Guarding ground: a vision for a National Indigenous Cultural Authority

Wentworth lecture 2008

as delivered

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WARNING
The document contains names of deceased Aboriginal and Torres Strait Islander people.

Important legal notice
This paper provides general advice only in an effort to encourage constructive debate on the topic. It is not intended to be legal advice. If you have a particular legal issue, we recommend that you seek independent legal advice from a suitably qualified legal practitioner.

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Guarding ground: a vision for a National Indigenous Cultural Authority

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Synopsis

In the past 20 years Indigenous Australians have called for greater recognition of Indigenous cultural and intellectual property rights. The intellectual property system does not acknowledge Indigenous communal ownership of cultural expressions and knowledge passed down through the generations, and nurtured by Indigenous cultural practice. Sacred knowledge is also at risk.

115 legislative and policy recommendations were made in Terri Janke's 1999 report - *Our Culture: Our Future – report on Australian Indigenous cultural and Intellectual Property Rights*. Yet, the protection of Indigenous cultural and intellectual property rights remains largely unprotected in Australia, and a hotly debated international issue. Now is the time for us to reassess the current framework.

This lecture will sketch out the ground gathered by Indigenous copyright cases and examine international model laws and draft provisions. Ms Janke argues for greater infrastructure to support and defend Indigenous cultural and intellectual property rights. Her vision is for a National Indigenous Cultural Authority to facilitate consent and payment of royalties; to develop standards of appropriate use to guard cultural integrity, and to enforce rights.

Author Profile

Terri Janke is an Indigenous arts lawyer, writer and consultant. She is a member of the Council of AIATSIS. Terri's law firm, Terri Janke and Company, is a Sydney based specialist Indigenous law firm representing Indigenous artists, writers, filmmakers and Indigenous businesses across many fields, in copyright and intellectual property issues. Her publications include *Our Culture: Our Future — report on Australian Indigenous Cultural and Intellectual Property Rights*, the first of its kind to outline a comprehensive framework for protecting Indigenous cultural heritage. She is also a published fiction author.

1. Introduction and background on Bill Wentworth

I acknowledge the Ngunnawal people on whose traditional lands we gather today. I also thank the Chairman, Professor Mick Dodson and the Australian Institute of Aboriginal and Torres Strait Islander Studies for inviting me to present the 2008 Wentworth Lecture. I am honoured to join the esteemed list of past presenters, including the 2006 lecture's presenter, Emeritus Professor Bob Tonkinson, who is a co-member of the AIATSIS Council, and is with us here today.

This biennial lecture is in honour of Bill Wentworth. I acknowledge his family and thank them for their continuing support of this lecture series. Bill Wentworth was an extraordinary Australian with great passion and persistence who brought the idea of a national Australian Institute for the promotion of Aboriginal and Torres Strait Islander Studies into fruition. This wonderful institution, the books, documents, films, photographs, sound recordings, the knowledge and the people – owe their existence, in some part to Bill Wentworth's vision.

His visionary nature has influenced my lecture today. Bill Wentworth was the first minister of Aboriginal Affairs, appointed after the 1967 Referendum that delivered powers to the Commonwealth to legislate with respect to Aboriginal people. He was Minister in 1968, for the passing of the current Copyright Act, and remained in office through its subsequent enactment on the 1 January 1969. My working career has been focused on Indigenous intellectual property, mostly copyright, and the

advancement of Indigenous cultural and intellectual property rights.

I discovered a link between Bill Wentworth's time in office and the focus of my paper when I was reading a colleague, Michael Davis' book, *Writing heritage*. In 1969, Bill Wentworth was involved in the early stages of exploring the need for Indigenous traditional cultural property protection. The newly established Council of Aboriginal Affairs' Chair, Nugget Coombes, the Council's chairperson, outlined a proposal for legislation to protect 'Traditional Aboriginal Property' to 'establish property rights in certain works of art, designs, areas of religious, ceremonial, ritual, artistic and tribal significance' to Aboriginal people. The proposed Traditional Aboriginal Property Act would serve to vest traditional Aboriginal property rights in a Trustee and by his (*sic*) delegation to corporate bodies, and to provide for the protection, development, and where appropriate, economic exploitation of these property rights in the interests of Aboriginal people. It further aimed to protect the work of Aboriginal people from 'imitation and unreasonable commercial practice, and to also provide effective marketing of their products.[1] This proposal more than likely influenced the moves of the Whitlam Government in the early 1970s to establish a Working Party on the protection of Aboriginal folklore. The Working Party took several years to complete their findings, which were finally released in 1981.[2] Generally, the Working Party recommended

[1] Michael Davis, *Writing Heritage, the Depiction of Indigenous Heritage in European-Australian Writings*, Australian Scholarly Publishing and National Museum of Australia Press, Canberra, 2007, p. 283.

[2] The Australian Working Party into the Protection of Aboriginal Folklore defined "folklore" as the "body of traditions, observances, customs and beliefs of Aboriginals as expressed in Aboriginal music, dance, craft, sculpture, painting, theatre and literature". Australian Department of Home Affairs and

the enactment of an Aboriginal Folklore Act which would provide safeguards against certain uses of Aboriginal arts and cultural material which are offensive to Aboriginal people and their traditions whilst at the same time encouraging fair and authorised use of Aboriginal arts and cultural material.

These proposed Australian laws did not take shape as law but the fact that such discussions took place in the early stages of Aboriginal affairs highlight that there was a debate about Indigenous cultural and intellectual property rights.

In the last four decades there has been a remarkable growth in the value and demand for Indigenous arts, cultural expression and knowledge. The Aboriginal Art Market is valued at $300 million per annum, traditional knowledge has applications in industries that range from tourism, entertainment through to the biotechnology industry. The increase in demand also meant the rise of a rip-off industry where Indigenous arts and knowledge was taken without consent, and without acknowledgment. In 40 years of calling for legal protection most of the measures have been instigated by Indigenous advocates guarding their ground by asserting cultural rights, bringing test cases, devising protocols and enforcing rights under agreement. Hence, my call for a National Indigenous Cultural Authority for Indigenous people to continue the advancement of rights.

My paper is in four parts:

1. 40 years of Indigenous cultural rights advocacy

Environment, *Report of the working Party on the Protection of Aboriginal Folklore* , Australian Government Printing Service, Canberra,1981.

2. *Our Culture: Our Future* – what happened to the recommendations in that big report
3. A good idea: a proposal for a National Indigenous Cultural Authority
4. Learning from developing International prior informed consent models.

2. 40 years of Indigenous cultural rights advocacy

Indigenous arts and cultural expression is interconnected with land and seas, handed down through the generations as part of cultural heritage. Painting, dances, stories, songs, and knowledge come from the land, and are passed on from generation to generation as Indigenous cultural heritage. Culture is not static, it evolves and adapts, and Indigenous people must be recognised as the primary custodians of their culture.

Since the 1970s, Indigenous artists have been calling for recognition of their creative rights on the same level as that of other Australian artists. In Australia, the *Copyright Act 1968* (Cwlth) provides rights for copyright owners to control the use and dissemination of literary, dramatic, artistic and musical works, and also certain listed subject matter including sound recordings, cinematograph films, television and sound broadcasts, and published editions.[3] There are certain requirements that must be met before protection is granted. But if a work, film or sound recording meets these requirements, then the law makes it the subject of copyright, without the need for

[3] *Copyright Act 1968* (Cwlth) – for full text see www.comlaw.gov.au.

registration. This feature of the law has two main impacts for Indigenous people:

1. Indigenous arts and culture is orally and performance based, and therefore does not meet requirements of copyright, at least in the old days of the 1960s and 1970s. Prior to the recent case law, Aboriginal arts was seen as *folklore* and considered unoriginal in that copying artistic traditions did not amount to innovation and interpretation.

2. The second main impact was that copyright was recognised however, in the written interpretations and recordings made of Indigenous knowledge, arts, dances, music and stories. Copyright protected the films and tapes which recorded Indigenous people and their cultural knowledge. But, that copyright was recognised in the material form created often by non-Indigenous people, and the ownership vested in the recorder as the 'author' of these works. So songs, dances, customs, knowledge about bushfoods and medicines have been recorded and continue to be recorded but not by the Indigenous knowledge holders or their communities.

2.1 David Malangi and the $1 note

In 1966, the new decimal $1 note depicted 'ancient Aboriginal art' by David Malangi. The selection of this art for the note involved no consultation with the artist. The original bark painting was purchased by an international art collector three years before, and had subsequently been donated to the Paris Museum of Arts of Africa and Oceania. The collector gave a

photocopy of the art to an officer of the Reserve Bank of Australia and then the designer of the $1 note. Nugget Coombes, Governor of the Reserve Bank was deeply embarrassed by the incident, himself a great advocate for Indigenous artists' rights. The Reserve Bank had not consulted at all, assuming the design was the work of an 'anonymous and probably long dead artist'. It was a copyright work of course. David Malangi was given $1,000, a fishing kit and a silver medallion.

2.2 Wandjuk Marika's call for copyright protection parity

In 1975, Wandjuk Marika, the first Chair of the Aboriginal Arts Board called for greater protection after seeing his important sacred works reproduced on a tea-towel. He said, 'this was one of the stories that my father had given to me and no-one else amongst my people would have painted it without permission. I was deeply upset and for many years I have been unable to paint. It was then that I realised that I and my fellow artists needed some sort of protection.[4] He pointed out copyright did not protect Indigenous arts and craft which was referred to as 'folklore' and dealt with as if it was in the public domain, *terra nullius*, free for all to use.

The early cases reflect a terra nullius notion of Indigenous arts where much of the art work was labelled 'artists unknown' and collected without reference to the cultural significance but its value as an object of curiosity. Wandjuk Marika's call set the ground for action by Indigenous people over the following years.

[4] Dr Vivien Johnson, *Copyrites*, National Indigenous Arts Advocacy Association, Sydney, 1997, p. 11.

2.2 Yumbulul and the $10 note

Another case involving currency, occurred when the $10 note commemorating Australia's bicentennial reproduced a morning star pole, rights granted under licence, by the Aboriginal Artists Agency, to the Reserve Bank. Morning star poles are made for the sacred morning star ceremony. This one, by Terry Yumbulul was made and sold to the Australian Museum. Yumbulul had entered into a licence agreement that had allowed his agent, the Aboriginal Artists Agency, to licence the work to the bank. Yumbulul came under considerable criticism form his clan when they found out that the morning star pole had been reproduced on the ten dollar note. He took action against the Agency and the Bank. The action against the Agency failed. Justice French recognised that: customary and copyright law have divergent interest when he said, ''Australia's copyright law does not provide adequate recognition of Aboriginal community claims to regulate the reproduction and use of works which are essentially communal in origin.'[5]

2.3 Bulun Bulun T-shirts

In 1989, the Ganalbingu artist John Bulun Bulun commenced action in the Darwin Federal Court against a t-shirt manufacturer who had copied his ceremonial artwork*, Magpie Geese and Waterlilies at the waterhole*. The clever Melbourne barrister Colin Golvan had heard the then Chair of the Aboriginal Arts Board, Lin Onus, on radio, discussing the case, and had then called Lin to offer his services on the case. 13 other Aboriginal artists were joined to the proceedings, because other artistic works were copied. The Court granted an interlocutory injunction to stop the manufacture and sale of the t-shirts. Before the trial, the parties

[5] *Yumbulul v. Reserve Bank of Australia* (1991), 21 I.P.R. 481 (F.C. Aus.).

settled. The defendant t-shirt company agreed to halt sales, and pay $150,000 in damages to the artists. That money was shared between the artists and their families (for the deceased ones). It became known as the 'Flash t-shirts' case, and articles in legal journals began to appear all over the world speculating on how the case may have been decided.

2.4 The Carpets Case

In 1994, *Milpurrurru v Indofurn*[6] became the first Federal Court judgment recognising Indigenous artist's works, which depicted pre-existing clan owned designs, were original copyright works. I was working for the National Indigenous Arts Advocacy Association as a junior legal information officer. I remember watching the fax machine curl out over 100 pages. The artists had met this requirement because of the skill and interpretation they had expended. In this matter, Justice von Doussa considered a claim that carpets with Indigenous designs amounted to copyright infringement. Justice von Doussa made a collective award to the artists rather than individual awards so that the artists could distribute it according to their custom. The court's finding that the company directors were also liable for copyright infringement was overturned on appeal. Still, the case set an important precedent and one media article likened it to the *Mabo* Case.

2.5 Bulun Bulun v R & T Textiles – the fiduciary duty

The judgment of *Bulun Bulun & Anor v R & T Textiles Pty Ltd*[7] was reported in 1998. This case concerned the artist, Johnny Bulun Bulun once again. The potential reach of this case in

[6] *Milpurrurru & Others v Indofurn Pty Ltd & Others* 30 IPR 209
[7] *Bulun Bulun v R & T Textiles Pty Ltd* [1998] 1082 FCA

copyright law is, in my opinion, yet to be determined. It builds upon the previous cases by making some important statements about the copyright and the relationships between individual Indigenous artists and their community, when the artwork incorporates communally owned ritual knowledge.

By way of background, copyright laws grant exclusive rights to authors to use, adapt and reproduce their works without conditions. This is at odds with the Indigenous cultural heritage material. In many Indigenous clans, there are laws that are based on responsibility for cultural heritage, to ensure that it is maintained and protected, and passed on to future generations. An individual or group of individuals may be empowered to act as the caretaker of a particular item of heritage.[8] The traditional custodians are empowered to protect a particular item only to the extent that their actions harmonise with the best interests of the community as a whole.

Johnny Bulun Bulun was the artist and copyright owner of the bark painting *At the Waterhole*. The painting embodied traditional ritual knowledge of the Ganalbingu people. Johnny Bulun Bulun's use of ritual knowledge to produce the artworks was given to him under Ganalbingu customary law, based on the trust and confidence that those giving permission had in the artist. R & T Textiles Ltd had imported and sold within Australia, fabric which copied parts of *At the Waterhole*. Once issued with the statement of claim, the textile company was quick to negotiate a settlement. However, the case still went to court to consider the issues relating to the clan interests in the copyright work.

[8] Although in some groups, where customary laws are less in tact, there may not be, due to the disruption of cultural practices since colonisation.

Justice von Doussa, the same judge who presided on the *Carpets Case*, found that there was no native title right to the paint. He also considered that there no equitable interest in the work. In the court's opinion, there was no evidence that the artist had created the work as part of an implied legal trust that would make his clan equal owners of the copyright. The witnesses and affidavit evidence showed that 'on many occasions paintings which incorporate to a greater or lesser degree parts of ritual knowledge of the Ganalbingu people are reproduced by Ganalbingu artists for commercial sale for the benefit of the artists concerned.'[9] Neither was the copyright in the work jointly owned by the artist and the clan because there was no evidence that anyone other than Johnny Bulun Bulun had created the bark painting.[10]

Justice von Doussa found that there was a fiduciary relationship between the artist and the clan. Customary laws impacted on the rights of the artist to deal with the work embodying the ritual knowledge in a way that he had to discuss and negotiate use of the traditional knowledge with relevant persons in authority within his clan. Evidence given by Djardie Ashley discussed how the Ganalbingu laws dealt with the consent procedures. Mr Ashley noted that in some circumstances, such as the reproduction of a painting in an art book, the artist might not need to consult with the group widely. In other circumstances, such as its mass-reproduction as merchandise, Mr Bulun Bulun may be required to consult widely. Mr Ashley further noted 'the question in each case depends on the use and the manner or the mode of

[9] *Bulun Bulun v R & T Textiles Pty Ltd* [1998] 1082 FCA
[10] Michael F Brown, *Who owns native culture?* Harvard University Press, USA, 2003, p 64.

production. But in the case of a use which is one that requires direct consultation, rather than one for which approval has already been given for a class of uses, all of the traditional owners[11] must agree, there must be total consensus. Bulun Bulun could not act alone to permit the reproduction of 'At the waterhole' in the manner that it was done.'[12]

This relationship imposed the obligation on Johnny Bulun Bulun not to 'exploit the artistic work in a way that is contrary to the law and customs of the Ganalbingu people, and, in the event of infringement by a third party, to take reasonable and appropriate action to restrain and remedy infringement of the copyright in the artistic work.[13] If the artist had been unable or unwilling to take copyright action, equity would have allowed the clan leader to take action to stop the infringement.

2.6 The potential extent of fiduciary duty

It is this fiduciary obligation imposed on the copyright owner artist that has much potential for Indigenous people. The potential repercussions of the judgment is whether this type of obligation may extend in certain circumstances where notice of the 'Bulun Bulun equity' is given to outsiders. For example, a third party licensee of an Indigenous artwork who is on notice of a custodian's interest, may be open to claims by an Indigenous clan that they owe a fiduciary duty to safeguard the integrity of

[11] *Traditional owners* refers to the group, clan, community of people in whom the custody and protection of cultural heritage is entrusted in accordance with the customary law and practices.
[12] *Bulun Bulun v R & T Textiles Pty Ltd* [1998] 1082 FCA
[13] *Bulun Bulun v R & T Textiles Pty Ltd* [1998] 1082 FCA

the work when dealing with the copyright work?[14] Perhaps the Bulun Bulun equity applies to other copyright works incorporating traditional ritual knowledge. A non-Indigenous third party fiduciary duty might arise where traditional custodians allow access to a filmmaker to take interviews with community members. If the filmmaker is given notice of the custodians' interest in traditional ritual knowledge communicated in the interviews, the film maker may owe a fiduciary duty to the custodians when dealing with copyright in the filmed interviews. A custodians' interest notice incorporated in the access permit would help to establish this duty. In other areas too, where outsiders enter communities to record traditional cultural expression, an Indigenous community could use written agreements to impose the fiduciary obligations of third parties when they access, record and publish traditional ritual knowledge. For example, where a researcher wants access to traditional ritual knowledge for a particular project, or film and record it, the community could enter into a written agreement with that person, requiring her to consult on an ongoing basis about the future use of that material. It could also require her to display a custodians' interest notice on any copyright material created. The community could even require copyright in the project to be jointly owned or held on trust for its benefit. In my opinion, this line of thought has implications for scholars, authors, filmmakers, sound recorder, compilers, researchers and other recorder of Indigenous traditional knowledge and cultural expression, where copyright is created.

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

Since the Bulun Bulun case, there has been a growing trend for a traditional custodian's notice to be affixed to reproductions of art, and inside the cover of publications the incorporate Indigenous cultural expression.[15]

2.7 Brandl rock art case study

In 1997, Riptide Churinga, a Sydney based t-shirt manufacturer, produced a range of t-shirts with Mimi rock art figures. The t-shirts were discovered on sale to the surprise of a descendant of the Badmardi clan and Dr Vivien Johnson an Aboriginal art lecturer. The use of the Mimi figures was guarded carefully under customary law, and are still significant to Indigenous cultural beliefs. Stories, and information surrounding the sites, the sites themselves, and the right to touch up or depict images like those embodied in rock form should, in theory for cultural heritage purposes, belong to the owners of the cultural images therein. The rock art is estimated to be about 4,000 years old and therefore not the subject of copyright.[16] This presented a problem, how could the Badmardi clan stop the t-shirt maker from transgressing their laws? Some rock art sites can only be

[15] The Arts Law Centre recommends that following traditional custodian notice in artworks with traditional knowledge: 'The images in this artwork embody traditional ritual knowledge of the (name) community. It was created with the consent of the custodians of the community. Dealing with nay part of the images for any purpose that has not been authorized by the custodians is a serious breach of the customary law of the (name) community, and may also breach the *Copyright Act 1968* (Cwlth). For enquiries about permitted reproduction of these images contact (community name)'. Arts Law Centre of Australia, www.artslaw.com.au, viewed 21 August 2008.

[16] Terri Janke, *Minding culture: case studies on intellectual property and traditional cultural expressions*, World Intellectual Property Organization, Geneva, 2003, p. 106.

painted or depicted by certain people with the relevant ritual knowledge and the right to do so under customary law.[17]

In the 1970s, Eric Brandl received grant funding from the Australian Institute of Aboriginal Studies (now the Australian Institute of Aboriginal and Torres Strait Islander Studies) to visit and record rock art sites in the Northern Territory. His methods of recording involved photographing the various rock art sites which were in very difficult place to get to in the Deaf Adder Creek region. He then returned to his office, where he projected the images onto a wall on of paper. He then traced the works out with his hand in Indian ink.

These drawings and photographs of the Mimi Rock Art were then published by the Australian Institute of Studies in 1973.[18] There was copyright in the book, the photograph and the drawings. In line with the originality principles of copyright, that such skill and labour applied to the original rock art, would give a copyright interest in the derived sketches. It was obvious that the Riptide Churinga had taken directly from the book to produce its t-shirts.

AIATSIS, the Brandl Estate and the Badmardi clan were able to demand that the t-shirt company stop production of the t-shirt, they entered into a settlement in which damage, and delivery up of unsold items were included. There was

[17] Environment Australia, Commonwealth of Australia, 2006, http://www.environment.gov.au/parks/kakadu/artculture/art/, viewed 31 May 2007.

[18] E. J. Brandl, *Australian Aboriginal Paintings in Western and Central Arnhem Land, Temporal Sequences and Elements of Style in Cadell and Deaf Adder Creek Art*, Aboriginal Studies Press, Canberra 1973.

also a national public apology posted in *The Australian*, a national newspaper.

The Brandl case illustrates that copyright owners can work with 'cultural owners' to commence action, even though the 'cultural owners' have no copyright. This case occurred prior to the Bulun Bulun fiduciary duty and it was commenced by AIATSIS in observation of their cultural custodial status as a national keeping place for Indigenous studies. It was not legally obliged to do so. But consider if the researcher Brandl had been on notice of the traditional custodian interest in the rock art, and had published a notice at the front of the publication. Then it may be open for speculation the issue of whether the clan could either compel the copyright owner to take action or if the copyright owner was unwilling or unable to take such action against the copyright infringer, then equity may allow them to commence and seek an appropriate remedy.

In summary, these cases changed the copyright landscape, so that now Indigenous Cultural and Intellectual Property rights, are seen as important rights for Indigenous people to be managed and administered. The questions now remain about the shortfalls, the areas that are not protected, namely, the communal rights, and the longer term protection, as well as issues for sacred secret works.

3. Our Culture: Our Future – what happened to that big report?

Ten years ago I worked on a project, coordinated by the Australian Institute of Aboriginal and Torres Strait Islander Studies, for the then ATSIC. It was to review and report on

Indigenous Cultural and Intellectual Property Rights. In 1994, the government released an issues paper entitled *Stopping the Ripoffs*[19] which looked at the shortfalls in the law in protecting Indigenous arts and cultural expression. There was also significant work undertaken as part of the Social Justice Package, which advocated for greater cultural rights.

ICIP rights had been a significant inclusion in the then draft Declaration on the Rights of Indigenous Peoples. These rights still remain in the final draft, passed by the Council last year. 4 countries voted against it - Australia was one of the four. The *United Nations Declaration on the Rights of Indigenous Peoples,* was passed. Article 31 states:

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

[19] Commonwealth of Australia, *Stopping the Ripoffs: Intellectual Property Protection for Aboriginal & Torres Strait Islander Peoples*, issues paper in Australia, Canberra, 1994.

2. In conjunction with Indigenous peoples, States shall take effective measures to recognise and protect the exercise of these rights.[20]

In 1999, the report *Our Culture: Our Future*[21] was released with 115 legislative and policy recommendations. The Indigenous reference group of approximately 15 Indigenous people were clear in setting their priority for sui generis legislation. They wanted legal foundations for the protection of Indigenous cultural and intellectual property rights. The report took a view that such legislation would be long term and recommended a range of potential legal and non-legal measures including changes to copyright, patent, trade marks and cultural heritage laws, as well as introducing practices within government departments such as including an Indigenous advisory committee or unit within IP Australia, the responsible government agency for trademarks, patents and design registration. My favourite recommendation was the establishment for a National Indigenous Cultural Authority to act as a leader organisation on the promotion and administration of ICIP rights.

The following recommendation appears in the report:

> 22.1 *National Indigenous Cultural Authority*
>
> A National Indigenous Cultural Authority should be established as an organisation made up of various Indigenous organisations to:

[20] United Nations, Declaration on the rights of Indigenous peoples, www.un.org/esal/socdev/unpfii/en/drip.html, viewed 20 August 2008.
[21] Terri Janke, *Our Culture: Our Future – Report on Australian Indigenous Cultural and Intellectual Property Rights*, Michael Frankel and Company, Sydney 1999.

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

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

Representation on the Authority should aim to cover all areas of Indigenous Cultural and Intellectual Property. The National Indigenous Cultural Authority should be funded by both industry and government.[22]

Very little of the measures were considered, not even a draft of a sui generis law, or moves to establish a National Indigenous Cultural Authority. Most of the initiatives have involved the development of protocols, and the use of contracts by

[22] Terri Janke, *Our Culture: Our Future – Report on Australian Indigenous Cultural and Intellectual Property Rights*, Michael Frankel and Company, Sydney 1999, published under commission of the Aboriginal and Torres Strait Islander Commission and the Australian Institute of Aboriginal and Torres Strait Islander Studies, p. 237.

Indigenous people, and supporting industry organisations. There was however, the proposal to amend the Copyright Act to include Indigenous communal moral rights.

3.1 Indigenous communal moral rights – right or wrong way?

In 2000, when the moral rights amendments were being discussed in the Senate, the then Senator Aden Ridgeway drew attention to the fact the moral rights proposals did not factor in Indigenous communal interests. The Howard government said that they would consider this and in 2003 drafted proposed amendments of the *Copyright Act 1968* (Cwlth) for Indigenous Communal Moral Rights.[23] If the draft Bill becomes law, Indigenous communal moral rights (ICMR) will exist alongside an individual author's moral rights.[24] ICMRs will exist in works and films that draw from a traditional base.[25] Under the ICMR model, an authorised representative of an Indigenous community can take action against infringements of the communal moral rights of attribution and integrity. These are two important rights for custodians of culture. Firstly, to be acknowledged as the source identifies the people who are responsible for the cultural continuum of the work. Secondly, integrity rights address cultural obligations to guard against derogatory treatment, and the need for Indigenous people to be recognised as the primary guardians

[23] Copyright Amendment (Indigenous Communal Moral Rights) Bill 2003 (Cwlth)

[24] The *Copyright Act 1968* (Cwlth) provides creators the unalienable rights: (i) The right of attribution of authorship; (ii) The right not to have authorship falsely attributed; and (iii) The right of integrity of authorship.

[25] 'Drawn from a traditional base' means that the work or film must be drawn from the 'particular body of traditions, observances, customs and beliefs held in common by the Indigenous community'.

and interpreters of their cultures, arts and sciences, whether created in the past, or developed by them in the future. The proposed ICMR model has an important limitation. For a work or film to have ICMR, there must be a voluntary agreement between the creator of the work or the film and the Indigenous community that ICMR exists, before the first dealing of the work or film.[26]

Another limitation of the proposed Bill is that ICMRs would exist for the term of the copyright period. As discussed above, Indigenous people see ICIP rights as extending much longer, in perpetuity, for continuing cultural practice.

The Bill has never seen the inside of the houses of parliament and its current status is uncertain. Perhaps this is for best, in light of international advances. I say this, because I think we should be thinking of a bigger vision.

In developing, a bigger vision we should re-examine some of the recommendations of *Our Culture Our Future*. The change in government at the Federal level and the international law developments offer a chance to rethink whether an Indigenous managed entity, with a clear mandate to promote cultural and intellectual property rights, has a place in the Australian cultural landscape.

[26] A 'community' is defined loosely and can include an individual, family, clan or community group. Terri Janke, 'The moral of the story: Indigenous communal moral rights', *Bulletin*, #3/05, ISSN #1440-477,pp. 1, 2, 7 & 8.

4. A idea worth discussing: a National Indigenous Cultural Authority

In April 2008, I was invited to attend the Australia 2020 Summit. For my one big idea, I suggested the establishment of a National Indigenous Cultural Authority.

In the lead up to the Summit, web pollster Get Up solicited the public for ideas. An on-line submission from the Australian Lawyers for Human Rights (ALHR) stated:

> 'ALHR is of the opinion that Intellectual Property protections in Australia need to be considered in respect of the unique significance arts and culture holds for Indigenous peoples.
>
> In particular, ALHR recognises that there are various protections that could be afforded to Indigenous cultural heritage, including: the protection of the underlying ideas or information that is put into a work; a style or method of art; some performances such as dance and music regardless of whether they have been recorded; and a community's rights in an artwork.'[27]

The participants in the Options for the Future of Indigenous Australians had many ideas ranging from education, business, health, constitutional reform, a treaty, a new dialogue and a

[27] Australian lawyers for human rights submission to Get Up, http://www.getup.org.au/2020/idea.php?ideaID=45, viewed 12 April 2008.

national representative organisation. Indigenous cultural and intellectual property rights were referred to in the initial report:

> 'There was a strong sense that Indigenous culture represents a real economic opportunity, and among the suggestions was a formalised structure for promoting Indigenous cultural and intellectual property rights and developing standards for appropriate use, attribution and royalties for such works.'[28]

It was the Creative Arts stream that gave the strongest support for Indigenous culture.[29] The Australia 2020's initial report captured that idea as follows:

> 'Creativity is central to Australian life and Indigenous culture is the core to this. To measure, document and leverage the strengths of this culture, to articulate our role and improve protection of indigenous culture, language and heritage through a National Indigenous Cultural Authority.'[30]

The final Summit report released in May 2008 expanded the idea in the Indigenous stream to a recommendation under the heading of 'Culture, art, symbols' Ideas 7.40 states:

[28] Commonwealth Government, Australian Summit, *Initial report*, Canberra, March 2008, p. 28.
[29] with Indigenous participants Rachel Perkins, Larissa Behrendt and Wesley Enoch.
[30] Commonwealth Government, Australian Summit, Initial report, March 2008, p. 29.

> Establish a national cultural authority for the protection of Aboriginal and Torres Strait Islander intellectual property.

Also of interest was the idea at 7.43:

> Consideration should be given to whether people with cultural knowledge should be accredited.[31]

The Final Report elaborated further on the Arts Stream's National Indigenous Cultural Authority in Recommendation 8.70:

> Establish a National Indigenous Cultural Authority
>
> - Measure, document and leverage the strengths of Indigenous culture
> - Articulate the role and improve protection of Indigenous cultures, languages and heritage.[32]

Since the Australia 2020 Summit, the Aboriginal and Torres Strait Islander Arts Board of the Australia Council articulated an interest for the establishment of a National Indigenous Cultural Authority. In May 2008, the Aboriginal and Torres Strait Islander Arts Board and the National Indigenous Arts Reference Group discussed the Australia 2020 results. Reporting back from the meetings, the first edition of *Aboriginal and Torres Strait Islander arts news*, reported that there 'was keen interest and much

[31] Australian Summit, Final Report, p. 229, http://www.australia2020.gov.au/final_report/index.cfm, viewed 7 July 2008.
[32] Commonwealth Government, *Australia Summit 2020 Final Report*, at p. 273, http://www.australia2020.gov.au/final_report/index.cfm, viewed 7 July 2008.

discussion about calls from the Australia 2020 Summit for a national cultural authority for the protection of Aboriginal and Torres Strait Islander intellectual property.'[33] This is an indication that national infrastructure is seen as an important consideration in the advance of Indigenous cultural and intellectual property rights.

This option is a self-determining model which could best address the comprehensive nature of Indigenous Cultural and Intellectual Property. It could also be a way to overcome the problems associated with customary laws being enshrined in legislation.

4.1 Why we need a national authority for Indigenous culture

A National Indigenous Cultural Authority is needed to provide leadership and to administer rights either directly or by establishing a distribution framework, for Indigenous cultural and intellectual property rights. Another important function of the National Indigenous Cultural Authority is to lobby for these rights holders. Experience has shown that industries have developed through the support of a leader authority. IP rights themselves are managed collectively internationally because it makes more sense commercially and in time for collection of royalties to be done in a structured way.

This deals with the economies of scale but there are also the cultural maintenance reasons - caring for culture. We need to make sure it is appropriately used, properly recompensed, that

[33]Australia Council, *Aboriginal and Torres Strait Islander arts news*, Sydney, July 2008, emailed 7 July 2008.

our Indigenous creators are valued and attributed, and also that our culture is not derogatorily used.

There is no national independent organisation that represents Indigenous artists and creators. Since the demise of the National Indigenous Arts Advocacy Association in 2003, legal advice has been provided by the Arts Law Centre of Australia through its Artists in the Black program.[34] Further, there has been some important work in Indigenous visual arts conducted by the National Association for the Visual Arts (NAVA) including the development of protocols *Valuing Art, Respecting Culture*[35] and *Indigenous Australian Art Commercial Code of Conduct*.[36] These two organisations have done well to advance the rights of Indigenous artists however, there is a need for an Indigenous managed and controlled agency to take the lead on these important issues, and to provide a collective voice and meaningful representation. A National Indigenous Cultural Authority will give a collective voice for Indigenous culture – which to date has been absent.

I note the Australian government's response to the Senate Standing Committee on the Environment, Communications, Information Technology and the Arts Committee Report – Indigenous art – *Securing the Future,* the report on the Inquiry

[34] Arts Law Centre of Australia, Artists in the Black Program information is available from www.artslaw.com.au, viewed 9 July 2008.
[35] Doreen Mellor with a legal section by Terri Janke, *Valuing Art, Respecting Culture: Protocols for working with the Australian Indigenous visual arts and craft sector* , National Association for the Visual Arts, Sydney, 2001.
[36] National Association for Visual Arts, www.visualarts.net.au, viewed 9 July 2008.

into Australia's Indigenous visual arts and craft sector. [37] The Committee recommended that the Indigenous Art Commercial Code of Conduct be developed and that the Commonwealth undertake a project examining and making recommendations regarding further initiatives to enhance the integrity of the Indigenous arts market.[38] The report also recommend resale royalty rights – another administration and management issue for Indigenous artists. Perhaps, the National Indigenous Cultural Authority could perform some of these functions.

The other important role of the National Indigenous Cultural Authority is to administer the framework for prior informed consent rights to cultural material. Currently, Indigenous cultural expression and knowledge is supplied and used without a fee. If we charged a royalty on use, just like copyright and other intellectual property, the resulting income could be distributed, through NICA, to the traditional owners and communities, which in turn would support community development, and artistic and cultural development, and maintenance.

The body could also monitor Indigenous Cultural and Intellectual Property protection nationally. A national approach to protecting Indigenous people s rights is required.

It also has an important networking role. Decision-makers in all States and Territories need to be aware of developments in other areas and communities of Australia, as well as internationally.

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[37] Standing Committee on Environment, Communications, Information Technology and the Arts, *Indigenous Art : Securing the Future Australia's Indigenous visual arts and craft sector*, June 2007, http://www.aph.gov.au/senate/committee/ecita_ctte/completed_inquiries/2004-07/indigenous_arts/report/report.pdf, viewed 21 August 2008.
[38] *ibid*, Recommendation 23.

Under this system, corporations would give back to Indigenous communities what they now take for free. More art and culture would be performed and encouraged. Indigenous people would find employment opportunities in not only arts and culture but in management, business, investment and professional adviser to these industries including lawyers and accountants. This system could promote the practice of culture and the business of culture at the same time.

4.2 Promoting rights

In 1980s the Australian Society of Authors (ASA) lobbied government for the establishment of the Public Lending Rights (PLR) and the Educational Lending Rights (ELR).[39] These rights are about the number of books writers have in libraries – they get a certain amount of money for the books they have in the libraries because the loan of books reduces the income through the sale of books. What about Indigenous oral recordings that are held in libraries and made available to the public. The NICA could lobby for payments like PLR and ELR for Indigenous storytellers as they are the authors of orally transmitted cultural expressions.

Other models to draw on include the statutory licensing schemes set up Copyright Agency Limited (CAL) and Australasian Performing Rights Association (APRA). These collective copyright management agencies have developed large industries, and are leading cultural organisations which turn over millions of dollars per annum, which they distribute to their membership of copyright owners. Consider the role that these collecting societies plays in developing and enhancing Australian

[39] See Australian Society of Authors website, www.asauthors.org, viewed 9 July 2008.

creative industries. The roots for this invigoration is based on prior consent models – copyright exploitation rights and the collection of fees. Surely we could make use of these types of models to develop a culturally appropriate organisation to promote Indigenous arts and cultural expression?

4.3 Legal structure

How should the National Indigenous Cultural Authority be legally structured? Will it be a government agency or statutory authority or should it be independent from government?

One option is to establish a statutory authority like the Australian Institute of Aboriginal and Torres Strait Islander Studies. Bodies such as AIATSIS have their own establishing legislation – a statute passed by the Commonwealth parliament.[40] It could be a government company like the Australian Securities Commission. It could be a company limited by guarantee, a not for profit company. It must have the power to raise money and invest. An example of this type of structure is the National Indigenous Television Inc. NITV is funded by government, but is an independent legal entity. However it relies on government funding to operate, and the funding agreement imposes a means for government to monitor the organisation's work, ensuring that it meets important agreed criteria.

[40] The Australian Institute of Aboriginal and Torres Strait Islander Studies *is* established under the *Australian Institute of Aboriginal and Torres Strait Islander Studies Act 1989* (Cwlth) and Tourism Australia is established under the *Tourism Australia Act 2004* (Cwlth).

4.4 Membership

For a cultural organisation to thrive, the National Indigenous Cultural Authority should be underpinned by strong membership which is open to Indigenous cultural practitioners with voting rights to effectively elect a representative Board.
The membership base should be made up of Indigenous stakeholders, the owners of Indigenous culture. The Board could form from a range of traditional owner representatives, industry and legal experts.
The National Indigenous Cultural Authority should be accountable to its membership to continue its charter, and implement good governance. The National Indigenous Arts Advocacy Association, which shut its doors in 2002, failed to do this. According to the NIAAA Review Report, the leadership of the organisation was highly volatile and unstable.[41] This leads to governance and service delivery.

4.5 Governance and service delivery

In setting up the new agency, there are lessons to be learned from the previous models which although sometimes classed as 'failures' have some successful aspects. In the 1990s, the National Indigenous Arts Advocacy Association (NIAAA) received funding from the Australia Council's Aboriginal and Torres Strait Islander Arts Board and the Aboriginal and Torres Strait Islander Commission (ATSIC). It functions including advancing Indigenous artists' rights, which it did quite well in the first five years, through coordinating cases such as the Carpets Case which I referred to in the first part of my lecture. However, another important function of NIAAA was to develop the National

[41] Matthew Rimmer, 'Australian Icons: Authenticity Marks and Identity Politics', *Indigenous Law Journal*, Volume 3, Fall 2004, pp. 139 – 179, p. 161.

Label of Authenticity project – a certification trade mark to denote authentic Indigenous arts products and to ensure fair returns to Indigenous artists, whilst also promoting greater understanding of Indigenous heritage and art.[42] The Label of Authenticity project faced many challenges and within two years of its launch in 2000, the Australia Council suspended funding to NIAAA, and commissioned a review.[43] The Final Report of the NIAAA Review noted that NIAAA was lacking in governance and structure. Although it was a National body it did not invite membership generally, and did not have representation on its governing Committee, from other states other than NSW. The members were not elected by their community. NIAAA had failed to win stakeholder's support and respondents to the Reviewer's survey noted that they had lost contact with NIAAA over the two years.[44] Despite the downfall, NIAAA did have many positive contributions, including the cases it coordinated and the development of a model for certification. This model inspired the New Zealand Toi Iho trade mark, now into its sixth year.[45] Fiji is also considered a model based along the original NIAAA model.

4.6 Government funding and reporting

Such an agency would require government funding at least initially. The Board and management should be required to report to government and meet certain threshold performance criteria in the same way that the collecting societies are kept in

[42] National Indigenous Arts Advocacy Association Inc., http://www.culture.com.au/exhibition/niaaa/labelqa.htm, viewed 19 August 2008.
[43] Matthew Rimmer, *op cit*, pp. 139 – 179.
[44] Final Report on the Review of the National Indigenous Arts Advocacy Association, Commissioned by the Australia Council, 2002.
[45] http://www.toiiho.com/, viewed 21 August 2008.

check by reporting to government and tabling their annual report in parliament. Collecting societies must also comply with developed codes of conduct.

4.7 Tools to assist functions

To undertake its functions, the NICA would need to make use of a range of tools which are intellectual property (IP) based, such as trade marks, and copyright licensing agreements. It would also use other measures such as protocols, bench-marking and Indigenous mediation services.

4.7.1 A strong trade mark to promote the licensing of ICIP

The NICA would need to develop a strong trade mark and branding system – once developed the trade mark should be registered, and operate to endorse projects, goods and services which are facilitated by the NICA processes of prior informed consent. Like the National Heart Foundation mark is applied to goods that meet criteria for healthy food, the NICA trade mark would appeal to consumers who are looking for authentic products and services that are made with fair trade through the sharing of benefits with Indigenous custodians of culture.

4.7.2 A comprehensive database

Keeping track of who owns rights, and who has made use of them, is an important feature of a rights access and management system. A National Indigenous Cultural Authority could manage rights clearances by keeping a comprehensive database of Intangible cultural material and list rights holders, so that those who want to negotiate or seek appropriate use can do so, by contacting the relevant parties. A Register would be a

fundamental implementation tool for the national authority. It should be made clear however the database is not a rights registration system, which infers rights once registered, like the trade mark registration system, but the database would be an identifier of who owns the rights to a particular item of cultural heritage. The United Nations University's report on *The Role of Registers and Databases in the Protection of Traditional Knowledge* will be useful to consider in developing a model for the National Indigenous Cultural Authority. [46] Databases can also be used as a measure to inform other rights based systems and assert Indigenous rights to material by preventing others to register rights in Indigenous traditional knowledge or cultural expression. Also of note is the Database of Official Insignia of Native American Tribes stops others from registering Native American insignia as trademarks in the United States of America.[47]

4.7.3 Agreement templates

The National Indigenous Cultural Authority would be responsible for developing standard terms for licence agreements entered into for use of material, as well as the branding to use the NICA trade mark. Collective organsation models have longed known the benefits of using standard agreements to limit administration costs, as well as set appropriate terms of use. See for example, the Australian Society of Authors Model Contract of publishing agreements.

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[46] United Nations University -IAS Report, *The Role of Registers and Databases in the Protection of Traditional Knowledge: A Comparative Analysis*, http://www.ias.unu.edu/binaries/UNUIAS_TKRegistersReport.pdf, viewed 9 July 2008.

[47] http://www.uspto.gov/web/offices/com/speeches/01-37.htm, viewed 21 August 2008.

4.7.4 Protocols

The National Indigenous Cultural Authority could develop protocols which set standards for consent procedures, attribution and integrity. Consultation with Indigenous communities will be necessary to develop these protocols. Already a strong framework for protocols has developed and whilst these are largely ethical in nature, or enforced in funding agreements for projects, protocols provide scope to examine how things might be implemented by a national coordination body, like the National Indigenous Cultural Authority.

The Australia Council for the Arts has published protocols for the development of Indigenous music which advise that when performing or recording communally owned musical works, it is important to seek permission from the relevant community owners of the music. Robynne Quiggin, author of the *Music protocols for producing Indigenous Australian music* states:

> 'Observing customary law means finding out who can speak for that music, so the right people are asked for permission to use the music. For instance, if a musician wanted to use a rhythm or phrase from music belonging to a Torres Strait Island language group or family, it is essential to locate the correct language group or family group from the particular Island owning that song or music.'[48]

[48] Robynne Quiggin, *Protocols for producing Indigenous Australian Music*, Australia Council for the Arts, Sydney, 2007, p. 14.

In this respect, the model can be used to enhance the preservation of traditional knowledge and expression of culture. It acknowledges the role of community ownership and control within that culture.

4.7.5 Dispute resolution

An authority and rights regime of this nature will almost certainly require thought to how competing interests and overlapping knowledge are dealt with. Mediation is a flexible method to resolve disputes The World Intellectual Property Organisation has a dispute resolution program.
I am in favour of the use of alternative dispute resolution services in Indigenous disputes generally.[49] However, I consider that there is useful application of alternative dispute resolution, especially mediation, by the National Indigenous Cultural Authority. Such a rights administration body would need to develop skills in resolving 'IP disputes' and negotiating rights– between Indigenous individuals, and communities (clan groups) and between Indigenous and non-Indigenous commercial entities, and between Indigenous and Indigenous groups. This approach is used in native title; lessons learned in that arena can be shared. Also, see also the WIPO mediation of international disputes concerning domain name registration. An approach for Indigenous mediation services is recommended. The Arts Law Centre of Australia has mediation guidelines and convenes a mediation service to deal with arts disputes. In my opinion, there are benefits in this approach.

[49] I also note the recommendation of Toni Bauman, a participant to Australia 2020. Toni is working on the project, Indigenous Facilitation and Mediation Project, at the Australian Institute of Aboriginal and Torres Strait Islander Studies. Her one big idea for Australia 2020 was a recommendation for a National Indigenous Mediation Centre.

5. Prior informed consent models

I would now like to examine some international prior informed consent models.

5.1 WIPO models

Since 2000, the World Intellectual Property Organisation (WIPO) has convened an Inter-Governmental Committee on intellectual property and genetic resources, traditional knowledge and folklore.[50] The WIPO IGC has developed two documents:-

(i) *Draft provisions for the protection of traditional cultural expressions (TCEs)*
(ii) *Draft provisions for the protection of traditional knowledge*. [51]

It is expected that the draft guidelines will shape future laws and policies relating to traditional cultural expressions and traditional knowledge. The *Draft provisions on traditional cultural expressions* cover 'traditional cultural expression'(TCE) which includes songs, stories, ceremonies, rituals, dance and art including rock art, face and body painting, sand sculptures, bark paintings.

[50] See the World Intellectual Property Organisation's website, www.wipo.int/globalissues: Our government is represented on that IGC, but there has been limited input from Indigenous Australian into the government's contribution, and little feedback to Indigenous communities. The Australian Francis Gurry is the nominee for the position of Director General of WIPO. His appointment is scheduled to be confirmed by the WIPO General Assembly at its next meeting in September 2008.
[51] See the World Intellectual Property Organisation's website, www.wipo.int/globalissues.

The WIPO provisions on Traditional Cultural Expressions include compliance with the 'free, prior and informed consent' principle and the recognition of customary laws and practices.' Under the WIPO Provisions the prior consent of the traditional owners of cultural expressions would be required prior to recording, to publication and communication to the public. There would also be moral rights for communities but these would be automatic and not just voluntary.

5.2 Pacific Model Law

The *Pacific Regional Framework for the Protection of Traditional Knowledge and Expression of Culture* establishes 'traditional cultural rights' for traditional owners of traditional knowledge and expression of culture.[52] The prior and informed consent of the traditional owners is required to reproduce, publish, perform, display, make available on line and electronically transmit, traditional knowledge or expressions of culture. The Pacific Model Law for the Protection of Traditional Knowledge and Expressions of Culture recognises the pivotal role of a cultural authority in administering prior informed consent rights. The explanatory memorandum of the Pacific Model law states:

> 'The model law provides two avenues by which a prospective user of traditional knowledge or expressions of culture for non-customary purposes can seek the prior and informed consent of the traditional owners for

[52] Secretariat of the Pacific Committee, drafted by legal experts in July 2002, WIPO/UNESCO, Section 6 of the Model Law for the Protection of Traditional Knowledge and Expressions of Culture, South Pacific Community, Noumea, 2002.

> the use of the traditional knowledge or expressions of culture. These avenues are:
>
> - applying to a 'Cultural Authority' which has functions in relation to identifying traditional owners and acting as a liaison between prospective users and traditional owners; or
> - dealing directly with the traditional owners.
>
> In both cases, the prior and informed consent of the traditional owners is to be evidence by an 'authorised user agreement'. And in both cases, the Cultural Authority has a role in providing advice to traditional owners about the terms and conditions of authorised user agreements and maintaining a record of finalised authorised user agreements.' [53]

I consider that this model law would be a great reference point for those seeking the introduction of a National Indigenous Cultural Authority, and such a model may not need legislation but could be established to facilitate negotiated agreements for use of Indigenous cultural and intellectual property, where both parties are willing to recognise ICIP rights, and where there are certain incentive for commercial interest groups to do so, for instance, where use of a branded trade mark or

[53]Explanatory Memorandum for the Model Law for the Protection of Traditional Knowledge and Expressions of Culture, South Pacific Community with legal expert teams from UNESCO, WIPO, 2003.

authentication label is given, as part of the licensed user rights.

Using this model as a guide, there are five Pacific countries which are lined up to introduce Traditional Cultural Expression law – Fiji, Palau, Cook Islands, Papua New Guinea and Vanuatu. Palau has drafted a *Bill for the Protection and Promotion of Traditional Knowledge and Expressions of Culture*. The Bill aims to establish a new form of Intellectual property identified as 'traditional knowledge and expressions of culture' and to vest ownership of this new property in the appropriate traditional groups, clans, and communities. 'Ownership' is defined as 'the manner of collective property control recognised in traditional law and does not create or imply non-traditional property interests for individual members of the owner.' The Palau proposed law requires prior and informed consent for all non-customary uses of traditional knowledge and expressions of culture.

5.3 African Traditional Knowledge Bill

In South Africa, an African Traditional Knowledge Bill proposes to provide for the recognition and protection of traditional performances having an Indigenous origin and a traditional character; to provide for the recognition and protection of copyright works of a traditional character. In this way, the Bill confers copyright on a traditional work if : (a) the work was created (i) on or after the date of commencement of the Intellectual Property Laws Amendment Act, 2007; or (ii) within a period of fifty years preceding the date contemplated in subparagraph (i); and (b) the community from which the work or

a substantial part thereof originated is or was an indigenous community when the work was created.[54]

The drafters of this proposed law have also provided for the establishment of a National Council in respect of traditional intellectual property and a national database for the recording to traditional IP. There is the establishment of a national trust fund which Indigenous clans can access for cultural purposes. Amendments to the Trade Mark Laws are also included which provides protection for geographical indications, recognising that art and culture comes from specific areas. The Bill is being reviewed after submissions and public consultation revealed that the majority of stakeholders present thought that amending the current laws may be unworkable. The general feeling is that a new law – a sui generis law, would be better to deal with traditional knowledge issues.[55] The SA Dept. of Trade & Industry plans to redraft the Bill and present the Parliament later this year. The SA developments will inform our own framework.

6. Conclusion: Towards a National Indigenous Cultural Authority

In summary, the establishment of a National Indigenous Cultural Authority would set up an appropriate structure to advance the rights of Indigenous artists and creators and to allow them to share in the benefits from the appropriate use of the culture. A

[54] Republic of South Africa, Department of Trade and Industry, Intellectual Property Laws Amendment Bill, 2007, Submissions on draft due by 30 June 2008, Contact: Mr. MacDonald Netshitenzhe, South Africa Dept. of Trade & Industry, Email: publiccomments@thedti.gov.za.

[55] On 13 June 2008, the South African government directed that the Bill in its current form should be re-worked considerably before it goes to Parliament.

National Indigenous Cultural Authority would set a new dialogue which would enrich the artistic, social and economic lives of Indigenous artists.

The National Indigenous Cultural Authority Model aims to be flexible to allow Indigenous Australian communities to implement a practical strategy for protecting and managing their Indigenous cultural and intellectual property.

It is important for the right infrastructure to be in place to manage rights and to provide good sound policy for service delivery. This is where my vision for a National Indigenous Cultural Authority comes in. This peak Indigenous cultural agency will have multi-functions relating to the promotion and protection of Indigenous arts and culture. It has a role to assist users make contact and identify relevant Indigenous owners. For there to be effective and efficient management of ICIP rights, there needs to be infrastructure to assist rights holders. I propose the establishment of a National Indigenous Cultural Authority to promote Indigenous cultural and intellectual property rights and to develop standards for appropriate use including royalties, cultural integrity and attribution.

To conclude, I'd like to thank Bill Wentworth for giving me the courage to put the vision of a National Indigenous Cultural Authority on the table. It needs to be debated and considered at length. I'd like to thank AIATSIS for giving me this space to set the parameters for that debate. I like to end by encourage Indigenous artists and Indigenous people to take the lead, and take action, It's time to guard ground.

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