

# Chapter 7

## The protection of Indigenous knowledge's

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### 1. Overview

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

Much of this knowledge forms an important contribution to research and development, particularly in areas such as pharmaceuticals, and agriculture and cosmetic products. In the context of these uses, Indigenous peoples claim that their rights as traditional holders and custodians of this knowledge are not adequately recognised or protected. They demand not only recognition and protection of this knowledge, but also the right to share equitably in benefits derived from the uses of this knowledge.<sup>1</sup>

It comes as no surprise that all societies argue for policies and practices that help sustain their cultures and systems of knowledge. This is because culture is fundamental to identity – it is our past, our present and our future. We need our culture to sustain us and to keep us well. But importantly, we need culture because it provides the fundamental essence of who we are, how we practice our Lore, how we interact with each other, and how we meet our familial and collective obligations and responsibilities. Indigenous peoples have been struggling for many years to sustain our culture, despite a history of policies designed to eradicate or assimilate our languages, our belief systems and our ways of living.

In an interesting reversal of thinking, we are living in times where some core values of Western society are being questioned. Some of the world's best thinkers now argue that aspects of Western culture seriously threaten global ecologies. And we are witnessing global efforts to rethink some of these Western value systems – these very same values that have been imposed on our people to the detriment of our cultures and our systems of knowledge. This is most striking where governments are working to develop responses to climate change. Some of the responses to this will be dependent on Indigenous traditional knowledge.

Indigenous peoples have the ability to interpret and react to the impacts of climate change in creative ways, drawing on our traditional knowledge's and other technologies to develop solutions which may also help the wider society in its attempts to cope with the changing climate. This reinforces the argument that Indigenous peoples are vital to, and active

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1 M Davis, (Science, Technology, Environment and Resources Group), *Biological Diversity and Indigenous Knowledge*, 29 June 1998, Research Paper 17 1997-98, Parliament of Australia. At: [www.aph.gov.au/library/Pubs/RP/1997-98/98rp17.htm](http://www.aph.gov.au/library/Pubs/RP/1997-98/98rp17.htm), (viewed 22 September 2008).

in, the enhancement of the ecosystems that inhabit our lands and are integral to the survival of Australia's uniqueness.<sup>2</sup> However, the current system does not adequately recognise or protect the role Indigenous peoples play or the knowledge we collectively possess.

According to the United Nations Permanent Forum on Indigenous Issues, there are Indigenous peoples living in approximately 70 countries throughout the world, constituting approximately 350 million people. This includes around 5,000 distinct peoples and over 4,000 languages and cultures, as well as many diverse Indigenous legal systems.

As discussed in chapter 5, Indigenous people's cultural and intellectual knowledge and understanding of our environments will be required to contribute to mitigate and adapt to climate change in the national interest. The reliance on Indigenous traditional knowledge in Australia is already well established, particularly in regions that possess valuable biodiversity. For example, the Federal Government's Green Paper on Climate Change in Australia discusses the need to investigate 'the feasibility of co-operative research centres to *collect* Indigenous knowledge'.<sup>3</sup>

In the context of the climate change law and policy, and the development of emissions trading schemes, the development of international and domestic mechanisms that adequately protect Indigenous peoples from the misappropriation and misuse of traditional knowledge is urgent.

### Text Box 1: What is Indigenous traditional knowledge?

The International Council for Science (ICSU) define traditional knowledge as:

A cumulative body of knowledge, know-how, practices and representations maintained and developed by peoples with extended histories of interaction with the natural environment. These sophisticated sets of understandings, interpretations and means are part and parcel of a cultural complex that encompasses language, naming and classification systems, resource use practices, ritual, spirituality and worldview.<sup>4</sup>

Indigenous traditional knowledge generally means traditional practices and culture and the knowledge of plants and animals and of their methods of propagation. It includes:

- expressions of cultural values
- beliefs
- rituals and community laws
- knowledge regarding land and ecosystem management.<sup>5</sup>

2 United Nations Permanent Forum on Indigenous Issues, *Climate Change and Indigenous peoples*. At: [http://www.un.org/esa/socdev/unpfii/en/climate\\_change.html](http://www.un.org/esa/socdev/unpfii/en/climate_change.html), (viewed 21 July 2008).

3 The Hon Peter Garrett, Minister for the Environment, Water, Heritage and the Arts, Correspondence with the Aboriginal and Torres Strait Islander Social Justice Commissioner – Request for Information in preparation of the Native Title Report 2008, 29 August 2008.

4 International Council for Science, *Science and Traditional Knowledge, Report from the ICSU Study Group on Science and Traditional Knowledge*, Paper delivered to 27<sup>th</sup> General Assembly of ICSU, Rio De Janeiro, Brazil, September 2002, p 3.

5 United Nations Permanent Forum on Indigenous Issues, *Report of the Secretariat on Indigenous traditional knowledge*, UN Doc E/C.19/2007/10. At: <http://daccessdds.un.org/doc/UNDOC/GEN/N07/277/15/PDF/N0727715.pdf?OpenElement> (viewed 15 September 2008).

The rights to Indigenous traditional knowledge are generally owned collectively by the Indigenous community (or language group, or tribal group), as distinct from the individual. It may be a section of the community or, in certain circumstances, a particular person sanctioned by the community that is able to speak for or make decisions in relation to a particular instance of traditional knowledge.

It is more often unwritten and handed down orally from generation to generation, and it is transmitted and preserved in that way. Some of the knowledge is of a highly sacred and secret nature and therefore extremely sensitive and culturally significant and not readily publicly available, even to members of the particular group.

The maintenance and protection of Indigenous traditional knowledge is crucial to the maintenance of Indigenous culture. It is also valuable to development policy and operations and the advancement of understandings of sustainability on a global scale.

### **Collective intellectual property aspects of traditional knowledge**

Indigenous traditional knowledge is not simply a different type of intellectual property; it is a completely different entity.<sup>6</sup>

Intellectual Property is a generic term for the various rights or bundles of rights which the law accords for the protection of creative effort, in particular, the economic investment in creative effort. Australian intellectual property regimes are established and governed primarily through Commonwealth legislation.<sup>7</sup>

The World Intellectual Property Organisation (WIPO) Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore, argue that the recognition and protection of indigenous traditional knowledge has largely taken place within the parameters of intellectual property law. However, they also recognise that this has been limited due to the western constructs of intellectual property laws failure to be able to accommodate the vastly different requirements for the protection of indigenous traditional knowledge, such as the communal transgenerational concepts of ownership, versus a focus on creativity and individualism.<sup>8</sup>

While the UNPFII, WIPO and other international bodies are involved in raising the importance of this issue and progressing the debate around the development of international mechanisms to protect indigenous traditional knowledge's, it remains unresolved. This is largely due to the diversity of indigenous communities including:

- that indigenous communities are not uniform and reflect various competing and often conflicting values, particularly in relation to the variety and diversity of customary law and indigenous traditional knowledge
- that systems of customary law devised to keep social order and maintain culture are localised, existing in a particular place, in a particular community, and related to particular circumstances of the environment and livelihoods

6 United Nations Permanent Forum on Indigenous Issues, *Report of the Secretariat on Indigenous traditional knowledge*, UN Doc E/C.19/2007/10. At: <http://daccessdds.un.org/doc/UNDOC/GEN/N07/277/15/PDF/N0727715.pdf?OpenElement> (viewed 15 September 2008).

7 Law Reform Commission of Western Australia, *Aboriginal Customary Laws, Final Report – The interaction of Western Australian law with Aboriginal law and culture*, Project 92, September 2006, p 265, Government of Western Australia.

8 United Nations Permanent Forum on Indigenous Issues, *Report of the Secretariat on Indigenous traditional knowledge*, UN Doc E/C.19/2007/10, p8. At: <http://daccessdds.un.org/doc/UNDOC/GEN/N07/277/15/PDF/N0727715.pdf?OpenElement> (viewed 15 September 2008).

- the conflicting world views of intellectual property and ownership and protection
- the variety of terminology used and lack of a clear definition of what indigenous knowledge's are
- the intersection between indigenous traditional knowledge and various areas of the law, such as intellectual property law, environmental law, heritage and sustainable development, and more recently climate change law and policy, at international, national and local levels
- the need for an international standard that is able to be implemented at the national level
- the role of customary law and indigenous communities in providing guidance and protection to Indigenous peoples' traditional knowledge.<sup>9</sup>

## 2. Classes of threat to Indigenous traditional knowledge

The preservation of Indigenous traditional knowledge is under threat. A report provided by the Australian Institute of Aboriginal and Torres Strait Islander Studies to the Secretariat of the Convention on Biological Diversity identified the following threats to Indigenous traditional knowledge:

- political pressures – the recognition and standing of Indigenous traditional knowledge, including involvement in policy and legislative development
- cultural integrity
- social and economic pressures – assimilation, poverty, education, marginalisation of women, loss of language
- territorial pressures – deforestation, forced displacement and migration
- exploitation of traditional knowledge – bioprospecting, objectification
- development policy – agricultural and industrial development
- globalisation and trade liberalisation.<sup>10</sup>

The lack of protection on a national level intensifies these threats. Climate change impacts and responses, particularly those resulting in increased bioprospecting<sup>11</sup> of Indigenous knowledge, will also heighten the urgency of the need for a national Indigenous traditional knowledge regime.

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9 United Nations Permanent Forum on Indigenous Issues, *Report of the Secretariat on Indigenous traditional knowledge*, UN Doc E/C.19/2007/10. At: <http://daccessdds.un.org/doc/UNDOC/GEN/N07/277/15/PDF/N0727715.pdf?OpenElement> (viewed 15 September 2008).

10 G Kelly (AIATSIS), *Report on Threats to the Practice and Transmission of Traditional Knowledge Regional Report: Asia and Australia*, Phase II of the Composite Report on the Status and Trends Regarding the Knowledge, Innovation and Practices of Indigenous Peoples and Local Communities relevant to the Conservation and Sustainable Use of Biodiversity, 2005, UN Doc: UNEP/CBDWG8J/4/INF/4, p 25.

11 Bioprospecting refers to the exploration of biodiversity (plant-related substances) for commercially valuable generic and biochemical resources. Law Reform Commission of Western Australia, *Aboriginal Customary Laws, Final Report – The interaction of Western Australian law with Aboriginal law and culture*, Project 92, September 2006, p 266, Government of Western Australia.

Within Australia, despite the existing evidence base in this area, mechanisms that protect and maintain Indigenous traditional knowledge remain significantly inadequate at all levels of government. As identified by the Law Reform Commission of Western Australia, as intellectual property laws are the jurisdiction of the Commonwealth Government:

the ability of the Western Australian Government to recognise Aboriginal customary laws in relation to Indigenous cultural and intellectual property rights is limited to the development of protocols and to the support of relevant amendment to Commonwealth legislation.<sup>12</sup>

Additionally, the Land Justice Group specifically asked the Victorian Government in 2006 to amend their Aboriginal Heritage Act to include the protection 'folklore' as defined in Part IIA of the Aboriginal and Torres Strait Islander Heritage Protection Act 1984.<sup>13</sup>

The AHA (s 4) should be amended to ensure the protection of Aboriginal 'folklore' as defined under the Commonwealth *ATS/ Heritage Protection Act 1984* (s 21A) to include 'songs, rituals, ceremonies, dances, art, customs and spiritual beliefs'.<sup>14</sup>

This request fell on deaf ears and Part IIA has subsequently been repealed.

### 3. The existing framework

Indigenous peoples' right to have our traditional knowledges recognised and protected is currently provided for in a number of existing international treaties. In Australia, there are a number of national and regional (State Government) arrangements that attempt to address the lack of protection domestically, including cultural heritage legislation. Additionally, there is an increasing body of research that provides useful principles for inclusion in international and domestic regimes established to protect and maintain Indigenous traditional knowledge.

#### 3.1 International

The table below provides a summary of the major international instruments that recognise the right of Indigenous peoples to protect and enjoy their traditional knowledge. Appendix 4 provides an overview of the international framework for Indigenous engagement in climate change policy. Indigenous traditional knowledge is relevant and should be incorporated into policies developed across each of the areas considered in Appendix 4.

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12 Law Reform Commission of Western Australia, *Aboriginal Customary Laws, Final Report – The interaction of Western Australian law with Aboriginal law and culture*, Project 92, September 2006, p 265, Government of Western Australia.

13 *Aboriginal and Torres Strait Islander Heritage Protection Act 1984*, s 21A.

14 Victorian Traditional Owner Land Justice Group, *Towards a Framework Agreement between The State of Victoria and the Victorian Traditional Owner Land Justice Group*, Discussion Paper, 26 August 2006, p 5.

<b>Table 1: Summary of major international instruments that recognise Indigenous peoples' right to protect their traditional knowledge</b>	
<b>International Instrument</b>	<b>Provision</b>
The Universal Declaration of Human Rights	Article 27
The International Covenant on Economic, Social and Cultural Rights	Article 15, paragraph 1 (c)
The International Covenant on Civil and Political Rights	Article 27
The Convention on Biological Diversity	Article 8 (j)
The International Labour Organisation Convention No.169 concerning Indigenous and Tribal Peoples in Independent Countries	Articles 13, 15, 23
Agenda 21	Paragraph 26.1
The Rio Declaration on Environment and Development	Principle 22
The Declaration on the Rights of Indigenous Peoples	Articles 11 and 31

The Declaration on the Rights of Indigenous Peoples draws on other major instruments to provide the most explicit recognition internationally of Indigenous people's rights to their traditional knowledge:

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.<sup>15</sup>

The Convention on Biological Diversity provides specific opportunities for introducing measures to recognise and protect Indigenous knowledge. Article 8(j) of the Convention encourages countries to:

...respect, preserve and maintain knowledge, innovations and practices of Indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity and promote their wider application with the approval and involvement of the holders of such knowledge, innovations and practices and encourage the equitable sharing of the benefits arising from the utilisation of such knowledge, innovations and practices.<sup>16</sup>

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15 The Declaration on the Rights of Indigenous Peoples, Article 31, paragraph 1.

16 Convention on Biological Diversity, Article 8(j).

Article 8(j) specifically gives recognition firstly to the traditional knowledge, innovations and practices of Indigenous people and local communities while also speaking strongly for its protection, preservation and maintenance. Article 8(j) also provides that the use of Indigenous traditional knowledge, innovations and practices should only occur with the approval and involvement of the Indigenous or local community and that any benefits that arise from its use is to be shared with the people or community from which that knowledge originated.<sup>17</sup>

The World Summit on Sustainable Development and the Conference of Parties of the Convention on Biological Diversity are currently lobbying internationally for intensified negotiations towards an 'international regime on access and benefit-sharing' to be completed by 2010.<sup>18</sup> This would coincide with the commencement of Australia's Carbon Pollution Reduction Scheme and provide Indigenous peoples with an opportunity to share in the economic benefits that may arise as a result of the relevant knowledge we possess about our lands and waters.

The World Intellectual Property Organisation (WIPO) Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (the IGC), which met for the first time in 2001, is in discussions about draft provisions for the enhanced protection of traditional knowledge and traditional cultural expressions against misappropriation and misuse.<sup>19</sup>

WIPO's work in these areas involves close cooperation with other international organisations and NGOs, as well as the organisation of a wide range of capacity-building activities. Capacity-building resources include practical guidelines for indigenous and local communities on developing intellectual property protocols, and information technology tools for managing intellectual property issues when digitising intangible cultural heritage, being developed within the Creative Heritage Project.<sup>20</sup>

Significant consideration to the development of an international regime on access and benefit-sharing has also been given by the United Nations Permanent Forum on Indigenous Issues.

Discussions to date have considered the following issues:

- human rights treaties and other existing or emerging instruments that are applicable to traditional knowledge and genetic resources
- elements of customary law that are vested in traditional knowledge protection and transmission
- an analysis of indigenous participation, including the levels and roles in decision-making, including measures to ensure compliance with free, prior and informed consent
- options and opportunities in the proposed certificate of origin, source or legal provenance from genetic resources

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17 H Fourmile-Marrie & G Kelly, *The Convention on Biological Diversity and Indigenous People: Information concerning the implementation of decisions of the Conference of the Parties under the Convention on Biological Diversity*, Centre for Indigenous History and the Arts, University of Western Sydney, 2000, pp 3-4.

18 J Carino (Tebtebba Foundation), *International Expert Group Meeting on the Convention on Biological Diversity's International Regime on Access and Benefit-Sharing and Indigenous Peoples' Human Rights*, United Nations Permanent Forum on Indigenous Issues Secretariat, 17-19 January 2007, New York.

19 The World Intellectual Property Organisation, *Traditional Knowledge, Genetic Resources and Traditional Cultural Expressions/Folklore*. At: <http://www.wipo.int/tk/en/> (viewed 15 December 2008).

20 W Wendland and J van Weelde, *WIPO's capacity building tools for indigenous cultural heritage*, Arts Law Centre of Australia Online. At: <http://www.artslaw.com.au/ArtLaw/Archive/08WIPOtools.asp> (viewed 15 December 2008).

- the role of customary law in the protection of traditional knowledge and development of regimes on access to genetic resources and benefit-sharing.<sup>21</sup>

In applying these principles at the domestic and national level, it is envisaged that an international access and benefit-sharing regime would be supported by national legislation that addresses a *sui-generis* protection of indigenous traditional knowledge, innovation and practices, ensuring compliance.

### The United Nations University (UNU) Centre on Traditional Knowledge

The UNU has been exploring the feasibility of establishing a research and training centre on traditional knowledge since 2004. A Traditional Knowledge Institute (TKI) has since been established and is hosted at Charles Darwin University, with an initial commitment of \$2.5m AUD (approx \$2.2m USD) from the Northern Territory Government.<sup>22</sup> This centre has the potential to play a key role in efforts addressing traditional knowledge and indigenous communities, both nationally and internationally. However it will require a strong policy and financial commitment from the Australian Government including dedicated capital resources to enable the UNU TKI to become sustainably self sufficient.

#### Text Box 2: The United Nations University (UNU) Centre on Traditional Knowledge

The UNU TKI aims to promote and strengthen research on traditional knowledge of indigenous and local communities conducted from a global perspective, grounded in local experience. In particular, the Institute seeks to contribute to:

- change mindsets and paradigms about the role of traditional knowledge in our society and in key sectors such as academia, government and business
- increasing the recognition and importance of traditional knowledge
- developing the application of traditional knowledge in a broad range of contexts (e.g. ecosystem management and biotechnology)
- developing strategies for the preservation and maintenance of traditional knowledge
- facilitating the development of the capacity of indigenous communities to conserve and apply their knowledge in an increasingly globalised economy.<sup>23</sup>

21 United Nations Permanent Forum on Indigenous Issues, *Report of the international expert group meeting on the international regime on access and benefit-sharing and indigenous peoples' human rights of the Convention on Biological Diversity*, Sixth Session, 14-25 May 2007, New York.

22 United Nations University, Institute of Advance Studies, *Traditional Knowledge Initiative*. At: [http://www.ias.unu.edu/sub\\_page.aspx?catID=107&ddlID=302](http://www.ias.unu.edu/sub_page.aspx?catID=107&ddlID=302), (viewed 12 January 2009).

23 For further information, see the Traditional Knowledge Initiative website at: [www.unutki.org](http://www.unutki.org).

The UNU TKI will investigate the threats to traditional knowledge, methods to maintain traditional knowledge, and the resilience of traditional knowledge systems. It will also consider the links between conventional and indigenous scientific systems while addressing some of the important questions this raises both in terms of research and capacity development, including:

- traditional knowledge and climate change
- traditional knowledge and water management
- traditional knowledge and biological resources
- traditional knowledge and marine management
- traditional knowledge and forestry
- traditional knowledge and international policy making.

A UNU-IAS pilot research programme on traditional knowledge, the Traditional Knowledge Initiative, was established in 2007 with the generous support of the Christensen Fund, a leading US based foundation active in the areas of cultural and biological diversity. The pilot programme is an important step in the process towards the establishment of a permanent UNU TKI.

Key pilot activities include:

- Climate change and indigenous peoples
- A book on the role of traditional knowledge
- Water management and traditional knowledge
- Traditional Knowledge Bulletin
- Pacific Islands programme.<sup>24</sup>

### 3.2 Domestic

In Australia, non-Indigenous intellectual property is protected under various intellectual property laws, including:

- the *Copyright Act 1968*<sup>25</sup>
- the *Patents Act 1990*<sup>26</sup>
- the *Trademarks Act 1995*<sup>27</sup>

Australian domestic policy provides for the recognition of Indigenous traditional knowledge in its environmental protection regulations, particularly concerning knowledge held by Indigenous people about biological resources. However, existing intellectual property laws offer limited scope for the recognition of Indigenous

24 For further information, see the Traditional Knowledge Initiative website at: [www.unutki.org](http://www.unutki.org).

25 Copyright is a set of specific rights granted to the creators of literary, dramatic, artistic or musical works and the makers of sound recordings, films and audio recordings. Copyright does not need to be registered as defined by the Australian Institute of Aboriginal and Torres Strait Islander Studies, and the Aboriginal and Torres Strait Islander Commission, *Our Culture: Our Future, Report on Australian Indigenous Cultural and Intellectual Property Rights*, M Frankel and T Janke, 1998, p 51.

26 A patent is a right to protect inventions. The patentee is granted the exclusive right (for 20 years), to exploit and to authorise another person to exploit the invention. To be patentable, and invention must include a product or process which is new, involve an inventive step and be useful. Patent protection is not automatic and patents must be applied for by the Australian Industrial Property Organisation, as defined by the Australian Institute of Aboriginal and Torres Strait Islander Studies, and the Aboriginal and Torres Strait Islander Commission, *Our Culture: Our Future, Report on Australian Indigenous Cultural and Intellectual Property Rights*, M Frankel and T Janke, 1998, p 565.

27 A trademark is a sign used to indicate the trade origin or source of goods or services. A trade mark is registered for up to 10 years initially and applications can be made to have the trademark renewed. *Trade Marks Act 1995*, s 17.

peoples' rights in biodiversity related knowledge and practices.<sup>28</sup> While native title, cultural heritage and environmental laws provide some recognition and protection, it is currently insufficient.

The *Native Title Act 1993* (Cth), establishes principles for the recognition of customary property rights, including rights in knowledge, based on the traditional laws and customs observed and practiced by the native title holders. While traditional owners are required to disclose their traditional knowledge in order to have their native title recognised, it provides some protection for Indigenous traditional knowledge particularly in relation to information about particular sites that may be classified by the traditional owner groups as being sacred. This information is classified as confidential, in many instances held by the Native Title Representative Body or Land Council, and access is restricted only to those who have been nominated by the traditional owners of that information.

The *Aboriginal and Torres Strait Islander Heritage Protection Act 1986* also has the potential to provide broader protection for Indigenous traditional knowledge. The purpose of this legislation is to preserve and protect areas and objects on lands and waters that are of particular significance to Indigenous people in accordance with their traditional law and custom.<sup>29</sup> Although this legislation is currently limited to the protection of physical heritage, and provides no mechanism to protect the secret and sacred knowledge relating to significant areas,<sup>30</sup> the Minister has the power to make a declaration in relation to areas of significance to Indigenous peoples which are under threat. A declaration under subsection 9(1) or 10(1) in relation to an area shall:

- a) describe the area with sufficient particulars to enable the area to be identified
- b) contain provisions for and in relation to the protection and preservation of the area from injury or desecration.<sup>31</sup>

Provisions provide for both emergency coverage of threatened areas for up to 60 days, and coverage for longer periods of time as declared by the Minister.<sup>32</sup>

Additionally, the National Heritage List and the Commonwealth Heritage List are established under the *Environment Protection and Biodiversity Conservation Act 1999* (EPBC Act), the Australian Government's central piece of environmental legislation. However, this Act and the Heritage lists are limited to matters of national environmental significance. Issues of non national significance come under the jurisdiction of the States.

The Australian Heritage Council, the expert advisory body on heritage matters which draws on the knowledge of Indigenous experts, and the Indigenous Advisory Committee (IAC) provide advice to the Minister on the operation of the EPBC Act taking into account their knowledge of the land, conservation and the use of biodiversity.

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28 M Davis, (Science, Technology, Environment and Resources Group), *Biological Diversity and Indigenous Knowledge*, 29 June 1998, Research Paper 17 1997-98, Parliament of Australia. At: <http://www.aph.gov.au/library/Pubs/RP/1997-98/98rp17.htm> (viewed 22 September 2008).

29 Australian Government, Department of the Environment, Water, Heritage and the Arts, *Heritage, Protecting Indigenous heritage places*. At: <http://www.environment.gov.au/heritage/about/indigenous/index.html> (viewed 25 September 2008).

30 M Davis, (Science, Technology, Environment and Resources Group), *Biological Diversity and Indigenous Knowledge*, 29 June 1998, Research Paper 17 1997-98, Parliament of Australia. At: <http://www.aph.gov.au/library/Pubs/RP/1997-98/98rp17.htm> (viewed 22 September 2008).

31 *Aboriginal and Torres Strait Islander Heritage Protection Act 1984*, s 11.

32 *Aboriginal and Torres Strait Islander Heritage Protection Act 1984*, ss 9-10.

As discussed in chapter 5, the scope of the IAC to be directive in their engagement is limited by their terms of reference. This is of particular concern in the development of climate change policy.

The protection of Indigenous peoples intellectual property will be a specific challenge for government and Indigenous groups, particularly where the protection of intellectual property in Australia is afforded as an individual protection and does not provide for communal or group protection.

## 4. Protection of Indigenous Knowledge's

Opportunities to preserve and value Indigenous Traditional Knowledge are endangered by the range of problems within our environment and communities today. Avenues for the preservation of traditional knowledge are fading and are at risk of being lost altogether. Loss of traditional knowledge will result in a decline of Indigenous identity and a severe reduction in the recognition and understanding of an invaluable sustainable knowledge system.<sup>33</sup>

At the local level, Indigenous people have also been actively developing strategies for recording and protecting their traditional knowledge's. For example, traditional owners in Cape York have been actively recording their knowledge about the biodiversity and ecosystems which inhabit their lands and waters, through the Traditional Knowledge Revival Pathways (TKRP).

### Text Box 3: Traditional Knowledge Revival Pathways<sup>34</sup>

The TKRP was developed from the aspirations of Indigenous Elders, to preserve and recognise traditional indigenous knowledge. Through a grassroots methodology, the project is connecting Indigenous groups, to recognise and strengthen traditional knowledge to benefit environment and community well being, for present and future generations.

This project is based on ensuring the survival of cultural knowledge, and the opportunity to demonstrate practices that have the ability to 'innovate' contemporary management and community outcomes for the benefit of all generations to come.

The TKRP supports community aspirations with the recording and applying of their knowledge to strengthen outcomes for traditional and contemporary wellbeing. TKRP is currently operating with seven traditional owner groups including:

- Wik people – Aurukun
- Northern Gulf Indigenous Savannah Group (NGISG – includes seven language groups)
- Kuku-Thaypan people – Lakefield National Park, Laura region
- Buru people – Chinacamp – Wujal Wujal, Cooktown region
- Kuku Yalanji people – Shipton Flats, Wujal Wujal, Cooktown region
- Lamalama people – Kalpowar – Laura region
- Moriori – New Zealand

33 Traditional Knowledge Revival Pathways. At: [http://tkrp.com.au/index.php?option=com\\_content&task=view&id=17&Itemid=26](http://tkrp.com.au/index.php?option=com_content&task=view&id=17&Itemid=26) (viewed 1 October 2008).

34 All information contained in this case study was obtained from the TKRP website. At: [http://tkrp.com.au/index.php?option=com\\_content&task=view&id=17&Itemid=26](http://tkrp.com.au/index.php?option=com_content&task=view&id=17&Itemid=26) (viewed 1 October 2008).

TKRP seeks to support Indigenous elders to mentor the process of Indigenous knowledge research and recording throughout Australia and with interests Internationally. The project has a demonstrated record of success, with a focused methodology, that has been built over time from local communities, and is rapidly disbursing its recording and mentoring methodology into other regions including New Zealand.

#### **Project Outcomes**

The Project is achieving the following:

- Transfer of traditional knowledge from the elders to their young people based on the traditional methods as determined by the elders.
- Digitally recording this traditional knowledge before it is lost forever.
- Storing knowledge onto multi-versions of a digital knowledgebase.
- Incorporating traditional knowledge in cooperative land management strategies and building this practice into “best practice principles” in all land management.
- Building and improving the profile of Indigenous knowledge and its appreciation with other land managers and users both nationally and internationally (eg. pastoralists, government and the general public).
- Creating practical action, research-driven, projects as live case studies to better collaborative land and community management.

#### **Community Training Program**

The training program is based on community mentoring community on the skills and methodology of the TKRP project. This includes:

- the recording of traditional knowledge
- use of digital camera
- editing and database use
- TKRP presentations
- traditional land management projects
- TKRP Web.

TKRP is continuing to develop by assisting the elders to conduct their own research on their own terms.

The traditional owner groups that live on the Murray-Darling River Basin have also been conducting use and occupancy mapping of the activities they conduct on their lands and waters

**Text Box 4: Use and Occupancy Mapping: Murray-Darling River Basin**

The Living Murray Indigenous Partnerships Program (IPP) established in February 2006, recognises Indigenous people's spiritual and cultural connection to their country, and their aspirations to be actively involved in managing the environment.

An approach, developed in Canada,<sup>35</sup> and adopted by the Living Murray Indigenous Partnerships Program, is being introduced to engage Indigenous people in a meaningful way. It does this by applying a social science methodology to map Indigenous people's contemporary relationship with icon sites. This approach is based on the principle of informed consent. A Canadian First Nations Chief highlighted the importance of this work:

The Supreme Court of Canada, in *Delgamuukw*, said Aboriginal title must be established by evidence of physical and legal occupancy, or tenure. The principal way of establishing physical occupancy is to plot the First Nation's land use activities on a map. Therefore it is important for nations and their advisors to know how to do this research and how to do it well.<sup>36</sup>

The Murray-Darling Basin Commission (MDBC) has worked with the Murray Lower Darling River Indigenous Nations (MLDRIN) and other representatives of Traditional Owners to gain support for the concept, and then undertook a pilot mapping project with an Indigenous community. As part of this pilot, use and occupancy maps have successfully been produced for several individuals at two of the icon sites.

Indigenous input will be provided into each of the icon site environmental management plans. Indigenous Working Groups will ensure that Indigenous involvement is undertaken in culturally appropriate ways. Local Indigenous facilitators are planned to be employed at each of the icon sites to work with their communities.

Over time these communities will produce "Use and Occupancy Maps" for each icon site. These maps can help identify and record the spiritual, cultural, environmental, social and economic interests of Indigenous people for each icon site. This approach focuses on Indigenous people's contemporary connections to the land in a way that can be directly related and considered in developing icon site management activities.

Considerable effort has been invested in involving and informing Indigenous community members regarding use and occupancy mapping, which is now gaining strong support within the Indigenous community.

35 T Tobias, *Chief Kerry's Moose: a guidebook to land use and occupancy mapping, research design and data collection*, A joint publication of the Union of BC Indian Chiefs and Ecotrust Canada, 2000, Canada. At: <http://www.ubcic.bc.ca/Resources/tus.htm> (viewed 12 January 2009).

36 Chief Arthur Manual in T Tobias, *Chief Kerry's Moose: a guidebook to land use and occupancy mapping, research design and data collection*, A joint publication of the Union of BC Indian Chiefs and Ecotrust Canada, 2000, Canada. At: <http://www.ubcic.bc.ca/Resources/tus.htm> (viewed 12 January 2009).

The maps can also be used as a basis for cultural heritage protection and management, and help monitor the impacts of The Living Murray. Use and occupancy mapping is sometimes referred to as the 'geography of oral tradition'.

The MDBC is working with Charles Sturt University to undertake a research and monitoring program to measure the impacts and benefits of use and occupancy mapping at the icon sites.

The MDBC is also closely involved in the development of the world's first textbook on use and occupancy mapping, currently being researched and written in Canada. This involvement will ensure that the textbook will be relevant to Australia and available for future training needs in the Murray-Darling Basin.<sup>37</sup>

While processes for recording traditional knowledge are already developed by Indigenous communities, principles contained in recommendation 81 of *the Final Report of the Law Reform Commission in Western Australia on Customary Law*<sup>38</sup> (which are also in accordance with international standards) provide a good foundation for the protection of this knowledge and will be integral to the development of an appropriate regime, including to:

- undertake direct consultation with Indigenous peoples as to their customary law and other requirements
- ensure compliance with Indigenous peoples' customary law and other requirements
- seek free, prior and informed consent for the use of any Indigenous traditional knowledge from the custodians of that traditional knowledge
- seek free, prior and informed consent for access to Indigenous lands and waters for any purposes, including collection
- ensure ethical conduct in any consultation, collection, or other processes
- ensure the use of agreements on mutually agreed terms with Indigenous peoples for all parts of the process
- devise equitable benefit-sharing arrangements
- acknowledge the contribution of Aboriginal peoples.

Additionally, the Desert Knowledge Cooperative Research Centre (Desert Knowledge CRC) have developed a comprehensive *Protocol for Aboriginal Knowledge and Intellectual Property*.<sup>39</sup> This protocol has been developed with specific relevance to the Aboriginal communities that Desert Knowledge CRC work closely with.

The protocol acknowledges and respects that those Aboriginal communities and groups will have their own protocols that must also be observed, understood and engaged with as an essential ongoing part of any process with Indigenous people. However, the protocol serves as a very useful guide towards best practice in ethics, confidentiality, equitable benefit sharing and in managing research information.<sup>40</sup>

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37 Information for this case study was obtained from, Murray-Darling Basin Commission, *Indigenous Partnership*. At: [http://www.mdbc.gov.au/subs/annual\\_reports/AR\\_2006-07/part1\\_1.htm](http://www.mdbc.gov.au/subs/annual_reports/AR_2006-07/part1_1.htm), and The Living Murray, *Indigenous Partnerships*, at: <http://www.thelivingmurray.mdbc.gov.au/communities> (both viewed 1 October 2008).

38 Law Reform Commission of Western Australia, *Aboriginal Customary Laws, Final Report – The interaction of Western Australian law with Aboriginal law and culture*, Project 92, September 2006, p 267, Government of Western Australia.

39 Desert Knowledge Cooperative Research Centre, *Protocol for Aboriginal Knowledge and Intellectual Property*. At: <http://www.desertknowledgecrc.com.au> (viewed 15 December 2008).

40 Desert Knowledge Cooperative Research Centre, *Protocol for Aboriginal Knowledge and Intellectual Property*. At: <http://www.desertknowledgecrc.com.au> (viewed 15 December 2008).

I have included the complete protocol at Appendix 8 as an example of what should be considered in the development of a National Indigenous Knowledge Use and Protection Protocol.

## 5. Principles of Protection

In the previous chapters, I have raised a number of concerns and opportunities relevant to Indigenous peoples and our communities to engage in emerging carbon and environmental markets and the developing national emissions trading scheme. I have discussed the significant contributions and compromise that Indigenous people in Australia will be required to make to assist with mitigation and adaptation efforts, and to increase the capacity for the Australian environment not only to withstand the impacts of climate change, but to ensure that our country is in a position to effectively participate in the emerging global markets.

A huge proportion of Australia's habitat is on Indigenous owned land...we rely on the dedication and skills of indigenous people to conserve it for all Australians.<sup>41</sup>

This reliance on and expectation of Indigenous peoples in addressing the impacts of climate change in turn deserves the respect and protection of Indigenous peoples right to engage effectively in related processes. If this relationship is to be mutual it will also mean that Indigenous people will need to be protected in doing so.

In conclusion, Indigenous people and various reports on the subject of Indigenous traditional knowledge, including the *Our Culture: Our Future*, argue that the current legal framework offers limited recognition and protection of Indigenous traditional knowledge.

Research suggests the introduction of *sui generis* legislation to protect Indigenous intellectual and cultural material in a way which accords with Indigenous customary law.

Such a system will require mechanisms firstly, that do not assume that Indigenous traditional knowledge is freely and absolutely available for appropriation, and secondly, in light of emerging climate change policy, affords the right to share equitably in the benefits derived from the uses of this knowledge.

The principle of free, prior, and informed consent should be applied to the use and appropriation of Indigenous knowledge. The United Nations Permanent Forum concluded that:

The free, prior and informed consent principle in the context of intellectual property can mean defensive protection in which any use of traditional knowledge, and in particular acquisition of intellectual property rights over traditional knowledge and derivatives thereof, without the prior consent of the community, can be prevented. Free, prior and informed consent can also support positive forms of protection, in which, for example, a community would have the right to authorize any use or commercialization of its knowledge, either by itself or by a third party, that would be to the community's financial and other advantage.<sup>42</sup>

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41 The Hon P Garrett, Minister for the Environment, Water, Heritage and the Arts, *Millions for ranger work*, Koori Mail, Wednesday 22 October 2008, p 3.

42 United Nations Permanent Forum on Indigenous Issues, *Report of the International Workshop on Methodologies regarding Free, Prior and Informed Consent and Indigenous Peoples*, New York, 17-19 January 2005, p 8. At: [http://www.hreoc.gov.au/social\\_justice/conference/engaging\\_communities/report\\_of\\_the\\_international\\_workshop\\_on\\_fpic.pdf](http://www.hreoc.gov.au/social_justice/conference/engaging_communities/report_of_the_international_workshop_on_fpic.pdf) (viewed 3 October 2008).

## 5.1 A framework for protection

As identified earlier, the current arrangements for protecting intellectual property rights are inadequate to protect Indigenous knowledges. With significant challenges such as climate change ahead, a national legislative regime is urgently required to enable the fullest possible protection for Indigenous knowledges.

A national legislative regime framework for the protection of Indigenous peoples in a changing climate will require:

- An appropriate legislative framework
- National principles for engagement
- National principles for protection

### (a) A Legislative framework that provides for:

- the full participation and engagement of Indigenous peoples in negotiations and agreements between parties
- the adoption of and compliance with the principle of free, prior and informed consent
- the protection of Indigenous interests, specifically access to our lands, waters and natural resources
- the protection of Indigenous areas of significance, biodiversity, and cultural heritage
- the protection of Indigenous knowledge relevant to climate change adaptation and mitigation strategies
- access and benefit-sharing through partnerships between the private sector and Indigenous communities
- non-discrimination and substantive equality.

### (b) National Principles for Engagement<sup>43</sup> that includes:

A Human Rights-Based Approach to Development

- All policies and programs relating to indigenous peoples and communities must be based on the principles of non-discrimination and equality, which recognise the cultural distinctiveness and diversity of indigenous peoples.
- Governments should consider the introduction of constitutional and or legislative provisions recognising indigenous rights.
- Indigenous peoples have the right to full and effective participation in decisions which directly or indirectly affect their lives.
- Such participation shall be based on the principle of free, prior and informed consent, which includes governments and the private sector providing information that is accurate, accessible, and in a language the indigenous peoples can understand.
- Mechanisms should exist for parties to resolve disputes, including access to independent systems of arbitration and conflict resolution.

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<sup>43</sup> These guidelines were developed at the *International Workshop on Engaging with Indigenous Communities* which took part at the *International Conference on Engaging Communities* in Brisbane in August 2005. Human Rights and Equal Opportunity Commission and United Nation Permanent Forum on Indigenous Issues, *Engaging the marginalised: Report of the workshop on engaging with Indigenous communities*, HREOC, Sydney, and United Nations, New York 2005. At: [www.humanrights.gov.au/social\\_justice/](http://www.humanrights.gov.au/social_justice/).

#### Mechanisms for representation and engagement

- Governments and the private sector should establish transparent and accountable frameworks for engagement, consultation and negotiation with indigenous peoples and communities.
- Indigenous peoples and communities have the right to choose their representatives and the right to specify the decision-making structures through which they engage with other sectors of society.

#### Design, negotiation, implementation, monitoring, and evaluation

- Frameworks for engagement should allow for the full and effective participation of indigenous peoples in the design, negotiation, implementation, monitoring, evaluation and assessment of outcomes.
- Indigenous peoples and communities should be invited to participate in identifying and prioritising objectives, as well as in establishing (short and long term) targets and benchmarks.
- There should be accurate and appropriate reporting by governments on progress in addressing agreed outcomes, with adequate data collection and disaggregation.
- In engaging with indigenous communities, governments and the private sector should adopt a long term approach to planning and funding that focuses on achieving sustainable outcomes and which is responsive to the human rights and changing needs and aspirations of indigenous communities.

#### Capacity-building

- There is a need for governments, the private sector, civil society and international organisations and aid agencies to support efforts to build the capacity of indigenous communities, including in the area of human rights so that they may participate equally and meaningfully in the planning, design, negotiation, implementation, monitoring and evaluation of policies, programs and projects that affect them.
- Similarly, there is a need to build capacity of government officials, the private sector and other non-governmental actors, which includes increasing their knowledge of indigenous peoples and awareness of the human rights based approach to development so that they are able to effectively engage with indigenous communities.
- This should include campaigns to recruit and then support indigenous people into government, private and non-government sector employment, as well as involve the training in capacity building and cultural awareness for civil servants.
- There is a need for human rights education on a systemic basis and at all levels of society.

**(c) National Principles for Protection that:**

- undertake direct consultation with Indigenous peoples as to their customary law and other requirements.
- ensure compliance with Indigenous peoples' customary law and other requirements.
- seek free, prior and informed consent for the use of any Indigenous traditional knowledge from the custodians of that traditional knowledge.
- seek free, prior and informed consent for access Indigenous lands and waters for any purposes, including collection.
- ensure ethical conduct in any consultation, collection, or other processes.
- ensure the use of agreements on mutually agreed terms with Indigenous peoples for all parts of the process.
- devise equitable benefit-sharing arrangements.
- formally acknowledge the contribution of Aboriginal peoples, including for example co-authorship.

<b>Recommendations</b>	
7.1	That the Australian Government engage Indigenous peoples around the country to develop a legislative framework that provides for protection of Indigenous knowledge's and a protocol for the use of this knowledge.
7.2	That all governments amend relevant legislation and policy, such as the Native Title Act, Cultural Heritage legislations and various land rights regimes, to ensure consistency with the proffered national legislative regime framework. This should extend to all legislation that relates to Indigenous peoples and their rights and interests such as education, health, tourism, the arts and so on.
7.3	The proffered national legislative regime framework should be applied to all climate change and water policy and processes, including domestic and international negotiations relating to carbon, water and environmental markets.