INDIGENOUS TRADITIONAL KNOWLEDGE, COPYRIGHT AND ART – SHORTCOMINGS IN PROTECTION AND AN ALTERNATIVE APPROACH

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I INTRODUCTION

This paper is premised on the assertion that, currently, enforceable protection is lacking for the traditional cultural expressions, cultural heritage, cultural and intellectual property rights, or, the traditional knowledge of Indigenous peoples in Australia.

The purpose of this paper is to make the case for reform. It commences by assessing the ability of Anglo-Australian law to provide full and meaningful protection of Indigenous peoples' traditional knowledge.[1] This assessment is made using the case study of traditional knowledge as expressed in Indigenous art, and it identifies the shortcomings of the one species of Anglo-Australian law – copyright – that, on its face, seems most able to provide legal recognition of this particular form of expression. Part II critically examines amendments to the *Copyright Act 1968* (Cth) ('*Copyright Act*') and litigation that has been pursued under that Act. It concludes that copyright law does not, and cannot, provide appropriate protection for Indigenous artists, and that this protection must instead come from mechanisms additional to copyright law. Part III of the paper moves beyond copyright law to consider a better way to protect Indigenous peoples' traditional knowledge.

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1 Terms adopted in this paper – such as 'traditional knowledge', 'Indigenous', 'Indigenous art', and 'Indigenous artists' – are not necessarily accepted as preferred terms by all relevant parties. This paper proceeds on the basis that the terminology in this field is problematic, eg, obscuring difference through using the term 'Indigenous', assuming that Indigenous peoples working as artists refer to themselves as Indigenous artists, or use traditional knowledge in their art, and using the copyright-informed terms 'art' or 'artwork'.

II THE CASE FOR FUNDAMENTAL CHANGE

A Case Study – Tensions between Copyright and Indigenous Art

To demonstrate the shortcomings of the *Copyright Act* as a vehicle through which to protect Indigenous art, it is necessary to situate Indigenous art within the particular context of Indigenous peoples' traditional knowledge. As discussed further below, Indigenous peoples' traditional knowledge comprises content that crosses several segments of Anglo-Australian law in that it includes literary and musical works, which may be protected by copyright law; ecological knowledge, which may be manifested in patent law; knowledge about sacred sites, which may be protected by cultural heritage law; and knowledge about land, which may be protected by land rights and native title law.[2] However, these various aspects are not necessarily divisible since things that Anglo-Australian law would perceive as 'intangible', such as ceremonial songs, often enjoy a synergetic relationship with tangible things such as land. Copyright, on the other hand: identifies distinct categories of subject matter capable of protection; is a proprietary right limited to protecting the material expression of ideas; and has experienced a particular historical development with a rationale grounded largely in notions of incentive and reward for economic endeavours.[3]

Indigenous consultations leading to the publication of Terri Janke and Michael Frankel's landmark report *Our Culture: Our Future*,[4] led to the identification of a number of rights relating to ownership of, and control over, Indigenous peoples' traditional knowledge (referred to as 'Indigenous Cultural and Intellectual Property'). These include rights to manage lands, safeguard sacred sites, enjoy full and proper attribution, and prevent derogatory and offensive uses of Indigenous traditional knowledge. These also include rights relating to the control of transmission of knowledge to Indigenous and non-Indigenous peoples, and the right to control and benefit from the commercial use of Indigenous traditional knowledge in accordance with traditional customary laws.[5]

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2 Other intellectual property laws present different challenges to accommodating Indigenous peoples' traditional knowledge. Australia's patent law will only offer protection for, say, ecological knowledge or genetic material when the novelty, inventive step and 'manner of manufacture' tests are satisfied: *Patents Act 1990* (Cth) ss 7, 18. Trade mark law protects only signs used in the course of business activities: *Trade Marks Act 1995* (Cth) s 17. For a brief examination of developments in Canada and New Zealand compared to Australia, see Ros Stein, 'Trade Mark Protection and ICIP: How Does Australia Fare?' (December 2006) *ART+Law* <http://www.artslaw.com.au/ArtLaw/Archive/2006/06TradeMarkProtectionAndICIP.asp> at 23 May 2009. These and other intellectual property laws such as designs (*Designs Act 2003* (Cth)) and plant breeder's legislation (*Plant Breeder's Rights Act 1994* (Cth)) do not recognise ongoing group rights; they cast protection only for individuals, and only for a limited period of time.

3 Michael Blakeney, 'Protection of Traditional Knowledge under Intellectual Law' (2000) 22 *European Intellectual Property Review* 251, 252.

4 Terri Janke, *Our Culture: Our Future, Report on Australian Indigenous Cultural and Intellectual Property Rights* (1998).

5 Terri Janke and Robynne Quiggin, *Indigenous Cultural and Intellectual Property and Customary Law*, Law Reform Commission of Western Australia, Background Paper 12 (2005) 451, 456.

These rights may be categorised as one of three rationales for enforceable protection of Indigenous peoples' traditional knowledge. First, the right to protect against misappropriation of culture is essential for the survival of Indigenous groups whose identity is bound to caring for place. Those peoples may be bound by strict laws governing obligations to share certain information and keep other information secret about certain places.[6]

Secondly, the ways in which cultural information should be shared – and to whom it should be transmitted – are of great importance. Fracturing the security and method of information-sharing processes threatens the cohesiveness and security of an Indigenous group.[7] The third rationale – the ability to control and benefit from commercial use of Indigenous traditional knowledge – overlaps with the first two reasons for seeking change to the *Copyright Act*. While the economic exploitation of rights may or may not be as important as cultural protection and transmission to many Indigenous peoples, it is nonetheless vital to the survival of Indigenous culture that Indigenous artists living in both rural and urban areas are promoted and assisted in, rather than precluded from, participation in the broader Australian economy.[8]

The interconnected relationship between knowledge and country for many Indigenous peoples is a feature of Indigenous peoples' traditional knowledge. The symbiotic association between land and knowledge, often expressed in Indigenous art, has been explained by Indigenous peoples and is well documented in legal and anthropological literature.[9] This association also has received a nod from some members of the judiciary, notwithstanding the lack of support from the majority of the High Court in the context of native title claims.[10]

The right of exploitation of copyright will vest in the person who first expresses the work in material form. This may create problems for Indigenous peoples wanting to prevent dissemination of, for example, a photograph of ancient rock art or a documentary film of a dance ceremony (as opposed to the actual rock art or ceremony) taken by a non-member of the Indigenous group

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6 Janke, 'Our Culture: Our Future', above n 4, 19. See also precursors to this landmark report such as the Commonwealth Department of Home Affairs and Environment, *Report of the Working Party into the Protection of Aboriginal Folklore* (1981) and Commonwealth Attorney-General's Department, *Stopping the Rip-Offs: Intellectual Property Protection for Aboriginal and Torres Strait Islander Peoples*, Issues Paper (1994).

7 Janke, 'Our Culture: Our Future', above n 4, 7.

8 The constructive community role played by a thriving art centre is examined in Part III below. It is a misunderstanding of Indigenous culture to see it 'frozen' at the point of sovereignty. In drawing on and preserving traditions, the cultures of Indigenous peoples have proved to be vibrant and responsive. In the native title context, the High Court has taken a different approach in interpreting the *Native Title Act 1993* (Cth) to require the continuity of a society that existed at the time of settlement: *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422.

9 See, eg, Justice Ronald Sackville, 'Legal Protection of Indigenous Culture in Australia' (2003) 11 *Cardozo Journal of International and Comparative Law* 711, 714–16; Stephen Gray, 'Wheeling Dealing and Deconstruction – Aboriginal Art and the Land Post-*Mabo*' (1993) 3(63) *Aboriginal Law Bulletin* 31; Howard Morphy, *Ancestral Connections: Art and an Aboriginal System of Knowledge* (1991).

10 *Western Australia v Ward* (2002) 213 CLR 1, [562] (Kirby J); *Western Australia v Ward* (2000) 99 FCR 316, [863] (North J).

concerned. This is because underlying ideas or themes are not protected by copyright laws.

Finally, copyright's characterisation as a 'monopoly' right is limited both temporally and substantively. First, copyright in certain works lasts for 70 years after the death of an author with the rationale that works should eventually enter the common domain for public use.[11] This may be unsuitable for Indigenous groups whose cultural knowledge is rooted in generations of ownership and where there is no countervailing public interest in allowing such knowledge to fall within the public domain. Secondly, limitations such as the 'fair dealing' defence permit use of limited parts of a creation, or allow reproduction of a protected work or subject matter in certain circumstances.[12] It may be wholly inappropriate to allow Indigenous art to be subjected to parody or used in circumstances of news reporting, yet consideration of these defences to a copyright claim is more likely to be based on economic grounds rather than as a question of cultural fairness.[13] The adverse impact that the limits of copyright's absolute monopoly has on Indigenous art is further testament to the undesirability of contorting the *Copyright Act* to protect this aspect of Indigenous peoples' traditional knowledge.

B Limitations of Case Law

Decisions such as *Mabo v Queensland (No 2)*,[14] *Cubillo and Gunner v Commonwealth*,[15] *Bulun Bulun v R & T Textiles Pty Ltd*[16] and *Trevorrow v South Australia*[17] have helped raise the domestic and international profile of injustices faced by Australia's Indigenous peoples, and have acted as springboards to parliamentary inquiries and reviews conducted by government appointees,[18] government reports,[19] and occasional legislative change.[20] However, Australian courts are only constitutionally equipped to interpret the law, rather than provide holistic/comprehensive responses to issues outside the current legal system. Thus, the High Court in *Mabo* found that, existing as an incident of sovereignty

11 See *Copyright Act* s 33 for the duration of copyright in original works and *Copyright Act* Pt IV, Div 4 for the duration of copyright in sound recordings, cinematograph films, television broadcasts and published works.

12 For the full range of the recently expanded fair dealing defences, see *Copyright Act* Pt III in relation to works, and div 3 and ss 93–96 for subject matter other than works.

13 See, eg, the examples provided in *Hubbard v Vosper* [1972] 2 QB 84.

14 (1992) 175 CLR 1 ('*Mabo*').

15 (2001) 112 FCR 455 ('*Cubillo*').

16 (1998) 86 FCR 244 ('*Bulun Bulun*').

17 See eg, *Trevorrow v South Australia (No 5)* (2007) 98 SASR 136.

18 See, eg, the Parliamentary Joint Committee on Native Title and the Aboriginal and Torres Strait Islander Land Account, which was established after the decision in *Mabo* to consult on the operation of the *Native Title Act 1993* (Cth) and operated until 2006: see <http://www.aph.gov.au/senate/committee/ntlf_ctte/index.htm> at 1 June 2007. In 1998, a review of the native title system was conducted by John Reeves, *Building on Land Rights for the Next Generation – Report of the Review of the* Aboriginal Land Rights (Northern Territory) Act 1976 (1998).

19 See, eg, Rupert Myer, Commonwealth Department of Communications, Information and the Arts, *Report of the Contemporary Visual Arts and Craft Inquiry* (2002) ('Myer Report').

20 See, eg, the *Native Title Act 1993* (Cth).

itself, it was unable to interrogate the legitimacy of the British Crown's assertion of sovereignty over Australia.

The *Bulun Bulun* case, discussed below, is an example of judicial resistance to reading into the *Copyright Act* notions of customary law. The corollary of attempting to protect Indigenous peoples' traditional knowledge through conventional copyright laws is the validation of laws that cannot adequately protect this knowledge.[21] There is risk in this strategy, as judicial precedent and legislative amendments may be represented as providing significant protection, enabling legislators and policy-makers to strike the issue from the reform agenda without effecting meaningful change.[22]

In the copyright context, the case law has played a valuable role in bringing to the attention of the world the legal issues surrounding Indigenous art.[23] The common law's inability to broaden copyright's conceptual scope has not been recognised, and its legal significance has been too frequently overstated. Further exploration of issues raised by the case law is necessary, as much commentary still tends to overstate the ability of copyright law to safeguard Indigenous peoples' traditional knowledge contained in Indigenous art.[24]

The individual/group dialectic is a major issue in reconciling Indigenous ownership with the type of ownership contemplated by the *Copyright Act*. Indigenous traditional knowledge is frequently 'collectively owned, socially based and evolving continuously',[25] while copyright law sees creations as individually authored, or co-authored, with first ownership of the subject matter flowing from this. Justice von Doussa in *Bulun Bulun* found that the joint-ownership provisions in the *Copyright Act* require more than the mere 'inspiration' that group knowledge transmitted over the generations can provide.[26]

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21 See, eg, Jane Anderson, 'The Politics of Indigenous Knowledge: Australia's Proposed Communal Moral Rights Bill' (2004) 27(3) *University of New South Wales Law Journal* 585.

22 Ibid 590. See also Pat O'Malley, *Law, Capitalism and Democracy: A Sociology of Australian Legal Order* (1983) 104, cited in Jane Anderson, 'Indigenous Communal Moral Rights: The Utility of an Ineffective Law' (2004) 5(30) *Indigenous Law Bulletin* 8, 10.

23 See, eg, Susan Sell and Christopher May, 'Moments in Law: Contestation and Settlement in the History of Intellectual Property' (2001) 8 *Review of International Political Economy* 467.

24 For example, Jane Anderson is highly critical of the Copyright Amendment (Indigenous Communal Moral Rights) Bill 2003 (Cth) but also refers to the 'apparent success of copyright law in responding to Indigenous needs' in its demonstration of 'tangible outcomes in terms of economic restitution and the delivery up (supply) of carpets, material, T-shirts, etc, to the communities involved': Anderson, 'The Politics of Indigenous Knowledge', above n 21, 590 fn 23. Also, Terri Janke and Robynne Quiggin outline the problems with existing laws in their numerous publications but call for 'more test cases' and in their most recent report commend the Government for its attention towards group moral rights, calling again for the introduction of a communal rights bill: Terri Janke and Robynne Quiggin, *Indigenous Cultural and Intellectual Property: the Main Issues for the Indigenous Arts Industry*, Aboriginal and Torres Strait Islander Arts Board, Australia Council, Background Paper 12 (2006) 9, 13.

25 Janke and Quiggin, 'Indigenous Cultural and Intellectual Property and Customary Law', above n 5, 456.

26 *Bulun Bulun* (1998) 86 FCR 244, 245. Section 10(1) of the *Copyright Act* provides the definition of 'work of joint-authorship'. Sam Ricketson explains that an author must have contributed to expressing the idea in material form rather than merely providing the idea for the subject matter: Sam Ricketson, *The Law of Intellectual Property: Copyright, Designs and Confidential Information* (1999) [14.135].

Further, Indigenous 'ownership' needs to be understood in a different sense from the 'proprietary' sense of ownership that forms the basis of Anglo-Australian real and intellectual property law. The customary laws of different Indigenous groups generally require the preservation and transmission of cultural knowledge. These responsibilities are essentially the concomitants of the rights of possession and expression that are endowed by such customary laws.[27] In this vein, much has been made of *Milpurrurru v Indofurn Pty Ltd*[28] as a pivotal moment in Indigenous copyright case law. Upon finding that imported carpets bore substantial reproductions of the Indigenous artworks in question, von Doussa J awarded damages on the basis of the 'cultural harm' the respondents had caused the artists in preventing their discharge of responsibilities to the group.[29] However, the *Copyright Act* explicitly provides for the court to take into account all 'circumstances' relating to the infringement of copyright.[30] This does not equate with judicial recognition of the nature and obligations of Indigenous groups in establishing copyright *ownership*.

The *Bulun Bulun* case involved a copyright dispute over the reproduction on fabric of a waterhole design by John Bulun Bulun, a Ganalbingu man. The design was printed in Indonesia and imported to Australia.[31] Justice von Doussa articulated the nuances of Indigenous ownership in finding that the entire Ganalbingu group enjoyed an interest in the painted depiction of a waterhole such that the artist owed a fiduciary duty to the group. It is notable, however, that this finding was made on the basis of equitable principles and not copyright law.[32] The importance of *Bulun Bulun* has also been overstated in other respects. While the *Bulun Bulun* decision has been lauded as the high water mark in judicial recognition of Indigenous peoples' traditional knowledge, Kimberlee Weatherall has commented that it will only ever have a limited practical effect. She notes that the fiduciary obligation is discharged by the bringing of a court action to halt a third party's infringement. Not only is this a response-based – and potentially prohibitively expensive – solution, an Indigenous person or group is unlikely ever to refuse to take steps to prevent a third party's infringement of their traditional knowledge. Moreover, as discussed further below, there may actually be some detriment in permitting the judicial system to involve itself in

27 Janke and Quiggin, 'Indigenous Cultural and Intellectual Property and Customary Law', above n 5, 456.
28 (1994) 54 FCR 240.
29 *Milpurrurru v Indofurn Pty Ltd* (1994) 54 FCR 240, 278.
30 See *Copyright Act* s 115(4) and, eg, *Milpurrurru v Indofurn Pty Ltd* (1994) 54 FCR 240, 277–8: von Doussa J refers to cases such as *Williams v Settle* [1960] 1 WLR 1072.
31 See also Martin Hardie, 'The Bulun Bulun Case: John Bulun Bulun & Anor v R & T Textiles Pty Ltd' (1998) 4(16) *Indigenous Law Bulletin* 24.
32 *Bulun Bulun* (1998) 86 FCR 244, 262.

interpreting and enforcing intra-group customary laws by applying fiduciary law.[33]

Another theme underpinning the collective nature of the ownership of Indigenous peoples' traditional knowledge is reduced enjoyment of copyright once established. Indigenous groups may need to grant consent for different uses of a work through the relevant group's decision-making processes,[34] yet this is a limit on the enjoyment of rights which copyright law may not be able to contemplate. The facts in *Yambulul v Reserve Bank of Australia*[35] provide an example of this: an Indigenous group's consent for the depiction of a sacred design, the 'Morning Pole', in one circumstance (in a painting that was to be disclosed to non-Indigenous people) was insufficient consent for the use of the design for another purpose (wide dissemination through its reproduction on a bank note).[36]

C Amending the *Copyright Act*?

Some attention has been given to the possibility of amending the *Copyright Act* to protect aspects of Indigenous art through the vehicle of 'communal moral rights'. Prior to the 2007 election, the former federal Attorney-General announced that copyright amendment was to form part of the Australian Government's 2007 legislative agenda.[37] Moreover, the July 2007 Senate Committee Inquiry into the Indigenous Visual Arts and Craft Sector recommended that legislation introducing Indigenous moral rights be implemented 'as a matter of priority'.[38] In August 2008, the Labor Government indicated that it had not made a decision on whether to amend the *Copyright Act* to introduce group moral rights, but that the Attorney-General's Department was preparing a briefing for the Attorney-General on the issue.[39]

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33 Kimberlee Weatherall, 'Culture, Autonomy and Djulibinyamurr: Individual and Community in the Construction of Rights to Traditional Designs' (2001) 64 *Modern Law Review* 215, 221–2. However, Johanna Gibson examines various forms of equitable relief, including constructive and express trusts, and argues that these can be used 'creatively'. Gibson notes that '[e]quity provides the most promising and important means by which the traditional laws of Indigenous people can inform Anglo Australian legal principles': Johanna Gibson, 'Justice of Precedent, Justice of Equity: Equitable Protection and Remedies for Indigenous Intellectual Property' (2001) 6(4) *Australian Indigenous Law Reporter* 1, 21.

34 Janke and Quiggin, 'Indigenous Cultural and Intellectual Property and Customary Law', above n 5, 456.

35 (1991) 21 IPR 481.

36 It is, however, important to note that the outcome of this case was based on contractual rather copyright issues; the court was concerned with whether the artist intended to assign his copyright to the Reserve Bank or licence it for the purpose of the latter usage: Anderson, 'The Politics of Indigenous Knowledge' above n 21, 598 fn 63. One, albeit limited, way to deal with these issues may be to consider the role of licensing agreements in limiting the purpose or cultural context of use.

37 Philip Ruddock, 'Copyright: From "The Da Vinci Code" to YouTube' (Opening address delivered at the Australian Centre for Intellectual Property in Agriculture 12th Annual Copyright Conference, Brisbane, 16 February 2007).

38 Senate Standing Committee on Environment, Communications, Information Technology and the Arts, Parliament of Australia, *Indigenous Art – Securing the Future: Australia's Indigenous Visual Arts and Crafts Sector* (2007) Recommendation 24.

39 See Australian Government, *Response to the Senate Standing Committee on Environment, Communications, Information Technology and the Environment Committee Report* (2008) 12.

Moral rights are based on a European-imported concept of inalienable artistic worth that exists within a creation, regardless of its economic value.[40] As moral rights sit, sometimes uncomfortably, within a copyright framework, they are possessed by identifiable *authors*, creating the same set of issues discussed above. In 2000, the Australian Government responded to its obligations under the *Berne Convention for the Protection of Literary and Artistic Works*,[41] and amended the *Copyright Act* to recognise three individually held moral rights: the right of attribution; the right against false attribution; and the author's right to have their work treated with integrity and not in any kind of derogatory fashion.[42] Moral rights in performership were introduced in July 2007 as part of the implementation of the US Free Trade Agreement.[43] No Australian case law has yet considered the scope of the amendment, but it is suggested that, in the context of an Indigenous artwork, offensive treatment may include cropping or rotating a work to corrupt the meaning of the law/lore contained within, or placing a work in an inappropriate place.[44]

In the 1999 Parliamentary debates over the introduction of moral rights legislation, Senator Aden Ridgeway attempted to address the tension between individual and collective ownership in suggesting an expansion of Australia's moral rights regime to Indigenous groups. Three years later, the Myer Report recommended the introduction of moral rights that would attach to an Indigenous group rather than a single artist.[45] In 2003, an exposure draft of the Copyright Amendment (Indigenous Communal Moral Rights) Bill 2003 (Cth) ('ICMR Bill') was circulated by the then Attorney-General Philip Ruddock among certain stakeholders on a confidential basis. The primary feature of the proposed ICMR Bill was the extension of individually held moral rights to Indigenous communities. Several submissions criticised the drafting of the Bill and its introduction was postponed, ostensibly until 2006. The Bill was not introduced before the 2007 election, and, at the time of writing in April 2009, there has not been any indication that the Bill would be introduced. A matter of great concern

40 See, generally, Maree Sainsbury, *Moral Rights and their Application in Australia* (2003).

41 *Berne Convention for the Protection of Literary and Artistic Works*, opened for signature 9 July 1886, 943 UNTS 178, art 6*bis* (entered into force in Australia 1 March 1978). The *Berne Convention* provides an international framework for protection of author's rights.

42 The *Copyright Amendment (Moral Rights) Act 2000* (Cth) inserted ss 189–195AZO into the *Copyright Act*.

43 *US Free Trade Implementation Act 2004* (Cth) s 110; *Copyright Act* ss 195AI–195AL.

44 Terri Janke, 'Moral Rights and Protecting the Cultural Rights of Indigenous Artists' (September 2000) *ART+Law* <http://www.artslaw.com/ArtLaw/Archive/00Moralrights-IndigenousArtists.asp> at 26 April 2009. See also a pre-2000 Full Federal Court's affirmation of the trial judge's finding on 'debasement' in relation to s 55(2) adaptation of a work, although note disagreement over whether a subjective or objective test was appropriate: *Schott Musik International GmBH & Co v Colossal Records of Australia Pty Ltd* (1997) 75 FCR 321.

45 Myer Report, above n 19, 158.

was the lack of consultation in the initial drafting stage; there has been little indication that Indigenous consultation has since taken place.[46]

The proposed ICMR Bill was flawed in other ways. Dr Jane Anderson has deconstructed the terminology of the Bill. She has demonstrated that it would allow the concept of a homogenous Indigenous society encapsulated in the term 'Indigenous community' to become cemented in legislation, officially obscuring differences between the traditions, customs and experiences of the myriad Indigenous groups in Australia.[47] This is an observation that must be borne in mind for all Indigenous-specific law reform. Moreover, the Bill served to reinforce the Anglo-Australian legal perception of a static Indigenous society without recognising the fluidity and responsive nature of Indigenous systems of social organisation.[48]

On an operational level, the manner in which the Bill provided for Indigenous communal moral rights coming into existence has been the subject of trenchant criticism.[49] In addition to the requirement that the work must be 'made' and that it must 'draw on the traditions, beliefs, observances or customs of the community' as logical prerequisites to an Indigenous group's moral rights, the Bill also included further onerous requirements. These were that an agreement to create the work must have existed between the author and the community, the connection between the Indigenous community and the work must be acknowledged on the work itself, and a written notice of consent must have been obtained by the author or their representative from everyone with an interest in the work. Requiring acknowledgment of connection places too high a burden on an Indigenous group for it to be the qualifying factor for the existence of moral rights. Yet it is the consent requirement that is of greatest concern: could it mean that permission must be obtained by *all* parties with a possible interest in the work? Would it include, say, a member of the group currently not residing with the group, or the person or body that commissioned an artwork? Requiring an Indigenous community to locate and acquire the permission of all possible parties with an interest in the work would have had the potential to render the legislation ineffective in its operation.

The fundamental and insurmountable problem with utilising a moral rights regime to protect Indigenous cultural knowledge is that such a regime must sit within the *Copyright Act*. This would again draw one expression of Indigenous peoples' traditional knowledge within the purview of a law that is not structurally equipped to deal with its complexity. For example, as has been noted above, the

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46 For an overview of the 2003 moral rights bill, see Samantha Joseph and Erin Mackay, 'Moral Rights and Indigenous Communities' (September 2006) *ART+Law* <http://www.artslaw.com.au/artlaw/Archive/2006/06MoralRightsAndIndigenousCommunities.asp> at 23 December 2008.

47 Anderson, 'The Politics of Indigenous Knowledge', above n 21, 591–2.

48 Ibid 599–600.

49 Ian Macdonald, 'Indigenous Communal Moral Rights Back on the Agenda' (2003) 16(4) *Australian Intellectual Property Law Bulletin* 47, 47–8; Colin Golvan, 'Protection of Australian Indigenous Copyright: Overview and Future Strategies' (2006) 65 *Intellectual Property Forum: Journal of the Intellectual Property Society of Australia and New Zealand* 10, 14–15; Anderson, 'The Politics of Indigenous Knowledge', above n 21; Joseph and Mackay, above n 46.

ICMR Bill would not have protected works in which copyright would have expired, nor aspects of Indigenous peoples' traditional knowledge that were incapable of being awarded copyright protection. The requirement for copyright to subsist prior to moral rights arising is deeply problematic given the inability of copyright law to protect aspects of Indigenous peoples' traditional knowledge.

The experience of the 2003 ICMR Bill indicates that meaningful copyright reform may be a long time coming. Moreover, if the ICMR Bill is characteristic of a Government response to calls for copyright reform, then such calls are detrimental to the pursuit of the protection of Indigenous peoples' traditional knowledge. Attractively titled responses such as the ICMR Bill may appeal to some advocates of Indigenous rights but the danger is that such 'reform' may become an excuse not to introduce a badly needed instrument that fully recognises and protects the multi-faceted aspects of Indigenous peoples' traditional knowledge. The Labor Government's response to the recommendations made by a recent Senate Committee Inquiry, discussed below, reflects this reality.[50] This is not to denounce all Indigenous-specific responses by the legislature, but it is to advocate that any 'targeted' response must be subject to appropriate scrutiny to ensure that it is introduced for an appropriate reason and, by extension, that it meets its objectives. The next pressing question is how best to secure such an outcome.

III BEYOND THE *COPYRIGHT ACT*

The previous Part has argued that, rather than amending and re-interpreting laws such as copyright, there is an urgent need to reshape the conceptual landscape. For both academic commentators and international bodies, the next step at this point often is to suggest through 'other' means, either through a range of regulatory methods and private law,[51] or through some form of instrument that provides sui generis protection of rights.[52] Against the backdrop of relevant developments in the international and domestic spheres, this Part considers the best way to proceed.

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50 Australian Government, 'Response to the Senate Standing Committee', above n 39.

51 Kathy Bowrey, 'Alternative Intellectual Property?: Indigenous Protocols, Copyleft and New Juridifications of Customary Practices' (2006) 6 *Macquarie Law Journal* 65.

52 See, eg, Janke, 'Our Culture: Our Future', above n 4, ch 18; Matthew Rimmer, 'Australian Icons: Authenticity Marks and Identity Politics' (2004) 3 *Indigenous Law Journal* 139; Andrew T Kenyon, 'Copyright, Heritage and Australian Aboriginal Art' (2000) 9 *Griffith Law Review* 303; Kanchana Kariyawasam and Scott Guy, 'Intellectual Property Protection of Indigenous Knowledge: Implementing Initiatives at National and Regional Levels' (2007) 12(2) *Deakin Law Review* 105; Stephen McJohn and Lorie Graham, 'Indigenous Peoples and Intellectual Property' (2005) 19 *Washington University Journal of Law and Policy* 313; Chidi Ougamanam 'Protecting Indigenous Knowledge in International Law: Solidarity Beyond the Nation State' (2004) 8 *Law Text Culture* 191; Carlos Correa, 'Protecting Traditional Knowledge: Lessons from National Experiences' (Paper presented at UNCTAD Conference, Geneva, 4–6 February 2004). For an argument against the implementation of sui generis rights, discussed further below, see Bowrey, above n 51.

A International Developments

The protection of Indigenous peoples' traditional knowledge has been considered by a number of international agencies, including:

- United Nations ('UN') Permanent Forum on Indigenous Issues;[53]
- Expert Mechanism on Indigenous Issues;[54]
- Sub-Commission on the Prevention of Discrimination and the Protection of Minorities;[55]
- Special Rapporteur on the Human Rights and Fundamental Freedoms of Indigenous Peoples;[56]

53 The Permanent Forum was established in 2002 as an advisory body to the UN Economic and Social Council. It comprises 16 members, eight of whom are Indigenous experts, and attracts several NGO, State and Indigenous organisations as observers to its annual meetings. The mandate of the Permanent Forum is to report and provide recommendations to the UN Economic and Social Council on economic and social development, culture, the environment, education, health and human rights. It is also tasked with awareness-raising, promotion of the integration and coordination of activities relating to Indigenous issues within the UN system, and the preparation and dissemination of information on Indigenous issues. The most recent sessions of the Permanent Forum have carried the themes of Territories, Lands and Natural Resources (sixth session), and Climate Change, Bio-cultural Diversity and Livelihoods: The Stewardship Role of Indigenous Peoples and New Challenges (seventh session). See UN Permanent Forum on Indigenous Issues <http://www.un.org/esa/socdev/unpfii/> at 23 December 2008.

54 In December 2007, the UN Human Rights Council adopted a resolution to establish a new expert mechanism on Indigenous issues to address human rights issues relevant to Indigenous peoples. The Expert Mechanism assists the Human Rights Council on the implementation of its mandate by providing thematic reports and proposals. The first meeting of the Expert Mechanism was held in October 2008 in Geneva and Indigenous traditional knowledge will likely be on the agenda for future sessions: Office of the United Nations High Commissioner for Human Rights, *Expert Mechanism on the Rights of Indigenous Peoples* (2008) <http://www2.ohchr.org/english/issues/indigenous/ExpertMechanism/index.htm> at 23 December 2008.

55 *Draft Principles and Guidelines for the Protection of the Heritage of Indigenous Peoples* (1995). Released by Erica Irene-Daes, the Special Rapporteur for the UN Sub-Commission on the Prevention of Discrimination and the Protection of Minorities, these guidelines promote a holistic approach to the protection of Indigenous heritage and knowledge.

56 The Special Rapporteur (currently Professor James Anaya) fulfils his or her mandate by: presenting to the Human Rights Council reports on particular topics or situations of special importance regarding the promotion and protection of the rights of indigenous peoples; undertaking country visits; exchanging information with governments concerning alleged violations of the rights of Indigenous peoples; and undertaking activities to follow-up on the recommendations included in reports. In 2007, the first Special Rapporteur, Dr Rodolfo Stavenhagen released an annual report that considered, amongst other things, Indigenous peoples and intellectual property rights: Rodolfo Stavenhagen, *Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People*, UN Doc A/HRC/4/32 (2007).

- World Intellectual Property Organisation (WIPO) Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (IGC);[57] and
- Secretariat of the *UN Convention on Biological Diversity 1992*.[58]

Indigenous peoples' international advocacy culminated in September 2007 with the adoption by the UN General Assembly of the *Declaration on the Rights of Indigenous Peoples* ('*Declaration*').[59] The *Declaration* is an aspirational document in international law, and of itself does not affect the domestic law of nation states that endorse it.[60] Nonetheless, the *Declaration* is significant because it represents over twenty years of negotiation between Indigenous peoples and nation-states, and was adopted almost unanimously by UN member states (with Australia, Canada, the United States and New Zealand voting against its adoption). The *Declaration* draws on existing international law by elaborating upon 'fundamental rights in the specific cultural, historical, social and economic circumstances of Indigenous peoples'.[61] It provides guidance to the conduct of states, and eventually may form part of international customary law and affect

57 In the late 1990s, WIPO conducted fact-finding missions to 28 countries to ascertain the intellectual property needs and expectations of traditional knowledge holders. In 2001, the IGC was established to address the issues arising from the report. The IGC comprises: the 184 member states of WIPO; members of the European Union; inter-governmental organisations and international and regional NGOs accredited as observers; and over 150 ad hoc observers, including Indigenous groups. Since 2004, the IGC has been developing draft provisions for the protection of TCEs, TKs and genetic resources. At its most recent session in October 2008, the IGC continued to consider, for both TCEs and TK: (i) agreed Lists of Issues; (ii) draft sets of Revised Objectives and Principles, and (iii) draft gap analyses on protection: See, eg, Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore, *Protection of Traditional Cultural Expressions: Overview,* WIPO/GRTKF/IC/13/4 (A)(2008) and *The Protection of Traditional Cultural Expressions: Draft Gap Analysis*, WIPO/GRTKF/IC/13/4/(B)Rev (2008). It also considered a range of issues relating to the intellectual property aspects of genetic resources: see, eg, *Genetic Resources: List of Options,* WIPO/GRTKF/IC/13/8(A) (2008).

58 *Convention on Biological Diversity*, opened for signature 5 June 1992, 31 ILM 818, art 8(j). The *Convention on Biological Diversity* is dedicated to the promotion of sustainable development. In relation to Indigenous traditional knowledge, its work is focused on access rights and benefit-sharing of traditional knowledge rights. See, eg, Convention on Biological Diversity, *Article 8(j): Traditional Knowledge, Innovations and Practices* (2008) <http://www.cbd.int/traditional/> at 23 December 2008.

59 For example, Haudenosaunee Chief Deskaheh and Maori leader T W Ratana (unsuccessfully) sought audiences at the League of Nations in Geneva in 1923 and 1925 respectively: see UN Permanent Forum on Indigenous Issues, *A Brief History of Indigenous Peoples and the International* (2006) <http://www.un.org/esa/socdev/unpfii/en/history.html> at 23 December 2008. In addition, a number of relevant statements also have been made by Indigenous groups: See, eg, *Julayinbul Declaration on Indigenous Intellectual Property Rights* (1993) (Australia); *Mataatua Declaration on Cultural and Intellectual Property Rights of Indigenous Peoples* (1993) (New Zealand); and *Cusco Declaration on Access to Genetic Resources, Traditional Knowledge and Intellectual Property Rights of Like-Minded Megadiverse Countries* (2002) (Peru).

60 Megan Davis, 'United Nations Declaration on the Rights of Indigenous Peoples' (2008) 9 *Melbourne Journal of International Law* 439.

61 S James Anaya, *Draft Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People – The Human Rights of Indigenous Peoples, in Light of the New Declaration, and the Challenge of Making them Operative*, [40], UN Doc A/HRC/9/9 (2008).

international and Australian domestic law.[62] On 3 April 2009, the Labor Government indicated its formal support for the *Declaration*.[63]

Under the *Declaration*, Indigenous peoples have the right to full enjoyment, either as a group or as individuals, of all human rights and fundamental freedoms recognised in international human rights law.[64] Also contained in the *Declaration* are a number of articles that are particularly relevant to the protection of Indigenous peoples' traditional knowledge – most notably, article 31:

> Indigenous peoples have the right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions, as well as the manifestations of their sciences, technologies and cultures, including human and genetic resources, seeds, medicines, knowledge of the properties of fauna and flora, oral traditions, literatures, designs, sports and traditional games and visual and performing arts. They also have the right to maintain, control, protect and develop their intellectual property over such cultural heritage, traditional knowledge, and traditional cultural expressions.[65]

This, and several other articles in the *Declaration*, contain subsequent clauses with significant practical implications that compel states to act in conjunction with Indigenous peoples. For example, article 31(2) requires states to take effective measures to ensure ongoing recognition and protection for rights contained in article 31.[66] Indigenous peoples' input into 'effective redress' is critical.[67]

In addition to the *Declaration*, some protection is found within general international rights instruments ratified by the Australian Government. To varying degrees, the *United Nations Declaration on Human Rights*,[68] the *International Covenant on Civil and Political Rights*[69] and the *International*

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62 Davis, above n 60.

63 See Jenny Macklin, *Statement on the United Nations Declaration on the Rights of Indigenous Peoples* (2009) <http://www.jennymacklin.fahcsia.gov.au/internet/jennymacklin.nsf/content/un_declaration_03apr09.htm > at 14 April 2009.

64 *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, UN GAOR, 61st sess, 107th plen mtg, UN Doc A/RES/61/295 (2007), art 1.

65 *United Nations Declaration on the Rights of Indigenous Peoples* art 31(1). In addition, art 11(1) provides that Indigenous peoples have the right to practise and revitalize their cultural traditions and customs; art 12(1) provides that Indigenous peoples have the right to manifest, practise, develop and teach their spiritual and religious traditions, customs and ceremonies; the right to maintain, protect, and have access in privacy to their religious and cultural sites; the right to the use and control of their ceremonial objects; and the right to the repatriation of their human remains; art 13(1) provides that Indigenous peoples have the right to revitalise, use, develop and transmit to future generations their histories, languages, oral traditions, philosophies, writing systems and literatures, and to designate and retain their own names for communities, places and persons; and art 24(1) provides that Indigenous peoples have the right to their traditional medicines and to maintain their health practices, including the conservation of their vital medicinal plants, animals and minerals. Indigenous individuals also have the right to access, without any discrimination, to all social and health services.

66 *United Nations Declaration on the Rights of Indigenous Peoples* art 31(2).

67 Anaya, above n 61.

68 *United Nations Declaration on Human Rights*, GA Res 217A (III), UN GAOR, 3rd sess, 183rd plen mtg, UN Doc A/RES/217A (III) (1948). See especially art 27.

69 *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976). See especially art 27.

Covenant on Economic, Cultural and Social Rights[70] provide recognition of some rights with respect to Indigenous traditional knowledge. Other rights are found in the UNESCO *Convention for the Safeguarding of Intangible Cultural Heritage* (2003),[71] the Food and Agriculture Organisation's *International Treaty on Plant Genetic Resources for Food and Agriculture*,[72] and the *Convention on Biological Diversity*.[73]

These international laws and instruments represent significant achievements for the protection of Indigenous rights, including those relevant to the practice and preservation of traditional knowledge. Binding international instruments provide for the recognition of a minimum standard of rights protection to which a number of states have agreed. Non-binding instruments such as the *Declaration* provide guidance to states, as states that have not endorsed binding instruments can still be informed by the rights contained in such documents.[74] Consideration of a rights framework at the domestic level, therefore, should be informed by these significant developments at the international level.

However, international rights protection is not without pitfalls. While the *Declaration* can provide guidance to the Australian Government, for example, and should inform its decision making, it does not bind the Australian Government. Legislative protection of rights contained in a binding international instrument such as those discussed above is afforded only once an international instrument has been ratified by the Australian Executive and enacted as part of domestic law by the Australian Parliament.[75]

Further, the nature of international negotiation means that international instruments provide necessarily general principles of protection, rather than

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70 *International Covenant on Economic, Cultural and Social Rights*, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976). See especially art 15.

71 United Nations Educational, Scientific and Cultural Organization, *Universal Declaration on Cultural Diversity* (2001), *Convention for the Safeguarding of Intangible Cultural Heritage* (2003) and *Convention on the Protection and Promotion of the Diversity of Cultural Expressions* (2005).

72 *International Treaty on Plant Genetic Resources for Food and Agriculture*, opened for signature 4 November 2002 (entered into force 29 June 2004).

73 *Convention on Biological Diversity*, opened for signature 5 June 1992, 31 ILM 818, art 8(j). Note, however, that this article requires parties to preserve and maintain knowledge, innovations and practice, this 'is limited to situations where traditional knowledge is relevant to biological diversity and [it] is not designed to provide holistic protection for Indigenous traditional knowledge': Michael Dodson and Olivia Barr, 'Breaking the Deadlock: Developing an Indigenous Response to Protecting Indigenous Traditional Knowledge' (2007) 11(2) *Australian Indigenous Law Review* 19, 22.

74 Other examples of non-binding international instruments include: authoritative or persuasive interpretations or elaborations of existing legal instruments a high-level political resolution, declaration or decision; strengthened international coordination through guidelines or model laws: Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore, *Summary of Options for the International Dimension of the Committee's Work*, WIPO/GRTKF/IC/13/6, [4]. To this list, Michael Dodson and Olivia Barr have added: some form of framework agreement; or a memorandum of understanding may represent options for rights protection at the international level: Dodson and Barr, above n 73.

75 The desirability of a domestic sui generis instrument is discussed further below.

recognition of rights particular to any Indigenous group.[76] In part, this is because detailed protection in an international instrument is likely to significantly slow down the process of negotiation between several parties. Detailed protection also runs the risk of operating in a prescriptive manner and not recognising rights relevant to specific Indigenous groups.[77] In addition, requiring States to agree on content and form of protection means that State, rather than Indigenous, interests remain paramount.[78] Finally, the consideration of Indigenous issues in multiple international forums may lead to fragmentation of rights recognition and protection even at the international level.

These shortcomings indicate that, while international law provides essential guidance and broad-brush rights protection, particularly as it marches further ahead of Australian practice, the concomitant development of relevant domestic instruments is essential to attain appropriate rights protection in this area.

B Conceptual Basis for Another Framework

There is a tension in suggesting, first, that there should be a shift in focus from the intellectual property system, and secondly, that this system could inform the basis of another rights framework. This tension is reflected at an international level, where until recently much of the work on protection of traditional cultural expressions and traditional knowledge has been conducted by an intergovernmental committee of WIPO.[79]

Customary law may be a more appropriate source of protection for Indigenous peoples' traditional knowledge.[80] Indeed, a number of jurisdictions have implemented sui generis protection for Indigenous peoples' traditional knowledge based on customary laws, including, in the Pacific region, the Pacific

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76 Peter Drahos, 'Towards an International Framework for the Protection of Traditional Group Knowledge and Practice' (Paper presented at UNCTAD Conference, Geneva, 4–6 February 2004) 4; Jane Anderson, *The Production of Indigenous Knowledge in Intellectual Property Law* (D Phil Thesis, University of New South Wales, 2003) 315–6.

77 Dodson and Barr, above n 73, 27.

78 Note that at the 13th session of the IGC at WIPO in Geneva in October 2008, only one Indigenous observer nominated by an accredited Indigenous observer from Australia received funding from the Voluntary Contributions Fund to attend. Patricia Adjei from the Arts Law Centre of Australia: Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore, *Voluntary Fund for Accredited Indigenous and Local Communities: Information Note on Contributions and Applications for Support*, WIPO/GRTKF/IC/13/INF/4 (2008). In addition, Indigenous peoples representatives from Africa put in an alternative proposal to that prepared on behalf of the States: *African Group Proposal on the Protection of Traditional Knowledge, Traditional Cultural Expressions and Genetic Resources*, WIPO/GRTKF/IC/13/9 (2008).

79 WIPO is a UN agency dedicated to 'developing a balanced and accessible international intellectual property (IP) system, which rewards creativity, stimulates innovation and contributes to economic development while safeguarding the public interest': World Intellectual Property Organization 'What is WIPO' (2008) <http://www.wipo.int/about-wipo/en/what/> at 23 December 2008. Since 2001, a WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (IGC) has been developing draft provisions on traditional cultural expressions and traditional knowledge, discussed further below.

80 See, eg, Dodson and Barr, above n 73; Paul Kuruk, 'The Role of Customary Law Under Sui Generis Frameworks of Intellectual Property Rights in Traditional and Indigenous Knowledge' (2007) 17 *Indiana International and Comparative Law Review* 67.

Model Law.[81] A similar shift in thinking is taking place in the international arena. In 2007, Special Rapporteur Professor Mick Dodson recommended to the UN Permanent Forum on Indigenous Issues ('Permanent Forum') that it should:

> commission a study, under its mandate to prepare and disseminate information, to determine whether there ought to be a shift in the focus on the protection of indigenous traditional knowledge away from intellectual property law to protection via customary law, and if so, how this should occur. The study should consider how indigenous traditional knowledge could be protected at an international level by utilizing customary law, including the extent to which customary law should be reflected, thereby providing guidance to States and subsequently protection at national and regional levels.[82]

Comments on this recommendation were invited from Indigenous peoples, relevant private sector bodies, NGOs and United Nations agencies.[83] In May 2008, the Permanent Forum requested the secretariat of the Convention on Biological Diversity and WIPO for assistance in finalising the study.[84] The Permanent Forum may provide a view on this in its Eighth Session, to be held in May 2009.

To base the recognition of Indigenous peoples' traditional knowledge on customary law, however, is not without its difficulties. For example, if an enforceable instrument is used as the basis of this law, a key issue is who or what body will arbitrate disputes. In the international context, Professor Dodson and Olivia Barr query whether it is appropriate to task a non-Indigenous body with the power to interpret such laws. They suggest that, while a body such as the International Court of Justice may usefully settle disputes, it may 'usurp the power of interpretation and therefore law-making power from Indigenous peoples'.[85]

In addition, Professor Paul Kuruk notes that the success of a sui generis system based on customary laws is dependent on the extent to which these laws are already recognised by a relevant legal system.[86] While copyright generally has fallen short in recognising customary laws, some Anglo-Australian laws have

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81 Regional frameworks include the *African Model Law for the Protection of the Rights of Local Communities, Farmers, Breeders and Regulation of Access to Biological Resources* (adopted by the Council of Ministers of the Organization of African Unity, June 1998); *Model Law for the Protection of Traditional Knowledge and Expressions of Culture 2002* (Pacific Model Law). National frameworks protecting customary laws include: *On Legal Projection of Azerbaijani Expressions of Folklore 2003* (Azerbaijan); *Special Intellectual Property Regime on Collective Rights of Indigenous People for Protection and Defense of Cultural Identity as their Traditional Knowledge, Law No 20, 2000* (Panama); *Indigenous Peoples Rights Act 1997* (Philippines); *Law on the Protection and Preservation of Cultural Goods 1999* (Croatia); and *Cultural Heritage Law 2001* (Vietnam).

82 *Permanent Forum on Indigenous Issues – Report of the Secretariat on Indigenous Traditional Knowledge*, UN ESCOR UN Doc [24] E/C.19/2007/10 (2007). This recommendation followed consideration of the issue by the Permanent Forum and the International Technical Workshop on Indigenous Traditional Knowledge: see, eg, *Report of the International Technical Workshop on Indigenous Traditional Knowledge***,** UN Doc E/C.19/2006/2 (2005)**.**

83 See, eg, United Nations Permanent Forum on Indigenous Issues, *UNPFII Special Rapporteurs –Feedback* (2007) <http://www.un.org/esa/socdev/unpfii/en/special_rapporteurs.html> at 23 December 2008.

84 *Permanent Forum on Indigenous Issues – Report on the Seventh Session (21 April – 2 May 2008)* UN ESCOR, [84], UN Doc E/C.19/2008/13 (2008).

85 Dodson and Barr, above n 73, 27.

86 Kuruk, above n 80.

recognised some customary laws of Indigenous peoples in the realms of property, criminal, family and succession laws, albeit in a piecemeal way.[87] This provides some basis for protecting Indigenous traditional knowledge in this way. Professor Kathy Bowrey also has suggested that Indigenous protocols may represent a new form of custom that may be recognised by intellectual property laws.[88] The benefits and drawbacks of a range of domestic instruments in this area are considered below.

C Codes and Protocols

Increasingly, codes and protocols that recognise Indigenous culture are being developed for use in the arts and entertainment industries. For example, the Melbourne City Council has implemented a code of conduct for galleries and retailers of Indigenous art in the council area.[89] The Australia Council has produced protocols for Indigenous writing, visual arts, media arts, music and performing arts.[90] Screen Australia and SBS also have produced protocols for working with Indigenous peoples and content in film and television.[91]

At the national level, the development of a voluntary code for the Indigenous arts industry in Australia formed the general thrust of recommendations made by the Senate Standing Committee on Environment, Communications, Information Technology and the Arts ('Senate Committee') inquiry into the Indigenous arts and crafts industry in June 2007.[92] In December 2008, the Hon Peter Garrett, Minister for Environment, Heritage and the Arts, and the Australia Council for

87 See, eg, Australian Law Reform Commission, *The Recognition of Aboriginal Customary Laws*, Report 31 (1986) ch 6 'The Recognition of Aboriginal Customary Laws and Traditions Today'. Also, there have been amendments since the ALRC released its seminal report; eg, amendments to the *Crimes Act 1914* (Cth) in 2006 removed customary law considerations from the matters to be considered in sentencing, and prevented customary law or cultural practice to be taken into account as a mitigating factor in sentencing or in the context of granting bail: *Crimes Amendment (Bail and Sentencing) Act 2006* (Cth) sch 1. Also note the exceptions to hearsay and opinion rules of evidence contained in *Evidence Act 1995* (Cth) ss 72, 78.

88 Bowrey, above n 51, 72.

89 Melbourne City Council, *Code of Practice for Galleries and Retailers of Indigenous Art* <http://www.melbourne.vic.gov.au> at 23 December 2008.

90 Australia Council for the Arts, *Publications* <www.australiacouncil.gov.au> at 23 December 2008.

91 Screen Australia, *Indigenous Filming Protocol* <http://www.afc.gov.au/filminginaustralia/indigproto/fiapage_9.aspx> at 23 December 2008; SBS, *The Greater Perspective – Protocol and Guidelines for the Production of Film and Television on Aboriginal and Torres Strait Islander Communities* (2nd ed, 1997).

92 Senate Standing Committee, 'Inigenous Art', above n 38. See, in particular, Recommendations 17, 18 and 20. The Senate Committee made several non-key recommendations, including a number of recommendations related to the development and adoption of the Indigenous Art Commercial Code of Conduct; new reviews and examinations into NACIS funding schemes and authenticity labels; and pursuing the conversion of CDEP-funded positions in art centres into positions of ongoing and formal employment.

the Arts released a consultation draft for an Australian Indigenous Art Commercial Code of Conduct ('draft Code').[93]

The draft Code sets out requirements for 'dealers' (including agents, wholesalers, retailers, art galleries or art centres) operating in the Indigenous art industry, including that: dealings with artists must not be on an unconscionable basis and must take place under artwork agreements; dealers must respect Indigenous cultural practices and artists' rights; and dealers must comply with certain record-keeping requirements.[94] While the notes to the draft Code state that it is not intended to regulate conduct otherwise dealt with under law, several of the requirements in the draft Code reflect existing legal obligations – for example, the requirement to '[obtain] the consent of the artist before causing the artwork to be reproduced'[95] and to 'correctly [attribute] the artist or artists in accordance with the artist's Moral Right of Attribution'[96] are contained in the *Copyright Act*. Other requirements in the draft Code set out what is required to fulfil obligations under existing laws. For example, the requirement for a dealer to 'use clear labelling and packaging to correctly identify the artist or artists that created the artwork'[97] provides a useful elaboration of the steps required to accord proper attribution to an artist under the *Copyright Act*.

While not expressly stated as an objective, once in force, the draft Code is intended to be a self-regulatory device:

> (2) The purpose of this Code is to regulate the conduct of participants in the Indigenous art industry to ensure:
>
> (a) fair and ethical trade with artists;
>
> (b) transparency with the promotion and sale of artwork;
>
> (c) a fair and equitable dispute resolution system for disputes arising under this Code.[98]

Once it has been in operation for two years, the Code is to be reviewed 'to determine whether it is an effective tool in addressing unscrupulous and unethical

93 Australian Government, *Indigenous Australian Art Commercial Code of Conduct – Consultation Draft* (2008) <http://www.australiacouncil.gov.au/news/news_items/consultation_on_draft_indigenous_art_code_of_conduct> at 14 April 2009. The Australia Council will be conducting consultations on the Draft Code of Conduct until 1 May 2009.

94 Ibid Part 2, Divs 2.1–2.4.

95 Ibid cl 15(1)(d).

96 Ibid cl 15(1)(b).

97 Ibid cl 16(2).

98 Australian Government, 'Consultation Draft', above n 93.

behaviour in the Indigenous visual arts industry'.[99] Notwithstanding this review mechanism and the stated objective of the draft Code, its voluntary nature arguably undermines its effectiveness in changing the behaviour of those in the industry who already flout ethical behaviour – dealers can choose whether to become signatories to the draft Code, and signatories that do not comply with the requirements in the draft Code can deal with complaints against them on an internal basis. Further, signatories are subject in limited circumstances to limited sanctions from the regulating body under the draft Code. The Code Administration Committee can publish the name of a dealer on its website, or remove it from the Code register.[100] This 'name and shame' approach does not provide redress to individual artists, and moreover, assumes a degree of proactive research and interest on the part of the consumer. Further, while mediation is available in the event that a complaint is not resolved and both parties agree to pursue mediation,[101] the draft Code does not contain a mechanism to address a lack of agreement, or lack of compliance with an agreement, at this stage. It has been suggested that self-regulatory mechanisms are most effective when they address internal and external dispute resolution and methods for redress.[102]

Protocols provide an even gentler nudge to industry players not already acting ethically. For example, the Australia Council introduces its protocols as:

> appropriate ways of using Indigenous cultural material, and interacting with Indigenous artists and Indigenous communities. They encourage ethical conduct and promote interaction based on good faith and mutual respect.[103]

The Australia Council protocols are based on nine fundamental principles: respect; Indigenous control; communication, consultation and consent; interpretation, integrity and authenticity; secrecy and confidentiality; attribution; proper return and royalties; continuing cultures; and recognition and protection.[104]

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99 Ibid. This, however, does not mean that in two years the draft Code will become mandatory: Australian Government, *Indigenous Australian Art Commercial Code of Conduct – Background* (2008) 2. In 2007, the possibility of prescribing an Indigenous arts industry code under Part IVB of the *Trade Practices Act 1974* (Cth) was considered by the Senate Environment, Communications, Information Technology and the Environment Committee in its inquiry into the Indigenous visual arts and crafts sector. The Senate Committee was of the view that '[i]f problems persist with fair business practices in Indigenous art, the committee believes it may be appropriate to review this situation and consider movement toward a prescribed code of conduct under the Trade Practices Act. The committee notes that this would require extensive consultations by DCITA [now the Department of Broadband, Communications and the Digital Economy], and the preparation of a Regulation Impact Statement': Senate Standing Committee, 'Indigenous Art', above n 38, [10.87].

100 Australian Government, 'Consultation Draft', above n 93, cl 20.

101 Ibid cl 22.

102 See, eg, the discussion of the operation of codes of practice in the energy and financial sectors, and the Productivity Commission, *Review of Australia's Policy Framework: Draft Report* (2007) in Nicola Howell, 'Developing a Consumer Policy for the 21st Century' (2008) 33 *Alternative Law Journal* 80, 81. For further criticism of the draft code of conduct, see the submission of the Arts Law Centre of Australia, *Submission on Draft Indigenous Australian Art Commercial Code of Conduct* (25 March 2009) <http://www.australiacouncil.gov.au/news/news_items/consultation_on_draft_indigenous_art_code_of_conduct/submissions_of_draft_indigenous_australian_art_commercial_code_of_conduct> at 14 April 2009.

103 Australia Council, *Protocols for Producing Indigenous Australian Visual Arts* (2nd ed, 2006) 3.

104 Ibid 9–34.

The Australia Council protocols, and the section in the draft Code dealing with respect for Indigenous culture, are enormously valuable in their expression of Indigenous peoples' voices and interests with respect to law, culture and traditional knowledge.[105] Codes and protocols also can play an essential role in raising awareness of the existence and importance of this law and knowledge, and can shape the behaviour of interested parties. While such features are very important, there is an insurmountable problem in relying on the described codes and protocols for full and effective protection of rights. High-level protocols rarely provide sufficiently detailed guidance on the steps that need to be taken to achieve articulated outcomes. Also, while compliance with voluntary instruments may be a relevant factor with respect to securing funding, for example from the Australia Council, voluntary codes and protocols do not regulate parties that are not already complying with, or have an interest in complying with, the requirements contained in such instruments. This is demonstrated in two contexts.

The first example relates to the reaction to the Resale Rights for Visual Artists Bill 2008 (Cth), which was introduced into Parliament in November 2008 and was recently examined by the House of Representatives Standing Committee on Climate Change, Water, Environment and the Arts.[106] This Bill is intended to increase financial return to visual artists, and particularly Indigenous visual artists, by requiring the payment to these artists of a royalty of five per cent upon the resale of artworks created after the commencement of the scheme.[107] This scheme reflects the existing voluntary protocol on royalties produced by the Australia Council with respect to the Indigenous visual arts industry. However, lobbyists for the arts industry have opposed the proposed Bill with some vigour.[108] In light of such opposition, it is naïve to assume that the Australia Council protocol for royalties would be followed on a voluntary basis by these influential players in the industry.

A second example is the extent to which contract law can be used to protect Indigenous traditional knowledge. Professor Kathy Bowrey favours over

105 See, eg, Sonia Cooper and Terri Janke 'Code to Boost Ethical Standards in the Sale of Indigenous Art' (2006) 6(2) *Indigenous Law Bulletin* 9; Bowrey, above n 51.

106 The Terms of Reference were narrow in scope – they required the Committee to consider whether the Bill met the objectives set out in the Bill and the Minister's Second reading speech. The Committee released its report on 20 February 2009. It recommended that the Bill proceed, and made other recommendations relating to the content and operation of a resale rights scheme. See House of Representatives Standing Committee on Climate Change, Water, Environment and the Arts, *Inquiry into Resale Royalty Right for Visual Artists Bill 2008 – Terms of Reference* (2008) <http://www.aph.gov.au/house/committee/ccwea/resaleroyalty/tor.htm> at 23 December 2008; House of Representatives Standing Committee on Climate Change, Water, Environment and the Arts, *Report of the Inquiry into Resale Royalty Right for Visual Artists Bill 2008* (2009) <http://www.aph.gov.au/House/committee/ccwea/resaleroyalty/report.htm> at 14 April 2009.

107 Resale Rights for Visual Artists Bill 2008 (Cth) divs 1 and 3.

108 See, eg, Adrian Newstead, 'Artist Royalties Would Leave Investors in the Lurch', Letter to the Editor, *Sydney Morning Herald* (Sydney) 17 September 2008; Ashleigh Wilson and Sean Parnell, 'Art Resale Royalties "May Cost Indigenous Artists"', *The Australian* (Sydney), 24 October 2008. Also see several relevant submissions made to the recent House of Representatives Standing Committee on Climate Change, Water, Environment and the Arts, *Inquiry into Resale Royalty Right for Visual Artists Bill 2008: Submissions* <http://www.aph.gov.au/House/committee/ccwea/resaleroyalty/subs.htm> at 14 April 2009.

international and national law reform the investigation of 'practical uses of private law at the community level for the protection of custom'.[109] Bowrey cites both pragmatic and jurisprudential reasons: the political ill-will of Australian Government to conduct law reform in this area; and the failure to fully realise the post-*Mabo* 'emancipatory potential of international and national laws'.[110]

Political lethargy in this area certainly has been an Australian reality – although, as the proposed resale rights scheme and endorsement of the *Declaration* suggests, not necessarily a permanent one.[111] Further, appeals to private law are difficult for two reasons. First, much has been made of unequal bargaining relations, which cannot be treated lightly. For example, the poor socio-economic situation of many Indigenous artists was the subject of evidence presented to the Senate Committee Inquiry in 2007. If artists are not in a position to negotiate the inclusion of codes or protocols in formal contracts or informal collaborations, and the codes or protocols do not give rise to enforceable undertakings, the artist will likely be left without redress. A second, related issue was considered by the Australian Law Reform Commission ('ALRC') in its recent Inquiry into the *Privacy Act 1988* (Cth). In a consultation paper released midway through this Inquiry, the ALRC proposed that protocols for the protection of privacy of Indigenous groups (rather than individuals, who already enjoy protection under the *Privacy Act*) should be developed by the Office of the Privacy Commissioner in consultation with Indigenous representatives.[112] While this proposal received in-principle support, submissions from Indigenous and non-Indigenous stakeholders expressed a range of concerns about the stand-alone proposal, including in what circumstances Indigenous peoples would be in a position to negotiate with respect to their traditional knowledge outside (and on occasion inside) the arts arena.[113] Accordingly, in its final Report, the ALRC noted that protocols were important and necessary in this area, but also recommended that the Australian Government consider conducting an inquiry to determine whether other protection of Indigenous cultural rights is necessary.[114]

D Sui Generis Legislation

One way to address the issues raised above is the implementation of sui generis legislation for the protection of Indigenous peoples' traditional

109 Bowrey, above n 51, 66.

110 Ibid.

111 While not of itself providing relief of Indigenous disadvantage in Australia, Prime Minister Kevin Rudd's Apology to Indigenous Peoples was delivered after an extended period of staunch opposition to such an apology by former Prime Minister John Howard: House of Representatives, Parliament of Australia, Canberra, 13 February 2008 (Kevin Rudd, Prime Minister of Australia).

112 The ALRC made this proposal as there was very little support for the expansion of the operation of the *Privacy Act 1988* (Cth) to protect the information of Indigenous groups as well as 'personal information' about individuals: Australian Law Reform Commission, *Review of Australian Privacy Law*, Discussion Paper 72 (2007) Proposal 1-1 and accompanying text.

113 See, eg, the ALRC's discussion of the submissions made by the NSW Aboriginal Justice Advisory Council and the Arts Law Centre of Australia in Australian Law Reform Commission, *For Your Information: Australian Privacy Law and Practice*, Report No 108 (2008) [7.40]–[7.50].

114 Ibid Recommendation 7-2.

knowledge. A sui generis instrument refers to an instrument directed towards recognition of a specific set of rights. The term 'sui generis' has entered common parlance in the academic and international literature on Indigenous peoples' traditional knowledge.[115] However, the precise form, objective and application of a sui generis instrument in Australia has not been subject to extensive analysis. Those commentating on the issue generally note the possibility of sui generis rights, but go on to state that such a consideration is outside the scope of the particular study. This is not to say that all commentators – or indeed the Australian Government – favour a sui generis instrument as a method through which to address gaps in Anglo-Australian laws. This section of the paper considers why it is that sui generis legislation is frequently nominated as a potential 'solution' for Indigenous peoples in Australia, or discarded from the agenda in favour of other mechanisms. Further, how would such a sui generis instrument operate in the Australian context – in particular, what form would such an instrument take, and how would it interact with existing laws?

A recent example of attention given to the issue was in the 2007 Senate Committee inquiry into the Indigenous arts and crafts sector. The Committee concluded that 'current legislation generally fails to take into account the very different notions of cultural and intellectual property that form the basis of Indigenous society and cultural identity'.[116] With little analysis about appropriate methods of regulation, however, the Committee recommended that the Australian Government should introduce legislation to provide for the protection of ICIP rights.[117]

In August 2008, this recommendation was rejected by the Labor Government. This rejection was not founded on a stated objection to the method of regulation, but rather upon the notion that intellectual property laws provide adequate recourse for Indigenous artists.[118] This response falls squarely within one of two main sets of arguments against the introduction of sui generis

115 See, eg, Janke, 'Our Culture: Our Future', above n 4, ch 18; Rimmer, above n 52; Kenyon, above n 52; Kariyawasam and Guy, above n 52; McJohn and Graham, above n 52; Ougamanam, above n 52; Correa, above n 52. For an argument against the implementation of sui generis rights, discussed further below, see Bowrey, above n 51. The UN Permanent Forum on Indigenous Issues recently recommended a study into the basis of an international instrument protecting sui generis rights, discussed further below.

116 Senate Standing Committee, 'Indigenous Art', above n 38, [11.59]. This was not unique to this Inquiry – a similar conclusion was reached in Commonwealth Attorney-General's Department, *Stopping the Rip-Offs: Intellectual Property Protection for Aboriginal and Torres Strait Islander Peoples*: *Issues Paper* (1994).

117 The Committee also recommended that this legislation should be drafted to ensure prosecutions of breaches will have a realistic chance of success; and the Australian Customs Service have an appropriate role in assisting the protection of these rights in relation to imported and exported goods: Senate Standing Committee, 'Indigenous Art', above n 38, Recommendation 25.

118 The position that legal reform is not necessary is founded on the Australian Government's view that intellectual property rights provide adequate recourse for Indigenous artists, Customs has sufficient legal powers to deal with illegal exports, and Australian Government officials are involved with discussions at WIPO and with state and territory agencies to deal with the issue: Australian Government, 'Response to the Senate Standing Committee', above n 39, 11.

legislation.[119] The first part of this paper argues that intellectual property laws cannot provide meaningful protection of Indigenous traditional knowledge by showing that a seemingly amenable intellectual property law, copyright, cannot adequately protect Indigenous peoples' traditional knowledge as expressed through Indigenous art.

A more nuanced set of arguments against the introduction of sui generis legislation focus around concerns that such legislation would inappropriately codify custom,[120] and treat Indigenous peoples in Australia as if the same set of customary laws were practised by all groups and individuals.[121] The pertinence of the latter observation is highlighted by Professor Dodson and Olivia Barr's suggestion that there may still be 200 Indigenous legal systems in operation in Australia.[122]

The tension between effective and enforceable protection of rights and 'juridification' of custom echoes international conversations about interpretation of rights in any sui generis instrument. Indigenous peoples in Australia have expressed concern about 'giving away' customary laws to a legal system that does not, or cannot, adequately reflect the content of such laws either at the stages of legislative enactment or judicial interpretation. As the ALRC remarked in its 1986 report *The Recognition of Aboriginal Customary Laws*:

> Aboriginal customary laws are as much a process for the resolution of conflict as a system or set of rules. This characteristic makes the danger of distortion, where customary laws are applied by outside agencies, even more significant … the cardinal objection to codification is that it takes the question of the interpretation and content of their customary laws and traditions out of the hands of the Aboriginal people concerned.[123]

A better approach, therefore, is to call for the implementation of a legislative instrument that includes broadly drafted minimum standards, to avoid, as far as possible, the appropriation of custom through law. Federal legislators, however, need to tread carefully in this area. The concept of 'recognising rights' is fraught, as it essentially means that 'the general legal system is in effect dictating the extent to which it is prepared to accommodate Aboriginal customary laws'.[124] Further, notwithstanding the complexity of the Northern Territory Emergency Response or Intervention (NTER), the recent suspension of the *Racial Discrimination Act 1975* (Cth) for the purposes of the NTER is an example of the fallibility of statutory rights instruments.[125] The abolition of the permit system for access to Indigenous land in the Northern Territory, established under the

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119 See also Colin Golvan, *Copyright Law and Practice* (2007) 'Protection of Indigenous Copyright', ch 9, 186–206; Megan Carpenter, 'Intellectual Property Law and Indigenous Peoples: Adapting Copyright Law to the Needs of a Global Community' (2004) 7 *Yale Human Rights and Development Law Journal* 51.

120 See, eg, Bowrey, above n 51, 95.

121 See, eg, Anderson, 'The Protection of Indigenous Knowledge in Intellectual Property Law', above n 76; and Michael Brown's concern about 'totalizing solutions to complex problems' in Michael Brown, *Who Owns Native Culture?* (2003) 8.

122 Dodson and Barr, above n 73, 25.

123 Australian Law Reform Commission, 'The Recognition of Aboriginal Customary Laws', above n 87, [202].

124 Ibid [209].

125 *Northern Territory National Emergency Response Act 2007* (Cth) s 132.

Aboriginal Land Rights (Northern Territory) Act 1975 (Cth), is an example of removal of a system of rights.[126] A corollary of parliamentary supremacy and the flexible legislative process, therefore, is the capacity for the brisk amendment and removal of laws that may otherwise have provided benefit to Indigenous peoples.[127]

A sui generis rights framework will not, of course, automatically result in the recognition and protection of rights sought by Indigenous peoples. It is essential that such a framework be implemented in consultation with Indigenous peoples in a way that provides meaningful protection and recognition of enforceable traditional knowledge rights. The *Native Title Act 1993* (Cth) is an example of a statutory sui generis (land) rights regime that, overall, has proven to be a disappointment to most stakeholders – the literature on the shortcomings of Australian native title legislation is vast.[128] Issues to do with native title include: evidentiary difficulties in proving the existence and ongoing exercise of rights; narrow interpretation of rights by the courts; comprehensive provisions for the extinguishment of rights; intra-Indigenous disputes with respect to overlapping claim areas; poor resourcing of those involved in the native title system; delayed hearings of claims in the court and tribunal systems; and lack of clarity around compensation for infringement or extinguishment of rights.[129]

Notwithstanding the issues with a sui generis rights framework, an instrument giving rise to enforceable traditional knowledge rights is necessary, because: voluntary measures such as codes and protocols are most effective for those parties interested in and committed to compliance; international laws provide guidance but rarely enforceable measures; and private law remedies are most effective for parties with bargaining chips firmly in hand. Regulatory research demonstrates that sometimes the *existence* of laws is enough to modify

126 *Aboriginal Lands Right (Northern Territory) Act 1976* (Cth) ('ALRA') s 4 made it an offence to enter or remain on Aboriginal land except in accordance with the ALRA or a law of the Northern Territory: see Erin Mackay, 'Recent Developments: Copyright and the Protection of Indigenous Art ' (2008) 7(2) *Indigenous Law Bulletin* 11, 11–13.

127 The Terms of Reference provided by the Australian Government to the current National Human Rights Consultation Committee state that the options identified for reform should not include constitutional reform: National Human Rights Consultation, *Terms of Reference* (2008) <http://www.humanrightsconsultation.gov.au/www/nhrcc/nhrcc.nsf/Page/Terms_of_Reference> at 23 December 2008.

128 For example, in April 2009, the ALRC released a special native title edition of its journal *Reform,* which contained articles critical of some existing aspects of the native title system contributed by: Chief Justice French, the Chief Justice of the High Court of Australia; Tom Calma, the Aboriginal and Torres Strait Islander Social Justice Commissioner and Race Discrimination Commissioner; Megan Davis, the Director of the Indigenous Law Centre at UNSW; the Hon Jenny Macklin MP, Minister for Families, Housing, Community Services and Indigenous Affairs; Graeme Neate, the President of the National Native Title Tribunal; Tony McAvoy, an Indigenous barrister practising in areas including native title; Sean Brennan, the Director of the Indigenous Legal Issues Project at UNSW; and several others: 'Native Title' (2009) 93 *Reform*.

129 For example, the High Court of Australia has interpreted s 223(1) of the *Native Title Act 1993* (Cth) to mean that an Indigenous group needs to undertake the onerous task of demonstrating continuous operation of laws and customs since the time of British settlement of Australia: *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422. The High Court also has found that cultural knowledge, without physical connection to the land, is not of itself a native title right: *Western Australia v Ward* (2002) 213 CLR 1, [59].

behaviour.[130] With enforceability the key objective, therefore, the challenge is to promote agreements, based on protocols and customary laws, for the protection of Indigenous peoples' traditional knowledge.[131] Such an instrument should also establish a body that includes Indigenous peoples to provide effective methods to deal with disputes and provide for appropriate remedies.[132]

IV CONCLUDING THOUGHTS

Codes and protocols have placed issues surrounding Indigenous traditional knowledge squarely into the consciousness of non-Indigenous people working in the art, film and television industries, and sometimes into contracts and policy documents. These mechanisms are the essential building blocks – both in terms of their guiding principles and their focus on negotiation and agreement-making. However, the lack of enforceability is the sticking point.

As a very first step in developing such an appropriate instrument, this paper has considered the conceptual basis for a sui generis system of protecting Indigenous peoples' traditional knowledge. Immediate issues for further inquiry include consideration of how such an instrument would work in practice. Such issues include: should such rights enjoy a constitutional, treaty or statutory status; what should be the precise content of protected rights; what should be the duration of rights protection; how such rights should be enforced; what should happen in the case of conflict with other laws; how rights should be managed; what kind of registration system (if any) should be established; whether Indigenous groups, individuals or a managing body receives proceeds for benefit sharing; who should be able to exercise any rights; what happens when rights over traditional knowledge can be claimed by more than one group or individual; what protection should be afforded to derivative knowledge; what exceptions and limitations should be included in a system of rights protection; and what sorts of transitional arrangements should take place.

In arguing for consideration of a sui generis framework of rights, this article has not intended to depict existing Anglo-Australian laws such as copyright as irrelevant to the future of Indigenous artists in Australia. The success of education of Indigenous artists about copyright interests, and the development of codes and protocols in the Indigenous art industry are reflective of this. Such measures are essential to combat a range of social, economic, linguistic and geographical barriers that may confront Indigenous artists. This means that adequate funding and support of art centres and other relevant advisory services

130 See, eg, discussion of regulatory approaches in the Australian Law Reform Commission, 'For Your Information', above n 113, ch 4 and *Principled Regulation: Federal Civil and Administrative Penalties in Australia*, Report 95 (2002) ch 6.

131 For a discussion of this in the US context, see McJohn and Graham, above n 52. For documents regarding a broad treaty between Indigenous and non-Indigenous Australians, see Gilbert + Tobin Centre for Public Law, *Treaty Project* <http://www.gtcentre.unsw.edu.au/resources/treatyprojects.asp> at 23 December 2008.

132 The developments with respect to establishing an Indigenous representative body will be relevant in this regard: see Jenny Macklin, 'Next Steps for Indigenous Body' (Press Release, 16 December 2008).

– such as the Artists in the Black program at the Arts Law Centre of Australia – is essential to ensure access to justice for Indigenous artists regardless of what rights framework is in existence.

Finally, the type of rights framework discussed in this article would not exist in a vacuum, and the interrelationship between such a framework and existing laws is paramount. In the case of conflict, would rights in such a framework override existing intellectual property, cultural heritage, native title, land rights or other laws? Any sui generis framework of rights, therefore, should be developed to complement the existing legal system, rather than set up in contradistinction to that system.[133] Nevertheless, a continued reliance on existing Anglo-Australian laws, and a misplaced faith in piecemeal law reform, cannot be sustained in the face of the manifest inadequacy of such measures to provide meaningful and lasting solutions for the traditional knowledge of Indigenous peoples in Australia.

133 Dodson and Barr, above n 73, 23.