboriginal material culture.

These critiques of the classificatory schemes that informed collectors' activities applied also to displays of Aboriginal cultural materials. Baldwin Spencer's approach to the display of implements in the National Museum of Victoria was based on taxonomy, as he had explained in his 1901 *Guide to the Australian Ethnographical Collection*: ' ... the forms of shields used in different tribes are shown in one case, boomerangs in another, sacred and ceremonial objects in another'.[80] Mulvaney and Calaby write of Spencer's approach to classifying Aboriginal material culture that 'by such shredded and fragmented presentation of material culture, its virtual organic unity, its cultural reciprocity and its ecological adjustments were obscured'.[81] This comment on fragmentation pertains to Europeans' approaches to Aboriginal cultural heritage generally.

Another collector and writer with an appreciation of the diversity of Aboriginal culture was Melbourne-based Stanley Robert Mitchell. Mitchell had a keen lifelong interest in stone tools, and his vast collection of them developed over many decades was eventually to form part of the ethnographic collection of the National Museum of Australia. As with most collectors, Mitchell's was a 'spare time' activity, his main occupation being in metallurgy. Since 'his interest in minerals grew from accompanying his father on collecting trips around the basalt quarries near Melbourne', it is likely that his metallurgical and ethnological pursuits were relatively compatible.[82] Mitchell was active in a number of organisations, as honorary ethnologist, and a trustee and treasurer of the National Museum of Victoria, president of the Field Naturalists Club of Victoria, and a founder and President of the Anthropological Society of Victoria.[83] Influenced by A. S. Kenyon, Mitchell was an advocate for the argument that local materials and conditions governed the forms and functions of stone tools. He also shared the views of those such

as Aiston that material technology was best understood in a wider context, as he wrote to Towle in 1935:

> ... I do not find that any of these broad generalizations can be made on one item of material culture when we take into consideration local environment, climate, flora, fauna, and many other factors we will never know of.[84]

Mitchell advocated using the auspices of the anthropology societies for such work, and extolled the advantages of collaboration between collectors:

> It is in this way that we could use our Societies: formulate some very comprehensive investigation for a number of workers to tackle the problem as a team, which would necessitate years of work, and covering every possible phase before generalization would be of value. This watertight compartment, with each individual working alone, is of little good.[85]

The decades of the 1920s to 1930s saw, in addition to the busy work of amateur collectors and writers such as Aiston, Towle, Kenyon and Mitchell, a proliferation of published works on Aboriginal culture by individuals with more 'professional' backgrounds and 'officially sanctioned' experience among Aboriginal people. These latter included those such as Herbert Basedow, whose brief experience as Protector of Aborigines in the Northern Territory and role in geological and survey expeditions in the early decades of the twentieth century had well equipped him to write about Aboriginal people.

Basedow's *Australian Aboriginal*

In his 1925 book *The Australian Aboriginal,* Basedow expressed views on Aboriginal art and material culture that were by now familiar themes in Europeans' writings.[86] Basedow's regret over the

imminent 'disappearance' of the Aborigines, and emphasis on the urgency of collecting and recording the traces of their cultures, illustrates this:

> There is no doubt that primitive art in Australia is a fascinating study which has not received the attention it merits; and unfortunately it is rather late in the day to think of making a start.[87]

Where some writers had thought Aboriginal art devoid of meaning, Basedow finds every design full of significance:

> We have for too long looked upon aboriginal designs as meaningless, and upon aboriginal art production as being idle concoctions out of nothing which were invented just to make a thing 'look pretty'. This is anything but the true position. An aboriginal artist knows no such thing as a design without motive or origin; to him the shortest line or the smallest circle conveys a thought.[88]

In a poignant reminder of the European project of collecting Aboriginal cultural products to fill their museums, Basedow makes a point that connects these objects with other living expressions of culture:

> Bones, stone artifacts, and wooden implements will remain in our museums for ever, but the habits, laws, beliefs and legends are doomed to rapid extinction.[89]

Employing the palaeolithic analogy, Basedow described the Aborigines making images on cave walls, observing that 'as did his palaeolithic relative in the Old World, the aboriginal during the rainy season spends much of his time under the cover of overhanging rock shelters, well within the cheerful influence of his never-failing fire'. Like Spencer, he, too, emphasised the role of the individual artist:

> There are usually a few men in every tribe who have established a reputation as artists; and their work is prized by the heads and protected by tribal law from the hands of vandals who would at a

> frivolous moment deface or disfigure a work of art which the tribe is proud to look upon as their own.[90]

Basedow's narrative also highlighted the desire often articulated by Europeans for permanence in Aboriginal cultural heritage, as he wrote:

> It is gratifying to observe that there is very little tendency on the part of the aboriginal, humble as he is, to destroy wantonly or deliberately a work designed to create an environment for him during his leisure or to protect his body and kin against aggression by evil during the darkness of night.[91]

Basedow also has much to say on the subject of Aboriginal stone implements, asserting that 'there are not many places left in the world where the man of the Stone Age can still be seen roaming the wilds of his inherited possessions'. This notion of Australian Aboriginal societies as a kind of 'living laboratory' for the Stone Age appears in many European writings. Basedow comments on the Aborigines' use of steel to replace stone:

> ... it is, of course, only to be expected that the superiority of the metal blades of the white man's implements would appeal to the native who formerly had to spend hours making a crude cutting edge which only too often broke when applied to the test for the first time. We shall, however, treat the subject regardless of the alterations which have been brought about by our appearance upon the scene, and without attempting to draw up a hard and fast scheme of classification.[92]

Here Basedow proposes to construct his narrative on the basis of a presumed 'ethnographic present' in which Indigenous societies were described as though they were in a 'pristine' state, unchanged and unchanging since time immemorial. Like Aiston, Basedow highlights the need to observe and record the manufacture and use of Australian stone tools by Aborigines:

> At the present time, whilst there are not only some of the primitive men alive still, but also a limited number of observers who have had the good fortune of seeing them at work, it is of vastly greater importance to record the living facts than to write exhaustively, nay, even speculatively, upon the comparative shapes and embodied techniques of artifacts whose stony composition will ensure their keeping, even fossilized, long after the men who made them, and the scientists who lived among them, have passed into oblivion.[93]

These remarks suggest that the 'disappearance' of Aboriginal societies did not necessarily only mean their actual removal (although of course this was occurring at an increasing rate). It also meant that the Aboriginal societies of their imagination – the 'pure', 'stone-age' societies they constructed as ideal types – in a sense, had 'disappeared', to be replaced by emerging new societies influenced by Europeans' introduced technologies, materials and ways of life.

In the same decade that Basedow's comprehensive book was published, others were released that had a somewhat different approach. These were books by people who made relatively brief visits to regions of Australia, and whose works focused only marginally on Aboriginal culture. Examples of these kinds of works were writings by Norwegian naturalist Knut Dahl, and Australian adventurer Hubert Wilkins. Knut Dahl visited Australia near the end of the century, but his account of that visit was not published until some decades later, in 1925.[94] His purpose in visiting Australia was 'to explore the fauna of Arnhem Land, the northern peninsula of the Australian Continent, situated between the Gulf of Carpentaria and the Indian Ocean'.[95] Dahl's depiction of Australia was of a wild, uncivilised land. He made scant distinction between the country's fauna and its human inhabitants:

> The country we intended to explore was wild and primitive. ... For hundreds and hundreds of miles you may ride through this forest, straight into the heart of the Continent, without noticing much change. You meet smaller plains now and then, you meet

> mountains and ridges, but the enormous forest stretches ever onwards. In fact, the whole of Northern Australia is, as it were, covered with a scanty canopy of the blue-green leaves of the forest. And under this canopy live only birds and wild animals and savages of the forest.[96]

Although only a few years separated the publication of Dahl's account and those of both Spencer and Basedow, in style these works could not be further apart. Dahl's publication was an account of a visit he had made some four decades earlier – yet its depiction of place and peoples is more reminiscent of an even earlier era, imbued as it is with racially based notions of Aborigines as lowly primitives. In the following extract he describes his visit to Darwin:

> On our short excursions round Port Darwin we gained a first acquaintance with the nature and the aboriginals of Australia. Both were strange, and unlike anything else a European has ever seen. In fact, everything in this country impresses one as strange and unintelligible – as long as one is unfamiliar with the reasons for this strangeness.[97]

Dahl places the Aborigines firmly in a time and place far distant from his own. He searches for a context in which to situate these people – and finds the various prehistoric cultures of Europe the most relevant, as the following extracts tell:

> Among living races few if any parallels will be found. Recourse must be had to finds and excavations of very distant ages in order to find a human race comparable with the Australian aboriginal.
>
> As is well known, science generally recognises two distinct races of glacial man. The one is the Neanderthal race or the Moustier Man. The other is the Cromagnon race or the Aurignac Man.
>
> ... If now we consider the aboriginals of Australia we observe that in many respects they represent as it were a type between the two primitive races of Europe.[98]

As was the case with many writers struggling to find racial affinities for the Aborigines, in Dahl's scheme, the key to classifying Aborigines was in their stone tools. He wrote:

> If we consider the stone implements of the Australian we notice great variation in the treatment of stone. We find, in fact, all variations between the coarse treatment of stone peculiar to the Neanderthaler, and the finer elaboration of flint noticeable in the implements of Cromagnon man ...[99]

Notwithstanding Dahl's pejorative, race-based view of Aboriginal cultures, he did, however, note a degree of cultural diversity, as he commented on variations in Aboriginal implements between those from Arnhem Land and other parts of Australia:

> Among the natives of Arnhem Land one finds only the coarse treatment of the stone. From other parts of Australia, however, I collected stone implements – spear heads – which are far more finely treated ...[100]

Dahl also wrote about Aboriginal art. Like many Europeans, his ideas about Aboriginal racial affinities were formed mostly on the basis of the visible manifestations of these peoples' culture. To observers such as Dahl, the material and expressive aspects of Aboriginal culture were physical, tangible indicators of peoples' place in the hierarchical scheme of humankind. The more rudimentary and 'coarse' were their tools and 'artistic' works, the lower they were deemed to be on the scale of progress. Maintaining his notion that Aborigines were placed somewhere between two different types of European prehistoric cultures, Dahl commented on their art:

> In other respects also the Australian occupies an intermediate position. So far as we know, Neanderthal man developed no sculpture and no pictorial art, whereas the Cromagnon people were great artists. Their sculpture, and especially their rock paintings in

> the Magdalen period, show the Cromagnon artists to have been clever and observant draughtsmen of a comparatively high standard. The Australian aboriginal is also a crude sculptor and paints on the rock as well, but his drawings are rougher and do not reach the high level of the drawings of the Cromagnon painter.[101]

This discourse on lack or absence permeates Dahl's text, as he states that 'The first and main fact regarding these people is the amazing simplicity of their life and of their whole apparatus of life.'[102] He builds a picture of a people who, in his view, are like the animals, living close to nature, and whose entire lives are characterised by absence:

> The arms and implements which they have invented are very few. They do not understand agriculture. ... Houses or permanent habitations are unknown. The earth is their bed and the heaven is their roof, as long as the dry season lasts. In the rainy season they resort to mountain caves or build a temporary shelter from bark and twigs. Free, unfettered, like herds of apes, they roam the gigantic forest of Arnhem Land.[103]

And again:

> The weapons, implements and ornaments of these people are few, simple and primitive, and European influence has altered them very little. They still live in the stone age, and the iron of the European has not replaced stone and wood to any extent as material in their weapons.[104]

Depictions of Aborigines in terms of absence (lacking religion, private property, and so on) have unfortunately continued among some sectors of society up to the present time.

Dahl's visit to Arnhem Land highlights the increasing popularity of that northern region for researchers, collectors, and visitors of many kinds. Another visitor was the explorer Sir Hubert Wilkins, who led an expedition to Queensland and the Northern Territory

during 1923–25 to collect natural history specimens for the British Museum, and whose account of that expedition was published in 1929. In the first years of his expedition, while travelling through north-west Queensland, Wilkins noted some images in caves. Like many writers, Wilkins pondered the meaning of these images, as he wrote 'in the dim light of the caves these white hands outlined with blood-red colour resembled ghostly apparitions, and it is difficult to determine their meaning or significance, if there is any such attached to them'. As well as speculating on the 'lost meanings' of the images, Wilkins was also concerned with erosion and the need for preservation:

> The natives in the district at present have no knowledge of the meaning of the hands or of the other signs, and it may be that these stencillings are merely the meaningless work of natives using the caves when decorating themselves for some ceremonial performance. In any case, the significance of these markings will be lost entirely if facts about them are not soon collected, for the sandstone surfaces are weathering fast and the markings will disappear within a few years. Already a number of imprints have been destroyed.[105]

Like many others who wrote of Aboriginal rock markings, Wilkins portrayed these images and designs as if they were disconnected from the people who had produced them. His narrative suggests that these rock images had more meaning as objects of Europeans' curiosity, and for scientific study, than they might have as expressions of Aboriginal cultural heritage. He described one such 'slab' of rock:

> One long slab is so covered with signs and symbols that it has the appearance of some ancient attempt at writing, but the aborigines now living in the vicinity have no idea as to the meaning of the signs.[106]

In contrast to some earlier writers who thought that Aborigines had no knowledge of rock markings, Wilkins seemed to recognise topographical features as having more significance to the Aboriginal people in a given area. His narrative of his visit to Goulburn Island, near King River Range, suggests that he had an awareness of the connection between these sites, Aboriginal belief, and importantly, *place*:

> ... Just beyond this range there rises a peculiarly isolated peak known to white men as Torr Rock. To those geologically informed it is just a hard rocky knob of igneous matter which has withstood the wear and tear of the elements while the surrounding earth has been worn away by water action, but to the native the rock has a far greater significance. Its face is carved with fantastic designs, and on the roofs and ledges are drawings of hands and arms and of many animals found in the neighbourhood. The rock itself is said by some natives to be the remains of a giant spirit which roamed the earth in early days and was changed to rock for the benefit of the black man, for, as the rock rises above the surrounding plain, it is a haven of refuge from the mosquitoes during the wet season.[107]

Wilkins also visited Groote Eylandt, where he 'traded tobacco for stone spears and woomerahs', these items forming the basis for an ethnographic collection for the British Museum.[108]

The narratives of Wilkins and Dahl illustrate the kinds of writing that might be described as 'explorer narratives', produced as a result of transient visits across broad areas of the country. The purpose of these writings differed from that of detailed ethnographies such as those of Spencer and Gillen. The explorer narratives sought to reach a wider, more popular audience, and to engage that audience with tales of heroism, adventure and the lure of the exotic. By contrast, the more ethnographically oriented works endeavoured to inform more than entertain, providing a more specialised readership with a 'study' of a particular Aboriginal society or group of societies, based on the presumed authority and expertise of the writer.

Berndt and Berndt have outlined a history of Australian Aboriginal studies in which they refer to several successive phases of study, beginning with an 'elementary' phase, comprising travellers' accounts produced from the seventeenth century to the mid-nineteenth century. This was followed by a 'formative' phase, in which many of the nineteenth-century missionary works were written. A 'constructive' phase came next, during which many of the major studies were carried out by people such as Howitt, Mathews, Roth, and Spencer and Gillen. Dahl's writings, in the Berndts' scheme, also belong to this period, as do those of Basedow, Mountford and Tindale. The Berndts define a 'professional' phase, beginning with Elkin in the mid-1920s. This period encompasses workers such as Stanner, Warner, McConnel, Kaberry, McCarthy, Davidson, and the Berndts' own work.[109]

Fieldwork, research and publication: the growth in knowledge

Throughout the decades of the 1920s and 1930s there was a steady accumulation in knowledge of Aboriginal societies and cultures, including details of their art, material culture and other elements of cultural heritage. A regular stream of researchers contributed to this growth in knowledge, visiting Arnhem Land and other parts of the Northern Territory and 'remote' Australia to conduct fieldwork in anthropology, archaeology and related disciplines. Norman Tindale, an ethnologist at the South Australian Museum, visited Groote Eylandt during 1920–21. Lloyd Warner, an American anthropologist, carried out fieldwork in several localities within Arnhem Land in 1926, and again in 1929, and published his major work some years later in 1937. Spencer and Gillen published yet more works, with their book on the Central Australian peoples, whom they termed the 'Arunta', appearing in 1927, and Spencer's *Wanderings in Wild Australia*, a more reflective narrative of his years

in the Northern Territory, published in 1928. A third edition of Spencer's guide to ethnological collections in the Melbourne museum was also issued in 1928. Spencer and Gillen's work, in contrast to that of earlier people such as Aiston, Mitchell, Towle and Kenyon, was conducted in a much more systematic way.

From the mid- to late 1920s, Aboriginal studies (especially anthropology) established a professional foundation and, conducted in more rigorous and intensive ways, was supported by universities and museums. The work of people such as Tindale, Warner, Elkin, McConnel, Thomson, Stanner and others during the 1920s to 1940s formed an important core of research.[110]

Norman Tindale, ethnologist with the South Australian Museum, was active in researching and writing on Aboriginal culture, and participated in expeditions to many parts of South Australia, Central Australia and the Northern Territory. In 1925 he published an account of his visit during 1921–22 to the Northern Territory's Groote Eylandt and the Gulf of Carpentaria.[111] In Tindale's description of wet season huts used by Groote Eylandt Aborigines, he wrote that 'the smooth bark walls of the hut in course of time become covered with sketches, drawings and painted designs executed during the idle hours of the day'. He observed that 'the wet season is a time of industry. Many spears are made, weapons, baskets, and ornaments are painted, and ceremonial objects are prepared'. Not only were bark huts used for creative activities, but so too were other temporary shelters used during the wet season, and Tindale noted that 'the walls of these caves are also covered with pictures'.[112] This description conveys a sense that the Aborigines had a casual approach to creating designs, where these are produced in the course of sheltering from the elements. Tindale also collected some paintings from Groote Eylandt during his visit there.

In 1924 Tindale visited the Flinders Ranges in South Australia, accompanied by the South Australian Museum's Herbert Hale, and an account of that visit was published in 1925.[113] In this work, Hale

and Tindale indicate the way they obtained information from the Aborigines:

> Aborigines were encamped in the vicinity, and we had many interesting conversations with the older natives. The younger generation evince little or no interest in the customs and handiwork of their ancestors, and, indeed, know very little concerning them. Even the older aborigines have been in more or less intermittent contact with the white man all their lives, and only meagre details of the old-time customs of their tribe may be gleaned from them.[114]

In this extract there is once again an evocation of a 'disappearing' culture. Hale and Tindale's comment provides an important perspective on early approaches to fieldwork, and foreshadows later debates about the nature of Europeans' fieldwork practice and work with Aboriginal people. Here there is a sense of heritage as a living tradition, where knowledge transmitted through the generations is gradually being lost with the encroachment of Europeans.

The beginning of systematic archaeological excavation

The increasing pace of fieldwork and research during the 1920s did not only focus on Aboriginal social organisation, art and material culture. Another discipline that came to prominence during this decade, and which was to have a profound influence on European notions of Indigenous heritage, was that of archaeology. While the continuing work of amateur collectors and ethnologists, and their proliferating writings, created a firm discourse on questions of antiquity, origins, and classification of Australia's human occupants and the material products of their cultures, others were providing the beginnings of a more rigorous discipline of archaeology. South Australians Hale and Tindale were among these latter, and they conducted the first full-scale controlled excavation in 1929. This excavation, at a rock shelter called Devon Downs in South Australia,

established an important beginning for a discipline founded on systematic excavation. Devon Downs was to become a reference point for future archaeological work, and for debates about culture sequences and periodisation in Australian archaeology. The prominence of the Devon Downs work led one writer to question the extent to which one excavation should determine all future theories on archaeological 'periods'. Fred McCarthy, curator of anthropology at the Australian Museum in Sydney, wrote in 1962:

> It is, however, in the description of our prehistoric cultures that the most serious differences of opinion exist, and here it has become largely a matter of whether or not the basic archaeological periods of Australia can be decided upon one excavation, that of Hale and Tindale (1930) on the lower Murray river in South Australia.[115]

McCarthy had a particular interest in periodisation in Australian archaeology. By delineating periods and successive 'cultures' or 'sequences' of Aboriginal occupation and cultural production, McCarthy and others – such as Norman Tindale, John Mulvaney, Harry Allen and Rhys Jones – constructed a 'prehistory' of Aborigines.[116] Debates in later years over Aboriginal heritage, cultural property and sacred sites highlighted the contested nature of 'prehistory'. Like heritage, pre-history was eventually to be regarded by some as not merely another academic discipline, or an artifact of the European imagination, but an important element of Aboriginal peoples' own cultural heritage.[117]

'Increasingly difficult to obtain specimens': preserving and collecting

The intensification of fieldwork, the continued activities of collectors, the increasing administrative and bureaucratic controls over Aboriginal people, and the growing pressures of settlement and resulting disruption of Aboriginal peoples' lives all combined to

create a heightened sense of urgency to record, document and 'preserve' the vestiges of Aboriginal culture. This led to increasing calls for collections of Aboriginal and other (e.g., Melanesian) cultural materials to be established, and for some kind of centralised, or 'national' collection. Among the early advocates for a national collection was the noted anthropologist A. R. Radcliffe Brown, who held the first Chair in Anthropology at the then newly established department in Sydney University. In 1927 Radcliffe Brown wrote in a memorandum to the Prime Minister's Department:

> Australia has a number of ethnological collections, one in each of the capital cities, and some of them are extensive and important. But there is certainly room, in addition, for a national collection in the Federal Capital of Canberra. The first purpose of such a museum would be to preserve, study and exhibit objects illustrating the mode of life and manners and customs of the aboriginal regions – New Guinea, Melanesia, Polynesia, etc. ... If such an ethnological museum is ever to be established at all some steps must be taken immediately. Every year it becomes increasingly difficult to obtain specimens illustrating the life and cultures of the Australasian peoples. The native people themselves are dying out or are ceasing to make or use the things they formerly had. Moreover there is at the present time a very great demand for such specimens in Europe and America, so that any which are available quickly find their way to museums in those continents. Every delay, therefore, will add considerably to the difficulty and cost of making such a representative collection.[118]

Here the anthropologist gives a firm and authoritative voice to the notion that the Aborigines were 'dying out', and uses this as a pretext for the need to preserve the material remains of their societies. This idea of 'saving' the culture through their material products would continue to course through European discourses for a considerable period of time.

Collecting the sacred: the *tjurunga*

With Europeans' interest in Aboriginal culture growing at a rapid rate, the flow of objects taken from Aboriginal societies also increased as a consequence. It was not only stone tools, wooden spears, boomerangs and bark paintings that were increasingly filling the museums, universities and drawing rooms of Europeans. Among the types of objects desired and collected by the intruders were the special class of object known as *tjurungas*, or 'churinga' to writers of earlier decades. However, unlike most stone 'tools', and many of the other kinds of objects, these *tjurungas* were seemingly acknowledged by many Europeans as having very particular and culturally significant associations to the Aborigines. The sacred qualities of *tjurungas* set them apart from other, more mundane objects, and placed them in a special category of collectable items.

Europeans had long been aware that Aboriginal people had a spiritual life, and some early writers documented this aspect of Aboriginal society. However, Europeans often did not regard the Aborigines' spiritual life as having the same attributes or status as 'religion'. But many writers and observers nonetheless knew that this non-material aspect was an important dimension to Aboriginal society; for example, they understood this within the context of prevailing interests in what was termed 'totemism'. Since at least the last century the subject of totemism had been of particular interest to Europeans – an interest that was facilitated in part by its having been taken up by some of the leading European intellectuals, such as Tylor, Frazer, Durkheim and Freud. The ethnographic works of Spencer and Gillen had played an important role in making these Europeans aware of the religious ideas of the Aborigines.

Despite these early indicators of a nascent sense in Europeans' writings of the deeper complexities of Aboriginal spiritual and sacred life, the important connections between objects and the sacred in Aboriginal societies were not readily understood or acknowledged

for a very long time. The *tjurungas* that were coming increasingly to the attention of Europeans were regarded by many as simply another type of object to be acquired and added to ethnology collections, or traded on the artifact market.[119] This allure of *tjuringas* to Europeans was powerfully illustrated by the way members of the 1894 Horn Expedition had stolen *tjurungas* from their secret cave. However, over time the *tjurungas* became a locus in Europeans' writings for the interplay of tensions between the desire among these writers to collect, display and 'preserve' Aboriginal material objects, and a slowly growing appreciation by some Europeans of the significance that such objects had for the Aboriginal people themselves. This tension is illustrated in the following letters written by Kenyon in 1927, in which he expresses outrage at the apparent 'theft' of some *tjurungas* from Oodnadatta. Kenyon wrote to Radcliffe Brown:

> Dear Professor
> You may have heard or read that the recent 'Reso' train from Victoria to Central Australia was responsible for the raiding of one of the sacred depositories of the Arunta Churingas. Whether directly or vicariously is uncertain as the accounts of those concerned vary much. Archbishop Lees (Anglican) and John Mathew for the Presbyterian Church, have written strong letters to the paper to induce the culprit to return them, but so far without success. The Federal Government would have intervened but as the transaction is alleged to have taken place in South Australia and out of the Territory it is powerless. And that is why I am writing this. ...[120]

Here Kenyon raises a concern about lack of Commonwealth control over Aboriginal matters, including the regulation of illegal acquisition, and traffic in cultural objects. His comments presage later debates about the nature and limitations of legislative proposals for protection of Indigenous heritage. Kenyon also wrote to A. C. Haddon about the theft of the Oodnadatta 'churingas':

> This month a 'Reso' – that is a special train, sleepers, dining car, etc. – containing about 80 tourists, the objective being the inspection of the *resources* of Australia – tour was made from Melbourne via Adelaide to Oodnadatta and cars thence to Alice Springs and Barrows Creek. One of its members either rifled or induced the rifling of a sacred deposit of Arunta Churingas. It got into the papers, and there was a great outcry. The Archbishop of Melbourne urges their immediate return. The Roman Catholic and Presbyterian heads back him up. The Museum Trustees refuse to receive them. The Federal Government has no jurisdiction, nor apparently any of the States. Probably the individual will see the error of his ways and restitute.[121]

Kenyon's writing highlights several key issues that were to become increasingly prominent over the following decades. His references to the lack of power by the Commonwealth to act to redress the 'theft' raises the question of jurisdictional responsibility for Aboriginal people. The only areas in which the Commonwealth, at this time, was able to provide for Aboriginal people were in those parts that were Commonwealth territory – that is, the Northern Territory. This problem of relations between the Commonwealth and the States regarding control over Indigenous heritage was – and remains – a vexed one.

Another aspect of Kenyon's letters invites attention. He urges his respondents to take action to 'return' the 'churingas'. We might assume he meant their return to the place from which they were taken – described here as a 'sacred deposit'. This notion of the return of sacred objects (or indeed of any cultural objects) was unusual for this time, since the more typical pre-occupation for Europeans – as will be seen – was to *remove* cultural objects from their sources (i.e., communities, former campsites, middens, etc), and to place them in collections and public exhibitions. Kenyon and others expressed outrage at what they saw as theft, or acts of sacrilege directed against Aboriginal culture.[122] However, there were Europeans who held different views. L. Keith Ward, government geologist in South Australia, argued that the *tjurungas* in question were no longer 'in use', as they had come from sites long abandoned by Aborigines. Writing to Kenyon, Ward explained:

> Regarding the 'sacrilegious act' a few words: the churingas were found in situ, from what I hear, in the vicinity of Oodnadatta, where, so far as I have been able to ascertain, they have not been in use for ceremonial purposes for very many years, since no corroborees have been held there, and very few blacks indeed remain. I am in entire agreement with those who regard the despoiling of a hiding place of the churingas now in use as nothing less than sacrilege. ... but I do not think the case is the same where the old culture has gone permanently.[123]

Ward thought it 'better that the Churingas should then pass into the custody of permanent trustees such as the Museums'.[124] He also explained his view on keeping *tjurungas*, from sites thought to be abandoned, in museum collections, as he wrote:

> I personally have one churinga that comes from a totem centre in Central Australia and I know that the centre has been abandoned for over 25 years. I have been there and know that the old sanctuary is despoiled and defiled, and feel no compunction about holding a churinga once associated with that place.

His argument for entrusting these objects to museums was made in what he saw as the interests of preservation, as he explained to Kenyon:

> There are many churingas in the National Museum in Melbourne and in our Adelaide museum which came from localities that have been abandoned as centres of ceremonial observance for a less time than Oodnadatta. Should these Churingas be returned? I think not. If they are put back, no effort will be spared by some persons to rob the treasure; and the set will be removed for private collections and lost for purposes of record.[125]

Kenyon continued to argue that the *tjurungas* in question were 'alive', as he pointed out to Ward:

> Re: the Churingas, I think you are misinformed re the matter. If found where stated, then they must have been very much 'alive' ... As to 'dead' Churingas, I have a dozen or more, our Museum say a hundred or two, and yours about a thousand, some at least of which are the usual Mission Station fakes. The whole point to my mind is that the stones were wrapped and greased.[126]

Despite Kenyon's concerns about the irresponsible taking of *tjurungas*, he was clearly proud of his collection of these objects, notwithstanding his disdain for those who would acquire such 'live' ones. As one who had long advocated the need for legislative control over collecting, Kenyon concluded that 'what is needed at the present time is one control, and that must be the Commonwealth Government'.[127]

This debate about whether the *tjurungas* were still 'in use' is underpinned by a number of assumptions concerning preservation, and views about 'living' cultures. One assumption was that cultural objects no longer used by Aborigines, or found in places thought to be no longer occupied, visited or used by Aborigines, were not therefore part of a 'living' Aboriginal culture. This assumption was the basis upon which Europeans could 'justify' their obtaining such objects and placing them in collections for scientific and ethnographic study and display. Another assumption informing the Ward–Kenyon discussion concerns Europeans' interests in collecting, recording and documenting Aboriginal culture as an object for the study and contemplation of European science, natural history and ethnology, rather than as a part of Aboriginal peoples' own cultural heritage. Also threading through Ward and Kenyon's correspondence is a separate theme that was to assume increased prominence in coming decades: the tensions between private and public (e.g., museum) collections, and questions regarding government regulation of collecting.

From ethnology to art: the 1929 exhibition

European-Australian collectors and others generally regarded objects of heritage – such as stone tools and other implements, and sacred objects – as ethnological specimens. However, by the late 1920s a transformation was emerging in the way Europeans regarded certain elements of Aboriginal culture and heritage. The designs and images that the intruders and visitors had for so long admired, or simply contemplated on rock and cave walls, on stone and wood, and on slabs of bark, were by now assuming the status of something other than that of ethnological curiosity or scientific specimen. There was a growing interest in these designs and images as 'art'. In 1929 many of these designs and images were brought together for an exhibition at Melbourne's National Museum. Accompanying this exhibition was a catalogue with text by Charles Barrett and A. S. Kenyon, which espoused the virtues of this hitherto little known area of what the authors called 'primitive art'.[128] Charles Barrett was a Melbourne-based naturalist, collector and writer. In his contribution, 'The Primitive Artist', he began with the following summary:

> Australia has been neglected by students of primitive art, who have devoted many years to the cultures of 'Stone Age' peoples. In Europe and America ethnologists certainly have ample material for their studies, but some, at least, have failed to realize the importance of our aboriginal art, if only for purposes of comparison.[129]
>
> All that we know yet of aboriginal art in Australia is dominated by cave and rock-shelter pictures. More elaborate is the art of their finest decorations, on weapons and sacred objects, of wood or of stone; and of those wonderful ground drawings, before which I have seen the old men of a tribe crooning earnestly.[130]

> The art of our forerunners in Australia, from the red hands on cave walls to the painted shields of Queensland, is illustrated in a unique exhibition, whose purpose is clear. We should have more interest in the Australian race; learn its culture, which ranks with that of other 'Stone Age' peoples, who survive like living fossils, but are failing. Every relic of the aboriginals is worth preserving; and the caves and shelters, where they painted and carved, should be guarded as national possessions.[131]

Barrett uses familiar language, extolling his readers to preserve the designs and images on cave walls, rock surfaces and decorated shields as the relics of a disappearing 'Stone Age' culture. His call to safeguard these things as 'national possessions', which was expressed with increasing frequency in Europeans' writings, illustrates another transition in writers' views on Aboriginal cultural heritage. Where many writers had regarded the aspects of Aboriginal heritage that they saw, recorded and collected as 'specimens' or 'relics' for scientific study and display in museums, there was an emerging sense that this heritage was something more than items of scientific interest. It was coming to be considered a part of the nation, as in Barrett's reference to 'national possessions'.

Kenyon, too, wrote of this Aboriginal 'art' as a subject requiring attention beyond that of anthropology. His paper, entitled 'The art of the Australian Aboriginal', proclaimed:

> The subject of Aboriginal Art – in this case the Art of the Australian Aboriginal – has to be approached with the utmost caution, for, though it comes directly within the domain of anthropology, it is in an indirect way a very important question in psychology and pedagogics.[132]
>
> We possess some knowledge of our own mentality through the kind offices of psychology; but though we have some – many in certain classes – material relics of our primitive and prehistoric ancestor, the only evidence of evolution of thought and of the development of his powers of abstract conception must be derived from his art remains, his pictographs, sculptures, and adornments. Hence the dominating importance of such relics and the pressing need for very cautious treading by the mere anthropologist.[133]

Here Kenyon valued this Aboriginal art as a way of educating the viewing public about Aboriginal culture. Thus, not unlike the stone tools that had so preoccupied many writers, Aboriginal art could be a key to understanding the Aborigines – as 'evidence' of their progress on the scale of evolution.

The institutionalisation of anthropology

By the late 1920s the activities of amateur collectors and writers on Aboriginal culture heritage began to be increasingly circumscribed by the growth of professionalism in anthropology, archaeology and Aboriginal studies. The museums and universities had long held particular interests in Aboriginal studies, especially in ethnological and anthropological studies. Science and natural history studies also commonly incorporated some reference to Aboriginal culture and heritage. The establishment in 1926 of the first professional university department of anthropology at Sydney University was an important development. The occupant of the Chair of Anthropology at Sydney University came to play a major role in influencing the direction of all matters regarding Aboriginal affairs.[134] By this time there were already some well-established non-professional anthropological societies, which played an important role in the formation of a consciousness about Indigenous heritage in the European mind.[135]

One of the implications of the establishment of the anthropology department at Sydney University was that it highlighted the differences between social anthropology and ethnology in Australia. The discipline of social anthropology, with its emphasis on social and political organisation and kinship, became increasingly professional, and was now, according to one view, 'primarily the domain of the

academic world'. In contrast, the study of material culture was 'relegated to a peripheral position'.[136] The tension between those who studied social anthropology and those more concerned with material culture was often played out in the personal writings of some of those involved. Nonetheless, the work of 'non-professionals' in collecting, identifying and classifying material culture continued unabated, and many of these people were keen participants in the various societies, associations and other bodies involved in anthropology, archaeology and natural history.

The continued activities of collecting, recording and documenting Aboriginal cultural heritage began, at least for some participants, to acquire an increasingly interventionist dimension. Where from early times Europeans' activities involving Aboriginal cultural expressions and objects were predominantly remote and distanced, over the decades they came to be more concerned with the production, and also with the 'use' of Aboriginal culture. In this sense, Europeans did not always simply collect, document and record culture passively 'as they saw it'; they were now more often instrumental in the production of the culture that they recorded. Indeed, the intruders would, in many instances, intentionally intervene in the ongoing life of a community, with the specific purpose of obtaining a record or 'sample' of that community. This intervention might involve 'commissioning' bark paintings (as with Spencer at Oenpelli), requesting Aborigines to make certain specific kinds of objects on demand, or facilitating, with gifts of tobacco, knives and other goods, the staging of a performance of dance or ceremony.

Influence, copying or innovation? Margaret Preston and Aboriginal art

Europeans' fascination for Aboriginal art and material culture did not only manifest itself through collecting, recording, documenting

and classifying cultural objects and expressions. Europeans also continued to intervene – either by intent or implicitly – in the creative processes of Aboriginal people in many and varied ways. Some sought to incorporate Aboriginal artistic designs into their own practice, and advocated that others follow their example. Others again, fascinated by the ways in which Aboriginal people produced art and cultural objects, became involved in the processes of Aboriginal peoples' adaptation to new forms of creative and cultural expression. In a sense, this use of Aboriginal designs in European art was yet another kind of 'collecting' and 'recording' of Aboriginal heritage. But here, the Aboriginal designs are less clearly discernible as they became integrated into the European object or image. Indigenous art and culture had, by the 1920s, long exerted a strong influence on the western imagination. At around this time the growing interest in Aboriginal art as fine art, rather than as ethnographic curiosity, was also gaining ground. This interest was facilitated by the success of Namatjira and other Hermannsburg Aboriginal artists, as well as by the accessibility of writings by people such as Fred McCarthy, Charles Mountford and A. P. Elkin.

One person whose work reflected the influences of Aboriginal art was the artist Margaret Preston. Working between the wars, Preston, who was born in 1894, was known for her campaign for the development of an Australian national art based on Aboriginal forms. In many of her writings from the 1920s to the 1940s she drew attention to the varieties of Aboriginal design and urged others to turn to these for inspiration. In 1924 Preston wrote:

> ... Australia must honestly confess to having no designs of her own. Taking native flowers, etc., of any country and twiddling them into unique forms will never give a national decorative art. The need then to try and base our designs on other foundations is obvious. A study of our own aboriginal art may meet with better success. Other countries have not been above profiting by close observation of primitive or foreign races. Many designs for curtains, floorings,

> etc., are inspired from such sources. Australia could be influenced to its own advantage in the same way.[137]

This sentiment, if viewed from the perspective of today, when there is much debate and discussion about the exploitation of Aboriginal art and designs, strikes the reader as a clear instance of the promotion of such exploitation. However, to Preston, the use of Aboriginal designs as inspiration for a 'national decorative art' was seen not as exploitation, but as a genuine attempt to develop a truly 'Australian' art. One critic has suggested though that Preston's 'championing of Aboriginal art':

> ... was accompanied by a virulent artistic colonialism, which advocated the adoption of Aboriginal methods and ways of seeing but at the same time, denied the culture that gave them meaning.[138]

Before further exploring the ways in which Europeans 'created' the culture they collected and recorded, I will consider one particular means of recording culture: the use of photography. As a powerful tool in the recording of culture, photography was an essential part of much fieldwork. Spencer and Gillen's work was well known for its use of photography in producing a visual document of every aspect of the societies observed. A lesser known photographer was B. L. Hornshaw.

Recording rock art: Hornshaw's work

The markings that Europeans saw on rock surfaces, on the walls of caves, and on bark slabs were to them often strange and enigmatic, and equally as compelling as stone tools, weapons and bark paintings. These markings differed from objects in at least one important respect: they were generally not portable. Unlike the objects, which could be carried, stored and transported often over vast distances, markings on rock were fixed. They could only be observed, studied

and recorded *in situ* – thus necessitating their observers to make journeys to see them.

Not only did rock markings in 'remote' regions such as the Kimberley in Western Australia invite Europeans' attention, so too did markings found in and around closely settled and urban areas. Many such markings were found in the Sydney region and other parts of New South Wales. These had been noted by some of the first European visitors to Australia,[139] and continued to fascinate many observers.

One person intrigued by these markings was Bernard Leslie Hornshaw, a tramways worker from Sydney. Hornshaw was one of those people – like Stan Mitchell, Charles Barrett and many others – who dedicated their 'spare' time to the collection and documenting of Aboriginal art and artifacts. In contrast to professionally trained workers such as Elkin, Warner, Stanner, and McCarthy, Hornshaw approached the recording of Aboriginal cultural heritage in a style reminiscent of the explorers of a previous century. Like many of these amateur ethnologists, Hornshaw adopted a tone of awe and wonder at what he saw and recorded. His tone is more that of a popular adventure narrator than of a scholar. His depiction of 'wild tribes' no longer in existence, and their 'strange beliefs and customs', is in marked contrast to that of more rigorous writers such as Basedow. He introduced his readers to these rock markings in the following way:

> Although we have no wild tribes in New South Wales today, a fact which, from an anthropological point of view, is greatly to be deplored, there are still to be found a great number of interesting records of their strange beliefs and customs. These, if the key to their meaning could be found, would unravel the mystery of many of their primitive ceremonies. I refer to aboriginal art, and believe that nothing stimulates the mind more than the study of these interesting relics of the past.[140]

In Hornshaw's view, the Aborigines whom he denoted as 'wild tribes' no longer existed. Instead, all that remained were their traces, the 'interesting records of their strange beliefs and customs' or 'interesting relics of the past'. The writer describes the images in the 'many crude "art galleries"' that he found during his 'wanderings through the bush'. He lists the various types of rock and tree markings, and compares certain of these with those found in other parts of the world:

> Red hands, which are fairly common in this country, have their similarities in other parts of the world, and resemble some of the paintings and drawings found in the caves of France and Spain, and are worthy of comparison with the pictographs so well portrayed by the bushmen of South Africa. In the delineation of the tracks of animals and birds, the dusky artist excelled, for they are true in every essential detail.[141]

This extract once again presents a discourse on resemblance, a theme that re-emerges in many writings. Here, the quality of the 'red hands' drawn by the 'dusky artist' of Australia is considered equal to that of the European palaeolithic people and to those of South African bushmen. Hornshaw regards likeness to 'real' images of fauna an indicator of artistic 'excellence'. He continues:

> It is doubtful if the meaning of native art in this country will ever be discovered, but its abundance seems to prove that it is intentionally a record, and not the work of idle hands as some anthropologists claim.
>
> When we consider what a small amount of labour the Aborigine devoted to his habitations, clothing, ornaments and cooking utensils, it is surprising how much time he has given to art.[142]

So apparently vast was Hornshaw's knowledge of New South Wales rock art sites that, mourning his death in October 1937, one newspaper eulogised Hornshaw claiming that 'he knew more about this form of primitive art than any other amateur student'.[143]

The Melbourne collector and writer Charles Barrett paid homage to Hornshaw's work in his contribution to the 1943 work *Art of the Australian Aboriginal* that he edited with fellow collector Robert Henderson Croll.[144] Barrett describes Hornshaw's work:

> Student as well as recorder, Hornshaw devoted the leisure hours of half a lifetime to aboriginal art, as represented in the Hawkesbury sandstone region. Becoming interested as a young man, when he noticed petroglyphs during his bush rambles, he decided to make a scientific record of all the groups he could find. Very soon, the majority of the well-known groups within a short distance of Sydney had been visited, and scores of others located in French's Forest, at Bantry Bay, and elsewhere. Then the amateur ethnologist went further afield.[145]

Barrett says Hornshaw was 'astonished at the abundance of rock carvings in his ever widening territory'.[146] Barrett wrote further of Hornshaw's work:

> The Hawkesbury sandstone, with its rock shelter walls and great flat or gently sloping rocks, offered a 'canvas' to the aboriginal wherever he roamed. Hundreds of human and animal figures, symbols, and imaginary objects carved in the sandstone, were photographed and measured, each photograph being accompanied by valuable data. Hornshaw's enthusiasm never waned, though his good work seldom received due recognition.[147]

Although writings by Hornshaw are scant, he did leave a considerable photographic record of the rock carvings that fascinated him. Barrett tells us that Hornshaw 'took nearly one thousand photographs of rock carvings, and filled many notebooks with details of different groups', and that 'no such record of primitive art perhaps has been made by one man in any other country'.[148] Barrett continues:

> Most generous with his own knowledge and photographs, he kept none of his 'finds' secret from those who, like the present writer, were eager to visit the groups. Often enough he guided us to them and helped in photography and measuring. The contents of his notebooks, when published, will add greatly to our knowledge of the petroglyphs of eastern New South Wales.
>
> This unassuming man, with a true scientific outlook and a deep love of aboriginal art, formed definite theories concerning the meaning of many of the rock carvings which are associated with sacred ceremonies. He held that the aborigines were not without some religious ideas; that they believed in some form of Great Spirit or deity. He advocated that every effort should be made to preserve rock carvings and pictographs, and, with others, he was instrumental in getting something done in this direction.[149]

Here we are presented with a picture of Hornshaw as a kind of lone 'saviour' for the rock art, busily tramping the New South Wales countryside photographing and recording these sites. Hornshaw, like many of those individuals who collected, recorded and displayed Aboriginal art and culture, had a kind of 'museum' approach to this work, carrying out his no doubt well-intentioned studies in a remote, distant way, apparently devoid of any sense of Aboriginal peoples' connections with the rock art. The legacy of his work, a substantial photographic record of these rock art sites, is however available to the public, as it resides in the archives of the Australian Institute of Aboriginal and Torres Strait Islander Studies in Canberra. As well as its role in documenting engraving and art sites, the use of photography was also seminal in recording ceremonial and other kinds of performances.

Recording performance: Aiston's corroboree

One aspect of Aboriginal life that was of enduring fascination to Europeans was the performance widely known as the 'corroboree'.

This expression of Indigenous culture was often deliberately sought (or constructed) by European observers and fieldworkers in their enthusiasm to establish some kind of record of the culture. Very often, too, corroborees were 'staged' by Aborigines as a specific form of response to Europeans, or organised in collusion with the visitors.[150] This notion of corroborees as spectacle for the gaze of Europeans has already been discussed in the context of Frank Gillen's remarks in 1901 about photographing such a performance. Similar issues are prominent in the following comments about corroborees made by George Aiston in 1931 to Robert Henderson Croll, the Melbourne-based collector, art critic and naturalist:

> Dear Mr Croll
> I hardly know what to say about the possibility of getting a record of a corroboree, the blacks are like wild dogs here today and gone tomorrow. It might be possible, I have spoken to some of the more civilized and they are agreeable as far as they are concerned but of course they cannot vouch for the others and the bush blacks are a totally unknown quantity, they have no interest what ever in the white man, his goods or his works, at present they are all still scattering again, a mob of about a dozen came here last evening, some of them are going south and some north, they expect to meet here again in about a fortnight, but it is quite probable they will not meet for months. They are so totally unreliable.
>
> If a party could be here when they were assembled they would be delighted to give every assistance but the trouble would be in mustering them, but I will write more later.[151]

This letter seems somewhat at odds with Aiston's correspondence on stone tools examined above. Unlike the stone tool correspondence, this letter conveys a pejorative view of Aborigines. Aiston's reference to them as 'like wild dogs', and his insistence on their unreliability construct a powerful image of the crude, 'uncivilised' savage. Employing this harsh racialised language, Aiston's remark that the Aborigines 'have no interest what ever in the white man, his goods

or his works' reinforces his stereotype of a brute savage uncaring of the benefits of 'civilised' man and 'his works'. Aiston persisted in trying to obtain a 'record of a corroboree', whereby the Aborigines would perform for the European observers 'on demand'. He wrote again to Croll:

> ... I have had quite a mob of blacks here lately, they are all shifting about, yesterday I suppose that at least 50 were in the camp, to-day they are down to about 20, I gave rations to that many this morning. Dr Horne had the luck to bump into a big corroboree at Mungeranie, but one may never have the luck to strike a lot like that again. They are so unreliable, I could get enough at any time to make a show like some of those I saw at Canberra (of American Indians performing some of their ceremonial dances) but I doubt if it would be possible to get a genuine show, for one thing the corroboree takes up so much room, anything up to a mile of country is needed for the various parts of the ceremony, and most of the important things are at night, during the day the performers are out hunting, only the few privileged old men stay in camp and instruct the initiates. At every corroboree there are some who get advanced a degree or so, a performance that a boy or young man of this year would be excluded from (although he had been made a young man) would possibly be open to him next year. This goes on until the man has been admitted to the final old man's dance when he becomes a Pinnaru and after that he has the freedom of all dances, even of the secret women's dance. This is usually kept exclusive by a picket of women and lord help the man who tries to get through the line of sentries. I saw part of this once on the Frome River, but I could not get nearer than about a hundred yards, and only then because the old gin who was guarding that part was a tribal sister of mine, but she got frightened after a bit and begged me to go.[152]

Here Aiston has, it seems, at last succeeded in observing a women's secret corroboree. This letter suggests the way Aboriginal culture was staged or choreographed by Europeans, apparently to satisfy the

curious gaze of the observer and recorder. This staged performance may well have also been an intentional strategy by the Aborigines to engage with Europeans.

Aiston's writing further highlights the continuing anxieties that Europeans had regarding 'authenticity'. In this letter Aiston is confident that he could 'get enough [Aboriginal people] at any time to make a show', but doubts that such a 'show' would be 'genuine'. There is a presumption here about what, in his view, might constitute 'genuine'. It is at this point that he then launches into a polemic about the extent of 'room' that would be needed for such a 'genuine' performance, and concerns that these performances are usually conducted at night. He considered these factors as constraints to the possibility of organising a 'genuine' performance for the Europeans' consumption. Aiston's remarks about the corroboree needing 'so much room', and that 'most of the important things are at night', again illustrate, as we saw earlier with Gillen's comment on photographing a performance, the ways in which many Europeans could only 'see' Aboriginal culture within their own frames of space and time. Aiston's classification of 'more civilised' versus 'wild blacks' also reifies the kind of evolutionary discourse that continued to inform much writing by Europeans at this time.

A growing consciousness by Europeans of the many facets of Indigenous heritage was, by the 1930s, profoundly influenced by the growth of the discipline of archaeology. While Aborigines were objects for the photographers' gaze, their relationship to the practice of archaeology was equally complex, and occasionally (especially in later decades) fraught. One archaeologist who articulated some of these issues at this time was American Daniel Sutherland Davidson.

Davidson and archaeology

In 1935 Davidson published an article, *Archaeological Problems of Northern Australia*, based on his brief 'archaeological reconnaissance'

in the Katherine River and Victoria River region of North Australia carried out while a Visiting Fellow from the University of Pennsylvania.[153] Davidson wrote that 'the presence of the natives was found to be of great value in archaeological work', as he explained:

> Various tribesmen rendered invaluable assistance in their willingness to point out caves and other sites of aboriginal occupation and in their knowledge of the artifacts excavated. As a result of their identification of various objects, light was thrown upon a number of points of interest which might otherwise have been left unanswered. It is interesting to note the amazement of the natives in the finding of useful specimens deep in the floors of the very caves in which many of them have lived. The fact that I, a stranger in the region, seemed to have come into their country with the knowledge, or at least the suspicion, that their own caves contained these materials, struck them as decidedly uncanny, and they never ceased to show their astonishment and awe as various artifacts were extracted.[154]

In Davidson's summing up, the state of archaeology at this time was considered predominantly in terms of lack of information, as he wrote 'archaeologically speaking, very little is known of the continent of Australia'. He proclaimed that 'there is at present considerable information concerning the stonework of southern and south-eastern Australia ... but for the most part this knowledge is concerned with surface finds or ethnological observations'. With the exception of the Devon Downs excavation, the work of Warner in Arnhem Land, and a few others, Davidson proclaims, 'very few serious attempts at excavation have been made anywhere on the continent'. He continued in this same tone of lack:

> Archaeologically Australia stands unique among the continents in the complete lack of pottery and of bows and arrows. For these reasons archaeological investigation is seriously handicapped, for the selection of aboriginal sites, so easily determined where potsherds and stone arrow-heads are found, by necessity must depend upon other considerations.[155]

Davidson's bleak summary also articulates a powerful discourse of lack in regard to the Aborigines. He continued:

> Archaeology is also hindered as the result of the nomadic tendencies of the natives for, in being a purely hunting people, with neither agriculture nor domesticated animals, they seldom remained long at one camp but were constantly on the march in search of game and wild foods.[156]

He did, however, sound a note of optimism, suggesting other regions may have 'preserved' some otherwise 'perishable' objects:

> The desert areas, on the other hand, may offer compensations in other ways for, as the result of arid conditions, it is possible that many perishable objects may be retrieved. It is to be expected that white ants will have annihilated the remains of wooden objects in some of these regions. In others, however, it may be possible eventually to determine from stratified deposits the histories of development of, or the succession of types of, various wooden tools and weapons and utilitarian and religious objects.[157]

In general terms, Davidson maintained his view of a material culture based on absence:

> Unfortunately the material culture of the Australians is rather meagre, and at first glance this fact would appear to increase the difficulties in retrieving an abundance of material. On the other hand, this condition may prove helpful in the long run in that those objects which are recovered should bear directly upon a few major problems.
>
> There is so little archaeological information available at present that it is difficult to outline any strictly archaeological problem.[158]

Pre-empting views of people such as Fred McCarthy, he advocated a need for continent-wide archaeological surveys to delineate patterns and typologies in material culture:

> What is needed most in Australia is a number of surveys in all parts of the continent to establish in a general way the archaeological areas as determined by types of artifacts, the conditions of preservation, the types of sites and the relative abundance of material in them.

Davidson also defined opinions about origins of Aboriginal material culture:

> We cannot be certain at the present time of the derivation of most of the stone tools and weapons found in Australia. Many of them have been reported as surface finds only in localized areas and, as a result, appear to be Indigenous to those regions.
>
> Traits which, for the time being, appear to be Indigenous in origin may be found to have been derived from regions which we now would never suspect.[159]

Here Davidson is advocating a diffusionist approach wherein certain developments in Australian Aboriginal material culture are likely to have originated outside of this continent, and 'diffused' into the country.

The 1930s social and political context

Europeans' writings on the various elements of Aboriginal heritage were not conducted in isolation, but were shaped by, and in turn influenced developments in, policy and legislation in Aboriginal affairs. By the late 1930s the plight of Aboriginal people, suffering the combined effects of drought and destruction of their societies through European settlement in the Northern Territory, began to gain the attention of the Commonwealth Government. In 1939 the Minister for the Interior, John McEwen, set out the basis for a new

policy on Aboriginal affairs, which was developed under the influence of anthropologist A. P. Elkin.[160] This policy represented an important shift away from the idea of 'preservation' or protection of Aboriginal peoples' distinct cultures and lifestyles, to one of assimilation: the Aborigines were to be assimilated into European society through the combined civilising projects of government and the missions. With the growth in control and regulation of Aborigines through policy, there was a corresponding increase in the establishment of bureaucratic and administrative structures for the implementation of laws and policies. A new bureaucracy had been established to administer the Northern Territory, and in particular, Aboriginal people. The appointment of E. W. P. Chinnery in 1939 as Government Adviser on Native Affairs, and then as the first Director of Native Affairs for the Northern Territory, was an important step in this increased machinery of control. After World War II the assimilationist policy of the Commonwealth Government began to be more fully implemented through the Department of the Interior.[161]

Part II

4

Collecting, Recording and Preserving: Art, Stone and Bark

Throughout the 1930s to 1940s many Europeans' writings on Indigenous heritage were still imbued with a sense of wonderment and curiosity. These sentiments contributed to the continued zeal for the collecting, classifying and display of Indigenous cultural materials. Many collectors were possessive of the objects they gathered, imprinting these with the stamp of their own personality. One of those who held such views was Melbourne writer Robert Henderson Croll, who described his interest in collecting in his 1937 narrative *Wanderings in Wild Australia*:

> My first expedition quickened a lifelong interest in our aborigines, an interest that had lain dormant for want of just such an experience. Incidentally I began then a collection of native implements and sacred objects which has grown to be of considerable importance. To increase that collection I have paid visits to most of the well-known, and long-deserted camping grounds in Victoria, but none of these journeys equalled in interest the motor drive to Marree with my friend S. R. Mitchell in 1930.[1]

This extract raises questions about the value of cultural objects. What did Croll mean when he described his collection as having

'considerable importance', and to whom was it important? How was importance ascribed? These questions become especially interesting in later years when museums and other institutions were seeking to acquire or purchase collections, as will be seen later. Croll also conveyed the enthusiasm for collecting that his colleagues had, as he wrote that 'never was there a keener collector than Mitchell'.[2]

Croll described the presence of objects found in former Aboriginal camping grounds, writing that 'about them, hidden by the sand or exposed by the action of the wind, lie the stone implements dropped by the tribes when they moved camp to another site.'[3] There is a profound sadness to Croll's tone as he evokes the picture of a long-departed people whose former presence was marked only by these cultural objects. Croll expanded on this sense of loss, claiming that the makers of the implements:

> ... will never return to recover them, for in this particular part of Australia, distant though it is from cities, not one blackfellow remains in his native state to care what becomes of the tools and weapons and articles of daily use which he and his ancestors had taken such pains to fashion. Those implements were what we were hunting.[4]

Croll wondered at the meanings of these implements, pondering the loss of connection of the objects with Aboriginal people:

> We are told by the scientists that many of the relics we were discovering are common to stone-age peoples the world over. Here in Australia we have actual contact to-day with the one considerable body of such folk that still exists; but, and it is an amazing thing, we have to guess at the meaning of much that we pick up. None knows why some of the implements were made and whether they were for particular or general use. There are plenty of speculations of course, and some probably have hit the truth, but in the absence of agreement amongst the experts the layman finds himself standing on the shifting sands of doubt.[5]

Croll distances himself and fellow 'amateur' collectors here from their professional colleagues, whom he refers to as 'scientists'. This tension between amateur and professional writers and observers of Aboriginal material culture persisted for many decades.

Croll wrote of the scant remnants of the Aborigines' material culture in a language of pursuit and reward:

> An axe with a nicely ground edge was an occasional prize, but nothing wooden remained in this countryside save a few fragments of ancient throwing-sticks. ... Certain dry lakes were dotted with such obvious things as mills and pounding stones.[6]

In this passage there is also nostalgia for things that have perished and disappeared – once again invoking the unconscious desire for permanence that was so powerfully insistent throughout Europeans' writings on Indigenous heritage.

Lost relics and the search for meaning

The notion of the Aborigines as a 'dying race' dominated many European writings about Aboriginal cultural heritage. As the Aborigines were thought to be disappearing, it was also believed that there was a loss of meaning attached to remaining objects of their culture. This was a source of anxiety for many writers, and underpinned the salvage discourses that prevailed for a long time. Anthropologist Ursula McConnel was another of those who pondered the meaning of objects, as illustrated in a paper published in 1935 in *Art in Australia* based on her fieldwork in north Queensland.[7] She requested that the Australian National Research Council provide funds to 'purchase these specimens of native art and to carry out further enquiries'.[8] In her paper she connected the designs on these objects to the ancestral stories associated with them, and also to the items such as food products that they represent. The Aborigines of this area, she asserted, bring to their designs 'an artistic appreciation

of form and colour, a delightful sense of humour, a joy in the good things of life, and, above all, an intimate knowledge of nature'. She concluded:

> It has thus been possible not only to salvage these interesting relics of a dying art, but to place on record something of their meaning. It is doubtful if this art will survive the life-time of the present artists, and certainly its meaning might have vanished forever unrecorded.[9]

Where Croll's narrative is imbued with sadness and the nostalgia of loss, McConnel's writing evokes a sense of appreciation of the intricately designed objects left by the departed makers. Her emphasis on salvage, and the survival of the art, echoes other writers concerned with the European ideal of permanence and preservation.

Another observer puzzled by an absence of meaning was R. H. Goddard who, in August 1935, had visited some 'remarkable' rock carvings on a formation that he referred to as 'Devil's Rock' in New South Wales.[10] He wrote of these in a paper delivered to a meeting in 1937 of the Australian and New Zealand Association for the Advancement of Science, in Auckland:

> The almost total absence of historical facts relative to the aborigine of Australia, during the long ages that have passed since the continent was first peopled until the advent of the white man precludes the possibility of any satisfactory data upon which to trace their ancestry. We are therefore compelled to fall back upon the rock sculptures, cave paintings, and the language for the solution of the problem.

Once again, the emphasis here is on the physical, although unlike many, Goddard included language as a means to understanding Aboriginal culture.

The artifact hunter and the archaeologist

By the 1930s and 1940s collectors were still acquiring their objects mostly from the surface. They incessantly tramped the fields and paddocks of the countryside picking up 'relics' and pondering the meaning, form and function of these. Although surface collecting continued, in this period the growth of the discipline of archaeology, especially controlled excavations, became an influence on the collection and interpretation of material culture. One consequence of this growth in archaeology was a tension between the methods of the amateur collectors and those of the professional archaeologists. Mulvaney and Calaby commented on the collecting strategies of people such as Croll, Kenyon, Barrett and others, bemoaning that 'under Kenyon's dogmatic spell, artefact hunters scoured south-eastern Australia for over half a century, leaving little behind for latter-day archaeologists'.[11] These concerns are reinforced by a comment from Stan Mitchell, a keen Victorian collector, who wrote to Fred McCarthy in 1944 describing material collected at various Victorian localities:

> I have posted a set of artifacts from Pt. Cook, a bayside campsite about 16 miles South-West of Melbourne. This one and another at Altona are the only ones of importance between Melbourne and Geelong. They have yielded a large number of microlithic forms, but very few of the larger types other than ground axes, and a few pebble implements. Unfortunately the latter were gathered by earlier collectors, and we have little information about them or their numbers.[12]

This clearing activity notwithstanding, Mulvaney and Calaby commented that there were also some benefits in collectors' activities, since 'their efforts proved to be a not unmixed blessing, because these dedicated men labelled their specimens and hoarded them, even though they were highly selective in their collection building'.[13] The labelling and classifying of the collections was considered by

most collectors, archaeologists and museum curators to be of particular importance. This became evident in later years as collectors discussed the possible transfer of their collections to museums, and the labelling of these collections assumed significance as a marker of the collector's individual personality. As Australian Museum curator, Joseph Shellshear, observed in 1937:

> ... The question might well be asked: Why do men collect these relics of ancient man? There are many reasons: Firstly, they are collected for personal gain. There is an exaggerated idea of the value of stone implements and a fictitious price is put on them. Recently I saw an implement in a shop window in Sydney, and in curiosity I asked its price. I found that fifteen shillings was being asked for the implement, although the vendor had no idea of its place of origin.[14]

Croll's *tjurungas*

Many Europeans saw remote Australia as a place of particular fascination and desire, as an imagined place where one could find the 'real' Aborigines. Croll made several visits to Central Australia, mostly in the company of artist friends. Describing this region as 'long a place of desire', Croll's encounter with Aborigines there helped shape his views on the 'ideal' Aborigines, whom he believed were 'corrupted' by European culture. He wrote in his 1939 published memoir:

> My reaction to the aboriginal each time that I meet him in Central Australia is always one of disgust with my own kind. I am not speaking of the wild, naked people (rarely to be met with now) but of those who have eaten of the tree of knowledge of good and evil as introduced by us and have learnt shame. In other words, they are clothed. Usually that transforms them from upright free-moving men and women to shambling mendicants. Then we scorn them for being shabby and for being beggars, conditions which we have forced upon them.[15]

Croll's visit to Central Australia in 1934, accompanied by Melbourne artists Rex Battarbee and John Gardner, was his fourth trip to the region. His private diary conjures his excitement in collecting Aboriginal cultural objects:

> Mr & Mrs Gill welcomed us to morning tea and we stayed to lunch also (fowl), not leaving till 3.30. He has 3 fine old Churinga, the mates of those held for him in Melb. by his uncle W. H. Gill and he told us that he has the whole contents (save 8 Churinga) of the famous Emily Gap corroboree cave mentioned by Spencer. Bought them from a government official in the Alice. *Has permission of the native owners to open up two corroboree caves now*, but does not intend to do so, at least not at present.[16]

As in the narratives of the Horn Expedition reviewed earlier, Croll's writing also illustrates the desire that Europeans had for acquiring *tjurungas*, as they proudly boasted about their collections of these. The statement that Gill had 'permission of the native owners' to open up 'corroboree caves' suggests that for all their zealous collecting of *tjurungas*, some Europeans did recognise that the Aboriginal people were the owners of these objects. Either this, or that the Aborigines were coerced into revealing the location of the *tjurungas*, as in the Horn Expedition. Croll's enthusiasm for these sacred objects is palpable in his diary entry for April:

> Great lot of dinkum old Churinga (in 2 boxes) brought from Petermann and far west by a couple of natives on their backs. My mouth watered for some of the largest of course but prices have gone up and Mr Albrecht's book of charges is away with him so I did not dare go very deeply into the buying. Really big old stone ones are up by £1, the prices varying with the size ... I selected about 5 and took some little bullroarers and a few odds and ends which were at the bottom of an old chest where knives, pointing bones, nosebones, etc. are kept.[17]

Tjurungas, like many Indigenous cultural objects, were increasingly assigned monetary value and were sought as commodities for a growing market. For Croll at least, the features of these and other cultural objects that appealed were their obvious physical attributes such as size, and their supposed age (the older, the better). Almost childlike in his enthusiasm, Croll salivates as he yearns for the largest, but ultimately he is constrained by the practicalities of purchase.

Observing and recording art: Albert Namatjira

At the same time as Europeans were building their collections of Indigenous cultural objects and pondering the meanings of these, another aspect of Aboriginal heritage was increasingly occupying their attention. The fascination with Aboriginal art did not only dwell on the images seen and recorded on stone, cave walls and bark. The rising prominence of living Aboriginal artists such as Albert Namatjira was also becoming a favoured subject for debate and discussion.

In 1943 artist and teacher Rex Battarbee wrote eagerly to E. W. P. Chinnery, anthropologist and Director of Native Affairs for the Northern Territory from 1932, of the market potential of Namatjira's work:

> ... Albert Namatjira is still away on his painting trip, even at the higher price all his pictures have been sold and we have a list of people waiting to buy so we are going to have another talk over prices it seems as though there is no limit to what his pictures will go, but I think we will stop private sales and save up for an exhibition ...[18]

Not only was Battarbee enthusiastic about the impact of this art on the western commercial world, but he also expressed his excitement

about its adoption by other artists, and the transfer of the artists' work onto other objects:

> Since you were here several of the boomerang painters have made a big advance in their work and are painting on woomeras now and some are keen to be watercolourists so we have no shortage of artists. I feel that this place will become famous for its artists. Some of the woomeras painted by these young men make Albert's work look old fashioned.[19]

So powerfully did Namatjira capture the popular imagination that he became the focus of contested views and interests among many Europeans intent on recording his and other Hermannsburg artists' work. In 1946 Battarbee wrote to Ralph Foster, who was film commissioner with the then Commonwealth Department of Information, to complain about the South Australian Charles Mountford making a film about Namatjira and the Pareroultja Brothers:

> Messrs Poignant and Robinson told me that advice had been received by them to the effect that the Pareroultja Brothers are to be included in the film now being made of Albert Namatjira. After thinking the matter over from all angles, I feel I should write and bring the following before you for consideration.
>
> Without any exageration [sic], I am safe to say that without my efforts none of these native artists would have achieved anything like they have, or managed to establish themselves. And even now I feel that their work would largely be wasted if I ceased directing them. This does not in the least mean that I am trying to make copyists of them, rather try and lead them to express themselves in their art individually. This effort, I believe, has been particularly successful with the Pareroultja Brothers, and I would deplore it if they would be shown together with Albert Namatjira. Such a film would show neither of them at their best; they would lose their individuality, the most striking point in their development so far.[20]

This is a bold statement of European intervention in the creation and production of Aboriginal creativity. With an eye for the market, Battarbee promoted his own role in the development of the work of artists such as Namatjira. His claims to having been the sole impetus for the Hermannsburg painters' increasingly renowned work also finds its expression in his desire to control the representation of these artists by filmmakers. In expressing his concern at the possibility of this film being made by Mountford, Battarbee detailed some of the problems he believed existed with Mountford's potential role. He concluded by indicating the future success he saw in Aboriginal art:

> At the same time I feel that the Pareroultja Brothers will be famous in the world of art, and something should be done to bring their work before the public. Such publicity would not only benefit the men concerned but the Aborigines as such, and is of sufficient importance to be taken up by your Department.[21]

Battarbee's prediction of what was to eventually become part of a significant Aboriginal fine art industry evokes the growing relationship between Europeans' museum-like notions of preservation and recording of Aboriginal cultural heritage, and the emerging importance of market and commodity aspects to this heritage.

Mountford and palaeolithic art

Although the development of the unique artistic style of Namatjira and other Hermannsburg Aborigines signalled an important new direction in Aboriginal art, many Europeans continued to hold the view that Aboriginal art should be what they regarded as 'pure' or 'authentic', untainted by European influence. South Australian Charles Mountford was for a long time one of the chief advocates of this 'stone age' view of Aboriginal art and culture. In 1937 Mountford participated in an expedition to Nepabunna, in the northern

Flinders Ranges of South Australia, where he provided paper and chalks to Aboriginal children and asked them to make 'marks'. His diary entry for Wednesday, 29 December illustrates his concerns about European influence in the resulting drawings:

> Today the drawings and associated legends have started to roll in. Some of the drawings are remarkably good. Europeanised somewhat, but distinctive. Not a single one of the artists have had any training. I made special inquiries about that.[22]

Mountford's assumption that quality fine art can usually only result from training begs many questions. We can only speculate, for example, as to what he meant by 'training'; either he had in mind the training of Aborigines by Europeans in western techniques and practices, or that they had no formal training from the Elders in their community, but rather had acquired their skills by observation. His admiration of the quality of these drawings highlights the continuing theme in Europeans' writings that was concerned with the nature of Indigenous peoples' cultural creativity, and their 'originality' of expression in the context of European intrusions.

Aboriginal art in comparative context: D. S. Davidson

Aboriginal art was often compared with that of ancient Europe, or with the art of other cultures such as African bushmen. One writer who pursued such comparisons was the American archaeologist Daniel Sutherland Davidson, who conducted brief fieldwork in northern Australia in 1930 while visiting during 1930–31 as a Fellow of the Social Science Research Council. In his 1936 publication Davidson claimed that Australia 'is now the only continent where rock painting still flourishes as a normal cultural expression, although rock carving appears to be no longer practiced'.[23] Placing rock art in a global context, he thought that this

form of cultural expression had all but disappeared, and it 'is only in Australia that we can still find the artists at work'.[24]

Davidson compared Australian Aboriginal rock art with the 'European art of the Glacial Period and Bushmen art in Africa'. Where in these other regions 'the surrounding fauna so important to a hunting people has been emphasized', he stated that 'in Australia, however, the superb qualities of the art of these other areas is lacking'. Explaining this deficiency he wrote:

> The portrayals, although realistic in essence, are not marked by the animation so obvious in the other regions. The Australian artist has not caught the living spirit of his animals, nor has he ventured to portray them with the fidelity to life that characterizes Palaeolithic and Bushmen endeavours. In these appearances the artists, although following closely the conventional style and pattern of their day, nevertheless were unfettered in respect to detail. They painted their animals browsing, stalking, running, resting, at bay or in any one of a dozen other postures and they reproduced their impressions with a fidelity to life which has evoked the admiration of all who have beheld.[25]

Davidson contrasts the Australian Aboriginal rock images:

> This is not so for the Australian. His naturalism is of a different sort, a realism not in the free and unrestricted sense of the word in which free play of the brush is encouraged within certain broad cultural limitations, but a realism apparently closely governed by cultural forces which seem to impose rough conventionalizations and to confine expression to more or less fixed and narrow channels.[26]

Here Davidson recognises the cultural context of Aboriginal art and its basis in customary law. In his 1937 study of decorative art he wrote in a language of absence:

> ... There are many factors in Australian culture which do not encourage high technical development in decorative art even if we could grant that technical perfection is a goal of Australian artists. Being a hunting and wild food collecting people more or less constantly on the march in search of anything and everything edible their material wealth is strictly limited to the carrying capacity of their own bodies, with the consequence that specialized tools and supplies from distant areas must be reduced to a minimum. The Australians thus apparently tend to find it more convenient to limit the scope of their decorative art to those techniques which are associated with other activities, or which require no specialized equipment, than to give much attention to elaborations which require added physical hardships.[27]

This is a familiar refrain, portraying, Aborigines as minimalist, pragmatic and focused on daily subsistence activities.

Other writers on material culture: missionary, geologist and anthropologist

There was no single, homogeneous European Australian view of Indigenous heritage. Rather, there was a wide range of perspectives, by people from diverse disciplines and backgrounds. For example, in 1938 the missionary the Rev. Theodore Webb, Chairman of the Methodist Mission in North Australia, described Aboriginal peoples' material culture in an evolutionary framework, claiming that 'in his material culture the aboriginal has not risen above the stone age. That is to say, he has not of himself discovered the use of metals.'[28] While Webb cast his discussion of Aboriginal peoples' material culture generally within a context of lack, or absence, he nonetheless held some aspects of their cultural products in high regard. He commented that 'in other directions, however, the handicrafts of the aboriginal have reached a considerable stage of development, though

their range is somewhat limited'. Like many people at that time, Webb had some fascination with Aboriginal weapons:

> Most of their weapons are of wood, and consist of spears of many types, spear-throwers, boomerangs of a heavy type, and long two-handed clubs or wooden swords with the blade sharpened on both edges. All these weapons are beautifully fashioned and finished. Many of the spears, with hafts eight feet or more in length, and with heads of delicate and intricate design, are carved, with such crude tools as they possess, from a single piece of hardwood. The clubs are constructed with perfect symmetry from the extremely hard and heavy ironwood, and are perfectly smoothed and polished.[29]

Webb had similar praise for the quality of string and basketwork. He continued:

> Practically all their weapons and utensils, but particularly their sacred objects, are decorated by an art which has reached a truly striking degree of development. With infinite care and patience, designs of intricate patterns or representations of natural species are reproduced in minute lines of coloured clays laid on with a tiny twig, the end of which has been crushed to form a rude brush. Many kinds of cord, ranging from fine twine to stout rope, are spun from vegetable fibre, the fur of animals, or human hair. Into much of this cord, when used for ceremonial purposes, are neatly and skilfully woven the bright feathers of parrots and other birds, with very pleasing and striking effect. Some of the contrivances and methods employed for taking fish or game are both ingenious and highly effective.[30]

As well as missionaries, those involved in the natural sciences – such as geology, surveying and zoology – also had particular interests in aspects of Aboriginal life. For example, the geologist Charles Madigan had an eye for signs of Aboriginal peoples' stone artifacts,

as he described in his account of the 1939 Simpson Desert expedition:

> Nodules of ironstone lay around, and pieces of chalcedony. Crocker discovered a small rock outcrop of chalcedonized sandstone. More interesting still was the discovery of signs of the former presence of aboriginals, the only such indications seen in the whole desert crossing. There were chips of chalcedony, typical of aboriginal workshop sites where knives, scrapers and spearheads have been made, and also parts of grinding stones, one a piece of schist that must have come from the MacDonnells.[31]

Perhaps most prominent among the kinds of Europeans who wrote about Aboriginal cultural heritage were the anthropologists. Lloyd Warner was an American anthropologist who published the experiences of his fieldwork among the Murngin people of northeast Arnhem Land in 1937. Warner remarked of the Aboriginal people that 'they belong to a Stone Age culture; were they placed in our own chronology, their technological development would fall somewhere between the Old and the New Stone Ages'.[32] This comment typifies the kind of evolutionary discourse that persisted in writings on Aboriginal cultural heritage for much of the century. By firmly placing the Aborigines' technological development in some invented past labelled as 'Stone Age', writers established a perpetual distance from the peoples they described, in both time and space. This distancing serves to maintain an uneven power relationship between the writers and the objects of their writing.[33]

Warner viewed Murngin technology as an integral part of their cultural system:

> The Murngin material culture is comparatively simple, and a study of their implements offers an opportunity to examine some of the physical activities of a people who have been disciplined by technological behavior. ... The making of any one article of culture is associated with every technical process in the whole of the material culture of the tribe. Material culture, in its turn, articulates with every other branch of culture, so that starting with such a small element in technology as the making of a spear-thrower one must ultimately consider the whole of the civilization.[34]

Warner's work was a reference for later anthropological and archaeological work in Arnhem Land, as is discussed below.

Calls for preservation

Europeans continued to call for preservation of the art and culture they were observing and documenting, and from the 1930s this interest in preservation began to grow among those in professional and official positions as well as among 'amateurs'. The need for laws to regulate the collecting and export of Aboriginal cultural materials had been recognised from the early 1900s, and customs legislation was used for this purpose. One influential figure involved in these early moves for preservation was Baldwin Spencer, who, 'as a result of his experience in the Northern Territory during 1912, ... advised the Commonwealth government that stringent control was necessary over the export of Aboriginal ethnographic and skeletal material'.[35] Spencer's influence resulted in the government issuing a proclamation of 22 November 1913 under the *Customs Act 1901–1910*.[36]

Amateur collectors were among those who voiced their concerns for measures to be taken for preservation, as Towle wrote to his Victorian colleague Kenyon in 1936:

> I do hope that the Victorians will quickly formulate proposals for the preservation of our national monuments. I want to see them take the lead and maintain it.[37]

Towle was particularly concerned about rock engraving sites in New South Wales, and he described the threats these sites faced from encroaching settlement:

> We have had some very enjoyable excursions of late to the rock carvings and paintings along the Hawkesbury. Some of the series we have visited are relatively unknown. The great number of carvings and paintings around Port Jackson and the Hawkesbury baffles description. Campbell in his book missed many more than he recorded. The tragedy is that as the suburbs extend the carvings disappear. The problem of preserving them is most difficult. I am of the opinion that our best plan will be to have the best of them protected. I fear that there is no possibility of saving them all. From where I live at Eastwood I am able to reach many very fine groups in a short time and am able to observe the destructive processes now going on.[38]

In this passage we see references to selective preservation; Europeans assigned priority to particular sites over others. This selectivity raises questions about the nature of the process: for example, what criteria were used to determine which sites were (in Towle's terms) 'the best'? Was 'significance' a factor, and if so, how? Although Victorian collector Stan Mitchell agreed with Towle on the need for legislation to prevent illicit export of cultural materials, he thought that such legislation could have undesirable consequences for the serious collector:

> Personally I am with you in keeping the science free because if we have the suggested restrictions, Australian ethnological material will greatly increase in value and an undesirable element will profit by illicit collecting and disposal of the spoils overseas. ... It might be advisable to have restrictions on the indiscriminate digging of caves, providing men like yourself could be given a licence to do so, especially in association with some reputable body ... Could your Society [the Anthropological Society of NSW] not make a recommendation to the effect and try to get control of the work. Similarly with the recording and preservation of rock carvings; this should be in the hand of a live committee. Our Council for the Preservation of National Monuments will work along these lines, first of all to try to secure legislation and then suggest means of carrying out the work.[39]

As well as concerned individuals such as Mitchell, Kenyon and Towle, some people in official positions also articulated a desire for formal measures for preservation. Representations were made to the Prime Minister calling for legislation to protect what were collectively referred to as 'national monuments'. In 1937 A. B. Walker, General Secretary of the Australian and New Zealand Association for the Advancement of Science, conveyed that organisation's recently passed resolution concerning protection of Aboriginal heritage. The science body informed the Commonwealth Government 'that it views with great concern the unchecked destruction of relics of prehistoric value in Australia, New Zealand, New Guinea, and the Pacific Islands'. It requested 'the various Governments and administrations concerned to take such steps as may seem advisable to provide for the declaration as national monuments, and thus the protection of the following relics':

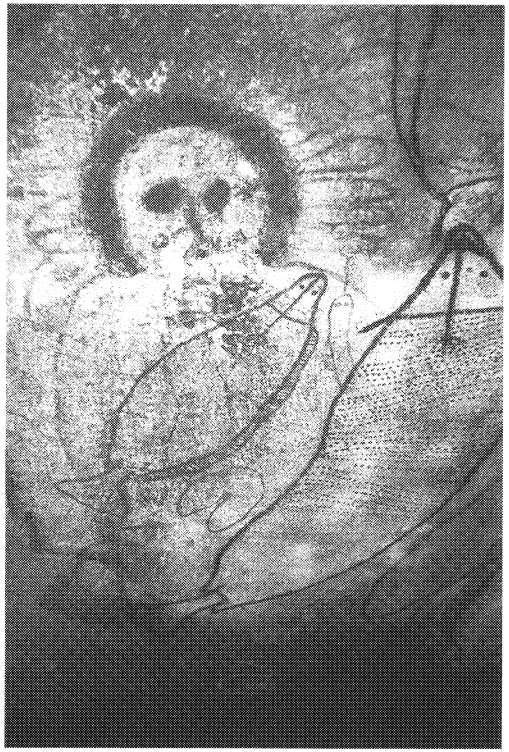
> cave and rock shelter deposits, rock carvings and paintings; burial grounds and graves; stone structures and arrangements; and any other relics of prehistoric interest; and to make provision for the examination by approved societies and institutions of cave and rock shelters and camp and village sites.

The Association went on to outline the kind of destructive activities it sought to have outlawed:

> The destruction referred to in the resolution includes the defacement of rock carvings and paintings, and the disturbance of stone structures and arrangements; and also the destruction of valuable archaeological data by irresponsible and ill-considered digging up of cave deposits and camp sites for the artefacts and skeletal remains therein contained.[40]

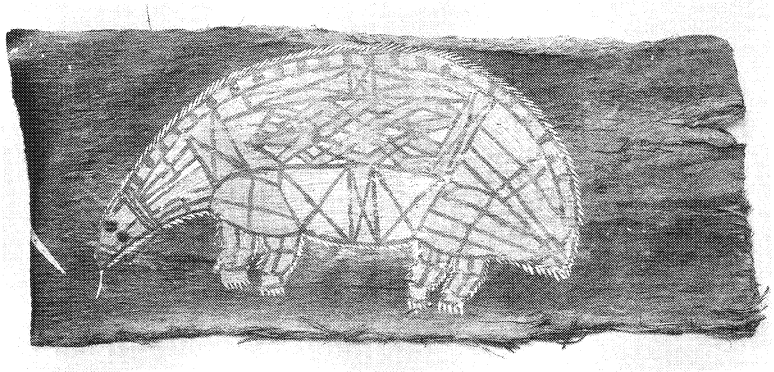
Above: Frank Gillen conducting ethnographic work in the Northern Territory, about 1901–3.

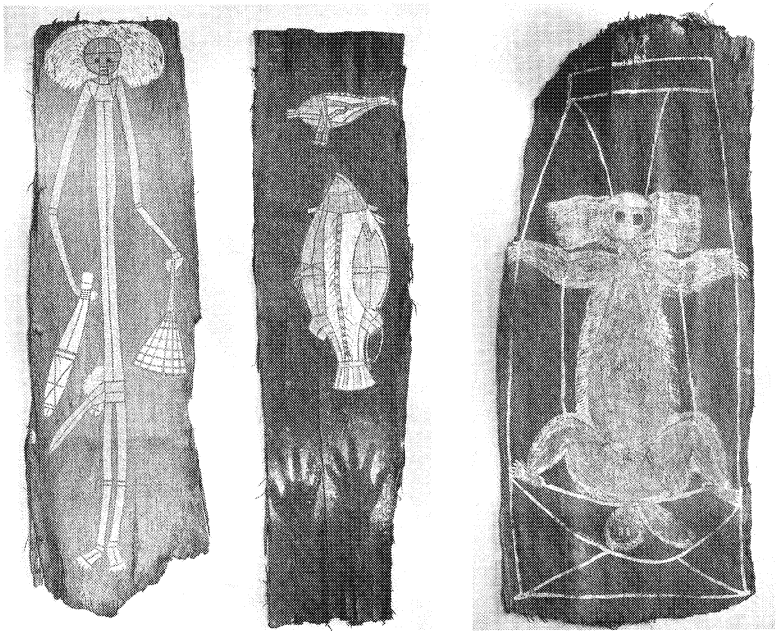
National Library of Australia



Right: Wandjina rock painting of the kind seen by George Grey and others in the Kimberley region of Western Australia.

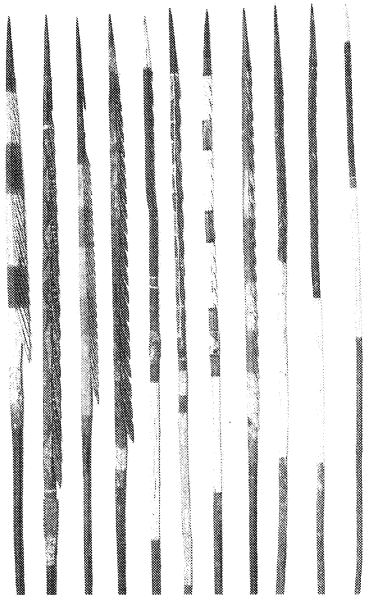
Groger-Wurm Collection, Australian Institute of Aboriginal and Torres Strait Islander Studies



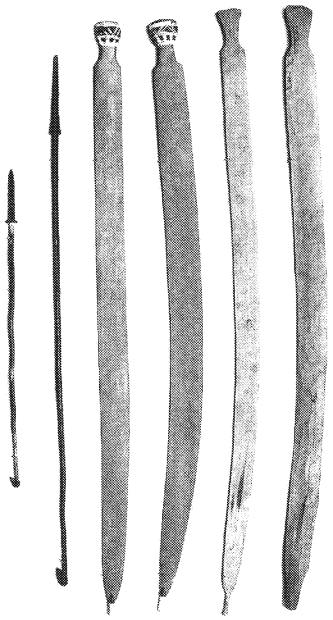


Bark paintings collected by Baldwin Spencer, published in *Native Tribes of the Northern Territory of Australia*, 1914.

Museum Victoria

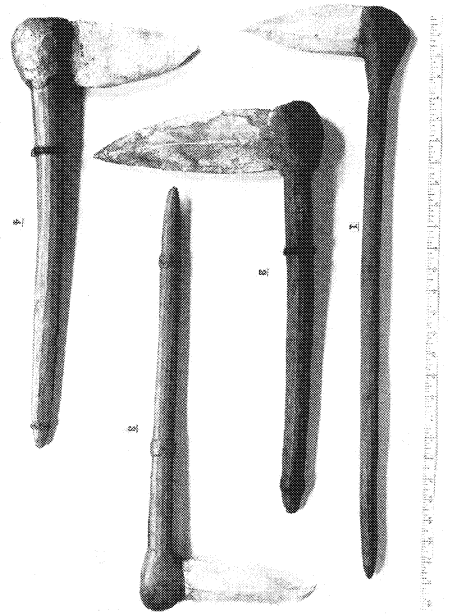


Melville and Bathurst Island spears.

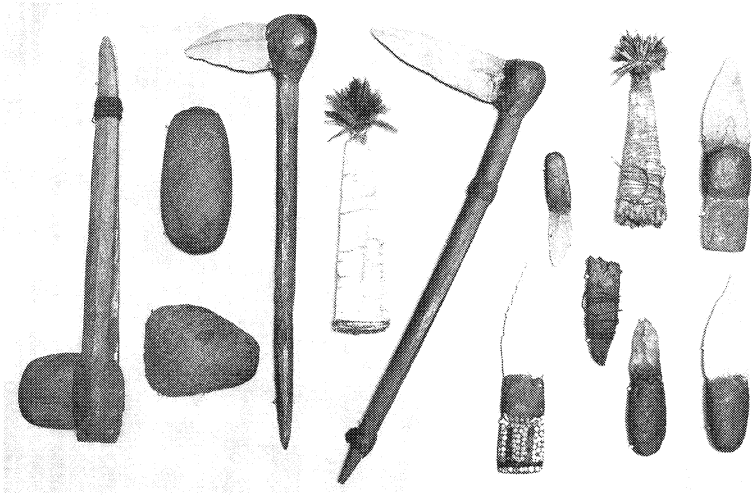


Spearthrowers from Northern Territory (including, at left, a toy spearthrower and, at right, two spearthrowers in the course of construction).

From Baldwin Spencer, *Native Tribes of the Northern Territory of Australia*, 1914.

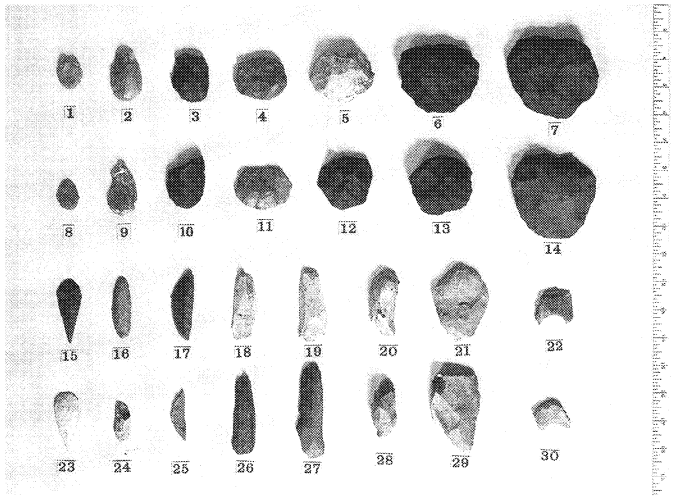


Fighting picks, central Australia.



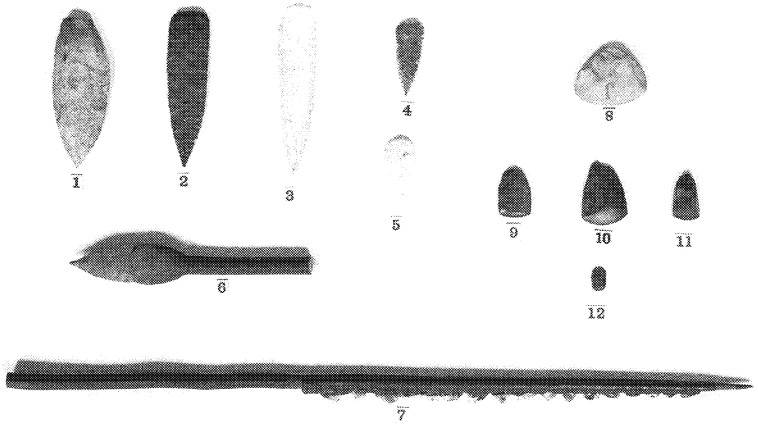
Stone axes, fighting picks and knives, central Australia.
From Baldwin Spencer and F. J. Gillen, *The Native Tribes of Central Australia*, 1899.

Baldwin Spencer Collection, Museum Victoria



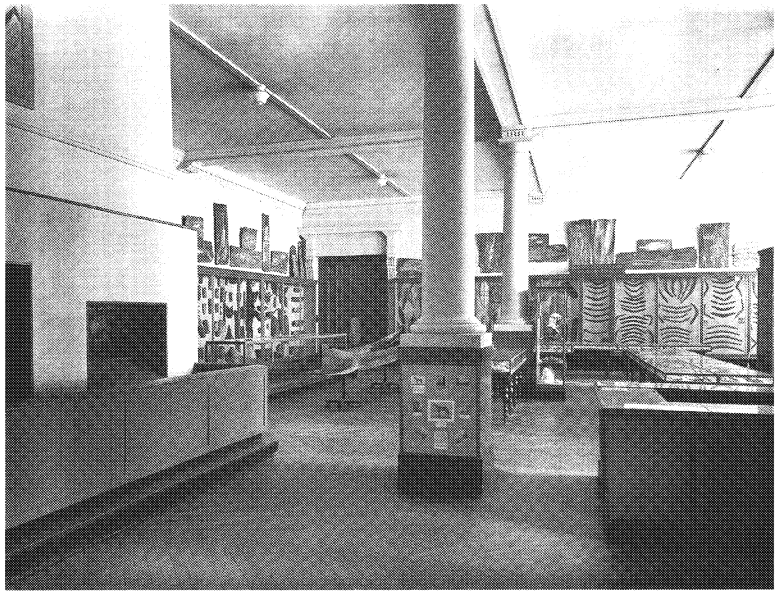
Australian prehistoric stone tools.

Baldwin Spencer Collection, Museum Victoria



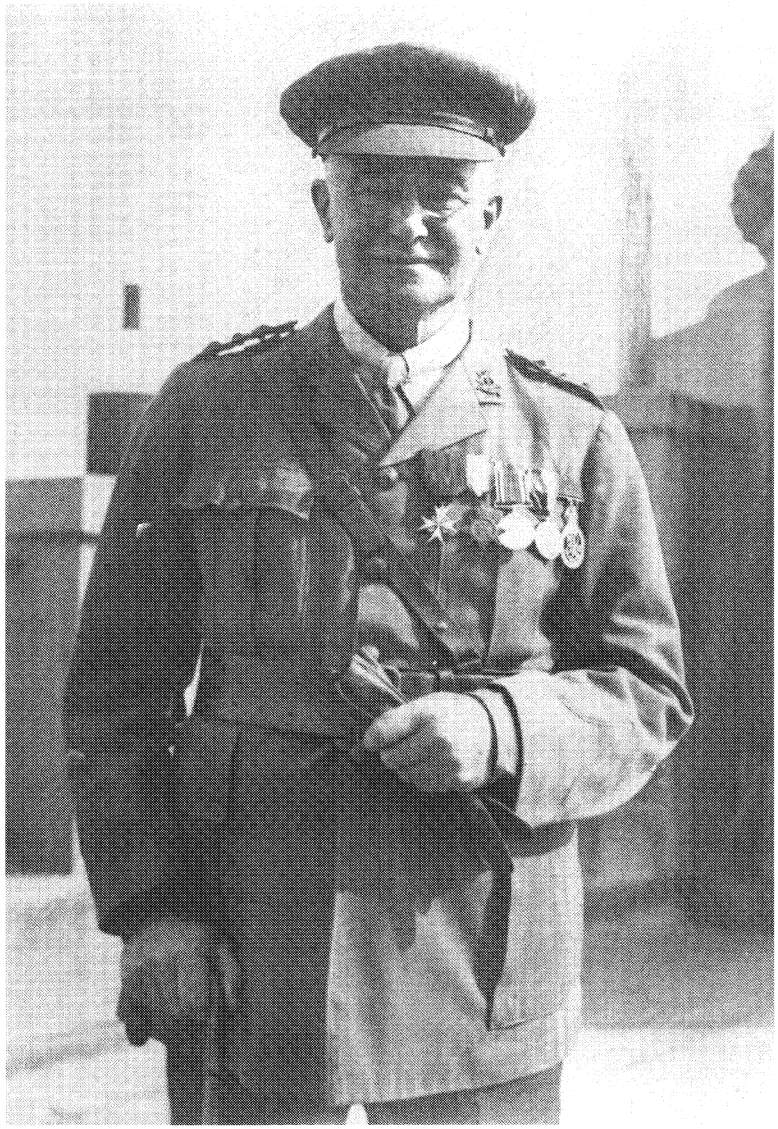
Spearheads and ground knives.

Baldwin Spencer Collection, Museum Victoria



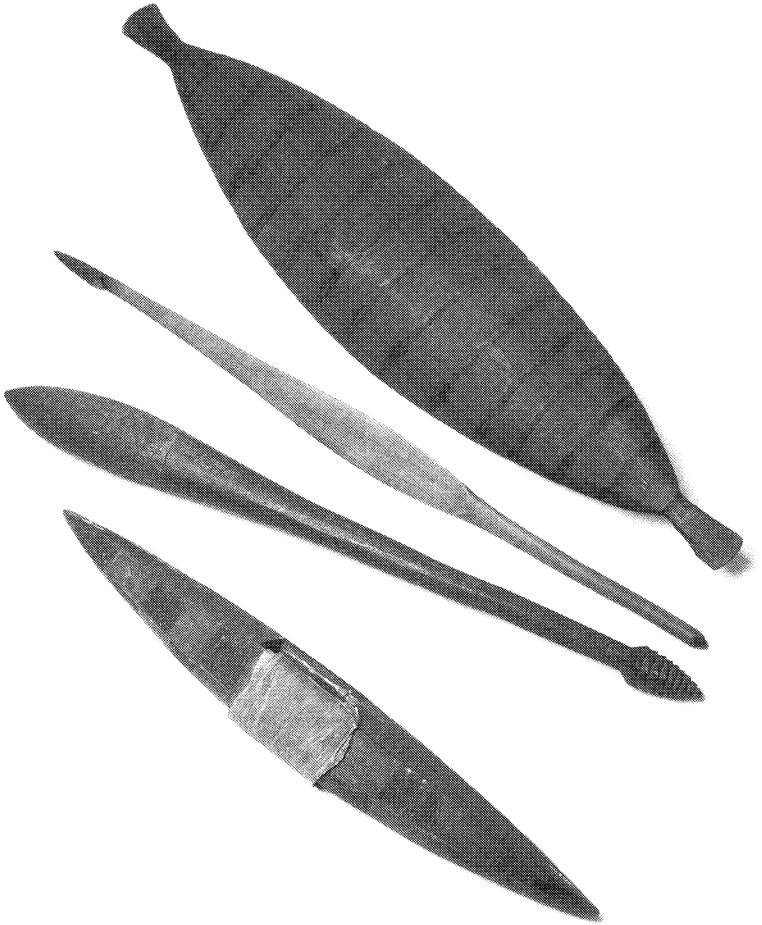
Spencer Hall, in the former National Museum of Victoria.

Museum Victoria



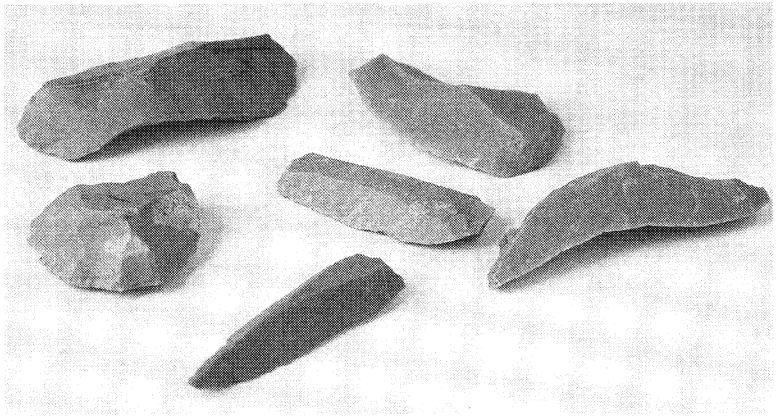
George Horne was a Melbourne doctor with an interest in Aboriginal cultures. He collaborated with George Aiston to write *Savage Life in Central Australia*, 1924.

Portrait by Agnes Paterson, National Museum of Australia



Victorian artefacts (from top, a shield, spearthrower, club and shield) from Horne's collection.

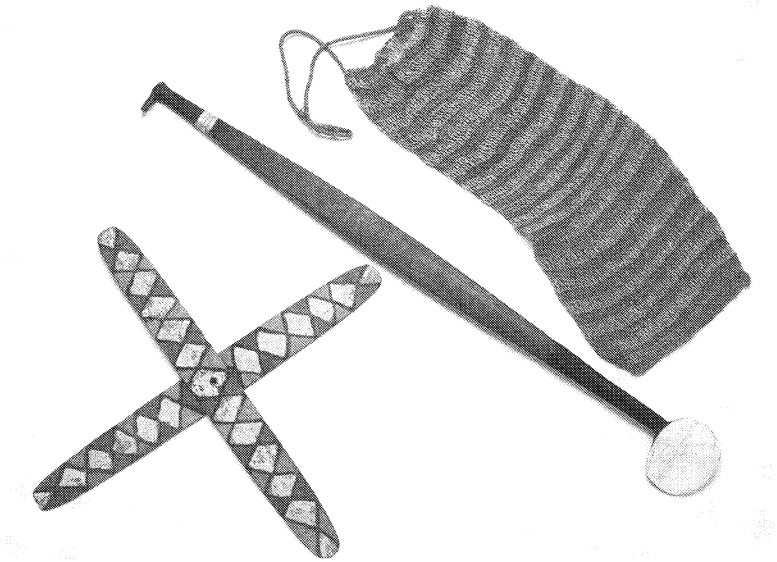
National Museum of Australia



Dean McNicoll

George Aiston spent many years at Mungeranie station in northern South Australia. This photograph shows six stone tools that he collected from the Lake Eyre region. They are part of a small collection that went to the Australian Institute of Anatomy, probably after he gave it to Dr Colin MacKenzie, the Institute's first director.

National Museum of Australia



Dean McNicoll

A cross-boomerang from Yarrabah, a spearthrower from Archer River and a bag from the Gulf of Carpentaria, collected by anthropologist Ursula McConnel, who worked in North Queensland in the 1920s and 1930s.

National Museum of Australia

Right: Ursula Hope McConnel, Sydney, late 1920s or early 1930s.

Photograph, Judith Fletcher, Fryer Library, University of Queensland Library. UQFL89, Box 4

Below: Sculptures by Kalboori Youngi, a Pitta Pitta artist from far-western Queensland, acquired by Roy Goddard in 1938.

National Museum of Australia

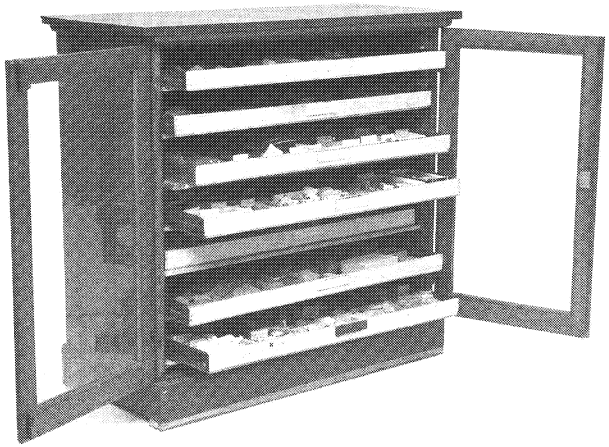
Dean McNicoll

Above: Members of the Carnarvon Ranges expedition organised by the Queensland branch of the Royal Geographical Society (Roy Goddard at far left), from a print in Roy Goddard's expedition album.

National Museum of Australia

Left: Melbourne collector Stan Mitchell in later life, probably about 1960.

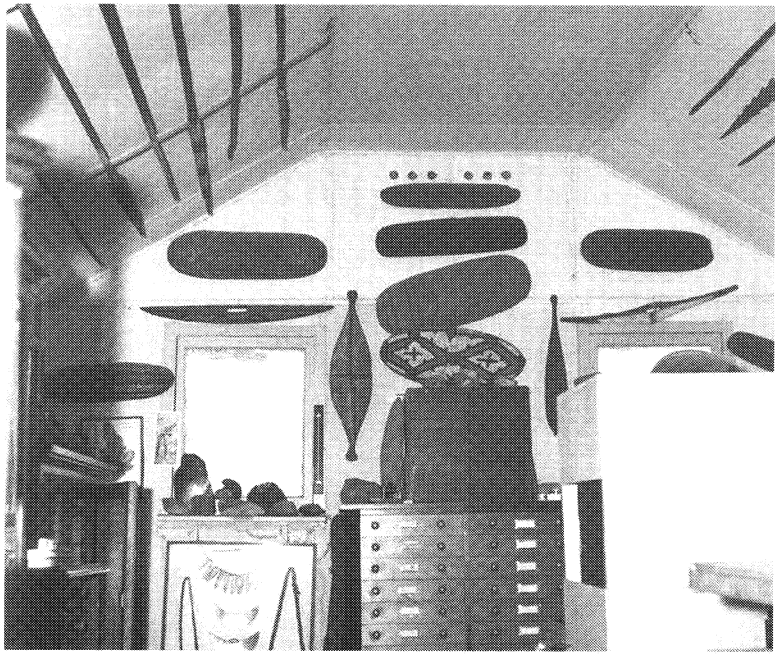
Mitchell family; National Museum of Australia



Dean McNicoll

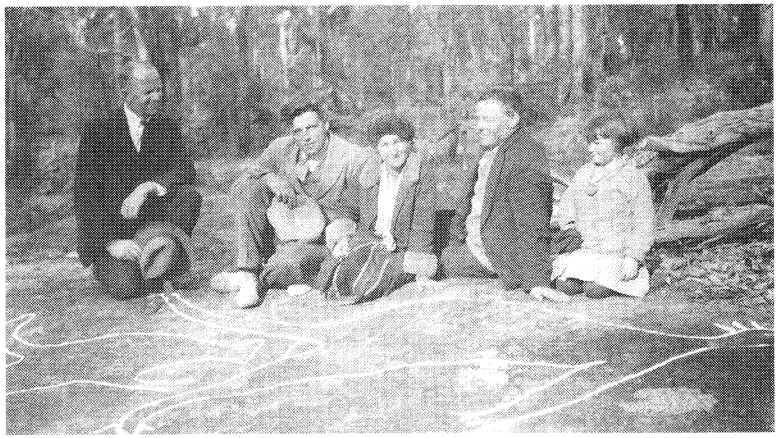
A cabinet that housed some of the large collection of stone tools amassed by Mitchell.

National Museum of Australia



Mitchell's collecting room at his home in Frankston, near Melbourne.

Mitchell family; National Museum of Australia

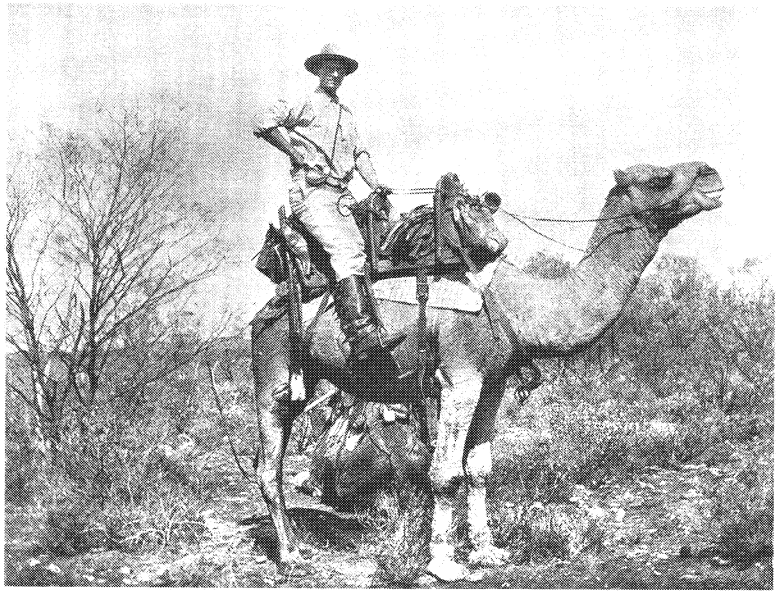


Among many keen collectors were C. C. Towle and G. E. Bunyan. Here, they are surveying an Aboriginal rock carving near Hawkesbury Lookout, New South Wales, 19 July 1931.

Hornshaw Collection, Australian Institute of Aboriginal and Torres Strait Islander Studies; Allen Madden, Metropolitan Local Aboriginal Land Council

New South Wales collector and photographer Bernard Hornshaw created a large collection of photographs of Aboriginal rock carvings in New South Wales. He is shown at Ku-ring-gai Chase '2 m E of Cowan Creek' on 19 August 1934.

Hornshaw Collection, Australian Institute of Aboriginal and Torres Strait Islander Studies; Allen Madden, Metropolitan Local Aboriginal Land Council

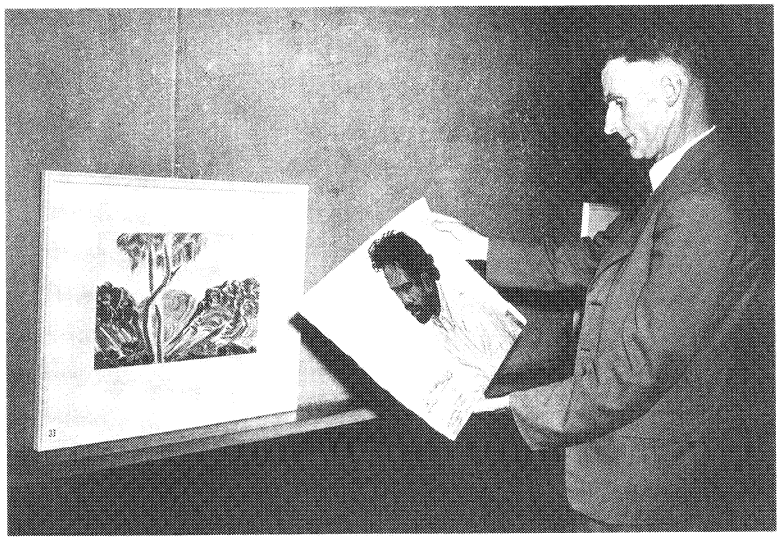


Above: Herbert Basedow on a riding camel named Buxton, photographed near present-day Granite Downs station in north-western South Australia on 21 April 1903. Alfred Treloar took this photograph using Basedow's camera.

National Museum of Australia

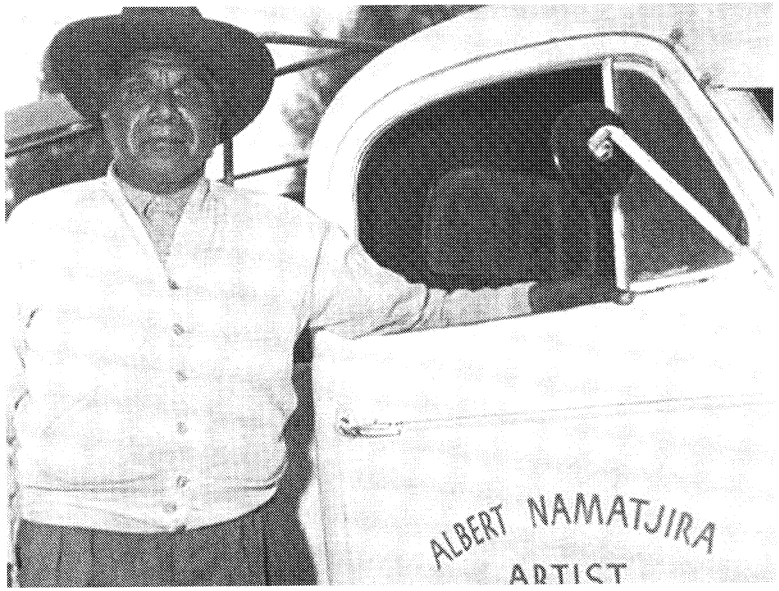
Left: Herbert Basedow, about 1925.

National Museum of Australia



Melbourne schoolteacher and artist Rex Battarbee was influential in encouraging the Aboriginal artists of the Hermannsburg school of Central Australia to develop their techniques by using introduced materials. His name became linked to that of Albert Namatjira, the well-known Arrernte artist.

National Library of Australia



Albert Namatjira with his truck at Haast's Bluff Aboriginal Reserve, Northern Territory, in 1954.

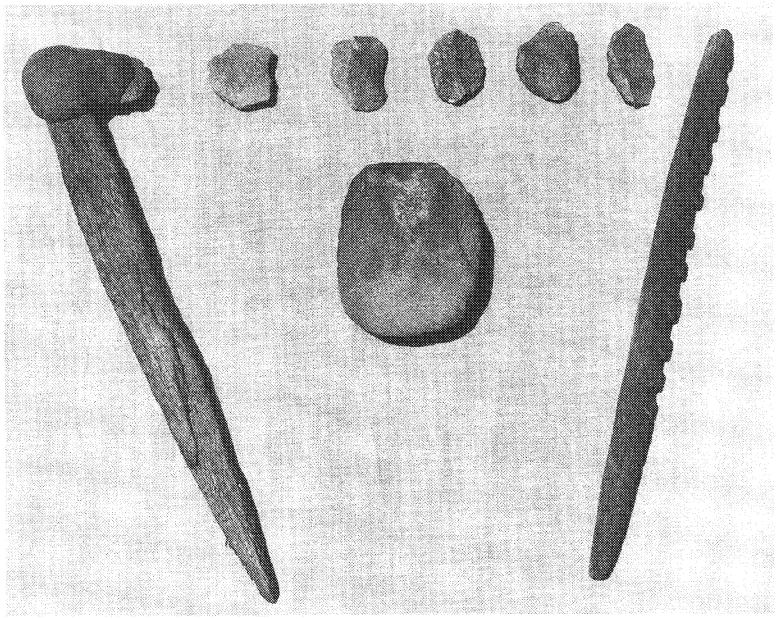
Ms Lenie Namatjira; Ngurratjuta Arts Centre; Mr Gus Williams, Ntaria Council, Hermannsburg; National Archives of Australia

Charles Mountford making a sound recording with 'Hindu' Mirniyowan at Groote Eylandt in the Northern Territory during the American–Australian Scientific Expedition to Arnhem Land in 1948.

Mountford–Sheard Collection, State Library of South Australia; the family of Hindu Mirniyowan; Tony Wurramarba of the Angurugu Community Government Council, Groote Eylandt

Frederick McCarthy and Frank Setzler carrying out archaeological work during the American–Australian expedition. They are shifting dirt in front of a picture gallery at Oenpelli, Northern Territory, in October 1948.

Frank M. Setzler Collection, National Library of Australia; Paul E. Setzler

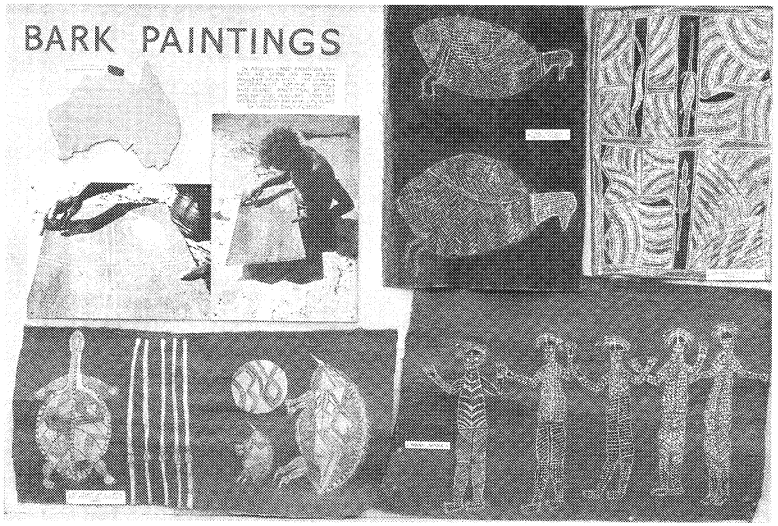


A hafted scraper, a ground-edge hatchet head, a wooden spearhead and scrapers found during excavations by McCarthy and Setzler at site no. 2, Oenpelli Hill, Northern Territory, October 1948.

Frank M. Setzler Collection, National Library of Australia; Paul E. Setzler.

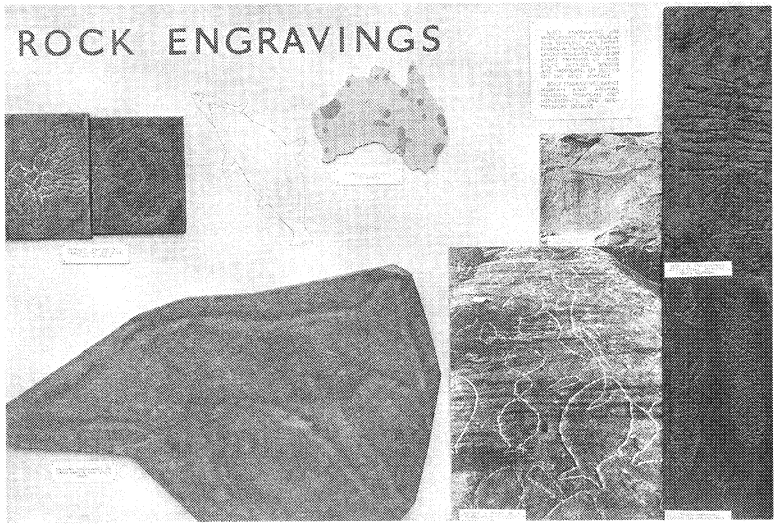
Artist Karel Kupka visited Arnhem Land and collected bark paintings in the 1950s.

National Archives of Australia



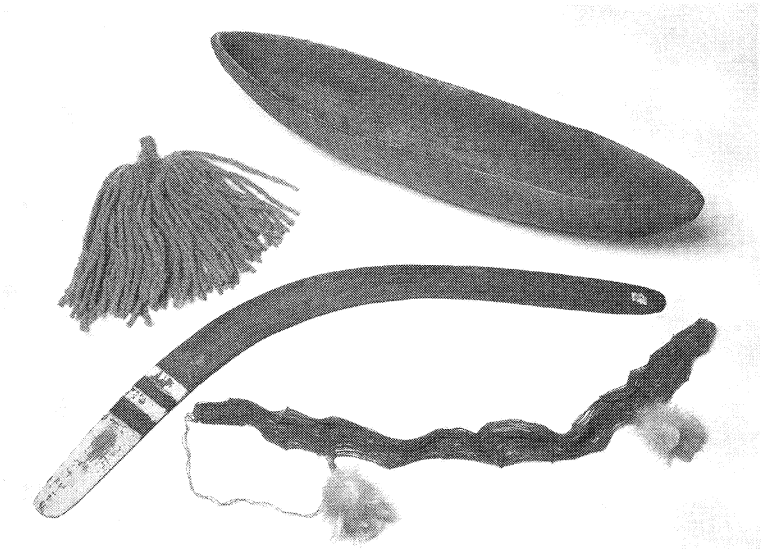
Display panels for a UNESCO exhibition on Aboriginal culture at the Australian Museum, Sydney, 1953.

National Archives of Australia



Display panel for the UNESCO exhibition, the Australian Museum, Sydney, 1953.

National Archives of Australia



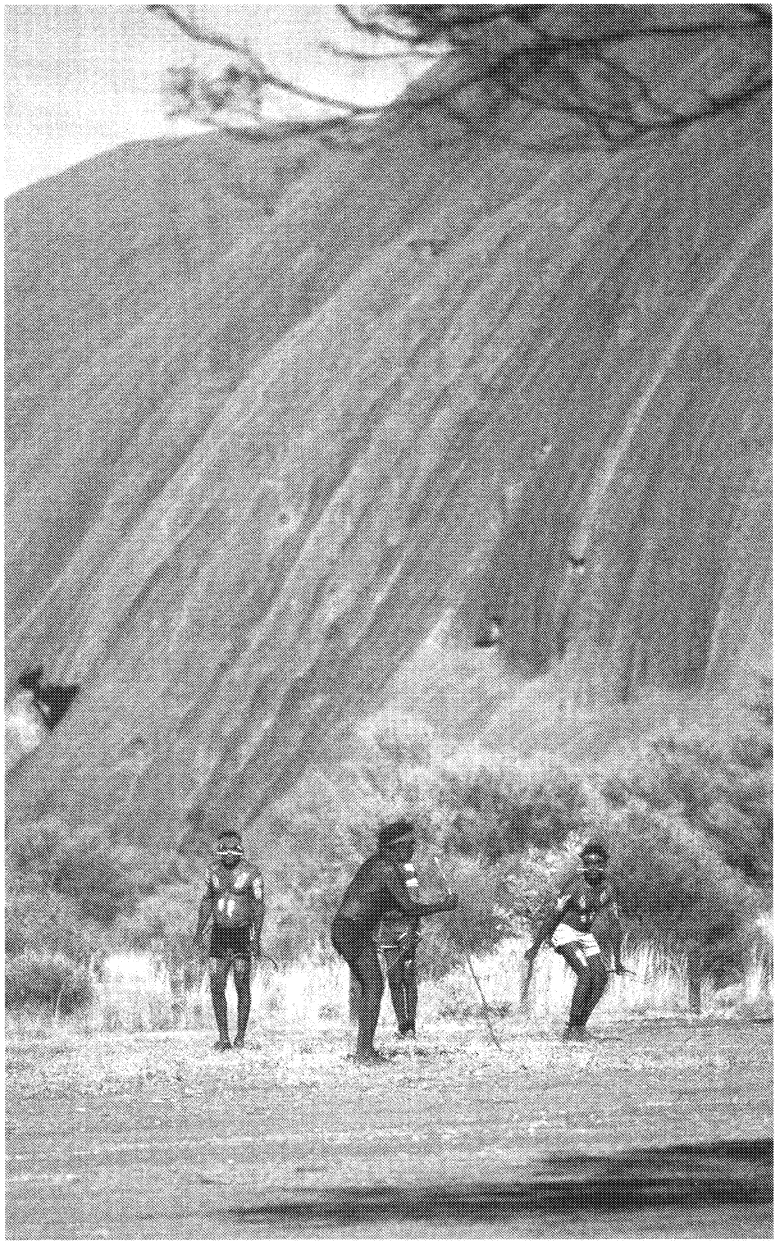
Dean McNicoll

Artefacts collected by Dr Groger-Wurm from Mornington Island, Queensland, in 1960 (clockwise from top right, a wooden container, pubic cover, boomerang and waistband).

National Museum of Australia

Helen Groger-Wurm, anthropologist, curator and collector, in 1976. Dr Groger-Wurm worked for the Australian Institute of Anatomy.

Canberra Times



Aboriginal men performing a corroboree at Uluru in 1984. The Commonwealth Government's interest in Uluru (Ayers Rock) grew during the 1950s.

National Archives of Australia

A similar representation was made from D. MacCallum, Honorary Secretary of the Point Piper Branch of the United Australia Party. This organisation put to the Prime Minister a resolution 'unanimously requesting that the matter of preserving aboriginal curios and relics be brought to your notice'. Concerned about 'two foreign expeditions ... at present operating in South Australia', MacCallum wrote that 'it is desired that you treat the matter as urgent, and bring it to the immediate notice of the Federal Government'. He urged that 'legislation be enacted by the State and Federal Governments of Australia' to:

> Prohibit except under strict government supervision the export of all aboriginal curios from Australia,
> Protect and preserve all aboriginal relics *in situ*, including rock engravings and paintings, ceremonial sites, burial grounds, and all deposits of archaeological value,
> Ensure Government control of all excavations of pre-historic deposits,
> Apply adequate penalties for infringement of the above regulations.[41]

These calls for preservation of Aboriginal heritage prompted some, such as Interior Minister John McEwen, to acknowledge limitations in the Commonwealth's powers. In 1939 he wrote to his colleague, the Minister for External Territories, pointing out some of these limitations:

> The question of the prohibition of the export of aboriginal curios from Australia is one for consideration by our colleague, the Minister for Trade and Customs. ... In so far as the protection and preservation of aboriginal relics and curios are concerned, the Commonwealth has jurisdiction only in the territories of the Commonwealth. There is not at present any law on this subject, in force in either the Australian Capital Territory or the Northern Territory. Some steps have, however, been taken to protect and preserve relics of pre-historic value.[42]

International developments were among the factors that influenced some official bodies in their calls for national legislation. L. H. Giles, a representative of the Northern Territory administration, drew attention to the work of the League of Nations in a letter to the Secretary of the Department of the Interior in May 1939:

> Protectors of Aboriginals have also been instructed to furnish information concerning the location of any objects of antiquity as defined in the League of Nations circular No. 38/29480 of 9th November, 1938. No information in this regard has, however, yet been received.
>
> Notwithstanding the fact that, at present, there is little information available as to the existence of relics of pre-historic value, it is thought that legislation should be provided to prevent the export from Australia of any such items which might be discovered in the future and also to prevent the removal of rock markings, etc., from their original sites. In the absence of any such law, Police Officers and Protectors could do little to prevent the removal or defacing of such relics.
>
> It is obviously desirable that any such legislation should cover the whole of the Commonwealth and it would thus be necessary to approach each of the States with a view to having similar legislation promulgated in each.[43]

In advocating legislation, it was becoming increasingly apparent that what was needed were better definitions and descriptions of what comprised 'relics' or 'national monuments'. Key considerations included whether 'objects of antiquity' or 'objects of prehistoric value' should be protected, and the range and types of material that such legislation should preserve. This problem of definition did not yet extend to questions about 'ownership' of Aboriginal heritage since, in their concern for preservation, Europeans did not consider heritage as belonging to the Aborigines as a specific group. They

held that this heritage was in need of saving as national or even global heritage. Couched in terms such as 'monuments', 'curios' or 'curiosities', 'antiquities' and 'relics', Aboriginal cultural heritage was still regarded primarily as something of value to science and nation.

One person who was to become increasingly vocal in the discussions and debates about preservation and legislative protection of Aboriginal cultural heritage was Frederick David McCarthy, a prominent figure in Australian Aboriginal archaeology and art, whose career and writings spanned several decades. McCarthy began work at the Australian Museum in Sydney in 1932, and spent several decades there as curator of anthropology before taking up appointment as the first Principal of the Australian Institute of Aboriginal Studies when that body was formally established by statute in 1964.[44] In one of his early published writings, McCarthy argued for legislative protection of Aboriginal heritage in terms of its value for the 'science of anthropology':

> The vital need for legislation for the preservation of prehistoric and aboriginal relics in New South Wales, and Australia generally, has long been recognized by those interested in the subject. Up to the present the public has shown that it cannot be trusted to regard such relics with due respect and no more important step forward for the science of anthropology could be made than the enactment of such legislation throughout Australia.[45]

McCarthy's partner and colleague at the Australian Museum, Elsie Bramell, also argued in 1939 for the preservation of Aboriginal heritage as what she termed 'national property':

> A matter of grave concern to all interested in the aboriginal Australians and their achievements as craftsmen and artists of the Stone Age, is the continued destruction of relics of their culture throughout the continent. These relics include rock paintings and engravings, caves occupied and deposits left by the aborigines, and other objects *in situ*, such as burial grounds, carved trees, stone arrangements, kitchen middens, quarries, and totem centres; secondly, portable artefacts or objects, skeletons and skulls – all of their very nature national property, and the preservation of which, therefore, is the responsibility of each and every one of us.[46]

Bramell's writing here illustrates the emphasis on compiling lists and inventories, and is typical of a discourse that posited a lost culture that could be known only by its material traces.

Another advocate for protective legislation was Professor Joseph Shellshear, honorary archaeologist at the Australian Museum. In 1937, drawing attention to the destruction of archaeological sites and artifacts resulting from vandalism and unscrupulous collectors, Shellshear wrote:

> Whilst it is obvious that steps will have to be taken to preserve what is left of the aboriginal remains, as has been done by the legislature in other countries, it is of interest to analyse the causes of this wholesale destruction. This is done not to offend those whose collecting efforts are laudable, but in the hope that some thought will be given to preservation not only in New South Wales, but also in other States.[47]

Authenticity again: McCarthy, Goddard and Kalboori Youngi

In the context of growing interest in preservation, Europeans continued to express their anxieties about 'authentic' or 'traditional' Aboriginal art, heritage and culture. These anxieties are illustrated by a debate that arose in relation to a paper presented to the 1939 meeting of the Australian and New Zealand Association for the Advancement of Science (ANZAAS), held in Canberra.[48] This paper by R. H. Goddard described a 'gifted Australian Aboriginal sculptress' called Kalboori Youngi of the Pitta Pitta people in the Diamantina region of central western Queensland. Goddard praised the skills of Youngi, whose carved clay figures he thought were the

creations of an 'artist of outstanding merit'. In the paternalistic tone common for this period, Goddard considered the Aborigines to 'possess talents, capabilities, aspirations, and artistic instincts that are merely dormant and only need the vitalizing guidance of a kindly hand to burgeon into life'. Goddard did, however, ascribe an Indigenous cultural origin to Youngi's work, arguing that the artist's talent was rooted in her culture, and was not the result of contact with missions. He characterised the Pitta Pitta people as 'virtually a tribe of hereditary artists', stating that:

> numerous rock-drawings, paintings and carvings can be seen from one end of the Diamantina to the other, the most extensive being in caves and rocks on Brighton Downs Station, and they were executed long before the white man took up his pastoral holdings.[49]

Goddard claimed that although Youngi's 'tribe is now "civilized" to the extent that it has been forced to accept the inevitable contact with station-life, it has not been degraded by the influence of what we misname civilization; a fact that seems beyond comprehension', and that Youngi 'has not known the influence of the Mission station'. She worked, he wrote, 'with dexterous hand and keen artistic eye', and 'shows all the characteristics of the artistic temperament'.[50] He offered some suggestions for enabling the Aborigines to 'progress' using their artistic talents:

> There must be many Kalboori Youngis among our aborigines. Why not give them the opportunity of developing their artistic tendencies along lines that may become a source of profit such as the manufacture of pottery and other industries that other races in a primitive state of progress have evolved? Thus the race could acquire a sense of self-sufficiency and independence that might prove its salvation from the doom of extinction to which our culpable indifference has condemned it.[51]

Later writers, such as A. P. Elkin and Leonhard Adam, also articulated this sentiment. Both of these writers advocated at different times, and in different contexts, the virtues of encouraging Aboriginal communities to develop 'art and craft' industries oriented towards the market.

While Goddard extolled the virtues of Youngi's art as an Indigenous expression of her community, Fred McCarthy had a different view. He argued that Kalboori Youngi's skill could not have been developed without the influence of Europeans. He wrote to the Honorary Secretary of ANZAAS to 'register a strong protest against the inclusion of papers such as that on pages 160–163, with plate, entitled Aboriginal Sculpture, by R. H. Goddard'. McCarthy explained his view on European influence:

> The author's claim that the work of this aboriginal woman, Kalboori Youngi, is uninfluenced by European ideas should have been carefully checked before publication, and in fact, her life-history fully investigated. The Pitta Pitta tribe, of which she is a member, had been brought under white influence when Dr. W. E. Roth made his investigations on its ethnography between 1890 and 1897, and the process has continued more intensely till the present time.
>
> A study of aboriginal Australian art reveals that plastic work was unknown prior to the penetration of the continent by the white man. To-day, there are Aranda artists in Central Australia painting upon canvas, and others who have produced plastic work under the tuition of the missionaries. Thus, an important cultural principle is involved, i.e., whether the technique of plastic work is Indigenous to Australia, or whether, like practically all other advanced techniques in their material culture, it would have had to diffuse from New Guinea or Malaya.[52]

McCarthy's diffusionist view is prominent here, as he argued that Aboriginal cultural traits had seeped into Australia from neigh-

bouring regions to the north. Calling for more information on Kalboori Youngi's 'life history', McCarthy concluded:

> As one who has made a special study of aboriginal art, I feel that I can speak with some authority. I can not therefore, accept Mr. Goddard's claims without detailed information about Kalboori Youngi's life-history. Further, I am of the opinion that the Committee of Section F erred in selecting this paper for inclusion in the report, because it will give rise to misconceptions about their work.[53]

The reply from Margaret Walkom contained more than a hint that McCarthy was verging on arrogance in his views on Aboriginal art:

> The Committee of Section F must surely have been aware of the contents of the paper and also of any comment or criticism that may have been made when the paper was read. If the Committee considered there was any justification for the publication of Mr. Goddard's views they were quite within their rights in recommending the paper for publication. You surely would not wish to take up the position that no views on aboriginal art should be published that do not coincide with your own, and yet your letter is open to that interpretation. I am forwarding a copy of your letter and my reply to the honorary secretary of the Section at the Canberra meeting for any comment he may wish to make.[54]

Professor A. P. Elkin, Secretary of 'Section F' on anthropology, responded to Walkom, supporting the inclusion of Goddard's paper in the ANZAAS meeting, stating that:

> I have to say that I think that the Committee did not err in recommending its inclusion. I, like Mr. McCarthy, felt that I should like much more information about the Aboriginal woman concerned and I enquired as thoroughly as I could from Mr. Goddard who has been in the area and who has connections there and he has always stuck to his information that the woman was untaught and had not seen sculptured works. Now that the paper is published, if people criticize it Mr. Goddard must stand up to it and endeavour to satisfy them.[55]

Elkin imparted a moderate tone to the debate, agreeing that Kalboori Youngi's work warranted having its description in Goddard's paper, but also accepting the need for more information on Youngi's background. He explained to Walkom:

> But apart from the two or three lines in which he makes that statement, Mr. Goddard's paper was, in our opinion, worth publishing for another reason, namely, that whether the woman had ever had any help or not, it showed that an Aborigine was capable of doing quite good plastic work and that itself is a very important point. Of course, Aborigines have done some carving in the round – in fact I have a very fine head in small dimensions carved in the round in wood on my mantelpiece which was carved in the 'nineties by a Queensland black. If we could get some details about the woman's life history all the better, but in the meantime her work was worth the note which Mr. Goddard's very short paper gave.[56]

Kalboori Youngi's work also came to the attention of other writers, such as Roman Black, a visiting Polish writer who described the artist's work in his 1964 book:

> The young aboriginal sculptress carved her earlier work with a flake of quartzite until someone gave her a superior tool, a pocket-knife. R. H. Goddard described and illustrated some of her limestone carvings, which he acquired from the artist in 1938 when she came to the cattle station for food. These are now in the Australian Institute of Anatomy, Canberra ...[57]

Like many of the collections of the former Australian Institute of Anatomy, these carvings are now held by the National Museum of Australia.

Black praised Kalboori's originality:

> When artists in Sydney saw these aboriginal carvings in the round, they hailed them as 'the work of creative genius' and compared Kalboori Youngi's work with primitive Chinese sculpture. Dr Leonhard Adam described it as having a 'naïve, almost Gothic simplicity'. The original work of a person who has not seen other sculpture before rightly deserves such praise.[58]

Europeans would continue to worry and debate about the possibility, nature and extent of 'outside' influences on Aboriginal cultural productions.

'What do we know about them?': gathering information

The correspondence over Kalboori Youngi highlighted the growing interest in gathering information about the details of Aboriginal life and in documenting and recording these details in as many different forms as possible. Fred McCarthy was prominent in advocating wide-ranging field studies of Aboriginal societies, including material culture, as he proclaimed to Mountford in 1941:

> ... Your remarks about the use of rough unworked stones by the aborigines are interesting and of course of the greatest importance. Every scrap of direct evidence should be published, and it is essential that more field-work be done in Australia to see what and how the remaining aborigines make of stone. We have tens of thousands of implements in collections, all beautifully selected, but what do we know about them?[59]

This urge to document and record Aboriginal life had a competitive dimension as writers, collectors and observers sought to be 'the first' to find or observe some aspect of Aboriginal culture and heritage, and to proclaim their authority over their work. Mountford was one who was particularly adept at promoting his own work, as he boasted to Towle of his film record of stone tool making:

> ... I am, or will be, sending you a paper, on what I think is a find of some importance, re, the making of a wooden spearthrower, almost entirely with unflaked tools. We, of course, thought there was a time when man did not flake stone, but never expected to see living people doing it. However, now it is, and supported by about 250 feet of cine film, perhaps twenty stills, the stone, themselves, and the implement. I think this will quieten all doubters, for they always exist.[60]

In Mountford's view, these records were 'evidence' or 'proof' of the existence of some aspect of the Aboriginal cultures. The production of records and documents was also a means by which Europeans could establish their authority on certain aspects of Aboriginal culture.

Material culture and social anthropology

The ongoing description and recording of Aboriginal culture and heritage was conducted within a milieu of rivalry and competition between individuals, and also between disciplines. This competitiveness is illustrated by remarks made by material culture specialists about those whom they considered their 'rivals', the social anthropologists. For example, while ruminating to his colleague Lindsay Black in 1941 on the meaning of 'ceremonial grounds', Towle moaned:

> With reference to ceremonial grounds. It seems to me that in Australia we have primarily two kinds of ceremonial practices: 1) connected with totemic beliefs and 2) connected with initiations. Fortunately we know something of both ceremonies; unfortunately, we do not know enough of either of them.
>
> ... The whole trouble about the matter is that men like Howitt who were so interested in the aborigines, did not take the trouble to describe in detail all that happened during the ceremonies. They

have left out much concerning the paraphernalia of the ceremonies which would have been of the utmost value to us now.

On the other hand, the social anthropologist is too highly superior to bother his superior intelligence about details. Not one of the descriptions made by a social anthropologist gives any real information about the material arrangements connected with increase rites. In every way, the social anthropologist has failed to record material culture. This failure will become more apparent later on. At the present time so much is being learned of the social and spiritual life of the aborigines that the deficiency on the side of material culture has almost passed unnoticed. Again and again, I go to their writings for guidance on material culture and am left wanting. In other words, they do not take a wide enough interest in anthropology. They fail to understand that social anthropology is one aspect only of the life and doings of the aborigines. Of course, they would indignantly deny my statements; they assert that they are the 'king pins' of anthropology. Work like mine is hardly worth notice.[61]

Towle's comments suggest an almost desperate sense of conviction that some amateur collectors and observers had in their own work, and their desire to be given consideration equal to that of the professionals. This letter was written at a time when professional anthropology was in the ascendancy, with its emphasis on studies of social relations and its role in providing advice for administration and policy. This may have heightened the anxieties felt by the 'amateurs', and prompted their criticisms of the anthropologists.

Other European responses: Margaret Preston and Fred McCarthy

While ethnologists and anthropologists were competing over their theories and collections, others were responding in quite different ways to the art and culture that they observed in Aboriginal societies. Many writers continued to be inspired by visits to remote

regions of Central Australia and the Northern Territory. The artist Margaret Preston, who had been writing since the 1920s urging recognition of Aboriginal art, was captivated by the art that she saw on a visit to Arnhem Land, and wrote in 1940:

> It has been for a long time the accepted idea of the world in general that the Australian aboriginal is in the lowest grade of humanity. This unfortunate impression should be completely altered after a study of his pictorial and decorative art.[62]

Preston responded eagerly to the Arnhem Land art, seeing it as a basis for a national Australian art:

> Outside the cave are walls of high rock, some decorated by long, attenuated figures of spirit men; others by drawings of kangaroos, and yet another with a curious drawing of a gnome. The surrounding district contains many other paintings, but it is difficult country to travel over, and demands the constant service of the aborigines as guides. As it is not possible for the average artist to travel to these places, he must depend on the museums. Work studied there should be used with the technical knowledge of the trained artist. If this is done, there is a chance for Australia to have a national art – an art taken from its primitive peoples, the Australian aborigines; an art for Australia from Australians.[63]

Preston's work attracted the interest of Sydney museum curator Fred McCarthy, who detailed his views in a letter to the artist in 1942:

> I have been to see the display of your wood and masonite cuts several times, and I offer you the following comments for what they are worth and to acquaint you with my impressions of the work.
>
> Firstly, let me congratulate you on the 'Fish,' 'Sturt's Desert Pea,' 'Aboriginal Hunt,' and 'Bark Basket' prints – they strike the right note in colour, and in them you have achieved a remarkably effective combination of the methods and idiom of the aborigines. The colouring appeals to me because of its clear cut masses, bands,

etc., an arrangement which is the keynote of the work of aboriginal artists. For this reason I do not consider 'Aboriginal Design' to be as successful as the others; the composition is excellent, but the colour scheme is too light and therefore loses the spirit of aboriginal work. I have, however, discussed it with various friends and most of them liked it very much indeed.

My only other criticism is that the decorative designs on the vases might be made more definite – the aborigine rarely makes a few meaningless strokes in his decorative work but always applies a definite pattern or design as the symbol of his secret and religious life and to imbue the object with the magical power of his ancestors. It is on these vases, clubs and weapons, table-covers, etc., in your work that the geometrical designs should be shown, and thus combined with the flowers from the same area. Thus Sturt's Desert Pea should go with concentric circle and allied motives [sic], the zigzag with the Western Australian wildflowers, and the bright patterns of north-east Queensland with jungle flowers. In this connection, I might mention an idea that occurred to me is the combination of Christmas Bells and Christmas Bush flowers, concentric diamonds, etc. in a field of herring-bones and parallel lines on the vase, and some outline rock engravings – men hunting kangaroos or emus – on the table cover; such a combination would represent the flowers and aboriginal art of the Sydney area, that is, the Hawkesbury sandstone district.[64]

McCarthy envisaged that western art based on Aboriginal forms should seek to resemble the Aboriginal styles and forms as closely as possible, not merely evoke a kind of Aboriginality in a western artistic response.

'I have saved the art from oblivion': Mountford and the meaning of Aboriginal art

One of several prolific writers on Aboriginal art was Charles Mountford, the Adelaide writer and photographer who would later lead the

American–Australian Expedition to Arnhem Land. Like many, Mountford was particularly interested in seeking the 'meaning' of the rock paintings and other art works that he saw and collected. He had worked on seeking the meaning to art in Central Australia in the 1940s, and had a strong sense of his proprietary interests in Aboriginal art. His claims to authority are clear in the following correspondence with Towle in early November 1942:

> I am still concentrating on the art of the people – in spite of papers on stone implements, and found striking differences between sacred, secular and magical art. Altogether, I have probably collected now about 1700 sheets of crayon drawings of aborigines, from Western Australia to Alice Springs in a strip east and west. Goodness only knows when they will be published, but at any rate I have saved the art from oblivion. I wish, that, by some strange chance, I could find out as much about the art of Arnhem Land, but then I am becoming greedy.[65]

This comment foreshadows Mountford's visit to Arnhem Land as leader of the 1948 expedition, and illustrates his sense of self-importance. Mountford nonetheless drew the admiration of Towle who replied to him later in November 1942:

> You are most fortunate in having the opportunity of finding out the meaning of the art of some of the Central tribes. There is no doubt that investigators in South Australia are doing the best all-round work. There is far too much sameness about the work done by the purely social anthropologists. Much of the interest has gone out of that sort of work. We want to know much more about the aborigines in many other ways and you in South Australia are doing this wider kind of work. In this state, we cannot, of course, find out anything about the meaning of the art, but I have been surprised at the wide area over which rock paintings occur. I am sure I am correct in stating that they occur over practically half the area of the state.[66]

While Mountford was promoting his own work on 'saving the art from oblivion', others continued to keenly collect stone tools and discuss the meaning of these objects, often from entrenched positions within their own discipline or experience.

'Our ways of approach are quite different': Stone tool collectors and the problem of stratigraphy

The competition and rivalry, and authority claims that filled the letters, notebooks and diaries of Europeans who wrote on Aboriginal culture and heritage, seemed most evident among those who worked on material culture. The discipline of archaeology gave increasing prominence to depth and stratigraphy in determining antiquity, and this in turn provided a stimulus for further debates between collectors. Correspondence between these collectors suggests that these issues – antiquity, chronology and the role of archaeology – became the bases upon which they could continue to assert their claims of authority and expertise over one another.

One of the debates was between those who argued for the importance of stratigraphy and chronology in determining stone tool antiquity – that is, those supporting the role of *archaeology* – and those who denied this historical approach and continued to advocate surface collecting. Among the protagonists in this debate were Leonhard Adam, Fred McCarthy and Stan Mitchell. Adam, who was ethnologist at Melbourne University and had worked on some of the stone implements kept at the National Museum of Victoria, criticised Mitchell's denial of stratigraphy in a long letter to McCarthy in 1945:

> As you remember, I have been engaged for some time in studying the uniface and semi-uniface pebbles, especially of Victoria, in this museum. Although specimens are not yet easily available, it is a little better now that at least some of the walls of books which had been built round the stone cases have been removed. I think conditions will improve for the following reason: Mr S. R. Mitchell, who is honorary Mineralogist and Metallurgist for the museum, told me that he was going to write a book of his own on stone implements. Needless to say, his work will in no way make my own efforts pointless because our ways of approach are quite different, and Mitchell, with his profound knowledge of the materials of which stone implements are made seems to be convinced that stratigraphic and this historical research is hopeless – a view with which both of us, ie you and I do not agree.[67]

Adam also had some comments to make on the finding of some previously uncatalogued collections of stone implements, and on the role of 'amateur' collectors, as he detailed to McCarthy:

> ... Mitchell the other day 'discovered' a number of boxes and cases containing stone implements from Victorian sites which had not even been catalogued, although they have been in the museum vaults for years. Very interesting is the fact that, among those implements, all brought together by amateur collectors, and at least partly labelled (I fancy, only partly), there are types from localities which offer nothing of those kinds nowadays.[68]

Adam complained that the activities of these 'amateurs' had negative consequences for 'serious research':

> For example, all the ground axes of Altona have been taken away by 'collectors' of that ridiculous type, so that you would not be able to find a single specimen to-day. But here, in these 'excavated' trays, you can see some of them – the others are in the possession of a retired schoolmaster in Altona. Then I saw pieces from Keilor which turns out to have been hunting ground for 'collectors' for a long time before it became famous through the skull. ... I think I can now assert that all the known localities in southern Victoria have been spoilt for serious research by the amateurs.[69]

This correspondence gives some indication of the play of rivalries as professional ethnologists Adam and McCarthy criticised the

amateurs over technique and method in collecting, classifying and cataloguing.

Charles Barrett's traveller's tale

While debates and rivalries continued between amateur and professional, the steady stream of writings by those 'amateurs' nonetheless produced a more popular, accessible kind of discourse, and played an important role in reaching a wider audience.

Like Croll, Melbourne naturalist and popular writer Charles Barrett used the metaphor of 'hunting' in his description about the search for artifacts. This metaphor invites parallels with other pursuits such as the safari, or the drive to capture and kill. Barrett's eager prose captures this metaphor well in this 1941 account of a journey he made through northern Australia:

> We should have good hunting on the Wessels. Meanwhile, at Yirrkala there was plenty of work for a naturalist and dabbler in ethnology. Mobs of it. We took scores of photographs every day; added to our various collections; returning, all hot and bothered, to the mission house – to be cooled down by iced lemonade.[70]

This passage also invokes again the connection between the discourses of natural history and ethnology, echoing the writings of earlier people such as Dahl and Wilkins. Elsewhere in his book, again reminiscent of the earlier work of Croll, Barrett's prose conjures up a sad discourse on the 'dying race' theme as he wistfully mourns the demise of Aboriginal culture in all its manifestations:

> Before the end of this century, the Wessel Island group of aborigines will be as a tale that is told; but their works, rock paintings in the caves, will survive, to lure unborn scientists to lonely isles of the Arafura Sea; unless vandals deface them, as they have defaced ancient native drawings on rock in the dead heart of Australia.[71]

From collecting to classifying

Another theme that was subject to a continuing interest to writers was the classification of material culture. Many European–Australians had, from the early part of the century, sought patterns and trends in material culture, and to devise systematic classificatory schemes for the ever-growing collections of stone and other artifacts. In 1946 Fred McCarthy, with Elsie Bramell and H. V. V. Noone, published a small volume on material culture called *The Stone Implements of Australia.*[72] In contrast to the vivid, racy prose of popular works such as that of Barrett, this work sets out in an impersonal and detached way the authors' scheme for classification of Australian stone implements. The paper began by declaring its purpose:

> The study of Australian stone implements has advanced steadily during the past twenty years. At present, however, the position has been reached in which there exist [sic] a certain amount of confusion regarding typology and nomenclature and a lack of knowledge among those interested, both here and abroad, of the full range of Australian implement types and their variations. This work is a systematic study intended to clarify these aspects of the subject as far as possible.[73]

This statement has a tone reminiscent of the 'filling the gaps' approach common in many writings on material culture and ethnology. The authors place their study in the context of previous work, stating that a classification based solely on one factor, such as function, is inadequate. Instead, they sought to adopt a broader basis to classification that considered a range of other aspects, including diffusion. McCarthy, Bramell and Noone, invoking the kinds of concern with nomenclature raised by earlier writers such as Roth, outlined some of the problems of naming stone implements:

> A matter of great importance to the development of the study of Australian stone implements is that a system of nomenclature must be established, and furthermore, it must be one by which all workers abide.[74]

In acknowledging the difficulties in nomenclature, they asserted that 'the naming of an implement is not an easy task' and claimed that 'its characteristics must be defined and illustrated in order to demonstrate that the implement is a specialized type'. Elaborating on this, they wrote:

> A name stands for a set of characteristics and is preferable, where possible, to an unwieldy phrase. ... It is advisable to adopt the name given by a tribe to an implement where it is known, otherwise to use the name of a tribe in whose territory a type is first recorded or in which it is particularly abundant, or the aboriginal name of a type locality.

With this in mind, they stated that their aim was 'to establish an Australian terminology', and detailed the reasoning for this view:

> We do not regard Australian implements as a group apart from all others, for in fact similarities and relationships between Australia and neighbouring regions have been shown to exist, but we wish to avoid the confusion that will arise from the use of terms which may have a different connotation in other countries.
>
> ... We are of the opinion, generally speaking, that Australian implements and cultures should be given a local terminology, a policy which tends to promote greater care in their comparison with those of other countries.[75]

The importance placed by these writers on naming stone implements according to their local characteristics was to become particularly relevant in the following decades, with growing recognition of the role of Aboriginal people in defining and controlling their cultural heritage.

5

'Made to Order': Arnhem Land 1948

During the following decades, the Northern Territory region of Arnhem Land gained the increasing attention of Europeans. This region was considered by many observers and writers to be the place where Aboriginal people were still living what was thought to be a 'traditional' lifestyle. Arnhem Land had long been a focus for natural history, ethnographic and scientific expeditions. As a Commonwealth territory it was also subject to increasing scrutiny by administrators as they further developed the Commonwealth government's machinery of control.

In 1948 an expedition was formed to 'investigate the ethnology, art and legends of the aborigines of Arnhem Land and adjacent areas of the Northern Territory of Australia'.[1] The expedition members comprised a multi-disciplinary team of ethnologists, archaeologists, natural scientists and nutritionists, as well as photographers and support personnel. This joint American–Australian expedition led by Charles Mountford was to become a major event both in terms of the contributions it made to knowledge of this region and as a result of the writings produced by it. It resulted in a voluminous literature comprising official records of the expedition and various journal articles as well as a considerable amount of private correspondence, journals and other private documents. The expedition

also resulted in large collections of ethnographic objects and natural science materials, and in extensive collections of photographs, audio and film records. The ethnographic collections – in particular, bark paintings – were the subject of some controversy regarding their eventual locations, and the politics of their division between several different collecting institutions.[2]

One source that provides a good picture of the day-to-day activities of the expedition is the diary of American archaeologist Frank M. Setzler, the expedition's deputy leader.[3] Setzler's reflections and comments in his diary provide an important contribution to our knowledge of the history of anthropology and archaeology in Australia, and to other disciplines such as the history of Aboriginal art and ethnographic collecting. Although Setzler was the expedition's archaeologist, he also comments on other areas of the work, such as the recording of sacred sites. In describing some of the approaches of the expedition in obtaining information about such sites, Setzler's remarks raise important issues about the nature of ethnographic fieldwork, relations with Indigenous informants, and considerations about ethics and authenticity in fieldwork.

Setzler departed for Australia in late January 1948. Before travelling to Arnhem Land to commence the work of the expedition, he visited Adelaide, Sydney, Canberra and Melbourne for meetings and publicity activities. Arriving in Canberra on 25 February he met Arthur Calwell, Minister of Immigration and Information, whom he described as:

> a most delightful politician with a sharp tongue, quick wit, and keen mind. He has red hair and talks out of the side of his mouth.[4]

Setzler was favourably impressed by Canberra, describing it as:

> a beautifully planned town consisting now of wide open spaces and millions of trees and flowering shrubs from all over the world. There are so many trees you cannot see the low buildings.[5]

Eventually arriving at Arnhem Land in April, he wrote of the contrast between his preconceived image of 'wild' Aborigines and the people he saw there:

> It is quite obvious that the so-called wild Australian aborigines of Arnhem Land are non-existent. The people over practically all of Arnhem Land live either at the missions or work at the various cattle stations.[6]

This comment illustrates the dichotomy, found in some Europeans' writings, between their preconceived images of Aborigines and their subsequent observations based on experience and later reflection.

The expedition made its first base at the settlement of Umbakumba, in the northeast corner of Groote Eylandt, from 14 April until 8 July 1948. The next station visited was Yirrkala, where they stayed from 9 July to 9 September. From 2 to 20 August they conducted excavations at Milingimbi Island. Finally, the group stayed at Oenpelli from mid-September until departing Arnhem Land on 2 November.[7]

There were some delays in starting the expedition's work, and Setzler, who was keen to 'find' some archaeological sites, recorded his frustration shortly after arriving at Umbakumba in April, complaining that 'we still haven't found an archaeological site, but right now it is a question of making our food last'.[8] By May, he was still worried about this delay and wrote:

> Here it is almost 6 weeks since we left Darwin, and the entire group has not yet got together. Our equipment is only the scantiest that could be brought in the Catalina [supply vessel], and our food supply is always running low. My own disappointment is the delay in getting on an archaeological site. Thus far I've gotten 20 good bark paintings for the U.S.N.M. [United States National Museum], lots of notes and photos of their material culture.[9]

This extract raises an interesting question about the perceived nature of archaeological sites: in one sense, it could be said such sites are not simply 'found', but instead are 'made' as a result of the archaeologists' excavation.

Eventually in June, accompanied by Fred McCarthy, Setzler managed to carry out some archaeological work. The archaeologists were seeking, among other things, evidence of the presence of Malays or Macassans who traded with and visited Aboriginal communities in the north for many centuries before European contact. Setzler described one such site:

> We looked over the Macassar site ... it seems to consist of blocks of ironstone, or trevertine, on the surface, black midden layer, and one introduced item brought in by the Malays from the town of Makassa in the Celebes, namely the tamarind tree. There is a regular grove of these lovely trees along the beach.[10]

For Setzler, the objective was to find something of significance, and he complained at one stage about the lack of any worthwhile 'finds':

> ... About 4.00 PM we began some long trenches back of our camp in what might be called shell mounds. ... These trenches extended across 3 depressions, but nothing of abo stone work or even Malay pottery was found. Slim pickings![11]

A desire to find something: archaeology in Arnhem Land

A discourse of 'first discovery' permeates Setzler's account, as he moaned on 7 June 1948:

> ... except for exploring the island, our archaeological work was finished. One might dig in these shallow shell heaps for weeks in the hope of finding a ground stone ax or even a metal Malay ax or stone knife or mortar. Certainly the long trenches we had put in yesterday gave no promise of finding things.[12]

A telling moment occurred during a hot October day while excavating at a cave site at Oenpelli. Setzler described the scene:

> Another hot day. By the time we reach the cave we feel as though we've done a day's work. ... In the second screen load appeared a well-made ground and polished stone ax. ... This is the first complete stone ax we have found in a cave deposit. Too bad we didn't get it yesterday when the photographers were present.[13]

Here the lens of the camera is ever present, ready to show proof of experience and to establish validity and authority. Setzler is clearly becoming more confident of the archaeological work, and there is even greater glory yet to come. He continues his description of that October day:

> About an hour later, Mickey called my attention [to] a rough looking piece of wood sticking out of the vertical wall of our trench at a depth of 18 inches. I troweled off the upper layer and when we brought it out into the sunlight I realised that we had recovered a highly-prized specimen. On the one end of the stick was a well-formed lump of wax or cement fashioned at an acute angle to the handle. At the end of this cement was the tip end of a quartzite scraper with the customary high polish. Here then was the actual method of hafting these quartzite scrapers which we had been finding by the hundreds. Too bad McCarthy was not present. However, I'll try to get him to express his views concerning the method of hafting these scrapers and then show him the real thing. ... This was a thrilling day. It was a pay-off for six weeks of dirty, hot cave digging.[14]

Setzler's enthusiasm and clear excitement at these finds shines through his diary. The intimate, personal style captures the 'moment of discovery'. He wishes his colleague Fred McCarthy had been

present – to perhaps share in the excitement – possibly a comment on rare collegial collaboration.

The narrative of the 'discovery' of the hafted axe so intimately described by Setzler in his diary was transformed a few years later into an impersonal, seamless scientific statement with the publication by Setzler and McCarthy of this find in the *Journal of the Washington Academy of Sciences* (1950). The tone in this article is relatively restrained, as the authors wrote:

> On October 26 and 27, 1948, within a few days prior to the closing of the Arnhem Land Expedition camp at Oenpelli, we had the good fortune to recover the hafted adz and blade described and illustrated here.[15]

In the shift in the description of an item of material culture from private into public discourse, the excited rhetoric of first discovery is smoothed, cleansed of hyperbole, and given the certainty and authority required by the discipline (archaeology, in this case). Yet the private discourses on this Oenpelli implement continued to course through other writings, appearing again not long before the Setzler and McCarthy paper was published. In 1950 Fred McCarthy wrote to various colleagues about the hafted axe and Setzler's 'discovery'. He explained to botanist Ray Specht his views on the manuscript for the *Journal of the Washington Academy of Sciences* paper sent to him by Setzler:

> ... I haven't heard from Setzler for some time. He sent me several pages of M. on the hafted adze but they were so bad that I simply discarded them and re-wrote the complete paper, giving him 'senior' authorship (which he inserted into the text) because he found the implement.[16]

Here the sense of harmonious, collegial collaboration implied in the published article is undermined by the discord evident in McCarthy's complaint. In another letter, this time to former

Arnhem Land colleague, photographer Peter Bassett-Smith, McCarthy elaborates on his disquiet over Setzler's claims to having 'discovered' the stone axe at Oenpelli:

> ... I am glad you found the paper on the hafted adze of interest. As a matter of fact, Frank sent me the original manuscript and really you could never, or perhaps you could now, imagine how inadequate and superficial it was – the whole point brought out in it was the tremendous, amazing, astounding value of the discovery by Frank M. Setzler of such a unique implement. I just wiped the whole thing and wrote what was printed – even then Frank altered one or two things, such as inserting senior author in place of one of us which is the usual custom in these papers ...[17]

This indicates something of a process of sanitisation that occurred to transform what was Setzler's ebullience over his 'discovery' of the stone axe, into a muted, scientific account of the find. But in depersonalising the account, McCarthy has also sought to erase Setzler's claims to having been the one to find the implement. This produces a stark discourse of 'ownership' of heritage, and of contested claims to authority and possession of a discipline, as played out through its textual representations. These authority claims of expedition members McCarthy and Setzler also flowed through into other writings, as they all but dismissed earlier archaeological work by Lloyd Warner in their summary of archaeology published in 1960 in the expedition's records.

Warner's Arnhem Land

Although Setzler and McCarthy wrote authoritatively about their ethnological and archaeological work, they were not the 'first in the field' in this region. Their writings contain references to earlier work by Lloyd Warner, whose fieldwork in the 1920s, and 1937 monograph were important reference points for the 1948 expedition. In

Setzler's brief diary note on arriving at Milingimbi on 30 July, he recorded that he had 'examined shell heaps ... [and] identified Warner's 1926 and 1927 trench'. But there is a contradiction between the 1948 expedition's work, and the writings produced from it. Although in practice Warner's work was clearly an important reference point for that expedition, in their published works flowing from the expedition Setzler and McCarthy had all but dismissed the earlier archaeologist's work. However, in Warner's record of his own work, his excavation in Arnhem Land in the 1920s assumes a greater importance than is conveyed by Setzler and McCarthy's references. In his account of his excavation at Milingimbi, in the country of the Murngin, Warner proclaimed his interest in stone axes and wrote that he 'made a fairly large collection of them'.[18] He explained the purpose of his excavation in studying this axe:

> Because the axe is stone and durable it gives one a good opportunity to use archaeological methods to study its approximate age in Murngin culture and possibly Australian civilization ... Two of these Milingimbi mounds were excavated by the writer with the help of aboriginal labor and mission picks and shovels. ... The largest mound was located about one hundred yards or so from the shore and was shaped like the crater of a volcano with a rock water hole in its depths.[19]

His work yielded a find that he thought significant:

> A ground stone axe was found within six inches from the bottom, or eight feet beneath the surface. This seemed to indicate a great antiquity for this implement in this area and therefore at least for its appearance in Australia. The finding of this axe was the most important positive contribution made by the two mounds that were excavated, since it was a positive proof of the long use of this artifact in north Australia.[20]

While Warner had established the authority of discovery, Setzler and McCarthy rendered his work relatively insignificant in a paper published in 1960 in the records of that expedition. Here, describing their archaeological work carried out on the 1948 expedition, these writers claim:

> Except for the minor excavations by Warner during his two seasons of ethnological field work on Milingimbi Island in 1927–28, no other controlled excavations had been undertaken up to this time in the northern portion of Arnhem Land.[21]

The claims to authority and the possession of specialist knowledge or experience in the McCarthy–Setzler writings permeate much of the discourse produced by the 1948 Arnhem Land expedition. These proprietary claims are a significant aspect not only of Europeans' attitudes to Aboriginal cultures, but also as expressed in their writings. Such claims were used to validate their 'expertise' and maintain authority over knowledge and disciplines.

Archaeology and culture sequence

In Setzler and McCarthy's 1960 published summary of archaeology, they emphasise the absence of archaeological materials, stating that 'as might be expected, the archaeological material is relatively sparse and is limited almost entirely to the non-perishable chipped stone and bone implements'. This, they claim, created some difficulties in establishing the 'prehistory' of the people in this area:

> The relative paucity of artifacts in most of the sites excavated increases the difficulty of reconstructing the prehistory of a people whose descendants still subsist on a hunting-gathering-fishing cultural level.[22]

Items used by present day Aboriginal peoples, these writers argued, did not provide a direct insight into past uses:

> A wide variety of perishable specimens, ceremonial as well as utilitarian, are used by the living aborigines, but on the basis of our archaeological specimens alone, it would be impossible to determine the type of spears, spear-throwers, drone-tubes, clap or music-sticks, baskets, bags, wooden receptacles, bark paintings, carved wooden figures, the multitude of ceremonial paraphernalia, types of houses, or clothes used by the ancestors of these living natives. Yet these people – with the exception of those living round the missions – probably differ very little in their material culture, their economic or ceremonial life from their ancestors who lived in this territory a thousand or more years ago.[23]

This extract suggests that the writers maintained a denial of change and innovation in Aboriginal culture. Employing the familiar theme of absence, Setzler and McCarthy commented on the paucity of objects found through their archaeological work. They expressed surprise at the 'distinct contrast between the scanty, non-perishable objects recovered by archaeologists and the multitude and variety of perishable objects used by these primitive men', and concluded that the Aborigines had advanced little in their material culture. Like many of their predecessors and contemporaries, McCarthy and Setzler bemoaned the difficulties of studying a 'people without pottery', stating that 'the authors often wished that the prehistoric Australians had reached the stage of manufacturing pottery'.[24] Here, the apparent paucity of material 'evidence' is constructed not in terms of the vagaries and unevenness of the archaeological record, but as an attribute of lack in the Aboriginal people themselves.

Classification and archaeology

The Arnhem Land Expedition and its writings highlight the continuing debate among Europeans concerning cultural affinities and classification of Aboriginal cultures. McCarthy used the Arnhem Land work as an opportunity to modify his classification of Abori-

ginal prehistoric stone cultures to include local developments that he labelled as 'Oenpellian' and 'Milingimbian'.[25] The Sydney-based ethnologist was known for his tendency to draw wide comparisons between cultures in different parts of Australia, and in other parts of the world. Mulvaney and Kamminga state that in McCarthy's earlier work, he 'was prone to correlate far-flung examples of prehistoric artifacts, just as Tindale had done, but he proved to be more flexible in framing his cultural phases and in his use of terminology'.[26] McCarthy's broad comparative approach had earlier been criticised by Towle, writing to Kenyon in 1941:

> Why does McCarthy write so much? Why does he not think more? I am afraid that much of his work is slapdash. Recently I received a copy of his paper dealing with the comparison of the prehistory of Australia with that of Indo-China, Malay and Netherlands East Indies. In it he makes statements which could only be expected from an armchair writer. From his pen theory follows theory. After all, what is their value unless they are based on solid fact?[27]

Criticising McCarthy's approach to culture sequence, Towle wrote that McCarthy had 'thrown caution to the winds', as he explained to Kenyon:

> He [McCarthy] went to Indo-China and other places nearby, and came home crammed full of theories about inter-relationships .... I suppose that if McCarthy had gone to India, he would have come home with theories about prehistoric India and Australia having been related ... One does not question McCarthy's sincerity and industry, but his paper is an undigested conglomeration of statements. I fail to find in it any real appreciation of the difficulties confronting us with respect to Australian archaeology.[28]

Towle's criticism of the 'theorising' of McCarthy might have been motivated by a wish to promote the work of people like himself and other amateurs who worked outside the academies and research institutions. As he outlined to Kenyon, 'what we want in Australia is

a body of scientific workers independent of Museums and Universities, with sufficient knowledge and influence to deal with all such theories on their merits ...'.[29]

Made to order: collecting art and culture

As well as archaeological work, many of the Arnhem Land expedition's activities were focused on collecting 'art and culture'. Much of Setzler's diary records the daily process of acquiring objects, and he maintains a steady critique of the ways in which these were produced 'on demand'. He wrote on 21 April at Groote Eylandt, shortly after arrival in Arnhem Land, while waiting for an opportunity to carry out some archaeological work:

> The natives are carrying on with the making of bark paintings and the making of spears, baskets, etc. It is unfortunate that these natives have to be told *what* to make, rather than our collecting the paraphernalia *of* their material culture.[30]

The Aborigines were producing cultural items 'on demand', on the basis of descriptions in Warner's ethnography, as Setzler described on 12 July:

> We've got 12 natives working on bark paintings and material cultural objects, having prepared a list from Warner's book.[31]

A few days later, on 15 July, he again referred to the 1920s fieldwork of Warner as he commented:

> McCarthy is feeling better and is checking types of material culture as reported by Warner. He will carry forward the directions for making those specimens. It all seems backwards, but that is our only method for obtaining ethnological specimens.[32]

Setzler also remarks on the use of trade goods for cultural objects, as he noted for 3 August:

> At noon we showed our trade objects to Tom – razor blades, combs, and mirrors. We seem agreed to trade this stuff for ethnological specimens.[33]

This trade moved at a brisk pace:

> ... Native boys brought 3 woomeras, 2 stone spear points hafted, 2 steel shovel spears, 2 stone spear points unhafted, a basket, and polished ax head. Bought all of them for a stick of native tobacco a piece. Big business.[34]

As the trade continues, Setzler provides a critique of this method of procuring cultural objects:

> Continued excavations at the 'Well'. Wrote my notes, marked archaeological specimens. Am constantly disturbed by the natives bringing us ethnological specimens, for which we trade them tobacco. They are not interested in anything else. They will do most anything for you. Have purchased or traded one stick of tobacco for a spear, or a basket, etc. Many specimens coming in are not those made to order – so to speak – but the actual specimens which they use in their everyday life. This turns out by far the best procedure – to purchase or trade the things of their culture we desire, rather than get the objects they actually use. This is a more orthodox way of collecting, I feel.[35]

Here again, we meet this discourse of 'authenticity' examined in the context of collecting cultural items. Setzler's use of the term 'orthodox' to denote the method of acquiring cultural objects is curious. His expressed preference for the 'things of their culture we desire' over 'the objects they actually use' reinforces the artificiality of the collecting practised here, with its focus on prescribing what objects should be made. Setzler's comment appears to be more a rhetorical device intended to justify the rather rigorously imposed demands placed by the Europeans for the production of Aboriginal

artifacts, than it was an observation on the strategy of ethnographic collecting.

As with the performance of ceremonies described by many ethnographers, the production of cultural objects was also conducted, in part, for the Europeans. These objects, once manufactured, entered into Europeans' domains and underwent successive journeys and transformations to become ethnological curiosities displayed in museums and private collections. Many would also eventually be classified as 'art' for mass consumption in galleries and boardrooms. The term 'specimen' used by Setzler belongs more to a discourse of science than of ethnography – a stark pointer to ethnography's earlier incarnation as 'ethnology', and its links with science and natural history. Specimens are samples that people obtain in order to form a collection to demonstrate certain ideas, or to study for various characteristics and properties.

The members of the Arnhem Land expedition saw their collection of cultural objects as having been obtained variously through trade, and by specially commissioning items. However, to the Aboriginal people the proffering of items such as bark paintings to Europeans was at times likely to have been motivated by other concerns, such as social and political ones, as anthropologist Howard Morphy points out. In his study of the art of the Yolngu people of Arnhem Land, Morphy argues that art played a vital role in mediating between Yolngu and Europeans:

> Works of art were commodities, but they were also a means of widening Australians' understanding of Aboriginal culture, in hopes of redressing the imbalance of propaganda or adverse publicity ...[36]

Morphy describes the process by which 'Yolngu ... became aware of the connection between artifact and advocacy', stating that:

> ... it is certain that by the mid-1950s Yolngu had begun to appreciate the value of their art as a means of both asserting cultural identity and attempting to get Europeans to negotiate with them on their own terms.[37]

'The natives are starving for tobacco'

Setzler also had some opinions on the role of the mission in maintaining a supply of tobacco to the Aboriginal people, thus creating demand. He wrote on 6 August:

> Continued excavations ... Natives come from all over the mainland in order to trade here. Mission seems to function on the basis that when they have sufficient food for the natives, they'll hire about 40 out of about 150. ... Their tobacco is also rationed to one stick on Monday and one stick on Friday, for which the natives are starving for tobacco. The Mission would like to eradicate the habit of smoking, but thus far has had no success. As a result, they'll sell their souls for a stick of tobacco, and we have been able to buy hundreds of their daily used objects for the few pounds of tobacco we have with us.[38]

His entry for 7 August continued this theme:

> Traded with natives after breakfast until 9.00 A.M. Traded for more specimens when we came home. Those natives surely love their tobacco. ... Need cash and more tobacco if we want some of the good specimens available here.[39]

Setzler's comments on tobacco echo remarks by earlier writers such as the Norwegian visitor, Dahl, who had recorded his observations in 1925:

> These tobacco-hunting loafers were just the right people for my purpose. For a small payment in tobacco they would bring me all the ordinary animals which were to be found in the neighbourhood. No sooner had I made my trading intentions public than daily we were besieged at the door of our 'museum' by people who wanted to barter away for tobacco everything, from their day's bag of

> animals to their arms and ornaments. For tobacco they would sell or do anything, and I could easily have found individuals who, for a stick of tobacco, would not have hesitated to kill their own grandmothers.[40]

Tobacco was very often used as a trade good by Europeans, as a means for engaging with Aborigines, and in transactions over cultural performances and material objects. However, the resulting demand for tobacco that was created in Aboriginal societies led to a pejorative discourse in many Europeans' writings.

Finding rock art

While archaeological sites were apparently few, during the Arnhem Land expedition there were seemingly rich finds of rock art sites, as Setzler noted:

> ... About 6.00 p.m. Fred McCarthy and Korpitja came aboard, having had a very successful afternoon finding a low rock ledge back of Amalipa with hundreds of paintings of animals, birds, fish, canoes, abos fishing and spearing turtle and dugongs from canoes, all in red ochre.[41]

The delight apparent in this description is also evident in Fred McCarthy's writing as he related his work in recording cave paintings at Chasm Island, off Groote Eylandt, on 29 June:

> This was a longed for & enjoyable experience ... because of the existence on the island of the first rock paintings reported in Australia by Flinders in 1802–3, which I had the great privilege of recording. It houses a great number of sites, of which I recorded 25 or so, & did not see those at the eastern end described briefly by Tindale. I also found a new colour, a rich brown dry pigment, in aboriginal art, & lightly pecked rock engravings, the first reported in Arnhem Land. My inspiring visit to the great cavern in which the frieze of large porpoises and turtles is situated was a memorable one, & must have been like that of the discoverer of a new cave in western Europe.[42]

This extract from McCarthy's diary exudes pride in 'first discovery' as he revels in having followed in the tracks of Matthew Flinders some 145 years earlier.

'I've been able to get some good pictures': creating a visual record

One of the many objectives of the Arnhem Land expedition was to obtain a visual record of Aboriginal art and culture. Setzler maintains a record of the constant presence of camera and film. On 17 June he noted the steady production of various cultural objects and reflected on having secured photographs of this process:

> ... While I was in charge of camp I've had the natives working on canoe paddles, special spear throwers, and spears. I've been able to get some good pictures showing the process of manufacture, from original log, through the various stages, to the finished painted implement, all on one film.[43]

Setzler's boast here is consistent with the claims of 'first discovery' in that it establishes the writer's authority over all that he has seen and recorded. These proud claims of accomplishment in collecting and recording are elements of the process of colonisation, demonstrations of the power of the coloniser as observer, collector and administrator. The all-seeing eye of the camera stands witness to Setzler's proud mastery over Aboriginal culture, producing the permanent record so often desired by observers of that culture.

As was Aiston some years earlier, so too were members of the 1948 Arnhem Land expedition keen to see and record Aboriginal cultural performances, and they intervened in various ways to help bring such performances about. In late June Setzler comments on

one performance that was carried out at the instigation of the Europeans, and on the filming of that performance:

> ... How many dances were not put on that would have been used in their regular dance held at [?] we shall never know. One thing is certain and that is that no other Australian native dance ceremony has ever been recorded on cine film in color as this artificial corroboree has been.[44]

He elaborates on his use of the term 'artificial':

> I say 'artificial' because all of it was put on for the benefit of the cameras. It would have been far better anthropologically if we could have been bystanders or photographers recording the dances and other activities during one of their annual dance ceremonies held at the regular sacred dance ground, Amalipa, during the fall when the natives provide their own food, instead of large tins of flour and other commodities supplied by Mountford. However, this film record is better than none.[45]

This scenario is again reminiscent of Aiston's attempts described earlier to 'choreograph' a corroboree. Like Aiston, Setzler also has anxieties about the spatial and temporal requirements of the corroboree. The ever present nostalgia for some presumed 'authentic' culture is prominent in this writing as well, in Setzler's comment on what kind of performance would have been 'far better anthropologically'.

'The difficulty with archaeology'

Setzler's forthright opinions were not confined to the making of cultural objects and the filming and photographing of performances. He also had some firm views on the nature of Australian archaeology. In August he recorded that McCarthy had found some 'large chert flakes along an outcropping of the beach'. Although McCarthy insisted that what he had found was an 'old chipping site', Setzler

thought otherwise, writing that 'I told Fred I wouldn't consider it as such because it looked like too large flakes which were likely made by other forces than by primitive man'. One of the local Aboriginal people present at the time, Miangala, 'finally told Fred this was the place he had broken up the rocks in order to make a fish trap which he showed us in the bay'. While McCarthy 'still tried to insist on its being an old flaking site', Setzler 'cautioned him against using such evidence'. This debate prompted Setzler to declare that 'the difficulty with archaeology in Australia is that they have only stone points for artifacts, and therefore analyze them to the "nth" degree'.[46]

Setzler offers further reflections on the nature of archaeological work in Australia. On 23 September – two days after his 46th birthday – he described excavations at a rock shelter at Oenpelli, observing that 'the specimens were few and far between, but when we completed the operation; we had everything man-made'. This combination of paucity of 'specimens' and the seeming difficulty in finding 'explanations' for what was found led Setzler to reflect:

> Since these aborigines, as is true of all Australian cultures, were nomadic, their range of specimens is quite small. It therefore becomes necessary to examine carefully every stone that could have been used for chipping purposes. Moreover, the archaeologists here in Australia go into the minutest description of their chipped stone specimens.[47]

This suggestion of Australian archaeology as being somehow minimalist again reinforces the notion of lack that was prevalent in Europeans' discourses on Indigenous heritage.

Recording sites

The Arnhem Land expedition members also had an interest in documenting and recording significant Aboriginal sites. In an entry

for Tuesday, 8 June, Setzler narrates the process by which Mountford ('Monty') sought information from Aboriginal guides about totemic sites. As the expedition leader questioned the guides, Banju and Charlie, Setzler takes up the story:

> ... Another and more serious aspect of the totemic sites consists in Monty's pushing Banju and Charlie to tell him the significance of each natural formation. One of the boat boys overheard Banju and Charlie talking together and deciding among themselves to call a certain rock formation jutting out at a point on Bickerton the 'Baylor totem'. No one can convince Monty that a lot of the stuff they give him is rubbish in order to get their tobacco!![48]

This extract captures some of the tensions between the Europeans and Aborigines, and suggests an Aboriginal response to what was likely to have been persistent questioning by the expedition members. The passage conjures a notion of Mountford's gullibility, but at the same time also portrays the Aborigines in a pejorative way as people whose lives were based almost entirely around the pursuit of tobacco and trade goods. We might also glean in this passage some sense though of Aborigines as active agents in the encounter – a palpable shift from the many writings in which these people were either silent, absent, or passive objects of Europeans' gaze.

Setzler's diary invites many readings on the nature of the engagement between Aborigines and the expedition members. In the above extract the encounter appears to be informed by a sense of the Aborigines as either inherently unknowable, as materially demanding (for tobacco and other trade goods), or as tellers of untruths; while the Europeans (or at least Mountford) are portrayed as gullible. This depiction of European–Aboriginal engagement emphasises the *processes* of collecting and recording Aboriginal cultural heritage as much as the objects of that heritage.

6

'Free from European Influence'

In the wake of the 1948 Arnhem Land expedition

Following the 1948 expedition to Arnhem Land, its participants maintained an interest in the region and engaged in correspondence about various matters relating to art, collections of bark paintings, and the publication of the expedition reports. In 1949 Fred McCarthy received a letter from Fred Gray, the superintendent of the settlement at Umbakumba on Groote Eylandt who had hosted the expedition there. Gray informed McCarthy about the continuing work of the Aboriginal artists:

> ... Recently a number of Caledon Bay natives have been down to make one of their visits and they included old Wongu, who was not, I believe at Yirrkala while you were there. It was rather a pity for he is a wonderful artist and is one of the few old men who really knows his stuff ...[1]

Gray's comment illustrates the growing importance that Europeans attributed to individual Aboriginal artists, echoing the observations made earlier by Baldwin Spencer. McCarthy replied to Gray in 1950 expressing his interest in carrying out further work on Groote Eylandt:

> ... I heard from Fred Rose about Wongo [sic] and his crowd settling down at Umba Kumba. I would certainly like to get some of his bark paintings and if there is any possibility of getting a series please let me know the cost and I will try to arrange a deal. ... I suppose life on Groote has changed very little. ... I would like to spend two or three months on the island, now that I know what is there and the actual work that I would like to do. In particular, I would like to complete my recording of the cave paintings on Chasm ... I would also like to go over the bark problem painting work again – Monty tackled it in the wrong way and although he got a lot of interesting dope I am sure a much better series of paintings could be obtained.[2]

The artist Wongu (or Wonggu in alternative spellings) referred to in this correspondence had been 'a leading figure in Yolngu resistance to European invasion' and had been known to Fred Gray for a long time.[3] McCarthy's statement that 'I am sure a much better series of paintings could be obtained' indicates the kind of influence Europeans either had or desired in the production of Aboriginal art works. We are not informed as to what constituted 'better' paintings, though it is likely to have been a European judgement. McCarthy's expressed wish to revisit the field and to do further work on recording rock art and collecting bark paintings epitomises his lifelong interest in intensive research and regional studies. He advanced this interest further in later years as Principal of the Australian Institute of Aboriginal Studies.

Mountford and the *National Geographic Magazine*

The 1948 expedition generated voluminous writings, which included private diaries, journals and correspondence, as well as published reports and journal articles. Some members of the expedition also produced more popular accounts, some of which were published in the *National Geographic Magazine*, the journal of

one of the expedition's sponsors. Mountford was particularly adept at popularising the expedition in print, photographs and films. His 1949 article 'Exploring Stone Age Arnhem Land' was written in a style typical of the *National Geographic*, with its emphasis on wonder and awe, evoking the romance of adventure.[4] As such, the *National Geographic* provided a medium particularly suited to Mountford, whose own approach to the study and recording of Aboriginal culture was underpinned by a kind of naïve enthusiasm and entrenched view of Aborigines as remnants of 'stone age man'. The opening sentence of his article – 'A strange world below our plane unfolded like an ancient chart on weathered parchment' – set the scene for a narrative that constructed Aborigines as essentially different, strange, *other*.[5] Mountford's prose echoes the kind of racialised narrative of much earlier writers, as he exoticises the Aborigines as quintessentially savage:

> Often the aborigines hold an all-night *corroboree* (tribal song and dance), their painted bodies flashing grotesquely in the firelight. And sometimes their spears fly in a fight to the death over women.[6]

Detailing the various members of the Arnhem Land expedition and their tasks, Mountford described his own role:

> As ethnologist, my special interest was in primitive art. Through the kind cooperation of Fred Gray, I had at my disposal several aboriginal artists from his settlement. On bark they painted legendary symbols and figures in various ochre colors with crude, stubby, stick 'brushes.' Each painting had a story behind it; the legends I recorded as told me by artists and older tribal members.[7]

Here again is a sense of the way Europeans constructed, choreographed or 'manufactured' the production of Aboriginal culture for their own purposes. Mountford constructed the Aborigines as a people without history, living in a timeless, unchanging society. As the expedition left Arnhem Land he concluded his article:

> Calmly, slowly, the aborigines returned to their halcyon life in Arnhem Land where haste had no place, where time never mattered, where tribal folk didn't reckon in days or years or even centuries.[8]

His master's recording: Mountford's style

The *National Geographic* article contains many photographs of the expedition's work. In one of these photographs we see Mountford standing behind a packing crate marked 'Arnhem Land Expedition, Darwin', upon which sits sound recording equipment. At Mountford's right, seated on the ground is an Aboriginal man singing or reciting, and holding clapping sticks. This photograph presents an image of the white colonial master clearly in control of the Aboriginal subject. Mountford stands above the Aboriginal man, adopting a pose of dominance and superiority, and is dressed in light coloured clothing reminiscent of the kind of tropical safari suits worn by explorers of earlier times. The Aboriginal man, in stark contrast, is seated cross-legged on the ground, is near naked and wears a headdress of feathers, a pendant and a loincloth. Mountford's caption, titled 'Much wailing but no microphone fright marks the amateur hour on Groote Eylandt', reinforces the colonialist image (as does the name 'India' given to the Aboriginal man):

> India, who wears white cockatoo feathers, beats time with sticks as he delivers an unmelodious chant about bandicoot, turtle, shark, or sting ray, all important tribal totems. The pendant, a charm bag which India bites in battle to give him courage and frighten his adversary, formerly contained the fat of an enemy. Examined by scientists, it revealed a medicine man's darning needle used to 'cure' ill persons. Here the author makes the wire recording in a studio of eucalyptus boughs.[9]

Fred McCarthy was scathing about Mountford's *National Geographic* piece, as he explained in 1950 in a letter to Peter Bassett-Smith, who had been the cine-photographer on the expedition:

> The N.G.S [National Geographic Society] article was a great disappointment to me. Monty's inclusion of himself working the wire-recorder whilst you were excluded both in this regard and in the photography, and the omission of Ray [Specht] altogether, appeared to me [to] be unfortunate but in your case typical of the lust for publicity which makes Monty so greedy. Then the style of writing in which Daddy Monty and all his children Frank, Fred, Margaret, Peter, and the rest have a nice picnic in Arnhem Land is in very poor taste and suggests an attitude of cordiality between the leader and the personnel that never existed. His constant reiteration of the wild natives among whom we worked is, to say the least of it, ridiculous particularly to the many people who know Arnhem Land.[10]

McCarthy also expressed his harsh judgement of Mountford's methods to Ronald Berndt in 1956, writing that the expedition leader's 'method of interviewing natives is also open to criticism'. He went on to explain that:

> In Arnhem Land he [Mountford] employed about a dozen or so men to make and paint various articles – barks, figures, etc. which they did during the day. At dusk or thereabouts he got them together near his tent with their out for the day [sic] and hammered the interpretations out of them, some times in a friendly way, at others in a bullying style. He's partly deaf and his recordings of native words must be very inaccurate. His data is thus not the product of spontaneous work on the part of the natives but has been got from a short-term 'pounding' of the informants.[11]

As well as providing comments on Mountford's methods of obtaining information from the Aboriginal people about their art and culture, McCarthy also reflected on his own approach, and on some

of the problems he had encountered while in the field. Writing in 1960 in one of the published records of the expedition he explained:

> In the limited time available I had no opportunity of questioning the old men about the meaning, significance and age of the various paintings. Most of the paintings can be readily identified, but the opinions of individual natives vary considerably in identification, particularly where there is any doubt about the nature of the subject.[12]

This comment captures something of the notion, recognised in some Europeans' writings, of cultural context and of Aboriginal art as being part of a dynamic, living heritage.

The Arnhem Land expedition published

Publications of the Arnhem Land expedition's work continued to appear throughout the following decade. In 1955 McCarthy produced a 'preliminary report' in the journal *Mankind* on his work in recording the cave paintings of Groote and Chasm Islands.[13] In contrast to the personal and enthusiastic tone of his diary entry reviewed earlier, his narrative in this article is written in a detached, formal academic style. He wrote:

> These sites contain some 2,400 paintings, but there are probably as many more in other galleries yet to be recorded on these two islands. Historically they are of interest because paintings on Chasm Island seen by Captain Flinders and some of his officers during the voyage of 1802–03 were the first pictographs reported in Australia.[14]

In this article McCarthy presented a detailed analysis of styles, subjects and colours of the cave paintings. He called for wider application of this type of analysis as this would provide 'a body of comparative data that will enable us to understand more clearly not only the chronological problems involved but also the relative

importance of economic and ritual subjects and inspiration in Aboriginal cave art'.[15] This statement indicates McCarthy's lifelong interest in, and advocacy for, wide-ranging and comparative research – a view that was to become particularly important in later years during his tenure as the inaugural Principal of the Australian Institute of Aboriginal and Torres Strait Islander Studies.

The publications resulting from the Arnhem Land expedition contained extensive details of the collections that were acquired. In a 1956 publication, released as volume one of the Records of the American–Australian Scientific Expedition to Arnhem Land, Mountford boasted of the extent and range of the collections made from Arnhem Land:

> The gross results of the collections, too, were impressive: 13,500 plant specimens, 30,000 fish, 850 birds, 460 animals, several thousand aboriginal implements and weapons, together with photographs and drawings of a large number of cave paintings from Chasm Island, Groote Eylandt and Oenpelli. There was also a collection of several hundred aboriginal bark paintings and two hundred string figures. In addition to the physical collections of natural history and ethnological specimens, each scientist had written extensive field notes as a basis for his scientific papers. There were also many hundreds of monochrome and coloured photographs as well as several miles of colour film on aboriginal life and natural history.[16]

Mountford explains how the bark paintings were specially made at the request of the researchers:

> ... In Arnhem Land, the aborigines make their paintings on the inside of their bark huts during the enforced idleness of the rainy season. Spencer was the first to notice them at Oenpelli [1928]. It is likely that, wherever the aborigines constructed their huts with sheets of bark, they would have painted designs on the inside of them. However, no painting taken from an Arnhem Land bark shelter would be more than a year old because, long before the onset

> of the next wet season, it would have been destroyed by the elements, insects or fire. ... The paintings in the expedition collection, and, in fact, most of those housed in the various universities and museums, have never been part of a wet-weather shelter, but have been made at the request of the investigator.[17]

Collection of the bark paintings was accompanied by obtaining 'myths', stories and songs associated with them – a particular interest of Mountford's, as he detailed:

> ... The method which I adopted was to ask the men to make bark paintings for me, seldom suggesting a subject. At the end of each day, the artists brought their work to my tent, related the associated myth, and explained the meanings of the designs.[18]

It is interesting to read these published accounts by Mountford in the light of the 'subtext' of criticism and carping among members of the expedition that permeates through much of the private correspondence.

Mountford's volume received several reviews, some of which were sharply critical. Ronald Berndt began his October 1958 review in the following negative tone:

> The publication of Mr. C. P. Mountford's volume on the art, myth and symbolism of Arnhem Land (1956) brings to our attention the urgent need to take stock of this anthropologically neglected aspect of Australian Aboriginal life. What indeed do we know, in social anthropological terms, of the function and significance of Aboriginal art? The answer must be – precious little: and that knowledge is not appreciably extended in the book under review.[19]

Berndt was concerned that 'questions which a social anthropologist might ask are not even posed in this volume, let alone answered'. He continued, disparagingly:

> Apart from the acknowledged value of this book in making available to us a great number of illustrations relating to Arnhem Land artistic productions (and to the layman this may well override all other considerations), it has little to commend it. The discussion is not 'scientific' nor anthropological, and the descriptive procedure used throughout the volume is far from satisfactory. As far as the study of Australian Aboriginal art and mythology is concerned it is retrogressive.[20]

Berndt's criticisms of Mountford's work were numerous and wide-ranging. He described as a 'complete misrepresentation' Mountford's assertion that Arnhem Land was 'little known prior to the visit of the American–Australian Scientific Expedition'.[21] Berndt thought Mountford's many descriptions of 'myths and stories, set out in conjunction with illustrations of bark paintings and of various objects' were 'completely unsatisfactory'. He argued that 'except for some casual references to ritual and ceremony, there is ... no key to the significance of the mythology and the implications it may have in a social context. Instead, we are offered a motley of unrelated, disconnected and scrappy stories'.[22] Berndt thought that the 'most outstanding gap' was Mountford's 'failure to treat mythology in relation to art (i.e., beyond noting that the one illustrates certain features of the other), which has left us with a vague descriptive account'.[23] Berndt also took Mountford to task for his use of the term 'primitive', which 'is being discarded by social anthropologists', and for his 'naïve comparisons with the art of prehistoric Europe and the African Bushmen'.[24] He summed up his criticisms:

> If one were to assess this as an 'art book', there could be nothing but praise for the superb illustrations – a field in which Mountford has always excelled. One can only regret that the text doesn't match: and this is all the more regrettable in the light of its claims to be a comprehensive, authoritative, and 'scientific' study.[25]

Mountford's book received similarly harsh judgement from sociologist Peter Worsley. Although praising Mountford for having 'given professional anthropologists an object lesson in public

relations', Worsley thought the work's 'scientific value' to be 'extremely meagre', as he wrote:

> ... since the book is an old-fashioned 'ethnological' collection of 'facts,' with no explicit theoretical analysis whatsoever, it can only be of very limited value to the social anthropologist, the artist, the student of folklore or the comparative ethnologist.[26]

Mountford's work was not entirely without supporters, as another reviewer B. L. Cranstone of the British Museum argued that the book was useful in that it provided a record of an otherwise 'disappearing culture'. He wrote:

> If a thorough investigation of Arnhem Land social structure is made before it is too late many anthropologists may be glad that Mr. Mountford has preserved this *corpus* of related information, for already, I gather, in some districts a good proportion of the bark paintings are made to order for the mission stations.[27]

In Mountford's reply to Berndt's criticism, he based his argument on the notion that *Art, Myth and Symbolism* was a book on art, not anthropology:

> It is to be regretted that Dr. Berndt wasted so much of his valuable time, as well as the funds and space of 'Mankind' in reviewing my book from the entirely the wrong angle, that of the social anthropologist. Had he paused to look at the title, he would have noticed that it was not a book on social anthropology, but on *Art*; the art of the aborigines of Arnhem Land, the symbolism they employ in that art, and the myths illustrated by those symbols.[28]

Mountford, like Cranstone, rated the importance of his book as an illustrated record of the extensive range of Aboriginal material culture observed and collected by the expedition. He explained this cultural archive:

> The book was written to record permanently this large and valuable collection. The cave paintings I have described are remote and inaccessible, while collections are so often dispersed, sometimes without being annotated, or even numbered, a fate which Dr. Berndt admits has already befallen his Arnhem Land collection of eleven years ago. ... the volume under review is by far the most extensive record of aboriginal art and its significance, yet to be published.[29]

Mountford also had some support for his work in a review in 1961 by Elkin, who described it as 'a significant factual contribution to the study of Arnhem Land art'.[30] Elkin acknowledged that Mountford did not have the kind of field experience in Arnhem Land 'language, social structure, mythology and ritual' that he and others possessed, stating that 'it is lack of depth in these matters which handicaps Mr. Mountford as, of course, he realizes'. However, acknowledging Mountford's strengths in some dimensions of Aboriginal art and culture, Elkin provided a more constructive critique of Mountford's work, as he explained:

> When dealing with form and pattern, he [Mountford] must be listened to with great respect, but in the sphere of meaning he is not on such sure ground. Meaning is not obtained by asking the artist or a bystander what a certain pattern indicates, nor merely by getting the myth it represents. Meaning comes after much travail out of the functional relationship of philosophy, belief, ritual, social structure and the general heritage of culture.[31]

Elkin's succinct statement here indicates the view that he espoused consistently throughout his prolific career, that Aboriginal art is part of a whole culture that, taken as a whole, might be considered as a kind of system of philosophy.[32]

Aboriginal art as cultural heritage: Elkin and the Berndts

Mountford's work on the art of Arnhem Land was only one of a rapidly growing body of publications on Aboriginal art. The steady accumulation of these studies was characterised by two emerging trends: a focus on the art of the Northern Territory, in particular Arnhem Land; and the recognition by some writers that art was to be understood as part of a wider system of Aboriginal culture and heritage.

Among the more prolific of writers on Aboriginal art were the by now familiar names of Mountford, Elkin, and Ronald and Catherine Berndt. In 1950 Elkin and the Berndts collaborated in a publication entitled *Art in Arnhem Land*.[33] In his Foreword to this volume, Elkin wrote poetically in homage to the Aboriginal people of Arnhem Land, and in praise of their art and culture:

> This book is a tribute to the artists of Arnhem Land. Them and their clansfolk we have known in social and ceremonial life; we have shared their gossip in their own tongue, listened to their cogitations on life and death, been enveloped in their mysteries, and enchanted by their poetry and song. Such is the background of our appreciation of their visual art. Their paintings, carvings and decorations, which we have with us, are windows through which we see again their life and ours in Arnhem Land. Perhaps through our presentation of some of their artistic designs and symbols we shall enable others to glimpse something of the vividness and depth of Aboriginal art and culture.[34]

Here again is the emphasis on the relationship between art and society, with art providing a key to understanding these other aspects. As well as his many works on the history of Aboriginal studies, Elkin had also by this time published papers on aspects of Aboriginal cosmology. Much of his writing was based on fieldwork conducted in the Northern Territory in the early 1930s. In his 1932

paper 'The secret life of the Australian Aborigines', he detailed the role of sacred objects and sites in the life of the Aborigines, and argued for an understanding of the 'secret life with its complex of beliefs, rites, customs, duties, and even languages'.[35] Throughout his writing, Elkin understood that art, decoration, ceremony and other elements of Aboriginal culture and heritage are not separate from social, political and religious life, but are interconnected. In his book *The Australian Aborigines*, originally published in 1938, he stated of Aboriginal art, 'we have studied it as a living element in the tribal culture of several regions, and have come to understand much of its meaning and of its function in the context of Aboriginal social life, religion and philosophy'.[36] Similarly, in *Art in Arnhem Land*, Elkin and the Berndts explained what they saw as the relationship between art and ritual, claiming that 'ritual implies art – at least for the Aborigines'.[37] The authors expanded on their assertion that Aboriginal art must be understood as part of a living culture:

> In this book we are not presenting an aesthetic study of ethnographical exhibits in a museum. We are social anthropologists concerned with art as an element in the lives of people whom we know – as an aspect of culture in which we have tried to steep ourselves.[38]

With an echo of earlier descriptions from Spencer's 1912 visit and the more recent 1948 expedition to that region, Elkin and the Berndts draw attention to the rich art of Oenpelli:

> In the Oenpelli region alone there are even to-day unvisited galleries of drawings in one rock shelter and cave after the other; and now is the time to study them while there are still some Aborigines who take pride in preserving the heritage of song and myth which has come down from owner to owner through twenty generations and more, the name of each owner in succession being known.[39]

This is a clear statement linking art with heritage, and defining the latter as a body of traditions and practices preserved by being transmitted through generations. Asserting that 'paintings, engravings, sacred symbols, magical objects, carved posts, painted skulls, decorated baskets and spears' have meaning only within their social and cultural contexts, the authors continued with their argument that art was part of cultural heritage:

> Aboriginal art is an integral part of Aboriginal culture – of food-getting and love-making, of magic and religion, of the continuum of the past and present. Its motifs, designs and media are part of the Aboriginal cultural heritage.[40]

Ronald and Catherine Berndt also maintained this more integrated approach to understanding Aboriginal art in a short article in the literary magazine *Meanjin* in 1950, in which they wrote:

> Art to the anthropologist is something more than just beautiful drawings, carvings or workmanship, possessed of graceful lines and aesthetic values – it is the external expression of the 'soul' of the people. It fulfils a vital need in the culture, and is dictated by the tradition, religion and mythology. It is closely interwoven with the cultural configuration, and art forms are nearly always symbolic representations with a vast background of 'history' in the form of ritual and mythology.[41]

Later, in 1964 Ronald Berndt edited the book *Australian Aboriginal Art*, with contributions by several prominent experts. In his Preface, Berndt explained the development of Aboriginal art:

> Australian Aboriginal art is becoming better known these days, or at least more widely known, than ever before. Once it was relegated to the ethnological section of a museum, and treated along with artifacts and material objects of other non-literate peoples. Now it is not unusual to find such things as Aboriginal bark paintings taking their place alongside European and other examples of aesthetic expression.[42]

Elkin comments in his contribution on the capacity for change and adaptation in Aboriginal art, essentially explaining its role as part of cultural heritage:

> ... the variety in Aboriginal art, as represented both on weapons, implements, and ritual paraphernalia, and also on bark and rock, shows that, although there are traditional, tribal, and regional and ritual patterns, new ideas and new techniques have been worked out or obtained in some way and accepted. The Aborigines are no more hidebound in their art, be this painting, engraving, chanting, or dancing, than in their artifacts, their social organization, their ritual, or their ceremonies.[43]

T. G. H. Strehlow had a more conservative view of art among the people of Central Australia with whom he worked for a long time. To these people, Strehlow believed art was a means of adhering to ancient ancestral traditions, as he explained:

> The Aboriginal pictorial art of inland Australia appears to have been linked almost everywhere to a greater or lesser degree with the religious beliefs of the native population. In this respect it resembled the other art forms of this region – song, dance, and verse. In the case of the art patterns associated with sacred drama and ritual these links were naturally strong, and their nature obvious. But, even in the purely decorative designs that were applied to weapons, tools, and utensils in everyday use, there was little interest, traditionally at least, in introducing new patterns. For it was maintained that the local supernatural personages who had first fashioned these weapons, tools and utensils, had determined their form, their shape, and their decorative patterns at the beginning of time. Hence the native artists seem to have made few attempts in recent times to change the decorative patterns, even when ornamenting non-sacred objects.[44]

Art and assimilation

Like many writers, Elkin and the Berndts also had some concerns about what they saw as the threats European culture posed to Aboriginal art. They alerted readers to the potential 'disappearance' of this art:

> Such atrophy and ultimate disappearance have been the fate of native art in tribe after tribe as its members become affected by or immersed in civilization ...
>
> The introduction of tins, utensils, steel, axes, iron, cloth and boxes supplants articles of native manufacture, and so the craftsman's skill is lost.
>
> Finally, as the Aborigines lose their own beliefs through European influence or because they are not fully initiated by the elders, the sacred background and ritual need for artistic expression is lost.[45]

They claimed that 'whether we like it or not, the Aborigines, even of Arnhem Land, must find a positive place in the economic life and structure of Australia'.[46] Part of this assimilation into white society was, they claimed, possible through the Aborigines' artistic endeavours. They suggested that by using new, more 'permanent' materials such as canvas, and oils or watercolours, the Aborigines could enter the recently emerging 'arts and crafts' markets developed by the missions. The authors stated that 'for some time to come, encouragement should be given to the Aboriginal leaders to retain their ceremonial life for the sake of the art, which is an essential element in it, as well as for the maintenance of social cohesion of the clans and tribes'.[47] Thus art was seen as central to the ordered working of the Aboriginal societies and a key to Europeans' notions of advancement.

Discussing the possibility that the Arnhem Land Aborigines might adopt new media for their art, Elkin and the Berndts were perhaps inevitably drawn to make reference to Albert Namatjira and the Hermannsburg painters of Central Australia. They wrote:

> If the northern Arnhem Land artists adopted water colours or oils, we could expect a different development of theme than has occurred in the Hermannsburg (Central Australia) Aboriginal school of water colour artists. The latter's native tradition of art consisted mainly of geometrical symbols – concentric circles, parallel lines and track marks, with very little, and that a poor, attempt at realism. So now, Albert Namatjira and his followers confine themselves to painting the geographical environment – the hills, ravines, trees and grass in all their brilliance of colour, with seldom any hint of anything Aboriginal. ... The men know little or nothing of the deep ritual and mythology of the Dreaming of their tribe, the Aranda; they are Christian, and culturally the products of contact.[48]

Turning their attention to the more traditionally oriented people of Arnhem Land, Elkin and the Berndts saw the encouragement of an arts and crafts industry in that region, adapted for modern materials and methods, and incorporated into a market, as one of the keys to 'saving' the Aborigines. This would also enable, in the authors' view, the development of northern Australia. As they put it:

> We have learnt that the full-blood Aborigines need not pass, if we provide for them, as we demand for other born Australians, adequate diet, prenatal and post-natal care for mothers, children's clinics, medical services, and an independent economic life. We need these people for the peopling and development of northern Australia. We can have them. Therefore, let us see that they receive the education to which, as Australians, they are entitled; and let us give them full opportunity to develop the talents they possess. Amongst these talents is the capacity to draw and paint. It is, moreover, part of their own tradition, of their own life; and from that heritage of art they will be able, if encouraged, to produce

> treasures new and old, to enrich Australia, a land which is theirs as well as ours.[49]

This idea that Aborigines might 'advance' by developing arts and crafts based on their 'traditional' designs and images and translated onto new media, was gaining increasing attention at this time.

Other researchers held similar views during this period about the critical role of art in Aboriginal culture and heritage. Jane Goodale, for example, had been a member of an expedition to Bathurst Island in 1954 led by Mountford. In a paper published in 1966 with Joan D. Koss, she discussed social relations and processes that provided the context for artistic activity among the Tiwi people.[50] Goodale and Koss suggested that the production of burial poles by Tiwi was characterised by a continuity of tradition, yet with a capacity for adapting to new materials and techniques. In the authors' words:

> We suggest that, despite change in other aspects of the culture, if the need and desire for burial poles remain they will be gratified in the traditional way with the customary fervor unless events disrupt the contexts for creative activity. Given the same opportunities for artistic activity, the same values and approximately equivalent patterns of social relations in art-producing contexts, introduced tools, techniques and ideas will yield stylistic variation but little change in the basic pattern of the art form. Among Tiwi, steel axes, manufactured pigments and new items of material culture have led to a greater number of sculpted and painted elements on the poles yet little extensive change.[51]

Another writer who expressed firm views on change and continuity in Aboriginal art and culture was Melbourne ethnologist and art expert, Leonhard Adam.

'Free from European influence': Leonhard Adam on art and collecting

German born Leonhard Adam was an anthropologist and lawyer who had worked and taught in Europe and England before being interned as an 'enemy alien' in 1940 and 'dispatched to Australia'.[52] Before arriving in Australia Adam had 'already studied and published extensively in primitive law', and during his internment at Tatura camp in Victoria he 'gave lessons on primitive religion and ethnology'.[53] Adam published the first edition of his major work, *Primitive Art*, in 1940 in England, and later produced several articles on Aboriginal art.[54] Through these works, and his papers held at the University of Melbourne Archives, it is possible to glean some insights into Adam's wide-ranging experience and interests in Aboriginal art and cultural heritage. Like many writers, Adam held an idealised view of Aboriginal art and culture as pristine and 'authentic', and he expressed some disdain at European influence. While desiring the continuity of some kind of authenticity, Adam also promoted the idea of developing Aboriginal art through training and the introduction of new materials and techniques. He held forth on a question that preoccupied many writers and observers of Aboriginal culture: whether the art being produced by Albert Namatjira could be considered as Aboriginal art or as European art that was created by an Aboriginal person. In the third edition of his book *Primitive Art*, published in 1954, he wrote:

> During the last ten years or so a distinguished Australian landscape-painter, Mr Rex Battarbee, has scored a triumph as art teacher of a number of natives of the Aranda tribe in Central Australia. His first pupil was Albert Namatjira, now a recognized landscape-painter, whose water-colours have been exhibited more than once in the capital cities of Australia. ... He has a marked sense of colour, is a good draughtsman in the European sense of the term, and, thanks to his teacher, knows all about linear and colour perspective. Many

of his pictures are distinguished by their excellent composition, and they have the true atmosphere of the country. But it is European art, and Namatjira's achievement is by no means a step towards an organic development of the primitive art of his people, but only a wonderful proof of the Australian aborigines' latent talent and learning ability.[55]

This 'Hermansburg [sic] school of native painters', as they have been called, has grown up in an area of culture contact between black and white, and thus not far from the undisturbed setting of the nomadic hunter. Unfortunately, their output is very large ... But there are already indications of a mass production on the part of the more serious group of adult painters ....[56]

Let us hope, however, that the case of the native water-colourists of Central Australia will remain an exception, for it is irrelevant for the solution of a much deeper, and more important problem, namely, the future of *real* Australian aboriginal art ... and the development of the aborigines' own artistic talent rather than their imitative ability.[57]

Adam continued:

It does not follow that the aborigines should not use modern art materials. Their use alone does not necessarily mean that the native artist will become the ape of the white man. This is inevitable only if a European artist practises in the presence of talented aborigines, even without talking to them. ... But when European art materials are made available to the aborigines with only a minimum of simply technical European art instruction, the result may be amazing ...

Adam argued for support for Aboriginal art, as a purely 'decorative' medium of expression:

It would be good if the competent authorities would help the aborigines as a whole to develop their ancient primitive art and to adapt its attractive decorative patterns to modern requirements ...[58]

In a statement reminiscent of the views of Elkin and the Berndts, Adam argued for the benefit of developing Aboriginal arts and crafts for economic improvement. He advocated the pursuit of activities such as weaving as a means of maintaining Aboriginal aesthetics, referring to Aboriginal artistic works as 'handicrafts':

There are two handicrafts in which aboriginal art could be usefully employed, viz, pottery and weaving. Weaving has already been introduced, on a small scale, on some mission stations, but European designs are still principally used. I can imagine that carpets and rugs, made in an Oriental technique but decorated in purely aboriginal patterns and colours, would produce a magnificent effect and probably soon be in great demand; they might also become a high-grade article for export. ...

All the guidance required would be purely technical – i.e., how to handle the loom or, respectively, the potter's wheel – whereas aesthetic arrangements of the designs and shades should be entirely left to the genius of the aborigines, without any interference by white artists, whose vision is different, and whose ideas would naturally spoil the originality of aboriginal work.[59]

Here Adam is writing within an assimilationist paradigm, as he offers his suggestions for developing Aboriginal art in a European context. Adam's views conjure an image of the benevolent, although well-intentioned expert proffering the superiority of European technology as a means by which the Aborigines could be raised from their subject or dependent status.

As well as his published thoughts on Aboriginal art, Adam also had an interest in collecting cultural objects, particularly with the aim of developing an ethnological collection for the University of Melbourne.[60] Along with planning to make paper copies of rock paintings, he also wanted to build his collection of artifacts, as he wrote to Douglas Boerner in 1955 while planning for a University expedition to Alice Springs:

> Please, note that, apart from the copying of the rock-paintings, I have two other purposes. Firstly, we want to collect stone implements, i.e, older, flaked scrapers and other flaked types, as many as possible, for the University Collection. We are not so very keen on nice ground axe heads (which are preferred by amateurs), although if we find one we would not mind collecting it. We are not anxious to purchase any wooden implements, except if we are offered a particularly beautiful churinga.[61]

Here again, as we saw with Croll and others, Adam has a weakness for the lure of the prize 'specimen'. Though his letter has a slight tone of humility, he was nonetheless clearly keen on collecting the odd 'nice ground edge axe head' or 'particularly beautiful churinga'. While expressing his interest in collecting, Adam also had some views about meeting with Aboriginal people:

> Generally speaking, we are not anxious to make contact with aborigines, although we should like to pay a visit to Hermannsburg if possible (my wife has been there before, when Pastor Albrecht was there).[62]

This is a clear instance of the 'distancing' practiced by many Europeans, whose interests in Aboriginal material culture were decontextualised, and removed the Aboriginal people from their purview. Adam again expressed his view about the role of artists such as Namatjira:

> I should like to avoid any contact with people associated with the so-called 'Hermannsburg School' of European water-colour painters. I suppose you have read what I think of it in the latest edition of Primitive Art. I admire Namatjira but I am sure his art, a great personal achievement, will not help a bit to develop true aboriginal art. It is wrong to describe watercolours done by aborigines in an essentially European technique, and with European media, as 'aboriginal art'.[63]

Adam's concern for what he considered 'true' Aboriginal art was expressed often in his correspondence. Like many collectors he had a wide circle of correspondents in various localities that were sources for Aboriginal cultural objects. He wrote in 1955 to the Rev. G. J. Symons, Superintendent of the Methodist Mission at Yirrkala:

> I am much obliged to you for your kind letter of the 25th ult. If I can get up to ten good bark paintings, carefully executed and, as far as you can prevent it, free from European influence.[64]

Adam also expressed a desire for information about the cultural context of these:

> Of course, for demonstrations of lectures on aboriginal beliefs, myths and rituals, it would be very highly appreciated if the interpretation supplied by the artist himself would be recorded. Also we should like to know the name, clan, and approximate age of the artist in each case.[65]

This desire for detailed information associated with the bark paintings was somewhat unusual among collectors, as many collections that were acquired generally lacked any details of their cultural contexts. Europeans' interests in collecting bark paintings from Oenpelli and other centres in the Northern Territory were by this stage becoming attuned to the politics of the exchange. Collectors, sponsors, administrators and the many others who made up the socio-cultural context within which collecting was carried out were inevitably becoming more aware of matters such as the roles and responsibilities of various participants, the ethics of collecting, and issues concerning the removal of barks from Australia.

'Much trouble about getting informants': working with Aborigines

Adam's explicit desire that he was 'not anxious to make contact with Aborigines' epitomises the kind of ambivalent attitudes many Europeans maintained towards Aboriginal people. While the collecting, documenting and recording of Aboriginal culture grew at an ever increasing rate, relations between Europeans and Aboriginal people remained complex and often fraught. The tensions between those who wrote about and observed Aboriginal cultures from the safe distance of their armchairs and the academies, and others who spent many years among Aboriginal people, had been clearly palpable in the correspondence reviewed earlier between George Aiston and his Melbourne colleague Gill. They reappear often, either in subtle ways or explicitly, as in the following correspondence between Fred McCarthy and European academic Andreas Lommel in 1955:

> Dear Dr. Lommel
> I can well imagine the beautiful copies that your wife would make of the Wondjinas and other paintings in the Kimberleys, but I am sorry to hear that you had so much trouble about getting informants otherwise. The tribal movements are astounding and it appears that little anthropological work of real value can now be done in the Kimberleys. The same story also unfortunately is being enacted all over Australia and most of our anthropologists are going to New Guinea.[66]

This kind of statement foreshadowed discussions and debates about working in Aboriginal societies that became more explicit following the establishment of the Australian Institute of Aboriginal Studies in 1964.[67] No longer would the Aborigines be seen to be little more than the passive, silent objects of European study as increasingly their actions and voices began to be noted, articulated and expressed.

Showcasing Aboriginal culture: the UNESCO Exhibition

By the 1950s, despite a growing consciousness of the rights and interests of the Aboriginal peoples whom Europeans were studying, and whose cultures they were recording and collecting, there continued much collecting and display of Aboriginal culture without sufficient attention to context. An example of this was an exhibition of Aboriginal culture organised by the United Nations Educational, Scientific and Cultural Organisation (UNESCO). The concept for that exhibition had originated in 1949 when the Commonwealth Government agreed to a request from the Australian UNESCO Committee for Museums to fund a travelling exhibition 'to illustrate the life of the Australian aborigines'.[68] The 1953 exhibition at the Australian Museum in Sydney consisted of twenty-four panels, and it travelled widely throughout Australia and overseas. Fred McCarthy, one of the organisers, wrote that 'this exhibition is probably unique in respect to the method adopted to portray the life and culture of a primitive people in a self-contained portable display'.[69]

The panels illustrated typify the museum approach to Aboriginal culture and heritage, with its compartmentalisation of different elements of culture. Thus 'cave paintings, 'rock engravings, 'bark paintings', 'decorative art', and 'ceremonial life' were shown in separate, distinct panels, apparently without a narrative linking them, which would demonstrate the close interdependence between these and other elements of Aboriginal culture.

Institutionalising collections

During the 1950s and 1960s the collections of Aboriginal material culture that had been amassed by amateur and professional collectors, anthropologists, missionaries and others over many decades began to gain the attention of government officials interested in developing ethnographic collections in museums and universities. Taking up the refrain sounded earlier by Radcliffe Brown, these officials argued for the importance of establishing a national ethnographic collection.

The anthropologist Donald Thomson, who had spent many years in Arnhem Land, had acquired a substantial collection of Aboriginal art and cultural materials. In 1959 there was some interest by the Commonwealth in acquiring his collection, as the nucleus of a possible national centre for art and culture. A letter from the National Capital Development Commission to the Prime Minister's Department outlined this interest:

> ... A few weeks ago I was in touch with Mr. Cumming in connection with a proposal which Sir Daryl Lindsay had made in one of our National Capital Planning Committee meetings that a collection of aboriginal art that Dr. Donald Thompson [sic] has under his charge in Melbourne should be secured for the Commonwealth and housed in the proposed National Centre at Capital Hill.
>
> ... As far as aboriginal art is concerned our Committee has emphasized the fact that material is rare and is rapidly disappearing. It has been stressed that unless steps are taken to secure existing collections or to make permanent records of work in this field the opportunity of preserving material for posterity may be lost. This led to a discussion on the collection which Dr. Donald Thompson now holds in the Melbourne University.
>
> ... One complication which must be mentioned is that of ownership of the material. Dr. Thompson speaks of the collection as his to be disposed of as and when he feels inclined. We have not questioned this view or discussed it with the University where the collection is now located. No doubt this is one of the first questions that would have to be considered in the event of the Government wishing to pursue the matter.[70]

The comment about Thomson's proprietorial claims in the collection that he had acquired highlights the sense of ownership that collectors had generally over their collections. In today's context, ownership of Indigenous cultural materials (often now referred to as 'cultural property') continues to be a contested domain, and the subject of some debate. There is still considerable resistance by some sectors of society to the fact of Indigenous rights in these collections. This is despite (or perhaps because of) an increasing prominence given to Indigenous peoples' claims to these materials that have been taken from their societies.

Prior to 1961 the government's primary collecting institution was the Australian Institute of Anatomy. This Institute's anthropology curator was Helen Wurm, who was also one of the leading figures in collecting and studying Arnhem Land bark paintings. Wurm was given the task of assessing collections and negotiating for their acquisition by the Institute. Among the collections sought by the Institute were those by Melbourne collectors Fred Smith, Stan Mitchell and Bob Wishart. Writing to Fred Smith in 1961 Wurm cautioned about maintaining the integrity of the collection if it were sold privately:

> Mr Mitchell also mentioned to me that he had a talk to you about your collection of aboriginal stone- and wooden implements and that you might consider arranging for disposal of the collection in entirety. I know that you originally planned to have the collection auctioned for private collectors. Unfortunately in this case the dealers would outbid any private persons and the items you have so painstakingly collected and arranged at your home would be scattered around and loose [sic] a great deal of their value they have as a unity.[71]

Wurm extolled the virtues of Smith's collection being acquired by a national museum:

> I wonder if you would consider offering your whole collection as it is for sale to the Institute of Anatomy, which is the custodian of the National Ethnographic collection, which will eventually be housed in the proposed National Museum to be built in Canberra in the near future. It would be known for all times as the 'Fred Smith Collection' and items would be suitably displayed for the many interstates [sic] and overseas visitors who come through Canberra and do ap[p]reciate aboriginal exhibits.[72]

She argued for the role of the public museum in preserving material culture:

> Only in offering the collection to a museum you can be sure that it will be preserved for posterity. If it goes in private hands it may be ap[p]reciated by the person who buys it at present but what will happen when this person dies? The objects may come into hands where they are absolutely of no interest and may end up being broken as children's toys or rott [sic] away in an attic and I am sure that it is not what you would like to happen.[73]

Wurm's remarks about the possibility of the collection being acquired by private collectors also indicate a concern for maintaining the integrity of collections.

Another collector approached by Wurm was Dr Robert Milne Wishart, a New Zealand-born medical doctor who had established a practice in Melbourne.[74] He was one of the founders of the Anthropology Society of Victoria and was President of that Society for some time.[75] His collection of Aboriginal artifacts was said to rank 'among Australia's biggest private accumulations of this kind'.[76] Wishart, like many of these collectors, had enthused about the quantity of items he found, as the following newspaper article revealed:

> 'Our best find ever was in 1932 in the Western District, on a sheep property out of Willaura,' he [Wishart] remembers. 'This had been the area of the Tjapwurun tribe. Fred Smith and I picked up 1700 stone implements in one day and solemnly counted them that night. It was like having all our birthdays at once.'[77]

Wishart collected over a period of approximately twenty-four years, until around 1957.[78] Like many amateur collectors, he sought his objects from the surface, and also procured them from other collections or by purchase.[79] Wurm gave her assessment of Wishart's collection:

> I recently inspected the above collection in Melbourne and was very impressed with the range of material of which the collection consists, the condition of the material and the meticulous way in which the majority of items are documented and labelled, a factor which adds greatly to the value of any collections.[80]

While Wurm was negotiating the acquisition of the Fred Smith and Bob Wishart collections, Stan Mitchell was preparing for the potential disposal of his collection.

Publishing and collecting: the Stan Mitchell Collection

Stanley Robert Mitchell had been prominent among stone tool collectors for a long period of time, and in 1949 had published his *Stone Age Craftsmen*.[81] In this work Mitchell argued that stone tools were best understood by knowledge of their uses and the materials that they were made from. He also believed that what was required was 'knowledge of his [the Aborigine's] tribal territory, its climate, and its animal and vegetable resources'.[82] Mitchell continued to focus on implements found on the surface at former Aboriginal campsites, notwithstanding that stone tool analyses now potentially benefited from data provided by stratigraphic-based archaeological excavations. He wrote that:

> The largest proportion of stone artifacts from the camps are found on the surface. The general absence of stratificational evidence makes it impossible to state whether more than one culture is represented, but it is certain that their production extended over a considerable period and the camps were occupied by different native peoples with characteristic techniques.[83]

Although apparently comprehensive and authoritative in its presentation, and based as it was on decades of collecting, *Stone-Age Craftsmen* nonetheless prompted some readers with greater experience among Aboriginal people to question some of its details. One such person was Melbourne-based anthropologist Donald Thomson, who had spent many years working among Aboriginal people in Arnhem Land, and who had a good understanding of the material culture from the people of that region. Thomson wrote to Mitchell in 1950 to discuss certain aspects of tool uses and functions, expressing his concern that in his experience living among Aboriginal people he had not seen instances of the kinds of uses of stone implements that were described in Mitchell's work:

> I have just been reading your 'Stone-Age Craftsmen' and have been much interested in your notes and comments on the use of stone implements and particularly scrapers. ... A point that strikes me always when I read the accounts of the use of stone-scrapers which are found in such numbers in old middens and camp sites, is the fact that, although I have lived for years among people who are making and using flint and other stone implements, I have seen very few stone implements actually used as scrapers.[84]

In a similar way to the discussions between George Aiston and W. H. Gill, Thomson's letter suggests tensions between those who theorised about Aboriginal material culture (Mitchell, in this case), and others who formed their views on the basis of having lived and worked closely with Aboriginal people.

The publication of Mitchell's *Stone Age Craftsmen* also prompted Sydney ethnologist Fred McCarthy to mention his differences with Mitchell. He wrote to Leonhard Adam that '[f]or some reason unknown to me Mitchell has not shown me the manuscript of his book on the Victorian stone implement camp-sites although I think I could help him in many ways. He still adheres to the old "material governing form" complex and he knows I have other views so perhaps this is the difficulty.'[85] With perhaps a hint of rivalry, McCarthy described Mitchell's book as 'a very useful work of 200 odd pages, beautifully illustrated and printed, but technically it leaves much to be desired'.[86]

After a lifetime's collecting, the time eventually arrived when Mitchell felt a need to consider the future of his collection. In 1961 he wrote to anthropologist Bill Stanner, informing him about his plans:

> Further to our conversation of yesterday regarding the disposal of my ethnological collection, I wish to notify you that in my Will it has to be offered to the Federal Government. Much as I would like to donate the collection I have to make provision for Probate, being now 80 years of age. ... I have already donated a large collection of mineral specimens to the C.S.I.R.O. now housed at Fishermans Bend, Melbourne. I can only make a provisional valuation of the ethnological collection of five to six thousand pounds pending a census to be completed.[87]

At 80 years of age, Mitchell's concerns were now with maintaining the 'integrity' of his collection, and in ensuring its ordered accessibility for future students and researchers. He explained this to Stanner:

> ... My book 'Stone Age Craftsmen' was largely based on my collection and 30 years intensive collecting around many parts of Australia and study of the Australian aborigine stone industry. In the event of the Government taking it over I should appreciate it

being kept intact as it is now so arranged to give students a proper perspective of the stone work of the aborigines.

During several visits to Canberra I have sorted out and classified most of the stone artifacts in the Institute of Anatomy and it is now in excellent order, but so far there is no proper system of recording. This should be attended to as soon as possible. I have kept each donor's collections intact, showing his name in each tray. If this system is adopted and becomes known it should encourage owners of collections to donate them to a truly National Museum.[88]

In response to offers to purchase his collection, in February 1962, not long before his death, Mitchell wrote again to Stanner who was then representing the newly established Australian Institute of Aboriginal Studies:

> Your letter of February 8th, with an offer of [£]1500/-/- for my ethnological collection has been given my careful consideration. My original approach to the Federal Government through Sir W. Cooper was to ascertain whether it would be interested in acquiring this collection on my decease. The offer I consider far too low and I am now making a census for a proper valuation. I was a trustee and Treasurer of the National Museum, Melbourne for ten years and have much experience in valuing collections for purchase by our Museum.[89]

Here we see a clear illustration of the ways in which Aboriginal material culture acquires the status of a desirable commodity, subject to negotiations over its presumed monetary value.

Mitchell had been a tireless advocate for the right of the amateur collectors to continue their activities without the constraints of legislation. He complained to Stanner about these matters, and the role of Fred McCarthy:

> With due respect to Mr. McCarthy I wish to state that he has been adverse to Museums buying ethnological material, and has been advocating the passing of an Act to prevent private individuals collecting such material and to make it illegal to own them. Had this been in operation in the past much invaluable material would have been lost to science.[90]

Mitchell went on to describe his long involvement in collecting, and to extol the virtues of his collection. Like Mountford, he had a strong sense of the importance of his own role in collecting, clearly implying that he had 'saved' many stone implements from obscurity or invisibility. He reflected to Stanner:

> Many of the surface camp sites investigated by me are now unavailable, owing to the planting of Marram grass, pines, housing projects and agricultural activities. ... My study of the stone implements of the Australian aborigines commenced in 1921 through the influence of Baldwin Spencer and A. S. Kenyon and I have had opportunities of visiting many places on the continent always with a view to securing a complete range of the artifacts. My collection is most comprehensive and should be invaluable to future students.[91]

After Mitchell's death in 1963, Melbourne museum curator Aldo Massola described him as 'the last of the early students of the stone implements of the Australian Aborigines'. As 'a contemporary of the great men of a bygone generation' he was, in Massola's estimation:

> the last representative of a school which included Sir Baldwin Spencer, Kenyon, Mahoney, Mann, Stirling, Thorpe and others who were steadfast in the idea that the stone implements used by the Aborigines were inexorably fixed in type and that this type was dictated by the availability of the material on the one hand, and the fracturability of it on the other.[92]

The concerns of curators and collectors for maintaining ethnographic collections as complete entities, properly classified and labelled, reflected a growing consciousness of the role of ethnographic collection in the formation of national identity. Although

clearly imbued with their desires to imprint these collections with their own individual identities, Mitchell, Smith and other collectors also had an eye on the value of their collections to the nation.

Valuing collections

In discussions about collections and their acquisition, questions about their value were often central. In 1974 a Mr Webster in Western Australia was interested in selling his collection to the Aboriginal Arts Board. He wrote to H. C. Coombs, then Chairman of the Australian Council for the Arts, about his endeavours to sell his collection to Robert Edwards, Director of the Aboriginal Arts Board:

> ... Mr Robert Edwards did, in due course, make contact and later visited us and, of course, inspected the collection. He has expressed the judgment that it is a very fine collection of Aboriginal Artifacts.[93]

According to Webster, Edwards had written to him to 'say that the Institute [Australian Institute of Aboriginal Studies] considers the price is too high and "quite beyond its resources"'. Webster detailed his views to Coombs about the value of the collection:

> Through me, the family (five of them) had asked Two Hundred and Fifty Thousand dollars which represents a fair recompense for five generations of effort in collecting, caring for and preserving a national asset which is far more than a fine work of art, it is the very essence of how the earliest known peoples on this planet pursued their very existence. It is visual factual evidence of how the most primitive peoples known to civilized mankind had carried on their lives for countless thousands of years, right up to the twentieth century.[94]

This is remarkably racialised language for this period ('the most primitive peoples known to civilised mankind'). We know nothing

of Webster, yet this letter indicates something of the pervasiveness of the notion of Aborigines as examplars of the primitive in the European imagination.

Webster described some of the collection in his attempt to persuade the authorities of its uniqueness:

> Some of the pieces are so rare and quite frail, such as a fish net strung with genuine Aboriginal women's hair, that I have not permitted others to handle; grinding stones encased in plastic bags which I would not allow to be touched by white men's hands other than people such as you and the Prime Minister himself.[95]

He concluded his appeal:

> I feel quite sure that you, personally, will agree that such like things cannot be talked of in the context and phraseology of 'market values'. I only wish that we were sufficiently well off to make a gift of the whole collection to the nation.[96]

Coombs forwarded Webster's letter to Edwards, and received a reply in October 1974 stating:

> Thank you for your letter of 26th September in regard to the acquisition of the Webster collection of Aboriginal artifacts.
>
> I am afraid the price asked in this instance was quite outrageous, so much so that further negotiations seem pointless. While prepared to recommend purchase of historic collections of importance to Aboriginals at good prices, the level of exploitation was beyond all reason.[97]

This correspondence illustrated the vexed issue of assigning a monetary value to collections of Indigenous cultural materials. By thus valuing Indigenous collections they also became, in a sense, transformed into market commodities, which further removes them from the cultural contexts within which they originated. Edwards' acknowledgement of the importance of these collections to the

Aboriginal people is a rare instance of such recognition of Indigenous peoples' rights and interests in their cultural heritage.

Until comparatively recent times, many collectors pursued their activity removed from any 'living' Aboriginal context. The artifacts were collected, displayed, debated and discussed almost purely as physical objects, regardless of any social and cultural context in which they were produced, used and circulated. There was an absence of any sense of the ways in which material objects interact with the human world (or the spiritual world). Only in more recent years has there been a recognition that, in the words of archaeologist Julian Thomas, 'objects, whether or not they have been transformed by human labour, become bound up with human projects, and form part of the web of relations in which we are embedded'.[98]

Institutionalising research: the Australian Institute of Aboriginal Studies

In recognition of the need to formalise the study of Aboriginal societies and cultures, the Australian Institute of Aboriginal Studies (AIAS), now known as the Australian Institute of Aboriginal and Torres Strait Islander Studies (AIATSIS), was formally established by statute in 1964. The Institute's functions were, as set out by Fred McCarthy, its founding Principal, 'to promote and publish research on the Australian Aborigines, to encourage co-operation between institutions concerned with this field of research, and to assist these institutions in the training of research workers'.[99] The Institute was to play a leading role from this time on in collection and research on all aspects of Aboriginal culture and society.

Spike and Fred: retouch, and the art of Woy Woy

The formation of a national ethnographic collection was part of a process by which Europeans were increasingly engaging with the idea of preserving Aboriginal culture as national heritage. There were, though, other ways that Europeans perceived 'preservation', as in the following exchange between Fred McCarthy and the late British comedian Spike Milligan in 1962. Milligan was at this time residing at the New South Wales town of Woy Woy. He wrote to McCarthy, who was still curator of anthropology at the Australian Museum, to seek the latter's advice on his desire to 'save' some rock paintings from erosion by retouching them:

> I am the unshaven creature who recently visited you with the news I had discovered a new Aboriginal cave which you politely informed me was already on your books. ... Most of the carvings of the DARUK tribe are in danger of wearing away within the next 10–20 years, now, my brother and I (we are both artists, he professional, I amateur) took the trouble to 're-etch' a small carving (a dingo dog), we took great care to follow the original line, where we were not certain, we left the line untraced, being 'truists', we used local hard stone chippings to re-etch the subject, now Sir, if you do not object to the above, have I *your* permission to approach the National Trust asking for any of their members who are either sculptors or artists (that is most important) who might like to carry on this work, but *only* on carvings that are in danger of disappearing through erosion? Also may I put up small notices asking for people not to deface the statues, and a small notice saying that the carvings are attributed to the Daruk tribe? A hasty reply please – I leave for England in Nov. by then with your permission I could, I think do some good work in preserving the carvings. I beg you not to consider me as a crank – the carvings will soon be gone for ever, and a few copies on paper can *never* re-create the thrill of the genuine article.[100]

Although Milligan did not, as Mountford had, profess to have 'saved the art from oblivion', he did share the South Australian's passion for preserving Aboriginal artistic creations from destruction by erosion and other deleterious impacts. His admirable concern for the preservation of this carving site raises issues about the appropriateness of retouching. McCarthy replied, encouraging Milligan in his retouching work:

> The question of re-grooving the rock engravings has been discussed from time to time but there is no general agreement among students of the subject as to whether or not it should be done. As time goes by, and the natural elements wear down the engravings more and more, it is becoming obvious that serious consideration will have to be given to this method of at least saving the figures as [far] as it is humanly possible. ... I would not advocate a wholesale programme of re-grooving – this would raise howls of protest on all sides, and I think with some justification.
>
> Modern methods of recording, particularly at night with a strong lamp, have shown that the Aboriginal artists added figures to many groups generation after generation, so that figures in all stages of preservation from faint and almost indiscernible to those with well preserved grooves may be seen. Where all of the figures in a group are old figures and very faint the problem arises of how best to save them?
>
> I feel that the best course for you to follow is to re-groove a few figures, or even a small group. Do this work quietly, without any publicity, to see what the result will be. It would be a most interesting experiment, and if successful could be used as an argument for further re-grooving elsewhere.[101]

While encouraging Milligan in this retouching, McCarthy's letter conveyed a sense of wariness ('do this work quietly, without any publicity'), suggesting that the museum curator was sensitive to the potentially negative impact of retouching this site.

A major field of inquiry: Aboriginal art in the 1960s

By the 1960s Aboriginal art continued to be an important field for study and contemplation. There was a proliferation of writings by people such as Elkin, the Berndts, McCarthy and Mountford – individuals who had dominated anthropology and Aboriginal art studies for decades. Aboriginal art was now more often studied not in isolation, but in terms of its relationship to other elements of Aboriginal culture, and as part of living society. One person who had made the study of Aboriginal art his life's work was Charles Mountford, whose involvement in the 1948 Arnhem Land expedition had been a crucial point in his career. Among his many other activities, Mountford was a member of a committee formed in the late 1950s by the Council of the Royal Anthropological Institute to organise a symposium on 'primitive art'. The papers and discussions of that symposium, entitled 'The Artist in Tribal Society', were published in 1961.[102]

In his presentation to the symposium, Mountford remained fixed in his unquestioned view of Aboriginal art as primitive and his denial of change and transformation. He stated boldly that 'Aboriginal culture did not alter under the white man – it simply died out – and nothing, as yet, has taken its place'. He also wrote that 'the subject of the artist and his art in Australian aboriginal society is of particular interest to the art historian because the aborigines are probably the most primitive of any living people'.[103] These antiquated views of an unchanging Aboriginal society were hallmarks of Mountford's approach throughout his career. Although he understood that art, ceremony, song, dance and story were intimately intertwined within Aboriginal society, this did not detract from Mountford's 'stone age' view of Aboriginal technology as the 'simplest in the world', comparable with that of the European Palaeolithic.

This notion of 'primitive' as a reference to earlier, supposedly simpler cultures was challenged by the editor of the publication, Marian Smith, who offered a useful critique of the term 'primitive art', suggesting that it 'is inaccurate and suggests conditions which are not borne out in fact'.[104] She elaborated:

> The objects designated are not primitive in the sense that they are early; they are not early; they are not the primitive precursors of our Western tradition. The first expressions of an art style are better called 'archaic', and this word has been adopted by both archaeologists and art historians. The great examples of primitive art are the results of long development, culminations of expression in well-established traditions. The primitive is not necessarily either simple or unsophisticated ... Primitive art is wholly contemporary with our own – it is distinguished entirely by the differences of the art traditions involved.[105]

Although critical of the primitivist view of Aboriginal art, in her introduction to Mountford's contribution, Smith nonetheless promoted Aboriginal culture on the basis of absence – in this case, an absence of complexity, or variety, in material culture. She wrote:

> We open our discussion with reference to a distant region, distant not only in space but in the simplicity of its technology. No people of modern history have lived with as few items of material culture as the Australian aborigine. It is said that some tribes have only four things in their list of material possessions. Yet as Mr. Mountford has previously shown, these aborigines have a rich artistic life.[106]

Mountford remained consistent in his view that Aboriginal art and culture were primitive on the basis of their resemblance to those of an earlier time, the Palaeolithic, based on their apparent simplicity. He expounded this view in 1975, many years after his retirement, in a letter to Alexander Marshak of the Peabody Museum at Harvard:

> In an address I gave some years ago before the Royal Anthropological Institute of London, I said, casually, that as the aborigines in the remote parts of Australia had a simpler material culture than the ice age man of Europe, yet they had a rich philosophy and a code of just laws, would it not be a reasonable hypothesis to postulate that Paleolithic man had similar concepts. Of course, I was heavily attacked for this remark, but the more I have considered the matter during later researches, the more I am convinced that this hypothesis is reasonable.[107]

Mountford's old-fashioned views stood in some contrast to those of Elkin and the Berndts, who years earlier had already been describing Aboriginal art as an element of living culture, and as part of Aboriginal cultural heritage. However, Mountford was not alone in his primitivist and evolutionary view on Aboriginal culture, as other writers propounded similar ideas throughout the 1960s.

Australia as a living laboratory

Despite the work of some more enlightened thinkers, Europeans' writings gave remarkably persistent representations of Aboriginal art as being simple, and as an antecedent to present day art. In 1963 South Australian anthropologist Norman Tindale collaborated with writer H. A. Lindsay in a publication aimed at the popular market. Simply titled *Aboriginal Australians*, this slim volume set out these authors' views in straightforward, accessible language, drawing extensively on Tindale's earlier fieldwork. Despite having been published in 1963, this book maintained the view of Aboriginal people as 'stone-age', as the authors began:

> Australia is the only place in the world where we can study a simple hunting people, still living with the aid of the tools of the Old Stone Age. Not only do they show us how our own early ancestors may have lived, worked and played long ago; they also provide us

with a guide as to how the prehistoric peoples of other lands developed their cultures.[108]

Reminiscent of Mountford's approach, this work also perpetuated the stereotype of Aborigines as exemplars of 'stone age man', and Australia as a 'living laboratory' where these people could be studied. In *Aboriginal Australians*, Tindale outlined for the ordinary reader his theory of the 'origins' of the Aboriginal peoples, based largely on his archaeological work at a site called Devon Downs in South Australia in 1929 and at other sites. His analysis of stone tools and other materials from this site had led him to formulate a theory that Aboriginal culture was comprised of successive migrations of peoples over a long period of time. Each of these peoples had, in Tindale's scheme, a different kind of stone technology.

Tindale and Lindsay devote a chapter to 'art', in which, notwithstanding the general primitivist tone of their book, they extol the virtues of the decorative and artistic skills of the Aborigines:

> Our museums today house great treasures of aboriginal art, ranging from crude scratchings and daubings to work of such excellence that civilised artists have copied the designs. These indicate how the aborigines devoted time to some forms of art work when they had the necessary leisure.[109]

Their comment that 'civilised artists have copied the designs' might be a reference to people such as Margaret Preston, who had spent many decades exploring the ways in which Australian art might incorporate Aboriginal designs.

'The most "primitive" artistic expression': the case of Karel Kupka

The view that Aboriginal culture provided a window into former times and other places was also the basis for Karel Kupka's 1965 book, *The Dawn of Art*. Karel Kupka was a Paris-based artist who,

during visits to Australia in the 1950s and 1960s, collected and studied bark paintings from Yirrkala. Kupka considered Australia as a kind of 'living laboratory' wherein the 'dawn of art' could be studied. In *The Dawn of Art* he wrote:

> Over the last twelve years my search took me four times to Australia; I was looking for an art, living and practised in our own times, yet still related to the most 'primitive' artistic expression. The present study is the result of these journeys.[110]

He detailed the purpose for his research:

> The object I set myself was to study evidence furnished directly by people whose present living conditions and way of life most closely approach those of the first man. While I had no intention of criticizing existing theories on the origin of art, neither did I wish to formulate new ones. All I wanted was to find out how far the existing theories correspond to reality, and to experience this reality as it can be found among the Aborigines of Australia. The very fact that I was aware of the existence of this art made me want to *see* it and collect specimens.[111]
>
> I spoke with the artists, I listened carefully to their answers to my questions, and, most important of all, I observed them in the act of creation.[112]

In the years before his book was published, Kupka had been the subject of some criticism, predominantly by Fred McCarthy who later believed Kupka's methods to have been faulty and dishonest. In 1958 McCarthy described Kupka's work to a colleague, Andreas Lommel:

> Karel Kupka is a French artist who spent some time – about six months or more – in Arnhem Land studying aboriginal art from the artist's – not the anthropologist's point of view. He had a very nice collection of paintings most of them on small pieces of bark. In actual fact, all bark paintings are made to order today in Arnhem

> Land and it becomes a question of judging the quality of a particular painting to assess its value.[113]

Kupka's proposed method of collecting bark paintings is outlined in a letter in 1963 from the anthropologist A. P. Elkin to Professor Barnes, who was then the Executive Member of the newly established Australian Institute of Aboriginal Studies (AIAS). Elkin wrote:

> Mr Kupka has been in touch with the Church Missionary Society, and has paved the way for visiting Oenpelli. With regard to obtaining paintings etc. from there for the Institute, he has arranged that he selects the artists and they paint: he, if satisfied with the results, packs the paintings and forwards them to the C.M.S. in Sydney, where he or a representative of the Institute unpacks them; and there the missionary authorities decide with us on price. Apparently there is much bargaining and selling going on at the Missions at present, and some way has to be found by which the natives, the Missions and the purchaser (ourselves) can be protected.[114]

McCarthy, however, became very concerned about what he saw as Kupka's failings in regard to his collecting activities. In 1964 he recounted Kupka's conduct to another colleague, Dr Simon Kooiman, Curator of Oceanic Ethnology at the Rijksmuseum vock Volkerkunde in Leiden, Holland:

> On every count the man has proved to be unscrupulous – perhaps his most serious regression was to apply for funds to carry out research on art in Arnhem Land when his sole intention was to make a quick dash through the area and get as many specimens as he could. He actually applied for six months in the field and spent ten weeks there. He's already held an exhibition in Rome and will be holding one in Paris shortly.[115]

McCarthy believed that Kupka, who had conducted AIAS-funded research to collect and document the bark paintings from Yirrkala, had breached an agreement with the Institute concerning his allocation to that organisation of a proportion of barks he had collected. McCarthy was of the opinion that Kupka had left Australia hastily, had taken the barks with him without a customs permit, and had then conducted a 'campaign of vilification' of the Institute. In his correspondence with colleagues McCarthy also questioned Kupka's method of collecting the paintings, asserting that the artist had not spent the necessary time in the field, but had simply sped through the area picking up the paintings. Writing to Professor Jean Guiart in April 1964 McCarthy claimed that Kupka:

> ... (1) spent only ten weeks in the field occupied principally in collecting specimens and ascertaining their meanings, (2) did not examine museum collections, and (3) refused to share the documented collection of bark paintings to be made at Croker Id., Milingimbi and Groote Id. Missions which, he said, would suffice for the Institute. He refused to allow representatives of the Institute to examine his total collection whose value appeared to be between [£]1200 and [£]1500.[116]

This correspondence highlights the growing awareness among many Europeans of the need for proper conduct and respect for Aboriginal peoples' rights and interests, and appropriate ethical approaches and standards in the ways in which researchers engaged with Aboriginal people and their cultures.

'Before they disappear entirely': the urge to collect

The Northern Territory, and Arnhem Land in particular, continued to be important for the collection, research, and production of Aboriginal art and other aspects of cultural heritage. Other areas, too, were also being considered for their potential to supply an ever

growing interest and demand for Aboriginal cultural materials. Lorna Lippman, then Acting Secretary of the Aborigines' Advancement League in Victoria, wrote to Fred McCarthy in 1962 to inquire about the availability of Aboriginal artifacts. She outlined her organisation's purpose in acquiring these:

> Our organisation is anxious to obtain tribal works of art from different parts of Australia for display and sale in Melbourne.
>
> Our aim in this is two-fold: firstly to assist the tribal people in earning money; and secondly, to arrange art exhibitions which would help to make the public realize the mental and artistic capacity of the Aboriginal people. We would not consider it as a money-making venture for the League, but feel that the Aborigines themselves should benefit from the very real interest in bark paintings and carvings which exists here.
>
> We were wondering if you would be good enough to let us know whom we should contact for this purpose? Are there any areas other than Arnhem Land where Aboriginal art is still being produced?[117]

McCarthy replied:

> I am afraid there are very few places in Australia in which genuine Aboriginal artifacts of artistic value are being produced apart from Arnhem Land.
>
> There is nothing to be obtained in northwestern Australia, where a few excellent wood carvings of human figures, in a flattish style, have been collected – some are in the National Museum of Victoria. There are prospects here of beginning the production of these figures if the right natives could be contacted and if they would be prepared to make them. They are ritual and they are very circumspect about this side of their life.
>
> The Yarrabah Mission is the centre of the interesting coloured shields, paddles and whirlers so well represented in museums, but whether these could be obtained on a commercial basis I do not know. It would be interesting to see the designs reproduced on bark sheets but the promotion of such a scheme would have to be carefully handled.
>
> Otherwise there is nothing being done to nurture art for sale among the Aborigines.[118]

Lippman replied that 'since it would appear that Arnhem Land is the only remaining area of production, we are more than ever anxious to obtain a collection, before they disappear entirely'.[119] There was still at this time the notion that Aborigines were disappearing, only to leave the material remnants of their societies. While this passion for collecting Aboriginal cultural objects continued to occupy much of Europeans' time, there was also by now a firmly entrenched interest in legislation for preservation.

7

Legislation for Preservation

As we saw with reviews of Mountford's report of the 1948 Arnhem Land expedition, some Europeans had argued that collecting, documenting, recording and writing about Aboriginal cultural objects was, if nothing else, a form of preservation. In the context of what many Europeans still thought was a 'disappearing' Aboriginal culture, the production of a permanent record of Aboriginal culture in all its forms was regarded as increasingly important. Publication was one sure way to establish such a record; legislation was another, as that would, it was hoped, encourage preservation and prevent destruction. The calls for legislation for preservation and for the prevention of illicit export of Aboriginal cultural materials that had been voiced by some collectors, as well as by officials and others in earlier decades, were eventually to be translated into action. Although the representations made over a decade earlier to the Commonwealth Government to legislate for protection of Aboriginal heritage had not been immediately followed by action, by the early 1950s there were some stirrings of interest in bureaucratic circles. Developments by the United Nations and its agencies – particularly UNESCO – provided some impetus for the Commonwealth Government to consider the question of heritage protection.

In the 1950s the Australian office of UNESCO in the Commonwealth Office of Education kept an interested watch over relevant UNESCO proceedings. In 1951 the Acting Director of the Office of Education, W. J. Weedon, brought some of these developments to the attention of the Department of Territories:

> In pursuance of resolutions of the Unesco General Conference relating to the preservation of the cultural heritage of mankind, our Unesco National Co-operating Body for Museums has urged that legislation be introduced for the preservation of aboriginal sites, human remains and relics.[1]

Once again, as seen earlier, this call for legislation sought to define the matter to be protected by means of a list of elements of heritage. Here the list is relatively brief, comprising only 'aboriginal sites, human remains and relics'. However, the inclusion of 'aboriginal sites' was an important step towards recognition of place (in addition to moveable physical objects or 'relics') as a component of Aboriginal cultural heritage. The Department of Territories official, J. E. Willoughby, responded, claiming that 'at present there are practically no known archaeological remains in the Territory', but urging the reporting of any that 'may be discovered in the future'. Willoughby suggested that the declaration of Aboriginal reserves in the Northern Territory had played a role in protecting heritage:

> There is no direct legislation for the purpose of preservation of archaeological sites, but provisions for proclamation of aboriginal reserves indirectly aid preservation of antiquities and archaeological remains.[2]

In the discussions that continued over the years there was a geographical focus on the Northern Territory. The reason for this may have been twofold: as a Commonwealth territory the Northern Territory was an obvious focus for Commonwealth attention. In addition, many Europeans still held the view that the Northern

Territory was the locus for most of the 'traditional' Aboriginal societies. The Director of the Office of Education put forward a case for legislation:

> In inviting your attention to the Committee's resolution, I am sure that there is no need for this Office to stress the importance to the morale of primitive peoples of legislation which demonstrates a respect for the culture of their ancestors and helps to give them a sense of cultural continuity with the past.[3]

Although still couched in primitivist language, this statement, somewhat unusually for that time, articulates the importance of protecting heritage for the Aboriginal people themselves. It also presents a definition of Indigenous heritage as that which has continuity with the past, thus indicating a more dynamic sense of heritage.

Preserving Aboriginal sites: Ayers Rock

Weedon's reference to 'aboriginal sites' signalled a growing recognition from the early 1950s that place was an important part of Aboriginal heritage. One place that gained some attention from government officials in this decade was Ayers Rock – or Uluru, as it is known today. This imposing Rock had of course been known for a very long time as a landmark of particular importance, though perhaps more as a major European–Australian landscape feature than as an Aboriginal sacred site. It was one of the Aboriginal reserves that had been established under the 1918 Northern Territory Aboriginal Ordinance and gazetted in July 1920.

Anthropologists had worked in Central Australia over many decades and there was by now considerable knowledge about the Aboriginal communities there. Over time, population movements, European intrusions, mission and government activities, and drought had had a huge impact on the desert populations. By the

1950s some government officials were questioning whether there were in fact still Aboriginal people present at the Rock, and inquiring about the importance of Ayers Rock/Uluru to these people. Officials expressed these views in the context of increasing interest in this area by developers and tourist operators. For example, considering a proposal to build an airstrip at Ayers Rock, Frank Wise, the Northern Territory Administrator wrote in 1952 to the Secretary of the Department of Territories:

> Ayers Rock is within the South-West Aboriginal Reserve, but the Director of Native Affairs advises that Aborigines do not reside in the area and that only travelling groups of them pass through the adjacent country which is mainly desert.[4]

The Administrator claimed that 'no harm would be done to the interests of the Aborigines if the area adjacent to the Rock were excised from the Reserve'.[5] However, the Minister for Territories, Paul Hasluck, sought further advice from the Territory administration and, in a memorandum to the Secretary of his Department, he wrote:

> I am receiving various representations on the subject of Ayre's Rock [sic] from persons who claim definitely that the site is still used by the aboriginals, and its preservation as an aboriginal reserve is vital to them. Please inform me of the present position in regard to the proposal to excise part of the reserve in order that it may become more accessible to tourists ... I should also like to have exact and detailed information about the number of aborigines which visit the area, and whether, in fact, Ayre's Rock [sic] and its surrounds are of significance to them.[6]

The Territory Administrator claimed that the area was no longer significant to Aborigines:

> ... There are no aborigines residing in the area around Ayers Rock and Mount Olga, and only a very few natives now visit the area,

and such visits are usually only when hunting wild dogs for their scalps during the 'dogging' season from July to September in each year. Their purpose in visiting the area in this period is only to make use of the natural water near Ayers Rock.

Although the cave and rock paintings indicate that it was formerly a native ceremonial centre this was for previous generations of aborigines, and the present generation does not visit or make use of the area for any ceremonial purposes. It appears therefore that Ayers Rock and its surrounds no longer have any religious or other significance for the present generation of aborigines ...[7]

Hasluck reiterated this view a few years later, in 1957. With growing concerns about vandalism and suggestions by some that the Rock should become a National Park, he wrote to Senator Walter Cooper, Minister for Repatriation:

> There is evidence that although the cave and rock paintings at Ayers Rock indicate that the area was once an important native ceremonial centre, this no longer applies. ... there are very few natives in that area. It seems that the present generation of aborigines attaches little, if any, significance to the area and that it no longer holds any religious significance for them. The water supplies which exist there are not permanent and the hunting resources of the country are sufficient to sustain only small bands of nomadic natives.[8]

The language in this correspondence echoes that used by L. Keith Ward and A. S. Kenyon in earlier years in relation to *tjurungas* thought by Ward to be no longer 'in use' because the Aborigines were no longer seen to be using the *tjurunga* storehouses for ceremonial purposes. The prerequisite for an object or site being considered of importance as Aboriginal heritage was, it seems, based on its continued occupation or use by Aboriginal people.

Despite his view that Aborigines no longer used Ayers Rock, Hasluck nonetheless recognised the need to tighten controls to

prevent vandalism, and the following years saw increasing interest in protecting Uluru as a National Park. Representations were made to the Commonwealth Government from international organisations keen to share their experiences in protecting natural and cultural areas and to offer assistance. One example was a letter in 1958 from Fred M. Packard, the Executive Secretary of the National Parks Association of the United States to the Australian Minister for Repatriation:

> The National Parks Association of the United States is keenly interested in this suggestion because of the experience we have had in the country with the problem of destruction of our own aboriginal remains and especially the cliff dwellings of the Pueblo peoples of our ancient south west. The National Park Service, which is the agency of the United States Government which administers the national park system, has jurisdiction over eighteen national archaeological monuments which protect such sites. They were given this responsibility because the government considered such evidences of our native historic past to be of priceless value and felt that the only way they could be protected properly was under careful regulation and protection sponsored by the Government itself.[9]

This statement illustrates the importance attached to Indigenous sites and objects as national heritage in other countries. Discussions in official and government circles from the 1950s would increasingly adopt a similarly patriotic tone regarding preservation.

Northern Territory heritage legislation

The Northern Territory was the first jurisdiction to introduce specific legislation to protect Aboriginal heritage. From 1911, when the Commonwealth Government assumed control over the Territory, Ordinances were enacted for administering the Aboriginal populations of the region. Some of these, such as the Reserves

Ordinance, were occasionally cited by government officials as relevant to the protection of 'antiquities' in the Territory. By the 1950s a need for further legal control over Aboriginal heritage was acknowledged, which resulted in the introduction in 1955 of the Native and Historical Objects Preservation Ordinance. A press release issued by the Minister for Territories, Paul Hasluck, in January 1955 succinctly stated the objects of the new Ordinance:

> The Minister for Territories, Mr Paul Hasluck, said today that, as a result of an Ordinance passed by the Legislative Council for the Northern Territory at its last session, it was an offence for any person wilfully or negligently to deface, damage or interfere with aboriginal ceremonial grounds and relics, including carvings and paintings, in the Northern Territory. It was also an offence to destroy, remove or conceal native relics, carvings or paintings or anything of ethnological or anthropological interest.
>
> The Minister stated that this was a stop-gap measure pending the introduction of a more comprehensive bill on the subject of the preservation of aboriginal relics, historical sites and natural features in the Northern Territory.[10]

However, in the years following the introduction of this Ordinance, there was a growing realisation that it did not allow for the protection of place – only objects. As one official remarked, 'There is a growing need in the Territory for legislation designed to protect certain areas which are of interest from a number of aspects, viz., tourist, flora and fauna, scientific, historical, anthropological'.[11] Eventually, in 1960 the Ordinance was amended to the Native and Historical Objects and Areas Preservation Ordinance 1960. The amendment was explained as follows:

> This Ordinance widens the scope of the Native and Historical Objects Preservation Ordinance 1955 by the inclusion of sites and areas within the provisions of the Ordinance. This action was necessary as persons interested in historical or anthropological investigation had found that certain caves and sites in the Northern Territory, which were not protected in any way by legislation, were being destroyed or damaged by vandals, or by persons who were not aware of their scientific or historical importance.[12]

The debate on the amended legislation in the Northern Territory Legislative Council drew some criticisms from members concerned at what they thought would be the 'locking up' of areas to non-Aboriginal people. For example, Harold Brennan, representing Elsey, objected to the proposed Bill, referring to some caves at the town of Katherine. He complained, 'I have been trying to find out what the caves are and I have been informed there are some small caves that have been found. You find these caves all round the countryside, no matter where you go, and if each one of these areas is going to be indiscriminately reserved there will be nowhere for us to go.' He went on with this theme:

> I notice the Director of Welfare said [there are] a number of caves in the Katherine area which are obviously of some ritual significance. This ritual can be carried to extremes. These caves – I have not found any ritual or known of any rituals taking place in them. ... But this word ritual can be carried to extremes because there is barely a part of the Territory, taking it all round, that at some time or other has not been used for ritual and so forth. ... You will find a lot of places where there are heaps of stones and I do not think anyone is worried about them, but they have some ritualistic significance, much more than the ***blinking*** caves, but if we are going to worry about those heaps of stones that have been put together by people through, I do not know how long the world has lasted – some say millions and others less. ... But if you are going to make it an offence for a person to just go and perhaps remove one of these blinking stones from that heap and use it to chock a wheel of a vehicle where you have pulled up, it is a bit of a farce. This is where bureaucracy runs wild.[13]

Most other members supported the amendment Bill. The member for Alice Springs, Mr Hargrave, welcomed the Bill, saying that 'it has long been a problem to the Northern Territory Reserves Board what action is to be taken with respect to places of this nature with valuable, original, artistic and other types of records to preserve them from vandals and persons who remove them to other places'.[14] However, another critic of the Bill was Mr Petrick, representing Stuart, who argued that 'it can become dangerous ... that an area should be declared a prohibited area'. He explained his objections:

> We have quite a few prospectors. A prospector does not read the *Gazette* and he finds himself in a prohibited area. It should be well left alone. I know that the Member for Alice Springs, if he says [sees] a red stone lying in the middle of a street, declares it an historical object. There should be a reason before anything is declared historical by experts and not by laymen. Many things are today declared historical. They are only as recent as yesterday and they are called historical. You find that weapons sold to the tourists are not worth a cracker because they are absolutely just mass produced today and mean nothing. I have got some of them here which are really weapons that come from a long way back, but you cannot get those weapons today because the blacks have found out how to make money easily – by selling tools that are rubbish. I feel we should treat this particular Ordinance very carefully and not overstep the mark ...[15]

In responding to the criticisms from Brennan and others, the Director of Welfare, Harry Giese, commented on the Bill:

> I do not propose to follow the Member for Elsey into a definition of the term 'ritual'. I admit, though, that I did use the term in the second reading speech somewhat loosely. There are a large number of areas in the Territory which have some ritual significance to aborigines and where there are relics of various sorts – whether paintings or carvings, whether burial grounds or initiation grounds or weapon-making grounds – which have an importance to them, and I think we have a responsibility to these people to see that those areas are not desecrated. I am concerned because the Northern Territory is becoming known to quite a large number of people, anthropologists and others, as being an area where, by excavating certain of these ritual grounds, quite significant finds can be made.[16]

The Bill was duly passed, but the debate illustrates the way in which heritage protection becomes a contested domain. Throughout its history, the development and implementation of legislation for Indigenous cultural heritage protection has been a site for the playing out of varied interests, often centred on the conflicting notions of ownership and rights.

A few years following the amended legislation, in November 1964, the Northern Territory Legislative Council established a Select Committee to inquire into whether any further amendment of the Native and Historical Objects and Areas Preservation Ordinance 1955–1960 was required. The Committee's findings and recommendations presented in its report of 10 August 1965 were far reaching. The report began by noting 'evidence of gross neglect and maladministration of this Ordinance by the Welfare Branch of the Northern Territory Administration'. It also claimed that 'very few witnesses were aware of the existence of the Ordinance and, apart from officers of the Welfare Branch, no witness was aware of any application of the Ordinance'. Commenting on the operation of the Ordinance, the report stated that during the Committee's investigation it 'became aware of a vital principle of democracy which could be denied by the Ordinance'. It went on to explain:

> The Aboriginals, as a minority group having different religious beliefs from the majority of the Australian population, are entitled to look to the Government for freedom to practise their religion and for protection from those who would desecrate their sacred objects. Your Committee believes that there should be no distinction between the desecration of a sacred object in a church or

temple and the desecration of a sacred object in a place held sacred by the Aborigines.[17]

The report had some firm opinions on the legacy of missions as well:

> Your Committee believes that every effort should be made to preserve what is left of the Aboriginal culture. Our predecessors in the Territory, including over-zealous Christian missionaries, appear to have had little regard for the niceties of individual liberties in their anxiety to 'civilize' the Aboriginals. Your Committee was particularly disturbed to be told by Aboriginal witnesses that they were not permitted to use their ancient ceremonial grounds within a mission area and that they were not permitted to perform their ceremonies in the manner and at the times they wished.[18]

Commenting on *tjurungas* removed from the Northern Territory, and now mostly lost, the report described these objects as 'links in a chain or perhaps more accurately as chapters in a story'. The report also recommended protection against unscrupulous activities by outsiders against Aboriginal artists. It detailed some of these:

> Some evidence was heard concerning the lucrative trade in Aboriginal bark paintings. ... Allegations of large retail profits with small returns to the painters were made and one Aboriginal witness claimed that his people were refusing to paint any more barks for sale because of the small payment received for paintings which were sold in the capital cities for very high prices. In the interest of justice and fair play the bark painting industry should be carefully examined with a view to legislating for the protection of the artists and with the preservation of a high standard of painting.[19]

This comment is an insightful reference to concerns that became more prominent much later, during the 1990s, regarding the exploitation of Aboriginal artists.

In the light of its findings the Committee recommended that the Ordinance be repealed, and replaced with 'legislation ... to establish

a museum controlled by an independent board of trustees'. The 'prime object' of the trustees of this museum would be 'the collection and preservation of material related to the history of the Northern Territory and the culture of the Aboriginal inhabitants'. Crucial recommendations were: that a Federal Government appoint an 'expert committee to inquire into and make recommendations concerning the protection and preservation of the culture of the Aboriginals of the Northern Territory'; and that 'the Legislative Council appoint a commissioner under the Inquiries Ordinance to investigate the production and sale of bark paintings by Aboriginals with a view to recommending legislation which will ensure that the individual artists receive an adequate proportion of the retailers' prices'.[20]

One of the submissions to the Committee's Inquiry was from T. G. H. Strehlow, and another from the Aboriginal Art Committee. Strehlow stressed the rights Aboriginal people held in their cultural heritage, as he wrote that 'all things connected with the old religion of Central Australia – myths, songs, dramatic acts, and sacred objects – were privately owned'. He explained that the 'sacred objects – known as *tjurunga* (and spelt *churinga* by you) – symbolized the personal ties of living or dead human individuals to these supernatural beings'. Elaborating further, he stated that to the Aborigines these *tjurunga*:

> were not regarded as remote archaeological or historical objects: they were 'the secret bodies' of the human beings believed to have been reincarnated from them: and they were hence the undisputed private property of these persons. If a man died, then his objects became the undisputed private property of his sons (or other heirs).[21]

On the basis of his extensive experience and knowledge of Central Australian Aboriginal life, Strehlow claimed that the Ordinance:

gives no indication that it recognizes the fact that all sacred sites were once regarded as being owned by all members born into the appropriate local totemic clan, and that all other persons – unless expressly invited to visit them by the headman of the totemic clan – were regarded as trespassers meriting the death penalty.[22]

Strehlow believed the sections of the Ordinance that required the disclosure of objects to be an infringement of Aboriginal peoples' civil liberties and a threat to their right to freely practice their religion. He wrote:

> While the death penalty has been removed by our modern Australian laws, it is surely proper that in a country professing to guarantee religious freedom, the religious rights of the Indigenous inhabitants should be expressly protested in an Ordinance which deals, among other things, with sacred sites and sacred objects. If not only Christian churches, but also Jewish synagogues, Moslem mosques, and Masonic temples are protected against unauthorized entry and despoliation, why should not these ancient aboriginal sites be granted similar privileges? If any 'outsiders', such as missionaries, Government officials, or anthropologists wish to know something about them, surely they should carry out their researches only after they have been invited in the traditional manner by the appropriate totemic clansmen.[23]

Again, Strehlow's observations echo the kind of sentiments others were to express in later decades, when recognition of Indigenous peoples' rights emerged as a legitimate interest among some sections of the community. Ahead of his time, Strehlow's observations also presage later debates (albeit within limited circles) about the importance of obtaining prior informed consent from Aboriginal people before conducting research in their communities. He suggested that 'no person should be permitted to receive sacred objects except from their lawful aboriginal owners, and in the presence and with the approval of the remaining members of the appropriate local totemic

clan'.[24] Strehlow's critique presents a more sophisticated understanding of the inner life of Aborigines, of the interrelationships between the physical and the spiritual, and of the importance of Aboriginal culture and heritage as a 'living' force. Despite the recommendations concerning repeal of the Territory's Ordinance, it appears that no immediate action was taken.

Despite the inquiry, government officials and administrators continued to reflect on the adequacy of the Northern Territory Ordinance. The Minister for the Interior, Peter Nixon, remained relatively confident of the Ordinance's capacity to provide adequate protection for sites of importance, as he wrote to Fred McCarthy in 1969:

> Some sites have already been protected by action to place them under the provisions of the Native and Historical Objects Preservation Ordinance, and others have been included in reserves under the control of Territory Reserves Board. The Reserves Board, for example, has taken particular care to preserve the rock drawings in the caves at Ayers Rock.[25]

The Minister also indicated work that was being done on the compilation of inventories:

> As you know, work on the compilation of a catalogue of sites has been continuing for several years in the Northern Territory and a new revised list is in course of preparation at the present time. This catalogue does not discriminate in importance between sites and probably records only some part of the total number of rock painting and engraving sites in the Territory.[26]

The Minister did, however, acknowledge a need for additional protection from development, stating that 'an examination might be made of the need for special legislation to provide for the survey and rescue of material threatened by development projects'. While some Ministers were claiming the Ordinance provided satisfactory pro-

tection, in parts of the Commonwealth bureaucracy officials were increasingly aware of the limitations of the statute. As one internal minute suggested:

> ... I have examined the provisions of the Native and Historical Objects and Areas Preservation Ordinance 1955–1961 with particular regard to the provisions relating to prescribed or prohibited areas. The clear conclusion is that the Ordinance is largely unworkable, especially in relation to areas declared as prescribed or prohibited areas.
>
> ... Obviously, the Ordinance as it stands is of little help in protecting sacred sites. In the circumstances, I suggest that we arrange early amendment of the Ordinance along the lines indicated in my draft memorandum to the Administrator ... In the meantime, survey of selected sites could be made. There could also be some advantage in putting up of notices warning the public that the areas are sacred sites. The public would probably not be aware that such notices were without any legal effect and the notices would show some indication of our good faith.[27]

This was a clear statement of the inadequacies of legislation for protecting sacred sites and places. Since the beginnings of European intrusion, the newcomers had been constantly challenged and perplexed by the concepts of sacredness, and the intangible aspects of Aboriginal cultural heritage. Although many perceptive observers and writers had long understood these fundamental elements of Aboriginal culture, the legislators and administrators were grappling with them within the domain of law and policy. The administrator's acute observation that the Northern Territory law did not provide for protection of sacred sites foreshadowed what was to become (and remains to this day) an increasingly fraught area of legislative and bureaucratic activity.

Protecting place: an example from South Australia

As the debates and inquiries concerning the Northern Territory Ordinance show, protection of Aboriginal heritage raised important moral and metaphysical issues about rights, use, access and ownership. These issues became more prevalent as, over the years, other jurisdictions introduced heritage protection legislation. One example concerned a stone arrangement in South Australia, in an area that had been set aside for weapons testing. This site was the subject of correspondence in the mid-1960s from the newly established South Australian Aboriginal and Historical Relics Advisory Board, set up under the South Australian *Aboriginal and Historic Relics Preservation Act 1965*. Under this legislation, the Board sought to have an Aboriginal stone arrangement protected as a 'historic reserve'. Robert Edwards, then Director of the South Australian Museum, wrote to Dr M. W. Woods, Director of the Weapons Research Establishment at Salisbury in South Australia, informing him of the introduction of the legislation and alerting him to the stone arrangement in question:

> Professional and amateur anthropologists in South Australia have been concerned for many years about the steady deterioration of aboriginal relics throughout the State and the increasing amount of vandalism. After continuous agitation the Aboriginal and Historic Relics Preservation Act 1965 was passed by Parliament and gazetted on 3rd August 1967 ...
>
> The extensive 'Stonehenge' site, near Observatory Hill on the Emu Reserve, has been submitted as an important example of an aboriginal stone arrangement. ... The Board requests permission to declare a small area incorporating the site as an 'Historic Reserve' under the terms of the Act. This would in no way interfere with the present jurisdiction of the Commonwealth Government. ... Your assistance in these matters would be an important contribution to the preservation of what is part of our National Heritage.[28]

The Acting Chief Administrator of the Northern Territory, G. C. Agars, wrote to the Deputy Crown Solicitor on 4 January 1968 seeking advice as to what the effect would be of declaring the 'Stonehenge' site a reserve, given that the site was within 'that piece of land in South Australia known as the Maralinga Prohibited Area declared under the Defence (Special Undertakings) Act, 1952'.[29] However, as the site was found to be Crown land, it decided that the consent of the Commonwealth was not required in order to protect the site under the South Australian Act. The site was therefore proclaimed a 'Historic Reserve' on 30 May 1968, but it would still be subject to the Commonwealth's rights and powers under the provisions of the *Defence (Special Undertakings) Act.*[30] Robert Edwards described this site as 'one of the finest and most striking of its kind yet discovered'.[31] This legal debate shows the way in which Aboriginal sites, areas and objects could become entangled in the interplay of Commonwealth and State laws, and debates between different interests triggered by 'findings' of such Aboriginal cultural heritage objects, sites and areas.

Heritage as a catalogue: preservation by classification

By the late 1960s interest in the protection of Aboriginal heritage was growing, and by the end of the decade most states had either introduced protection laws or were considering doing so. In May 1968 the Australian Institute of Aboriginal Studies organised a conference on 'Prehistoric Monuments and Antiquities' in conjunction with its general meeting. The Institute's Principal, Fred McCarthy, wrote to the Minister for the Interior, Peter Nixon, drawing his attention to the current status of protection legislation throughout the country, and providing him with a copy of the recommendations from the conference.[32] The conference recommended that financial assistance should be provided for the recording and protection of sites in each State and Territory and

that 'not all sites could be preserved, but that all sites should be recorded'. It recommended that a catalogue of sites should be compiled, and a 'select list of important sites'. For the catalogue, the report outlined the following strategy:

> It is suggested that in this first stage antiquities such as rock paintings and engravings, stone arrangements, axe grooves, ceremonial and burial grounds, marked or carved trees, coastal and riverine shell and other midden deposits should be visited to obtain the basic information required for the catalogue. On the other hand, surface campsites (strewn with stone implements often among fireplaces) are too numerous to visit on a State-wide basis and require detailed local surveys to list them completely. A library survey of published records and descriptions of all sites in a State would form a basis for the catalogue.[33]

This proposal for a catalogue reinforces the notion that in their endeavours to protect Indigenous heritage, legislators and administrators approached this task encyclopaedically by listing and documenting the heritage as a way of defining it. Rather than understanding this heritage as a concept, a way of living, it seems it could only be comprehended in terms of its constituent elements. The taxonomic approach reigned throughout the entire history of heritage protection. The catalogue suggested by the Institute's conference report provides a good example of such classifying. It was also a means by which decisions were to be made about preservation. In recommending a 'select list of important sites' the report advocated that:

> The catalogue should provide, or refer to relevant reports, that will enable a decision to be made about which sites should be proclaimed, reserved and protected as national monuments, and which ones could be utilized for tourist purposes. It is becoming increasingly urgent that lists of this nature be compiled because of the remarkable growth of tourist activities, and of the need to

> exploit such sites for this purpose, and also because of the increasing danger to sites through vandalism and construction work.[34]

As was seen in some earlier writings, these comments also conjure up an image of Indigenous heritage being defined in terms of a Eurocentric hierarchy of priorities. As well, this document presents an important shift in the rationale for protection of Indigenous heritage. Although writers were, from the earliest times, concerned at the destructive potential of encroaching European settlement on Aboriginal places and objects, their primary motive in calling for preservation had often been the imminent 'disappearance' of Aboriginal culture. By the late 1960s the primary rationale for protecting Aboriginal heritage was not so much to save the physical remnants of a 'dying culture', but to prevent Aboriginal heritage from being destroyed or damaged by tourism, vandalism and development.

The next chapters will examine the history of attempts to recognise the intangible elements of Indigenous heritage.

Part III

8

Sacred Sites as Heritage

The concept of the sacred

The sacred domain in Aboriginal culture is a crucial aspect of cultural heritage. This was understood in earlier writings by Spencer and Gillen, whose ground-breaking ethnographic works laid the foundation for anthropology and Aboriginal studies throughout the century. Anthropologist Kenneth Maddock charts the anthropological usage of the concept of sacredness. Following Durkheim, Maddock outlines the nature of sacred things as being 'protected and isolated, hedged about with interdictions'.[1] The term 'sacred site' has a specific connotation, linking this quality of sacredness with place. Maddock reviews the emergence of sacred sites, and the role of anthropology in Australia. He states that 'after being coined by Strehlow and Elkin, the term "sacred site" waited almost twenty years to become prominent in anthropology'.[2] From the late 1960s, notions of Aboriginal tradition and of sacred sites became more enmeshed in law and legal discourse.[3]

From early times explorers, prospectors and others had observed and remarked on the presence of an Aboriginal sacred domain. One such person was prospector Stuart Love who recorded his comments

during an expedition to Arnhem Land in 1910. Love noted evidence of Aborigines' ceremonial practices:

> Thursday August 11th – (A great many trees along this bank for the last mile were ringed with paint at a regular level of about 5 ft. from the ground. For the first half mile of this distance they were all ringed with red ochre. Paddy [one of the Aborigines with the party] informed us that this was in honour of some dead black fellow of importance.)[4]

Although the information provided by the Aboriginal guide Paddy indicated the Aboriginal peoples' connection with the sacred, Love later sought the advice of anthropologist Donald Thomson on the meaning of the markings and, in a footnote added to his diary in 1948, he commented:

> Donald Thompson [sic] informs me quite definitely that the red ochre markings would be to remove the 'tabu' on the hunting ground of an important member of the tribe, recently dead. The 'tabu', if not lifted, would prevent any other member of the tribe hunting over that area. ... He is not certain about the white markings, but thinks that they were most probably connected with the 'White Maggot Totem', which is held in particular respect by the tribes on the estuary of the Koolatong River ... and in connection with which white markings are always used ...[5]

Love's observations of the Aborigines' marking-out of the landscape in significant ways implies recognition of the sacredness imbued in Aboriginal peoples' relationships to the land. Others, too, noted the existence of a sacred domain in Aboriginal culture. W. F. Murphy, a mining engineer who participated in a prospecting expedition to Arnhem Land in 1912 known as the Caledon Bay Prospecting Expedition, noted this in his diary. While camped near Rose River on Monday, 5 June, Murphy described an Aboriginal burial site:

> We camped last night in the vicinity of a native sepulchre which is in a cave in a cliff just opposite our camp. Its weird hieroglyphics and paintings on the walls of the cave are exceedingly interesting, the bones of the departed are deposited in dilly bags made from fibres of pandanous [sic] leaves along the ledges of the cave and on raised platforms built from the bush timber. It is customary with the natives in these parts to exhume the body of the dead some time after death when all the bones are scraped quite clean, then the disjointed frame is placed in the dilly bag which in turn is wrapped up in a layer of paperbark securely tied with string mostly made from human hair and then placed in the sepulchre or as they may be frequently seen in the bush they are jammed into the fork of a tree.[6]

Murphy's writing depicts Aboriginal cultural expressions as bizarre and exotic in his description of 'weird hieroglyphics and paintings'. Although constrained by his value-laden language and inappropriate terminology, Murphy is nonetheless clearly impressed by the powerful presence of an unseen domain of Aboriginal cultural life. It would be some decades before the idea of sacredness as a vital aspect of Aboriginal heritage would emerge more explicitly in legal and policy discourses.

Sacredness and place

The concept of sacredness could not be fathomed without regard for place, and Aboriginal people's notion of place as a sacred space was to provide a particular challenge to administrators and legislators. Although this sacred domain was not fully appreciated by officials, some anthropologists had long recognised its importance. However, the connections between place and heritage, and recognition by European-Australians of the significance of these to Aboriginal people, often only became apparent in the context of threats to specific sites or areas from development, tourism and other European activities. One example of this concerned a waterhole in Central Australia. In 1936 physical anthropologist John Burton Cleland participated in a University of Adelaide expedition to the Granites, in South Australia's Northern Territory. On his return he wrote to T. Paterson, Minister for the Interior, expressing concern about sites and areas of importance to Aborigines that he thought might be threatened by the activities of prospectors:

> Native soaks and waterholes are few. This country is traversed from time to time by prospectors. The natives in this area tend to gravitate naturally towards the settlement at the Granites where they come in contact with white people, get a certain amount of European food, put on clothes (to their considerable disadvantage), and soon become detribalised. ... Advantage would accrue if it were possible to prevent the approach of natives to the Granites and to Tanami closer than, say, 10 miles. On the other hand, such a prohibition might cut off the native soaks and ceremonial places, both of which are essential in keeping the native alive and preventing his detribalisation.[7]

Cleland was particularly concerned about a waterhole site that he thought had special significance to the Aborigines, and which was threatened by the activities of a prospector and pastoralist named Braitling:

> I understand that Mr Braitling has taken out under the Mining Act the right to the waters of a place called Tjilla (Jilla). This name means *The* Spring, indicating that it is one of the most important waters to the natives, and it is also an important native totemic centre. As there is no mining in the neighbourhood and as this is a native water, it does not seem clear why this permit was granted. Having been granted, I do not know whether under the Mining Act it can be revoked. I presume the permit has to be annually renewed, and as there seems to be no reason under the Mining Act for granting it, I would recommend that it be not renewed at the end of the year. I understand that he [Braitling] has timbered this water

hole. It is very necessary to see that no interference is made with the natives in their access to the water.[8]

Here Cleland highlights not only the importance of water as a natural resource vital for the survival of Aboriginal people, but of waterholes as places of profound spiritual significance. Significance here is constructed within a domain of threat – in this case, by pastoralists' activities. In the coming decades sacred sites were to become a matter for considerable attention by government officials and others.

Recording sacred sites

As earlier chapters showed, a growing consciousness emerged in bureaucratic and administrative circles of a need to document and protect Aboriginal sacred sites. This need assumed a greater urgency in the mid-1960s, prompted by bauxite mining interests in the Northern Territory, in Queensland and in Western Australia. The claims of Aboriginal people became more prominent in the public arena in 1963 when the Aboriginal people of Yirrkala, on the Gove Peninsula in Arnhem Land, sent a writ to the government expressing concerns with the proposed bauxite mining and exploration interests. That writ and a subsequent inquiry by the Parliament were key factors in encouraging the urgent recording of sacred sites and discussions about protection. In 1964, partly in response to the events at Yirrkala, Ronald and Catherine Berndt, who had been conducting research in that area for many years, carried out a survey of sacred sites. Ronald Berndt explained this work:

> My aim is simply to demonstrate the major importance of certain sites which are an integral part of the religious system of these people and represent, in visible and tangible form, their traditional heritage. Further, arising from the consideration of this is the significant question of Aboriginal land rights.[9]

The Berndts' survey was an important basis for discussions on sacredness and sacred sites, especially by administrators and politicians. These discussions in turn were critical in debates on protection and preservation. The Berndts' survey was expanded over the years, and prompted a discourse that became focused on matters such as the actual status of particular sites, the kinds of sites that might be included in surveys and lists, and the range of options for protection. The following 1968 exchange between responsible Ministers conveys the flavour of some of these discussions:

> For the past eight years the Northern Territory Administration Welfare Branch has been compiling information on sites of Aboriginal interest, particularly those containing rock paintings or engravings. A list of known paintings and engravings produced in January 1968 is attached for your information. ... The information in the list relates to important traditional sites some of which might be regarded as semi-sacred only. The status of the site, insofar as an Aboriginal group is concerned, is used as a guide to the action that should ultimately be taken in respect of the preservation of the site. Where there is a risk of sites being damaged or destroyed action has been taken to protect and preserve them. A substantial number of sites in the attached list is afforded some reasonable protection because they are within Aboriginal reserves.
>
> A difficulty in giving the sites the status of protected or prohibited sites under the appropriate Northern Territory Ordinance is that an exact survey is a prerequisite for this purpose. Survey work has been carried out on certain sacred sites on Gove Peninsula and eventually these sites will be gazetted either as prohibited or protected sites. It is intended to include local Aboriginals either as rangers or persons authorised by the Administrator to give permission to enter a prohibited area. ... Apart from painting and engraving sites there are many other sites of Aboriginal interest in the Northern Territory which could be listed and given some form of protection. Some of these, of course, such as natural features, may have no interest at all for non-Aboriginals.

> The task of identifying and recording all sites in the Territory is a major one which will take a long time and, in my view, calls for certain skills and experience.[10]

This detail illustrates the way in which bureaucracy approached Aboriginal heritage protection through a systematic classification and taxonomy of sites. Here we see a description of this kind of ordered process of listing and compiling, categorising and classifying, and a proposal for a program for surveying identifying sites for protection. All these activities, the writer states, required certain kinds of expertise – thereby foreshadowing the introduction of an authoritative structure within which certain experts would manage, control and determine the existence and management of Aboriginal heritage. This description also established a duality of roles for, and values held by, Aborigines and non-Aborigines respectively. The Aborigines, whose heritage was the object of this elaborate system of control and management, would, in this scheme assume a subsidiary role to the white administrators and bureaucrats. While purporting to allow Aborigines the right to 'give permission to enter a prohibited area', the plan envisaged that ultimate authority rested with the Administrator. Aborigines may also act as rangers – a role in which they might have the opportunity to apply their customary knowledge of, and practices relating to the sites and areas – but within a system that was controlled by predominantly non-Indigenous administrators and bureaucrats. It is worth noting, too, that the writer suggests some sites, 'such as natural features', 'may have no interest at all for non-Aboriginals'. There is in this comment a notion that there are discrete Aboriginal and non-Aboriginal domains of interest relating to sites of significance. Curiously, 'natural features' that may be of interest to Aborigines were assumed to be of no interest to non-Aborigines. What, then, of natural features that were considered to be worthy of preserving in national parks and the like as 'natural heritage'? Were these likely to be of no interest to Aboriginal peoples? These assumptions about

Indigenous and non-Indigenous heritage create false dichotomies that further serve to diminish Europeans' capacity to understand the totality of Aboriginal heritage, while also cramping the opportunity for Aboriginal people to have control over protecting and defining their heritage.

The role of the expert: anthropologists, administrators and Aborigines

Other writers seemed to understand better the value of enabling Aboriginal people to take a more significant role in the recording and protection of their sites. In 1968 Fred McCarthy wrote to the Minister in charge of Aboriginal affairs, W. C. Wentworth, outlining some elements of types of sites and detailing some aspects of their recording and preservation:

> The Welfare Branch in Darwin has a catalogue of rock paintings and engravings, and stone arrangements, in the Northern Territory, of which it has issued roneoed lists. Macassan camps, excavated prehistoric deposits and other sites are included in the lists ...
>
> It is probable that every social anthropologist who has worked in the Northern Territory has some notes on sacred places in the mythology and ritual data recorded, but the information is scattered through notebooks. Unless the plotting of the sites by them was extensive a new survey would be necessary in each area ...
>
> ... The work involves traversing the whole of the territory of clans/local groups with Aboriginal men who still know the sacred sites, the most numerous of which are the natural rocks, hills, trees, waterholes and the like. An anthropologist would need to spend up to six months with one group visiting their sacred sites with guides to record case histories of them in the context of the mythology of the group. Over 100 named tribal groups are represented in the Territory each with a large number of clans (many no longer exist), and it is obvious that many years of research are involved in the total project. Further, as the Aborigines have left their tribal terri-

tories to live on government and mission settlements, cattle stations and elsewhere, and many of them no longer visit these sites, only a partial map may be compiled.

... To short-circuit the time involved in recording the mythology, the Aborigines could be asked to supply the names of the sacred sites for mapping purposes, and this procedure would be justified for administrative purposes. Many of the sacred places are revealed as the Aborigines relate their mythology about totemic and spirit centres and the travels of their spiritual ancestors, but the site would have to be visited to be mapped.

I have stressed the scientific value of mapping sacred sites in my address to the general meeting, May 1968, of the Institute, and in other documents circulated to our members. Inquiries have revealed that social anthropologists will study Aboriginal religion, mythology and songs, and the relevant ceremonies, in a theoretical context, but they are not interested in straight out mapping and listing of sacred sites as this work does not merit higher degrees. Strehlow is an exception, but his mapping of place and sacred site names is part of a lifetime's study of Aranda culture.[11]

Although McCarthy seemed to describe a greater role for Aborigines in the work of surveying and recording sacred sites, ultimately it was the anthropologists who, in his approach, still held the authority over this work. While Europeans were busy surveying, recording and listing Aboriginal sites, it was not apparent for whom this work was being carried out. Was it for the benefit of the Aboriginal people, or in the interests of western science? Were these sites thought of as elements of national heritage? Some of these issues are illustrated in a Department of the Interior memo from the Northern Territory Administrator to a Mr Donovan, which sought to provide a typology of sacred sites:

> One useful distinction could be made between sites which we wish to preserve for our own reasons, regardless of Aboriginal views, and sites of special interest to Aboriginals. In the first category come all,

> or virtually all, rock painting and engraving sites i.e., the sites, and others like them, listed in the Welfare Branch check list. Generally these do not appear to be sites which come to Aboriginal minds when one enquires about sacred sites. At Groote Eylandt for example the two places the Aboriginals insisted must remain inviolable would be of no interest to non-Aboriginals, being natural features of no special interest. Burial caves and areas are of interest to skull-measurers and souvenir hunters and generally Aboriginals show some concern that they are not disturbed. Probably relatively few of the painting galleries would be regarded by Aboriginals as especially sacred.[12]

The writer went on to suggest that other attempts to classify sacred sites tended to be too inclusive:

> Definition of what constitutes a sacred site is difficult. Professor Berndt, in his survey of the Gove Peninsula area and in his address to the AIAS meeting last May seems inclined to put virtually every locality with mythological associations in this category. The recording of all such sites would not just be a long, expensive and difficult task, it would be impossible for all practical purposes.[13]

Notwithstanding this difficulty, the task would be more feasible if sites were faced with threat of desecration or vandalism, as the writer put it:

> Location of areas of special significance to Aboriginals or of scientific etc., interest in limited areas which are in some way threatened by development – whether mining, tourist, residential or whatever – is difficult but not impossible.[14]

Like bureaucrats, Ministers were also grappling with issues of categorisation and measures for protection of sacred sites. Their concerns were equally quantified in terms of available resources, time constraints and practicality – but with more of an eye to the political scene. The Minister in charge of Aboriginal affairs, Bill Wentworth, wrote to his colleague Peter Nixon, Minister for the

Interior, in May 1969, enclosing a copy of the Berndts' Gove site survey report:

> I think the report illustrates the difficulty and complexity of this whole matter. I note that it was made some three years ago and it may not be adequate towards meeting the present situation. It does, however, seem to me to be a very worthwhile job ... This whole subject is going to cause great difficulty not only at Gove but throughout the whole of the Northern Territory both because the accounts given by Aboriginals themselves in good faith may not always be coherent (and, indeed, sometimes may be in conflict) and also because of the tendency amongst Aboriginals to exaggerate for political purposes or simply to inflate importance beyond what is justified.[15]

This comment reifies the kind of pejorative views that questioned the veracity and validity of Aboriginal perspectives. Sadly, even to this day this kind of rhetoric enables those in power to sustain their supremacy over Aboriginal peoples' narratives, and to legitimate their denial of Aboriginal peoples' control of their own heritage.

A greater role for the Commonwealth

By the late 1960s the shape of Aboriginal affairs administration was changing dramatically. A referendum in 1967 had resulted in an amendment to the Australian Constitution that gave the Commonwealth Government greater control over the administration of law and policy for Aboriginal peoples and Torres Strait Islanders. Following this, the Commonwealth Government established a Council of Aboriginal Affairs (CAA) which reported to a newly established Office of Aboriginal Affairs within the Prime Minister's Department. This new structure enabled a greater focus on Aboriginal affairs generally, and also provided a milieu within which Aboriginal cultural aspects could be given a higher profile. One consequence of the new structure was a converging of interests in

Aboriginal arts with those in land, sacred sites and heritage protection. The chairperson of the CAA was H. C. ('Nugget') Coombs, who had long held an interest in Aboriginal art, and was a strong advocate for Indigenous rights among his many other high-profile activities. By the late 1960s officials were becoming increasingly interested in the idea of legislating for protection of Aboriginal art. Unusually for that time, there was a proposal to develop legislation that would protect both art *and* sacred sites at the one time. This was outlined in 1969 by Coombs in a proposal to Wentworth:

> The Aboriginal people of Australia have a unique tradition and practice in the arts including –
>
> - Painting and sculpture
> - Ceremonial, drama, and dancing
> - Weapons and other artifacts
>
> In the main these arts are closely involved with the activities and ceremonies of their tribal life and therefore are threatened by changes taking place in the economic and social pattern of their lives. It would, however, be a great loss not merely to the emotional and cultural life of the aboriginal people but to the whole Australian community if these arts were to be lost or to be wholly depreciated. Nevertheless it is unlikely that they will preserve their freshness and vitality on which much of their quality depends if they are preserved simply as museum relics or if they become a depreciating adjunct to the tourist trade.[16]

Coombs' proposed legislation would serve to:

- establish property rights in certain works of art, designs, areas of religious, ceremonial, ritual, artistic and tribal significance to the aboriginal people;
- vest these property rights in a Trustee and by his delegation to corporate bodies;

- provide for the protection, development and, where appropriate, economic exploitation of these property rights in the interests of the aboriginal people;
- provide for the preservation and development as living arts the traditional arts and crafts of the aboriginal people;
- protect the work of aboriginal citizens in these arts from imitation and unreasonable commercial practices;
- provide aboriginal artists and craftsmen with effective marketing opportunities for their products.[17]

Coombs went on to explain:

> For this legislation to be effective, however, requires in the Council's opinion a study of the present state of these arts and the development of a conscious strategy for preserving them as an integral part of the lives of aboriginal citizens and of enabling them to adapt, without breach of tradition or continuity, to the changing content of those lives. This may, of course, raise the difficult question of whether aboriginal ceremonial life and the traditional social purposes and disciplines which it expresses, can retain any sense of reality in contemporary Australia.
>
> The Council wishes, therefore, to establish a committee to study the present state of the arts and crafts of aboriginal peoples of Australia and to recommend policies designed to preserve and develop them as significant elements in the cultural life of the Australian people generally.
>
> ... The Committee should have power to co-opt for the whole or part of its deliberations aboriginal Australians active in their arts or crafts or concerned with their ceremonial or other significance in tribal life.[18]

The legislation would enable the following to be designated as 'Traditional Aboriginal Property':

- work of art
- ritual, ceremony, dance or drama
- record in any form of such ritual, ceremony, dance or drama

- design
- area of land

The proposed legislation would define such 'Traditional Aboriginal Property' as follows:

> to be a traditional aboriginal property: provided that it shall so recommend only when it is satisfied after due enquiry that the property concerned by tradition is and/or has been identified with and is and/or has been of cultural ritual, artistic or similar significance to a tribal group or groups of aboriginal Australians.[19]

This was a far-reaching proposal, seemingly designed to capture the intrinsic connections between art, land and sacred sites, and to recognise these as integral elements of a category designated as 'Traditional Aboriginal Property'. At the same time, and within the same spirit, there were also debates about the inadequacies of laws in protecting the rights of Aboriginal artists, and the levels of royalties that should be paid to those artists. One example of these debates is contained in correspondence from Barrie Dexter, in charge of the Office of Aboriginal Affairs, to the Department of the Interior in September 1968. Dexter wrote:

> You will recall that since the meeting of the Standing Committee of Officers in 1966 consideration has been given to the question of royalties on Aboriginal songs, dances, music, etc. ... Action was first taken by the former Department of Territories and more recently this Office has been pursuing the matter. ... The Council for Aboriginal Affairs considers the position unsatisfactory. It proposes shortly to have this Office conduct a study of possible ways of preserving Aboriginal arts and crafts as living activities. Part of that study will be considering possible ways of establishing property rights for individual Aboriginals and ethnic groups in design, music, artifacts, etc. and of protecting such property rights to ensure that commercial benefit is reserved to those in whom property is vested.[20]

In the next decades these debates would continue, and, influenced to some degree by international developments, would also search for new language with which to articulate these 'property' rights of Aboriginal peoples. The following chapter surveys these attempts to define and incorporate Aboriginal intangible property into the legislative and policy arenas.

9

Writing Heritage as Property

Debating property: different laws, different concepts

The emerging concerns by administrators, policy makers and academics over protection of Aboriginal art, and the connections that some people recognised between art and sacred sites, marked a shift in focus to intangible aspects of Indigenous heritage. They also signalled a focus on the question of whether the European concept of property was properly applicable to Aboriginal culture and heritage.

The suggestion that some kind of property rights were fundamental to Indigenous cultures had been articulated by Strehlow in his submission to the 1965 inquiry into the Northern Territory Native and Historical Objects and Areas Preservation Ordinance 1955–1960 (see above). Other observers, writers and ethnologists had commented at times over the decades on the notion that Aborigines had property rights in certain areas, sites (such as ochre quarries) and objects. But this idea was not yet readily accepted or understood by the dominant political and legislative system.

The Yirrkala writ in 1963 showed that Aboriginal people were by now increasingly politicised, were asserting their rights and interests in land, and demanding their right to participate in the political

process. Developments during the 1960s and 1970s culminated in the Gove land rights decision by Justice Blackburn of the Northern Territory Supreme Court in 1971.[1] Although that decision failed to uphold the claimants' Aboriginal property rights in land, it nonetheless paved the way for a series of developments that eventually resulted in the country's first law recognising Aboriginal peoples' rights to land in the Northern Territory in 1976. Land and property were now firmly on the political and administrative agenda for discussions and debates in Aboriginal affairs. This was an important achievement, but there remained unresolved some difficult questions regarding the nature of Indigenous property rights, and especially concerning the kinds of rights that vest in the intangible aspects of Indigenous culture.

Protecting the unseen

By now many Europeans were aware that there was a domain of cultural heritage that, while not visible to the casual eye, was no less fundamental to Aboriginal culture and society. Among the most frequently observed expressions of this unseen world were performances of ceremony and song, dance and various forms of ritual behaviour. While mostly respectful towards such performances, Europeans found aspects of these, and other areas of Indigenous cultural life, to be imponderable. The term 'cultural and intellectual property' is sometimes used today to refer to these aspects of Indigenous culture, particularly to those elements that do not strictly encompass land, and cannot be clearly identifiable within the rubric of 'relics' or 'antiquities' – to use the language of earlier debates. Underpinning cultural and intellectual property is the concept of 'property', which itself may provide a key to elucidating links between heritage, land and the invisible, spiritual life of the Aborigines.

Exploring Yolngu concepts of property

In debates and discussions on land and sacred sites it was not clear to policy makers, legislators and others who were grappling with these issues whether the notion of 'property', as this was understood in a conventional legal sense, was readily applicable to Indigenous cultures. In the Gove decision, Justice Blackburn found that the Aboriginal plaintiffs had a profound relationship to their land, but that this was not, in these circumstances, construable as a 'property right' in the commonly understood western legal sense.[2] The judge also found that the clan – the primary Aboriginal land-owning group – could not be considered a corporate entity for the purposes of holding property rights. However, where the legal system was at that time unable to accept that Aboriginal land-owning groups could hold property rights in land, in the views of some anthropologists such group rights were clearly discernable in Aboriginal societies. Anthropologist Nancy Williams, for example, claims that the judge 'never saw the clan as more than an indeterminate collection of individuals, and no statute provided for the vesting of title in such a collectivity'.[3] After examining Yolngu concepts relating to title, possession, and occupation and use, she concluded that 'the Yolngu system of land tenure is characterised by groups which, in terms that common law can comprehend, are corporate with respect to their interests in land, and that those interests are proprietary'.[4] Williams suggested that the problem lay in cultural translation, arguing that 'seen in historical context, English concepts of ownership, interests in land, suggest that the concepts themselves are at issue, rather than whether Yolngu concepts can or cannot be equated with common law concepts'.[5] This problem of translating Indigenous concepts into a language familiar to western law and policy lies at the heart of any discussion about recognising Indigenous cultural heritage as a whole system, rather than as a series of discrete components. The formulation and administration of the

Aboriginal Land Rights Act illustrates some of the problems in the cross-cultural translation of concepts, categories and behaviours (such as humans' relationships with land and environments).[6]

Property and Indigenous cultural heritage

The western legal concept of property is based on the notion of individual (or legally defined corporate) rights and ownership. Yet the terms 'cultural property' and 'intellectual property' are often used to denote aspects of Indigenous cultural heritage underpinned by various kinds of group rights. How can a legal system based on principles of individuality accommodate difference and recognise the rights of certain kinds of groups that cannot be easily translated into the required legal concepts?

A firmer understanding of Indigenous notions of heritage may be achieved by understanding such group rights, and finding an appropriate language within which Indigenous concepts can be properly accommodated in western law and policy. Critic Amanda Pask suggests that a shift in terminology from 'cultural property' to 'cultural heritage' might provide a context in which cultural property law becomes more amenable to appreciating the intangible components of heritage.[7] As Pask suggests, the term 'cultural heritage' conveys more of a sense of a cultural whole than does 'property'. In her view this unity, or 'community', is fractured and fragmented by western legal systems in which the various fragments are denoted by labels such as 'cultural property':

> The unity of the issues with which this discussion began – the appropriation of Native intellectual property, cultural property, land and bodies – lies in the preservation and production of communities, indeed of nations. The blindness of the legal system to this unity, apparent in the fragmentary and fragmenting character of its responses, is both to Native peoples *as* communities, that is, the questions of standing at international law, and in domestic law the inability to account for anything between the individual and the universal 'public', *and* to the dynamic character of the links which constitute community, apparent in the refusal to see culture as communication rather than as information.[8]

Other writers have also highlighted the ways in which western legal discourses fracture the unity of Indigenous cultures.[9] For example, Aboriginal writer Henrietta Fourmile suggests that 'all current Aboriginal heritage legislation, from an Aboriginal viewpoint, is defective in serious ways'.[10] She draws attention to the ways in which the legislation and administration of Indigenous heritage results in fragmentation of this heritage:

> While particular pieces of legislation are required to protect and foster what might be loosely referred to as the 'artistic' aspects of non-Aboriginal culture, one of the consequences of responsibility for the maintenance of Australia's cultural heritage being divided up and given under legislation to various authorities is that likewise major parts of our heritage are similarly divided up and administered under different departments. While this situation might be appropriate for the wider society it has the effect of dismembering Aboriginal cultures and results in the marginalisation of our concerns within the institutional structures of the dominant society. We lose control, we cannot assert our priorities, and we are unable to effectively command and manage our own cultural resources.[11]

Fourmile's critique highlights ways in which legislating for Indigenous heritage has fractured what is meant to be protected. The next chapter further explores this fragmentation, then reviews some possible attempts to restore this heritage as a whole cultural system.

10

Making it Whole Again: Towards an Inclusive Heritage?

For most of the twentieth century Europeans saw, recorded and commented on stone and wooden weapons, utensils and implements; on artistic products including rock engravings and paintings and bark paintings; and on expressive aspects of Aboriginal culture such as dance and ritual performances. For the most part they wrote as though the particular element they were describing was a discrete entity, unrelated to other aspects of Aboriginal culture. Although they could generally only see parts of a whole cultural system, from the early part of the century some Europeans also recognised that there were other, perhaps deeper aspects to the observed objects, behaviours and performances, and that these spoke of another dimension to Aboriginal life. The existence of this intangible aspect – what might be termed 'the sacred' – was acknowledged by a few writers at times throughout the century. It was not until the later part of the twentieth century, however, that writers and observers began to recognise that these different aspects of Indigenous heritage – the physical and the intangible – were inextricably linked. Also at this time there emerged a growing consciousness of the importance of protection for cultural heritage in a wider sense, and of this

heritage comprising a wider range of aspects of Indigenous culture than had previously been thought.

One of the challenges to understanding heritage as an inclusive concept was to find a language to describe both its tangible and intangible aspects. The attempts to develop ways of protecting the Aboriginal arts and crafts industry illustrate some of these challenges. The growth in the Aboriginal arts industry through the 1960s and 1970s had prompted debates about how to protect the rights and interests of the artists to ensure that they received adequate returns for the sale of their works, and to promote the maintenance of high quality art. The struggle was to develop the Aboriginal arts industry as a viable economic entity that would allow artists to reap the financial benefits, while also recognising the need to sustain this art as an integral part of Indigenous cultural heritage. The proposal for 'traditional properties' legislation by the Council for Aboriginal Affairs in 1969 was an early attempt to draw together some of these threads. Although that proposal did not proceed, acknowledgment of the need for such legislation remained, at least in some circles.

In 1981 there was a further attempt to legislate to protect a body of Indigenous cultural products, expressions and performances, this time under the terminology of 'Aboriginal folklore'. Once again, this initiative arose from within the arts-related domain of Aboriginal affairs. This development had begun in May 1973, with a National Seminar on Aboriginal Arts held in Canberra that resolved:

> That the Australia Council's newly formed Aboriginal Arts Board should initiate procedures which would enable each tribal body to protect its own particular designs and works and to strictly control the use of them by non-Aboriginals.[1]

Following that resolution, a Working Party was established, initially within the Attorney-General's Department, to 'examine the nature of legislation required to protect Aboriginal artists in regard to Australian and international copyright'. The first meeting of the

Working Party was held on 28 October 1975. By 1979 'it became clear that substantial issues beyond copyright were raised', and the Working Party was eventually transferred to the Minister for Home Affairs and Environment. The Working Party then 'directed its attention to the nature of Aboriginal folklore and to finding an appropriate way of protecting it'.[2] Among the matters the Working Party was to consider were 'legislative protection of Aboriginal artists and folklore', 'special protection for certain types of works such as sacred-secret materials', and 'matters of proof and the relationship between Aboriginal and Commonwealth laws'.[3] The impetus for the Working Party's inquiry came from the growing number of instances of unauthorised use of Aboriginal art and designs. As the Working Party Report explained:

> There has been widespread use of Aboriginal designs taken from original works by Aboriginal artists. Reproduction for commercial purposes has included the manufacture of tea-towels, wall-hangings, postcards and a range of souvenirs. In the majority of these instances the artist's consent to reproduce was not obtained and no royalties were paid. Some of the motifs were of a sacred nature and their reproduction caused grave offence not only to the artist but to particular Aboriginal groups. Although there have been instances of communications between commercial enterprises and Aboriginals or communities concerning the payment of royalties for the use of Aboriginal designs and works this has not been common practice.[4]

The Report outlined the nature of the problems raised by this exploitation of Aboriginal art:

> The resolution passed by the National Seminar was based on the principle that the traditional arts and crafts of the Aboriginal people are their own cultural property from which they should benefit and which they should be able to control. The question of translating such a principle into Commonwealth law raises issues concerning every facet of Aboriginal cultural expression:

- How are such expressions to be defined and categorized?
- Which uses are to be permitted or forbidden?
- Would the principles of copyright and design law provide a protection?
- Would additional legislative sanctions be necessary to ensure an effective scheme?[5]

In discussing the 'nature of Aboriginal folklore', the Report considered several aspects. These included: the 'Dreamtime' (more commonly called 'Dreaming' today) as a reference that sanctions Aboriginal beliefs and actions; the transmission of 'themes through Aboriginal folklore' over generations; societal rules governing the creative process; the sacred qualities of some Aboriginal folklore; and the complexities of ownership in Aboriginal societies. The Report also discussed the important issue of 'ownership':

> Although the nature of 'ownership' is complex in both Aboriginal and Western societies, a general difference between them is discernible. Whereas in Western society ownership of a work of art may usually be transferred from one individual or group to another by a commercial transaction, in Aboriginal society differentiated rights over a work of art are generally distributed over several individuals and groups of individuals.

The Report concluded that 'particular patterns of rights over cultural property vary from place to place. In some cases rights may be vested in clans; however, these rights may reside with other groups or individuals depending upon local traditions.'[6] This indicates a relatively sophisticated understanding – possibly influenced by anthropology – of some of the complexities of Aboriginal cultures and societies.

Another matter the Working Party discussed in its Report was the concept of 'folklore' itself. Although aware of the problem of using the term 'folklore' to refer to a body of Aboriginal beliefs,

traditions and practices, the Report maintained use of the term, as it explained:

> Use of the term 'folklore' recognises that traditions, customs and beliefs underlie forms of artistic expression, since Aboriginal arts are tightly integrated within the totality of Aboriginal culture. In this sense folklore is the expression in a variety of art forms of a body of custom and tradition built up by a community or ethnic group and evolving continuously.

The Report acknowledged that 'the word "folklore" in the proposed legislation could be subject to several misinterpretations'. Explaining this further, the Report went on:

> The word is not used narrowly to refer to oral literature only, as it is sometimes used. Nor do we mean to imply that Australian Aboriginals possess a rudimentary, unsophisticated artistic tradition; nor that Aboriginal artistic traditions are static or even dead, when in fact they are constantly renewed; nor that Aboriginal 'folklore' bears a close historical relationship to surrounding artistic traditions similar to that found, for example, in Europe or South America.

Despite this range of possible uses inappropriate to Aboriginal culture, the Report justified its decision to adopt the term 'folklore':

> Notwithstanding the influences on each other of Aboriginal and non-Aboriginal traditions in Australia, we recognise that Aboriginal arts constitute a distinct and sophisticated tradition in its own right. Nevertheless the word 'folklore' has been adopted as a compromise meeting the conceptual and international legal requirements for such a term.[7]

In deliberating the nature of proposed 'folklore' legislation, the Report discussed the apparently competing objectives of preserving 'folklore' as part of a continuing tradition, and encouraging the economic interests of Aboriginal artists.[8] The proposed Act would also establish a mechanism in which claims by Aboriginal people

regarding use, or possible use, of their 'folklore' could be assessed and recommendations made to the relevant Minister. An advisory body ('the Aboriginal Folklore Board') would also be established.[9] The Working Party Report and its proposed legislation were brave attempts to define and protect a body of Aboriginal cultural expressions, ideas and practices as a whole entity. By proposing a scheme by which Aboriginal people would be compensated for the use of their 'folklore' through receipt of benefits, the Working Party foreshadowed suggestions and proposals that were still only at the discussion stage many years later. Although the use of the term 'folklore' was problematic, the model was advanced for its time.[10]

Breach of trust: Mountford's indiscretion

That Indigenous peoples had certain rights in designs, images, and secret and sacred aspects of their cultures had been recognised by some European writers and observers over the decades. At the same time, there was also a growing realisation of the importance of respecting these rights in practice and in relationships with Aboriginal people 'in the field'. This was especially important in the context of observing and recording sacred and secret sites, ceremonies and objects. Instances in which Europeans had explicitly ignored Aboriginal peoples' rights, and shown lack of respect for their customary rules and protocols regarding their culture, are too numerous to mention. The theft of *tjurungas* by members of the 1894 Horn Expedition was just one example of this cultural exploitation. Another instance came to public attention during the 1970s, although the events that led up to it had occurred some decades earlier, in the 1940s.

In 1940 Charles Mountford travelled through Central Australia recording aspects of Pitjatjantjara and Jankatjatjara culture. At the time it seemed that the Aboriginal people among whom Mountford had worked had taken him into their confidence. They 'showed him

and explained to him sacred sites and objects, paintings and rock engravings, and he recorded their myths and totemic geography by aboriginal drawings, the camera and the notebook'.[11] Mountford later published the results of his studies in his 1976 book, *Nomads of the Australian Desert*. In that same year, in the Northern Territory Supreme Court, Justice Muirhead heard a case in which representatives of the Pitjantjatjara people sought an injunction to prevent Mountford's book being sold in the Northern Territory. The plaintiffs claimed that the publication and display of information they had given to Mountford in confidence during his visit to their country in 1940 was a clear breach of the trust with which they had provided the information. Justice Muirhead found that this information had 'deep religious and cultural significance' to the plaintiffs. He found that 'some of the matters hitherto secret are revealed in the book, and that this had caused dismay, concern and anger'. 'The revelation of the secrets to the women, children and uninitiated men', Muirhead said, 'may undermine the social and religious stability of their [the plaintiffs] hard-pressed community'.[12] Since Mountford declined to withdraw the book from sale, the judge granted an injunction to the plaintiffs to allow them to prevent the sale of the book. That case was significant in that it was one of the first instances in which Aboriginal people had brought to the courts their rights to protect the sanctity of their culture.

The court case *Foster v Mountford* also established the by now firm realisation that the visible or tangible manifestations of Aboriginal culture and heritage were closely interrelated with the intangible, and that these components were nested within a complex cultural system. For many decades these interconnections had often been articulated solely with regard to art. The next years were to see a critical re-evaluation in which Aboriginal art works came to be viewed increasingly not only as objects of aesthetic interest or as physical things. The designs and images in these works were now also being considered for what they might reveal about Aboriginal

peoples' special connections to country, and their ritual and spiritual lives. For example, Fred McCarthy wrote in the third edition of his book *Australian Aboriginal Rock Art* in 1979:

> The Aboriginals' aesthetic self-expression is culturally conditioned. Sources of inspiration are derived from their religion with its dynamic and absorbing rituals, their mythology of bush spirits and folklore about colouration, shapes and habits of animals, magic, death and its threat to group unity and safety, tribal laws and discipline laid down by the ancestral spirits of the Dreamtime, economic life, fighting, and aesthetic impulse.[13]

McCarthy recognised the cultural and heritage values in art, stating that 'the Aboriginals utilise art in many ways to perpetuate ideas and tribal knowledge'. He wrote that 'art is an essential ingredient of Aboriginal life, with both psychological and ritual values, and is not pursued mainly for art's sake and certainly not for wealth'.[14]

Protecting art as 'intellectual property'

The 1970s was a crucial decade in terms of a growing realisation by Europeans of the dangers of unauthorised uses of Aboriginal cultural products and expressions. By the beginning of the new decade the Report of the Working Party on the Protection of Aboriginal Folklore, and the case of *Foster v Mountford* had created a milieu in which the need for a closer look at ways of protecting Aboriginal culture was becoming critical. The legislation proposed by the Working Party did not proceed, and yet again Aboriginal people faced a growth in the exploitation of their cultures. Given the popularity of Aboriginal art, the exploitation of this domain of Aboriginal cultural activity brought the problems of protection to public attention over ensuing decades. Developments during the 1980s and 1990s highlighted the need to protect these works of art not only as physical objects of aesthetic interest, but, perhaps more

importantly, as expressions of Aboriginal peoples' spiritual and cultural life. During this period conventional intellectual property rights law – mainly copyright and breach of trust – was used several times by Aboriginal people as a means of seeking redress for the inappropriate uses of their traditional designs and images. Traditional clan-based designs and images were being reproduced indiscriminately on tea-towels, currency, carpets and tourist souvenirs by an ever-hungry market and its suppliers and agents. The wronged Aboriginal artists used copyright and trade practices law to claim damages and to assert their cultural rights in their designs and images.[15] The use of these intellectual property laws was effective in bringing the problem of infringement of Aboriginal cultural rights to the attention of policy makers and legislators, and in extending the interpretation of existing intellectual property law. But it left unresolved the deeper problem of providing effective recognition and protection for a class of specific Indigenous cultural rights as yet unacknowledged. Although framed within the discourse of 'intellectual property', what Indigenous people were seeking to protect was their cultural heritage.

Legislating heritage: the 1980s

The 1967 referendum that gave the Commonwealth Government constitutional power to enact legislation for Aboriginal people was a major turning point in Aboriginal affairs. It was instrumental in enabling significant legislation to be introduced over the ensuing decades. The *Aboriginal Land Rights Act 1976* (NT) was one important step in the legislative protection and recognition of Aboriginal culture, acknowledging land as the foundation for Aboriginal peoples' maintenance of their culture and identity. Legislation for national protection of Aboriginal and Torres Strait Islander heritage had still to be achieved. Such an Act eventually became law with the passage of the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984*. This Act enabled the Commonwealth Government to protect significant Aboriginal and Torres Strait Islander sites, areas and objects for which state and territory laws were unable to provide effective protection. The Commonwealth Act was used as a 'last resort', where state and territory protection laws had proved inadequate, and it allowed for temporary protection by means of declarations over areas, sites or objects that were faced with threat of injury or desecration. This Act was subject to a comprehensive review in 1996 by Justice Elizabeth Evatt. During the mid- to late 1990s the Act came increasingly into the public arena as a result of several high-profile cases involving sites or areas that were subject to claims for protection. One of these cases in particular, known as the Hindmarsh Island Bridge case, highlighted powerfully some of the major flaws in present laws for protecting Indigenous heritage. Partly in response to the Hindmarsh Island Bridge case, as well as to the Evatt Review, the Commonwealth Government commenced its own review of the Act in 1996, which resulted in a series of proposals for comprehensive amendment. That process had not been completed as this book went to press.

By the 1980s there were other Commonwealth laws that could be used to protect certain aspects of Aboriginal and Torres Strait Islander cultural heritage. One of these was the *Protection of Movable Cultural Heritage Act*, introduced by the Commonwealth Government in 1986. This Act was enacted as Australia's fulfilment of its international responsibilities under the 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illegal Import, Export and Transfer of Ownership of Cultural Property. The *Protection of Movable Cultural Heritage Act* was designed principally to prevent the illegal export and import of items of 'movable cultural heritage'. The introduction of this Act had been preceded by a series of inquiries and reports into aspects of Australia's heritage, including a 1974 inquiry into the National Estate and a 1975 inquiry on

Museums and National Collections.[16] The outcomes of those inquiries gave further impetus to the growing acceptance of a need to protect national movable cultural heritage, including the concept of a National Register.

A review of the *Protection of Movable Cultural Heritage Act* in 1991 defined 'the cultural heritage of humanity' as 'any manifestation of cultural activities which has survived from the past'.[17] The protection of Aboriginal cultural heritage is mentioned:

> Australian Aboriginal heritage is particularly precious – because it is so valuable to contemporary Aborigines and their culture and, increasingly, to non-Aboriginal Australians, and also from a scientific viewpoint, in which it can tell us about the way humans lived in the past.[18]

In 1988 Cabinet had approved amending Regulations to this Act which established a control list of categories of Australian protected objects.[19] Categories of heritage are defined in terms of their suitability for export, and the extent to which permits may be required in order to export or import them. The 1991 review brought to light further considerations about the nature of heritage, and discussion about the control list.[20] The review report recommended, among other things, that Aboriginal sacred and secret material should be classed as prohibited from export, explaining that:

> Given the importance of sacred and secret ritual material to contemporary Aboriginal culture, it is considered that there is a need for such objects to be protected from indiscriminate exposure to persons to whom Aboriginal people consider such exposure is inappropriate or dangerous.[21]

The formation of classes of objects in terms of their suitability or otherwise as export items perpetuates the classifying approach to Indigenous heritage. It is consistent with the tendency over the decades for Europeans to come to terms with defining and protecting Indigenous heritage by means of classifying and categorising it. The compilation of lists, catalogues, inventories and legislative regulations are all examples of this classifying machine at work.

As well as introducing laws protecting specific 'types' of heritage, such as Indigenous heritage or 'movable' heritage, in the 1970s the Commonwealth Government was also moving towards protection of 'national heritage'. Shortly after it gained office in 1972 the Whitlam Labor Government began to call in policy speeches for consideration of national heritage protection, framed in terms of the 'national estate'. Although the terms 'heritage' and 'national estate' were in currency earlier, they became more prominent as part of the discourse of policy and legislation in the 1970s.[22] Following a committee of inquiry in 1974 and further discussions, new legislation (the *Australian Heritage Commission Act*) was introduced in 1975 establishing the Australian Heritage Commission, charged with responsibility to 'identify, conserve, improve and present Australia's National Estate'.[23] The National Estate was defined as 'those places, being components of the natural environment of Australia or the cultural environment of Australia, that have aesthetic, historic, scientific or social significance or other special value for future generations as well as for the present community'.[24] The Australian Heritage Commission did not include objects in the composition of the National Estate. Places are assessed in terms of their significance, defined in terms of their 'strong or special association with a particular community or cultural group for social, cultural or spiritual reasons'.[25] Although a great many places and areas of significance to Aboriginal and Torres Strait Islander people were listed on the Register of the National Estate, this provided only limited protection. The National Estate, although important, nonetheless shows that once again heritage was defined by an encyclopaedic approach that had been the basis of much heritage discourse over the century. In 2004 the Commonwealth Government introduced a new system for Australia's national heritage, with

protection now to be provided under a series of laws replacing the previous arrangements. Although the Register of the National Estate has been retained, the new *Australian Heritage Council (Consequential and Transitional Provisions) Act 2003*, and *Australian Heritage Council Act 2003* have replaced the Act that established the Australian Heritage Commission. A heritage advisory body now exists in place of the Commission, and a National Heritage List, decided by the Minister, provides protection for nominated places, under the *Environment Protection and Biodiversity Conservation Act 1999*. These changes signal a far greater intervention by the Commonwealth Government and the relevant Minister in national heritage, including Indigenous heritage.

Towards self-determination: the establishment of ATSIC

By the end of the 1980s there were further developments in the administration and control of Indigenous affairs, with the establishment of the Aboriginal and Torres Strait Islander Commission (ATSIC) in 1989. ATSIC replaced the Department of Aboriginal Affairs and was a significant step towards enabling Indigenous peoples to govern their own affairs. ATSIC provided a decentralised, representative Aboriginal and Torres Strait Islander organisation empowered to make decisions for, and on behalf of, Indigenous peoples. A Board of Commissioners was the supreme decision-making body advising the Commonwealth Government, with Commissioners as elected representatives of communities throughout the country. From its inception until 1999 (when this responsibility was transferred to the Commonwealth Environment and Heritage Department), ATSIC had responsibility for administering the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984*. This was an important responsibility, as it signalled – in principle, at least – that Indigenous peoples themselves would now

be in control over decisions concerning their culture and heritage. In practice, the relevant Minister still had ultimate power over decision-making in respect of Indigenous heritage. Following its decision in April 2004 to abolish ATSIC, that organisation subsequently ceased to exist. All programs, policy and legislation for Indigenous affairs is once again 'mainstreamed' across all government departments and agencies. The unique opportunity that ATSIC gave Indigenous people to articulate their own needs, views and aspirations, and to represent themselves both within Australia and internationally, is no longer.

Full circle: the 1994 *Stopping the Rip-Offs* paper and beyond

Decades of failed attempts to protect Aboriginal culture as a whole body of beliefs, practices, values, expressions and objects did not prevent governments from trying again. In October 1994, acknowledging the need to find ways to protect the intangible aspects of Indigenous heritage, the Commonwealth Government released an Issues Paper called *Stopping the Rip-Offs: Intellectual Property Protection for Aboriginal and Torres Strait Islander Peoples*. That Paper had some merit in that it was yet another endeavour to seek ways to protect aspects of Indigenous culture that were not adequately protected under existing laws. But for all its good intentions, the Issues Paper was flawed in its overly narrow approach to Indigenous cultural heritage. Grappling with terminology, the Paper used the term 'arts and cultural expression' to 'describe the particular kinds of Aboriginal and Torres Strait Islander culture and heritage under discussion'. Although the term 'arts and cultural expression' was possibly a slight improvement on 'folklore', it was questionable whether it adequately reflected the totality of cultural performances, areas, sites, knowledge and expressions for which protection was sought. Apparently unable to stray beyond the

boundaries of copyright law in exploring possible measures for improved protection of aspects of Indigenous culture, the Issues Paper limited itself to the 'artistic' domain of Indigenous cultural activity. It was within the safe and familiar realm of copyright law that the authors of the Issues Paper felt most able to find solutions to the puzzle of protecting Aboriginal culture. After all, copyright law had so far, in the public arena at least, provided the most readily available 'remedy' for redressing the exploitation of Indigenous art works. The Issues Paper explained its rationale for using the term 'arts and cultural expressions', and sought comments:

> The term is intended to encompass all forms of artistic expression which are based on custom and tradition derived from communities which are continually evolving. We would welcome suggestions for other terms that may be more appropriate.[26]

Stating its limitations more clearly, the Paper claimed that it 'is principally concerned with the role of copyright, and where relevant designs law, in protecting the ownership and integrity of Aboriginal and Torres Strait Islander arts and cultural expressions'.[27] Drawing the boundaries tightly around the subject matter to be considered, the Paper stated:

> Other areas such as biodiversity and Indigenous knowledge are sometimes considered to be protected by intellectual property laws. However, these areas often touch on aspects of intellectual property protection without involving property rights themselves. This paper discusses those aspects of the protection of arts and cultural expression that have a close connection with copyright law.[28]

Here was the dilemma: the Issues Paper professed to be concerned with finding 'a better way to protect and promote Aboriginal and Torres Strait Islander arts and cultural expression', but did not seem prepared to step outside the framework of the existing *Copyright Act*. It seemed extraordinarily proscribed: any suggestions for protection

measures would be welcome, as long as they related to the *Copyright Act* only. Yet the Paper did include among the suggested options for 'addressing the limitations in present protection', in addition to amendments to the *Copyright Act*, amendments to the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984*, and 'special legislation'.[29] Thus while inviting comments and suggestions for protection that went far beyond the ambit of the *Copyright Act*, it would remain to be seen to what extent such suggestions would be considered seriously. Despite its flaws, the *Stopping the Rip-Offs* Paper created an impetus for others to begin to examine more comprehensively the issue of Indigenous peoples' 'cultural and intellectual property rights'. By now there was a growing body of studies and reports that examined the inadequacies of existing intellectual property laws for recognising Indigenous forms of 'intellectual property', and explored ways of finding means to recognise and protect Indigenous rights.[30]

In the mid-1990s a study was commissioned by ATSIC and the Australian Institute of Aboriginal and Torres Strait Islander Studies to respond to the *Stopping the Rip-Offs* Paper. That resulted in 1998 in the groundbreaking report *Our Culture, Our Future: Report on Australian Indigenous Cultural and Intellectual Property Rights*.[31] Guided by international developments, *Our Culture, Our Future* used as a basis for its discussion a more holistic view of Indigenous cultural heritage, declaring that '"Indigenous cultural and intellectual property rights" refers to Indigenous Australians' rights to their heritage'. The report explained that:

> Heritage consists of the intangible and tangible aspects of the whole body of cultural practices, resources and knowledge systems developed, nurtured and refined by Indigenous people and passed on by them as part of expressing their cultural identity.[32]

Our Culture, Our Future became an important reference point for calls to reform legislation, policy and administration to provide for

recognition and protection of 'Indigenous Cultural and Intellectual Property'. The exploration of ways in which there could be recognition of what might be regarded as an emerging new class of fundamental Indigenous rights was now apparently more firmly on the agenda for discussion.[33]

A distinct class of rights: *Mabo* and native title

Another avenue that offered the potential for recognising a more complete sense of Indigenous cultural heritage began to emerge in the early 1990s. In 1992 the Australian High Court handed down a decision that was to change the face of Australian law. The *Mabo* decision recognised the existence of Indigenous native title in common law.[34] It overturned the previously held doctrine that Australia was, at the time of European settlement, an unoccupied land, or *terra nullius*. The *Native Title Act 1993* (Cwlth) gave formal recognition to the *Mabo* decision in statute law and established a process for determining claims to native title. The *Mabo* decision and the *Native Title Act 1993* entrench in Australian law recognition of the special relationship Aboriginal and Torres Strait Islander peoples have with their country. In theory, this also offers a framework for considering the expressions, knowledge and products of Indigenous peoples' culture as things that are not separate from land, but rather, integral to it. There was now the opportunity for non-Indigenous Australia to appreciate the profound relationships between Indigenous land, culture, and cultural products and expressions. *The Native Title Act* does not itself provide any rights, nor does it protect culture or heritage, but it does provide a framework for the development of protection measures. Nonetheless, despite the opportunities that native title has potentially brought for such recognition, in the years since the *Mabo* decision the focus has been more on processes of resolving native title claims, rather than on considerations of the content and meaning of native title.

Owning heritage: competing views and claims

One of the matters that continued to perplex policy makers and legislators in contemplating protection for Aboriginal heritage was the question of its 'ownership'. Although this theme had been discussed in earlier decades, by the 1980s, with Indigenous peoples' voices now more often heard, it was once again a subject for debate and discussion.

Heritage is commonly associated with 'the past', and it was in this sense that a 1983 symposium pondered the question of 'Who Owns the Past?'.[35] In her Introduction to the published papers from that symposium, archaeologist Isabel McBryde outlines the relationship between 'the past', the question of 'ownership', and 'heritage':

> If we ask the question 'who owns the past?', accepting that we have but this ephemeral perception of past reality, the answer may be swift and brutal – 'everyone or no one'. The question seems as elusive as the past. Yet in legislative responses to the question, especially as applied to the tangible remains from the past, we find a clear and consistent assumption. This assumption (embedded in legislation pertaining to sites and artifacts), is that these constitute the common heritage of all. In Australia it is found in both federal and state legislation.[36]

McBryde points out that this notion of 'world heritage' underpinned Commonwealth heritage legislation. This sense of the past as the heritage of all was translated into the idea of a physical site of heritage interest becoming a 'national symbol'.[37] But the idea of a national heritage was not new, as official documents surveyed earlier in this book often referred to Indigenous heritage collectively as 'national monuments'. McBryde states that 'some of the earliest arguments for national policies of heritage protection were couched in terms of the site as both symbol and patrimony'.[38] She also describes the way in which these sites sometimes become 'symbols of collective cultural identity', citing Kutikina Cave on Tasmania's

Franklin River as an example of such sites for Tasmanian Aboriginal people.[39] The notion of sites, areas and objects as 'world' or 'national' heritage has been increasingly challenged over the decades since the legislative acts of the 1980s, with claims by Aboriginal people for the rights of ownership and control over what they regard as their heritage.

Archaeologist John Mulvaney contributed to the 'Who Owns the Past?' symposium by arguing in support of the role of museums and 'science', while also claiming that the collection and preservation of objects by Europeans has benefited Aborigines:

> It is relevant, also, that museums are a Western institution. Aboriginal society held different values, and rather than collecting and storing artifacts, these often involved the destruction of creative works immediately following their use in ceremonies, or upon the deaths of their owners. ... Except for the case of certain sacred items, therefore, preservation of the material past for the instruction of future generations was not a feature of Aboriginal culture. Consequently, Aboriginal people may come to acknowledge the good fortune that European collectors preserved fragments of their cultural heritage.[40]

Mulvaney has been a consistent advocate for the value of Indigenous heritage – including human skeletal material – to archaeology and science. He argued that 'it is necessary to emphasize the scientific importance of ancient bones of any race, and of the medical, dietary and cultural inferences which may flow from their analysis'.[41] Mulvaney acknowledged the crucial role for museums, universities and other western research institutions in collecting and preserving Indigenous heritage, and argued that Aborigines are *custodians* of their cultural heritage (as distinct from 'owners').[42]

Indigenous writers such as Ros Langford have offered a very different perspective on 'ownership' of heritage. Langford identifies what she regards as issues of 'conflict between the science of archaeology and the Aboriginal people'.[43] She eloquently states her case:

> The Issue is control. You seek to say that as scientists you have a right to obtain and study information of our culture. You seek to say that because you are Australians you have a right to study and explore our heritage because it is a heritage to be shared by all Australians, white and black. From our point of view we say you have come as invaders, you have tried to destroy our culture, you have built your fortunes upon the lands and bodies of our people and now, having said sorry, want a share in picking out the bones of what you regard as a dead past. We say that it is our past, our culture and heritage, and forms part of our present life. As such it is ours to control and it is ours to share on our terms.[44]

The issue of 'ownership' of Indigenous heritage identified by Langford and others was by the 1980s no longer a subject merely for quiet contemplation or for academic debate. It became increasingly a subject for disputes as the competing interests of supporters and proponents of development, and advocates for Indigenous rights, struggled to assert their ground.

Indigenous heritage defined by adversity

The question of Aboriginal claims to sites as heritage has occasionally received a high public profile, particularly at times of conflict. One example of this was the *Tasmanian Dams Case*. In 1983 the Commonwealth Government invoked its constitutional powers to prevent the Tasmanian Government proceeding with a planned hydro-electric power scheme that would have resulted in the destruction of important World Heritage wilderness areas on Tasmania's Franklin River. At the heart of this issue were some Aboriginal sites located in caves on the river. Arguments by archaeologists and others for protection of those sites was an important factor in the intervention by the then Hawke Labor

Government to prevent the hydro-electric scheme going ahead.[45] The *Tasmanian Dams Case* illustrates the ways in which Aboriginal and Torres Strait Islander heritage has typically been defined as a locus of claims and counterclaims in a contested domain of development and 'progress'. This constructs Indigenous heritage as something that is intrinsically defined as a site of adversity and division.

Indigenous heritage defined by competing truth claims

Another example of Indigenous heritage constructed as a site of adversarial relations is that known as the Hindmarsh Island Bridge case. This had its origins in 1989, with a proposal by developers to build a bridge between the mainland of South Australia and an adjacent island known as Hindmarsh Island or Kumarangk.[46] Applications for protection of areas thought to be of continuing significance to Aboriginal tradition were lodged with the Federal Minister for Aboriginal Affairs in 1993, 1994 and 1995. This development proposal, and the consequent Aboriginal claims, became the subject of an extensive series of legal processes, inquiries and litigation. The case highlighted the inability of Federal and State laws and processes to handle information of a highly sensitive and confidential nature to Aboriginal people. It also brought into the public arena contested notions of the nature of Aboriginal cultural sites and information, and raised important questions about the capacity of the dominant legal and political system to understand and accept the legitimacy of Aboriginal oral evidence. The role of women's knowledge became a particular issue during the lengthy Hindmarsh Island Bridge debates and discussions.[47] The Hindmarsh Island Bridge case also illustrates the lack of capacity of prevailing legal, political and administrative processes to provide adequate mechanisms by which Indigenous heritage can be protected as a whole entity comprising not only the physical, but also the intangible, including knowledge of a confidential and particular kind.

A summing-up

Europeans have tended to see, record, describe and think about Australian Indigenous heritage not as a whole body of objects, beliefs, knowledge and practices. Rather, they have engaged with this heritage in terms of its discrete parts, as bark paintings, rock carvings, stone and wooden implements and weapons, or songs, dances and ceremonial performances. That is not to say that many writers failed to understand that the objects and performances they saw, described and collected were all somehow interconnected, and both flowed from, and in turn informed, a spiritual dimension of Indigenous life. But when writers, observers, collectors and others began calling for the preservation of Indigenous culture, their focus was mainly on the physical, tangible objects that had for so long fascinated and challenged them. Ceremony, song and dance was also seen to be in need of preserving. But these were preserved on sound and film recordings, mostly as distinct features of Indigenous life in themselves, without immediate recognition of their living cultural contexts or relationships with other elements of heritage such as cultural objects. This fragmented approach to writing about Indigenous heritage has persisted well into present decades, as policy makers and legislators continue to grapple with the concept of an Indigenous heritage that is an inclusive body of knowledge, traditions, objects, performances and beliefs.

Europeans' writings about Indigenous heritage over the last hundred years or more have shown a concern with particular themes. Dominant among these has been a search for 'authenticity', a presumed need to preserve objects and expressions of culture as 'relics' of a 'lost or 'disappearing' people, and anxieties about defining, classifying and cataloguing Indigenous heritage. Although

underlying motives and intellectual pre-suppositions have changed, many of these themes continue to guide Europeans' writings and discussions about Indigenous heritage today.

Notes

Introduction (between p. xiii and p. xxi)

1 Herbert Basedow, *The Australian Aboriginal*, Adelaide, F. W. Preece and Sons, 1925, p. xiii.
2 See for example Bain Attwood, 'Introduction. The past as future: Aborigines, Australia, and the (dis)course of history', in Bain Attwood (ed.), *In the Age of Mabo: History, Aborigines and Australia*, St Leonards, NSW, Allen & Unwin, 1996; David Lowenthal, *The Past is a Foreign Country*, Cambridge, Cambridge University Press, 1985; Tom Griffiths, *Hunters and Collectors: The Antiquarian Imagination in Australia*, Cambridge, Cambridge University Press, 1996.
3 Lowenthal, op. cit., p. 6.
4 ibid., pp. 52–53.
5 Attwood, op. cit.; Jeremy Beckett, 'The past in the present; the present in the past: constructing a national Aboriginality', in Jeremy Beckett (ed.), *Past and Present: The Construction of Aboriginality*, Canberra, Aboriginal Studies Press, 1988.
6 Graeme Davison and Chris McConville (eds), *A Heritage Handbook*, Sydney, Allen & Unwin, 1991, p. 1.
7 ibid.
8 ibid.
9 ibid.
10 Tim Bonyhady, 'The stuff of heritage', in Tim Bonyhady and Tom Griffiths (eds), *Prehistory to Politics: John Mulvaney, The Humanities and the Public Intellectual*, Melbourne, Melbourne University Press, 1996, pp. 144–162.
11 Peter Sutton and Christopher Anderson, Introduction in Peter Sutton (ed.), *Dreamings: The Art of Aboriginal Australia*, Ringwood, Victoria, Viking, in association with The Asia Society Galleries, New York, 1988, p. 3.
12 ibid.
13 ibid., p. 4.

Part I

1: 'To Rescue from Oblivion' (between p. 3 and p. 37)

1 Ruth Teale, 'Cox, James Charles (1834–1912)', in Douglas Pike (ed.), *Australian Dictionary of Biography*, vol. 3, 1851–1890, Melbourne, Melbourne University Press, 1969, pp. 482–483.
2 J. C. Cox, 'Drawings by Australian Aborigines', The Proceedings of the Linnean Society of New South Wales, vol. III, part 2, Sydney, 1879, pp. 155–160.
3 ibid.
4 ibid., p. 156.
5 F. Carrington, 'The rivers of the Northern Territory of South Australia', *Proceedings of the Royal Geographical Society of Australasia, South Australian Branch*, vol. II, 1890, p. 61.
6 ibid., p. 73.
7 P. W. Bassett-Smith, 'The Aborigines of North-West Australia', *The Journal of the Royal Anthropological Institute of Great Britain and Ireland*, vol. XXIII, 1894, p. 324.
8 ibid., p. 327.
9 ibid., p. 328.
10 Carl Lumholtz, *Among Cannibals: An account of four years' travels in Australia and of camp life with the Aborigines of Queensland*, New York, Charles Scribner's Sons, 1889, p. vii.
11 R. Brough Smyth, *The Aborigines of Victoria with Notes Relating to the Habits of the Natives of Other Parts of Australia and Tasmania*, 2 vols, London, Trubner and Co., 1878.
12 ibid., vol. I, p. v.
13 ibid., vol. I, p. xlii.
14 ibid., vol. I, pp. xliii–xliv.
15 ibid., vol. I, p. xxv.
16 ibid., vol. I, p. 283.
17 ibid., vol. I, p. 357.
18 Rev. John Mathew, 'Note on Aboriginal rock painting in the Victoria Range, County of Dundas, Victoria', *Proceedings of the Royal Society of Victoria*, vol. IX (new series), 1896, p. 31.
19 Thomas Worsnop, *The Prehistoric Arts, Manufactures, Works, Weapons, etc., of the Aborigines of Australia,* Adelaide, C. E. Bristow, Government Printer, 1897, p. v.
20 ibid.
21 Peter Sutton, Philip Jones, and Steven Hemming, 'Survival, regeneration, and impact', in Peter Sutton (ed.), *Dreamings: The Art of Aboriginal Australia*, Ringwood, Victoria, and London, Viking Press in Association with the Asia Society Galleries, New York, 1989, pp. 191–192.
22 Worsnop, op. cit., pp. v–vi.
23 ibid., p. 10.
24 W. A. Horn, Introduction in Baldwin Spencer (ed.), *Report on the Work of the Horn Scientific Expedition to Central Australia*, London, Dulau & Co., 1896, p. v.
25 ibid.
26 Baldwin Spencer, 'Through Larapinta Land: A Narrative of the Horn Expedition to Central Australia', in Spencer (ed.), *Report on the Work of the Horn Scientific Expedition to Central Australia*, London, Dulau & Co., 1896, Part I, p. 35.
27 E. C. Stirling, 'Anthropology', in Spencer (ed.), *Report on the Work of the Horn Scientific Expedition to Central Australia*, London, Dulau & Co., 1896, Part IV, p. 76.
28 ibid.
29 See also discussion in D. J. Mulvaney, '"A splendid lot of fellows": achievements and consequences of the Horn Expedition', in S. R. Morton and D. J. Mulvaney (eds), *Exploring Central Australia: Society, the Environment and the 1894 Horn Expedition*, Chipping Norton, NSW, Surrey Beatty & Sons, 1996, p. 8; Philip Jones, '"Objects of mystery and concealment": A history of *Tjurunga* collecting', in Christopher Anderson (ed.), *Politics of the Secret*, Oceania Monograph 45, Sydney, University of Sydney, pp. 71–92.
30 Philip Jones, op. cit., p. 73.
31 C. Winnecke, *Journal of the Horn Scientific Exploring Expedition, 1894*, Adelaide, Government Printer, 1897, pp. 40–41.
32 ibid., p. 42.
33 Philip Jones, op. cit., p. 73.
34 D. J. Mulvaney, op. cit., p. 9.
35 Baldwin Spencer and Frank Gillen, *The Native Tribes of Central Australia*, London, Macmillan and Co., 1899, pp. 11; 11–12.
36 ibid., p. 12.
37 ibid., p. 34.
38 ibid., p. 128.
39 ibid., p. 567.
40 ibid., p. 568.
41 ibid., pp. 568–570.
42 ibid., footnote, p. 570.
43 Andrée Rosenfeld, 'Rock art: a multifaceted heritage', in Sylvia Kleinert and Margo Neale (eds), *The Oxford Companion to Aboriginal Art and Culture*, Oxford, Oxford University Press, 2000, p. 103.

44 Sir George Grey, *Journals of Two Expeditions of Discovery In North West and Western Australia, During the Years 1837, 1838, and* 1839, London, T. & W. Boone, 1841, p. 201.
45 ibid., p. 202.
46 ibid., p. 205.
47 ibid., pp. 205–206.
48 ibid., p. 206.
49 ibid., p. 207.
50 ibid., p. 263.
51 Herbert Basedow, *The Australian Aboriginal*, Adelaide, F. W. Preece and Sons, 1925, p. 343.
52 ibid., pp. 344–345.
53 For a useful summary of these, and a critical analysis, see Paul Carter, *Living in a New Country: History, Travelling and Language*, London, Faber and Faber, 1992, p. 53.
54 A. P. Elkin, 'Rock paintings of north-west Australia', *Oceania*, vol. 1, no. 3, October–December 1930, p. 257.
55 ibid.
56 ibid., p. 273.
57 ibid.
58 ibid., p. 274.
59 These included Phyllis Kaberry in 1935, and Howard Coate in 1947.
60 I. M. Crawford, *The Art of the Wandjina*, Melbourne, Oxford University Press, 1968, p. 18 *et seq.*
61 Judith Ryan with Kim Akerman, 'Shadows of Wandjina: figurative art of the north-west and central Kimberley', in Judith Ryan with Kim Akerman, *Images of Power: Aboriginal Art of the Kimberley*, Melbourne, National Gallery of Victoria, c. 1993, p. 11. For a good recent study of *wandjina* as part of Kimberley Aboriginal peoples' living cultural traditions, see Valda Blundell, and Donny Woolagoodja with members of the Mowanjum Aboriginal Community, *Keeping the Wanjinas Fresh: Sam Woolagoodja and the Enduring Power of Lalai*, Fremantle, WA, Fremantle Arts Centre Press, 2005.
62 Rev. John Mathew, 'The Cave Paintings of Australia, their Authorship and Significance', *Journal of the Royal Anthropological Institute of Great Britain and Ireland*, vol. XXII, 1894, p. 42.
63 Barrie Reynolds, 'Roth, Walter Edmund (1861–1933)', in Geoffrey Serle (ed.), *Australian Dictionary of Biography*, vol. 11, 1891–1939, Melbourne, Melbourne University Press, 1988, p. 463.
64 Walter E. Roth, *Ethnological Studies among the North-West-Central Queensland Aborigines*, Brisbane, Government Printer, 1897, p. 116.
65 This theme is discussed by James Clifford in his essay 'On ethnographic authority', in Clifford, *The Predicament of Culture*, Cambridge, Massachusetts, and London, England, Harvard University Press, 1988, pp. 21–54.
66 R. H. Mathews, 'Pictorial art among the Australian Aborigines', *Victoria Institute Transactions*, 4 December 1899, p. 1.
67 ibid.
68 W. D. Campbell, 'Aboriginal Carvings of Port Jackson and Broken Bay', *Memoirs of the Geological Survey of New South Wales*, Ethnological Series no. 1, Sydney, William Applegate Gullick, Government Printer, Department of Mines and Agriculture, 1899.
69 ibid., p. 1.
70 ibid.
71 ibid.
72 ibid.
73 ibid.
74 ibid.
75 ibid., p. 2.
76 ibid., p. 4.
77 See A. P. Elkin, 'Anthropology in Australia: one chapter', *Mankind*, vol. V, no. 6, October 1958, p. 226; A. P. Elkin, 'The development of scientific knowledge of the Aborigines', in H. Sheils (ed.), *Australian Aboriginal Studies: A Symposium of Papers Presented at the 1961 Research Conference*, Melbourne, Oxford University Press, 1963, pp. 6–10.
78 A. S. Kenyon and D. L. Stirling, 'Australian Aboriginal stone implements: A suggested classification', *Proceedings of the Royal Society of Victoria*, vol. XIII (new series), part II, March 1901, p. 191.
79 ibid.
80 ibid.
81 Marcia Langton, 'Religion and art from colonial conquest to post-colonial resistance', in Sylvia Kleinert and Margo Neale (eds), *The Oxford Companion to Aboriginal Art and Culture*, Oxford, Oxford University Press, 2000, p. 19.

2: 'Nothing to be Discovered' (between p. 38 and p. 68)

1 Baldwin Spencer, *Guide to the Australian Ethnographical Collection in the National Museum of Victoria*, Melbourne, Government Printer, 1901, Preface, p. 5.
2 D. J. Mulvaney and J. H. Calaby, *"So Much That is New": Baldwin Spencer, 1860–1929, A Biography*, Melbourne, Melbourne University Press, 1985, p. 252.
3 ibid., p. 255.

4 ibid.
5 ibid.
6 Baldwin Spencer, *Guide to the Australian Ethnographical Collection*, op. cit., Preface, p. 5. In 1982 archaeologist and historian John Mulvaney described Spencer's *Guide* as 'still one of the few systematic collection guides to museums in Australia', see Mulvaney, 'Museums' in *Prehistory and Heritage: The Writings of John Mulvaney*, Occasional Papers in Prehistory 17, Department of Prehistory, Research School of Pacific Studies, Australian National University, Canberra, 1990, p. 297.
7 Entry for 3 August in F. J. Gillen, *The Camp Jottings of F. J. Gillen on the Spencer and Gillen Expedition Across Australia 1901–1902*, Adelaide, Libraries Board of South Australia, 1968, p. 264.
8 Cowle to Spencer, 31 August 1900, in John Mulvaney, with Alison Petch and Howard Morphy (eds), *From the Frontier: Outback letters to Baldwin Spencer,* St Leonards, NSW, Allen & Unwin, 2000, p. 146 (Cowle's emphasis).
9 Anon, 'The antiquarian objects and problems in Australia', *Science of Man and Journal of the Royal Anthropological Society of Australasia*, vol. 3, no. 12 (new series), 22 January 1901, p. 214.
10 ibid., p. 215.
11 Walter E. Roth, *Domestic Implements, Arts, and Manufactures*, North Queensland Ethnography: Bulletin no. 7, Brisbane, Government Printer, 1904, p. 9.
12 ibid., pp. 21–22.
13 ibid., p. 16.
14 ibid., p. 18.
15 ibid., p. 19.
16 Herbert Basedow, 'Anthropological Notes Made on the South Australian Government North-West Prospecting Expedition, 1903', from *Transactions of the Royal Society of South Australia*, vol. xxviii, 1904, p. 24.
17 ibid., pp. 25–26.
18 ibid., p. 38.
19 ibid., pp. 39–40.
20 Baldwin Spencer and F. J. Gillen, *The Northern Tribes of Central Australia*, London, Macmillan and Co., 1904, p. vii.
21 ibid., p. ix.
22 ibid.
23 ibid., p. x.
24 ibid., p. xii.
25 ibid., p. xiv.

26 Bernard Smith, *European Vision and the South Pacific 1768–1850*, London, Oxford University Press, 1960, p. 7.
27 ibid., pp. 126–127.
28 ibid.
29 Spencer and Gillen, *Northern Tribes*, op. cit., p. xv.
30 ibid., p. 634.
31 ibid., pp. 634–635.
32 I thank John Morton for suggesting this.
33 Spencer and Gillen, *Northern Tribes*, op. cit., p. 635.
34 ibid.
35 ibid., p. 696.
36 A. W. Howitt, *The Native Tribes of South-East Australia*, London, Macmillan and Co., 1904, Preface, p. vii; See also L. R. Hiatt, *Arguments about Aborigines: Australia and the Evolution of Social Anthropology*, Cambridge, Cambridge University Press, 1996, p. 43.
37 A. W. Howitt, op. cit., p. xiii.
38 Howitt, op. cit., pp. 311–312.
39 George W. Stocking Jr, *After Tylor: British Social Anthropology 1888–1951*, London, The Athlone Press, 1996, pp. 176, 377–378; See also Henrika Kuklik, *The Savage Within: The Social History of British Anthropology, 1885–1945*, Cambridge, Cambridge University Press, 1993, pp. 199–201.
40 N. W. Thomas, *The Native Races of Australia*, London, Archibald Constable and Co., 1906, p. 19.
41 ibid., p. 34.
42 ibid.
43 ibid., p. 35.
44 ibid., p. 48.
45 ibid., pp. 50–51.
46 See for example the discussion below about the theft of *tjurungas* from Central Australia in 1927, and correspondence by Kenyon and others.
47 Stuart Love, Journal of an Expedition in Arnhem Land, Northern Territory, Australia: Being some account of travels and explorations made in that country between 23 June and 23 October 1910 on behalf of William Orr, Esq. of Melbourne (written at Melbourne, October 1953), Manuscript, National Library of Australia, Canberra, NL MS 1565, p. 49. In a footnote, Love wrote that he thought that these tomahawks 'would be of Macassan origin'.
48 C. L. Shepherd, 'F. D. McCarthy: An outline of the professional and intellectual context of his work at the Australian Museum', unpublished BA Hons thesis, School of Archaeology and Anthropology, the Australian National University, 1982, pp. 17–21.

49 W. W. Thorpe, 'Aboriginal drawings in rock shelters at Bundanoon, N. S. Wales', *Records of the Australian Museum*, vol. VII, no. 4, 30 August 1909, p. 325.
50 ibid., p. 326.
51 ibid., p. 327.
52 A. Carroll, 'The carved and painted rocks of Australia, and their significance', *Science of Man*, vol. XIII, no. 2, 1 June 1911, p. 41.
53 Baldwin Spencer, 'Through Larapinta Land', op. cit., p. 35.
54 F. J. Gillen, *Camp Jottings*, op. cit., p. 64.
55 John Mulvaney, Howard Morphy and Alison Petch (eds), *'My Dear Spencer': The Letters of F. J. Gillen to Baldwin Spencer*, Flemington, Melbourne, Hyland House, 2001, esp. pp. 44–45; Nicolas Peterson, 'Visual knowledge: Spencer and Gillen's use of photography in the *Native Tribes of Australia*', unpublished paper, n.d. I am grateful to Dr Nicolas Peterson for providing me with a copy of this paper.
56 Peterson, op. cit., p. 16.
57 D. J. Mulvaney and J. H. Calaby, *"So Much That is New"*, op. cit., p. 173.
58 F. J. Gillen, *Camp Jottings*, op. cit., pp. 68–69.
59 Russell McGregor, *Imagined Destinies: Aboriginal Australians and the Doomed Race Theory*, Melbourne, Melbourne University Press, p. 68.
60 See for example Richard Broome, *Aboriginal Australians: Black Response to White Dominance 1788–1980*, Sydney, George Allen & Unwin, 1982.
61 Russell McGregor, op. cit., p. 65.
62 Quoted in ibid., p. 84.
63 See for example Keith Cole, *The Aborigines of Arnhem Land*, Adelaide, Rigby, 1979, pp. 85–87.
64 For a useful history of Arnhem Land see for example Ronald M. Berndt and Catherine H. Berndt, *Arnhem Land: Its History and Its People*, Melbourne, F. W. Cheshire, 1954.
65 Donald Thomson, *Interim General Report of Preliminary Expedition to Arnhem Land, Northern Territory of Australia, 1935–36*, Canberra, Department of the Interior, 9 April 1936; Donald Thomson, *Report on Expedition to Arnhem Land, 1936–37*, Canberra, Minister for the Interior, 1939; Donald Thomson, *Recommendations of Policy on Native Affairs in the Northern Territory of Australia*, Canberra, Commonwealth of Australia, December 1937, esp. pp. 5–8. See also R. M. Berndt and C. H. Berndt, *Arnhem Land*, op. cit. There is a voluminous literature on Aboriginal reserves, and policy and administration. For example see Russell McGregor, op. cit.; also useful is the three-volume work by C. D. Rowley, *The Remote Aborigines*, Penguin Books, 1970, *The Destruction of Aboriginal Society*, Penguin Books, 1970, and *Outcasts in White Australia*, Penguin Books, 1970.
66 See Julie Marcus, *The Indomitable Miss Pink: A Life in Anthropology*, Sydney, University of New South Wales Press, 2001.
67 F. Wood Jones, *Australia's Vanishing Race*, Sydney, Angus & Robertson, 1934, p. 40.
68 ibid.

3: *'Just Like a Civilised Artist' (between p. 69 and p. 142)*

1 The concept in anthropological and other writings of a 'traditional' Aboriginal society as one that was essentially unchanged, and whose lifestyle was thought to be maintained intact from before European contact is criticised by James Urry, for instance, who argues that it should be abandoned as not applicable to observed Aboriginal societies, since it denies change and adaptation. See James Urry, 'Beyond the frontier: European influence, Aborigines and the concept of "traditional" culture', *Journal of Australian Studies*, no. 5, November 1979, pp. 2–16.
2 cf. Bernard Smith, *European Vision and the South Pacific, 1768–1850*, Oxford, Oxford University Press, 1960, esp. p. 7.
3 Baldwin Spencer, *Wanderings in Wild Australia*, vol. II, London, Macmillan, 1928, p. 792.
4 ibid.
5 Marshall Sahlins, *Stone Age Economics*, London, Tavistock Publications, 1972, esp. pp. 1–39.
6 Spencer, *Wanderings*, op. cit., pp. 792–793.
7 ibid., p. 793.
8 ibid., pp. 793–794.
9 For discussion on the development of the art market in Aboriginal cultural artifacts and bark paintings see Howard Morphy, *Ancestral Connections: Art and an Aboriginal System of Knowledge*, Chicago, The University of Chicago Press, 1991; Morphy, *Aboriginal Art*, London, Phaidon Press, 1998; Luke Taylor, *Seeing the Inside: Bark Painting in Western Arnhem* Land, Oxford, Clarendon Press, 1996; P. Loveday and P. Cooke (eds), *Aboriginal Arts and Crafts and the Market*, North Australia Research Monograph, Darwin and Canberra, The Australian National University, 1983; Nancy Williams, 'Australian Aboriginal art at Yirrkala: Introduction and development of marketing', in Nelson H. H. Graburn (ed.), *Ethnic and Tourist Arts: Cultural Expressions from the Fourth World*, Berkeley, University of California Press, 1976, pp. 266–284.

10 Baldwin Spencer, *Native Tribes of the Northern Territory*, London, Macmillan and Co., 1914, p. 407.
11 ibid., p. 432.
12 ibid., p. 433.
13 Luke Taylor, op. cit., p. 24. For useful histories of the development of the bark painting industries in Arnhem Land, see also Nancy Williams, op. cit., P. Loveday and P. Cooke, op. cit., and Howard Morphy, *Ancestral Connections*, op. cit.
14 Luke Taylor, op. cit., pp. 24–25.
15 Peter Sutton and Christopher Anderson, Introduction, in Peter Sutton (ed.), *Dreamings: The Art of Aboriginal Australia*, Ringwood, Victoria, Viking, in association with The Asia Society Galleries, New York, 1988, pp. 1–12; also Nancy Williams, op. cit., pp. 266–284.
16 Peter Sutton and Christopher Anderson, Introduction, in Sutton, Peter (ed.), *Dreamings*, op. cit., p. 3.
17 Nancy Williams, op. cit., p. 270.
18 Howard Morphy, *Ancestral Connections*, op. cit., p. 13.
19 ibid., 13–14.
20 James Clifford, *The Predicament of Culture: Twentieth-Century Ethnography, Literature, and Art*, Cambridge, Massachusetts and London, England, Harvard University Press, 1988, especially pp. 215–251.
21 ibid., p. 218.
22 ibid.
23 ibid., pp. 227–228.
24 ibid., especially p. 229.
25 Nicholas Thomas, *Entangled Objects: Exchange, Material Culture, and Colonialism in the Pacific*, Cambridge, Massachusetts and London, England, Harvard University Press, 1991, p. 125.
26 ibid., pp. 126–127.
27 Tom Griffiths, *Hunters and Collectors*, op. cit., p. 56.
28 ibid.
29 Baldwin Spencer, 'The Aboriginals of Australia', in G. H. Knibbs (ed.), *Federal Handbook*, Melbourne, Government Printer, p. 77.
30 W. H. Gill in *The Bulletin*, 10 June 1920.
31 ibid.
32 ibid.
33 ibid.
34 ibid.
35 Philip Jones, 'Aiston, George (1879–1943)', in John Ritchie (ed.), *Australian Dictionary of Biography*, vol. 13: 1940–1980, Melbourne, Melbourne University Press, 1993, p. 18.
36 ibid.

37 ibid.
38 Aiston to Gill, 9 August 1920, Letters to W. H. Gill, CY Reel 605, ML A2535–A2537, Mitchell Library, State Library of New South Wales.
39 Aiston to Gill, 9 August 1920.
40 ibid.
41 ibid.
42 Aiston to Gill, July 1920.
43 Aiston to Gill, 27 September 1920.
44 Aiston to Gill, 1 October 1920.
45 Aiston to Gill, 21 October 1920.
46 ibid.
47 Aiston to Gill, 27 February 1921.
48 Aiston to Gill, 1 October 1920.
49 Aiston to Gill, 27 February 1921.
50 G. Horne and G Aiston, *Savage Life in Central Australia*, Macmillan and Co., London, 1924.
51 ibid.
52 ibid.
53 ibid., pp. 10–11.
54 ibid., p. 11.
55 ibid., pp. 91–92.
56 ibid., p. 92.
57 An example of classification by form can be seen in Baldwin Spencer's arrays of objects displayed in the National Museum of Victoria during the early 1900s. See plates pages of this study.
58 ibid., pp. 105–106.
59 Aiston to Towle, 20 November 1929, Towle Papers, ML MSS 3580, Mitchell Library, State Library of New South Wales.
60 Aiston to Towle, 10 March 1930, Towle Papers.
61 ibid.
62 Aiston to Towle, 16 May 1930, Towle Papers.
63 Aiston to Towle, 25 July 1930, Towle Papers.
64 Aiston to Towle, 23 November 1931, Towle Papers.
65 Aiston to Towle, 3 March 1932, Towle Papers.
66 ibid.
67 Aiston to Towle, 30 May 1933. The *tuhla* (or *tula*) is a chisel-like implement, see D. J. Mulvaney, *The Prehistory of Australia*, Harmondsworth, Penguin Books, 1975, pp. 77–83; 233–235.
68 Aiston to Towle, 11 December 1934, Towle Papers.
69 Kenyon to Towle, 12 March 1929, Towle Papers.
70 Fred McCarthy, 'Obituary – Mr. C. C. Towle, B.A.', *Mankind*, vol. 3, no. 10, pp. 307–308.

71 ibid., p. 307.
72 Towle to Kenyon, 30 November 1928, Kenyon Papers, MS 12173, La Trobe Australian Manuscripts Collection, State Library of Victoria, Melbourne.
73 Towle to Kenyon, 4 May 1929, Kenyon Papers.
74 Fred McCarthy, 'Obituary', op. cit., p. 307.
75 Towle to Kenyon, 4 December 1932, Towle Papers.
76 Kenyon to Towle, 13 December 1932, Towle Papers.
77 Towle to Elkin, 2 January 1933, Towle Papers.
78 Aiston to Towle, 10 February 1935, Towle Papers.
79 Aiston to Towle, 3 March 1935, Towle Papers.
80 Spencer, Baldwin, *Guide to the Australian Ethnographical Collection*, op. cit., Preface, p. 5.
81 D. J. Mulvaney and J. H. Calaby, *"So Much That is New"*, op. cit., p. 256.
82 J. F. Lovering, 'Mitchell, Stanley Robert (1881–1963)', in John Ritchie (ed.), *Australian Dictionary of Biography*, vol. 15: 1940– 1980, Melbourne, Melbourne University Press, 2000, p. 384.
83 ibid.
84 Mitchell to Towle, 20 May 1935, Towle Papers.
85 ibid.
86 H. Basedow, *The Australian Aboriginal*, Adelaide, F. W. Preece and Sons, 1925.
87 ibid., p. xii.
88 ibid.
89 ibid., p. xiii.
90 ibid., p. 314.
91 ibid., pp. 314–316.
92 ibid., p. 359.
93 ibid., pp. 359–360.
94 Knut Dahl, *In Savage Australia: An Account of a Hunting and Collecting Expedition to Arnhem Land and Dampier Land*, London, Philip Allan & Co., 1926.
95 ibid., p. 1.
96 ibid., p. 4.
97 ibid., p. 8.
98 ibid., pp. 9–11.
99 ibid., pp. 10–11.
100 ibid.
101 ibid., p. 11.
102 ibid.
103 ibid., p. 12.
104 ibid., p. 13.

105 Captain Sir G. H. Wilkins, *Undiscovered Australia: Being an Account of an Expedition to Tropical Australia to Collect Specimens of the Rarer Native Fauna for the British Museum, 1923–1925*, New York, G. P. Putnam's Sons, The Knickerbocker Press, 1929, p. 91.
106 ibid., p. 92.
107 ibid., p. 198.
108 ibid., p. 279.
109 R. M. Berndt and Catherine H. Berndt, *The World of the First Australians*, Canberra, Aboriginal Studies Press, 1988, pp. 533–541.
110 A considerable proportion of researchers during the decades of the 1920s to 1940s were supported by the University of Sydney. The South Australian Museum was also an important funding body, and was active in sending research expeditions to remote regions of that State and to the Northern Territory, funded through the University of Adelaide's Board for Anthropological Research. For an account of some of the early work see Philip Jones, 'South Australian anthropological history: the early expeditions of the Board for Anthropological Research', *Records of the South Australian Museum*, vol. 20, 1987, pp. 71–92.
111 Norman B. Tindale, 'Natives of Groote Eylandt and of the west coast of the Gulf of Carpentaria', *Records of the South Australian Museum*, vol. 3, no. 1, 1925, pp. 61–102; no. 2, pp. 103–134.
112 Norman B. Tindale, op. cit., Part II, p. 115.
113 Herbert M. Hale and Norman B. Tindale, 'Observations on Aborigines of the Flinders Ranges, and records of rock carvings and paintings', *Records of the South Australian Museum*, vol. III, no. 1, June 1925, pp. 45–59.
114 ibid., p. 45.
115 Frederick D. McCarthy, 'Some comments on the progress of archaeology in Australia: An appeal for co-operation', *Mankind*, vol. 5, no. 11, February 1962, p. 480.
116 See for example Frederick D. McCarthy, 'The prehistory of the Australian Aborigines', *Australian Natural History*, vol. XIV, no. 8, 15 December 1963, pp. 233–241. See also D. J. Mulvaney and J. Kamminga, *Prehistory of Australia*, St Leonards, NSW, Allen & Unwin, 1999, pp. 39–47.
117 The term 'prehistory' also has some negative connotations for Indigenous people, as it may imply that they are a people 'without history'. Although there are some important distinctions between 'archaeology' and 'prehistory', using the term 'archaeology' does not resolve this dilemma.

118 NAA: A458, AJ120/6, Federal Territory National Museum of Ethnology, 1928–1930, Memorandum on 'The Need of National Museum of Ethnology' by Professor Radcliffe Brown, August 1927.
119 By the 1930s, Arrernte and other Aboriginal people were trading *tjurungas* in some quantity. Some of these and other ethnographic objects currently held in museums and other collecting institutions were made specifically for collectors. I thank John Morton for offering this detail.
120 Kenyon to Radcliffe Brown, 23 August 1927, Kenyon Papers, La Trobe Manuscript Collection, State Library of Victoria, Melbourne.
121 Kenyon to Haddon, 23 August 1927, Kenyon Papers.
122 Herbert Basedow, for example, called it 'sacrilegious vandalism'. Basedow's comment is cited in Philip Jones, '"Objects of mystery and concealment": A history of *Tjurunga* collecting', in Christopher Anderson (ed.), *Politics of the Secret*, Oceania Monograph 45, Sydney, University of Sydney, 1995, esp. pp. 85–86.
123 L. Keith Ward to Kenyon, 26 August 1927, Kenyon Papers.
124 ibid.
125 ibid.
126 Kenyon to Ward, 30 August 1927, Kenyon Papers.
127 ibid.
128 National Museum of Victoria, *Australian Aboriginal Art*, Catalogue for Australian Aboriginal Art Exhibition, Melbourne, Trustees of the Public Library, Museums, and National Gallery of Victoria, Melbourne, Government Printer, July 1929.
129 Charles Barrett, 'The Primitive Artist', in National Museum of Victoria, op. cit., p. 5.
130 ibid., p. 12.
131 ibid.
132 A. S. Kenyon, 'The Art of the Australian Aboriginal', in National Museum of Victoria, op. cit., p. 15.
133 ibid.
134 The key individuals occupying this role during the course of the period of this study were A. R. Radcliffe Brown, A. P. Elkin, and, briefly, Raymond Firth. Elkin's own writings on the history of anthropology in Australia are also an important source. See for example A. P. Elkin, 'Anthropology in Australia, 1939', *Oceania*, vol. X, no. 1, September 1939, pp. 1–29; Elkin, 'Anthropology in Australia: One chapter', *Mankind*, vol. V, no. 6, October 1958, pp. 225–242; Elkin, 'The development of scientific knowledge of the Aborigines', in H. Sheils (ed.), *Australian Aboriginal Studies: A Symposium of Papers Presented at the 1961 Research Conference*, Melbourne, Oxford University Press, 1963, pp. 3–28.

135 For example, the Royal Anthropological Society of Australasia was established in 1885. Others came later.
136 C. L. Shepherd, 'F. D. McCarthy: An outline of the professional and intellectual context of his work at the Australian Museum', unpublished BA Hons thesis, School of Archaeology and Anthropology, the Australian National University, Canberra, 1982, p. 32.
137 Margaret Preston, 'Art for Crafts: Aboriginal Art Artfully Applied', *The Home*, vol. 5, no. 5, 1 December 1924, p. 30.
138 Elizabeth Butel, *Margaret Preston: The Art of Constant Rearrangement*, Ringwood, Victoria, Viking, in Association with the Art Gallery of New South Wales, 1985, p. 50.
139 W. W. Thorpe, 'Early references to Aboriginal Rock Carvings', *Mankind*, vol. 1, no. 1, March 1931, pp. 7–11.
140 B. L. Hornshaw, 'Primitive art in Australia', *Mankind*, vol. 1, no. 1, March 1931, p. 21.
141 ibid., pp. 21–22.
142 ibid.
143 'Expert on Rock Carvings: Mr. B. Hornshaw dies in Sydney', *The Sun News-Pictorial*, Saturday 16 October 1937, p. 35.
144 Charles Barrett, 'Rock carvings in New South Wales' in Charles Barrett and Robert Henderson Croll, *Art of the Australian Aboriginal*, Melbourne, The Bread and Cheese Club, 1943, pp. 79–85.
145 ibid., p. 80.
146 ibid., pp. 80–81.
147 ibid., p. 81.
148 ibid., p. 82.
149 ibid., p. 84.
150 See for example entry for 'corroborees' in Sylvia Kleinert and Margo Neale (eds), *Oxford Companion to Aboriginal Art and Culture*, pp. 564–565.
151 Aiston to Croll, 14 October 1931, Croll Papers, MS 8910, La Trobe Australian Manuscripts Collection, State Library of Victoria, Melbourne.
152 Aiston to Croll, 7 December 1931, ibid.
153 D. S. Davidson, 'Archaeological problems of Northern Australia', *Journal of the Royal Anthropological Institute of Great Britain and Ireland*, vol. LXV, no. 65, 1935, pp. 145–183.
154 ibid., pp. 145–146.
155 ibid., p. 146.
156 ibid.
157 ibid., p. 148.
158 ibid., p. 146.
159 ibid., p. 148.

160 Tigger Wise, *The Self-Made Anthropologist: A Life of A. P. Elkin*, Sydney, George Allen & Unwin, 1985, esp. pp. 141–145; Russell McGregor, op. cit.

161 For a useful summary of the development of administration for Aborigines in the Northern Territory, see Keith Cole, *The Aborigines of Arnhem Land*, Adelaide, Rigby, 1979, pp. 88–91.

Part II

4: Collecting, Recording and Preserving: Art, Stone and Bark (between p. 145 and p. 181)

1 Robert Henderson Croll, *Wanderings in Central Australia*, Sydney, Angus & Robertson, 1937, p. 124.
2 ibid.
3 ibid., pp. 124–125.
4 ibid., p. 125.
5 Croll, *Wanderings in Central Australia*, op. cit., p. 126.
6 ibid., p. 127.
7 Ursula H. McConnel, 'Inspiration and design in Aboriginal art', *Art in Australia*, third series, no. 59, 15 May 1935, pp. 49–68.
8 ibid., p. 56.
9 ibid.
10 R. H. Goddard, 'Certain observations of Aboriginal rock-carvings in the Wollombi District', Paper read before the Australasian and New Zealand Association for the Advancement of Science, Auckland Meeting, 14 January 1937, pp. 1, 3.
11 D. J. Mulvaney and J. H. Calaby, *"So Much That is New", Baldwin Spencer, 1860–1929*, Melbourne, Melbourne University Press, 1985, p. 251.
12 Stan Mitchell to Fred McCarthy, 22 March 1944, Mitchell Papers, MS 9a, AIATSIS, Canberra.
13 Mulvaney and Calaby, op. cit., p. 251.
14 Joseph L. Shellshear, 'An appeal for the preservation of prehistoric remains in Australia', *The Australian Museum Magazine*, vol. VI, no. 5, January–March 1937, p. 174.
15 R. H. Croll, *I Recall: Collections and Recollections*, Melbourne, Robertson & Mullens, 1939, pp. 89–90.
16 Croll's Diary, 'Notes of trip to Central Australia', Tuesday 15 May 1934, Croll Papers, La Trobe Australian Manuscripts Collection, State Library of Victoria, Melbourne. Emphasis is Croll's.
17 Croll's Diary, 25 April 1934.

18 Rex Battarbee to Chinnery, Herrmansburg via Alice Springs, 8 September 1943, Chinnery Papers, MS 766, Box 20, National Library of Australia, Canberra.
19 ibid.
20 Rex Battarbee to Mr Ralph Foster, 28 August 1946, Chinnery Papers.
21 ibid.
22 Mountford, Field Diary, Expedition to Flinders Ranges, December 1937 to December 1939, Mountford–Sheard Collection, Mortlock State Library of South Australia, Adelaide.
23 D. S. Davidson, *Aboriginal Australian and Tasmanian Rock Carvings and Paintings*, Memoirs of the American Philosophical Society, vol. V, Philadelphia, The American Philosophical Society, 1936, p. 1.
24 ibid., p. 4.
25 ibid., p. 13.
26 ibid., pp. 13–14.
27 D. S. Davidson, *A Preliminary Consideration of Aboriginal Australian Decorative Art*, Memoirs of the American Philosophical Society, vol. IX, Philadelphia, The American Philosophical Society, 1937, p. 3.
28 Rev. T. T. Webb, *Spears to Spades*, Sydney, The Department of Overseas Missions, 1938, p. 18.
29 ibid.
30 ibid., p. 20.
31 C. T. Madigan, *Crossing the Dead Heart*, Melbourne, Georgian House, 1946, pp. 64–65.
32 W. Lloyd Warner, *A Black Civilization: A Social Study of an Australian Tribe*, New York and London, Harper & Brothers Publishers, 1937, p. 4.
33 This distancing is termed by Johannes Fabian a 'denial of coevalness'; see his *Time and the Other: How Anthropology makes its Object*, New York, Columbia University Press, 1983.
34 Lloyd Warner, op. cit., p. 150.
35 D. J. Mulvaney and J. H. Calaby, *"So Much That is New"*, op. cit., pp. 261.
36 ibid.
37 Towle to Kenyon, 17 September 1936, Kenyon Papers.
38 Towle to Kenyon, 29 July 1939, Kenyon Papers.
39 Mitchell to Towle, 3 February 1937, Towle Papers.
40 NAA: A659, 1939/1/10936, Preservation of Aboriginal Relics, Fossils and Geological Specimens, 1937–1940, Memorandum to the Prime Minister from A. B. Walker, General Secretary of the Australian and NZ Association for the Advancement of Science, 15 February 1937.
41 NAA: A659, 1939/1/10936, op. cit., letter to the Hon E. Harrison MHR, Prime Minister's Department from D. MacCallum, Hon.

Secretary, Point Piper Branch of the United Australia Party, 9 February 1939.

42 NAA: A659, 1939/1/10936, op. cit., J. McEwen, Minister for the Interior to the Hon. E. J. Harrison MP, Minister administering External Territories, 9 March 1939.

43 NAA: A659, 1939/1/10936, op. cit., L. H. Giles for Administrator, NT Administration, Darwin to the Secretary, Department of the Interior, 8 May 1939.

44 An interim council for this Institute was set up, which met in December 1961. An Act was passed in June 1964 to formally establish the Institute. See Frederick D. McCarthy, 'The Australian Institute of Aboriginal Studies', *Australian Natural History*, vol. 15, no. 6, 15 June 1966, pp. 194–195.

45 Frederick D. McCarthy, 'Aboriginal relics and their preservation', *Mankind*, vol. 2, no. 5, August 1938, p. 120.

46 Elsie Bramell, *The Australian Journal of Science*, vol. II, no. 1, 21 August 1939, p. 1.

47 Joseph L. Shellshear, 'An appeal for the preservation of prehistoric remains in Australia', *The Australian Museum Magazine*, vol. VI, no. 5, January–March 1937, p. 174.

48 R. H. Goddard, 'Aboriginal sculpture', in Report of the Twenty-Fourth Meeting of the Australian and New Zealand Association for the Advancement of Science, Canberra Meeting, January 1939, pp. 160–163.

49 ibid., p. 160.

50 ibid., p. 161.

51 ibid., p. 162.

52 ibid.

53 McCarthy to Hon. Secretary, ANZAAS, 24 January 1940, Elkin Papers, Series 22, Box 141, File 3/2/5, University of Sydney Archives.

54 Walkom to McCarthy, 25 January 1940, Elkin Papers.

55 Elkin to Walkom, 1 February 1940, Elkin Papers.

56 ibid.

57 Roman Black, *Old and New Aboriginal Art*, Sydney, Angus & Robertson, 1964, p. 111.

58 ibid., p. 113.

59 Fred McCarthy to Mountford, 13 October 1941 in Mountford Correspondence 1941–1944, Mountford–Sheard Collection, Mortlock State Library of South Australia, Adelaide.

60 Mountford to Towle, 26 November 1941, Towle Papers.

61 Towle to R. Lindsay Black, 2 November 1941, Towle Papers.

62 Margaret Preston, 'Paintings in Arnhem Land', *Art in Australia*, third series, no. 81, 25 November 1940, p. 61.

63 ibid., p. 63.

64 McCarthy to Preston, 6 December 1943, McCarthy Papers, ML MSS 3188 Add-on 1350, Mitchell Library, State Library of New South Wales, Sydney.

65 Mountford to Towle, 2 November 1942, Towle Papers.

66 Towle to Mountford, 15 November 1942, Towle Papers.

67 Leonhard Adam to McCarthy, 5 May 1945, McCarthy Papers, Mitchell Library, State Library of New South Wales, Sydney.

68 Adam to McCarthy, 5 May 1945, McCarthy Papers, Mitchell Library.

69 ibid.

70 Charles Barrett, *Coast of Adventure: Untamed North Australia*, Melbourne, Robertson & Mullens, 1941, p. 82.

71 ibid., p. 92.

72 F. D. McCarthy, with E. Bramell, and H. V. V. Noone, *The Stone Implements of Australia*, Memoir IX, Sydney, The Australian Museum, 1946.

73 ibid., p. 1.

74 ibid., p. 3.

75 ibid., p. 4.

5: 'Made to Order': Arnhem Land 1948 (between p. 182 and p. 201)

1 Charles Mountford to the Chairman of the Research Committee, National Geographic Society, Washington, DC, 5 March 1945, Correspondence, Sheard–Mountford Collection, Mortlock State Library of South Australia.

2 See Sally May, 'The last frontier? Acquiring the American–Australian Scientific Expedition Ethnographic Collection 1948', unpublished BA Hons thesis, Department of Archaeology, Flinders University, South Australia. I am grateful for Ms May for providing me with a copy of this thesis.

3 Arnhem Land Diary of Frank M. Setzler, Setzler Papers, MS 5230, National Library of Australia, Canberra.

4 Setzler Diary, 25 February 1948.

5 Setzler Diary, 26 February 1948.

6 Setzler Diary, 8 April 1948.

7 Frederick D. McCarthy and Frank M. Setzler, 'The Archaeology of Arnhem Land', in Charles P. Mountford (ed.), *Records of the American–Australian Scientific Expedition to Arnhem Land*, vol. 2,

Anthropology and Nutrition, Melbourne, Melbourne University Press, 1960, pp. 215–216.
8 Setzler Diary, Thursday 15 April 1948.
9 Setzler Diary, 15 May 1948.
10 Setzler Diary, 2 June 1948.
11 Setzler Diary, 6 June 1948.
12 Setzler Diary, 7 June 1948.
13 Setzler Diary, Tuesday 26 October 1948.
14 ibid.
15 Frank M. Setzler and Frederick C. McCarthy, 'A unique archaeological specimen from Australia', *Journal of the Washington Academy of Sciences*, vol. 40, no. 1, January 1950, p. 1.
16 McCarthy to Specht, 28 August 1950, McCarthy Papers, Mitchell Library, Sydney.
17 McCarthy to Bassett-Smith, 16 June 1950, McCarthy Papers, Sydney.
18 Lloyd W. Warner, *A Black Civilization*, op. cit., p. 470.
19 ibid., p. 470.
20 ibid.
21 Frederick D. McCarthy and Frank M. Setzler, 'The Archaeology of Arnhem Land', in Charles P. Mountford (ed.), *Records of the American–Australian Scientific Expedition to Arnhem Land*, vol. 2, Anthropology and Nutrition, Melbourne, Melbourne University Press, 1960, p. 216.
22 ibid., p. 217.
23 ibid.
24 ibid.
25 See D. J. Mulvaney and Johan Kamminga, *Prehistory of Australia*, op. cit., pp. 41–43.
26 ibid., p. 42.
27 Towle to Kenyon, 23 November 1941, Towle Papers.
28 Towle to Kenyon, 21 December 1941, Towle Papers.
29 ibid.
30 Setzler Diary, 21 April 1948, Setzler Papers, Setzler's emphasis.
31 Setzler Diary, 12 July 1948.
32 Setzler Diary, 15 July 1948.
33 Setzler Diary, 3 August 1948.
34 Setzler Diary, 4 August 1948.
35 Setzler Diary, 5 August 1948.
36 Howard Morphy, *Ancestral Connections*, op. cit., p. 16.
37 ibid., p. 17.
38 Setzler Diary, 6 August 1948.
39 Setzler Diary, 7 August 1948.

40 Knut Dahl, *In Savage Australia*, op. cit., p. 39.
41 Setzler Diary, 7 June 1948.
42 Fred McCarthy, Groote Eylandt Diary no. 3, 29 June 1948, Item 271, McCarthy Papers, MS 3513, AIATSIS, Canberra.
43 Setzler Diary, Thursday 17 June 1948, Setzler Papers.
44 Setzler Diary, Saturday 26 June 1948.
45 ibid.
46 Setzler Diary, 19 August 1948.
47 Setzler Diary, 23 September 1948.
48 Setzler Diary, Tuesday 8 June 1948.

6: 'Free from European Influence' (between p. 202 and p. 248)

1 Fred Gray, The Groote Eylandt Native Settlement, c/o Roper River Mission, via Camooweal, Qld, to McCarthy, 22 January 1949, McCarthy Papers, Mitchell Library.
2 McCarthy to Fred Gray, 23 May 1950, McCarthy Papers, Mitchell Library.
3 Howard Morphy, *Ancestral Connections*, op. cit., pp. 15–16.
4 Charles P. Mountford, 'Exploring Stone Age Arnhem Land', *The National Geographic Magazine*, vol. XCVI, no. 6, December 1949, pp. 745–782.
5 ibid., p. 745.
6 ibid.
7 ibid., pp. 751–752.
8 ibid., p. 782.
9 ibid., p. 779.
10 McCarthy to Peter Bassett-Smith, 16 June 1950, McCarthy Papers, Mitchell Library, Sydney.
11 McCarthy to Ronald Berndt, 4 November 1957, McCarthy Papers, Mitchell Library, Sydney.
12 Frederick D. McCarthy, 'The cave paintings of Groote Eylandt and Chasm island', in Mountford (ed.), *Records of the American–Australian Scientific Expedition to Arnhem Land*, vol. 2, Anthropology and Nutrition, Melbourne, Melbourne University Press, 1960, p. 299.
13 Frederick. D. McCarthy, 'Notes on the cave paintings of Groote and Chasm Islands in the Gulf of Carpentaria', *Mankind*, vol. 5, no. 2, September 1955, pp. 68–75.
14 ibid., p. 68.
15 ibid., p. 75.

16 Charles P. Mountford, *Art, Myth and Symbolism*, Records of the American–Australian Scientific Expedition to Arnhem Land, vol. 1, Melbourne, Melbourne University Press, 1956, p. xxx.
17 ibid., p. 8.
18 ibid., p. 13.
19 R. M. Berndt, 'The Mountford Volume on Arnhem Land Art, Myth and Symbolism: A Critical Review', *Mankind*, vol. 5, no. 6, October 1958, p. 249.
20 ibid., p. 250.
21 ibid.
22 ibid., p. 252.
23 ibid., p. 253.
24 ibid., p. 255.
25 ibid., p. 261.
26 Peter M. Worsley, 'Records of the American–Australian Expedition to Arnhem Land: Vol. I, Art, Myth and Symbolism', *Man*, vol. LVII, no. 241, December 1957, p. 186.
27 B. A. L. Cranstone, 'The art, myth and symbolism of Arnhem Land', *Man*, vol. LVIII, nos 21–24, February 1958, p. 30.
28 Charles P. Mountford, 'The Mountford Volume on Arnhem Land Art, Myth and Symbolism: A Critical Review – A Rejoinder', *Mankind*, vol. 5, no. 6, October 1958, p. 268.
29 ibid.
30 A. P. Elkin, 'Art and Meaning: A Review Article', *Oceania*, vol. XXXII, no. 1, September 1961, p. 55.
31 ibid., p. 56.
32 See for example Elkin's 'The secret life of the Australian Aborigines', *Oceania*, vol. III, no. 2, December 1932, pp. 119–138, and 'Elements of Australian Aboriginal philosophy', *Oceania*, vol. XL, no. 2, December 1969, pp. 85–98.
33 A. P. Elkin, with Catherine and Ronald Berndt, *Art in Arnhem Land*, Melbourne, F. W. Cheshire, 1950.
34 A. P. Elkin, Foreword, in Elkin, with Catherine and Ronald Berndt, op. cit., p. xi.
35 A. P. Elkin, 'The secret life of the Australian Aborigines', *Oceania*, vol. III, no. 2, December 1932, p. 119.
36 A. P. Elkin, *The Australian Aborigines*, 5th edn, Sydney, Angus & Robertson Publishers, 1974, p. 263.
37 Elkin, with Catherine and Ronald Berndt, op. cit., p. 4.
38 ibid., p. 6.
39 ibid., p. 109.
40 ibid., p. 111.

41 R. and C. Berndt, 'Aboriginal art in Central Western Northern Territory', *Meanjin*, vol. 9, no. 3, Spring 1950, p. 183.
42 Ronald M. Berndt, Preface in Berndt (ed.), *Australian Aboriginal Art*, Sydney, Ure Smith, 1964, p. 1.
43 A. P. Elkin, 'Art and Life', in Berndt (ed.), op. cit., p. 19.
44 T. G. H. Strehlow, 'The art of circle, line, and square', in Berndt (ed.), op. cit., p. 44.
45 Elkin, Berndt and Berndt, op. cit., pp. 112–113.
46 ibid., p. 113.
47 ibid., p. 114.
48 ibid.
49 ibid., p. 115.
50 Jane C. Goodale and Joan D. Koss, 'The cultural context of creativity among Tiwi', in Charlotte M. Otten (ed.), *Anthropology and Art: Readings in Cross-Cultural Aesthetics*, Garden City, New York, The Natural History Press, 1971, pp. 182–200.
51 Goodale and Koss, op. cit., p. 200.
52 Greg Dening, 'Adam, Leonhard (1891–1960)', in John Ritchie (ed.), *The Australian Dictionary of Biography*, vol. 13: 1940–1980, Melbourne, Melbourne University Press, 1993, p. 8.
53 ibid.
54 Leonhard Adam, *Primitive Art*, Harmondsworth, Penguin Books, 1940. This work was published in three editions, in 1940, 1949 and 1954. See also Adam, 'Has Australian Aboriginal art a future?', *Angry Penguins*, Autumn 1944, pp. 42–50; Adam, 'The abstract art of the Aranda', *Anthropos*, vol. 55, 1960, pp. 345–354; Adam, 'The bark paintings of Groote Eylandt (Gulf of Carpentaria) in the Melbourne University Collection', *South Seas Studies, Gedenkschrift Zur Erinnerung An Felix Speiser*, Basel, 1951, pp. 162–188.
55 Leonhard Adam, *Primitive Art*, Melbourne, Penguin Books, 3rd edn, 1954, p. 207.
56 ibid., p. 208.
57 ibid., pp. 208–209.
58 ibid., p. 209.
59 ibid., pp. 210–211.
60 Greg Dening, op. cit., p. 9.
61 Leonhard Adam to Mr & Mrs Douglas Boerner, c/o Department of Works, Alice Springs, 24 April 1955, Adam Papers, University of Melbourne Archives.
62 ibid.
63 ibid. Notwithstanding his comment about being reluctant to 'make contact with Aborigines', Adam apparently did meet at least one, while at Jay Creek. Personal communication from Ms Mary-Clare

Adam. I am grateful for Ms Adam for providing this and other information about Adam's career.

64 Adam to Rev. G. T. Symons, Superintendent, Methodist Mission, Yirrkala, 1 August 1955, Adam Papers.

65 ibid.

66 McCarthy to Andeas Lommel, 8 December 1955, McCarthy Papers, Mitchell Library, Sydney.

67 An interim council was set up in 1961, and the Institute was formally established under legislation in 1964. See Frederick D. McCarthy, 'The Australian Institute of Aboriginal Studies', *Australian Natural History*, vol. 15, no. 5, 15 June 1966, pp. 194–197.

68 F. D. McCarthy, 'The UNESCO travelling exhibition of Aboriginal culture', *AGMA*, no. 7, 1953, p. 11.

69 ibid., p. 14.

70 NAA: A463, 1959/3831, Dr Donald Thompson [Thomson] – Collection of Aboriginal Art, 1959–1961, Grenfell Rudduck, Associate Commissioner, National Capital Development Commission, to E. J. Bunting, Secretary, Prime Minister's Department, 1 April 1959.

71 NAA: A2907, Folder 7, Australian Institute of Aboriginal Studies – Dr R Milne Wishart, 1961–1964, Dr Helen M. Wurm, Curator of Anthropology, Institute of Anatomy, to Mr Fred Smith, 10 May 1961.

72 ibid.

73 ibid.

74 Robyn Bromley, 'An Assessment of the Research Potential of a Museum Held Surface Collection: the Wishart Collection', unpublished BA Honours thesis, Department of Archaeology and Anthropology, The Australian National University, October 1980, p. 1.

75 ibid., p. 2.

76 Stuart Sayers, 'Doctor has Aboriginal relics galore', *The Age Wednesday Magazine*, 6 September 1961, p. 17. I thank David Kaus at the National Museum of Australia for providing me with a copy of this article.

77 ibid.

78 Robyn Bromley, op. cit., p. 3.

79 ibid., p. 7.

80 NAA: A2907, Folder 7, Australian Institute of Aboriginal Studies – Dr R Milne Wishart, 1961–1964, Note by Dr Helen M. Wurm, 8 October 1963.

81 S. R. Mitchell, *Stone-Age Craftsmen: Stone Tools and Camping Places of the Australian Aborigines*, Melbourne, Tate Book Co. Pty Ltd, 1949.

82 ibid., pp. 3–4.

83 ibid., pp. 4–5.

84 Donald Thomson to Stan Mitchell, 8 February 1950, Mitchell Papers, MS 9, Box 9a, AIATSIS, Canberra.

85 McCarthy to Adam, 21 June 1949, McCarthy Papers, Mitchell Library, State Library of New South Wales, Sydney.

86 McCarthy to Mr and Mrs Noone, 14 December 1949, McCarthy Papers, Mitchell Library.

87 Mitchell to Stanner, 16 November 1961, Mitchell Papers, MS 9, Box 9a, AIATSIS Library, Canberra.

88 ibid.

89 ibid.

90 Mitchell to Stanner, 16 February 1962, Mitchell Papers, AIATSIS.

91 ibid.

92 A. Massola, 'Stanley Robert Mitchell, 1881–1963', *Mankind*, vol. 6, no. 3, May 1964, p. 138.

93 I. C. S. Webster to H. C. Coombs, 17 September 1974, Coombs Papers MS 802, Box 41, Folder 338, National Library of Australia Manuscripts Collection, Canberra.

94 ibid.

95 ibid.

96 ibid.

97 Edwards to Coombs, 30 October 1974, Coombs Papers, Box 41, Folder 338, NLA

98 Julian Thomas, *Time, Culture and Identity: An Interpretive Archaeology*, London and New York, Routledge, 1996, p. 20.

99 Frederick D. McCarthy, 'The Australian Institute of Aboriginal Studies', *Australian Natural History*, vol. 15, no. 6, 15 June 1966, p. 195.

100 Spike Milligan to McCarthy, 2 September 1962, McCarthy Papers, Mitchell Library, State Library of New South Wales, Sydney.

101 McCarthy to Spike Milligan, 7 September 1962, McCarthy Papers, Mitchell Library, Sydney.

102 Marian W. Smith (ed.), *The Artist in Tribal Society: Proceedings of a Symposium held at the Royal Anthropological Institute*, London, Routledge & Kegan Paul, 1961.

103 Charles Mountford, 'The artist and his art in an Australian Aboriginal society', in Smith (ed.), op. cit., p. 2.

104 Marian Smith, Introduction in Smith (ed.), op. cit., p. x.

105 ibid., pp. x–xi.

106 ibid., p. 1.

107 Mountford to Alexander Marshak, 17 February 1975, 'Nomads of the Australian Desert' Correspondence, 1968–76, Mountford–Sheard Collection, Mortlock Library of South Australia, Adelaide.

108 Norman B. Tindale and H. A. Lindsay, *Aboriginal Australians*, Brisbane, The Jacaranda Press, 1963, p. 5.
109 ibid., p. 77.
110 Karel Kupka, *Dawn of Art: Painting and Sculpture of Australian Aborigines*, A Studio Book, New York, Viking Press, 1965, p. 14.
111 ibid.
112 ibid., pp. 14–15.
113 McCarthy to Lommel, 27 January 1958, McCarthy Papers, Mitchell Library, Sydney.
114 Elkin to Barnes, 22 June 1963, Elkin Papers, Accession 664, Box 149, file 3/8/9, Sydney University Archives.
115 McCarthy to Simon Kooiman, 23 March 1964, McCarthy Papers, Mitchell Library, Sydney.
116 McCarthy to Guiart, 9 April 1964, McCarthy Papers, Mitchell Library, Sydney.
117 Lorna Lippman to McCarthy, 20 March 1962, McCarthy Papers, Mitchell Library, Sydney.
118 McCarthy to Lorna Lippman, 23 March 1962, McCarthy Papers, Mitchell Library, Sydney.
119 Lorna Lippman to McCarthy, 26 March 1962, McCarthy Papers, Mitchell Library, Sydney.

7: Legislation for Preservation (between p. 249 and p. 267)

1 NAA: A452, 1958/3400, Preservations of Archaeological Sites and Relics in Commonwealth Territories, 1951–1958, Memo from W. J. Weedon, Acting Director, Office of Education, to Secretary, Department of Territories, Canberra, 24 August 1951.
2 NAA: A452, 1958/3400, Preservations of Archaeological Sites and Relics in Commonwealth Territories, 1951–1958, J. E. Willoughby, on behalf of Secretary, Department of Territories to W. J. Weedon, Acting Director, Office of Education, 24 September 1951.
3 NAA: A452, 1958/3400, op. cit., R. C. Mills, Director of the Commonwealth Office of Education, to the Secretary, Department of Territories, 5 February 1952.
4 NAA: A452, 1958/892, Ayers Rock, Mount Olga National Park – Northern Territory, 1952–1960, F. J. S. Wise, Administrator, Darwin, NT to Secretary, Department of Territories, 30 April 1952.
5 ibid.
6 NAA: A452, 1958/892, Ayers Rock, Mount Olga National Park – Northern Territory, 1952–1960, Memorandum from Paul Hasluck, Minister for Territories, to the Secretary, Department of Territories, 10 July 1953.

7 NAA: A452, 1958/892, op. cit., F. J. S. Wise, NT Administrator, to the Secretary, Department of Territories, 28 July 1953.
8 NAA: A452, 1958/892, op. cit., Hasluck to Cooper, 14 November 1957.
9 NAA: A452, 1958/892, op. cit., Fred. M. Packard to the Hon. Walter J. Cooper, MBE, Minister for Repatriation, 21 January 1958.
10 NAA: A452, 1952/410, Northern Territory – Preservation of Aboriginal Ceremonial Grounds, 1951–1955.
11 NAA: A452, NT1963/2957, Native and Historical Objects Preservation Ordinance – Northern Territory, 1960–1966, J. C. Archer, NT Administrator to Secretary, Department of Territories, 8 April 1960.
12 NAA: A452, NT1963/2957, op. cit., Native and Historical Objects and Areas Preservation Ordinance, Explanatory Memorandum.
13 NAA: A452, NT1963/2957, op. cit., Debate on the Native and Historical Objects and Areas Preservation (Amendment) Bill 1960, 29 November 1960, extract from NT Hansard, pp. 151–152.
14 ibid., p. 154.
15 ibid., pp. 155–156.
16 ibid., pp. 156–157.
17 NAA: A452, NT1963/2957, op. cit., Report from the Select Committee on The Native and Historical Objects and Areas Preservation Ordinance 1955–1960, The Legislative Council for the Northern Territory, 10 August 1965, p. 4.
18 ibid.
19 ibid., p. 5.
20 ibid.
21 ibid., p. 8, Appendix II, 'Some Comments from Mr T. G. H. Strehlow, Reader in Linguistics, University of Adelaide'.
22 ibid., p. 9.
23 ibid.
24 ibid.
25 NAA: A1734, NT1968/2388, Survey and Protection of Sacred Sites, 1968–1971, Nixon to McCarthy, 5 March 1969.
26 ibid.
27 ibid., Department of the Interior Minute, R. J. Etridge to Deputy Secretary, 6 November 1969.
28 NAA: A6456, R088/017, Aboriginal and Historical Relics Advisory Board – Reports and Correspondence, *circa* 1950 – *circa* 1985, Robert Edwards, Director, South Australian Museum, to Dr M. W. Woods, Director of the Weapons Research Establishment, Salisbury, South Australia, 18 December 1967.

29 NAA: A6456, R088/017, op. cit., G. C. Agars, Acting Chief Administrative Officer to Deputy Crown Solicitor, 4 January 1968.
30 ibid., G. J. Charlton, Deputy Crown Solicitor, to Director of the Weapons Research Establishment, 15 June 1968.
31 Robert Edwards, 'Legislation for the preservation of Aboriginal relics in South Australia', in F. D. McCarthy (ed.), *Aboriginal Antiquities in Australia: Their Nature and Preservation*, Australian Aboriginal Studies no. 22, Prehistory and Material Culture, third series, Australian Institute of Aboriginal Studies, Canberra, 1970, p. 162.
32 NAA: A1734, NT1968/2388, Survey and Protection of Sacred Sites, 1968–1971, F. D. McCarthy to P. J. Nixon, 11 December 1968.
33 ibid.
34 ibid., Recommendations of the Conference on Prehistoric Monuments and Antiquities, Australian Institute of Aboriginal Studies, attachment to McCarthy to Nixon, 11 December 1968.

Part III

8: Sacred Sites as Heritage (between p. 271 and p. 285)

1 Kenneth Maddock, 'Metamorphosing the sacred in Australia', *The Australian Journal of Anthropology*, vol. 2, no. 2, 1991, p. 215.
2 ibid., p. 219.
3 ibid., pp. 223–226.
4 Stuart Love, Journal of an Expedition in Arnhem Land, Northern Territory, Australia, Being some account of travels and explorations made in that country between 23 June and 23 October 1910 on behalf of William Orr, Esq. of Melbourne (written at Melbourne, October 1953), Manuscript, National Library of Australia, Canberra, NL MS 1565, p. 35.
5 ibid. Love 're' wrote his journal in Melbourne in October 1953, and included annotations and notes he had made to his 'original' in 1944 and 1948.
6 NAA: A1, 1912/2503, Caledon Bay Expedition, 1911–1913, Report of the Caledon Bay Prospecting Expedition, 1912, Diary of the Caledon Bay Prospecting Party by W. F. Murphy.
7 NAA: A1, 1936/8795, University of Adelaide, Anthropological Expedition to Granites, NT, 1936–1937, J. B. Cleland, Chairman, Board for Anthropological Research, University of Adelaide, to the Hon. T. Paterson, Minister for the Interior, 7 September 1936.
8 ibid., Cleland to Paterson, 7 September 1936, original emphasis.

9 NAA: A452, NT1964/5952, Paper prepared by Professor R. M. Berndt on Sacred Sites in Gove Peninsula Area, 1964–1966. This paper was also published as 'The Gove dispute: The question of Australian Aboriginal land and the preservation of sacred sites', *Anthropological Forum*, vol. 1, no. 2, November 1964, pp. 258–295.
10 NAA: A2354, 1969/322 Part I, Sacred sites and relics. Northern Territory – Identification and Protection, 1969–1973, Peter Nixon, Minister for the Interior, to W. C. Wentworth, Minister-in-Charge of Aboriginal Affairs, 23 October 1968.
11 ibid., Fred McCarthy to W. C. Wentworth, 12 August 1968.
12 NAA: A1734, NT1968/2388, Survey and Protection of Sacred Sites, 1968–1971, Department of the Interior Memo from R. L. Dean, Administrator of the Northern Territory, to Mr Donovan, n.d.
13 ibid.
14 ibid.
15 ibid., Wentworth to Nixon, 20 May 1969.
16 NAA: E460, 1982/108, Copyright on Aboriginal Songs – Art and Literature – Policy, H. C. Coombs, Chairman, Council for Aboriginal Affairs, to the Minister in Charge of Aboriginal Affairs, 29 January 1969.
17 ibid.
18 ibid.
19 ibid.
20 ibid., B. G. Dexter, Director of the Office of Aboriginal Affairs, PM's Department, to Mr R. S. Swift, Deputy Secretary, Department of the Interior, 27 September 1968.

9: Writing Heritage as Property (between p. 286 and p. 290)

1 *Milirrpum v Nabalco Pty Ltd and the Commonwealth of Australia* (the 'Gove Land Rights Case'), 17 FLR, 1971.
2 ibid., pp. 272–273.
3 Nancy Williams, *The Yolngu and Their Land: A System of Land Tenure and the Fight for its Recognition*, Canberra, Australian Institute of Aboriginal Studies, 1986, p. 201.
4 ibid., p. 104.
5 ibid., p. 232.
6 For critical comments on the roles of law and anthropology in relation to the formulation and operation of the *Aboriginal Land Rights Act*, see Robert Layton, *Uluru: An Aboriginal History of Ayers Rock*, Canberra, Aboriginal Studies Press, 1989; Layton, 'Relating to the country in the Western Desert', in Eric Hirsch and Michael

O'Hanlon (eds), *The Anthropology of Landscape: Perspectives on Place and Space*, Oxford, Clarendon Press, 1995, pp. 210–231.

7 Amanda Pask, 'Cultural appropriation and the law: An analysis of the legal regimes concerning culture', *Intellectual Property Journal*, vol. 8, no. 1, December 1995, pp. 66–67.

8 ibid., pp. 84–85. (Author's emphasis)

9 e.g., Henrietta Fourmile, 'Aboriginal heritage legislation and self-determination', *Australian–Canadian Studies*, vol. 7, nos 1–2 (Special Issue, 1989), pp. 45–61; Rosemary Coombe, 'The properties of culture and the politics of possessing identity: native claims in the cultural appropriation controversy', *Canadian Journal of Law and Jurisprudence*, vol. VI, no. 2, July 1993, pp. 249–285.

10 Henrietta Fourmile, op. cit., p. 45.

11 ibid., p. 52.

10: Making it Whole Again: Towards an Inclusive Heritage? (between p. 291 and p. 313)

1 Report of the Working Party on the Protection of Aboriginal Folklore, Canberra, Department of Home Affairs and Environment, Commonwealth of Australia, December 1981, Preface, para 101.

2 ibid., Preface, para 203.

3 ibid., Preface, para 204.

4 ibid., Preface, para 402.

5 ibid., Preface, para 406.

6 ibid., Preface, para 507.

7 ibid., Preface, para 503. The Report drew on existing and emerging international developments by UNESCO and the World Intellectual Property Organisation (WIPO) to protect what those organisations described as 'national folklore' (Report, paras 901 to 919).

8 ibid., Preface, paras 603–607.

9 ibid., Preface, paras A102–A110.

10 For a critique of the term 'folklore' see also Michael Davis, 'Competing Knowledges? Indigenous Knowledge Systems and Western Scientific Discourses', Paper presented to Science and Other Knowledge Traditions Conference, James Cook University, Cairns, 23–27 August 1996.

11 *Foster v Mountford* (1976) 29 FLR 233 at 235.

12 *Foster v Mountford* (1976) 29 FLR 233 at 236.

13 Frederick D. McCarthy, *Australian Aboriginal Rock Art*, Sydney, The Australian Museum, 1979, p. 7.

14 ibid., p. 8.

15 These cases are well documented in Michael Davis, *Indigenous Peoples and Intellectual Property Rights*, Research Paper no. 20 (1996–97), Information and Research Services, Canberra, Department of the Parliamentary Library, and Terri Janke, *Our Culture, Our Future: Report on Australian Indigenous Cultural and Intellectual Property Rights*, Canberra, ATSIC and AIATSIS, 1998.

16 John, F. Ley, *Report on the Ministerial Review of the Protection of Movable Cultural Heritage Act 1986 and Regulations*, Canberra, AGPS, July 1991, pp. 22–23.

17 ibid., p. 11.

18 ibid., p. 13.

19 ibid., p. 1.

20 ibid., p. xv.

21 ibid., p. 88.

22 Tim Bonyhady, 'The stuff of heritage', in Tim Bonyhady and Tom Griffiths (eds), *Prehistory to Politics: John Mulvaney, the Humanities and the Public Intellectual*, Melbourne, Melbourne University Press, 1996, pp. 144–162.

23 *Australian Heritage Commission Act 1975* (Cwlth), s 52, cited in Justice Elizabeth Evatt, *Review of the Aboriginal and Torres Strait Islander Heritage Protection Act 1984*, Report, 1996, p. 21.

24 ibid.

25 ibid.

26 *Stopping the Rip-Offs: Intellectual Property Protection for Aboriginal and Torres Strait Islander Peoples*, Issues Paper, Canberra, Commonwealth of Australia, October 1994, p. 2.

27 ibid.

28 ibid.

29 ibid., p. 7.

30 See Michael Davis, *Indigenous Peoples and Intellectual Property Rights*, Research Paper no. 20 (1996–97), Information and Research Services, Department of the Parliamentary Library, Canberra, June 1997; Michael Davis, *Biological Diversity and Indigenous Knowledge*, Research Paper no. 17 (1997–98), Information and Research Services, Department of the Parliamentary Library, Canberra, June 1998; Michael Davis, 'Indigenous Rights in Traditional Knowledge and Biological Diversity: Approaches to Protection', *Australian Indigenous Law Reporter*, vol. 4, no. 4, 1999, pp. 1–32.

31 Terri Janke, op. cit.

32 ibid., p. xvii.

33 See Michael Davis, 'Law, Anthropology, and the Recognition of Indigenous Cultural Systems', in René Kuppe and Richard Potz (eds),

Law and Anthropology: International Yearbook for Legal Anthropology, vol. 11 (2001), pp. 298–320.

34 *Mabo and Ors v State of Queensland (No. 2)* 1992 107 ALR 1.

35 Isabel McBryde (ed.), *Who Owns the Past? Papers from the Annual Symposium of the Australian Academy of the Humanities*, Melbourne, Oxford University Press, 1985.

36 ibid. p. 2.

37 ibid., pp. 2–3.

38 ibid., p. 3.

39 ibid., p. 4.

40 John Mulvaney, 'A question of values: museums and cultural property', in McBryde, op. cit., p. 88.

41 ibid., p. 93.

42 ibid., p. 95, my emphasis.

43 Ros Langford, 'Our heritage – Your playground', *Australian Archaeology*, no. 16, June 1983, p. 2.

44 ibid.

45 See *Commonwealth of Australia v Tasmania, 'The Tasmanian Dam Case'* (1983), 158 CLR 1; also *The Franklin Dam Case*, with Commentary by Michael Coper, Sydney, Butterworths, 1983.

46 See Maureen Tehan, 'A tale of two cultures', *Alternative Law Journal*, vol. 21, no. 1, February 1996, pp. 10–14.

47 A brief summary of the Hindmarsh Island Bridge Case as at 1996 is contained in Justice Elizabeth Evatt, op. cit., pp. 299–303.

Bibliography

Archives and Manuscript sources

National Archives of Australia

Archives

NAA: A1, 1912/2503, Caledon Bay Expedition, 1911–1913.

NAA: A1, 1936/8795, University of Adelaide, Anthropological Expedition to Granites, NT, 1936–1937.

NAA: A452, 1952/410, Northern Territory – Preservation of Aboriginal Ceremonial Grounds, 1951–1955.

NAA: A452, 1958/892, Ayers Rock, Mount Olga National Park – Northern Territory, 1952–1960.

NAA: A452, 1958/3400, Preservations of Archaeological Sites and Relics in Commonwealth Territories, 1951–1958.

NAA: A452, NT1963/2957, Native and Historical Objects Preservation Ordinance – Northern Territory, 1960–1966.

NAA: A452, NT1964/5952, Paper prepared by Professor R. M. Berndt on Sacred Sites in Gove Peninsula Area, 1964–1966.

NAA: A458, AJ120/6, Federal Territory National Museum of Ethnology, 1928–1930.

NAA: A463, 1959/3831, Dr Donald Thompson [Thomson] – Collection of Aboriginal Art, 1959–1961.

NAA: A659, 1939/1/10936, Preservation of Aboriginal Relics, Fossils and Geological Specimens, 1937–1940.

NAA: A1734, NT1968/2388, Survey and Protection of Sacred Sites, 1968–1971.

NAA: A2354, 1969/322 Part I, Sacred sites and relics. Northern Territory, 1969–1973.

NAA: A2907, Folder 7, Australian Institute of Aboriginal Studies – Dr R. Milne Wishart, 1961–1964.

NAA: A6456, R088/017, Aboriginal and Historical Relics Advisory Board – Reports and Correspondence, *circa* 1950 – *circa* 1985.

NAA: E460, 1982/108, Copyright on Aboriginal Songs – Art and Literature – Policy.

Photographs

NAA: A1200, Panels from Exhibition on Aboriginal Life – Australian Museum, Sydney, 1953.
L15353, Bark paintings.
L15366, Ceremonial life.
L15368, Cave paintings.
L15370, Rock engravings.
L15379, Decorative art.
L17549, Pioneer of the Aranda art movement, Albert Namatjira in front of his truck at Haast Bluff Aboriginal Reserve, NT, 1954.
L22085, Mr Karel Kupka displays samples of Aboriginal art.
L40552 and L40553, Dr R. M. Wishart with collection of Aboriginal implements.
NAA: A8746, KN7/3/84/301, Aboriginal men in a Corroboree at Uluru, NT, 1984.

Other archives

Adam, Leonhard, Papers, Accession 94/60, University of Melbourne Archives.
Aiston, George, Letters to W. H. Gill, 1920–1940, CY Reel 605, ML A2535–A2537, Mitchell Library, State Library of New South Wales.
Chinnery, E. H. P., Papers, MS 766, National Library of Australia, Canberra.
Coombs, H. C. Papers, MS 802, Manuscripts Collection, National Library of Australia, Canberra.
Croll, R. H., Papers, MS 8910 & MS 8964, La Trobe Australian Manuscripts Collection, State Library of Victoria, Melbourne.
Elkin, A. P., Papers, Archives, The University of Sydney.
Kenyon, A. S., Papers, MS 12173, La Trobe Australian Manuscripts Collection, State Library of Victoria, Melbourne.
Love, Stuart, 'Journal of an Expedition in Arnhem Land, Northern Territory, Australia: Being some account of travels and explorations made in that country between 23 June and 23 October 1910 on behalf of William Orr, Esq. of Melbourne (written at Melbourne, October 1953)', MS 1565 & 1527, National Library of Australia, Canberra.
McCarthy, F. D., Papers, ML MSS 3188 Add-on 1350 and ML MSS 3188 Add-on 1981, Mitchell Library, State Library of New South Wales, Sydney.

McCarthy, F. D., Papers, MS 3513, Australian Institute of Aboriginal and Torres Strait Islander Studies, Canberra.
Mitchell, S. R. Papers, MS 9, Australian Institute of Aboriginal and Torres Strait Islander Studies, Canberra.
Mountford, C. P., Papers, Mountford–Sheard Collection, Ref. PRG 1218, Mortlock Library, State Library of South Australia, Adelaide.
Setzler, Frank M., Papers, MS 5230, National Library of Australia, Canberra.
Towle, C. C., Papers, ML MSS 3580, Mitchell Library, State Library of New South Wales, Sydney.

Court decisions

Foster v Mountford (1976) 29 FLR 233
Mabo & Others v State of Queensland (No. 2) (1992) 107 ALR 1 (*Mabo* Decision)
Milirrpum v Nabalco (1971) (*Gove Case*)
Commonwealth of Australia v Tasmania (1983) 158 CLR 1 (*Tasmanian Dams Case*)

Official reports

Commonwealth of Australia, *Report of the Committee of Inquiry into the National Estate* (the 'Hope Report'), Canberra, AGPS, 1974.
Commonwealth of Australia, *Report of the Working Party on the Recognition of Aboriginal Folklore*, Canberra, Department of Home Affairs and Environment, 1981.
Commonwealth of Australia, *Stopping the Rip-Offs: Intellectual Property Protection for Aboriginal and Torres Strait Islander Peoples*, Issues Paper, Canberra, Attorney-General's Department, 1994.
Evatt, Justice Elizabeth, *Review of the Aboriginal and Torres Strait Islander Heritage Protection Act 1984*, Report, 1996.
Janke, Terri, *Our Culture, Our Future: Report on Australian Indigenous Cultural and Intellectual Property Rights*, ATSIC and AIATSIS, Canberra and Sydney, 1998.
Ley, John, *Report on the Ministerial Review of the Protection of Movable Cultural Heritage Act 1986 and Regulations*, Canberra, AGPS, 1991.

Published Works, Theses and Conference Papers

Adam, Leonhard, *Primitive Art*, Harmondsworth, Penguin Books, 1940.

Adam, Leonhard, 'Has Australian Aboriginal art a future?', *Angry Penguins*, Autumn 1944, pp. 42–50.

Adam, Leonhard, 'The bark paintings of Groote Eylandt (Gulf of Carpentaria) in the Melbourne University Collection', in *South Seas Studies, Gedenkschrift Zur Erinnerung An Felix Speiser*, Basel, Museum für Volkerkunde, 1951, pp. 162–188.

Adam, Leonhard, 'The abstract art of the Aranda', *Anthropos*, vol. 55, 1960, pp. 345–354.

Adam, Leonhard, *Primitive Art*, 3rd edn, Melbourne, London and Baltimore, Penguin Books, 1954.

Anon., 'The antiquarian objects and problems in Australia', *Science of Man and Journal of the Royal Anthropological Society of Australasia*, vol. 3, no. 12 (new series), 22 January 1901, pp. 214–215.

Attwood, Bain, 'Introduction. The past as future: Aborigines, Australia, and the (dis)course of history', in Bain Attwood (ed.), *In the Age of Mabo: History, Aborigines and Australia*, St Leonards, NSW, Allen & Unwin, 1996, pp. vii–xxxviii.

Barrett, Charles, 'The Primitive Artist', in National Museum of Victoria, *Australian Aboriginal Art*, Catalogue for Australian Aboriginal Art Exhibition, Melbourne, Trustees of the Public Library, Museums, and National Gallery of Victoria, Government Printer, 1929, pp. 5–14.

Barrett, Charles, *Coast of Adventure: Untamed North Australia*, Melbourne, Robertson & Mullens, 1941.

Barrett, Charles, 'Rock carvings in New South Wales', in Charles Barrett and Robert Henderson Croll, *Art of the Australian Aboriginal*, Melbourne, The Bread and Cheese Club, 1943, pp. 79–85.

Basedow, Herbert, 'Anthropological Notes Made on the South Australian Government North-West Prospecting Expedition, 1903', from *Transactions of the Royal Society of South Australia*, vol. XXVIII, 1904, pp. 12–51.

Basedow, Herbert, *The Australian Aboriginal*, Adelaide, F. W. Preece and Sons, 1925.

Bassett-Smith, P. W., 'The Aborigines of North-West Australia', *The Journal of the Royal Anthropological Institute of Great Britain and Ireland*, vol. XXIII, 1894, pp. 324–331.

Beckett, Jeremy, 'The past in the present; the present in the past: constructing a national Aboriginality', in Jeremy Beckett (ed.), *Past and Present: The Construction of Aboriginality*, Canberra, Aboriginal Studies Press, 1988, pp. 191–217.

Berndt, R. M., 'The Mountford Volume on Arnhem Land Art, Myth and Symbolism: A Critical Review', *Mankind*, vol. 5, no. 6, October 1958, pp. 249–261.

Berndt, R. M., 'The Gove dispute: The question of Australian Aboriginal land and the preservation of sacred sites', *Anthropological Forum*, vol. 1, no. 2, November 1964, pp. 258–295.

Berndt, R. M., 'Preface', in R. M. Berndt (ed.), *Australian Aboriginal Art*, Sydney, Ure Smith, 1964, pp. 1–10.

Berndt, R. M. (ed.), *Australian Aboriginal Art*, Sydney, Ure Smith, 1964.

Berndt, R. and Berndt, C., 'Aboriginal art in Central Western Northern Territory', *Meanjin*, vol. 9, no. 3, Spring 1950, pp. 183–188.

Berndt, R. M. and Berndt, C. H., *Arnhem Land: Its History and Its People*, Melbourne, F. W. Cheshire, 1954.

Berndt, R. M. and Berndt, Catherine H., *The World of the First Australians*, Canberra, Aboriginal Studies Press, 1988.

Black, Roman, *Old and New Aboriginal Art*, Sydney, Angus & Robertson, 1964.

Blundell, Valda and Donny Woolagoodja with members of the Mowanjum Aboriginal Community, *Keeping the Wanjinas Fresh: Sam Woolagoodja and the Enduring Power of Lalai*, Fremantle, WA, Fremantle Arts Centre Press, 2005.

Bonyhady, Tim, 'The stuff of heritage', in Tim Bonyhady and Tom Griffiths (eds), *Prehistory to Politics: John Mulvaney, The Humanities and the Public Intellectual*, Melbourne, Melbourne University Press, 1996, pp. 144–162.

Bramell, Elsie, 'The necessity for the preservation of Aboriginal relics', *The Australian Journal of Science*, vol. II, no. 1, 21 August 1939, pp. 1–3.

Bromley, Robyn, 'An Assessment of the Research Potential of a Museum Held Surface Collection: The Wishart Collection', unpublished BA Hons thesis, Department of Archaeology and Anthropology, The Australian National University, 1980.

Broome, Richard, *Aboriginal Australians: Black Response to White Dominance, 1880–1939*, Sydney, George Allen & Unwin, 1982.

Butel, Elizabeth, *Margaret Preston: The Art of Constant Rearrangement*, Ringwood, Victoria, Viking, in association with the Art Gallery of New South Wales, 1985.

Campbell, W. D., 'Aboriginal carvings of Port Jackson and Broken Bay', *Memoirs of the Geological Survey of New South Wales*, Ethnological Series No. 1, Sydney, William Applegate Gullick, Government Printer, Department of Mines and Agriculture, 1899.

Carrington, F., 'The rivers of the Northern Territory of South Australia', *Proceedings of the Royal Geographical Society of Australasia, South Australian Branch, Proceedings*, vol. 2, 1890, pp. 56–76.
Carroll, A., 'The carved and painted rocks of Australia, and their significance', *Science of Man*, vol. XIII, no. 2, 1 June 1911, pp. 41–59.
Carter, Paul, *Living in a New Country: History, Travelling and Language*, London, Faber and Faber, 1992.
Clifford, James L., 'On Ethnographic Authority', in James Clifford, *The Predicament of Culture: Twentieth Century Ethnography, Literature, and Art*, Cambridge, Massachusetts and London, England, Harvard University Press, 1988, pp. 21–54.
Clifford, James L., *The Predicament of Culture: Twentieth Century Ethnography, Literature, and Art*, Cambridge, Massachusetts and London, England, Harvard University Press, 1988.
Cole, Keith, *The Aborigines of Arnhem Land*, Adelaide, Rigby, 1979.
Coombe, Rosemary, 'The properties of culture and the politics of possessing identity: native title claims in the cultural appropriation controversy', *Canadian Journal of Law and Jurisprudence*, vol. VI, no. 2, July 1993, pp. 249–285.
Coper, Michael, *The Tasmanian Dam Case*, Sydney, Butterworths, 1983.
Cox, J. C., 'Drawings by Australian Aborigines', *The Proceedings of the Linnean Society of New South Wales*, vol. III, Part 2, Sydney, 1878, pp. 155–160.
Cranstone, B. A., 'The art, myth and symbolism of Arnhem Land', *Man*, vol. LVIII, nos 21–24, February 1958, p. 30.
Croll, R. H., *Wanderings in Central Australia*, Sydney, Angus & Robertson, 1937.
Croll, R. H., *I Recall: Collections and Recollections*, Melbourne, Robertson & Mullens, 1939.
Crawford, I. M., *The Art of the Wandjina*, Melbourne, Oxford University Press, 1968, p. 18 *et seq.*
Dahl, Knut, *In Savage Australia: An Account of a Hunting and Collecting Expedition to Arnhem Land and Dampier Land*, Oslo, London, Philip Allan & Co., 1926.
Davidson, D. S., 'Archaeological problems of Northern Australia', *Journal of the Royal Anthropological Institute of Great Britain and Ireland*, vol. LXV, no. 65, 1935, pp. 145–183.
Davidson, D. S., *Aboriginal Australian and Tasmanian Rock Carvings and Paintings*, Memoirs of the American Philosophical Society, vol. V, Philadelphia, The American Philosophical Society, 1936.
Davidson, D. S., *A Preliminary Consideration of Aboriginal Australian Decorative Art*, Memoirs of the American Philosophical Society, vol. IX, Philadelphia, The American Philosophical Society, 1937.

Davis, Michael, 'Competing knowledges? Indigenous knowledge systems and western scientific discourses', paper presented to Humanities Research Centre conference, Science and Other Knowledge Traditions, James Cook University, Cairns, 23–27 August 1996.
Davis, Michael, *Indigenous Peoples and Intellectual Property Rights*, Research Paper no. 20 (1996–97), Information and Research Services, Canberra, Department of The Parliamentary Library, 1997.
Davis, Michael, *Biological Diversity and Indigenous Knowledge*, Research Paper no. 17 (1997–98), Information and Research Services, Canberra, Department of The Parliamentary Library, 1998.
Davis, Michael, 'Indigenous rights in traditional knowledge and biological diversity: Approaches to protection', *Australian Indigenous Law Reporter*, vol. 4, no. 4, 1999, pp. 1–32.
Davis, Michael, 'Law, anthropology, and the recognition of Indigenous cultural systems', in René Kuppe and Richard Potz (eds), *Law and Anthropology: International Yearbook for Legal Anthropology*, vol. 11, 2001, pp. 298–320.
Davison, Graeme, 'The meanings of "heritage"', in Graeme Davison and Chris McConville (eds), *A Heritage Handbook*, Sydney, Allen & Unwin, 1991, pp. 1–13.
Dening, Greg, 'Adam, Leonhard (1891–1960)', in John Ritchie (ed.), *Australian Dictionary of Biography*, vol. 13: 1940–1980, Melbourne, Melbourne University Press, 1993, pp. 8–9.
Edwards, Robert, 'Legislation for the preservation of Aboriginal relics in South Australia', in F. D. McCarthy (ed.), *Aboriginal Antiquities in Australia: Their Nature and Preservation*, Australian Aboriginal Studies no. 22, Prehistory and Material Culture, third series, Canberra, Australian Institute of Aboriginal Studies, 1970, pp. 159–165.
Elkin, A. P., 'Rock paintings of north-west Australia', *Oceania*, vol. I, no. 3, October–December 1930, pp. 258–279.
Elkin, A. P., 'The secret life of the Australian Aborigines', *Oceania*, vol. III, no. 2, December 1932, pp. 119–138.
Elkin, A. P., 'Anthropology in Australia, 1939', *Oceania*, vol. X, no. 1, September 1939, pp. 1–29.
Elkin, A. P., Foreword, in A. P. Elkin, with R. M. Berndt and C. Berndt, *Art in Arnhem Land*, Melbourne, F. W. Cheshire, 1950, pp. 1–19.
Elkin, A. P., 'Anthropology in Australia: One chapter', *Mankind*, vol. V, no. 6, October 1958, pp. 225–242.
Elkin, A. P., 'Art and meaning: A review article', *Oceania*, vol. XXXII, no. 1, September 1961, pp. 54–61.
Elkin, A. P., 'The development of scientific knowledge of the Aborigines', in H. Sheils (ed.), *Australian Aboriginal Studies: A Symposium of Papers*

Presented at the 1961 Research Conference, Melbourne, Oxford University Press, 1963, pp. 3–25.
Elkin, A. P., 'Art and life', in R. M. Berndt (ed.), *Australian Aboriginal Art*, Sydney, Ure Smith, 1964, pp. 11–19.
Elkin, A. P., 'Elements of Australian Aboriginal philosophy', *Oceania*, vol. XL, no. 2, December 1969, pp. 85–98.
Elkin, A. P., *The Australian Aborigines*, 5th edn, Sydney, Angus & Robertson, 1974.
Elkin, A. P., with R. M. Berndt and C. Berndt, *Art in Arnhem Land*, Melbourne, F. W. Cheshire, 1950.
Fabian, Johannes, *Time and the Other: How Anthropology makes its Object*, New York, Columbia University Press, 1983.
Fourmile, Henrietta, 'Aboriginal heritage legislation and self-determination', *Australian–Canadian Studies*, vol. 7, nos 1–2, Special Issue 1989, pp. 45–61.
Gill, W. H., 'A cry from W. H. Gill, of East Camberwell (Vic.)', *The Bulletin*, 10 June 1920.
Gillen, F. J., *The Camp Jottings of F. J. Gillen on the Spencer and Gillen Expedition Across Australia 1901–1902*, Adelaide, Libraries Board of South Australia, 1968.
Goddard, R. H., 'Certain observations of Aboriginal rock-carvings in the Wollombi District', Paper read before the Australian and New Zealand Association for the Advancement of Science, Auckland Meeting, 14 January 1937.
Goddard, R. H., 'Aboriginal sculpture', in Report of the Twenty-Fourth Meeting of the Australian and New Zealand Association for the Advancement of Science, Canberra, January 1939, pp. 160–163.
Goodale, Jane C. and Koss, Joan D., 'The cultural context of creativity among Tiwi', in Charlotte M. Otten (ed.), *Anthropology and Art: Readings in Cross-Cultural Aesthetics*, Garden City, New York, The Natural History Press, 1971, pp. 182–200.
Grey, Sir George, *Journals of Two Expeditions of Discovery In North West and Western Australia, During the Years 1837, 1838, and* 1839, 2 vols, London, T. & W. Boone, 1841.
Griffiths, Tom, *Hunters and Collectors: The Antiquarian Imagination in Australia*, Cambridge University Press, 1996.
Hale, H. M. and Tindale, N. B., 'Observations on Aborigines of the Flinders Ranges, and records of rock carvings and paintings', *Records of the South Australian Museum*, vol. III, no. 1, June 1925, pp. 45–59.
Hiatt, L. R., *Arguments about Aborigines: Australia and the Evolution of Social Anthropology*, Cambridge, Cambridge University Press, 1996.

Horn, W. A., 'Introduction', in Baldwin Spencer (ed.), *Report on the Work of the Horn Scientific Expedition to Central Australia*, London, Dulau & Co., 1896, pp. v–x.
Horne, G. and Aiston, G., *Savage Life in Central Australia*, London, Macmillan and Co., 1924.
Hornshaw, B. L., 'Primitive art in Australia', *Mankind*, vol. 1, no. 1, March 1931, pp. 21–22.
Howitt, A. W., *The Native Tribes of South-East Australia*, London, Macmillan and Co., 1904.
Jones, Philip, 'South Australian anthropological history: the early expeditions of the Board for Anthropological Research', *Records of the South Australian Museum*, vol. 20, 1987, pp. 71–92.
Jones, Philip, 'Aiston, George (1879–1943)', in John Ritchie (ed.), *Australian Dictionary of Biography*, vol. 13: 1940–1980, Melbourne, Melbourne University Press, 1993, p. 18.
Jones, Philip, '"Objects of mystery and concealment": A history of *Tjurunga* collecting', in Christopher Anderson (ed.), *Politics of the Secret*, Oceania Monograph 45, Sydney, University of Sydney, 1995, pp. 67–96.
Kenyon, A. S. and Stirling, D. L., 'Australian Aboriginal stone implements: A suggested classification', *Proceedings of the Royal Society of Victoria*, vol. XIII (new series), Part II, March 1901, pp. 191–200.
Kenyon, A. S., 'The Art of the Australian Aboriginal', in National Museum of Victoria, *Australian Aboriginal Art*, Catalogue for Australian Aboriginal Art Exhibition, Melbourne, Trustees of the Public Library, Museums, and National Gallery of Victoria, Government Printer, 1929, pp. 15–39.
Kleinert, Sylvia and Neale, Margo (eds), *The Oxford Companion to Aboriginal Art and Culture*, Melbourne, Oxford University Press, 2000.
Kuklick, Henrika, *The Savage Within: The Social History of British Anthropology, 1885–1945*, Cambridge, Cambridge University Press, 1993.
Kupka, Karel, *Dawn of Art: Painting and Sculpture of Australian Aborigines*, A Studio Book, New York, The Viking Press, 1965.
Langford, Ros, 'Our heritage – Your playground', *Australian Archaeology*, no. 16, June 1983, pp. 1–6.
Langton, Marcia, 'Religion and art from colonial conquest to post-colonial resistance', in Sylvia Kleinert and Margo Neale (eds), *The Oxford Companion to Aboriginal Art and Culture*, Oxford, Oxford University Press, 2000, pp. 16–24.
Layton, Robert, *Uluru: An Aboriginal History of Ayers Rock*, Canberra, Aboriginal Studies Press, 1989.

Layton, Robert, 'Relating to the country in the Western Desert', in Eric Hirsch and Michael O'Hanlon (eds), *The Anthropology of Landscape: Perspectives on Place and Space*, Oxford, Clarendon Press, 1995, pp. 210–231.
Loveday, P. and Cooke, P. (eds), *Aboriginal Arts and Crafts and the Market*, North Australia Research Unit Monograph, Darwin, The Australian National University, 1983.
Lovering, J. F., 'Mitchell, Stanley Robert (1881–1963)', in John Ritchie (ed.), *Australian Dictionary of Biography*, vol. 15: 1940–1980, Melbourne, Melbourne University Press, 2000, pp. 384–385.
Lowenthal, David, *The Past is a Foreign Country*, Cambridge, Cambridge University Press, 1985.
Lumholtz, Carl, *Among Cannibals: An account of four years' travels in Australia and of camp life with the Aborigines of Queensland*, New York, Charles Scribner's Sons, 1889.
McBryde, Isabel (ed.), *Who Owns the Past?: Papers from the Annual Symposium of the Australian Academy of the Humanities*, Melbourne, Oxford University Press, 1985.
McCarthy, Frederick D., 'Aboriginal relics and their preservation', *Mankind*, vol. 2, no. 5, August 1938, pp. 120–126.
McCarthy, F. D., 'Obituary – C. C. Towle, B.A.', *Mankind*, vol. 3, no. 10, February 1947, pp. 307–308.
McCarthy, F. D., 'The UNESCO travelling exhibition of Aboriginal culture', *AGMA*, no. 7, 1953, pp. 11–14.
McCarthy, F. D., 'Notes on the Cave Paintings of Groote and Chasm Islands in the Gulf of Carpentaria', *Mankind*, vol. 5, no. 2, September 1955, pp. 68–75.
McCarthy, F. D., 'The cave paintings of Groote Eylandt and Chasm Island', in Charles P. Mountford (ed.), Records of the American–Australian Scientific Expedition to Arnhem Land, vol. 2, Melbourne, Melbourne University Press, 1960, pp. 297–414.
McCarthy, F. D., 'Some comments on the progress of Archaeology in Australia: An appeal for co-operation', *Mankind*, vol. 5, no. 11, February 1962, pp. 479–484.
McCarthy, F. D., 'The prehistory of the Australian Aborigines', *Australian Natural History*, vol. XIV, no. 8, 15 December 1963, pp. 233–241.
McCarthy, F. D., 'The Australian Institute of Aboriginal Studies', *Australian Natural History*, vol. 15, no. 6, 15 June 1966, pp. 194–197.
McCarthy, F. D., *Australian Aboriginal Rock Art*, 4th edn, Sydney, The Australian Museum, 1979.
McCarthy, F. D., with E. Bramell and H. V. V. Noone, *The Stone Implements of Australia*, Memoir IX, Sydney, The Australian Museum, 1946.

McCarthy, F. D. and Setzler, Frank M., 'The Archaeology of Arnhem Land', in Charles P. Mountford (ed.), Records of the American–Australian Scientific Expedition to Arnhem Land, vol. 2, Anthropology and Nutrition, Melbourne, Melbourne University Press, 1960, pp. 215–295.
McConnel, Ursula H., 'Inspiration and design in Aboriginal art', *Art in Australia*, third series, no. 59, 15 May 1935, pp. 49–68.
McGregor, Russell, *Imagined Destinies: Aboriginal Australians and the Doomed Race Theory*, Melbourne, Melbourne University Press, 1997.
Maddock, Kenneth, 'Metamorphosing the sacred in Australia', *The Australian Journal of Anthropology*, vol. 2, no. 2, 1991, pp. 213–232.
Madigan, C. T., *Crossing the Dead Heart*, Melbourne, Georgian House, 1946.
Marcus, Julie, *The Indomitable Miss Pink: A Life in Anthropology*, Sydney, University of New South Wales Press, 2001.
Mathew, Rev. John, 'The Cave Paintings of Australia, their Authorship and Significance', *Journal of the Royal Anthropological Institute of Great Britain and Ireland*, vol. XXIII, 1894, pp. 42–52.
Mathew, Rev. John, 'Note on Aboriginal rock painting in the Victoria Range, County of Dundas, Victoria', *Proceedings of the Royal Society of Victoria*, vol. IX (new series), 1896, pp. 29–33.
Mathews, R. H., 'Pictorial art among the Australian Aborigines', *Victoria Institute Transactions*, December 1899, pp. 1–20.
Massola, A., 'Stanley Robert Mitchell, 1895–1963', *Mankind*, vol. 6, no. 3, May 1964, pp. 138–140.
May, Sally, 'The Last Frontier? Acquiring the American–Australian Scientific Expedition Ethnographic Collection 1948', unpublished BA Honours thesis, Department of Archaeology, Flinders University, South Australia.
Mitchell, S. R., *Stone Age Craftsmen: Stone Tools and Camping Places of the Australian Aborigines*, Melbourne, Tait Book Co. Pty Ltd, 1949.
Morphy, Howard, *Ancestral Connections: Art and an Aboriginal System of Knowledge*, Chicago, The University of Chicago Press, 1991.
Morphy, Howard, *Aboriginal Art*, London, Phaidon Press, 1998.
Mountford, C. P., 'Exploring Stone Age Arnhem Land', *The National Geographic Magazine*, vol. XCVI, no. 6, December 1949, pp. 745–782.
Mountford, C. P., *Art, Myth and Symbolism*, Records of the American–Australian Scientific Expedition to Arnhem Land, vol. 1, Melbourne, Melbourne University Press, 1956.
Mountford, C. P., 'The Mountford Volume on Arnhem Land Art, Myth and Symbolism: A Rejoinder', *Mankind*, vol. 5, no. 6, October 1958, pp. 267–268.

Mountford, C. P., 'The artist and his art in an Australian Aboriginal society', in Marian W. Smith (ed.), *The Artist in Tribal Society*, 1961, pp. 1–14.
Mountford, C. P. (ed.), *Records of the American–Australian Scientific Expedition to Arnhem Land*, vol. 2, Anthropology and Nutrition, Melbourne, Melbourne University Press, 1960.
Mulvaney, D. J., *The Prehistory of Australia*, Harmondsworth, Penguin Books, 1975.
Mulvaney, D. J., 'A question of values: Museums and cultural property', in Isabel McBryde (ed.), *Who Owns the Past?*, 1985, pp. 86–98.
Mulvaney, D. J., 'Museums' in *Prehistory and Heritage: The Writings of John Mulvaney*, Occasional Papers in Prehistory 17, Canberra, Department of Prehistory, Research School of Pacific Studies, Australian National University, 1990, pp. 294–299.
Mulvaney, D. J., 'A splendid lot of fellows', in S. R. Morton and D. J. Mulvaney (eds), *Exploring Central Australia: Society, the Environment and the 1894 Horn Expedition*, Chipping Norton, New South Wales, Surrey Beatty & Sons Pty Ltd, 1996, pp. 3–12.
Mulvaney, D. J. and Calaby, J. H., *"So Much That is New": Baldwin Spencer, 1860–1929, A Biography*, Melbourne, Melbourne University Press, 1985.
Mulvaney, D. J. and Kamminga, J., *Prehistory of Australia*, St Leonards, NSW, Allen & Unwin, 1999.
Mulvaney, John, Petch, Alison and Morphy, Howard (eds), *'My Dear Spencer': The Letters of F. J. Gillen to Baldwin Spencer*, Flemington, Melbourne, Hyland House, 2001.
Mulvaney, John, with Alison Petch and Howard Morphy (eds), *From the Frontier: Outback letters to Baldwin Spencer*, St Leonards, NSW, Allen & Unwin, 2000.
National Museum of Victoria, *Australian Aboriginal Art*, Catalogue for Australian Aboriginal Art Exhibition, Melbourne, Trustees of the Public Library, Museums, and National Gallery of Victoria, Government Printer, 1929.
Pask, Amanda, 'Cultural appropriation and the law: An analysis of the legal regimes concerning culture', *Intellectual Property Journal*, vol. 8, no. 1, December 1995, pp. 57–86.
Peterson, Nicolas, 'Visual knowledge: Spencer and Gillen's use of photography in the *Native Tribes of Australia*', unpublished paper, n.d.
Preston, Margaret, 'Art for crafts: Aboriginal art artfully applied', *The Home*, vol. 5, no. 5, 1 December 1924, pp. 30–31.
Preston, Margaret, 'Paintings in Arnhem Land', *Art in Australia*, third series, no. 81, 25 November 1940, pp. 61–63.

Reynolds, Barrie, 'Roth, Walter Edmund (1861–1933)', in Geoffrey Serle (ed.), *Australian Dictionary of Biography*, vol. 11: 1891–1939, Melbourne, Melbourne University Press, 1988, pp. 463–464.
Rosenfeld, Andrée, 'Rock art: A multifaceted heritage', in Sylvia Kleinert and Margo Neale (eds), *The Oxford Companion to Aboriginal Art and Culture*, Oxford, Oxford University Press, 2000, pp. 103–109.
Roth, Walter E., *Ethnological Studies among the North-West-Central Queensland Aborigines*, Brisbane, Government Printer, 1897.
Roth, Walter E., *Domestic Implements, Arts, and Manufactures*, North Queensland Ethnography: Bulletin no. 7, Brisbane, Government Printer, 1904.
Rowley, C. D., *The Remote Aborigines*, Harmondsworth, Penguin, 1970.
Rowley, C. D., *The Destruction of Aboriginal Society*, Harmondsworth, Penguin, 1970.
Rowley, C. D., *Outcasts in White Australia*, Harmondsworth, Penguin, 1970.
Ryan, Judith with Kim Akerman, 'Shadows of Wandjina: figurative art of the north-west and central Kimberley', in Judith Ryan with Kim Akerman, *Images of Power: Aboriginal Art of the Kimberley*, Melbourne, National Gallery of Victoria, c. 1993, pp. 10–19.
Sahlins, Marshall, *Stone Age Economics*, London, Tavistock Publications, 1972.
Sayers, Stuart, 'Doctor has Aboriginal relics galore', *The Age Wednesday Magazine*, 6 September 1961, p. 17.
Setzler, Frank M. and McCarthy, F. D., 'A unique archaeological specimen from Australia', *Journal of the Washington Academy of Sciences*, vol. 40, no. 1, 15 January 1950, pp. 1–5.
Shellshear, Joseph, L., 'An appeal for the preservation of prehistoric remains in Australia', *The Australian Museum Magazine*, vol. VI, no. 5, January–March 1937, pp. 169–175.
Shepherd, C. L., 'F. D. McCarthy: An outline of the professional and intellectual context of his work at the Australian Museum', unpublished BA Hons thesis, School of Archaeology and Anthropology, Australian National University, Canberra, 1982.
Smith, Bernard, *European Vision and the South Pacific, 1768–1850*, London, Oxford University Press, 1960.
Smith, Marian W. (ed.), *The Artist in Tribal Society: Proceedings of a Symposium held at the Royal Anthropological Institute*, London, Routledge & Kegan Paul, 1961.
Smyth, R. Brough, *The Aborigines of Victoria, with Notes Relating to the Habits of the Natives of Other Parts of Australia and Tasmania*, 2 vols, London, Trubner and Co., 1878.

Spencer, Baldwin, 'Through Larapinta Land: A Narrative of the Horn Expedition to Central Australia', in Baldwin Spencer (ed.), *Report on the Work of the Horn Scientific Expedition to Central Australia*, Part I, London, Dulau & Co., 1896, pp. xiii–136.
Spencer, Baldwin, *Guide to the Australian Ethnographical Collection in the National Museum of Victoria*, Melbourne, Government Printer, 1901.
Spencer, Baldwin, 'The Aboriginals of Australia', in G. H. Knibbs (ed.), *Federal Handbook*, Melbourne, Government Printer, 1914, pp. 33– 85.
Spencer, Baldwin, *Native Tribes of the Northern Territory*, London, Macmillan and Co., 1914.
Spencer, Baldwin, *Wanderings in Wild Australia*, 2 vols, London, Macmillan, 1928.
Spencer, Baldwin (ed.), *Report on the Work of the Horn Scientific Expedition to Central Australia*, 4 vols, London, Dulau & Co., 1896.
Spencer, Baldwin and Gillen, F. J., *The Native Tribes of Central Australia*, London, Macmillan and Co., 1899.
Spencer, Baldwin and Gillen, F. J., *The Northern Tribes of Central Australia*, London, Macmillan and Co., 1904.
Spencer, Baldwin and Gillen, F. J., *The Arunta: A Study of a Stone Age People*, 2 vols, London, Macmillan, 1927.
Stirling, E. C., 'Anthropology', in Baldwin Spencer (ed.), *Report on the Work of the Horn Scientific Expedition to Central Australia*, Part IV, London, Dulau & Co., 1896, pp. 1–157.
Stocking, George W. Jr, *After Tylor: British Social Anthropology 1888–1951*, London, The Athlone Press, 1996.
Strehlow, T. G. S., 'The art of circle, line, and square', in R. M. Berndt (ed.), *Australian Aboriginal Art*, Sydney, Ure Smith, 1964, pp. 44–59.
Sutton, Peter (ed.), *Dreamings: The Art of Aboriginal Australia*, Ringwood, Victoria and Sydney, NSW, Viking in Association with the Asia Society Galleries, New York, 1988.
Sutton, Peter and Anderson, Christopher, 'Introduction', in Peter Sutton (ed.), *Dreamings: The Art of Aboriginal Australia*, pp. 1–12.
Sutton, Peter, Jones, Philip and Hemming, Steven, 'Survival, regeneration, and impact', in Peter Sutton (ed.), *Dreamings: The Art of Aboriginal Australia*, pp. 180–212.
Taylor, Luke, *Seeing the Inside: Bark Painting in Western Arnhem Land*, Oxford, Clarendon Press, 1996.
Teale, Ruth, 'Cox, James Charles (1834–1912)', in Douglas Pike (ed.), *Australian Dictionary of Biography*, vol. 3: 1851–1890, Melbourne, Melbourne University Press, 1969, pp. 482–484.
Tehan, Maureen, 'A tale of two cultures', *Alternative Law Journal*, vol. 21, no. 1, February 1996, pp. 10–14.

Thomas, Julian, *Time, Culture and Identity: An Interpretive Archaeology*, London and New York, Routledge, 1996.
Thomas, Nicholas, *Entangled Objects: Exchange, Material Culture, and Colonialism in the Pacific*, Cambridge, Massachusetts and London, England, Harvard University Press, 1991.
Thomas, N. W., *The Native Races of Australia*, London, Archibald Constable and Co., 1906.
Thomson, Donald, *Interim General Report of Preliminary Expedition to Arnhem Land, Northern Territory of Australia, 1935–36*, Canberra, Department of the Interior, 9 April 1936.
Thomson, Donald, *Recommendations of Policy on Native Affairs in the Northern Territory of Australia*, Canberra, Commonwealth of Australia, December 1937.
Thomson, Donald, *Report on Expedition to Arnhem Land, 1936–37*, Canberra, Minister for the Interior, 1939.
Thorpe, W. W., 'Aboriginal drawings in rock shelters at Bundanoon, N. S. Wales', *Records of the Australian Museum*, vol. VII, no. 4, 30 August 1909, pp. 325–328.
Thorpe, W. W., 'Early references to Aboriginal Rock Carvings', *Mankind*, vol. 1, no. 1, March 1931, pp. 7–11.
Tindale, N. B., 'Natives of Groote Eylandt and of the west coast of the Gulf of Carpentaria', Part I, *Records of the South Australian Museum*, vol. 3, no. 1, 1925, pp. 61–102.
Tindale, N. B., 'Natives of Groote Eylandt and of the west coast of the Gulf of Carpentaria', Part II, *Records of the South Australian Museum*, vol. 3, no. 2, 1925, pp. 103–134.
Tindale, N. B. and Lindsay, H. A., *Aboriginal Australians*, A Studio Book, New York, Viking, 1963.
Urry, James, 'Beyond the frontier: European influence, Aborigines and the concept of "traditional" culture', *Journal of Australian Studies*, no. 5, November 1979, pp. 2–16.
Warner, W. Lloyd, *A Black Civilization: A Social Study of an Australian Tribe*, New York and London, Harper & Brothers Publishers, 1937.
Webb, Rev. T. T., *Spears to Spades*, Sydney, The Department of Overseas Missions, 1938.
Wilkins, Captain Sir G. H., *Undiscovered Australia: Being an Account of an Expedition to Tropical Australia to Collect Specimens of the Rarer Native Fauna for the British Museum, 1923–1925*, New York, G. P. Putnam's Sons, The Knickerbocker Press, 1929.
Williams, Nancy, 'Australian Aboriginal art at Yirrkala: Introduction and development of marketing', in Nelson H. H. Graburn (ed.), *Ethnic and Tourist Arts: Cultural Expressions from the Fourth World*, Berkeley, University of California Press, 1976, pp. 264–285.

Williams, Nancy, *The Yolngu and Their Land: A System of Land Tenure and the Fight for its Recognition*, Canberra, Australian Institute of Aboriginal Studies, 1986.
Winnecke, Charles, *Journal of the Horn Scientific Exploring Expedition, 1894*, Adelaide, Government Printer, 1897.
Wise, Tigger, *The Self-Made Anthropologist: A Life of A. P. Elkin*, Sydney, George Allen & Unwin, 1985.
Wood Jones, Frederick, *Australia's Vanishing Race*, Sydney, Angus & Robertson, 1934.
Worsley, Peter M., 'Records of the American–Australian Expedition to Arnhem Land: Vol. I, Art, Myth and Symbolism', *Man*, vol. LVII, nos 241–244, December 1957, p. 186.
Worsley, Peter M., 'The art, myth and symbolism of Arnhem Land', *Man*, vol. LVIII, nos 92–95, May 1958, p. 80.
Worsnop, Thomas, *The Prehistoric Arts, Manufactures, Works, Weapons, etc., of the Aborigines of Australia*, Adelaide, C. E. Bristow, Government Printer, 1897.

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INDIGENOUS KNOWLEDGE: BEYOND PROTECTION, TOWARDS DIALOGUE

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Abstract

This paper interrogates the emphasis on devising regimes for protection of Indigenous knowledge, based on narrowly defined concepts of property, especially intellectual property in legislative and policy discussions and debates and programs of work on Indigenous knowledge. Commenting on the classificatory and typological tendencies of legislative protection regimes, the paper argues for a shift from this emphasis on protection, toward the creation of a space for engagement between Indigenous, and other knowledge traditions, wherein concepts of dialogue, negotiation and agreement-making can occur. The paper supports its argument by reviewing selected legal instruments such as the 2003 UNESCO Convention on the Safeguarding of the Intangible Heritage, and drawing on some of the author's experience working with Aboriginal people in the Kimberley.

Introduction

Debates on Indigenous knowledge are gathering pace in international forums such as the United Nations Environment Program's Convention on Biological Diversity (CBD), the World Intellectual Property Organisation (WIPO), and others. Increasingly, this activity is considering ways to develop legislative regimes and mechanisms for protection of Indigenous knowledge. Much of this activity focuses on the role of intellectual property rights (IPRs) in regulating and protecting Indigenous knowledge (e.g., Brown, 2005; Davis, 2006). At the same time, many assessments and critiques of IPR regimes in terms of their relevance for protecting Indigenous knowledge look to the development of alternative or *sui generis* approaches (Posey & Dutfield, 1996).

In this paper, I interrogate the focus on legislative approaches, especially around notions of "protection" of Indigenous knowledge, and suggest a shift away from this focus towards developing a space for dialogue and engagement between Indigenous and other knowledge traditions. In earlier work, I argued for a review of the kind of language and discourse employed in legislative and policy debates and discussions, in order to find ways of enhancing comparison and interaction between Indigenous and Western knowledge systems (Davis, 2006). I want to extend that argument to develop further an idea for dialogue and negotiation, in what might be called a "negotiating space" for Indigenous, and other knowledge traditions. I argue that Indigenous knowledge, by its nature, contains important qualities that allow a possibility for such dialogue and negotiation. This argument draws support from a body of writings that interrogate the perceived dichotomy between "Indigenous knowledge" on the one hand, and other forms of knowledge, including "Western science" on the other hand (e.g., Agrawal, 1995; Ellen & Harris, 2002). In critiquing the emphasis on legislative mechanisms concerned with protection of property rights in Indigenous knowledge, Gibson (2005, p. 11) for example, posits a consideration of the notion of "community resources" in order to "overcome the presumption of property and the economic value of information that inheres in such terms as 'traditional knowledge'". Pratt's (1992) use of the term "contact zone" is useful as a vehicle for conceptualising the meeting points between cultures and knowledge systems. In her scheme "contact zones" are "social spaces where disparate cultures

meet, clash, and grapple with each other, often in highly asymmetrical relations of domination and subordination" (Pratt, 1992, p. 4).

Nakata's (2007, p. 199) model for a "cultural interface" offers considerable theoretical scope for examining the space between cultural systems and modalities. This "cultural interface" is

> A multi-layered and multi-dimensional space of dynamic relations constituted by the intersections of time, place, distance, different systems of thought, competing and contesting discourses within and between different knowledge traditions, and different systems of social, economic and political organisation.

During 2006, I worked with some Aboriginal people in the Kimberley region of far north Western Australia. I was engaged in a project to develop guidelines and protocols for the protection of Aboriginal knowledge related to language. Over the course of several months, I had conversations with elders from different language groups, hearing their stories of their country and culture. As I listened, it seemed to me that these people were talking about their country as a way of being in, of, and on that country, enacting or (re)-enacting their connections with it. Through talking it, they were, in a sense, walking it through speech, words of language, recalling and depicting aspects of the topography, of the land, the plants and animals. They also spoke about the times past, describing such aspects as wet and dry season camps, different types of fire, bush tucker, and the old ways. These old peoples' knowledge both informs their intricate and deep understandings of their particular country, and is nourished by it. The knowledge situates them historically and temporally, and reaffirms their place in the world. It reaches back into memory and consciousness, but is also in the here and now.

Listening to those people talking about country reaffirmed for me that there is a vast domain of Indigenous knowledge that lies outside, or beyond the scope of classification, description, translation and legislation in the Western system. Where initially I was struck by what appeared to be repetition in the telling about their knowledge of country, I soon realised that this repetition is crucial to the ways in which they express meanings in the holding of, and sharing of their knowledge. Their articulation of knowledge of country was very much a performance: a movement back and forth, and a folding, or turning in upon itself, and upon the external world. The cadences, intonations, and patterns of speech are intrinsic qualities unique to every performance. There is a movement back and forth, inside and out, in the presentation of those old peoples' knowledge. The expression of their knowledge often appeared to possess a kind of interior quality, as if they were in dialogue between themselves as individuals: in a sense, their interior selves, the collective culture of their particular group, and the wider space of other listeners and observers.

When reflecting on these performances, on the ways in which people articulated their deep knowledge of country, it also confirmed my view that what is termed "Indigenous knowledge", or "traditional knowledge" is not a single, homogenous, uniform entity. There is a spectrum of different types of knowledge that embraces elements that may be described as "new", or "modern" or modernising knowledge, "old", or "traditional" knowledge, tacit, implied or existing knowledge, the "ordinary" knowledge of the mundane, of the everyday, and deep, or profound knowledge. All of these elements are constantly shifting and realigning, and are juxtaposed in complex ways. No knowledge system is comprised of just one dimension; it is a process, or an activity in which there is a constant, often imperceptible shifting and re-aligning between and among different kinds of knowledge.

As knowledge is articulated and transmitted through the vehicles of language and speech, then the roles of such critical devices as memory and recall also require consideration. Repetition too, is an important aspect of performance in an orally based culture (e.g., Ong, 2002). The repetitions, patterns and cadences of the verbal articulation of cultural knowledge provide the keys to Aboriginal peoples' understandings of, and holding of their knowledge. These textures importantly also provide markers for, and enhance, and aid listeners' understandings.

Considering all these qualities, some fundamental questions arise: If Indigenous knowledge is described and delineated in terms of regimes for "protection", what are we seeking to "protect" here, and why? What, if any, is the role of property and the law? The notion of protection requires a context. Legal protection is contingent upon the concept of Western ideas about property and ownership: the rights and interests of some as against the rights and interests of others. Who is to do the protecting, and how? What is it in need of protection from? A focus on protection in the legal domain, I am suggesting, creates a discourse in which Indigenous knowledge is defined, discussed and debated as a "negative" or "oppositional" entity, rather than as a system of meaning, values, practices and understandings in and of itself, as an intrinsic part of culture. An emphasis on protection in terms of property transforms a cultural system of meanings, values and expressions, into a discourse of potential conflict, division and competition.

Can the fragmentation, classification and typological approach to Indigenous heritage so ingrained in legal and policy developments adequately weld together the intricate and complex connections between things, places, persons, and have regard to the entire range of emotive, personal configurations so apparent in hearing a spoken account of Indigenous knowledge? The

endeavours to understand and interpret Indigenous cultural systems in law and policy are challenges of cultural translation. It is not just a matter of finding a correspondence between one language and another; it requires developing ways in which the deep meanings and contexts of Indigenous cultures can find equal space with other knowledges (e.g., Davis, 2001).

As I was listening to elders talking on country in the Kimberley, I noticed their capacity to be particularly present in, and engaged with their country in powerful and compelling ways. Taking all these experiences of listening to these people into account, I reflected that their knowledge, so deep and profound, and personal, is not something that can, or indeed should readily be defined by legal or policy documents, intellectual property, or regimes for protection. How can legislation and policy capture such organic, human qualities of nostalgia, loss, melancholy, feelings, intuition, remembrance, emotion, and all the complex and subtle nuances of speech and language that embody, are embedded in, and give expression to these qualities? Is it possible for law and policy to encapsulate the deep and profound connections between the knowledge itself, the bearers of this knowledge, and its source—the place wherein the knowledge resides, is formed, and which gives it meaning? Can legal and policy documents indicate something of the intricate relationships between people, place, and the world of spirits and ancestors?

It seemed to me, listening to the old peoples' talking, and watching them as they spoke, that they were not merely talking about "their country"; they were living it, experiencing it through language and speech. And at the same time, they were also engaging with, and sharing it with me, an outsider, a stranger. Aboriginal peoples' cultural knowledge and heritage creates a framework within which they deal with others—not only of their own group—but also from the wider community. I want to develop this idea that Indigenous knowledge concerns ways of engaging with the world as the basis for my argument that the recognition and understanding of this knowledge might be better advanced not only in terms of legal protection and the formulation of definitions, but also by creating the conditions that encourage dialogue, negotiation and partnerships between the knowledge holders and their communities, and the wider community.

To further pursue my idea about understanding Indigenous knowledge in terms of dialogue and negotiation, I want to take a step back, and explore some of the ways in which the terms and concepts – what I call the discourses – of law and policy, and of administration, seek to interpret, translate, perhaps give effect to, the complexity that is Indigenous knowledge. I am broadly arguing that existing and emerging legislative and policy discourses – at all levels, international, regional, national and local – tend to fragment and dismember the totality of Indigenous knowledge, and constrain it within the technical-legal-administrative domains of "property", and through the production of taxonomies and inventories. The tendency is to situate Indigenous knowledge in Western legal and policy discourses as a disembodied entity, separated from its living, dynamic contexts, out of place and time. Indigenous knowledge in these developments is not recognised as a way of engagement with the world and with others, as forms of participation, as ways of incorporating difference into a subtle and complex system of meaning and values.

I am arguing for greater recognition of the intrinsically emotive and affective qualities of Indigenous knowledge as distinct, and inherently unique from many Western discourses. However, at the same time I also want to stress the equity of these different knowledge systems. Indigenous knowledge holders are also intellectuals, philosophers, and scientists, and their knowledge systems are equally systems of law, and science. By giving greater attention to the expressive and emotive qualities of Indigenous knowledge, I am not in any way diminishing the validity of this knowledge tradition in opposition to, or contrast to Western epistemologies (e.g., Davis, 2006). Rather, I am arguing that the qualities of Indigenous knowledge that give it texture and dynamism, and that situate it in place and/or time, are not adequately represented in current discussions around protection of such knowledge. Indigenous knowledge systems, like all such systems, are juxtaposed within wider realms of meaning, and are not remnants, or fixed entities that are immutable, and separated from history, place, and people. As Dei (2000) has noted, "Indigenous knowledges do not 'sit in pristine fashion' outside of the effects of other knowledges" (p. 111).

A consequence of focussing discussions about Indigenous knowledge on legal and administrative-bureaucratic mechanisms for protection, as forms of property, is that such knowledge is fragmented into discrete entities that are amenable to classifying and inscribing into familiar regimes of Western law and policy (Davis, 2006). In advocating a shift from these fragmenting and classifying approaches, I consider the possibility of approaching Indigenous knowledge not as a form of "property", or as something that is defined negatively as an entity in need of protection, but rather, as a system of practices, performances, and ways of enacting the world and engaging with others through relationship, dialogue, negotiation and expression. To support my argument I present a brief survey and critique of some of the discourses of law and policy that focus on "protection", and which deploy terms such as "cultural property", or "intellectual property" and which seek to define these primarily through the formulation of inventories and typologies.

Many discussions and debates about Indigenous knowledge focus on the idea that Indigenous knowledge is primarily something that is in need of protection. This is an oppositional strategy in which Indigenous knowledge is not understood as a distinct realm of values, meanings, behaviours and rules in and

of itself, but is, rather, an entity that is defined in terms of being under threat from development, or from the encroachment and influences of the dominant world. In order to devise measures for protection, much attention is given to formulating definitions of Indigenous knowledge. These definitions are frequently based on, or require for their formulation, the production of taxonomies, of lists and inventories of what Indigenous knowledge is thought to comprise.

There is no doubt an alarming increase in the disappearance or erosion of Indigenous knowledge, the disappearance of the elders and other knowledge holders and custodians, and diminishing opportunities for Indigenous people to practice and transmit their knowledge. There is an urgent need to reduce threats to Indigenous peoples' lands, environments and communities as these diminish their capacity to retain and to enact their intricate understandings of their worlds. The relevance and meaning of Indigenous peoples' special knowledge systems is limited by the expansion of modernising influences, and destabilised with the corroding influences of alcohol, substance abuse, and the attendant social problems. There is unquestionably a growing need for the global community to act more decisively in preserving the world's biodiversity and variety of ecosystems, and to support and expand programs and policies for Indigenous language and cultural maintenance, and for community capacity development to enhance opportunities for Indigenous people to retain the integrity of their knowledge systems.

At the same time, there is a burgeoning of legal and standard setting developments and institutions concerned with developing measures for the protection of Indigenous knowledge, and for what is termed "Indigenous intellectual property". Many of these developments are occurring at the international level—predominantly through the Secretariat of the United Nations Convention on Biodiversity (the CBD), and the World Intellectual Property Organisation (WIPO) —and also through such agencies as the United Nations Permanent Forum on Indigenous Issues, and the UN Conference on Trade and Development (UNCTAD). Within this growing body of work there is a major theme: the formulation of mechanisms and measures for protection of Indigenous knowledge, and within this, a search for definitions of this knowledge, and with definitions often based on a re-iteration of inventories and catalogues of what is thought to be the "content" of Indigenous knowledge.

Discourses on protection and preservation

I support the development of legislative measures for protection, and of standards for recognition of Indigenous knowledge. However, at the same time I also want to argue that the notion of protection carries with it certain assumptions, and that these assumptions emphasise content at the expense of form, meaning and context for Indigenous knowledge. This focus on what might be termed a typological or classificatory approach to Indigenous knowledge, as a framework for developing a protection-based regime needs to be re-examined.

The 2003 UNESCO Intangible Heritage Convention

To illustrate my questioning of the notion of protection and its implications for a classificatory approach to heritage, I will consider one international instrument that has come into force in recent years, which provides for protection of intangible heritage – and therefore is particularly relevant to Indigenous knowledge. The UNESCO Convention on the Safeguarding of the Intangible Cultural Heritage was ratified by the UNESCO General Assembly on 17 October 2003. This Convention acknowledges in its Preamble the relationships between physical and tangible heritage, as it considers "the deep-seated interdependence between the intangible cultural heritage and the tangible cultural and natural heritage" (UNESCO 2003). This is a useful provision, since it is consistent with earlier standard setting developments in Indigenous heritage, such as the United Nations studies by Special Rapporteur Erica-Irene Daes. In a 1993 report Daes had proposed that "all elements of [Indigenous] heritage should be managed and protected as a single, interrelated and integrated whole" rather than as separate elements designated by terms such as "cultural property" and "intellectual property" (Daes, 1993, p. 7, para 31).

Despite the comprehensive reports such as those of Daes advocating maintenance of the integrity and totality of Indigenous heritage, the tendency in legislative and policy developments has nonetheless still been to fragment and compartmentalise Indigenous knowledge, and to devise lists and inventories in order to develop measures for protection.

The Convention on Safeguarding Intangible Heritage is a case in point. This Convention is not specific to Indigenous heritage, but it does illustrate the kind of problem I am discussing in heritage law and policy more generally. Despite its rhetoric of integrating different elements of heritage, and having proposed that the interrelatedness of intangible and tangible heritage be maintained, the Convention then moves on to definitions, where "safeguarding" is defined as:

> Measures aimed at ensuring the viability of the intangible cultural heritage, including the identification, documentation, research, preservation, protection, promotion, enhancement, transmission, particularly through formal and non-formal education, as well as the revitalization of the various aspects of such heritage (Art 2(3)).

The Convention then proceeds, like many instruments of this type, to advocate the inventorying of intangible heritage as a means of "ensuring the safeguarding" of this heritage, proposing that States shall:

> 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 (Art 11).

And that:

> To ensure identification with a view to safeguarding, each State Party shall draw up, in a manner geared to its own situation, one or more inventories of the intangible cultural heritage present in its territory. These inventories shall be regularly updated (Art 12).

This cataloguing, says the Convention, will be formalised into a "List of the Intangible Cultural Heritage of Humanity", to "ensure better visibility of the intangible cultural heritage and awareness of its significance, and to encourage dialogue which respects cultural diversity" (Art 16). This typological and classificatory approach to defining intangible cultural heritage as a way of protecting and preserving it is also common to many non-binding ("soft-law") instruments, including the Declaration on the Rights of Indigenous Peoples, the Mataatua Declaration, and others.

The taxonomic and inventorying provisions in the Convention on the Safeguarding of Intangible Heritage appear to perpetuate, or even to encourage a classificatory approach to intangible heritage. This is despite a view resulting from a 1999 evaluation of this Convention's predecessor instrument – the 1989 UNESCO Recommendation on the Safeguarding of Traditional Culture and Folklore – that the Recommendation "places too much emphasis on documentation and archiving and on the products rather than the producers of traditional culture" (Aikawa, 2004, p. 140).

In all this classifying, documenting and inventorying, what of the role of the people themselves, the knowledge holders and owners? As Aikawa reminds us, "recognition and respect for the active participation of grassroots practitioners in the production, transmission and preservation of their cultural expressions are essential to ensure the safeguarding of intangible cultural heritage" (Aikawa, 2004, p. 140).

Protection and preservation discourse in international standard setting

Another key international instrument relevant for Indigenous knowledge is the United Nations Convention on Biological Diversity (the CBD). This Convention, at Article 8(j) encourages State Parties, "subject to national legislation", to:

> Respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity and promote their wider application with the approval and involvement of the holders of such knowledge, innovations and practices and encourage the equitable sharing of the benefits arising from the utilisation of such knowledge, innovations and practices (CBD 1993, Art 8(j)).

The absence of references to place, historical contexts, and the dynamism of change in these CBD provisions on traditional knowledge are notable. The CBD also uses the language of preservation, and has insufficient emphasis on recognising and strengthening the rights of the producers and creators of the knowledge. Once again, Indigenous knowledge is linguistically and semantically trapped in a museological discourse that disembodies it and alienates it from its context in living cultures and societies.

The UN World Intellectual Property Organisation (WIPO) also employs the language of protection, although it is aware of some of the problems with protection. In a 2006 Information Note, WIPO states that "sometimes activities by museums and cultural specialists do not take adequate account of [Indigenous peoples'] rights and interests, and that documenting and displaying, say, a traditional song or a tribal symbol, make them vulnerable to misappropriation" (WIPO, 2006, p. 2). The work of WIPO, while commendable in many ways, also illustrates the way in which heritage protection has become synonymous with the development of legislative regimes, particularly those of intellectual property. One commentator, anthropologist Michael F. Brown argues that "the goal of rectifying civil wrongs thrusts heritage protection into the provinces of intellectual property and tort law" (2005, p. 44). Brown worries that the Intangible Heritage Convention "portrays intangible heritage as an objectified resource amenable to modern management techniques" (2005, p. 48). He protests, "in such a legalistic vision, heritage cannot be protected until it is thoroughly documented", and consequently, "one struggles to imagine how it will protect cultures as living, dynamic systems" (2005, p. 48).

In much of the debate and discussion, Indigenous knowledge is transformed into Western legal concepts of intellectual property. There has been a lot written about the incompatibilities between Indigenous knowledge and intellectual property laws. Essentially the mismatch highlights the fact that these are fundamentally radically different systems and worldviews; the one (Indigenous

knowledge) having to do with relationships between humans, their environments, and their cosmologies; the other being a system devised to foster and encourage commercial transactions and to protect individual rights.

Some historical examples of the typology approach to Indigenous heritage

The use of classification and inventorying as a means of defining Indigenous knowledge and heritage has been perpetuated for many years, both internationally and in Australia. On a more optimistic note, there have also been some attempts at devising approaches to protection and recognition in a more integrated or holistic way. In 1969 in Australia for example, there was an attempt to legislate for protection of an integrated entity to include "work of art", "ritual, ceremony, dance or drama", "record in any form of such ritual, ceremony, dance or drama", "design", and "area of land". This so-called "Traditional Aboriginal Property" legislation was proposed by H. C. Coombs. It was a far reaching proposal for the time, seemingly designed to encapsulate the intricate relationships in Aboriginal society between art, land, and sacred sites, and to recognise these as elements of an integral cultural system. The recognition within the political/administrative context of these connections between the different domains of Aboriginal culture was influenced at least in part by the work and writings of some anthropologists during the 1950s and 1960s, such as Ronald Berndt, A. P. Elkin and many others. Coombs and others, such as anthropologist Stanner, had understood the connections between art, land, and the sacred in Aboriginal society, and had sought to link these in the proposed legislation. Although the "Traditional Aboriginal Property" proposal was still oriented towards the notion of Aboriginal cultural heritage as "property", and adopted a classificatory approach, it was nonetheless progressive in its recognition of the links between different elements, especially between the sacred and physical domains. Unfortunately the proposal languished and did not amount to anything (Davis, 2007, p. 282-84).

The impetus for this development was in part provided by a growing realisation during the 1950s among policy makers and anthropologists of the importance of the sacred in Aboriginal society, and of the role of sacred sites. In part at least, this emerging consciousness was triggered by growing interests from the mining sector, notably in bauxite deposits in the Northern Territory, and an increasing politicisation by Aboriginal people (predominantly Yolngu people) of their rights in regard to their lands and sites where the proposed mining would occur. Anthropologist Ronald Berndt was engaged by the authorities to conduct surveys of sacred sites in the relevant areas of Arnhem Land, and his reports furnished lists of such sites. These lists subsequently formed the bases upon which heritage legislation was introduced at both Commonwealth (the *Aboriginal Land Rights Act 1975* (Northern Territory)) and Territory (the *Sacred Sites Act 1989* (NT)) levels (Davis, 2007).

Some years later, in the early 1980s there was another attempt to formulate law and policy to protect Indigenous heritage in a more integrated way. That development had resulted partly through debates over the previous decade about the problems in protecting the rights of Aboriginal artists, and the misuse of their designs. While aware of the problematic nature of using the term "folklore" a committee formed to examine this issue explained that:

> Use of the term "folklore" recognises that traditions, customs and beliefs underlie forms of artistic expression, since Aboriginal arts are tightly integrated within the totality of Aboriginal culture. In this sense folklore is the expression in a variety of forms of a body of custom and tradition built up by a community or ethnic group and evolving continuously (Report of the Working Party on the recognition of Aboriginal Folklore, cited in Davis, 2007, p. 295).

The report went on to say that "the word 'folklore' has been adopted as a compromise meeting the conceptual and international legal requirements for such a term" (Report of the Working Party on the recognition of Aboriginal Folklore, cited in Davis, 2007, p. 295). Although the proposed "Folklore Act" retained the typological approach to defining Indigenous heritage, that legislative development was relatively progressive in seeking to encompass, in an inclusive way, a number of different elements, including the tangible and intangible in Indigenous heritage. It was also ahead of its time in that it sought to establish a mechanism, or process by which rights and interests in "Aboriginal folklore" were to be ascertained and determined through a tribunal system. Aboriginal people, in this system, would be compensated for use of their "folklore" by provision of benefits. This was a more potentially appropriate way of protecting Aboriginal peoples' rights and interests than the more "top-down" or prescriptive approaches common to legislation today.

The problem with categories

I am arguing against dividing Indigenous heritage into categories for the questionable purposes of transforming them into disembodied legal entities. I am also concerned that this transformation requires, or depends on the classification, inventorying and documenting of Indigenous heritage, so that the latter ceases to exist as little more than an encyclopaedic legal category, disembodied from its cultural, historical and human contexts. There is some usefulness in categorising Indigenous heritage in limited ways for the purposes of analysis, and in order to gain some ground in reforms to enable prevention of misuse. There is, for

example, a growing interest by Indigenous peoples, and others, in exploring the role of community databases, registers and other mechanisms for documenting and recording Indigenous knowledge and cultural heritage as a means of defending it against misuse through bad patents or other forms of exploitation. Databases and registries are being developed, or considered at various levels, international, regional, national and local. The arguments for and against these measures are complex, and cannot be adequately discussed in this paper (e.g., Brahy, 2006; Hansen & VanFleet, 2003; UNU-IAS, 2003). These "defensive protection" measures and mechanisms are worth examining in more detail in another place. However, an over-determined approach that defines and regulates Indigenous heritage only as discrete elements does not serve the interests of the people whose heritage it is.

It is not only the compartmentalising and fragmenting of Indigenous heritage that is a concern. The unexamined adoption of terms and expressions within international standard setting activities and work programs risks further alienating Indigenous knowledge from its place – based contexts grounded in the particularities and contingencies of community, locality and time. The growing program of international laws seeking to develop standards for recognition and protection of Indigenous peoples' rights in culture and heritage is crucial, and welcome. But at the same time, there is a risk that this internationalisation will also tend to promote a universalising or essentialising of Indigenous culture and heritage at the expense of acknowledging its place-based and localised nature.

The problem with emphasising protection is that it privileges the relationship between heritage and property – and often equates the two. The result of this is that, as a property right, the problem of protection becomes an overwhelmingly legal one. The current tensions and anxieties in international levels bear witness to this, wherein Indigenous knowledge is discussed primarily within two separate United Nations agencies: the Convention on Biological Diversity (CBD), and the World Intellectual Property Organisation (WIPO). While the CBD has made some important advances in standard setting that can potentially realise, and advance recognition of the multiple, pluralistic and complex human dimensions of traditional knowledge, the work of WIPO is conducted within the more constrained framework of intellectual property rights.

In recent years the CBD has, through the excellent work of its Working parties on Access and Benefit-Sharing, and on Traditional Knowledge respectively, developed standards for access to genetic resources and fair and equitable sharing of the benefits arising out of their utilisation (the Bonn Declaration), and for cultural, environmental and social impact assessment (the Akwe Kon Guidelines). Although these are both voluntary guidelines, they are nonetheless of critical importance in that they shift the debate beyond the limitations of deterministic intellectual property and legal regimes, towards greater incorporation of human and cultural dimensions. They also encourage nation-states to consider the important roles of Indigenous and local peoples' customs and traditions, and authority and decision-making structures.

I am arguing then for a balance between the universal and the particular. Universals can enable or facilitate dialogue, cross-cultural comparisons, and a correspondence or integration of otherwise inherently disparate knowledge and cultural systems. However, these universals must be grounded in the contingencies and complexities of distinctiveness: the specific relationships between peoples, place, locality, and the trajectories of history. In problematising the received terms and categories of law and policy discourses, I am arguing for the creation of a space in which there can be greater focus on what is in common, while at the same time allowing for recognition of the distinct expressive qualities of Indigenous knowledge. I am suggesting the development of a new language of understanding, interpretation and translation, that can facilitate a better integration between Indigenous knowledge, and Western scientific knowledges. I am interested in how such engagement between Indigenous, and other forms of knowledge, can contribute to natural resource management and environment and heritage conservation, planning and management. If the received categories such as "protection" are adopted without interrogating them to ascertain more precision as to what they actually mean, and imply in practice, this is an impediment to progress in working different knowledge traditions together. An uncritical acceptance of notions such as "protection" often results in work on Indigenous knowledge being confined to merely recitations or inventories of "current developments" listing international, regional, and national laws and policies without analysis or interpretation.

Protection and property

The development of legal discourses for protecting Indigenous knowledge generally requires, or depends upon a transformation of Indigenous knowledge into property, a commodity for economic transactions. A significant focus in standard setting developments and the emergence of regimes for protection is on intellectual property. This implies an equation between Indigenous knowledge and commodity, and therefore creates a discourse of transaction, of market driven imperatives, and commercial interests.

Legal developments, policy-makers, and bureaucrats grapple with choice of terms, arguing over the relative merits of encapsulating Indigenous cultural traditions within such rubrics as "intellectual property", "cultural property", or "cultural heritage" (e.g., Blake, 2002; Frigo, 2004). Frigo, for example, argues for "cultural heritage" as the preferred term, stating:

> It is evident that the concept of cultural heritage, if compared to that of cultural property, is broader in scope, as it expresses a "form of inheritance to be kept in safekeeping and handed down to future generations". Conversely, the concept of cultural property is "inadequate and inappropriate for the range of matters covered by ... cultural elements (like dance, folklore, etc.) more recently deemed entitled to legal protection at the international level (Frigo, 2004, p. 369).

It is worrying that international developments and programs of work continue to agonise over the use of terms, and perpetuate the distinctions between them. Both UNESCO and WIPO illustrate these terminological anxieties.

Beyond the confines of protection: Indigenous knowledge, place, dialogue, and engagement

The philosopher Edward S. Casey (1993) has argued for a return to the importance of *place* in the Western imagination. He makes an eloquent case for the significance of place, tracing its genealogy back to ancient times, and refiguring place in Western thought. The concept of place, of situatedness, is critical for not only understanding the dynamic and intrinsic qualities of Indigenous knowledge, but also for developing a more engaged dialogue regarding the rapprochement between Indigenous, and other knowledge systems in the context of land, heritage, and natural resource management and conservation.

If Indigenous knowledge is returned to its context in place, and time, and understood as systems of relationship and dialogue, what, if any scope might there be in recognising and supporting these qualities within the dominant discourses of Western policy and programs? Greater opportunities for engagement with Indigenous knowledge as forms of relationship and dialogue can be found through the mechanisms of agreement-making, treaty-making and the development of negotiated partnerships. There is scope for formalising and supporting these types of approaches in developing creative approaches consistent with, and that domestically implement the Convention on Biological Diversity, and potentially through the native title process. We can look to some activities occurring at international levels in agreement-making and equitable benefit-sharing over bio-resources, collective and communal rights, and Indigenous knowledge and practices. There is a great deal more that needs to be done in Australia to develop these kinds of approaches.

There needs to be recognition of, and support for Indigenous customary laws and practices, especially in regard to modes of governance, community authority and decision-making processes and structures, permission giving, prior informed consent mechanisms, and communal structures for holding and managing knowledge, resources, and heritage. Dialogue and engagement through agreement-making allows the possibility of working two different knowledge traditions together – Indigenous knowledge and Western knowledge – for the wider benefit of sustainable development and livelihoods, natural and cultural resource management, and land, environment and heritage conservation, management and planning.

How can we understand Indigenous knowledge as sets of relationships, and as ways of being in place and in history? In addition, what, if any, practical implications might such an understanding present for natural resource management, cultural heritage, land and environment planning, management and conservation? I would advocate a need to look more seriously at devising new approaches – what have been called *sui generis* approaches – that lie outside, or beyond the constraints and limitations of conventional intellectual property laws. There is an established and growing body of work, and emerging standards for such *sui generis* approaches, and much scope for devising a good model for the Australian context. The ground breaking work of Posey and Dutfield (1996) in developing integrated approaches to Indigenous knowledge recognition that combines creative uses of human rights instruments, soft law, and contract and agreement making, and international and regional examples, provides just one model for examining the benefits of trialling such *sui generis* approaches in the Australian context. There is also a growing body of work at the international level that is exploring the possibility of such approaches. *Sui generis* approaches may include among their key elements: recognition of Aboriginal customary laws; provisions for free prior informed consent; recognition of human (especially cultural, social and economic) and moral rights; environmental protection and biodiversity conservation. Examples of some regional regimes are the African Union Model Law on Rights of Local Communities, Farmers, Breeders and Access (2000), the Andean Decision 391, Common Regime on Access to Genetic Resources (1996), and the Costa Rica Biodiversity Law (1998) (e.g., United Nations Environment Program (UNEP, 2005), for more details).

As part of developing a *sui generis* approach, there is potential for supporting partnership and negotiated agreement-making arrangements integrating Indigenous, and non-Indigenous knowledge systems, through legislation such as the Commonwealth's Environment *Protection and Biodiversity Conservation Act 1999*. Although this legislation regulates access to genetic resources primarily to support trade and commerce, it should be reviewed (especially the relevant Regulations) in order to assess its potential to provide avenues for equitable benefit-sharing partnerships with Indigenous peoples, that uphold Indigenous peoples' rights and interests in their bio-resources, and associated knowledge and practices, and that are based in recognition of their customary laws.

Moving beyond the confines of intellectual property and classificatory and typological approaches can allow a space for exploring the notion of Indigenous knowledge as sets of relationships, obligations, and contingencies. The dimensions of Indigenous knowledge that are often absent in the international and national legal regimes include those such as nostalgia, memory, authority, responsibility, and history. A shift away from property and protection regimes can enable a focusing on these qualities, and on the possibility of acknowledging these in law and policy.

References

Agrawal, A. (1995). Indigenous and scientific knowledge: some critical comments. *Indigenous Knowledge and Development Monitor, 3*(3), 1-9.

Aikawa, N. (2004). An historical overview of the preparation of the UNESCO International Convention for the Safeguarding of the Intangible Cultural Heritage. *Museum, 56*, 1-2.

Asia/Pacific Cultural Centre for UNESCO. (2006). UNESCO-ACCU Expert Meeting on Community Involvement in Safeguarding Intangible Cultural Heritage: Toward the Implementation of UNESCO's 2003 Convention, Tokyo, Japan, 13-15 March 2006. Information Note prepared by the Secretariat of the World Intellectual Property Organization. Retrieved 7 July, 2008, from http://www.accu.or.jp/ich/en/pdf/c2006Expert_UEMURA.pdf

Blake, J. (2002). On defining the cultural heritage. *International and Comparative Law Quarterly, 61*, 61-85.

Brahy, N. (2006). The contribution of databases and customary law to the protection of traditional knowledge. *International Social Science Journal, 58*(188), 259-282.

Brown, M. F. (2005). Heritage trouble: Recent work on the protection of intangible cultural property. *International Journal of Cultural Property, 12*, 40-61.

Casey, E. S. (1993). *Getting back into place: Toward a renewed understanding of the place-world*. Bloomington, IN: Indiana University Press.

Daes, E. (1993). *Study on the protection of the cultural and intellectual property of indigenous peoples*. United Nations document E/CN.4/Sub.2/1993/28, 28 July 1993.

Davis, M. (2001). Law, anthropology, and the recognition of Indigenous cultural systems. In R. Kuppe & R. Potz (Eds.), *Law and anthropology: International yearbook for legal anthropology 11* (pp. 298-320). The Hague, SH: Martinus Nijhof Publishers.

Davis, M. (2006). Bridging the gap or crossing a bridge? Indigenous knowledge and the language of law and policy. In W. V. Reid, F. Berkes, T. J. Wilbanks & D. Capistrano (Eds.), *Bridging scales and knowledge systems: Concepts and applications in ecosystem assessment* (pp. 145-165). Washington, DC: Island Press.

Davis, M. (2007). *Writing heritage: The depiction of Indigenous heritage in European-Australian writings*. Melbourne, VIC: Australian Scholarly Publishing and the National Museum of Australia.

Dei, G. (2000). Rethinking the role of Indigenous knowledges in the academy. *International Journal of Inclusive Education, 4*(2), 111-132.

Ellen, R., & Harris, H. (2002). Introduction. In R. Ellen, P. Parkes & A. Bicker (Eds.), *Indigenous environmental knowledge and its transformations: Critical anthropological perspectives* (pp. 1-29). Amsterdam: Harwood Academic.

Frigo, M. (2004). Cultural property v cultural heritage: a "battle of concepts" in international law. *IRRC, 86*(854), 367-378.

Gibson, J. (2005). *Community resources: Intellectual property, international trade and protection of traditional knowledge*. Aldershot, NSW: Ashgate Publishing Limited.

Hansen, S. A. & VanFleet, Justin W. (2003). *Traditional knowledge and intellectual property: A handbook on issues and options for traditional knowledge holders in protecting their intellectual property and maintaining biological diversity*. Washington, DC: American Association for the Advancement of Science.

Nakata, M. (2007). *Disciplining the savages: Savaging the disciplines*. Canberra, ACT: Aboriginal Studies Press.

Ong, W. J. (2002). *Orality and literacy*. London: Routledge.

Posey, D. A., & Dutfield, G. (1996). *Beyond intellectual property, toward traditional resource rights for Indigenous peoples and local communities*. Ottawa, ONT: International Development Research Centre.

Pratt, M. L. (1992). *Imperial eyes: Travel writing and transculturation*. London: Routledge.

United Nations Educational Scientific and Cultural Organization. (2003). *Convention For the Safeguarding of the Intangible Cultural Heritage*. Retrieved 7 July, 2008, from http://www.unesco.org

United Nations Environment Program. (1993). *Convention on Biological Diversity*. Retrieved 7 July, 2008, from http://www.cbd.int.

United Nations Environment Program. (2005). *Development of elements of sui generis systems for the protection of traditional knowledge, innovations and practices*. UNEP/CBD/WG8J/4/7, 24 November 2005. Retrieved 7 July, 2008, from http://www.cbd.int/doc/meetings/tk/wg8j-04/information/wg8j-04-inf-18-en.doc

United Nations University-Institute of Advanced Studies. (2003). *The role of registers and databases in the protection of traditional knowledge: A comparative analysis*. Tokyo: United Nations University Institute of Advanced Studies.

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