RESPECTING INDIGENOUS CULTURAL AND INTELLECTUAL PROPERTY RIGHTS

TERRI JANKE*[1]

I. INTRODUCTION

Recognising and respecting Indigenous cultural and intellectual property rights is a fundamental step in the process of reconciliation. The arts and cultural knowledge of Indigenous[2] Australians are important to the survival of Indigenous Australian cultures. For generations, cultural information has been passed down in many paintings, songs, dances and stories. In recent years, the demand for Indigenous cultural products has grown rapidly. Indigenous artworks are heavily in demand and Indigenous images are reproduced on a wide range of products including T-shirts. Indigenous words and motifs are used as brands and logos by Australian companies.

There is similar demand for Indigenous Australian cultural knowledge. Indigenous Australians have inhabited the lands and seas of Australia for thousands of years. Over this time, Indigenous Australians have developed and nurtured a close relationship with Australia's biologically diverse environment,

---

* Solicitor, Michael Frankel and Company.

1 In 1997, a National Australian Indigenous Cultural and Intellectual Property Project ('ICIP Project') was conducted, funded by ATSIC and coordinated by the Australian Institute of Aboriginal and Torres Strait Islander Studies ('AIATSIS'). As part of the ICIP Project, AIATSIS appointed Michael Frankel and Company, Solicitors, to conduct research in this area and prepare a report. Ms Terri Janke was the Principal Consultant on the Project. The Project is the first of its kind in Australia comprehensively to map the rights Indigenous Australians wanted in relation to their Cultural Heritage, analyse existing Australian laws and policies, and comment on their application to Indigenous cultural and intellectual property rights. The Project also puts forward a range of proposals on how Indigenous Australians might realise these rights in light of the existing legal and policy landscape. This paper is based on some of the key findings and recommendations of the Report.

2 'Indigenous' refers to 'Aboriginal and Torres Strait Islander people', the original inhabitants of mainland Australia and the Torres Strait Islands.

including the rainforests, deserts and marine ecosystems. Such knowledge has been the result of generations of skill and development, passed on through the years and continuously improving. It includes knowledge of sites and areas, the medicinal and nutritional values of a wide range of Australian plants and animals, land management practices, and customs and traditions. This knowledge is now in demand by bioprospectors, and by medical researchers and pharmaceutical companies in their quest to discover new medicines for commercial exploitation. Indigenous Australians are concerned that their knowledge is being appropriated without their consent or knowledge and for little or nothing in return.

The commercialisation of Indigenous intellectual and cultural property has often been done without respect for Indigenous cultures, without consent or legal Indigenous control and without sharing of benefits with Indigenous communities. Indigenous cultural heritage has often been distorted for commercial interests. This in turn is leading to its erosion.

In 1995, the Council for Aboriginal Reconciliation's submission to the Commonwealth Government, *Going Forward, Social Justice for the First Australians*,[3] recommended that:

> the Commonwealth legislate to create a specific new form of intellectual property which would enable Aboriginal and Torres Strait Islander communities and individuals to protect from exploitation styles of art or crafts and knowledge of traditional foods and medicines.[4]

The submission further set out a number of general principles which would need to be recognised within the Australian legal framework, including the right to own and control Indigenous cultural and intellectual property.[5] This important right was endorsed by the Australian Reconciliation Convention.[6] If reconciliation is to be fruitful in Australia, Australians must recognise Indigenous cultural and intellectual property rights within the Australian legal and policy framework and in all areas of industry.

II. WHAT IS INDIGENOUS CULTURAL AND INTELLECTUAL PROPERTY?

In *Our Culture: Our Future, Proposals for the Recognition and Protection of Indigenous Cultural and Intellectual Property* Report,[7] 'Indigenous cultural and intellectual property' was defined as referring to Indigenous Peoples' rights to

---

3 Council for Aboriginal Reconciliation, *Going Forward: Social Justice for the First Australians, A Submission to the Commonwealth Government* (1995).

4 *Ibid*, Recommendation 51 at 12.

5 *Ibid* at 72.

6 Council for Aboriginal Reconciliation, "The Path to Reconciliation, Issues for A People's Movement", presented at the Australian Reconciliation Convention, 26-28 May, 1997.

7 T Janke, *Our Culture: Our Future, Proposals for the Recognition and Protection of Indigenous Cultural and Intellectual Property*, (Discussion Paper) Michael Frankel and Company, July 1997.

their heritage. Heritage comprises all objects, sites and knowledge, the nature or use of which has been transmitted or continues to be transmitted from generation to generation, and which is regarded as pertaining to a particular Indigenous group or its territory. Heritage includes:

- Literary, performing and artistic works (including songs, music, dances, stories, ceremonies, symbols, languages and designs);
- Scientific, agricultural, technical and ecological knowledge (including cultigens, medicines and the phenotypes of flora and fauna);
- All items of movable cultural property;
- Human remains and tissues;
- Immovable cultural property (including sacred and historically significant sites and burial grounds); and
- Documentation of Indigenous peoples' heritage in archives, film, photographs, videotape, audiotape and all other forms of media.

Indigenous peoples' heritage is a living heritage and therefore also includes objects, knowledge and literary and artistic works which may be created in the future based on that heritage.[8]

III. RESPONSIBILITY FOR CULTURE

Indigenous cultural and intellectual property is collectively owned, socially based, and evolving continuously. A great number of generations contribute to the creation and development of Indigenous cultural and intellectual property. In addition, there are many different Indigenous Australian groups. Each particular group has ownership of rights over its particular inherited cultural heritage.[9]

One factor common to all Indigenous groups is the existence of Indigenous laws which govern rights to use and deal with Indigenous cultural and intellectual property. These laws are based on the premise of responsibility for cultural knowledge and the need to ensure that the culture is maintained and protected so that it can be passed on to future generations. To this end, there is often an individual or group who is the custodian or caretaker of a particular item of heritage. This type of relationship was noted in the case of *Bulun Bulun & Anor v R & T Textiles*.[10] In that case, Mr Bulun Bulun was the artist of, and copyright owner in, paintings which embodied communally owned designs of the Ganalbingu people. Mr Bulun Bulun's right to the use of ritual knowledge to produce the artworks was given to him in accordance with Ganalbingu customary law and was predicated on the trust and confidence which those giving permission had in the artist. The Court found that the relationship between Mr Bulun Bulun and the Ganalbingu people was of a fiduciary nature.

---

8 *Ibid* at 25.

9 *Ibid*.

10 (1998) 3 *Australian Indigenous Law Reporter* 547 (hereafter, *Bulun Bulun*) at 552.

Under this relationship, Mr Bulun Bulun had a fiduciary obligation to the rest of the clan group to ensure that the artwork is reproduced in ways which preserve the integrity of the culture and the knowledge.

Similarly, consent to authorise others to use Indigenous cultural knowledge must be given by the group as a whole. Such consent is given through specific decision-making procedures which differ depending on the nature of the particular cultural item. Consent procedures may differ from group to group. In *Bulun Bulun*, evidence given by Mr Djardie Ashley[11] discussed how the Ganalbingu laws deal with such consent procedures. Mr Ashley noted that in some circumstances, such as reproducing a painting in an art book, the artist may not need to consult widely with the group. However, in other circumstances, such as reproduction in merchandise, the artist may need to consult widely. Mr Ashley further noted:

> The question in each case depends on the use and the manner or mode of production. But in the case of a use which is one that requires direct consultation, rather than one for which approval has already been given for a class of uses, all of the traditional Aboriginal owners must agree. There must be total consensus. Bulun Bulun could not act alone to permit the reproduction of "At the Waterhole" in the manner as it was done.[12]

Moreover, consent is not permanent and may be revoked.[13]

IV. WHAT RIGHTS DO INDIGENOUS PEOPLE WANT IN RELATION TO THEIR CULTURES?

The *Our Culture: Our Future* Discussion Paper noted that Indigenous cultural and intellectual property rights are fundamental to the continuation and maintenance of Indigenous culture. Legislative reform and policy initiatives are urgently required to prevent the further erosion of Indigenous cultural identity. In light of the various concerns raised by Indigenous peoples, the following rights require recognition:

- The right to own and control Indigenous cultural and intellectual property;
- The right to control the commercial use of Indigenous cultural and intellectual property in accordance with traditional customary laws;
- The right to benefit commercially from the authorised use of Indigenous cultural and intellectual property;
- The right to full and proper attribution;
- The right to protect sacred and significant sites;

---

11 Mr Ashley is an Indigenous artist and member of the Ganalbingu people who stands in the position of Waku or Djungayi, that is a kind of cultural policeman who has the obligation to ensure that the owners of certain land and knowledge associated with the land is dealt with in accordance with Indigenous custom, law and tradition.

12 Note 10 *supra* at 552.

13 T Janke, note 7 *supra* at 25.

- The right to own and control management of lands which are conserved in whole or part because of their Indigenous cultural values;
- The right to prevent derogatory, offensive and fallacious uses of Indigenous cultural and intellectual property;
- The right to have a say in the preservation and care, protection, management and control of cultural artefacts, human remains, archaeological and significant traditional sites, traditional food resources and traditional and contemporary cultural expressions such as rituals, legends, and the designs used in, for instance, art, weaving, dances, songs and stories;
- The right to control use of traditional knowledge of medicinal plants, agricultural biodiversity, environmental management, and the recording of cultural customs and expressions; and
- The right to control use of the particular language which may be intrinsic to cultural identity, knowledge, the skill and teaching of culture.[14]

V. THE WAY FORWARD

In order to move towards reconciliation, there is a need to adopt measures to recognise Indigenous cultural and intellectual property rights. The sharing of Indigenous cultural and intellectual property should be based on the principles of respect, informed consent, negotiation, full and proper attribution, and benefit sharing.

Respect requires that Indigenous cultural and intellectual property rights are recognised within the Australian legal and policy framework. Such rights should be premised on the understanding that Indigenous customary laws concerning the use and dissemination of cultural material are similar to intellectual property laws and the rights of intellectual property rights-holders. Users of Indigenous cultural material should respect these laws, including laws governing dissemination, attribution and cultural integrity.

Informed consent requires that those who seek to use or ascertain Indigenous knowledge and to make use of Indigenous resources must gain the prior informed consent of the relevant Indigenous peoples. For consent to be informed, the purpose and nature of the intended use must be communicated including the risks and the benefits of such use. Relationships must be frank and open and discussions should include what participation is required by Indigenous people. Informed consent of the people as a group is required as well as that of individuals within that group, because often the grant of rights will affect the group as a whole. For example, Mr Mick Dodson has noted that medical research on one member of the group will affect all members given that their physiological and genetic make up is likely to be similar.[15] A researcher must

14 *Ibid* at 8.

15 See M Dodson, Aboriginal and Torres Strait Islander Social Justice Commissioner, Human Rights and Equal Opportunity Commission, "Indigenous Social and Ethical Issues: Control of Research and Sharing the Benefits", presented at the Scientific, Social and Ethical Issues Symposium, 22 July 1997, p 8.

identify appropriate avenues of gaining permission by consensus. Mr Dodson urges genetic researchers to identify the appropriate bodies such as land councils, medical services and small cooperatives at local and regional level.[16]

Indigenous Australians seek the right to negotiate on the terms of use of their cultural and intellectual property. Depending on the circumstances, this might include the extent of rights to be granted, appropriate attribution, royalties or whether consent should be given for use at all.

Full and proper attribution requires that both the group who is the source of the material or knowledge and any participants are fully acknowledged for their role and contribution.

The sharing of benefits should be included in all negotiations for use of Indigenous cultural and intellectual property. The nature of those benefits will vary substantially depending on the nature of the use. However, such benefits to Indigenous people could include Indigenous employment opportunities, development of Indigenous-controlled infrastructure, royalties to communities from earned income, and the sharing of any derived intellectual property rights.

It is fundamental that any changes to the law or major policy initiatives should allow Indigenous people self-determination at all levels. *Our Culture: Our Future* suggested a range of reform strategies including the following legislative and non-legislative measures.[17]

A. Legislative Measures

(i) Amendment of Intellectual Property Laws

Amendments could be made to intellectual property laws including the *Copyright Act* 1968 (Cth), the *Patents Act* 1990 (Cth) and the *Trade Marks Act* 1995 (Cth) to recognise communal ownership of Indigenous cultural material. For example, it might be possible to introduce a new class of rights within the *Copyright Act* for 'Indigenous works'. Rights to such Indigenous works could exist in perpetuity.[18]

(ii) Specific Legislation

New and specific legislation could be developed and introduced to protect Indigenous cultural and intellectual property. The legislation would need to address the following issues. The scope of the new legislative framework should be broad enough to protect all Indigenous cultural and intellectual property including arts, biodiversity and cultural material. It should provide protection for works that are intangible, there need not be a requirement of material form. Rights should exist in perpetuity to ensure that there are no time limits on protection. The new legislative framework should include provisions that:

- prohibit the wilful distortion and destruction of cultural material;
- prevent misrepresentations of the source of cultural material;

---

16 *Ibid* p 10

17 Note 7 *supra* at 71-4.

18 *Ibid* at 65.

- allow payments to Indigenous owners for the commercial use of their cultural material; and
- provide special protection for sacred and secret materials.

The legislation should not inhibit the further cultural development of materials within their originating communities; that is, customary and traditional use should not be affected. Any established administration system should allow local, regional and state decision-making. Any dispute resolution measures should be culturally appropriate. Decision-making bodies should be made up of Indigenous custodians and/or traditional owners, specialists in Indigenous law, and legal experts. Confidentiality provisions should set out what can and cannot be disclosed to the public. There could also be closed tribunal hearings and avenues of access to the Federal Court for determinations. Any systems of authorisation should include prior authorisation provisions and be based on respect, negotiation, and free and informed consent. There should be fair dealing provisions only for traditional and customary use, research and study, and judicial proceedings. However, judicial proceedings relating to sacred or secret material and culturally sensitive information should not be made public or used for other purposes.

B. Non-Legislative Measures

Outside of legislative measures, Indigenous cultural and intellectual property rights could be better protected as follows:-

(i) Negotiating Rights under Agreement

Indigenous cultural and intellectual property rights could be included in written agreements between Indigenous custodial groups and commercial users of Indigenous cultural and intellectual property. Provisions could impose standards on those who use and disseminate Indigenous cultural and intellectual property, including filmmakers, research companies, local government and industry organisations.[19] For example, Amrad Pty Ltd, an Australian pharmaceutical company, has signed an agreement with the Tiwi Land Council to allow it to undertake research on plants of the Tiwi Islands.[20] Whilst the terms of the agreement have not been publicly disclosed, the agreement is said to include terms for the sharing of benefits with the Tiwi people.

(ii) Developing Cultural Infrastructure

The development of Indigenous Cultural infrastructure could also facilitate the protection of Indigenous cultural and intellectual property. For instance, the establishment of a National Indigenous Cultural Authority could provide support for existing Indigenous authority structures to control and monitor uses of Indigenous cultural and intellectual property. Furthermore, the establishment of registers and archives could assist with identification of sources so as to facilitate

19 *Ibid* at 79.

20 C Oddie, "Bioprospecting" (1998) 9 *Australian Intellectual Property Journal* 6 at 9.

consent procedures and to ensure that appropriate provisions for use are made the subject of written and legally binding agreements.[21]

(iii) Indigenous Cultural Protocols

Cultural protocols for obtaining consent for uses of Indigenous cultural and intellectual property could also enhance protection. All government, industry and professional bodies should be encouraged to develop protocols when dealing with uses of Indigenous cultural and intellectual property. Issues covered could include dealing with sacred material, processes for clearances and consents, attribution and the maintaining integrity of the cultural material.[22]

The development of ethical guidelines may also assist in protecting Indigenous cultural and intellectual property. For example, the Australian Science, Technology and Engineering Council developed *National Principles and Guidelines for the Ethical Conduct of Research in Protected and Envrionmentally Sensitive Areas*, which includes a principle relating to cooperation with Indigenous Groups.[23] The principle states that "[i]t is important for researchers to establish what Indigenous groups or individuals to contact with regard to getting permission or information". A list of strategies is suggested including negotiation of all aspects of research with traditional owners of protected areas and the need to obtain the informed consent of traditional owners before beginning or continuing any research in protected areas.[24]

(iv) Authentication Mark

The establishment of an authenticity label similar to the Australian Woolmark could promote cultural integrity. Through an appropriate system of licensing, managed and approved by Indigenous people, the label could be affixed to authentic Indigenous cultural products. By way of an extensive education and marketing program, consumers could be attracted to buy products which bear the label. This would in turn increase the demand for authentic and Indigenous produced goods and services. The mark would be registered as a certification mark under the *Trade Marks Act* 1995 (Cth) thereby benefiting from the enforcement and protection regime under the Act.[25]

VI. CONCLUSION

In conclusion, recognising Indigenous cultural and intellectual property is at the heart of the reconciliation process. Indigenous Australians must have the right to control uses of their cultural and intellectual property in order to

21 Note 7 *supra* at 82.

22 *Ibid* at 84.

23 Australian Science, Technology and Engineering Council, *Environmental Research Ethics, National Principles and Guidelines for the Ethical Conduct of Research in Protected and Environmental Sensitive Areas* (1998), principle 3.4.

24 *Ibid*, principle 1.2.

25 Note 7 *supra* at 75.

maintain their unique cultural identities. Government, industry and all those who seek to make use of Indigenous cultural and intellectual property other than in traditional or customary ways, must proceed on the basis of the principles of respect, informed consent, negotiation, full and proper attribution, and the sharing of benefits.