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Matthew Rimmer, *Australian National University College of Law*



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LEGAL PROTECTION OF INDIGENOUS TRADITIONAL KNOWLEDGE AND CULTURAL EXPRESSION

Blame it on Rio: Biodiscovery, Native Title, and Traditional Knowledge

Dr Matthew Rimmer[□]

*This article examines the legal responses to protect traditional knowledge of biodiversity in the wake of the Rio Convention on Biological Diversity. It considers the relative merits of the interlocking regimes of contract law, environmental law, intellectual property law, and native title law. Part 1 considers the natural drug discovery industry in Australia. In particular, it looks at the operations of Amrad, Astra Zeneca R & D, and the Australian Institute of Marine Science. This section examines the key features of the draft regulations proposed under the Environment Protection and Biodiversity Conservation Act 1999 (Cth) - model contracts, informed consent, benefit-sharing, and ministerial discretion. The use of Indigenous Land Use Agreements in the context of access to genetic resources is also explored. Part 2 considers the role played by native title law in dealing with tangible and intangible property interests. The High Court decision in *Western Australia v Ward* considers the relationship between native title rights and cultural knowledge. The Federal Court case of *Neowarra v Western Australia* provides an intriguing gloss on this High Court decision. Part 3 looks at whether traditional knowledge of biodiversity can be protected under intellectual property law. It focuses upon reforms such as Senator Aden Ridgeway's proposed amendments to the Plant Breeder's*

[□] Matthew Rimmer, BA (Hons)/ LLB (Hons) (ANU), PhD (UNSW), is a Lecturer at ACIPA, the Faculty of Law, the Australian National University. The author is indebted to his informants Professor Ron Quinn from Astra Zeneca R & D, Merrilyn Wasson from the ANU/ Australian Institute of Marine Sciences, and Geoff Burton from Environment Australia. He is also grateful to Jane Anderson, Nick Parmeter, Antony Taubman and Brad Sherman, for their discussions about the subject, and Christine Henry, Elsa Gilchrist, and Robyn Briese for their research assistance. This project has been supported by an ARC Linkage Grant to research "Protection of Botanical Innovations".

Rights Act 1994 (*Cth*), and the push to make disclosure of origin a requirement of patent law.

Introduction

The 1993 *Rio Convention on Biological Diversity* has encouraged the fair and equitable sharing of benefits arising from access to genetic resources, particularly in relation to traditional knowledge.¹ One of the objectives of the Convention, as set out in its Article 1, is the “fair and equitable sharing of the benefits arising out of the utilization of genetic resources, including by appropriate access to genetic resources and by appropriate transfer of relevant technologies, taking into account all rights over those resources and to technologies, and by appropriate funding”. A framework for the implementation of this objective of the Convention with regard to access to genetic resources is provided in Article 15 of the Convention. In addition, Article 8 (j) requires states to “preserve and maintain knowledge, innovations and practices of [I]ndigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity and to promote their wider application with the approval and involvement of the holders of such knowledge, innovations and practices and encourage the equitable sharing of benefits arising from the utilization of such knowledge, innovations and practices”. There has been much interest in the implementation of the *Rio Convention on Biological Diversity* in a number of jurisdictions and regions - including New Zealand,² the Arafura sea,³ the South Pacific,⁴ India,⁵ Canada,⁶ the United States,⁷ South America,⁸ and Antarctica.⁹

¹ International lawyers have considered the interpretation of the Rio Convention on Biological Diversity, and its relationship with other international treaties: Kate KT and Laird S, *The Commercial Use Of Biodiversity: Access To Genetic Resources And Benefit-Sharing*, Earthscan, London, 1999; Taubman A, “Compunctious Visitings Of Nature: Access To Genetic Resources”, ACIPA Seminar Series, Canberra, October 2001; and Evans G, “Integrating Intellectual Property Rights And Human Rights: The Case Of Plant Genetic Resources”, Activating Human Rights And Diversity Conference, Southern Cross University, Byron Bay, 3 July 2003.

² Young S, “The Patentability Of Maori Traditional Medicine And The Morality Exclusion In The Patents Act 1953” (2001) 32 *Victoria University Of Wellington Law Review* 255; and Austin G, “Re-Treating Intellectual Property Law: The WAI 262 Proceeding And The Heuristics Of Intellectual Property Law” (2003) 11 (2) *Cardozo Journal Of International And Comparative Law* 333.

³ Wasson M, “Indigenous Fishers’ Intellectual Property Rights: The Commercialisation of Knowledge as a Socio-environmental Benefit?” *Human*

The *Rio Convention on Biological Diversity* has encouraged the Federal Government of Australia to develop a national scheme to regulate access to genetic resources. Environment Australia commissioned South Australian lawyer, John Voumard, to conduct a Commonwealth public inquiry into *Access to Biological Resources in Commonwealth Areas*, and the report was released in July 2000.¹⁰ The front cover illustration of the report features Bruce Woodley and Johnny Parker, Aboriginal Park Rangers, showing a native nicotine plant. The terms of reference directed the Inquiry to “focus on the equitable sharing of benefits arising from the utilisation of traditional knowledge, innovation, and practices”. Voumard emphasized the concerns of traditional owners in his final report:

I have listened carefully to the concerns of traditional owners in Commonwealth areas, particularly about the misuse of their knowledge of biodiversity. This issue has also been the subject of many submissions and representations. This Inquiry has sought to come to terms with the limitations of the existing legal

Geography, Seminar Program, Research School of Pacific and Asian Studies, 24 June 2002.

- 4 Parry B, “Cultures Of Knowledge: Investigating Intellectual Property Rights And Relations In The Pacific” (2002) 34 (4) *Antipode* 679; and Forsyth M, “Cargo Cults And Intellectual Property In The South Pacific” (2003) 14 *Australian Intellectual Property Journal* 193.
- 5 Shiva V, *Biopiracy: The Plunder Of Nature And Knowledge*, Research Foundation for Science, Technology and Ecology, New Delhi, 1998.
- 6 Battiste M and Henderson JY, *Protecting Indigenous Knowledge And Heritage: A Global Challenge*, Purich Publishing Ltd, Saskatoon, 2000; and Gervais D, “Spiritual But Not Intellectual? The Protection Of Sacred Intangible Traditional Knowledge” (2003) 11 (2) *Cardozo Journal of International And Comparative Law* 467.
- 7 Ziff B and Rao P (ed), *Borrowed Power: Essays On Cultural Appropriation*, Rutgers University Press, Brunswick, 1997; and Brown M, *Who Owns Native Culture?* Harvard University Press, Cambridge (Mass), 2003.
- 8 Coughlin M, “Using the Merck-INBio Agreement to Clarify the Convention on Biological Diversity” (1993) 31 *Columbia Journal of Transnational Law* 337; and McManis C, “Intellectual Property, Genetic Resources And Traditional Knowledge Protection: Thinking Globally, Acting Locally” (2003) 11 (2) *Cardozo Journal Of International And Comparative Law* 547.
- 9 Jabour-Green J and Nicol D, “Bioprospecting In Areas Outside National Jurisdiction: Antarctica And The Southern Ocean” (2003) 4 (1) *Melbourne Journal Of International Law* 76.
- 10 Voumard J, *Commonwealth Public Inquiry Into Access To Biological Resources In Commonwealth Areas*, Environment Australia, Canberra, 2000, <http://www.ea.gov.au/biodiversity/science/access/inquiry/index.html>

system in protecting and valuing this knowledge. I believe the best protection presently available for the rights of Indigenous peoples to their biological resources and their intellectual property can be achieved through inclusion of appropriate contractual terms. The solutions the Inquiry recommends are practical and, most importantly I believe, empowering for Indigenous communities which have leased their land to the Commonwealth.¹¹

Voumard proposed the development of administrative regulations under *Environment Protection and Biodiversity Conservation Act 1999* (Cth) to govern access to genetic resources in Commonwealth areas. The scheme is intended to serve a number of policy objectives, including conservation of the environment, recognition of traditional knowledge, and commercialisation of biological resources.

A number of Indigenous leaders have taken a keen interest in access to genetic resources. Most notably, Henrietta Fourmile has played a key role in the debate over intellectual property and access to genetic resources in Australia.¹² She has also worked with the United Nations Secretariat of the *Convention on Biological Diversity* in Montreal, where she was responsible for the implementation of Article 8 (j) of the Convention and related provisions relevant to traditional knowledge. There has also been insightful analysis by commentators - such as Terri Janke,¹³ Michael Davis,¹⁴ Marcia Langton,¹⁵ Mick Dodson,¹⁶ and David Epworth,¹⁷ to name but a few.

¹¹ Voumard J, note 10, p 6.

¹² Fourmile H, "Protecting Indigenous Property Rights in Biodiversity", Sultan R (ed) in *Ecopolitics IX: Perspectives On Indigenous Peoples' Management of Environmental Resources*. Northern Land Council, Darwin, 1995; Fourmile H, "Respecting Our Knowledge: National research Institutions And Their Obligations To Indigenous And Local Communities Under Article 8 (J) and Related Provisions Of The Convention On Biological Diversity" (2000) 1 *Humanities Research* 41; and Fourmile H, "Developing A Regime To Protect Indigenous Traditional Biodiversity Related Knowledge" (2000) 1 (1) *Balay: Culture, Law And Colonialism* <http://wwwlaw.murdoch.edu.au/balay/v1n1/fourmile.shtml>

¹³ Janke T, *Our Culture, Our Future: Indigenous Cultural And Intellectual Property Rights*. Australian Institute Of Aboriginal And Torres Strait Islander Studies, Canberra, 1999, <http://www.icip.lawnet.com.au/>; Mellor D and Janke T, *Valuing Art, Respecting Culture: Protocols For Working With The Australian Indigenous Visual Arts And Craft Sector*, National Association for the Visual Arts, Sydney, 2001; and Janke T, *Minding Culture: Case-Studies on Intellectual Property and*

The reference group for the public inquiry included Henrietta Fourmile. She was commissioned to synthesize the submissions in relation to Indigenous interests in biological resources in Commonwealth areas.¹⁸ The inquiry received fifteen submissions from organisations and individuals with a particular interest in Indigenous issues. Fourmile put forward in her report the most substantive model to protect traditional knowledge. She argued that the access to genetic resources scheme must protect the interests of traditional owners on their lands, biological resources, and associated traditional knowledge. Any access procedure should, in her view, contain requirements that would make the approval of access conditional upon receipt of prior informed consent from the traditional owners and knowledge holders. There was also a need for the Commonwealth to develop an approach to benefit-sharing that recognised the role of Indigenous peoples.

The House of Representatives Standing Committee on Primary Industries and Regional Services considered the recommendations of the Voumard Report in its inquiry, *Bioprospecting: Discoveries For The Future*, in September 2001.¹⁹ The accent of this inquiry was upon

Traditional Cultural Expressions, World Intellectual Property Organization, Geneva, 2002,

<http://www.wipo.int/tk/en/studies/cultural/minding-culture/index.html>

- 14 Davis M, "Indigenous Rights In Traditional Knowledge And Biological Diversity: Approaches To Protection" (1999) 4 (4) *Australian Indigenous Law Reporter* 9; and Davis M, *Protecting Culture: Indigenous Cultural And Intellectual Property Rights In The Far North Queensland Wet Tropics*, A Report To The Aboriginal And Torres Strait Islander Commission Cairns And District Regional Council, August 2002.
- 15 Langton M, "Art, Wilderness And Terra Nullius", 9th Ecopolitics Conference: Perspectives on Indigenous Peoples Management Of Environmental Resources, 1996, pp 11-24.
- 16 Dodson M, "Indigenous Peoples, Social Justice And Rights To The Environment", 9th Ecopolitics Conference: Perspectives on Indigenous Peoples Management Of Environmental Resources, 1996, pp 25-29.
- 17 Epworth D, "Draft Statement Of Principles Regarding Biophysical Research in the Aboriginal Lands, Islands, And Waters Of The Cape York Peninsula", <http://www.balkanu.com.au/business/policy-dev/draftstatement.htm>
- 18 Fourmile H, "Indigenous Interest In Biological Resources In Commonwealth Areas: A Synthesis Of Submissions and Related Information", Appendix 10 in Voumard J, *Commonwealth Public Inquiry Into Access To Biological Resources In Commonwealth Areas*, Environment Australia, Canberra, 2000, <http://www.ea.gov.au/biodiversity/science/access/inquiry/index.html>
- 19 House of Representatives Standing Committee on Primary Industries and Regional Services, *Bioprospecting: Discoveries For The Future*, Australian Parliament,

boosting the development of high technology industries in regional Australia based on bioprospecting. The Committee was uncertain as to the significance of traditional knowledge in the process of biodiscovery: “While several submissions to the inquiry called for rewards to flow to indigenous groups from biodiscoveries that rise from traditional knowledge, others were interested only in collecting species from traditional land.”²⁰ The Committee was also unsure as to the extent to which “biopiracy” was a problem in Australia:

There has been some criticism and dispute in the past about the unacknowledged use of traditional knowledge in Australia.... The committee gained the impression that most bioprospectors place relatively little, if any, reliance on indigenous knowledge. This appeared to be in part the result of difficulties in benefit sharing and the lack of IP protection for traditional knowledge.²¹

Nonetheless, the Committee affirmed the recommendations of the Voumard report that regulations under the act should provide for contracts in respect of use of Indigenous genetic resources. Such agreements should include the key elements of prior informed consent, mutually agreed terms, and adequate benefit sharing agreements. The Committee hoped that such arrangements would help resolve some of the complex matters that needed to be addressed in ensuring Indigenous interests were not compromised by individual agreements with entrepreneurs.

This article provides a critique of the legislative scheme put forward by the Federal Government to regulate access to biological resources in Commonwealth areas. It argues that the draft regulations put forward under the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) will be insufficient to protect Indigenous cultural and traditional knowledge relating to biodiversity. The regime will certainly facilitate commercial negotiations over genetic resources. However, the scheme fails to provide adequate sanctions with respect to acts of

Canberra, September 2001,
<http://www.aph.gov.au/house/committee/primind/bioinq/report/contents.htm>

20 House of Representatives Standing Committee on Primary Industries and Regional Services, note 19, p 43.

21 House of Representatives Standing Committee on Primary Industries and Regional Services, note 19, p 44.

biopiracy. This paper is concerned that the access to genetic resources scheme only recognises that native title holders can control physical access to native title law. There is no recognition that native title holders might also enjoy intellectual property rights with respect to traditional knowledge. This article also contends that the access to genetic resources scheme could be strengthened by amendments to a number of regimes of intellectual property. The holders of plant breeder's rights and patents should be required to provide proof of the origin of biological resources, and evidence that they have entered into a benefit-sharing agreement with an access provider.

This article examines the legal responses to protect traditional knowledge of biodiversity in the wake of the *Rio Convention on Biological Diversity*. It considers the relative merits of the interlocking regimes of contract law, environmental law, native title law, and intellectual property law. This article offers a critical analysis of recent developments in access to genetic resources in Australia. Part One provides an overview of the natural drug discovery industry in Australia. It provides three case studies - dealing with Amrad, Astra Zeneca R & D, and the Australian Institute of Marine Science. It examines the draft regulations proposed under the *Environment Protection and Biodiversity Conservation Act 1999* (Cth). It evaluates the components of the scheme - model contracts, informed consent, benefit-sharing, and ministerial discretion. The use of Indigenous Land Use Agreements in the context of access to genetic resources is also explored. Part Two considers the role played by *Native Title Act 1993* (Cth) in dealing with tangible and intangible property interests. The High Court decision in *Western Australia v Ward* is a telling case study as it featured debate over the relationship between native title rights and cultural knowledge.²² The Federal Court decision in *Neowarra v Western Australia* provides a new perspective on the native title and the protection of cultural knowledge.²³ Part Three evaluates whether traditional knowledge of biodiversity can be protected under intellectual property law. It focuses upon reforms such as Senator Aden Ridgeway's proposed amendments to the *Plant Breeder's Rights Act 1994* (Cth), and the push to make disclosure of origin a requirement of the *Patents Act 1990* (Cth). Such local developments may help provide guidance to other international

²² *Western Australia v Ward* (2002) 191 ALR 1.

²³ *Neowarra v Western Australia* [2003] FCA 1402.

countries as to the implementation of the *Rio Convention on Biological Diversity*.

PART ONE

Bioprospecting: Discoveries for the Future

There have been a number of controversies in recent years over bioprospecting in respect of Indigenous lands and traditional knowledge.

A company called Cerylid Biosciences Ltd., which was formerly known as Amrad Discovery Technologies and Ex-Genix, has a collection of agreements that give it exclusive access to a significant proportion of Australia's genetic resources. It has contracts with the Victorian Department of Conservation and Natural Resources, and Melbourne's Royal Botanic Gardens. It also has agreements with the Northern Territory's Parks and Wildlife Commission, and the Tasmanian Herbarium. There have been concerns about the activities of Amrad Discovery Technologies in relation to Indigenous knowledge.

Infamously, there was a dispute over the exploitation of the Smokebush plant, which grows in the coastal areas between Geraldton and Esperance in Western Australia.²⁴ The National Cancer Council identified Smokebush as being a potential drug candidate in respect of AIDS. In the 1990s, Amrad, a Victorian biotechnology company, paid \$1.5 million to the Western Australian Government to secure access to Smokebush and related species. Indigenous people were concerned that they had not received any acknowledgment, financial or otherwise, for their role in having first discovered the healing properties of Smokebush. As Gerald Tooth opines, "It's unlikely that Aboriginal people will ever receive a benefit from their knowledge of natural medicines. While that ancient community information is of great value

²⁴ Gray S, "Vampires Round The Campfire: Indigenous Intellectual Property Rights And Patent Laws" (1997) 22 (2) *Alternative Law Journal* 60; Blakeney M, "Bioprospecting And The Protection Of Traditional Medical Knowledge" (1997) 19 (6) *European Intellectual Property Review* 298-303; and Janke T, note 13, 1999.

to those hunting for new drugs in the environment, it is rendered worthless by our intellectual property laws.”²⁵

Other controversies over bioprospecting have been less clear-cut. In 1993 AstraZeneca entered into a joint venture with Griffith University to screen Queensland biota for bioactive compounds. Subsequent contracts were negotiated with the Queensland Herbarium, and the Queensland Museum, for the collection and supply of plant and animal species. However, some Aboriginal groups were concerned that Astra Zeneca R & D appeared to have unfettered access to the environment through these arrangements. David Epworth of the Balkanu Aboriginal Development Corporation on Cape York, maintained that bioprospectors and the Queensland Herbarium had failed to gain permission from traditional owners to engage in the collection of genetic resources on native title land.²⁶ Manager Gordon Guymer said the Herbarium had done extensive “vegetation mapping” on Cape York, but as far as he knew they had not been collecting on any Aboriginal land. He said that they would certainly get in contact with the relevant people before engaging in bioprospecting.

In response, Astra Zeneca R & D sought to develop a formal relationship with Aboriginal communities.²⁷ In particular, it entered into a benefit-sharing agreement with an Indigenous community in respect of access to genetic resources.²⁸ Professor Ron Quinn of Astra Zeneca R & D comments:

If there is a traditional knowledge, then that’s a specific knowledge, if you like. Now that may be against a specific disease, or it might be something else. In a biotechnology area it might be some other use of the material. But it’s much more focused, so the arrangement here is that the traditional knowledge actually raises the value, so in particular we’ve entered into a benefit sharing agreement with an indigenous

25 Tooth G, “Bioprospecting In Queensland: Oceans Of Opportunity, Forests Of Concern”, Background Briefing, ABC Radio National, Sunday 27 May 2001, <http://www.abc.net.au/rn/talks/bbing/stories/s303991.htm>

26 Tooth G, note 25.

27 Watson, I. “Plundering The Plants”, Background Briefing, ABC Radio National, Sunday 13 October 2002, <http://www.abc.net.au/rn/talks/bbing/stories/s701553.htm>

28 Watson I, note 27.

community on a 50-50 basis. So that whatever we receive, we split between Griffith University and the community. Because they bring specific knowledge about, well in this case, disease.

The difficulty for us is that an extract has got a thousand compounds in it; we have to be able to go through and sift out the one that is useful. To do that, we have to have an assay system established in the laboratory. The real difficulty of dealing with traditional knowledge is to be able to take that information and find the target that allows you to set up the assay, and if we can't set up a suitable assay, no matter how good the knowledge is, we can't actually work with the project. So that's a limitation that exists there.²⁹

Professor Ron Quinn maintains that traditional knowledge offers potential economic outcomes to Indigenous communities around Queensland: "I think that if you can translate the knowledge and find the scientific basis, there's a potential to get a commercial outcome out of it."³⁰ He stresses that the research organisation respects the principles of the *Rio Convention on Biological Diversity*, and would enter into a benefit-sharing agreement with an Indigenous community, if it wanted to collect genetic resources from Indigenous land.

Bioprospecting can also take place in relation to the marine environment. The Commonwealth Government established the Australian Institute of Marine Science in 1972 to generate the knowledge needed for the sustainable use and protection of the marine environment through innovative, world-class scientific and technological research.³¹ For over a decade, the Australian Institute of Marine Science research activities have included biodiscovery and bioprospecting research. The organisation hopes to discover biologically active molecules that can be developed as drugs, industrial herbicides or other products by an industrial partner. The Institute seeks to understand the ecological roles that biologically active molecules play in their source organisms. It also hopes to support sustainable development of new product leads.

²⁹ Watson I, note 27.

³⁰ Watson I, note 27.

³¹ Voumard J, note 10, pp 95-97.

The Australian Institute of Marine Science has developed a standardised formula and ratio as the basis for benefit-sharing agreements. The Institute summarised its approach:

By defining a broad array of benefits that are available for sharing, the AIMS approach formally acknowledges all benefits of biodiscovery research including some that, to date, have been overlooked by many resource stakeholders. When seen in the context of the total benefits package, purely monetary returns such as potential royalties take on minor importance.³²

The Institute will provide non-monetary benefits prior to the emergence of a lead. The benefits will comprise documentation of biodiversity, including lodgement of taxonomic vouchers in relevant museums, description of new species and provision of data to aid research management. It will also involve opportunities for scientists to be involved in collection expeditions and other collaborations, which provide the development of intellectual property in respect of commercial discoveries. The Institute will provide monetary benefits once a lead has emerged. The actual percentage of monetary benefits will reflect the contributions to the discovery and the development of the lead. This model has been applied in relation to the joint project between the Australian Institute of Marine Science and the Australian National University - the Arafura-Timor Research Facility.³³ This project will involve close collaboration with the Northern Land Council.

These case studies illustrate the legal problems that are involved with access to genetic resources. There has been much conflict and misunderstanding between the stakeholders because of a lack of certainty about the rights and responsibilities of the parties involved in natural drug discovery. Indigenous people have desired legal protection; researchers and scientists looked for guidance as to their legal responsibilities; green groups sought to conserve the environment; and biotechnology companies and pharmaceutical drugs companies have wanted commercial certainty. The disputes over genetic resources have been complicated by the overlapping layers of

³² Australian Institute for Marine Science. "Submission Number 50" in Voumard J, note 10, p 247.

³³ Wasson M, note 3.

legal regulation - including contract law, environmental law, native title law, and intellectual property law. As a result, the parties are in desperate need of a legislative scheme to provide a framework for negotiations over access to genetic resources.

Environment Protection and Biodiversity Conservation Act

The *Environment Protection and Biodiversity Conservation Act 1999* (Cth) puts into law many of Australia's obligations under international environment-related treaties. A requirement to respect traditional knowledge stems from Commonwealth obligations under the *Rio Convention on Biological Diversity*. Article 8 (j) of the Convention recognises that Indigenous people should be involved in approving the use and application of their traditional knowledge and should share equitably in benefits from its application.

Environment Australia has released draft regulations dealing with access to genetic resources under the *Environment Protection and Biodiversity Conservation Act 1999* (Cth).³⁴ Under the proposed scheme, a party seeking access to biological resources in Commonwealth areas must apply for an access permit to be issued by the Minister. Environment Australia's role would be to assess the application, in consultation with the relevant Commonwealth agency or landowner, and make a recommendation to the Minister whether the access permit should be granted or refused. While the assessment process is underway, the applicant would be required to negotiate a benefit-sharing contract covering commercial and other aspects of the agreement with the provider of the biological resources.

The regime represents a bold attempt to satisfy Australia's obligations under the *Rio Convention on Biological Diversity*. However, the legislation scheme does have a number of important limitations. First, the regime draws a false distinction between research and commerce in the field of natural drug discovery. Second, there is a danger that the requirement for informed consent might be diluted. Third, there is an ongoing debate about the value of Indigenous Land Use Agreements, which seek to share benefits over the exploitation of natural resources.

³⁴ *Draft Environment Protection and Biodiversity Conservation Amendment Regulations 2001*,
<http://www.ea.gov.au/epbc/about/amendments/biological.html>

Finally, there is a potential for conflict between the federal regulations and state schemes - such as that set up by the Queensland Government under the Biodiscovery Bill 2003 (Qld).

Access To Genetic Resources

Regulation 8A.05 establishes that a permit is required for lawful access to biological resources in a Commonwealth area and provides a penalty for accessing biological resources without a permit. Regulation 8A.03(1) identifies the access provider for each class of Commonwealth area and includes any native title holder for any area. The access provider is the party with whom an applicant must enter into a benefit-sharing agreement.³⁵

The Commonwealth scheme imposes less onerous requirements on applicants who intend to use the genetic resources in non-commercial, as distinct from commercial, scientific research. A party who is seeking access to genetic resources in Commonwealth areas, and who intends to use the resources in commercial scientific research, is required to do two things. First, under 17.02 (2) (g) of the regulations, they must apply to Environment Australia for an access permit and pay the appropriate application fee. The application must include information about the biological resources to which the person seeks access; the location and the amount of biological resources that will be collected; the uses that the applicant intends to make of the biological resources; and the nature and extent of environmental impact. Secondly, a party seeking access to biological resources for use in commercial research is also required to enter into a benefit-sharing agreement with the relevant access provider (or providers).

A party seeking access to biological resources in Commonwealth areas for use in non-commercial research must apply to Environment Australia for an access permit. Following this, an applicant who intends to use the genetic resources in non-commercial scientific research is also required to provide Environment Australia with evidence that they have the permission of the access provider to obtain the samples sought. They must have provided the access provider with

³⁵ Paragraph 8A.02(3)(a) makes it clear that the taking of biological resources by Indigenous people for a purpose not specified in regulation 8A.02(1) is not "access to biological resources". This addresses concerns that allowing access to biological resources might limit Indigenous people's existing uses of those resources.

an undertaking to share the outcomes of the research or to publish the results of the research. The applicant must have also undertaken to offer a voucher specimen of each species collected to an appropriate taxonomic institution, and negotiated a commercial benefit-sharing agreement in the event that the applicant commercialises the research.

In some respects, this division between research and commercial purposes is an artificial one. As Henrietta Fourmile comments: “A number of submissions noted the need to distinguish between access to biological resources for ‘pure research’ (or ‘academic research’) purposes as distinct from research which has a commercial purpose in mind. In reality, however, the boundaries between the two are often blurred.”³⁶ The courts could struggle to make such fine distinctions.³⁷ It could be difficult to disentangle research from commerce in the field of bioprospecting, since public institutions undertake collection of genetic resources on behalf of commercial biotechnology companies and pharmaceutical drugs manufacturers.

Informed Consent

Regulation 8A.09(1) requires that where the access provider is the owner of Indigenous people’s land or holds native title, the access provider must have given prior informed consent to the benefit-sharing agreement. Regulation 8A.09(2) identifies the factors the Minister must take into account in considering whether informed consent has been given. These involve the provision of information, the negotiation process, the amount of time involved (including for consultation), the views of representative bodies and the provision of independent legal advice.

Approval connotes the elements of consent, permission and authorisation before traditional Indigenous knowledge or resources are used. For consent, permission and authorisation to be genuine, there is a clear need for Indigenous people to have access to all the information about the proposed use of their traditional knowledge. They must be

³⁶ Fourmile H, note 18, p 234.

³⁷ Witness, for instance, judicial interpretation in the field of patent law. In the case of *Madey v Duke University* (2002) 307 F.3d 1351, the United States Court of Appeals found that the educational institution Duke University could not rely upon the research exemption because the projects “further the institution’s business objectives, including educating and enlightening students and faculty.”

able to play an active part in the planning process of projects involving the use of the traditional knowledge or resources.

The requirement for prior informed consent means that Indigenous communities will be able to exercise a right of veto in relation to access to genetic resources located on native title land. This reflects the recommendation of the Voumard report that decisions by Indigenous communities to deny access to bioprospectors should not be reviewable, ensuring that access could be refused where the access seeker was undervaluing Indigenous resources and knowledge.³⁸

The right to control of access to genetic resources is a necessary feature of the regime. There are dangers involved if the notion of informed consent is diluted to a mere right of negotiation or consultation. Indigenous people would then be dependent upon the benevolence of the government of the day to protect their interests. The regulations would have little legitimacy unless informed consent is enshrined under the legislation. The regime would otherwise be open to allegations that the system is merely facilitating biopiracy. It would not be worth embarking upon such a scheme if it failed to resolve the central concern about the unauthorised exploitation of genetic resources.

Benefit-Sharing And Indigenous Land Use Agreements

Draft regulation 8A.03 defines the benefit sharing arrangements: “The benefit-sharing agreement must provide for reasonable benefit-sharing arrangements, including protection for, recognition of and valuing of any indigenous knowledge given by the access provider.”

The principle of benefit sharing involves the access to genetic resources and related knowledge in return for information, technology, and participation in research. Benefit-sharing can include both monetary and non-monetary benefits. Thus it can extend to an equitable share of the money, which flows from the commercialisation of research based on the access to genetic resources. The Kew Botanic Gardens Statement provides an indication of some non-commercial forms of benefit-sharing - such as the sharing of the research

³⁸ As summarised in House of Representatives Standing Committee on Primary Industries and Regional Services, note 19, p 43.

outcomes and knowledge, technology transfer, education and training.³⁹

Draft Regulation 8A.01 (3) provides that “an agreement may be both a benefit-sharing agreement, if it complies with these Regulations, and an indigenous land use agreement within the meaning of the *Native Title Act 1993* (Cth).”

Under the *Native Title Act 1993* (Cth), Indigenous people and other persons, organisations or governments, may enter Indigenous Land Use Agreements.⁴⁰ These may be developed in the course of, or independently of, an application for a determination of native title. These agreements can deal with a range of issues in relation to access to, and use of, land and waters in a given area, including extraction and use of natural resources. Mining agreements probably most closely parallel the bioprospecting situation because there is essentially a two-phase process of exploration followed by potential commercialisation. Indigenous Land Use Agreements are also commonly negotiated in relation to pastoral use, fishing, marine use, conservation and reserve management. Parties to the agreement can request the Native Title Registrar to register the agreement on the Register of Indigenous Land Use Agreements. Upon registration an agreement takes effect as a contract between the parties. Therefore, even if a native title application has not been filed or finalised, parties are able to reach agreements about access to land and use of resources derived from that land, including biological resources. Local, state, territory and Commonwealth governments may be party to an Indigenous Land Use Agreement.

Indigenous Land Use Agreements have a number of potential benefits for prospective bioprospectors and for Indigenous communities. They

³⁹ Kew Royal Botanic Gardens, *Principles on Access to Genetic Resources and Benefit-Sharing for Participating Institutions*, Royal Botanic Gardens, Kew, London, 2001, <http://www.rbgekew.org.uk/conservation/principles.html>

⁴⁰ Neate G, *Getting on with Business: Indigenous Land Use Agreements*, Paper presented at the Australian Mining and Petroleum Law Association, 23rd Annual Conference, Sydney 28-30 July 1999; Padgett A, *Native Title and Associated Resource Use Issues: Australia*, Paper presented at the Australian Agricultural and Resource Economics Society 43rd Annual Conference, Christchurch, New Zealand, January 20-22, 1999.

can be useful in the resolution of conflicts over natural resources.⁴¹ Michael Davis argued:

Regional agreements provide significant opportunities for the development of partnerships between [I]ndigenous 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 customary laws, codes of ethics and notions of sustainability and responsibility for looking after their country and its resources.⁴²

Native title representative bodies provide a definite stakeholder with whom research institutions and biotechnology companies can deal. They also help to resolve demarcation and boundary disputes over competing claims to genetic resources. Indigenous Land Use Agreements offer the potential for certainty, flexibility, and convenience. They allow quite complex mechanisms of discussion and compensation in respect of access to land and use of resources.⁴³ Although not acting as a substitute for native title determination, Indigenous Land Use Agreements can be reached against the background of disputed claims, thus removing a delay to agreement. They bind future native title claimants and holders, including descendants.

However, there has also been concerted criticism of Indigenous Land Use Agreements. Marcia Langton was concerned that Indigenous Land Use Agreements would be vulnerable to unscrupulous developers who persuaded native title holders to enter agreements

⁴¹ Foley T, "Negotiating Resource Agreements: Lessons From ILUAs" (2002) 19 (4) *Environmental And Planning Law Journal* 267.

⁴² Davis M, note 14, 1999, p 9.

⁴³ Note that there is legislative provision for an expedited negotiation process for mining exploration on the basis of its likely low impact on the environment, significant sites and community life. It is possible that such a legislative provision could be extended to bioprospecting.

contrary to their best interests.⁴⁴ At a conference “Native Title Forum 2001: Negotiating Country”, Wade and Lombardi⁴⁵ and Ferris⁴⁶ discussed the experiences of the non native title party, which can be used to assist any party with negotiation. There was a general warning against overestimating the efficacy of Indigenous Land Use Agreements. A further criticism is that there could also be difficulties in enforcing Indigenous Land Use Agreements.⁴⁷ The Federal Government continues to monitor and review Indigenous Land Use Agreements in the context of the administration of native title law.⁴⁸

Assessment by the Minister

Regulation 8A.12 (1)(a) enables the Minister to consult Commonwealth bodies in relation to a permit application or benefit-sharing agreement. Regulation 8A.12(1)(b) requires the Minister to take into account any model benefit-sharing agreement and any variations from it.

Regulation 8A.12(1)(c) sets out the elements of informed consent to be considered by the Minister in considering whether or not informed consent was given by an Indigenous owner of biological resources. These elements involve the adequacy of information provided by the applicant, the conduct of negotiations, the time provided for consideration of the permit application and for consultation, representation and availability of independent legal advice.

Regulation 8A.12(2) allows the Minister to be satisfied that informed consent has been given by any affected native title holders if there is a registered Indigenous land use agreement reflecting their agreement.

44 Langton M, “Address to Wik Summit”, *The Wik Summit Papers*, Cape York Land Council, Cairns, 1997, p 94.

45 Wade R and Lombardi L, “Indigenous Land Use Agreements: their Role and Scope”, paper presented at Native Title Forum 2001: Negotiating Country, 1-3 August 2001.

46 Ferris J, “Indigenous Land Use Agreements: The Track Record”, paper presented at Native Title Forum 2001: Negotiating Country, Brisbane, 1-3 August 2001.

47 Dorsett S and Godden L, “Enforceability of Indigenous Land Use Agreements” (2000) 2 (1) *Land, Rights, Laws: Issues of Native Title* 1-11.

48 Parliamentary Joint Committee on Native Title and the Aboriginal and Torres Strait Islander Land Fund, *Nineteenth Report: Second Interim Report for the s.206(d) Inquiry - Indigenous Land Use Agreements*, September 2001, URL: http://www.aph.gov.au/senate/committee/ntlf_ctte/report_19/report/index.htm

There could be concern about the extent to which the scheme depends upon ministerial discretion. There could be problems if a particular Minister lacked vigilance in enforcing the access regime. It is worth remembering the problems associated with the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth) in the Hindmarsh Island case, in which the relevant Minister was willing to pass special retrospective legislation to abrogate the operation of cultural heritage laws in a particularly sensitive area.⁴⁹ There is a danger that the Federal Government could override the access to genetic resources scheme in particular cases in order to permit greater exploitation of natural resources by bioprospecting companies.

Remedies

The remedies available for a breach of the access to genetic resources scheme are capped because of the reliance upon regulations, rather than legislative reform. Brad Sherman comments that the access to genetic resources scheme does not deal with the situation where biological material is passed to a third party in breach of contract, or where the biological material is obtained through biopiracy and then sold to a third party. He comments:

While these commercial practices may provide some protection against the misuse of genetic resources, they are not infallible. In part this is because while some companies may look at the origin of genetic material when they are undertaking their due diligence inquiries, it is not yet universal practice. These potential problems are exacerbated by the fact that it is possible to imagine the situation where a company makes a calculated decision to collect biological samples without an access permit. While the fine of A\$5,500 and the adverse publicity may provide some disincentive against this happening, a company may decide that is outweighed by the legal costs and by the moneys that they would have to pay under a benefit sharing agreement with the access provider.⁵⁰

⁴⁹ *Hindmarsh Island Bridge Act 1997* (Cth); *Kartinyeri v The Commonwealth of Australia* (1998) 195 CLR 337; and Bell D, *Ngarrindjeri Wurruwarrin: A World That Is, Was, And Will Be*. Spinifex Press, Melbourne, 1998.

⁵⁰ Sherman B, "Regulating Access And Use Of Genetic Resources: Intellectual Property Law And Biodiscovery" (2003) 25 (7) *European Intellectual Property Review* 301-308.

However, Environment Australia is unable to impose greater penalties against individuals or companies who would flout this regime. Notably, the maximum fine of A\$5,500 is unable to be raised any higher without legislative amendment.

Nationally Consistent Scheme

Moreover, the scope of the federal regulations is necessarily limited by jurisdiction. As a result of the division of constitutional powers under the federal system in Australia, the Federal Government will need State Governments to pass complementary legislation. The Queensland Government has been at the vanguard of this policy development, because of the high concentration of biodiscovery research organisations, co-operative research centres and companies within the state.⁵¹ State Premier Peter Beattie announced the proposed enactment of the Biodiscovery Bill 1999 (Qld) at BIO2003, a United States conference on biotechnology.⁵² The Premier stressed the commercial benefits of bioprospecting for his state:

This Bill is an Australian first and shows Queensland is a leader in safe and sustainable biotechnology. Biodiscovery is about collecting and analysing small samples of native biological material - such as a leaf - to identify compounds that may be used to develop new drugs and products. It's environmentally-friendly, and offers big returns in terms of new jobs and training opportunities, more R&D and significant investment.⁵³

The fact-pack accompanying the draft legislation boasts: "Queensland has gone further than any other Australian jurisdiction to ensure benefits arising from biodiscovery flow on to traditional knowledge holders."⁵⁴ However, there was a great deal of dissatisfaction with the

⁵¹ Queensland Government, *Queensland Biodiscovery Policy: Discussion Policy*, May 2002.

⁵² Biodiscovery Bill 1999 (Qld),
<http://www.iie.qld.gov.au/biotechnology/biodiscovery.asp>

⁵³ Beattie P, "Biodiscovery To Deliver Smart State Dividends To Taxpayers", Press Release, Queensland Government, 23 June 2003,
<http://statements.cabinet.qld.gov.au/portfolio-display/tmp/1056346430.html>

⁵⁴ Biodiscovery Bill 1999 (Qld),
<http://www.iie.qld.gov.au/biotechnology/biodiscovery.asp>

Biodiscovery Policy amongst Indigenous groups.⁵⁵ In particular, there was concern that the legislation did not adequately deal with difficult questions about the interaction between contract law, native title and intellectual property rights.⁵⁶ Instead the Queensland Government wanted to deal with such issues under the *Code of Ethical Practice for Biotechnology in Queensland*. There is the potential for conflict between the state legislation and the federal regulations.

PART TWO

Skeletal principles: Native Title and cultural knowledge

The *Native Title Act 1993* (Cth) is relevant to the access regime laid down by the regulations under the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) in a number of ways. First, Indigenous people will be able to control access to the biological resources attached to land and water, in which there has been a successful native title determination.⁵⁷ Second, Indigenous people can take advantage of the system of Indigenous Land Use Agreements.⁵⁸ Finally, the system of future acts is addressed in the access regime.⁵⁹

A number of academics - including Kamal Puri,⁶⁰ Stephen Gray,⁶¹ and Shelley Wright⁶² - have explored whether legislative or judicial

⁵⁵ Watson I, note 27.

⁵⁶ Clause 22 applies where a native title determination has been made and that determination recognises the right of exclusive possession (basically a legal power to restrict access by others) of the native title holders. Sub-clause 22(2) provides that where such a determination has been made existing Biodiscovery Collection Authorities in relation to that land are cancelled. Sub-clause 22(3) provides that in such circumstances the EPA chief executive must advise the BCA holder in writing that the relevant BCA has been cancelled including the date of the determination. Sub-clause 22(3) provides that no compensation is payable to a BCA holder if such a determination is made.

⁵⁷ Regulation 8A.03 of *Environment Protection and Biodiversity Conservation Act 1999* (Cth).

⁵⁸ Regulation 8A.06 (3) of *Environment Protection and Biodiversity Conservation Act 1999* (Cth).

⁵⁹ Regulation 17.03B of *Environment Protection and Biodiversity Conservation Act 1999* (Cth).

⁶⁰ Puri K, "Copyright Protection For Australian Aborigines In Light Of Mabo", in Stephenson M and Ratnapala S (ed), *Mabo: A Judicial Revolution*, University of Queensland Press, St Lucia, 1993, p 157.

recognition of Indigenous laws can usefully be extrapolated beyond the context of native title and land rights to inform an understanding of Indigenous rights in intellectual property. Such proposals have been taken up in a number of policy documents developed by writers such as Henrietta Fourmile,⁶³ Terri Janke⁶⁴, Doreen Mellor,⁶⁵ and Michael Davis.⁶⁶ Terri Janke advised: “Support should be given for native title actions which test and expand the meaning of native title rights and interests to other areas of Indigenous cultural heritage including stories, biodiversity knowledge and cultural objects”.⁶⁷

In the case of *Yanner v Eaton*, the importance of the recognition of the spiritual as well as the secular aspects of native title was emphasised by the majority: “And an important aspect of the socially constituted fact of native title rights and interests that is recognised by the common law is the spiritual, cultural and social connection with the land.”⁶⁸

In *Yarmirr v The Northern Territory of Australia*, the Croker Island case, Justice Olney elaborates upon the claimed right to safeguard cultural knowledge - the right to receive, possess and safeguard the cultural and religious knowledge associated with the estate and the right and duty to pass it on to the younger generation.⁶⁹ However, in the High Court, the majority judgment of Chief Justice Gleeson and Justices Gaudron, Gummow and Hayne noted in parenthesis that there was no discussion about whether native title might give effect a right of access to ‘protect’ places or safeguard knowledge.⁷⁰ Therefore there was no definitive judgment as to whether native title would include cultural knowledge.

61 Gray S, “Wheeling, Dealing And Deconstruction: Aboriginal Art And The Land Post-Mabo”, (1993) 3 (63) *Aboriginal Land Bulletin* 10.

62 Wright S, “Submission To *The Stopping The Rip-Offs Inquiry*”, January 1995, p 7.

63 Fourmile H, note 18, pp 216-218.

64 Janke T, note 13, 1999.

65 Mellor D and Janke T, note 13.

66 Davis M, note 14, 2002.

67 Janke T, note 13, 1999.

68 *Yanner v Eaton* (1999) 166 ALR 25 at 270.

69 *Yarmirr v The Northern Territory of Australia* (1998) 82 FCR 533.

70 *Commonwealth v Yarmirr* (2001) 184 ALR 113.

Western Australia v Ward

The High Court case of *Western Australia v Ward* related to the native title claim by the Miriuwung-Gajerrong peoples.⁷¹ It primarily considered the nature and principles of extinguishment of native title.⁷² The High Court also considered, in passing, the important issue of whether there was a connection between native title rights and cultural knowledge.⁷³ The key provision under scrutiny was s 223 (1) of the *Native Title Act 1993* (Cth), which defines the expression “native title” and “native title rights and interests” as meaning “the communal, group or individual rights and interests of Aboriginal peoples or Torres Strait Islanders in relation to land or waters”. First, the High Court reviewed the precedent of *Bulun Bulun v R & T Textiles*.⁷⁴ They considered whether the recognition of native title rights as including cultural knowledge would fracture a “skeletal principle” of the common law. Second, the High Court considered the nature and scope of cultural knowledge. Third, one of the judges considered whether express or implied constitutional guarantees might intervene to provide protection for cultural knowledge.

The Majority Decision

The majority of the High Court doubted that “a right to maintain, protect and prevent the misuse of cultural knowledge is a right in relation to land of the kind that can be the subject of a determination of native title.”⁷⁵ It refused to provide *sui generis* protection for “cultural knowledge” because the limits and boundaries of such subject matter has been ill-defined:

⁷¹ *Western Australia v Ward*, note 22.

⁷² Such issues are considered elsewhere: Strelein L, “*Western Australia v Ward* on Behalf Of Miriuwung Gajerrong: Summary of Judgment” (2002) 2 (17) *Land, Rights, Laws: Issues Of Native Title*; Clarke J, “Recent Native Title Decisions In The High Court”, *Australian Policy Online*, 12 August 2002, <http://law.anu.edu.au/CIPL/Publications/Clarke.pdf>; and Dodson M, “Native Title on the Precipice: The Implications of the High Court’s Judgment on the *Ward* Case”, ANU Institute for Indigenous Australia, 17 October 2002, <http://ni.anu.edu.au/docs/dodson.pdf>

⁷³ For a discussion of these issues in the Federal Court in the *Ward* case, see Malcolm R and Meyers G, “Native Title Rights And The Protection Of Indigenous Cultural Knowledge” (2002) 50 *Intellectual Property Forum* 12-25.

⁷⁴ *Bulun Bulun and Milpurrurru v R & T Textiles Pty Ltd* (1998) 41 IPR 513.

⁷⁵ *Western Australia v Ward*, note 22, p 31.

The first difficulty in the path of that submission is the imprecision of the term “cultural knowledge” and the apparent lack of any specific content given it by factual findings made at trial. In submissions, reference was made to such matters as the inappropriate viewing, hearing or reproduction of secret ceremonies, artworks, song cycles and sacred narratives. To some degree, for example respecting access to sites where artworks on rock are located, or ceremonies are performed, the traditional laws and customs which are manifested at these sites answer the requirement of connection with the land found in para (b) of the definition in s 223 (1) of the *Native Title Act* 1993 (Cth). However, it is apparent that what is asserted goes beyond that to something approaching an incorporeal right akin to a new species of intellectual property to be recognised by the common law under para (c) of s 223 (1). The “recognition” of this right would extend beyond denial or control of access to land held under native title. It would, so it appears, involve, for example, the restraint of visual or auditory reproductions of what was to be found there or took place there, or elsewhere.⁷⁶

The lack of clarity was partly the fault of the advocates. Mr Bennett for the Commonwealth was absolutely opposed to native title being interpreted to include intangible interests. He did not explore what scope of protection should be offered to cultural knowledge, if it was recognised under native title law. Mr Basten for the Indigenous appellants submitted that native title did include the protection of cultural knowledge. However, he did not clarify the scope of the protection circumscribed by cultural knowledge.

In the joint majority judgment, Chief Justice Gleeson, and Justices Gaudron, Gummow and Hayne dismissed the argument that native title rights were linked to cultural knowledge rights. These judges supported the remarks of Justice von Doussa:

It is here that the second and fatal difficulty appears.

In *Bulun Bulun v R & T Textiles Pty Ltd*, von Doussa J observed that a fundamental principle of the Australian legal system was that the ownership of land and ownership of artistic works are

⁷⁶ *Western Australia v Ward*, note 22, p 31.

separate statutory and common law institutions. That is the case, but the essential point for present purposes is the requirement of “connection” in para(b) of the definition in s 223 (1) of native title and native title rights and interests. The scope of the right for which recognition by the common law is sought here goes beyond the content of the definition in s 223 (1).

That is not to say that in other respects the general law and statute do not afford protection in various respects to matters of cultural knowledge of Aboriginal peoples or Torres Strait Islanders. Decided cases apply in this field the law respecting confidential information, copyright, and fiduciary duties. Provision respecting moral rights is now made by Pt IX (s 189 - s 195AZO) of the *Copyright Act 1968* (Cth).⁷⁷

The judges assert that Federal Court precedents demonstrate that current intellectual property laws provide sufficient protection of Indigenous cultural property. In *Milpurrurru And Others v Indofurn Pty Ltd And Others*, 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.⁷⁸ In *Bulun Bulun v R & T Textiles Pty*, Justice von Doussa was willing to find that the relationship between Bulun Bulun and the Ganalbingu people gave rise to fiduciary obligations.⁷⁹ He concluded that “if the copyright owner of an artistic work which embodies ritual knowledge of an Aboriginal clan is being used inappropriately, and the copyright owner fails or refuses to take appropriate action to enforce the copyright, the Australian legal system will permit remedial action through the courts by the clan.”⁸⁰ The judges also insist that the *Copyright Amendment (Moral Rights) Act 2000* (Cth) may offer some protection of Indigenous cultural property. However the effect of those new provisions will be limited, until the Federal Parliament passes proposed amendments for the recognition of Indigenous communal ownership of moral rights.⁸¹

⁷⁷ *Western Australia v Ward*, note 22, pp 31-32.

⁷⁸ *Milpurrurru v Indofurn Pty Ltd* (1994) 30 IPR 209.

⁷⁹ *Bulun Bulun and Milpurrurru v R & T Textiles Pty Ltd*, note 74.

⁸⁰ *Bulun Bulun and Milpurrurru v R & T Textiles Pty Ltd*, note 74.

⁸¹ Copyright Amendment (Indigenous Communal Moral Rights) Bill 2003 (Cth).

The joint majority judgment noted that s 223 (1) (b) of the *Native Title Act 1993* (Cth) required consideration of whether, by the traditional laws acknowledged and the traditional customs observed by the peoples concerned, they have a “connection” with the land or waters. However, it found it unnecessary to form a conclusion as to whether there could be shown a spiritual connection to the land: “We, therefore, need express no view, in these matters, on what is the nature of the ‘connection’ that must be shown to exist. In particular, we need express no view on when a ‘spiritual connection’ with the land (an expression often used in the Western Australian submissions and apparently intended as meaning any form of asserted connection without evidence of continuing use or physical presence) will suffice.”⁸²

Justice Callinan argued that the *Native Title Act 1993* (Cth) does not extend to cultural knowledge or reverence for land:

The existence of that cultural significance does not mean that the bare knowledge and reverence of themselves can constitute a native title right or interest in relation to land within the meaning of the Act. Physical presence is essential. The Full Court was therefore correct to hold that any rights to maintain, protect and prevent the misuse of cultural knowledge could not be the subject of the determination of native title.⁸³

His Honour adds that the decisions in *Mabo [No 2]*⁸⁴ and *Wik*,⁸⁵ and their statutory manifestations in the *Native Title Act 1993* (Cth) do not address a claim to equate cultural knowledge or reverence with some form of proprietary interest in land. Justice McHugh concurred with this judgment.⁸⁶

In this decision, the majority of the High Court is unduly suspicious of *sui generis* protection of traditional knowledge. In the past, the courts and policy-makers have been willing to accommodate certain valuable and lucrative subject matter within the scope of intellectual property, even though it might be ephemeral or unstable. For instance,

⁸² *Western Australia v Ward*, note 22, p 184.

⁸³ *Western Australia v Ward*, note 22, p 184.

⁸⁴ *Mabo v Queensland* (1992) 175 CLR 1.

⁸⁵ *The Wik Peoples v Queensland* (1996) 187 CLR 1.

⁸⁶ *Western Australia v Ward*, note 22.

sui generis protection has been granted to circuit layouts and plant breeder's rights. However, other areas - such as scientific discoveries - were denied special protection on the grounds that the subject matter was formless and nebulous.⁸⁷ Similarly, traditional knowledge has been refused *sui generis* protection because the limits and boundaries of such subject matter have been ill defined. The desire for intellectual property to be fixed in a stable form is a longstanding anxiety.

As a result of this angst, the majority of the High Court read down the scope of the *Native Title Act 1993* (Cth), so that it does not encompass cultural knowledge. Native title lawyer Jennifer Clarke comments upon the limitations of this approach:

Paradoxically, Australian law may still refuse to 'recognise' some Indigenous land traditions as native title. This is because the cultural categories which underlie Australian law are intolerant of different ways of classifying the world... The common law of property is all about possession and use of land, and the 'recognition' principles insist that Aboriginal concepts of land ownership which differ from this 'pragmatic' model are unenforceable. Thus, for example, native title claimants have been unable to convince the courts to recognise as native title their traditional rights to control the painting of land-related motifs. To Australian law, these are issues for the law of intellectual property - which in Aboriginal terms also deals with them unsatisfactorily.⁸⁸

The majority argued that native title rights were limited to tangible property, and did not extend to intangible property because of a cultural materialism and a legal pragmatism. Arguably, there is a need to take a more expansive view of the relationship between native title rights, customary law and spiritual custodianship.

⁸⁷ For a discussion of the unsuccessful attempt by the League of Nations to provide *sui generis* protection for scientific discoveries, see Merges R, "Property Rights Theory And The Commons: The Case Of Scientific Research", in Paul E, Miller F and Paul J (ed), *Scientific Innovation, Philosophy And Public Policy*. Cambridge: Cambridge University Press, 1996.

⁸⁸ Clarke J, note 72.

Justice Kirby's dissent

In his dissenting judgment, Justice Kirby questions whether there is sufficient protection for traditional knowledge under existing regimes of intellectual property:

The joint reasons describe the right claimed as “akin to a new species of intellectual property”. They state that the general law or statute law may provide avenues for its protection. That may be so. However, it must also be accepted that the established laws of intellectual property are ill-equipped to provide full protection of the kind sought in this case. The Preamble to the *Native Title Act 1993 (Cth)* expressly states that the Act aims to supplement the rights available under the general law.⁸⁹

He illustrates his point with the example of *Yumbulul v Reserve Bank of Australia* in which the Federal Court of Australia refused to support a copyright infringement action by an artist in respect of Morning Star funeral poles being used in the bicentennial ten-dollar note released by the Reserve Bank.⁹⁰

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

An application of Brennan J's statement regarding “skeletal principles” should consider his Honour's reasoning in its entirety. Skeletal principles are not immutable. When they offend values of justice and human rights, they can no longer command “unquestioning adherence”. A balancing exercise must be undertaken to determine whether, if the rule were overturned, the disturbance “would be disproportionate to the benefit flowing from the overturning”.⁹¹

89 *Western Australia v Ward*, note 22, pp 162-163.

90 *Yumbulul v Reserve Bank of Australia* (1991) 21 IPR 481 at 484, 490.

91 *Western Australia v Ward*, note 22, p 163.

Justice Kirby also notes his previous consideration of the “skeletal principle” enunciated by Justice Brennan in *Mabo [No 2]*.⁹² In *The Commonwealth v Yarmirr*, his Honour acknowledged the importance of s 223 (1) (c) of the *Native Title Act 1993* (Cth) in ensuring that rights and interests repugnant to, or destructive of, basic legal principles of Australian law would not be recognised.⁹³ Justice Kirby acknowledged that the protection of some aspects of cultural knowledge might have such a consequence. However, in his view, such repugnancy has not been demonstrated in the facts of the appeals.

A number of academics have also cautioned that the doctrine of “skeletal principles” should be applied with care and circumspection. Stephen Gray observed:

Brennan J in *Mabo* itself did not set down any guidelines for determining when recognition of a particular law or custom would facture a ‘skeletal principle’. von Doussa J in *Bulun Bulun*, however, suggested that the principle that ownership of land and ownership of art are separate ‘may well’ be characterised as ‘skeletal’. There is as yet little guidance on the apparently new jurisprudential distinction between ‘skeletal’ and ‘non-skeletal’ principles of the common law.⁹⁴

He believed that the ownership of land and the ownership of art should be able to co-exist, in light of international norms, and social and political practices. Similarly, Kristin Howden concluded that “comprehensive consideration of Justice Brennan’s ‘skeletal principle’ test, in fact confirms the need to recognise a native title right to protect traditional knowledge”.⁹⁵ Others remain concerned that the very notion of “skeletal principles” is nothing more than an intellectual fiction or construct. In the manner of Stanley Fish, Andrew Kenyon quipped: “There’s no such thing as a skeletal principle, and it’s a good thing too.”⁹⁶

⁹² *Mabo v Queensland* (1992) 175 CLR 1.

⁹³ *Commonwealth v Yarmirr*, note 70.

⁹⁴ Gray S, “Peeking into Pandora’s Box: Common Law Recognition Of Native Title To Aboriginal Art” (2000) 9 (2) *Griffith Law Review* 227 at 240.

⁹⁵ Howden K, “Indigenous Traditional Knowledge And Native Title” (2001) 24 (1) *The University of New South Wales Law Journal* 60.

⁹⁶ Kenyon A, “The Artist Fiduciary - Australian Aboriginal Art and Copyright” (1999) 10 *Entertainment Law Review* 42-49.

In his dissent, Justice Kirby recognises that it is difficult to define a native title right to maintain, protect and prevent the misuse of cultural knowledge of the native title holders: “The right to protect cultural knowledge was not well defined in submissions before this Court.”⁹⁷ Nonetheless, Justice Kirby believes that it is possible to define the scope of cultural knowledge. His Honour elaborates:

It has been accepted that the connection between Aboriginal Australians and ‘country’ is inherently spiritual and that the cultural knowledge belonging to Aboriginal people is, by indigenous accounts, inextricably linked with their land and waters, that is, with their ‘country’. In evidence, the Ningarmara appellants described the ‘land-relatedness’ of their spiritual beliefs and cultural narratives. Dreaming Beings located at certain sites, for example, are narrated in song cycles, dance rituals and body designs. If this cultural knowledge, as exhibited in ceremony, performance, artistic creation and narrative, is inherently related to the land according to Aboriginal beliefs, it follows logically that the right to protect such knowledge is therefore related to the land for the purposes of the *Native Title Act* 1993 (Cth).⁹⁸

Justice Kirby maintains that such rights include many elements, such as “restricting access to certain sites or ceremonies and restricting the reproduction of artwork or other images”.⁹⁹ A travelling exhibition called *Native Title Business* illustrates that paintings are often used as evidence to document and secure native title.¹⁰⁰ The inextricable link between culture and place is readily apparent in works of art - such as the Ngurrara canvas painted by a group of twenty-two Kimberley artists to demonstrate their 1996 native title claim to an area of the Great Sandy Desert.¹⁰¹

⁹⁷ *Western Australia v Ward*, note 22, p 160.

⁹⁸ *Western Australia v Ward*, note 22, pp 161-162.

⁹⁹ *Western Australia v Ward*, note 22, p 160.

¹⁰⁰ Winter J, *Native Title Business: Contemporary Indigenous Art, a Travelling Exhibition*, Keeaira Press, Southport, 2002.

¹⁰¹ Dick T, “The Old Fella’s Still Got It, But Little Shorty Packs A Punch”, *The Sydney Morning Herald*, 31 July 2003, <http://www.smh.com.au/articles/2003/07/31/1059480481916.html>

Citing an article by Chief Justice Black of the Federal Court,¹⁰² Justice Kirby discusses the need to protect the secrecy of cultural knowledge - no doubt recalling the problems experienced in the Hindmarsh Island case.¹⁰³ His Honour nonetheless believes that the legal system can accommodate such concerns: “If the *Native Title Act* 1993 (Cth) protects the right and interest in question, procedures of the courts and other decision-makers could facilitate means of proof and challenge that involved the minimum intrusion upon secrecy where this is itself part of the cultural knowledge that is afforded statutory protection.”¹⁰⁴

Curiously, Justice Kirby also explores the possibility that cultural knowledge may be protected under s 116 of the *Constitution* (Cth),¹⁰⁵ which provides: “The Commonwealth shall not make any law for establishing any religion, or for imposing any religious observance, or for prohibiting the free exercise of any religion.” He has previously expressed the view that intellectual property powers should be subject to certain constitutionally guaranteed freedoms.¹⁰⁶ Justice Kirby believes that s 116 of the *Constitution* (Cth) has the potential to provide protection for the right to cultural knowledge insofar as it based upon the spirituality of Australia’s Indigenous people.¹⁰⁷ His Honour was inspired by an academic article by Grutzner entitled “Invalidating Provisions of the *Native Title Act* 1993 (Cth) on Religious Grounds”.¹⁰⁸ However, the High Court has only been willing to read and interpret s 116 of the *Constitution* (Cth) in a narrow and pedantic fashion.¹⁰⁹ The constitutional guarantee has never had the same scope as its United States counterpart. Indeed the

102 Black CJ, “Developments In Practice And Procedure In Native Title Cases” (2002) 13 *Public Law Review* 16.

103 *Chapman v Luminis Pty Ltd* (No 5) [2001] FCA 1106; and Bell D, note 49.

104 *Western Australia v Ward*, note 22, p 161.

105 *Western Australia v Ward*, note 22, p 164.

106 *Grain Pool of Western Australia v Commonwealth* (2000) 46 IPR 515.

107 *Western Australia v Ward*, note 22, p 160.

108 Grutzner H, “Invalidating Provisions of the Native Title Act 1993 (Cth) on Religious Grounds: s 116 of the Constitution and the Freedom to Exercise Indigenous Spiritual Beliefs”, in Boge CJ (ed), *Justice for All? Native Title in the Australian Legal System*, Lawyer Books, Brisbane, 2001, p 85.

109 *Krygger v Williams* (1912) 15 CLR 366; *Adelaide Company of Jehovah’s Witnesses Incorporated v Commonwealth* (1943) 67 CLR 116; *Church of the New Faith v Commissioner of Pay-Roll Tax (Vic)* (1983) 154 CLR 120; and *Kruger v the Commonwealth* (1997) 190 CLR 1.

High Court has never upheld a claim based on s 116 of the Constitution. Most notably, in *Kruger v the Commonwealth*, the majority of the High Court rejected the argument that the removal of Aboriginal children from their families was constitutionally invalid because it prohibited the free exercise of Aboriginal religion.¹¹⁰ Given this background, it is not surprising that the possibility of s 116 of the *Constitution* (Cth) has not been raised in the context of native title.

The judgment of Justice Kirby is a principled, honourable dissent. It provides an intelligent account of the relationship between native title and intellectual property. Justice Kirby has a flashing intuition or insight here that much of Indigenous cultural knowledge is sacred in its nature, and by extension within the scope of s 116 of the *Constitution* (Cth). Unfortunately, his Honour does not follow through the implications of this reasoning, and consider how exactly this express constitutional guarantee might provide protection for traditional knowledge in the factual circumstances of this case. Nonetheless, the judgment of Justice Kirby has much to commend. It will undoubtedly be an influential dissenting judgment.

Neowarra v Western Australia

The recent Federal Court decision of *Neowarra v Western Australia* concerned a native title claim in respect of the land and waters in the northwest of the Kimberley in Western Australia.¹¹¹ In his decision, Justice Sundberg relied in part upon cultural knowledge to establish the native title rights of the community. As a journalist observed: “The wandjina, a mouthless, spaceman-like creation figure that featured in the Olympic Games opening ceremony, has helped convince a judge to give a group of Aborigines native title rights in an area of the Kimberley.”¹¹² The case certainly provided an intriguing gloss on the High Court ruling on native title rights and cultural knowledge in *Western Australia v Ward*.¹¹³

¹¹⁰ *Kruger v the Commonwealth* (1997) 190 CLR 1.

¹¹¹ *Neowarra v Western Australia*, note 23.

¹¹² Jopson D, “Wandjina Triumphs In Native Title Case”, *The Sydney Morning Herald*, 9 December 2003, <http://www.smh.com.au/articles/2003/12/08/1070732146760.html>

¹¹³ *Western Australia v Ward*, note 22.

As part of their claim, the Wanjinna-Wungurr community sought the recognition of a right to use, maintain, protect, and prevent the misuse of cultural knowledge of common law holders. The community also claimed possession of painted images on rock surfaces within the claim area, in particular in relation to Wanjinna and Gwion images. Paddy Neowarra, a member of the community, provided evidence as to his responsibilities under law and custom as to repainting Wanjinna's:

We just got to come along and renew him again when he falling to - when everything and paint coming off. That's our law and that's how we keep it. And that's what was given to us from the old people. You've got to take care of it and look after it and always remember that.¹¹⁴

Professor Valda Blundell - the author of *The Art Of Country*¹¹⁵ - also gave evidence about the significance to the claimant group of Wanjinna's on canvas. She spoke of "a shared cultural geography, a culture-scape that was marked and named during the Lalai/Lalan (the Dreaming) by the activities of the Wanjinna and their associated spiritual beings".¹¹⁶ There was concern about unauthorised and unsupervised persons, such as tourist operators, damaging Wanjinna or Wungurr places.

Justice Sundberg considered the decision of the High Court in *Western Australia v Ward* that native title rights did not extend to cultural knowledge:

As I understand the joint judgment, the claim to reinstate par 3(j) in the determination was ultimately rejected on the ground that there could be no recognition of the right claimed under s 23(1)(c) because it would be a new species of intellectual property right which could not be recognised for want of a connection with land. The examples given of what might fall within the right were the restraint of visual or auditory reproductions of what was to be found at Aboriginal sites or took place there or elsewhere.¹¹⁷

¹¹⁴ *Neowarra v Western Australia* [2003] FCA 1402 at 277.

¹¹⁵ Blundell V, "The Art Of Country: Aesthetics, Place And Aboriginal Identity In Northwest Australia", Land, Place, Culture And Identity Conference, University Of Western Australia, 2000, p 30.

¹¹⁶ *Neowarra v Western Australia*, note 23, p 90.

¹¹⁷ *Neowarra v Western Australia*, note 23, p 486.

In light of the High Court decision, the Wanjina-Wungurr community did not press this claim. However, they did seek recognition of the right “to prevent the disclosure otherwise than in accordance with traditional laws and customs [of] tenets of spiritual beliefs and practices (including songs, narratives, rituals and ceremonies) which relate to areas of land or waters, or places on the land or waters”.¹¹⁸ However, Justice Sundberg held that the reformulation of the right to cultural knowledge suffered the same “fatal difficulty” adverted to by the High Court: “It will still involve the ‘restraint of visual or auditory reproductions of what was found [on the land] or took place there.’”¹¹⁹

However, Justice Sundberg also considered whether the community could claim possession of painted images on rock surfaces within the claim area, including the Wanjina images and Gwion images. His Honour held:

In my view claimants with a traditional right to freshen or repaint a particular painting site may have access to pastoral land in order to exercise that right. Neither the access nor the freshening or repainting is inconsistent, since it amounts to a right of exclusive possession of the site. The same will apply to the right to make decisions about the images if it is asserted as an exclusive right.¹²⁰

Justice Sundberg recognises that the community has a right to access land in order to repaint and freshen up images. Such native title rights are much weaker than intellectual property rights, which would provide exclusive rights of possession in respect of intangible property. Nonetheless, the case represents a significant advancement upon existing jurisprudence. Arguably, the judgment demonstrates the need for a wider judicial revolution, so that native title law provides full recognition of the rights of Indigenous communities regarding cultural knowledge.

¹¹⁸ *Neowarra v Western Australia*, note 23, p 487.

¹¹⁹ *Neowarra v Western Australia*, note 23, p 487.

¹²⁰ *Neowarra v Western Australia*, note 23, p 491.

PART THREE

Traditional Knowledge: Patent Law and Plant Breeder's Rights

The draft *Environment Protection and Biodiversity Conservation Act 1999* (Cth) regulations do not alter any existing property rights or intellectual property rights for any parties. Thus plant breeder's rights and patent rights are not affected at the level of ownership or validity or exploitation. The Bailey Parliamentary Report observed:

Australia's IP regime does not currently protect traditional knowledge. Nor do the IP regimes of foreign countries. They fail to recognise collective rights and provide protection for only limited periods of time. Furthermore, traditional knowledge would not generally be regarded as patentable because it lacks the requisite newness. What may therefore be needed is a new category of rights that protects traditional knowledge from unauthorised use, recognises its origin, and provides just compensation. *Sui generis* methods of IP protection, such as those used for plant varieties, have been recommended in this context, for example, in an ATSIAC commissioned report on indigenous cultural and IP.¹²¹

There have been a number of domestic reports that have sought to find ways of protecting traditional knowledge through legislative amendments, or the development of a *sui generis* system of protection.¹²² There have also been a number of international efforts to protect traditional knowledge. The World Intellectual Property Organization mooted the development of a convention to protect "folklore" in the 1970s. However, this nomenclature was considered to be inappropriate and patronising. Building upon international developments, the *Our Culture, Our Future* report written by Terri Janke emphasised the need to recognise "Indigenous cultural heritage".¹²³ The World Intellectual Property Organization has

¹²¹ House of Representatives Standing Committee on Primary Industries and Regional Services, note 19, p 46.

¹²² Attorney General's Department. *Stopping The Rip-Offs: Intellectual Property Protection For Aboriginal And Torres Strait Islander Peoples*. October 1994; Janke T, note 13, 1999; and Fourmile H, note 18.

¹²³ Janke T, note 13, 1999.

recently undertaken a fact-finding mission into “traditional knowledge”, and explored the development of *sui generis* legislation to protect traditional knowledge.¹²⁴ However, the Australian Government has not yet passed legislation to specifically protect traditional knowledge. This has been the cause of some disappointment amongst Indigenous people who have been lobbying for the protection of traditional knowledge for some time. Nonetheless, there remains much interest in the use of intellectual property to regulate access to genetic resources and traditional knowledge.¹²⁵

Confidential Information

In *Western Australia v Ward*, there was a discussion of the use of trade secrets law to protect the confidential information of Indigenous knowledge.¹²⁶ Trade secrets law may be a way for Indigenous people to safeguard traditional knowledge. It would allow individuals to keep sensitive information out of the public domain, and control its transfer within a particular community.

In *Foster v Mountford*, the Supreme Court of the Northern Territory considered whether Mountford, an anthropologist, had breached a duty of confidential information in publishing a book called *Nomads of the Australian Desert*.¹²⁷ It found that there was a breach of confidence on the part of defendant because information of a deep religious and cultural significance to the Aboriginal group was depicted in the book. Similar findings were made in *Pitjantjatjara Council Inc and Peter Nguaningu v Lowe and Bender*, an action related to lantern slides,

¹²⁴ World Intellectual Property Organization, “Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore”, Fact-Finding Missions, 1998-1999, <http://www.wipo.int/globalissues/tk/report/final/index.html>; and Taubman A, note 1.

¹²⁵ Stoianoff N, “Access To Australia’s Biological Resources And Technology Transfer” (1998) 20 (8) *European Intellectual Property Review* 298-305; Drahos P, “Indigenous Knowledge, Intellectual Property And Biopiracy: Is A Global Bio-Collecting Society The Answer?” (2000) 22 (6) *European Intellectual Property Review* 245-250; Dutfield G, *Intellectual Property Rights And The Life Science Industries: A Twentieth Century History*, Ashgate, Aldershot, 2003; Lawson C and Pickering C, “Successfully Controlling Access Under the *Environment Protection and Biodiversity Conservation Act 1999* And Its Regulations Requires A Proper Assessment Of The Impact Of The *Patents Act 1990*” (2002) 13 (3) *Australian Intellectual Property Journal* 109.

¹²⁶ *Western Australia v Ward*, note 22.

¹²⁷ *Foster v Mountford* (1976) 14 ALR 71.

which were taken by Mountford of sacred material belonging to the Pitjantjatjara people.¹²⁸

Confidential information and trade secrets may be of relevance to plant varieties. In *Franklin v Giddins*, the Queensland Supreme Court dealt with the application of confidential information and trade secrets law to plant breeding.¹²⁹ The plaintiffs conducted an orchard where they grew “Franklin Early White” nectarines, which were highly successful from a commercial point of view. The male defendant stole budwood cuttings from the plaintiffs’ orchard and by carrying out the necessary grafting process commenced to grow Franklin Early White nectarines, in competition with the plaintiffs. The female defendant subsequently learnt that the nectarine trees being grow in their orchard were the produce of the stolen budwood.

Justice Dunn held that the male defendant had acted unconscionably and stolen a trade secret in contravention of the plaintiffs’ rights. In the circumstances, the plaintiffs were entitled to equitable relief against him independently of any contractual relationship. Justice Dunn found that it would be unconscionable for the female defendant to derive any benefit from the trees, and that she also infringed the plaintiff’s rights, and was subject to the equitable jurisdiction of the court. His Honour ordered that the defendants deliver up to the plaintiffs for destruction the productive budwood.

Such precedents have a particular relevance in relation to traditional knowledge about biological resources. Bioprospectors would have to negotiate with Indigenous people to gain access to confidential information. They would be unable to collect, catalogue, and classify genetic resources in an unfettered fashion.

¹²⁸ *Pitjantjatjara Council Inc and Peter Nguningu v Lowe and Bender* (unreported, SCVic, 1796/82, 26 March 1982).

¹²⁹ *Franklin v Giddins* (1978) Qd R 72.

Plant Breeder's Rights

There was initially legislative debate about whether the *Plant Breeder's Rights Act 1994* (Cth) would be in conflict with the *Native Title Act 1993* (Cth) and the *Racial Discrimination Act 1975* (Cth).¹³⁰

The Australian Conservation Foundation, and a legal advisor to the Cape York Land Council, Matthew Baird, argued that the *Plant Breeder's Rights Act 1994* (Cth) had the potential to extinguish native title rights of Indigenous Australians which are protected under the *Native Title Act 1993* (Cth), and the *Racial Discrimination Act 1975* (Cth).¹³¹ He maintained that the Bill and the 1991 UPOV Convention may be inconsistent with a number of obligations under the *Rio Convention on Biodiversity* relating to Indigenous people, as well as the *Draft Declaration on the Rights of Indigenous People*.

However, the Attorney-General's Department provided advice that the *Plant Breeder's Rights Act 1994* (Cth) did not have the potential to extinguish or affect native title rights.¹³² First, it thought it unlikely that rights to genetic plant material would arise in customary Indigenous laws. Secondly, it doubted whether the *Native Title Act 1993* (Cth) would include plant genetic resources. Thirdly, assuming Indigenous rights to genetic plant material existed and were covered by *Native Title Act 1993* (Cth), the development and registration of a new plant variety from genetic material owned by native title holders, would not be an act affecting native title and would, therefore, not be regulated by the *Native Title Act 1993* (Cth).

The debate over plant breeder's rights and traditional knowledge re-emerged in parliamentary debate over the Plant Breeder's Rights Amendment Bill 2002 (Cth) introduced by the Federal Government to clarify the rights of plant breeders in respect of equitable remuneration.

The Australian Democrats were concerned that the plant breeder's rights scheme failed to provide any rights for Aboriginal communities - even if a plant was originally discovered on their land. They proposed a number of substantive amendments to the Plant Breeder's

¹³⁰ Senate Standing Committee On Rural And Regional Affairs. *Plant Breeder's Rights Bill*. Canberra: Australian Government Publishing Service, May 1994.

¹³¹ Senate Standing Committee On Rural And Regional Affairs, note 130, pp 387-388.

¹³² Senate Standing Committee On Rural And Regional Affairs, note 130,

Rights Bill 2002 (Cth). In particular, Senator John Cherry and Senator Aden Ridgeway moved to entrench the rights of Indigenous Australians to benefits flowing from native plants under the plant breeder's rights scheme:

While Indigenous communities are not the only group affected by this act, their rights and their traditional relationship with the land are being widely ignored in this legislation. The Democrats are proposing amendments that will reduce the chances of biopiracy from Indigenous land and increase the capacity of the Indigenous community to object when biopiracy is occurring. We will also be moving to add Indigenous representation to the advisory committee that provides expert advice to the minister. Currently, Indigenous and conservation interests are not represented on the committee at all. While encouraging innovation and new commercial varieties is fully supported by the Democrats, legislation that gives rights to one group by denying others is not acceptable.¹³³

The Australian Democrats stressed that the amendments were essential to prevent the plant breeder's rights scheme from being jeopardised by major problems with biopiracy. They also introduced other amendments to ensure that the approval process deals with economic, as well as environmental and scientific concerns especially in relation to genetically modified plants. A possible inspiration for such a legislative plan would be the *Plant Variety Protection and Farmers' Rights Act 2001* passed by the Indian Parliament.¹³⁴

In his second reading speech, Senator John Cherry expressed a particular concern about the biopiracy of traditional knowledge.¹³⁵ Relying heavily upon the work of the Canadian based Rural

¹³³ Cherry J, "Plant Breeder's Rights Amendment Bill 2002: Second Reading Speech", Senate Hansard, 21 October 2002, p 5553.

¹³⁴ Adcock M, "Farmers' Right Or Privilege?" (2001/2002) 3 *Bio-Science Law Review* 93; and Sahai, S. "India's Plant Variety Protection And Farmers' Rights Legislation" in Drahos P and Mayne R (ed), *Global Intellectual Property Rights: Knowledge, Access And Development*, Palgrave Macmillan, New York, 2002, pp 214-224.

¹³⁵ Cherry J, note 133, p 5553.

Advancement Foundation International,¹³⁶ the Australian Democrats alleged that there were 149 documented cases in Australia of established plant varieties being wrongly registered as new varieties. This included plants brought to Australia from neighbouring countries such as Papua New Guinea, and plants traditionally used by Aboriginal communities. The Australian Democrats noted that Australia was presented with the Captain Hook Award, bestowed on the country with the worst record in the world in the area of biopiracy.¹³⁷

Although rhetorically powerful in their criticisms, the Rural Advancement Foundation International is a rather unreliable source of information. The study conducted by the group does not display a particularly good understanding of the plant breeder's system that exists in Australia. An alternative explanation could be provided of the controversy. A business manager, Vince Logan, comments that the filing of the plant breeder's rights applications was not the result of some conspiracy.¹³⁸ Rather, the problem arose as a result of a lack of communication between researchers and seed banks. As soon as the issue was identified, the applications were withdrawn. The Plant Breeder's Rights Office subsequently tightened its administrative practice in dealing with such established plant varieties.

The legislative amendments sought to define "traditional knowledge, innovations and practices" and "traditional landrace varieties". Proposed Subsection 3(1) defined "traditional knowledge, innovations and practices" as meaning "knowledge and those innovations and practices that have been and continue to be developed and practiced by indigenous peoples in accordance with their traditions and customs." Proposed section 42 (4) provided: "If a plant variety is a traditional landrace plant variety or a variety which is essentially derived from such landrace plant variety, PBR must not be granted to that variety." Proposed section 42 (4A) defined "traditional landrace variety" as a

¹³⁶ Rural Advancement Foundation International and Australian Heritage Seeds Curators Association, "Plant Breeder's Wrongs: An Inquiry Into The Potential for Plant Piracy Through International Intellectual Property Conventions", 26 August 1998, http://www.etcgroup.org/documents/occ_plant.pdf

¹³⁷ Rural Advancement Foundation International, "Captain Hook Awards For Outstanding Achievements in Biopiracy", 11 May 2000.

¹³⁸ Logan V, "Confessions of a Biopirate and Other Tales on the Commercialisation of Agriculture Research", Intellectual Property And Agriculture Symposium, Canberra, 18 September 2003.

“variety developed over millennia by selecting favourable characteristics within a cultivated crop species, or a variety that is the outcome of indigenous peoples’ traditional and customary innovations and practices”. Alternatively, it may also be known as a “traditional variety”, “local variety” or “farmers’ variety”.

Proposed section 42 (5) provided that plant breeder’s rights must not be granted to a variety which is discovered on Crown lands, national parks, world heritage sites, and native title lands. Senator John Cherry explained the intent of the amendment:

Amendment (13) amends section 42 of the act. It ensures that plant varieties derived from varieties that have developed over millennia by selective breeding or by way of traditional knowledge and innovation cannot be granted a PBR. The exception is when Indigenous communities give informed consent and are guaranteed to benefit from a PBR. The amendment also ensures that plants discovered on public or Aboriginal lands, regardless of the degree of selective breeding that takes place, cannot be granted a PBR. The purpose behind this amendment is to ensure that the plant varieties discovered on public or Aboriginal lands remain in the hands of the community where they were found. Currently, there is no provision for Aboriginal communities, for instance, to exercise any rights over new plant varieties when the original variety was found on Aboriginal land.¹³⁹

Proposed section 42 (5) does provide an exception “where it can be shown to be the subject of rights and interests by [I]ndigenous peoples, including customary and other forms of ownership unless: (i) the prior informed consent of the holders of such knowledge, innovations and practices has been sought and received; and (ii) equitable sharing of the benefits arising from the utilisation of such knowledge, innovations and practices has been agreed to amongst the parties.” In other words, it seeks to dovetail in with the access to genetic resources scheme being set up by the Commonwealth.

Liberal Senator Judith Troeth, the Parliamentary Secretary to the Minister for Agriculture, Fisheries and Forestry, explained that the Coalition Government would not support the amendments proposed

¹³⁹ Cherry S, note 133, p 6548.

by the Democrats. In particular, she objected the amendment relating to landrace varieties:

I will also respond to amendment (R13) and point out again, at the risk of labouring the point, that plant breeders rights is non-discriminatory and protects the interests of Indigenous and non-Indigenous plant breeders alike. These proposals would be a disincentive to all Australians, including Indigenous breeders and communities, to develop new varieties from germplasm found in certain locations. Landrace varieties are already ineligible for PBR registration under the Australian act and under UPOV. Plant breeders rights only apply to new varieties that are distinguishable from existing varieties of common knowledge.¹⁴⁰

Australian Labour Party Senator Kerry O'Brien also rejected the amendments proposed by the Democrats in respect of the Plant Breeder's Rights Amendment Bill 2002 (Cth).¹⁴¹ He also stressed that plant breeder's rights would not vest in landrace varieties, because they would be considered to be common knowledge. In particular, he thought that environmental laws would be more appropriate to deal with issues concerning environmental risks than the intellectual property legislation.

The Liberal Party, the National Party, and the Australian Labour Party passed the technical amendments that were contained in the original bill - relating to equitable remuneration, and the administration of the plant breeder's rights scheme. The concerns expressed by the Australian Democrats about landrace varieties were not incorporated into the final *Plant Breeder's Rights Amendment Act 2002* (Cth).

Patent Law

In its submissions to the Bailey Parliamentary Inquiry, IP Australia observed that it was exploring the use of existing patent systems as a

¹⁴⁰ Troeth J, "Plant Breeder's Rights Amendment Bill 2002: In Committee", Senate Hansard, 18 November 2002, p 6628.

¹⁴¹ O'Brien K, "Plant Breeder's Rights Amendment Bill 2002: In Committee", Senate Hansard, 18 November 2002, p 6628.

defensive means of protecting traditional knowledge.¹⁴² It hoped that the development of databases and registers of traditional knowledge would create a field of prior art to challenge patents and educate patent examiners.¹⁴³ Canadian academic Rosemary Coombe, though, has been sceptical of such strategies:

Another initiative being made to improve the current system is the creation of traditional knowledge databases and community registers of traditional knowledge. These initiatives are somewhat controversial and certainly not all [I]ndigenous peoples, traditional healers, or rural communities support them. Certainly they may be inappropriate for knowledge considered to be sacred and knowledge held and transmitted primarily through ritual means (although maintenance of conditions of confidentiality may obviate some of these concerns). Only knowledge, innovations, and practices that communities do not wish to commercialize should be put in publicly available databases.¹⁴⁴

Rosemary Coombe concludes: “At the end of the day, however, the documentation of traditional knowledge will not return any income to peoples.”¹⁴⁵ There is therefore a need to explore strategies that will ensure that Indigenous communities are able to share in the benefits flowing from the exploitation of intellectual property.

Similarly, Pires de Carvalho of the World Intellectual Property Organization¹⁴⁶ argues that Indigenous people can apply for patent protection over traditional knowledge. However, it is unrealistic to expect that Indigenous knowledge holders will be able to use the patent system in a strategic fashion. Henrietta Fourmile comments that

¹⁴² IP Australia, “Supplementary submission no. 39”, to the House of Representatives Standing Committee on Primary Industries and Regional Services, note 19.

¹⁴³ IP Australia had hired Michael Davis as a consultant to report on intellectual property and traditional knowledge. Davis M, note 14, 1999, pp 1- 32.

¹⁴⁴ Coombe R, “The Recognition of Indigenous Peoples’ and Community Traditional Knowledge in International Law” (2001) 14 *St. Thomas Law Review* 275.

¹⁴⁵ Coombe R, note 144.

¹⁴⁶ de Carvalho P, “From the Shaman’s Hut to the Patent Office: How Long and Winding is the Road?” (1999) 41 *Review of the Brazilian Association of Intellectual Property* 3.

the cost of the system would be beyond the resources of most Indigenous communities:

While this is an option few Indigenous groups anywhere have tried, it is also relevant to point out that the costs of applying for and defending a patent are way beyond the means of most communities. For example, to obtain patent protection for an invention in an appropriate range of countries can cost as much as US\$100,000 - 200,000 (A\$150,000 - 300,000), and up to double that per litigation to protect the patent from illegal use or challenge. While this might represent small change for a major biotechnology corporation, and is no doubt factored into their overall research and development and operational budgets, fees like this represent insurmountable obstacles for Indigenous traditional knowledge holders in Australia.¹⁴⁷

It would be very difficult to establish patent infringement where traditional knowledge is far removed from the end product of natural drug discovery - a chemically synthesized pharmaceutical drug.

A more radical requirement would be to require fundamental reforms to patent legislation. John Voumard recommended that “IP Australia consider amending patent law to require proof of source and, where appropriate, prior informed consent, as a prerequisite for granting a patent”.¹⁴⁸

Brad Sherman argues that the access to genetic resources scheme fails to deal with biopiracy by third parties: “The scheme has the potential to encourage good practice, but will not prevent biopiracy – where plants have been collected, chemicals patented and land owners not compensated.”¹⁴⁹ He argues that patent law could be a regulatory mechanism to improve the access to genetic resources scheme:

People see patent law as a tool for economic ends, such as to encourage investment in innovation. But it is possible to use the system to achieve other objectives, such as access to medicine,

¹⁴⁷ Fourmile H, note 18, p 222.

¹⁴⁸ Voumard J, note 10, p 88.

¹⁴⁹ Salleh A, “Loopholes In New Biopiracy Laws - Says Expert”, ABC Science Online, Friday 8 November 2002, http://www.abc.net.au/science/news/enviro/EnviroRepublish_721515.htm

protection of the environment and acknowledgment of [I]ndigenous knowledge.¹⁵⁰

Brad Sherman argues that compliance with the permit system should be made a condition for patenting biotechnological inventions.¹⁵¹ He recommends that a patent based on biological resources should only be granted on the condition that a benefit-sharing agreement has been reached with the landholder. “This would complement and strengthen the public good intention of the new laws. If people were serious about protecting [I]ndigenous knowledge from exploitation, this is a really easy way to do it.”¹⁵² Brad Sherman also develops a fallback option, in which disclosure would be voluntary.¹⁵³ He draws on the European Council Directive 98/44, which recommends that patent applicants should disclose the geographical origin of the biological material on which their inventions are based.

One option would be to enshrine the principle of the disclosure of the geographical origin of genetic resources in the *Patent Co-Operation Treaty* (PCT). Switzerland has put forward a proposal in relation to the declaration of the source of genetic resources and traditional knowledge in patent applications.¹⁵⁴ They suggest that the PCT Regulations should be amended to permit nations to amend their patent laws to require the lodgement of declarations of the source of genetic resources in patent applications:

Switzerland proposes to explicitly enable the national patent legislation to require the declaration of the source of genetic resources and traditional knowledge in patent applications. More specifically, Switzerland proposes to amend the Regulations under the Patent Cooperation Treaty (PCT) to explicitly enable the Contracting Parties of the PCT to require patent applicants, upon or after entry of the international application into the national phase of the PCT procedure, to

¹⁵⁰ Salleh A, note 149.

¹⁵¹ Sherman B, note 50.

¹⁵² Salleh A, note 149.

¹⁵³ Sherman B, note 50.

¹⁵⁴ World Intellectual Property Organization. “Proposals By Switzerland Regarding The Declaration Of The Source Of Genetic Resources And Traditional Knowledge In Patent Applications”, Working Group On Reform Of The Patent Cooperation Treaty, Fourth Session, Geneva, 19-23 May 2003.

declare the source of genetic resources and/or traditional knowledge, if an invention is directly based on such resource or knowledge. Furthermore, Switzerland proposes to afford applicants the possibility of satisfying this requirement at the time of filing an international patent application or later during the international phase. In case an international patent application does not contain the required declaration, national law may foresee that in the national phase the application is not processed any further until the patent applicant has furnished the required declaration.¹⁵⁵

In the view of Switzerland, the proposed amendments to the PCT-Regulations would “present one simple and practical solution to the issues arising in the context of access to genetic resources and traditional knowledge and the fair and equitable sharing of the benefits arising out of their utilization”.¹⁵⁶ They are confident that “these amendments could be introduced in a timely manner and would not require extensive changes to the provisions of relevant international agreements”.¹⁵⁷

It is striking that Switzerland, of all countries, should put forward such a proposal, given its long history of supporting the domestic interests of Swiss pharmaceutical drug manufacturers. However, Switzerland declared:

With regard to the underlying issues, Switzerland holds the view that a fair and balanced approach must be taken: on one hand, Switzerland supports the effective protection of biotechnological innovations through intellectual property rights, in particular patents. On the other hand, a fair and balanced approach necessitates effective, efficient, practical and timely solutions to the issues arising in the context of access to genetic resources and traditional knowledge and the fair and equitable sharing of the benefits arising out of their utilization.¹⁵⁸

¹⁵⁵ World Intellectual Property Organization, note 154.

¹⁵⁶ World Intellectual Property Organization, note 154.

¹⁵⁷ World Intellectual Property Organization, note 154.

¹⁵⁸ World Intellectual Property Organization, note 154.

The Swiss Government believed that this option would be preferable to the various other approaches that are currently being discussed at the international level - such as the negotiation of a protocol under the *Rio Convention on Biological Diversity*. It would appear that the country intends to implement domestic legislation to realise its proposal. The proposal has been lauded for being an “elegant” solution.¹⁵⁹ However, the Swiss Government has been unsuccessful in its attempts to garner support for this proposal at an international level.

Conclusion

The Australian Federal Government has an unrivalled opportunity to provide a blueprint for the implementation of the *Rio Convention on Biological Diversity*. It therefore needs to introduce the proposed access to genetic resources scheme without further delay or postponement. There is a call for a co-ordinated governmental response in this field. Michael Davis makes the pertinent comment:

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.¹⁶⁰

The Commonwealth scheme should respect the need to preserve and maintain traditional knowledge. Indigenous people and communities must retain a right of veto in respect of access to genetic resources. A number of compromises must be reviewed. The distinction between bioprospecting for research purposes and commercial motives will be difficult to sustain. The requirement of prior informed consent is vulnerable to ministerial discretion. The remedies available in respect of biopiracy are meagre. The jurisdiction of the Commonwealth scheme is also necessarily limited. There is a need for a nationally

¹⁵⁹ Burton G, “Introducing The New Swiss Proposals”, Correspondence, 7 May 2003.

¹⁶⁰ Davis M, “Indigenous Peoples and Intellectual Property Rights”, Australian Parliamentary Library, Research Paper 20, 1996-1997.

consistent scheme for access to genetic resources to be established. It is imperative that the integrity of the scheme is preserved, and the spirit of the *Rio Convention on Biological Diversity* be respected.

The proposed Commonwealth scheme does recognise the rights of native title holders in respect of physical access to land. However, it fails to acknowledge that native title holders might have additional rights to protect cultural knowledge. In the case of *Western Australia v Ward*, the High Court explored the possibility of using native title as a means of providing protection for providing protection for traditional biodiversity-related knowledge.¹⁶¹ The majority of the High Court denied that native title rights included cultural knowledge on the grounds that it would violate “skeletal principles” of the Australian legal system. They also maintained that it was impossible to delimit the boundaries of cultural knowledge. Justice Kirby dissented, holding that native title must necessarily include traditional knowledge, because of the intimate connection between land and culture. His Honour argued that the idea of “skeletal principles” was a judicial fiction. Justice Kirby emphasised that customary law would help define the scope of cultural knowledge. His Honour also stressed the importance of human rights and international law - especially the importance of the right to freedom of religious expression. This enlightened dissent should encourage further law reform in this particular field. The decision in *Neowarra v Western Australia* suggests that native title law does have a role to play in the protection of cultural knowledge.¹⁶² There is a need for the judiciary to develop native title law, so that it recognises the connection between land and traditional knowledge.

The access to genetic resources scheme fails at present to recognise communal ownership of traditional knowledge of biological resources. Henrietta Fourmile notes the inherent limitations of the access to genetic resources scheme: “While the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) addresses the important provisions contained in Articles 8 (j), 10 (c) and 18.4 of the *Convention on Biological Diversity*, it falls short of providing intellectual property-style protection for communally-held traditional knowledge.”¹⁶³ The access to genetic resources scheme could be enhanced by a number of reforms to existing regimes of intellectual

¹⁶¹ *Western Australia v Ward*, note 22.

¹⁶² *Neowarra v Western Australia*, note 23.

¹⁶³ Fourmile H, note 18, p 224.

property law. Trade secrets law could be used to protect confidential information about traditional medicines and knowledge. The *Plant Breeder's Rights Act 1994* (Cth) could be amended to ensure that traditional landrace varieties could not be exploited without the prior informed consent of the holders of such knowledge, and the equitable sharing of benefits. The *Patents Act 1990* (Cth) could be amended so that proof of source and prior informed consent was a prerequisite for the granting of a patent. The *Patent Co-Operation Treaty* regulations could also require the declaration of the source of genetic resources and traditional knowledge in patent applications. Such reforms may provide greater impetus for drafting comprehensive *sui generis* legislation to protect traditional knowledge in Australia.