DESERT KNOWLEDGE CRC

Scoping project on Aboriginal Traditional Knowledge

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with

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Report 22

February 2007

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The Desert Knowledge Cooperative Research Centre is an unincorporated joint venture with 27 partners whose mission is to develop and disseminate an understanding of sustainable living in remote desert environments, deliver enduring regional economies and livelihoods based on Desert Knowledge, and create the networks to market this knowledge in other desert lands.

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The Desert Knowledge CRC thanks the authors for their work. The CRC is a new organisation and is developing its approach in partnership with others. Since the time of writing this report, in November 2005, significant progress has been made and we would recommend that you visit our website at www.desertknowledgecrc.com.au for further information.

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Introduction

Background to the project

The project was led by Ms Sonia Smallacombe of the School of Australian Indigenous Knowledge Systems at Charles Darwin University, who is now working with the United Nations Permanent Forum on Indigenous Issues in New York.

Ms Smallacombe had the vision to select Indigenous and non-Indigenous people from within the Desert Knowledge Cooperative Research Centre (DKCRC) partnership and from outside agencies to make up the project team. She was particularly astute in selecting people with widely different, but complementary, skills and experience. The result was a genuinely collaborative project under Aboriginal leadership, which may well serve as a model for future DKCRC projects.

Executive summary

This report canvasses the meaning of the term 'Aboriginal Traditional Knowledge', variously expressed elsewhere as Indigenous Knowledge, Indigenous Traditional Knowledge or Cultural Knowledge. It aims to raise awareness of the role of this knowledge in research, policy and programs concerning desert peoples.

It proposes that the use of the term 'Desert Knowledge' in the name of the DKCRC underlines a need for the CRC to consider seriously the importance of Aboriginal Knowledge in planning and conducting research that aims to improve desert livelihoods.

The first part of the paper is devoted to a discussion of aspects of Aboriginal Traditional Knowledge. It concludes that DKCRC has an opportunity to take a leading role in working with Aboriginal Traditional Knowledge in ethical ways and urges DKCRC to develop benefit-sharing arrangements with Aboriginal people that are based on international standards.

The second part of the paper is a closer examination of measures for supporting the rights and interests of Aboriginal knowledge holders. With respect for customary law as its starting point, it explores what Aboriginal people and other Indigenous peoples have been doing to maintain their cultures and control the use of cultural knowledge.

Acknowledging the misappropriation of this knowledge as a major threat and noting the pressure on Indigenous knowledges from growing international interest in developing biological resources, this part canvasses local, regional and international protocols, case studies and guidelines for research engagement with Indigenous peoples, including sui generis legislation and defensive protective measures.

It also details existing regional and national legislation which may be applied to protecting the rights of the holders of Aboriginal knowledge and outlines international conventions which may apply, or on which Australian policy and practice may be modelled.

In the absence of Australian legislation protecting the rights and interests of Aboriginal knowledge holders, intellectual property rights may provide some protection. There is, however, tension between IP rights and uses according to customary law and they are, in any case, drafted primarily to protect economic interests, which does not always serve the needs of Aboriginal knowledge holders.

Clearly, free prior informed consent is an emerging international norm which can empower Indigenous peoples to make the best decisions possible over research and development involving their Traditional Knowledge.

The third part of the paper outlines requirements for closer engagement with Aboriginal peoples in the region, starting from a long history of poor research practice, and finishing with emerging models for engagement. It suggests an information strategy for DKCRC, but proposes this be done within the context of more through organisational change that will give engagement of Aboriginal peoples in the region the highest priority, the appropriate resources and an appropriate commitment to the long-term.

Recommendations

This scoping project recommends that the DKCRC:

1. Adopts the findings of this project as the basis for a policy for engaging Aboriginal Traditional Knowledge in its operations.
2. Takes steps to ensure that the distinction between Traditional Knowledge and intellectual property is made in the following ways:
   a. Develop and implement an Aboriginal Traditional Knowledge Protocol

   b. Review and amend all DKCRC agreements, contracts and protocols specifically with regard to their provisions regarding intellectual property

   c. Conduct an education, information and awareness campaign, both internally throughout the DKCRC, and in the wider community.
3. Develop a framework for the introduction of a CRC-wide fair and equitable access and benefit-sharing arrangement with Aboriginal organisations and communities. An access and benefit-sharing regime should incorporate provisions for free, prior and informed consent to be sought from Aboriginal people, and for measures that ensure recognition and protection of Aboriginal rights and interests in Traditional Knowledge, innovations and practices.
4. Convene a workshop at the DKCRC level to discuss Traditional Knowledge, access and benefit-sharing, and ethical research engagement. This workshop would provide opportunities to share information, and to demonstrate specific projects relevant to the workshop themes.

5. Endorse as a foundational statement:

   Aboriginal Traditional Knowledge is the original Desert Knowledge. It is central to the work of the Desert Knowledge CRC and DKCRC respects the sovereignty over this knowledge that Aboriginal people hold as a birthright.

   If we are to promote and apply Aboriginal Traditional Knowledge to the benefit of the community of desert peoples, we will do so in such a way as to show our respect practically by:

- Fully acknowledging the holders of Aboriginal Traditional Knowledge
- Involving them in defining how DKCRC applies their knowledge
- Compensating them appropriately for the use of their knowledge
- Protecting their rights and interests.

6. A statement of this kind will:

   a. Acknowledge Traditional Knowledge as central to the work of the Desert Knowledge CRC, and respect the sovereignty over their knowledge that Aboriginal people hold as a birthright.

   b.Form a basis for the DKCRC to develop fair and equitable benefit-sharing arrangements with Aboriginal knowledge-holders.

7. Introduce measures that recognise and respect, in practical ways, Aboriginal customary law as the main source of authority and action whenever the use of Traditional Knowledge is contemplated. This may be achieved by reviewing all of its agreements and protocols, ensuring that they give consistency and full and effective legal protection to the customary law obligations and rights of Traditional Knowledge holders.
8. Adopt and follow protocols, guidelines and principles developed by Indigenous peoples in any area in which it is engaged in research and development.
9. Incorporate the principle of free, prior and informed consent into all DKCRC protocols, DKCRC documents including contracts and agreements, DKCRC negotiations, and DKCRC dealings with Traditional Knowledge holders.
10. Monitor and review existing and emerging international standards in relation to Traditional Knowledge with a view to incorporating them into DKCRC business practices and advocating improved policy and legislative approaches to the rights of Aboriginal Knowledge owners.
11. Introduce processes to ensure adequate levels of awareness among owners of Traditional Knowledge about intellectual property rights and other developments. This should include:
    - Discussing the advantages and disadvantages of working with research and the implications for intellectual property systems
    - Discussing the relationship between intellectual property rights and Traditional Knowledge
    - Developing resource materials and capacity building strategies.
12. Support and promote the drafting and implementation of sui generis legislation to protect the rights of Traditional Knowledge holders.
13. Develop, and allocate sustained resources and effort to, an Aboriginal engagement strategy that will both help Aboriginal people engage with the DKCRC and provide a foundation for DKCRC operations that involves:

- Recognising the importance of relationship-building as a key element in promoting engagement and funding scoping; projects specifically to help build relationships
- Developing measures, including facilitating and financing desert Aboriginal peoples' networks and discussion, to allow for full and equal involvement of Aboriginal people in developing an Aboriginal research agenda and in determining the DKCRC research agenda, by proposing research projects and considering proposals
- Collaboratively developing measures to allow for full and equal involvement of Aboriginal people in research and other activities. The would cover recognition of prior learning and current expertise, skills development, formal acknowledgment of project leadership and joint authorship, and leadership positions within the organisation
- Collaboratively developing an Aboriginal employment strategy, including setting milestones, auditing and providing clear lines of accountability for meeting its targets

- Developing and assessing appropriate ways to feed back information from research projects to the people directly involved and to the wider desert Aboriginal community
- Collaboratively designing processes for rethinking research methodologies, practice and accountability in line with local Aboriginal perspectives and aspirations
- Designing benefit-sharing arrangements and appropriate levels of compensation from commercial development based on applying Aboriginal Knowledge
- Explicitly recognising the role played by engaging Aboriginal Knowledge in community development and building local capacity.

PART A: ABORIGINAL TRADITIONAL KNOWLEDGE: A DISCUSSION

1. Introduction and Background

The purpose of this discussion paper is to create awareness of the role of Indigenous knowledge in research, policy and programs concerning desert peoples. It provides a basis for developing strategies to ensure effective recognition and protection for Indigenous knowledge and practices in the research engagement between the Desert Knowledge Cooperative Research Centre (DKCRC) and Aboriginal communities and organisations.

This paper is for a diverse audience, which includes DKCRC Board members, partners, staff and researchers.

It aims:

- To provide a basis for the development of strategies in Aboriginal engagement in the research process that fully respects the role of Aboriginal Traditional Knowledge and practices
- To review developments in Australia and internationally that contribute to the debate on recognition and protection of Indigenous biodiversity-related knowledge and practices
- To explore the complex relationships between Indigenous knowledge and practices, and intellectual property rights, and to indicate how these relationships can inform policy and practice in the DKCRC research engagement with Aboriginal communities
- To provide a select bibliographic reference.

Perhaps most importantly, it is also for the Aboriginal communities (acknowledging the multiple and diverse meanings of the term 'community'), who are the owners, managers and custodians of land, knowledge, practices, and resources in the central desert. The term 'Desert Knowledge' in the DKCRC suggests a need to consider seriously the importance of, and role of Indigenous knowledge in planning and conducting research aimed at improving desert livelihoods. A key focus for this part of the report is therefore to promote an awareness of, and understanding of, Indigenous knowledge and a respect for maintaining the integrity of this knowledge. This part of the report integrates with the other parts and they should be used in conjunction with each other.

This paper hopes to encourage DKCRC project designers, planners and researchers to find ways to integrate Aboriginal Traditional Knowledge into their projects, while ensuring equity and benefits for Aboriginal people, as well as appropriate respect for, and protection of their knowledge and practices.

This discussion paper presents a brief introduction to and overview of the many aspects of Aboriginal Traditional Knowledge, including its relationship with intellectual property rights, and its relevance to, and importance in the research process. A selection of references is also included, with a more detailed bibliography provided at the end of the paper. The bibliography also includes some materials that are not referred to in the text, as an additional guide to the literature.

Recognising an Aboriginal Voice

It is important to set out some preliminary observations by way of background to this paper. This paper has been compiled by Indigenous and by non-Indigenous people who have interests and expertise in research and policy on Traditional Knowledge. In this sense, the paper can be said to represent the voice of Indigenous people – a rarity in many publications.

While representing an Indigenous voice, the paper also acknowledges the wider institutionalised silencing and marginalising of Aboriginal peoples' voices that is a consequence of the textual representation of Indigenous peoples' cultures, societies and ways of knowing. The paper also recognises a tendency for research and academic discourses to claim to 'speak for' Indigenous people, often without those peoples' consent or involvement. With these political issues and questions in mind, this paper seeks to position itself as an advocate on behalf of Aboriginal peoples, to encourage the recognition of Indigenous peoples' rights in their Traditional Knowledge, and their full and equal participation in the research engagement.

Valuing Indigenous Knowledge

Often, Traditional Knowledge is contrasted with other kinds of knowledge systems, most especially with western science. In these comparative contexts, Traditional Knowledge is frequently viewed as being inferior, less reliable and as intuitive and informal, lacking the rigorous testing and verifiability that characterise the scientific process. By contrast, what is generically termed 'Western science' is privileged and depicted as of a higher order than Indigenous knowledge. These pejorative views of Indigenous systems of knowledge correlate to a historically defined evolutionary view that placed Indigenous peoples and their cultures lower on the scale of 'progress' than western societies.

In more recent decades, while this hierarchical view of Traditional Knowledge has persisted in many areas of society, there has been growing recognition of the value of such knowledge in its own right. Increasingly there is an understanding of the benefits to be gained from drawing on this knowledge for development, tourism, conservation, park management and a range of other purposes. Integrating different knowledge systems – local, Indigenous, and scientific – is attracting attention in many global arenas, especially with regard to biodiversity, ecosystem and environmental assessment, conservation and management.

When the knowledge-holders in desert Aboriginal communities participate in collaboration with outside processes and systems, issues of accountability arise. For example, some people may assume, either for convenience, or for various motives of expediency, that Indigenous rights in Traditional Knowledge are invested in the whole community. Or it may be assumed by some outsiders that the Aboriginal Land Council is the only point at which agreements and contracts are negotiated, rather than considering that there may be more wide ranging Aboriginal interests within and between communities that do not necessarily, or solely, reside with the Land Council.

Yet another example of this 'politics of accountability' concerns the assumption some researchers may have that international protocols are the primary focus for matters relating to Indigenous knowledge. This assumption may result in a neglect to consider the local or customary protocols that already exist and operate in Aboriginal communities regarding Traditional Knowledge and Indigenous intellectual property.

Scale politics can also hide issues of accountability. Researchers may override or ignore the scale at which Indigenous knowledge is constituted and supervised, and create impunity for their projects. If a funding body or research project engages with a community on a knowledge-related project for example, then it may turn out to be the community council, which is left accountable to the individuals and family groups who share their knowledge. In the past such arrangements have left poorly constituted and under-resourced community councils (as well as knowledge centres, and health centres) unable to fulfil their responsibilities to the Traditional Knowledge owners. This has enabled projects to avoid their responsibilities.

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2. Characterising Indigenous Knowledge

A starting point for many discussions on Indigenous Knowledge is the challenge of characterising this knowledge and of delineating its features and parameters. In developing such a characterisation, it is acknowledged that the role of Aboriginal authority and power structures is vital to the formation, maintenance and transmission of Indigenous knowledge systems.

Indigenous Traditional Knowledge is best understood not as a discrete, stand-alone entity, but rather as tangible systems of knowledge, meanings, values and practices deeply embedded in Indigenous cultures. Indigenous cultural knowledge might be understood as the ways in which Indigenous people regard and act out their relationships with each other, with their lands and environments, and with their ancestors.

In this sense, Traditional Knowledge is concerned with much more than content; it is also about context. This involves an understanding of processes of transmission, expression, and other factors that comprise what might be termed the ‘political economy’ of Traditional Knowledge systems. Overall, the context of Indigenous knowledge systems also has to do with the multiple and diverse ways in which Indigenous knowledge is managed within, between and among Indigenous societies and individuals. Again, the role of Aboriginal authority (e.g. roles, responsibilities, modalities of power and influence, governance structures and processes) is crucial to an understanding of Indigenous knowledge systems and their contexts and dynamics.

What is sometimes termed Indigenous ‘traditional’ knowledge is often defined and discussed in Europeans discourses in terms of its need for protection or proper recognition. Indigenous knowledge is seen in this way as something that is by definition under threat or in danger of disappearance, damage, theft or desecration. Regarded in this way, Indigenous knowledge might only be seen to exist in terms of adversity, as a site for contested claims and interests. While it is certainly

true that Indigenous knowledge is fairly constantly under threat, this should not be its only defining feature. What is required is a more affirmative way of considering Indigenous knowledge, a way that sees its intrinsic properties, values, and modalities of existing as elements of a complex and viable Indigenous philosophy and epistemology.

Various terms are used to denote this knowledge, including 'Traditional Knowledge', and 'traditional ecological knowledge'. Some of these terms are problematic. For example, the term 'tradition' can be interpreted to mean something that is 'in the past' or 'fixed' and 'unchanging'. This may obscure the fact that Indigenous knowledge is a living, dynamic force that is adaptive and innovative.

The use of the word 'tradition' in descriptions and definitions of Indigenous knowledge is problematic. This term can be read as denoting societies, practices or beliefs and values that are 'in the past', unchanging, and static. This kind of interpretation denies a possibility of appreciating Indigenous Knowledge as dynamic and adaptive, and as belonging to living communities. As one commentator explains:

> *… in the dictionary sense, traditional usually refers to cultural continuity transmitted in the form of social attitudes, beliefs, principles and conventions of behaviour and practice derived from historical experience. However, societies change through time, constantly adopting new practices and technologies, and making it difficult to define just how much and what kind of change would affect the labelling of a practice as traditional' (Berkes 1993, p. 3).*

Because of the problematic connotations of the word 'tradition', some writers have suggested that it is preferable to use the expression 'traditional ecological knowledge'. Martha Johnson states that 'this helps avoid the debate about tradition and explicitly emphasizes indigenous people'. However, this term also has its problems, since 'similar knowledge is found among non-indigenous groups such as … fishermen and farmers … [and] … these groups have also acquired their knowledge and skills through hands-on experience living in close contact with their environment' (Johnson 1992, p. 4). The term 'traditional ecological knowledge' may imply that the knowledge relates only to ecology, rather than seeing this knowledge as all encompassing.

It is also useful to consider the notion of Indigenous Knowledge traditions (rather than Traditional Knowledge systems). This implicitly acknowledges the diversity of Indigenous knowledge traditions, and recognises that all Aboriginal people, whether urban, rural, or remote, participate in their own local familial traditions. In this notion, Traditional Knowledge is not confined to remote groups with pre-European languages.

If the term 'traditional' is understood to mean a dynamic, adaptive and living entity, then its use is acceptable for the purposes of discussion. These dynamic qualities of Indigenous knowledge are emphasised by the Canadian Indigenous organisation Four Directions Council, which suggested:

> *What is 'traditional' about Traditional Knowledge is not its antiquity but the way it is acquired and used. In other words the social process of learning and sharing knowledge, which is unique to each indigenous culture lies at the very heart of its*

'traditionality'. Much of this knowledge is actually quite new but it has a social meaning and legal character entirely unlike the knowledge indigenous people acquire from settlers and industrialised societies. (Cited in Posey 1999 p. 4).

In delineating some of the characteristics of Indigenous knowledge, it is useful to look at the ways some international organisations have employed the term 'traditional'. The World Intellectual Property Organization (WIPO) states that the notion of Indigenous knowledge being 'tradition-based', 'does not mean … that TK [Traditional Knowledge] is old or that it necessarily lacks a technical character'. WIPO argues that Traditional Knowledge 'is 'traditional' because it is created in a manner that reflects the traditions of the communities. 'Traditional', therefore, does not necessarily refer to the nature of the knowledge but to the way in which the knowledge is created, preserved and disseminated' (Document WIPO/GRTKF/IC/4/8, para 27).

The Convention on Biological Diversity (CBD) offers the following definition:

Traditional Knowledge refers to the knowledge, innovations and practices of indigenous and local communities around the world. Developed from experience gained over the centuries and adapted to the local culture and environment, Traditional Knowledge is transmitted orally from generation to generation. It tends to take the form of stories, songs, folklore, proverbs, cultural values, beliefs, rituals, community laws, local language, and agricultural practices. (See CBD web site www.biodiv.org)

This definition emphasises the basis of Traditional Knowledge as a living, dynamic body of traditions and practices, its genesis over considerable time, and its transmission through generations.

One defining feature of Traditional Knowledge is its inclusive quality: it encompasses the spiritual and the physical, and relates as much to relations between people as it does to relations between humans and their environment. It is also knowledge that relates to expressive aspects of Indigenous culture such as art, dance, song, story and ceremony. Another term used to denote Indigenous knowledge is 'Indigenous cultural and intellectual property'. Indigenous knowledge is also a component of Indigenous heritage. In this regard knowledge is characterised by its collective nature, and its importance in transmitting culture from one generation to the next.

A critical defining factor for Indigenous knowledge is to acknowledge its role as part of a living cultural tradition. The processes of learning, interacting, transmission of knowledge and practices, and the constant renewal and re-enactment through cultural and social practice within, among and between Indigenous people (inter-generationally and trans-generationally) comprise the defining characteristics of Indigenous knowledge. It is important to emphasise the ongoing vibrancy of Aboriginal culture and its ongoing embrace of new technologies and practices. These are the ways Indigenous knowledge is constantly validated, reaffirmed and renewed.

The threat comes where the role of older people in governance and in the economy (including the political, spiritual and other arenas) is undermined and young people are not in a position to learn from and respect them. The authority structures and processes of Indigenous communities are the key to maintaining viable Indigenous knowledge systems. Another important feature of Indigenous

knowledge is its inherent adaptability and flexibility. This knowledge has consistently shown its capacity to incorporate new ideas, technologies and categories. Equally important is the interrelationship between knowledge, community, and country.

That part of Aboriginal knowledge, which can be distilled into facts is only the tip of the iceberg. Databases and archives carry a bias towards those aspects of the knowledge system that can be commodified and exchanged. When Aboriginal knowledge owners have the time and space to characterise their own knowledge traditions, they can guard against their knowledge being too narrowly defined as content, rather than as practice.

Although it is important to be aware of the debate concerning definitions and characterisations of Traditional Knowledge, for the purposes of this discussion, it is useful to consider various working definitions that have been formulated.

Some of these are based on these characteristics:

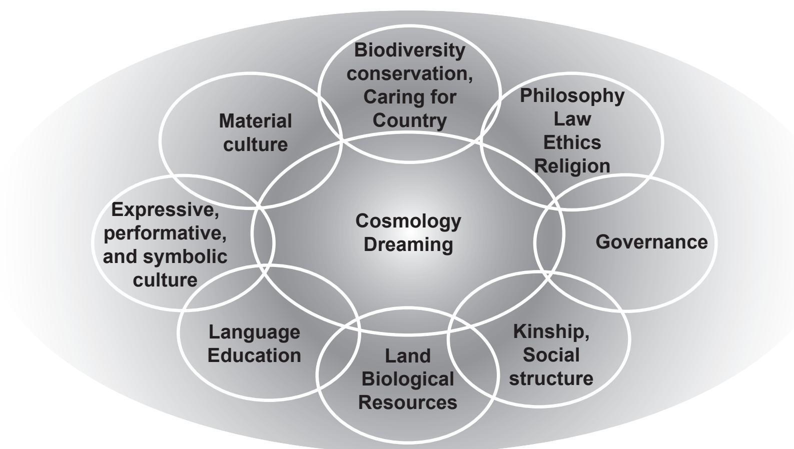
- The holding of communal rights and interests in knowledge alongside the rights and authority of individuals
- A close interdependence between knowledge, land and spirituality
- The passing down of knowledge through generations
- Oral exchange of knowledge, innovation and practices according to customary rules and principles
- The existence of rules regarding secrecy and sacredness which govern the management of knowledge
- As with all other knowledge, Aboriginal Traditional Knowledge comes from, and is expressed through, the routine, culturally specific practices of everyday life; and in turn, this knowledge makes those practices possible
- Indigenous knowledge traditions differ from place to place and are local, relating people to their place in their community and their country
- Traditional Knowledge is also performative, understood as actions as much as ideas
- Traditional Knowledge is managed in accordance with well defined rules and codes, including rules for ownership, the allocation and upholding of responsibilities, and for custodianship and stewardship
- Indigenous knowledge is political. Social and political groupings are constituted through shared knowledge, identity and the sharing of resources

The task of defining Indigenous knowledge and delineating its features is for Indigenous peoples them selves, as a self-determination right. Part of this process of determining the nature of Indigenous knowledge is to safeguard those aspects of their knowledge that should not be revealed to the wider community.

In conducting research and projects in the DKCRC and other organisations, it is important to keep in mind questions concerning the particular language used, and the way it is used. If employing the term ‘tradition’ when referring to Indigenous Knowledge, it is advantageous to explicitly state the intentions and meanings associated with its usage. Acknowledging the dynamic and adaptive qualities of Indigenous Traditional Knowledge, and the use of the term ‘Traditional Knowledge’ in international discourse, this paper will also adopt this term.

Visualising Indigenous Knowledge Systems

In the context of self-determination, it is for Indigenous peoples themselves to exercise and enjoy their rights responsibilities in stipulating the conditions, possibilities and contexts of maintaining, using, and sharing their 'traditional' and other knowledge systems. However, there are many 'working' definitions that can be formulated, for the purposes of discussion within the wider community.



This diagram illustrates something of the kinds of connections and relationships between and among the various components that together comprise the holistic, integrated system of Indigenous knowledge.

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3. Rights, Ethics and Responsibilities

Indigenous rights

Note: A more detailed discussion of the questions raised in this and later sections is to be found in Part B: Measures and requirements to support the rights and interests of Traditional Knowledge Holders.

Although Indigenous peoples' rights are well developed in a conceptual sense, there is relatively limited recognition of these both internationally and domestically. Compounding this problem is the fact that Aboriginal people are often restricted in their capacity to exercise and enjoy their rights both as Australian citizens and as Indigenous peoples.

Aboriginal and Torres Strait Islander peoples have human and citizenship rights by virtue of being Australian citizens. The universal system of human rights applies equally to all Indigenous peoples. As a consequence, Aboriginal people must be able to enjoy and exercise these rights. At the same time they also have Indigenous rights because of their status as Indigenous peoples. These rights – whether human rights, citizenship rights, or Indigenous rights – are not created by international standards and norms, and conferred on peoples. Rather, they are inherent in people as humans, and the role of the international rights regime is to recognise, reinforce, and uphold these rights.

In considering the concept of Indigenous rights, it is important not to privilege the global over the local, or the individual over the collective. Giving priority to global rights may exacerbate a tendency for the wider community to engage with Aboriginal peoples' culture and heritage in a reactive way. Aboriginal peoples' rights are not conferred as a result of international standards and conventions. Rather, their rights are intrinsic to their identities, and flow from their belonging to country.

Perhaps the most important right that Indigenous peoples have under the international system is that of self-determination. They have this right, as do all peoples, under the international charter of human rights (International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, and the Convention and the Convention for the Elimination of All Forms of Racial Discrimination). Article 1 of both the Covenant on Civil and Political Rights (ICCPR), and the Covenant on Economic, Social and Cultural Rights provides a universal right for self-determination:

> *All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.*

The ICCPR goes further, and at Article 27, contains an important provision that offers scope for Indigenous peoples to exercise their rights collectively to practice their culture:

> *In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.*

This provision forms the cornerstone of endeavours by Indigenous peoples globally to campaign for a more precise articulation of specific Indigenous peoples' rights, including especially collective, cultural rights.

Indigenous peoples' right to self-determination is articulated in the *Draft Declaration on the Rights of Indigenous Peoples*. The Draft Declaration includes the right to own, control, and manage their 'cultural and intellectual property', including cultural knowledge. By implication, this right therefore includes their right to determine the nature of, and to define their cultural and intellectual property and cultural knowledge.

The United Nations international rights regime under the United Nations has developed historically from a specifically European-centred philosophical basis, which privileges the individual over the group, or as prior to the group. However, Aboriginal people have rights to their knowledge not because of any international conventions or standards, but by virtue of the fact that they had a system of knowledge and its ownership long before colonisation. Their systems have retained a dynamism as living entities.

Recognition that there might be a class of inherent Indigenous rights relating to cultural knowledge of the environment and resources often occurs in situations of adversity or when there are contested claims over land, bio-resources and/or sacred sites. In this regard, Indigenous rights in cultural knowledge are articulated as a 'negative' entity; in other words, as rights that are defined in opposition to, or in contest with, other demands and claims. In these situations, Indigenous cultural rights then become a site for competing interests, and, in this sense, are defined reactively.

Using International Law

Indigenous peoples can use international law to advocate for recognition of their rights, including rights in Traditional Knowledge and intellectual property. For example, Australia's periodic reporting and monitoring obligations under international treaties provide an important avenue for Aboriginal and Torres Strait Islander peoples' concerns to be articulated where they believe their capacity to exercise and enjoy their rights has been diminished or restricted.

Complaint handling mechanisms are available under the First Optional Protocol to the International Covenant on Civil and Political Rights (ICCPR), and through similar arrangements under the Convention on the Elimination of All Forms of Racial Discrimination (CERD), and the Convention Against Torture (CAT). In 1991 Australia became a party to the First Optional Protocol to the ICCPR (Aboriginal and Torres Strait Islander Social Justice Commissioner, First Report, 1993, p. 91).

In recent years, there has been a number of comments, reports and observations by the CERD Committee concerning Australia's performance on the rights of Indigenous peoples. For example, in March 1999 a Decision of the CERD Committee expressed concerns about the amendments to the Native Title Act 1993 (Cth). The Decision states that 'while the original 1993 Native Title Act was delicately balanced between the rights of indigenous and non-indigenous title holders, the amended Act appears to create legal certainty for governments and third parties at the expense of indigenous title' (CERD/C/54/Misc.40/Rev.2, 18 March 1999, para 6). The Committee considered that some of the amendments were discriminatory, and that they raised concerns about Australia's

compliance with the Convention (paras 7 and 8). The Committee also expressed its concern about a 'lack of effective participation by indigenous communities in the formulation of the amendments' to the Native Title Act (para 9).

These concerns highlight the need to ensure effective consultation and participation by Aboriginal and Torres Strait Islander peoples in law and policy, in accordance with rights established under international treaties. These participation rights were reinforced in a General Recommendation of the CERD Committee which highlighted the obligations that this Convention places on State Parties to the Convention to 'take all appropriate means to combat and eliminate racism against Indigenous peoples' (Social Justice Report No. 2/2003, p. 188). Among measures that States are encouraged to take are to:

> *Ensure that members of all Indigenous peoples have equal rights in respect of effective participation in public life, and that no decisions directly relating to their rights and interests are taken without their informed consent; and*
>
> *Ensure that Indigenous communities can exercise their rights to practice and revitalise their cultural traditions and customs, to preserve and practice their languages. (CERD Committee General Recommendation XXII – Indigenous Peoples, UN Doc CERD/C/51/ Misc.13/Rev.4, 18 August 1997, para 4, cited in Aboriginal and Torres Strait Islander Social Justice Commissioner, Social Justice Report No.2/2003, p. 188).*

There are several ways to achieve greater protection and recognition of Indigenous peoples' rights. These include amendments to the Constitution, increased use of international law, and a Bill of Rights (Behrendt 2003, pp. 132-133).

Protocols, Guidelines and Ethics

Aboriginal people have a right to maintain, protect, use, and manage their Traditional Knowledge. This is one of their intrinsic rights as Indigenous peoples. Within the wider community, those engaging with Aboriginal people through research activities and in other ways must respect and observe Aboriginal peoples' protocols and values. The design and implementation of ethical standards and processes is critical to good practice in researchers' engagement with Aboriginal communities. Researchers and others have a responsibility to conduct their activities using good practice and ethical approaches. These are defined differently in different places and must be negotiated anew each time. There is increasing activity among certain sectors of the wider community involving the development of cultural protocols, ethical charters and guidelines and other such documents that serve to guide proper behaviour in regard to respecting Indigenous peoples' cultural values and knowledge systems. These must be built into a research program from the beginning. (See also discussion below on benefit-sharing and Aboriginal participation).

There are many different approaches to the development of protocols, charters and codes of conduct, both internationally and, to a lesser extent, in Australia. One international example that has had some attention is the International Society of Ethnobiology Code of Ethics (http://guallart.dac.uga.edu/ISE/ethics.html).

In Australia, the Australian Institute of Aboriginal and Torres Strait Islander Studies (AIATSIS) has produced some Guidelines for Ethical Research in Indigenous Studies. (www.aiatsis.gov.au). The National Health and Medical Research Council (NHMRC) has given a major focus to developing guidelines and standards for values and ethics in health research, including Aboriginal and Torres Strait Islander health research. In particular, the NHMRC has developed the documents *Values and Ethics: Guidelines for Ethical Conduct in Aboriginal and Torres Strait Islander Health Research* (2003), and the *National Statement on Ethical Conduct in Research* Involving Humans (1999). These two documents should be used together (http://www7.health.gov.au/nhmrc/ethics/human/ahec/projects/values.htm).

In May 1998 the then Australian Science, Technology and Engineering Council (ASTEC) produced its *National Principles and Guidelines for the Ethical Conduct of Research in Protected and Environmentally Sensitive Areas.* These Principles provide (at 1.2, and Attachments 1 and 2) for research that is conducted in 'protected and environmentally sensitive areas' to be accountable to the concerns and interests of Aboriginal and Torres Strait Islander peoples. This includes, amongst other things, ensuring proper negotiations with Traditional Owners, obtaining informed consent from Traditional Owners before commencing research, and acknowledging Aboriginal and Torres Strait Islander peoples' right to control use of their knowledge and intellectual property and to share in any profits derived from the use of their knowledge (http://www.dest.gov.au/archive/Science/astec/ethics/contents.html).

More recently (in 2005) the Central Land Council introduced (as a DKCRC funded project) a set of protocols for assisting people wishing to obtain a permit to work and conduct research on Aboriginal lands. These protocols are designed to strengthen the capacity for Traditional Owners and other Aboriginal people in the Central Land Council's region to regulate activities on their lands, and to uphold their cultural and intellectual property rights (www.clc.org.au).

There are other guidelines and protocols being developed to ensure sound ethical practices when working with Indigenous people, or to guide activities that involve Indigenous peoples' cultural products and expressions, or that impact on these. Examples of these are the Australian Heritage Commission's *Ask First: A Guide to Respecting Indigenous Heritage Places and Values* (http://www.ahc.gov.au/publications/indigenousheritage/index.html#pdf), and the Aboriginal and Torres Strait Islander Arts Board of the Australian Council set of protocols (Cultures) for music (song), literature (writing), performing arts, and new media (http://www.ozco.gov.au/arts_resources/publications/cultures_indigenous_protocol_guides/). The Natural Heritage Trust has also produced a set of guides for people working with Indigenous communities and Traditional Knowledge. These include the pamphlet *Ways to Improve Community Engagement*.

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4. Protection and use of Indigenous Knowledge

Using Traditional Knowledge and Practices

Traditional Knowledge can be maintained and protected by ensuring its continuity of use, including its transmission and expression. This includes, crucially, facilitating cultural practices such as looking after country. This may involve creating the means by which community members can travel around their country, nurture it, record it, restore or 'clean' it, and maintain it. Painting, singing, dancing and speaking about country are all significant aspects of this looking after country.

The recording and documenting of Aboriginal Traditional Knowledge is also crucial to protecting it. Under western intellectual property laws, an intellectual property right can only be acquired for something that is in a physical or tangible form. Thus, with Indigenous knowledge, protection under these laws may only be feasible if the knowledge is recorded, by audio or video means, by documentation, or by creation of a database of some kind. Conversely, however, there are also some negative aspects to recording and documenting Traditional Knowledge. First, because Traditional Knowledge is oral, performative, expressive and multi-dimensional, once it is reproduced in a recorded or documented form, it loses those distinct elements. Second, in written or recorded form, the knowledge becomes vulnerable to exploitation and unlawful use.

The use of databases and registers for recording Traditional Knowledge is gaining increasing attention both in practice and in the literature. There are many issues that need to be explored when we consider the role of databases and registries in protecting Indigenous knowledge and practices. Given that databases and registries contain information rather than knowledge, Indigenous knowledge may be disembodied and decontextualised, and removed from place and people in its transformation onto databases and registries.

A recent discussion paper from the United Nations University's Institute of Advanced Studies suggests that these databases and registries can be useful in providing 'defensive protection' against inappropriate patenting. Databases and registries used in this way can provide important information about what is termed 'prior art' – that is, previously known uses of processes or products – valuable in reviewing patent applications to assess whether they meet the criteria for 'inventiveness' or 'novelty'. However, transferring Indigenous knowledge to databases and registries presents a risk that such knowledge may be vulnerable to access from unwarranted interests.

Community (or private) databases and registries (as distinct from public ones) can be used to advantage by Aboriginal communities as a means of declaring and recording their own communal rights and interests in their knowledge and practices. As such, these kinds of databases and registries can also be employed by communities as a defensive protection against inappropriate

patenting. These databases and registries may also find use by Aboriginal communities in land and native title claims. A potential problem with private databases and registries is that since the information contained within them is not in the public domain, it cannot therefore form part of ‘prior art’ used in defensive protection. This means that the knowledge that the information refers to cannot be adequately protected from unlawful use in patents.

Aboriginal people in the desert and elsewhere are increasingly using digitising technologies in their own ways and for their own purposes, building collective memory to keep knowledge traditions alive. As these new Indigenous digital environments emerge in various contexts, new protocols and practices of knowledge production and exchange are developing which may be more appropriate for their intergenerational knowledge transmission traditions, for their regimes of supervision and protection, sharing and concealment and for their control over negotiations of exchange with outside interests (pharmacological, ecological, etc). For some examples and reports, see www.cdu.edu.au/ik.

It is important to acknowledge that Traditional Knowledge is still very much extant in many communities throughout the desert region – indeed throughout Australia. Traditional Knowledge is carried, transmitted and maintained as much (if not more) through practice as by knowing. Given that practice includes language and speech, the maintenance of Aboriginal languages is critical to keeping knowledge alive. The range of practices by which Traditional Knowledge is expressed, manifested and nurtured includes (but is not limited to) fishing, hunting, gathering, ceremony, and a wide range of community activities. Indigenous knowledge is about a vibrant, living practice rather than purely content. This is important to be aware of when thinking about the threat of extinction of Traditional Knowledge. What is under threat is not so much the knowledge itself, but the opportunities for young people to learn to practice and respect the knowledge production practices of their elders.

Since Traditional Knowledge is a living, dynamic body of traditions, meanings and rules and codes for behaviour, it cannot be considered as separate from the people who are its owners, holders, and custodians. This close interdependence between the knowledge, its practice, and the people who own and hold it is recognised by the Convention on Biological (CBD). Article 8(j) of this instrument refers to the ‘knowledge, innovations and practices’ of Indigenous people, thus importantly linking the active and adaptive elements of knowledge with its applications, and the communities.

Although many discussions about Indigenous knowledge refer to the need for ‘protection’, it is also important to think about whether what is required is actually ‘protection’, or rather ‘conservation’ or ‘preservation.’ The Diversity (CBD) refers to ‘preservation’ in its provision relating to Indigenous knowledge (at Article 8j), and to ‘conservation’ when referring to biological diversity.

The passing on of Aboriginal Elders and other knowledge holders and custodians is a major contributor to this loss of knowledge. Changes in lifestyle, demographic trends (such as people leaving communities for urban and semi-urban centres), and the effects of modernisation are all significant factors in the decline of functioning Indigenous knowledge systems, and of the practice, transmission and management of Indigenous knowledge. In many cases, Indigenous knowledge is very much in place; what is needed is a strengthening of respect for this knowledge by the wider community.

Since the viability and dynamism of Indigenous knowledge is maintained through expression and practice (such as fishing, hunting, and ceremony), changes to these will undoubtedly impact upon the knowledge itself. Maintenance and support for these activities are important ways of keeping Indigenous knowledge traditions strong. Language too is a crucial vehicle for transmitting Indigenous knowledge, and so the maintenance of language is vital for stemming the loss of Indigenous knowledge.

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5. Access and benefit-sharing

Many research projects in desert regions impact on, or are relevant in various ways to, Aboriginal peoples' relationships with natural resources. As well as projects that are specifically concerned with Aboriginal ecological and environmental matters, Traditional Knowledge and intellectual property, many other projects either directly or indirectly refer to Aboriginal environmental and ecological issues. For this reason, consideration must be given to the research, policy and other implications of these projects, and to their actual or potential impacts on Aboriginal Traditional Knowledge of natural resources and practices associated with this knowledge.

There are two critical, interrelated elements to consider in this regard. First, there are many, often complex matters that have to do with the way in which people access, or seek access to biological and genetic resources. A second and closely related point concerns the issues that must be considered in regard to Aboriginal peoples' participation in projects involving Traditional Knowledge and biological resources, the sharing and wider use of this knowledge and those resources, and the negotiation and return of equitable benefits to Aboriginal people based on their involvement in projects, and on the sharing and use of their knowledge and resources.

Access to biological resources

Increasingly, governments and the scientific, industrial, and research sectors are interested in acquiring access to biological resources. Some governments are introducing regulatory regimes to govern access to these resources and facilitate contracts for use. Interest in these resources is driven by an interest in harnessing these resources and products and derivatives from them for their potential commercial applications.

Fair and equitable benefit-sharing

There may be some elements of Aboriginal peoples' Traditional Knowledge that can be shared with the wider community. It is for communities to determine what aspects can be shared and how this may be done. There are some critical points to consider in situations where Traditional Knowledge and practices are used by the wider community. These include:

- That this use must only be on the basis of free prior informed consent by the Indigenous peoples[1]
- That Indigenous people must retain their intrinsic rights in this knowledge and those practices, and define quite specifically the individuals and groups in which these rights are invested
- That Indigenous people must be equal partners in, and exercise ongoing supervision for projects and processes using their knowledge and practices
- That Indigenous people should receive at least equal benefits that may arise from the wider use of their knowledge and practices
- That Indigenous peoples should be able to exercise their right to deny permission to access and use their resources, knowledge and practices by the wider community.

If people are seeking not only the natural resources that occur on Aboriginal country or for which Aboriginal people have rights and responsibilities, but also the knowledge and products of these natural resources, then it is vital to ensure equitable compensation and/or benefits are returned to the Aboriginal people involved. The levels and kinds of benefits received by Aboriginal peoples will need to be carefully negotiated before the commencement of any research and development projects. These negotiations should be conducted on the basis of mutually agreed terms, and in a way in which Aboriginal people are equal partners. Benefits can comprise a mix of monetary and non-monetary forms, and include up-front royalty or similar payments, as well as 'progress' or phased payments. For example, payments might be made on the basis of gaining access to country and to resources, and for 'start-up'. Non-monetary payments can include provision for training and skills development, facilities and infrastructure, services, and other kinds of capacity building.

A common way that has been pursued in many parts of the world to gain access to biological resources and share benefits from their use, is through bioprospecting contracts and agreements. While there are many advantages of these kinds of arrangements, there are also some disadvantages. They are useful in their flexibility and can provide all parties to the agreement with an opportunity to negotiate a range of terms and conditions. Contracts can also offer legal certainty. However, bioprospecting contacts and agreements can also be negotiated without any nationally consistent standards or guidelines. They also have the potential to create a disincentive for governments to develop national laws for access and benefit-sharing (Tobin 2002, p. 289). Access and

1 See Part B of this report

benefit-sharing arrangements for bioprospecting have been developed in Costa Rica in Central America, in Peru in South America, and in parts of Africa. These arrangements vary in their details, and are flawed in many respects with regard to Indigenous peoples' rights and interests.

The Costa Rica bioprospecting agreement was agreed in 1991 between the country's National Biodiversity Institute (INBio), a private, non-profit organisation, and the US-based pharmaceutical company Merck. The agreement was to provide Merck with access to products and derivatives obtained from the rich areas of biodiversity in Costa Rica (Reid et al 1993). This agreement pre-dated the introduction of the Convention on Biological Diversity, and it highlighted many issues and concerns about the ethics of gaining access to biological resources, about consultation with local peoples, and about distribution of benefits. The introduction of Cost Rica's Biodiversity Law in 1998 has addressed some of these issues, especially with regard to Indigenous rights in Traditional Knowledge and intellectual property.

In Peru, bioprospecting contracts were negotiated during the 1990s under the auspices of the International Cooperative Biodiversity Groups (ICBG). These agreements were developed between some Peruvian Indigenous organisations and pharmaceutical companies associated with Monsanto for provision of plants with known medicinal properties. These arrangements have been subject to some problems to do with lack of certainty regarding rights and interests, and other issues. As with Costa Rica, the absence of nationally consistent customary or statutory laws in Peru exacerbated the difficulties in effective and ethically sound agreements over natural resources. Peru has since introduced (in 1999) a draft law for protection of Indigenous property rights (Barber et al. 2002, pp. 386-388).

In South Africa the Council for Scientific and Industrial Research (CSIR) isolated the active ingredients of the Hoodia cactus – a species with known appetite suppressant properties – and signed an agreement with Phytopharm, a British scientific company, to enable the drug to be further developed and trialled. Phytopharm then entered into an arrangement with the US pharmaceutical company Pfizer to develop a prescription drug with potentially large commercial value. These agreements for commercialising the Hoodia occurred with no acknowledgement of the contribution of or informed consent from the San people, who possess Traditional Knowledge of the properties of the cactus.

The failure of the companies and organisations involved to effectively consult and negotiate with the San gained public attention, and eventually led in 2002 to a Memorandum of Understanding between the San and CSIR 'formally recognising the San as originators of Traditional Knowledge associated with human use of Hoodia, or Xhoba as the plant is locally known' (Wynberg 2003). An agreement was then signed in 2003 with the San and CSIR for benefit-sharing. Although this agreement is cited as 'one of the first attempts to give holders of Traditional Knowledge a share of royalties from drug sales', there are many problems, according to critics, not least of which is the level of benefits to be provided to the San. The San will receive from CSIR only 6% of royalties from all products sold, and 8% of all 'milestone' payments based on further development of the product (Wynberg 2003).[2] The San/CSIR case illustrates some of the lessons to be learnt when there is a lack of proper engagement with Indigenous peoples in research and development, and neglect or misuse of Traditional Knowledge.

2 For a more detailed discussion of the San Hoodia issue, see Part B below

Indigenous knowledge is often incorporated into both the planning and conceptual stages of the research process, and throughout the conduct of the research. However, the knowledge used is often unacknowledged or unattributed and the Aboriginal people whose knowledge is used receive few, if any benefits or compensation. It is often also the case that the Aboriginal people themselves are not equal participants in the research engagement, and that research is all too often conducted *about* rather than *with* Aboriginal people. It is also rare that Aboriginal people initiate and direct research conducted by the DKCRC.

The DKCRC has an opportunity to take a leadership role in this regard, and facilitate and encourage Aboriginal-initiated and -led research, and to involve Aboriginal people in research projects in full and equitable ways. An equitable research partnership is one in which there is full participation and agreement by Aboriginal people and others from the very beginning of a research process. It is also one that is developed using a sound foundation of ethics, responsibilities, and free prior informed consent. These types of engagement will also involve seeking initial and ongoing guidance from community elders about the use of their knowledge, and representations of that knowledge.

Free, prior and informed consent[3]

For any access and benefit-sharing regimes to be ethically sound, they must incorporate, and be underpinned by comprehensive provisions requiring the free, prior and informed consent of the providers and holders of Traditional Knowledge and biological resources (Fourmile 1998). There are many advantages to ensuring that working with Aboriginal communities is done only on the basis of free, prior and informed consent of those communities. Obtaining consent will provide greater certainty in conducting the project, and can reduce, or eliminate potential conflicts. Prior informed consent assists in securing a good working arrangement between the knowledge providers and owners, and those seeking to gain access and conduct research. The principle of free, prior and informed consent is emerging as a norm in international standard developments (see for example Tamarang 2005). The principle is contained in the CBD, and in the Bonn Guidelines.

Aboriginal Participation

Aboriginal people have a right to full and equitable participation in developments that impact on their communities. This is both a self-determination right in existing international law and is stated as such in the Draft Declaration on the Rights of Indigenous Peoples. Full and effective Aboriginal participation is fundamental to any research. It is a critical aspect of benefit-sharing agreements in relation to access to, and use of natural resources and biodiversity. The nature of Aboriginal participation in projects and research must be considered carefully. An understanding of the forms of engagement with Aboriginal communities is critical to the role of the DKCRC in research. The term ‘community participation’ requires an exploration of the different ways in which communities participate, and what this means for research planning and processes. ‘Participation’ can range from information distribution, through ‘consultation’, ‘negotiation’, and ‘collaboration’, to ‘empowerment’, and community controlled research (see Laird and Noejovich, in Laird, ed. 2002, pp. 187-188). An understanding of these kinds of engagement needs to underpin any discussion about access and benefit-sharing arrangements with Aboriginal communities, especially involving their knowledge traditions and practices.

3 This is, again, dealt with at some length in Part B.

In engaging with Aboriginal communities, it is also important to take account of the uneasy relationships that many Aboriginal people have with their communities' official governance structures (as legally constituted for example by the NT Office of Local Government). In most communities there are people who feel that they are not represented by the local community council. Councils are often dominated by particular groups at the expense of others, they are often not in a position to be negotiating IP arrangements on behalf of individuals or groups, they are often fractured, and have a very fluid and mobile constituency. Also critical is the need to develop and sustain awareness within, among and between research partners, project and planning personnel in regard to the values of Indigenous knowledge and practice.

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6. Current and emerging developments in protecting Traditional Knowledge

There are many developments occurring in international forums that are examining ways of protecting Indigenous knowledge and intellectual property. Foremost among these are the Convention on Biological Diversity (CBD) Secretariat and Conference of Parties (COP) and the World Intellectual Property Organization (WIPO).

The United Nations Convention on Biological Diversity (the CBD)

The CBD has working groups examining the implementation of Article 8(j) and others concerning protection of Traditional Knowledge, and Article 15 and others on access and benefit-sharing respectively.

The Convention on Biological Diversity is currently the only international standard that specifically provides for measures to protect Indigenous knowledge and practices relevant to the conservation and sustainable use of biodiversity. Given the close and inextricable links (discussed earlier) between all elements and dimensions of Indigenous Traditional Knowledge, the recognition and protection of biodiversity-related aspects must necessarily require meaningful recognition and protection of Traditional Knowledge.

The CBD also provides for equitable benefit-sharing with Indigenous people at Articles 8(j) and 15. Article 8(j) states that, 'subject to its national legislation', Parties shall:

> *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.*

Article 10(c) is also important. It says that each 'Contracting Party' shall 'as far as possible and as appropriate':

> *Protect and encourage customary use of biological resources in accordance with traditional cultural practices that are compatible with conservation or sustainable use requirements.*

This Article encourages countries to take measures to enable Indigenous peoples to maintain their activities and practices in relation to their involvement with biodiversity. This includes fishing, hunting and gathering. Importantly, it also allows for other customary ways Indigenous peoples use biological or natural resources, such as for medicinal, ceremonial and ritual purposes.

Article 10(c) is important because it recognises that Indigenous knowledge is part of the ways in which Indigenous people care for country, and maintain their connections with country.

Article 15 provides that Parties to the Convention shall determine access to their natural resources, that where access to genetic resources is granted, this should be on mutually agreed terms, and subject to prior informed consent. However, this Article does not specifically set out conditions for access to genetic or biological resources where these resources, and the knowledge of them, are owned by Indigenous or local peoples.

Two working groups exist under the auspices of the Conference of Parties to the Convention on Biological Diversity. These working groups are exploring ways of further implementing the key aspects of the CBD relevant to Indigenous peoples: Traditional Knowledge protection, and access and benefit-sharing. In 2002 the Working Group on Access and Benefit-Sharing produced a set of voluntary guidelines *(the Bonn Guidelines on Access to Genetic Resources and Fair and Equitable Sharing of the Benefits Arising out of their Utilization)*.

Also useful are the *Akwé Kwon Guidelines*. These were developed by working parties established by the Conference of Parties to the Convention on Biological Diversity.[4]

They are a voluntary guide to Parties and Governments in their development and implementation of impact assessment regimes. Consistent with the CBD, implementation of these Guidelines is 'subject to national legislation'. This means that if national laws relevant to impact assessment are relatively weak in their provisions for Indigenous peoples, then this will seriously limit the effectiveness of the voluntary guidelines.

Biodiversity-related developments in Australia

As part of its policy regime for implementing the CBD, the Commonwealth Government released, with State and Territory Governments, a *National Strategy for the Conservation of Australia's Biological Diversity* in 1996. This Strategy includes some goals and actions concerned with protection of Traditional Knowledge. For example, the Strategy acknowledges that Aboriginal and Torres Strait Islander peoples hold special knowledge of biological diversity and have a particular interest in the conservation status of indigenous species and environments. The Strategy also ensures that use of traditional biological knowledge in the scientific, commercial and public domains proceeds only with the cooperation and control of the traditional owners of that knowledge and ensures that the use and collection of such knowledge results in social and economic benefits to the traditional owners.

Australia is developing an access and benefit-sharing regulatory regime at the Commonwealth level, as part of the *Environment Protection and Biodiversity Conservation Act 1999* (EPBC Act). State and Territory governments are following with a range of relevant legislative and policy developments (www.deh.gov.au). Following the introduction of the EPBC Act, the Federal Environment Minister conducted an inquiry to gather views and submissions to assist it in formulating a model for access and benefit-sharing. The report of that inquiry (the Voumard Report) was released in 2000.

Following the Voumard Inquiry, the Commonwealth Government developed a set of Regulations under Section 301 of the EPBC Act designed to regulate access to biological resources on Commonwealth lands. Part 8A.01(c) states that these Regulations provide 'for the control of access to biological resources in Commonwealth areas' by, among other things, 'recognising the special knowledge held by Indigenous persons about biological resources'. The Regulations require those seeking access to biological resources to obtain a permit, and to enter into a benefit-sharing agreement with a provider of biological resources. The Regulations also state (at Section 8A.08) that 'a benefit-sharing agreement must provide for reasonable benefit-sharing arrangements, including protection for, recognition of and valuing of any Indigenous people's knowledge to be used'. It remains to be seen how effective these Regulations will be in their operation.

4 See Part B for further discussion of Akwe:kon

As part of the Commonwealth Government's framework for regulating access to biological resources, in 2002 a set of principles was endorsed by the Natural Resource Management Ministerial Council, for a *Nationally Consistent Approach for Access to and the Utilisation of Australia's Native Genetic and Biochemical Resources*. This is intended to provide the basis for a uniform approach across all jurisdictions in the country.

To date, regulatory and legislative regimes have been introduced by the Commonwealth and Queensland governments. The Queensland State Government introduced its Biodiscovery Act in 2004. The Northern Territory Government is, at the time of this report, in the process of developing a policy and legislative scheme for controlling access to biological resources and bioprospecting in the Territory.

Other international developments

Some international organisations are exploring and developing measures for better recognition and protection of Indigenous knowledge. These include the World Intellectual Property Organization (WIPO), which has established a work program and an Intergovernmental Committee on 'Traditional Knowledge, genetic resources, and folklore' (http://www.wipo.int/tk/en/).

The Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS) under the World Trade Organization (WTO) may also provide some measures for protection of Indigenous knowledge. The geographic indications provisions may be useful for Indigenous communities as a way of registering a product in terms of its origins in a specific geographic location. For greater relevance to Indigenous peoples, these provisions would need to be adapted to allow for a concept of 'community of origin'. (For the TRIPS Agreement see www.wto.org/english/tratop_e/trips_e/t_agm0_e.htm).

In November 2001 the United Nations Food and Agriculture Organization (FAO) endorsed an International Treaty on Plant Genetic Resources for Food and Agriculture. Article 9 provides for the concept of 'farmers' rights'. These may be a useful avenue to consider for recognition and protection of Traditional Knowledge as this relates to plant genetic resources (see for example Graham Dutfield, Protecting *Traditional Knowledge and Folklore: A Review of Progress in Diplomacy and Policy Formulation*, UNCTAD and ICTSD, 2002). These rights are defined as:

- Protection of Traditional Knowledge relevant to plant genetic resources for food and agriculture
- The right to equitably participate in sharing benefits arising from the utilisation of plant genetic resources for food and agriculture
- The right to participate in making decisions, at the national level, on matters related to the conservation and sustainable use of plant genetic resources for food and agriculture.

The United Nations Educational, Scientific, and Cultural Organization (UNESCO) has recently adopted a Convention for the Safeguarding of the Intangible Cultural Heritage (2003). Among the purposes of this Convention are the safeguarding of intangible cultural heritage, ensuring respect for intangible heritage of communities, groups and individuals, raising awareness at the local, national and international levels of the importance of intangible cultural heritage, and providing for international co operation and assistance. Examples of subject matter (at Article 2(2)) falling within the definition of intangible cultural heritage include:

- Oral traditions and expressions, including language as a vehicle of the intangible cultural heritage
- The performing arts
- Social practices, rituals and festive events
- Knowledge and practices concerning nature and the universe
- Traditional craftsmanship.

7. Traditional Knowledge and Intellectual Property Rights

Often, Traditional Knowledge is referred to as 'intellectual property', 'Indigenous intellectual property', or 'Indigenous cultural and intellectual property'. This latter term has gained wide currency, especially since the release in Australia in 1998 of the report *Our Culture, Our Future: Report on Australian Indigenous Cultural and Intellectual Property Rights*. Although the term 'Indigenous cultural and intellectual property' may suffice as a working term, in actuality Aboriginal Traditional Knowledge is very different from 'cultural and intellectual property'. There is the possibility that some elements of Traditional Knowledge may intersect with the intellectual property rights regime, and, if certain criteria are met with, these elements might be amenable to protection by intellectual property rights. For the purposes of this discussion however, and notwithstanding that there may be points at which Traditional Knowledge and intellectual property rights intersect, it is important to maintain an acknowledgment of the distinctions between them. Indeed, there is a view among some Indigenous communities and organisations and their advocates that intellectual property rights (IPRs) actually pose a threat to the recognition and protection of Traditional Knowledge. In their view, IPRs, especially patents and copyrights, have the capacity to be used to exploit and unlawfully appropriate Traditional Knowledge.[5]

Using the term 'intellectual property' to define or describe Traditional Knowledge also has the effect of assuming from the start that this knowledge is a form of property that is the same as 'property' in the western legal sense. Indeed, it can be argued that Indigenous peoples' systems of property and knowledge management are equivalent to what is called intellectual property in the western viewpoint, albeit based on a radically different conceptual basis. The more general view however, is that notions of property in Indigenous societies differ markedly from those in Western society. The United Nations Special Rapporteur Professor Erica-Irene Daes is among those who have pointed out that the concept of 'property' may not be appropriate as a basis for considering Indigenous heritage:

> *… Indigenous peoples do not view their heritage in terms of property at all – that is, something which has an owner and is used for the purpose of extracting economic benefits – but in terms of community and individual responsibility … For Indigenous peoples, heritage is a bundle of relationships, rather than a bundle of economic rights.*[6]

There are some critical distinctions between Traditional Knowledge and intellectual property. The latter is a form of property right that allows the owners of that intellectual property to gain commercially from transactions relating to that property. The former is a form of cultural heritage, is often 'owned' collectively by certain defined groups in Indigenous societies, and is deeply

5 See Part B for further discussion of this issue

6 Daes, 'Study on the protection of the cultural and intellectual property of indigenous peoples', Sub-Commission on Prevention of Discrimination and Protection of Minorities, E/CN.4/Sub.2/1993/28, 28 July 1993, para 26, p. 8

embedded in Indigenous culture and therefore not amenable to commercial gain. Daes puts it succinctly, stating that 'it is both simpler and more appropriate to refer to the collective 'heritage' of each Indigenous people, rather than make distinctions between 'cultural property' and 'intellectual property''.[7]

Terri Janke has also commented on the tensions inherent in references to Traditional Knowledge as either 'heritage' or as 'property'. In her study *Our Culture, Our Future: Report on Australian Indigenous Cultural and Intellectual Property Rights* she noted 'the debate concerning the fact that 'property' denotes commercialisation and protection of commercial rights, whereas 'heritage' implies preservation and maintenance issues'. She stated that her study 'found that Indigenous Australians not only want to protect their heritage … they also want to control and benefit from its commercial application'.[8]

Perhaps the most important distinction between Traditional Knowledge and intellectual property as the latter is understood in the conventional western sense, lies in the collective nature of Traditional Knowledge. Intellectual property rights are founded on individuals' rights in creative works or products or inventions, and in the ability that IPR laws confer for commercial gain based on transactions involving these works, products or inventions. By contrast, Traditional Knowledge is generally understood to be 'owned', held, managed and transmitted on the basis of rights and interests of groups, rather than individuals. These groups may be clan, sub-clan, family or other groups defined in accordance with Indigenous customary practices and obligations.

There is a growing body of literature and resource materials that examines options for including intellectual property rights among the tools that can be used by Indigenous communities to protect their Traditional Knowledge and innovations. The report Our Culture, Our Future is one of these. Other useful documents are:

- Posey, Darrell A., and Dutfield, Graham, *Beyond Intellectual Property: Toward Traditional Resource Rights for Indigenous Peoples and Local Communities*, International Development Research Centre, Ottawa, 1996.
- Hansen, Stephen A., and VanFleet, Justin W., *Traditional Knowledge and Intellectual Property: A Handbook on Issues and Options for Traditional Knowledge Holders in Protecting their Intellectual Property and Maintaining Biological Diversity*, American Association for the Advancement of Science, Washington DC, 2003.

In Australia, protection of Traditional Knowledge has often been discussed within the context of intellectual property law, specifically with reference to copyright law. Historically, one reason for this is the number of prominent court cases brought under copyright law by Aboriginal plaintiffs seeking damages and compensation for breach of their rights in designs that were used without permission on tea towels, carpets and in other ways (Janke 1998). The Copyright Act 1968 was recently amended to provide for moral rights, to provide better protection for the rights of individual creators to have their works attributed to them, and to prevent against distortion and mutilation of their works. The Report on Protection Measures provides more details.

7 Ibid. para 23, p. 8

8 Terri Janke, Our Culture, Our Future: Report on Australian Indigenous Cultural and Intellectual Property Rights, ATSIC and AIATSIS, Canberra, 1998, p. 7.

The DKCRC, Intellectual Property and Traditional Knowledge

The draft DKCRC Indigenous Intellectual Property Protocol (July 2003) sets out some principles for intellectual property in the context of the Centre's activities. While this document refers to 'Indigenous Intellectual Property', it is suggested that a clearer definition of this should be developed, and the distinctions made between Aboriginal peoples' Traditional Knowledge, and intellectual property.

The Central Land Council's protocols might offer some useful guidance in this regard (www.clc.org.au). It is important to delineate the nature and extent of Aboriginal peoples' input into research projects, as a prior step before making the assumption that this is intellectual property. There will be some elements of Traditional Knowledge, innovations and practices that Aboriginal people contribute to a project that likely will not form part of the project intellectual property. These elements must be respected, recognised and protected. There is also likely to be some intellectual property contributed by the non-Indigenous participants in the project. The intellectual property that then is created as a result of the project will comprise a complex mix of both these components, and it is this combination that must be better delineated if an effective protocol and policy is to be developed and implemented. To provide greater clarity, it may be useful for the DKCRC to consider developing an Indigenous Traditional Knowledge Protocol.

Given its focus on research involving integrating different knowledge traditions throughout the desert, and that State and Territory governments are among its core partners, the DKCRC has an opportunity to provide leadership and influence State and Territory law and policy in the area of Indigenous rights in Traditional Knowledge and intellectual property.

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8. Developing new approaches

The incompatibilities between Indigenous Traditional Knowledge and conventional intellectual property rights are well documented. As outlined above, Indigenous Traditional Knowledge has distinct characteristics, and is derived from cultural heritage and customary laws. These features mean it is very different to the kinds of subject matter that western intellectual property laws are designed to protect.

Because of these differences, a new approach is required to more effectively recognise and protect Traditional Knowledge. Such a new approach is often termed a *sui generis* –literally: 'of its own kind'. A *sui generis* approach usually comprises a specially formulated legislative regime that takes into account the unique elements of Indigenous collective rights in Traditional Knowledge. There is a growing body of *sui generis* laws and other initiatives internationally for protecting Traditional Knowledge and biological resources.

One such approach is what has been termed 'traditional resource rights'. This is described by Posey and Dutfield as 'the many 'bundles of rights' that can be used for protection, compensation and conservation' of Indigenous biodiversity-related knowledge, resources and practices (Posey and Dutfield 1996, p. 95). These traditional resource rights are based on a wide range of human rights instruments and emerging laws and developments, and reflect an attempt to build on the concept of IPR [intellectual property rights] protection and compensation, while recognising that traditional resources – both tangible and intangible – are also covered under a significant number of international agreements that can be used to form the basis for a *sui generis*[9] system.

Sui generis models have been developed at regional levels, such as the Andean region and the African region, and have also been suggested by some non-government organisations such as the Third World Network.

The Andean Pact (now called the Andean Community of Nations) passed its Decision 391 – *Common Regime on Access to Genetic Resources* in 1996. This Decision provides for states' sovereignty over derivatives of genetic resources. Importantly, for Indigenous peoples, it includes provision for an 'intangible component', which refers to 'any knowledge, innovation or practice (individual or collective) of actual or potential value associated with a biogenetic resource or derivative, whether or not it is protected by intellectual property rights' (Barber et al. 2000, p. 381).

The Organization of African Unity (OAU) produced in 2000 the African Model Legislation for the *Protection of the Rights of Local Communities, Farmers and Breeders, and for the Regulation of Access to Biological Resources*. This Model Legislation provides a relatively comprehensive scheme for ensuring conservation and sustainable use of biological resources. Its objectives (Part I) include:

9 Further discussed in Part B

- Support for the ‘inalienable rights of local communities including farming communities over their biological resources, knowledge and technologies’
- Access to biological resources subject to prior informed consent of local communities
- Fair and equitable sharing of benefits
- Effective participation of local communities ‘with a particular focus on women’
- ‘Appropriate institutional mechanisms for the effective implementation and enforcement of the rights of local communities’

The OAU law has been described as offering ‘perhaps the most powerful and comprehensive protection for Traditional Ecological Knowledge (TEK) and the natural resource rights of Indigenous peoples formulated to date’ (Fourmile 1998, p. 15). Fourmile also states that this legislation ‘provides a clear, concise and plain language model that can be used by Indigenous peoples in Australia … to secure appropriate levels of protection for our TEK and traditional natural resources’ (1998, p. 16).

What is of particular note in the OAU is its provisions that recognise the ‘community rights’ of local communities – defined as ‘those rights held by local communities over their biological resources or parts or derivatives thereof, and over their practices, innovations, knowledge and technologies’ (Part II). The OAU Model Law sets out comprehensive provisions (at Articles 16–23) providing for these community rights, including requirements for prior informed consent, the right to refuse consent and access, the right to traditional access, use and exchange, the right to benefit, and the recognition of ‘community intellectual rights’.

The Malaysian based non-government organisation Third World Network offers in its paper *In Defence of Local Community Knowledge and Biodiversity* a ‘Conceptual Framework and the Essential Elements of a Rights Regime’. Of particular interest is the outline presented in this report for a Community Intellectual Rights Act, which is described as an ‘Act to establish a sui generis system for the protection of the innovations and the intellectual knowledge of local communities’ (Nijar 1996, pp.56-62).

Also useful is the work of the independent organisation called the Action Group on Erosion, Technology and Concentration (ETC), formerly known as Rural Advancement Foundation International (RAFI). In its previous incarnation as RAFI, this organisation released a very useful guide called *Conserving Indigenous Knowledge: Integrating Two Systems of Innovation* (c1994). That report outlined some sui generis approaches as alternatives to intellectual property rights. For Traditional Knowledge, the group proposed a combination of initiatives, which they called an ‘Intellectual Integrity Framework’, which would allow Indigenous communities to ‘ensure the intellectual integrity of their ongoing innovations rather than to obtain intellectual property’ (RAFI c1994, pp. 52-53).

At the national levels, an example of a *sui generis* approach is the Costa Rica Biodiversity Law 1998. This law recognises and protects what it terms ‘sui generis community intellectual rights’, comprising the ‘knowledge, practices and innovations of Indigenous peoples and communities related to the use of components of biodiversity and associated knowledge’.

In New Zealand, under the Waitangi Tribunal, a claim (Wai 262) was submitted in 1991 by six Maori tribes for recognition and protection of their ‘cultural and intellectual heritage rights in relation to indigenous flora and fauna and their Traditional Knowledge, customs and practices related to that flora and fauna’ (interview with Maui Solomon, published in *In Motion Magazine*, 22 April 2001, www.inmotionmagazine.com/nztrip/ms1.html).

A useful web site for up to date laws, policies and other developments at regional and national levels for biodiversity conservation and Traditional Knowledge is that maintained by the Spanish based NGO called Genetic Resources International (GRAIN) (see www.grain.org). The Convention on Biological Diversity Secretariat web site also provides good links to many of these developments, at www.biodiv.org.

There is also a growing body of guides and resources designed for Indigenous and local communities, as well as for researchers and others, to assist them in pursuing options for maintaining and protecting Traditional Knowledge using existing intellectual property rights systems, and a range of other initiatives.

These resources include:

- Emery, Alan R., 2000: *Guidelines: Integrating Indigenous Knowledge in Project Planning and Implementation*, A Partnership Publication, The International Labor Organization, the World Bank, the Canadian International Development Agency, and KIVU Nature Inc., Washington D.C., Hull, Quebec, and Ontario
- Grenier, Louise, 1998: *Working With Indigenous Knowledge: A Guide for Researchers*, International Development Research Centre, Ottawa
- Hansen, Stephen A., and VanFleet, Justin W., 2003: *Traditional Knowledge and Intellectual Property: A Handbook on Issues and Options for Traditional Knowledge Holders in Protecting their Intellectual Property and Maintaining Biological Diversity*, American Association for the Advancement of Science, Washington DC.

The Canadian Department of Indian Affairs and Northern Development has produced these guides:

- *Intellectual Property and Aboriginal People*: A Working Paper (Fall 1999)
- *A Community Guide to Protecting Indigenous Knowledge* (June 2001), by Simon Brascoupé and Howard Mann.

In Australia, this is a useful reference:

- *Our Culture, Our Future: Report on Australian Indigenous Cultural and Intellectual Property Rights*, prepared by Terri Janke, published by ATSIC and AIATSIS, Canberra, 1998.

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9. Conclusions: Indigenous Knowledge in the Central Desert region

This paper has set out some of the characteristics of Aboriginal Traditional Knowledge, and a range of developments and options for its recognition and protection. The DKCRC has an opportunity to take a leading role in working with Aboriginal Traditional Knowledge in ethical and equitable ways. A key to this is to establish equitable partnerships with Aboriginal people across all DKCRC projects and programs, and to facilitate and encourage Aboriginal initiated research. Effective guidelines and protocols for recognition and protection of Traditional Knowledge should form part of the DKCRC's core strategy. The DKCRC also has an opportunity to develop approaches to benefit-sharing with Aboriginal people that are based on the best international standards, and that provide at least equal returns to the holders and custodians of Traditional Knowledge and practices.

10. Glossary

Free, Prior and Informed Consent

A process, or requirement by which proponents of development, and those seeking to access Aboriginal peoples' lands, resources, knowledge and communities must provide adequate information to Aboriginal people prior to undertaking any developments, research or activities, and enable Aboriginal people, of their own free will, to make informed decisions about whether to give their consent.

Intellectual Property

A form of property right, established through a series of laws such as copyrights, patents, trademarks, designs, and plant breeders' rights, that vests ownership over works, products and inventions in their producers, authors or creators.

Benefit-sharing

An arrangement in which providers of biological resources enter into agreements with users, and provisions are made – typically through formal contracts – to return benefits to the owners, holders and providers of resources. In the context of research engagement with Aboriginal peoples, benefit-sharing agreements offer useful mechanisms for returning benefits to Aboriginal people, based on the wider utilisation of their Traditional Knowledge. The Convention on Biological Diversity provides an internationally recognised legal framework within which signatory countries are encouraged to develop benefit-sharing arrangements over natural resources and biodiversity.

Sui generis

A law, and/or policy framework 'of its own kind', or 'of a new order'. The term is used to refer to new legislative initiatives to recognise and protect Indigenous peoples' rights and interests in biological diversity and Traditional Knowledge.

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PART B: MEASURES AND REQUIREMENTS TO SUPPORT THE RIGHTS AND INTERESTS OF TRADITIONAL KNOWLEDGE HOLDERS

Note: the following information should not be regarded as legal advice. Readers should make and rely on their own enquiries from a suitable qualified legal practitioner when making decisions affecting their interests.

1. Introduction

Indigenous people have strived for many years to preserve their culture, control its use and prevent the misappropriation of Traditional Knowledge. Misappropriation has occurred in a number of forums. This paper is concerned with the misappropriation, which has occurred, and is currently occurring in the pharmaceutical and agricultural industries, which use Traditional Knowledge in their research and development processes. Examples of this kind of misappropriation include the grant of patents and plant breeder's righ[10]ts over products that originated from Indigenous people's Traditional Knowledge. These examples raise serious concerns about monopoly rights over Traditional Knowledge and related genetic material.

In the current debate at both the national and international levels there has been a tendency to focus on developing protection mechanisms to control the scientific and commercial use of Traditional Knowledge with the aim of enabling Indigenous communities to capture anticipated benefits in the commercialisation of Traditional Knowledge. An equally important issue is the desire of Indigenous communities to protect the integrity of Traditional Knowledge, as part of their cultural heritage, rather than allowing it to become another marketable good. These two aims are often seen to be in conflict with each other.

The aim of this part of the project report is to examine both these issues. It will address the commercialisation aspect of Traditional Knowledge as well as the desire and need to protect the integrity of that knowledge from the perspective of the legal and non-legal protection measures that currently exist and which may protect Traditional Knowledge.

Legal protections

Overall, there appear to be very few effective mechanisms available specifically to assist Indigenous communities to protect and preserve Traditional Knowledge. There is a view that existing legal measures may go some way towards assisting Indigenous people to better protect and control Traditional Knowledge, however, the effectiveness of these measures needs to be considered against the broader community needs and aspirations.

These measures include:

- Using existing Intellectual Property laws (the rights created by intellectual property law are known as intellectual property rights or IPRs)
- Effective use of contractual arrangements to recognise Indigenous customs and knowledge

10 The term Traditional Knowledge is used in this paper, in part, as recognition of the full and diverse range of traditions referred to. Please see Part A of this report for full explanation of the term.

- Use of guidelines to ensure that third parties secure prior and informed consent before Indigenous people agree to share Traditional Knowledge
- Developing local mechanisms within communities to control, protect and preserve Traditional Knowledge.

Legal and non-legal protections for Traditional Knowledge holders are sought under the Australian state and federal legal system. The starting point for these protections is the systems of customary law and cultural practice which continue to regulate the protection and use of Traditional Knowledge at the local level. Indigenous customary law and cultural practice are the foundation for the development and strengthening of protection measures. This is increasingly important because engagement with the wider community has exposed Traditional Knowledge to the risk of misappropriation and misuse resulting in breaches of customary protection mechanisms and incidents of unauthorised use. The first step in any legal or non-legal protection measure is to ensure that people involved in researching or commercialising Traditional Knowledge engage in collaborative processes at the local level which will allow them to identify and observe traditional law at the initial stages of any proposed project.

The second step in any legal or non-legal protection measure is a process of seeking consent. Where Traditional Knowledge is sought by the wider community for any purpose, this should only be done if the knowledge holders have given their permission. There are a number of conditions which influence the ways in which permission should be sought, particularly the application of customary law in its diverse forms across Indigenous clans and nations.

In many areas of Australia, systems for knowledge sharing exist as part of customary law. These systems will need to be understood and complied with by anyone seeking to use Traditional Knowledge. In some areas these knowledge systems will be more accessible and obvious to outsiders than others. These systems exist in urban, rural and remote areas and should not be overlooked just because they are not immediately obvious, or even described as knowledge systems. Formal and informal rules nearly always apply to access to Traditional Knowledge. In addition, some areas require permission to enter Aboriginal control lands by application under a permit system.[11]

In international law, this permission giving is generally called free, prior and informed consent (FPIC). Free, prior and informed consent is a developing international standard. Meeting this standard is extremely important, and may require a multi-staged process.

Informed consent to projects can require a thorough understanding of complex issues. Significant capacity building is often required to provide the background scientific, legal, ethical and commercial information for Indigenous community members to make informed decisions. The ability to make informed decisions, free of undue influence can require strong institutional support from Indigenous organisations and government. Capacity building is also often necessary to construct institutional structures which can support Indigenous customary practices and advocate for government support for respect for Indigenous customary law practices.

11 See the *Aboriginal Land Rights (Northern Territory) Act* 1976 (Cth)

A creative approach may need to be taken with the legal arrangements for the project. While there may be options within intellectual property systems for Traditional Knowledge holders, it has to be remembered that Indigenous peoples' rights in Traditional Knowledge differ from conventional intellectual property rights in a number of important ways. These differences should be understood and legal and non-legal arrangements should be considered which use available law, and can also be modified to suit the parties and reflect their wishes.

Approaches to protecting and using Traditional Knowledge

Discussions of protection and use of Traditional Knowledge are often considered in the context of legal regimes relating to biodiversity conservation, environment protection, intellectual property rights or other areas of law such as contracts. While it is important to recognise Traditional Knowledge in these contexts, it is equally fundamental that Traditional Knowledge is understood, recognised and valued for its own intrinsic qualities within the context of communities.

Previously, systems of customary law and cultural practice regulated the protection and use of Traditional Knowledge. Engagement with the wider community has exposed Traditional Knowledge to the risk of misappropriation and misuse resulting in breaches of customary protection mechanisms and incidents of unauthorised use.

Where Traditional Knowledge is sought by the wider community for research, commercialisation or biodiversity conservation, this must only be done if the knowledge holders have been fully informed, consulted and have given their permission. This process is generally called free prior informed consent.

Recognising and Applying the Principle of Free Prior Informed Consent (FPIC)

Measures for protecting and using Traditional Knowledge should always be underpinned by the principle of free, prior and informed consent. Free, prior and informed consent (FPIC) is an established feature of international human rights norms and development policies in regards to Indigenous people. While its status has become more widely accepted, discussions about the application of this norm continue at international and national levels, and also at the regional and local levels. Indigenous people hold the view that there is a need to have an internationally agreed definition or understanding of the principle of free, prior and informed consent and that they should be guaranteed that this norm will be adhered to. On the other hand, States argue that FPIC contravenes state sovereignty, specifically state sovereignty over natural resources.

The following example of the use of smokebush illustrates the ways in which Indigenous people lose control over their plants and knowledge where arrangements such as free, prior informed consent are not respected and followed.

The Smokebush[12]

The smokebush is the common name for Conospermum, a plant that is widespread throughout parts of western Australia and in parts of some other states. It was used traditionally by Aboriginal peoples for a variety of therapeutic purposes.[13] *During the 1960s, the smokebush was among*

12 Michael Davis, Biological Diversity and Indigenous Knowledge, Research Paper 17. 1997-1998, Science, Technology, Environment and Resources Group, Australian Parliament, Canberra 29 June 1998

13 See Australian Institute of Aboriginal and Torres Strait Islander Studies. Our Culture, Our Future: Proposals for the recognition and protection of Indigenous cultural and intellectual property. Canberra, 1997. p.28. Henrietta Fourmile. 'Protecting Indigenous intellectual property rights in biodiversity'.

Current Affairs Bulletin vol 72, no 5, Feb/March 1996. p.39. Michael Blakeney, 'Bioprospecting and the protection of traditional medical knowledge'. Paper presented to

those plants that were collected and screened for scientific purposes by the US National Cancer Institute, under license from the West Australian Government. In 1981, some specimens were sent to the US where they were tested for possible anti-cancer chemicals. No cancer resistant properties were found, and the samples were stored for several years. Later, in the late 1980s, these samples were again tested, but this time for potential substances that could cure AIDS. A substance called Conocurvone was isolated which, when laboratory tested, was found to destroy the HIV virus in low concentrations.

To develop this substance, in the early 1990s the WA Government granted a license to Amrad Pty Ltd, a Victorian based multinational pharmaceutical company. The US National Cancer Institute granted Amrad an exclusive worldwide license to develop the patent for this anti-AIDS substance. It has been suggested that Amrad provided $1.5 million to gain access rights to smokebush and related species. Some estimates state that the WA Government would receive royalties exceeding $100 million by the year 2002 if Conocurvone is successfully commercialised. Given these commercial values on smokebush and its derivatives, critics argue that there should be provisions for Aboriginal peoples to share equitably in benefits from this plant, given their role as first having identified and used the smokebush for its therapeutic and healing properties.[14]

The collecting and screening of smokebush by scientific interests has been facilitated by the Western Australian Government's use of its Conservation and Land Management Act 1984. This Act was amended in 1993 to include a clause specifically designed to encourage state control over biological resources. Some have argued that these amendments disadvantage Indigenous peoples who claim rights to species, or knowledge of species in Western Australia, favouring instead, state and industry interests in these.[15]

The principle of FPIC has been applied at the international, national and local levels in the context of international human rights, environment and development law as well as within guidelines and policy frameworks to strengthen Indigenous people's consent practices. One of the most important uses of FPIC is in development projects. FPIC principles may be used to protect Indigenous people from being coerced, pressured and intimidated in their choice of development. Seeking the free, prior and informed consent of Indigenous people before development projects commence can enable Indigenous people to be fully informed about the scope and impacts of the proposed development activities on their lands, resources and wellbeing. FPIC processes also incorporate some provisions for enabling Indigenous people's choice to give or withhold consent over developments that affect them and require that this choice is respected and upheld.[16]

FPIC can also be utilised as a mechanism to complement and bridge the gap between intellectual property rights (discussed below) and the emerging collective rights of Indigenous people. For examples of FPIC see Appendix A.

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14 Michael Blakeney, 'Bioprospecting and the protection of traditional medical knowledge'. Paper presented to the Symposium on Intellectual Property Protection for the Arts and Cultural Expression of Aboriginal and Torres Strait Islander peoples , Perth, I October 1996 pp 12-13.

15 World Intellectual Property Organization, Introduction to Intellectual Property: Theory and Practice. Kluwer Law International, London, The Hague and Boston, 1997.

16 Parshuram Tamang 'An overview of the Principle of Free, Prior and Informed Consent and Indigenous peoples in International and Domestic Law and Practices', 2005, p13

Recognising and applying national and international laws and principles

It is important to point out, however, that despite emerging international norms and developments there is currently no specific national legislation that provides for recognition and protection of Traditional Knowledge. There is scope within existing laws which have been used by Indigenous peoples to glean limited recognition and protection. Examples of these are set out in the following.

At the international level, treaty frameworks such as the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs) and the Convention on Biological Diversity (CBD) both define and delimit the term 'Indigenous'. Within the TRIPs Agreement, there is limited consideration of Indigenous groups as the terms of the agreement concentrate solely on the rights, authority and capacity of States or national governments. TRIPs has attracted great criticism for its emphasis on large corporations, their control of the global distribution of goods, and the 'globalisation' of intellectual property rights at the expense of developing countries and Indigenous groups.[17]

While the CBD does not define 'Indigenous', it does acknowledge the capacity of Indigenous and local groups in the Preamble where it recognises 'the close and traditional dependence of many indigenous and local communities embodying traditional lifestyles on biological resources, and the desirability of sharing equitably benefits arising from the use of Traditional Knowledge, innovations and practices relevant to the conservation of biological diversity and the sustainable use of its component'.[18] Despite this recognition of Indigenous and local groups, which is sustained throughout the document, the CBD emphasises the sovereignty of states with respect to the preservation of biological resources, noting such protection is ultimately the responsibility of States.[19]

2. Using existing Intellectual Property laws

What are Intellectual Property Rights (IPRs)?

Intellectual property rights are derived from a system of statute and common law. Broadly speaking, we can say that intellectual property is a generic term for the various rights or bundles of rights which the law accords for the protection of creative effort … or, more specifically, for the protection of economic investment in creative effort.[20] The present regimes are ill-suited for the protection of intangible forms of cultural heritage.[21]

Intellectual property rights (IPR) are rights, which are held by the owners of some types of artistic and cultural expression, inventions, trademarks and industrial designs.

Some rights must be applied for. These include rights to the grant of a patent over an invention, rights to a trademark, plant breeders' rights, and design. Other rights, such as copyright come into existence once the work is created, if it meets certain criteria. All these rights last for a set amount of time.

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17 Joanna Gibson 'Traditional knowledge and the International Context for Protection' 2004, p12

18 The Convention on Biological Diversity. http://www.biodiv.org/doc/legal/cdb-en.pdf

19 Ibid, p9

20 McKeough, Stewart, Griffiths, *Intellectual Property in Australia*, Butterworths, 2004, page 3

21 Ibid, page 14

IPRs belong to the owner or owners of them. Sometimes the owner of the rights is the person(s) or company who created the invention, work, plant, trademark or design. Sometimes the owner might be the person(s) or company who employed the creator. Ownership of IPRs gives rights to control the uses of the invention, work, plant, trademark or design for a set period of time. Owning the right to control use generally also means control of the benefits, such as commercial returns.

Over the last thirty years there has been an international trend to standardise and enforce intellectual property regimes across the world, regardless of each individual country's economic, research base or commercial capacity to manage or exploit them. Much of this work has occurred under the supervision of international organisations such as the World Intellectual Property Organization and particularly the World Trade Organization.

The major vehicle for developing a global intellectual property rights system has been the World Trade Organization (WTO), which introduced intellectual property rules into the multilateral trading system for the first time. The Trade-Related Intellectual Property Rights (TRIPS) regime departed from older IPR systems in two important respects. First, it put enormous pressure on countries and regions to sign up to a global IPR regime by linking it to their participation in world trade. Second, once nations sign up to TRIPS, they lose much internal control of their IPR regimes, leaving themselves open to the incursion of outside interests able to exploit TRIPS far more effectively than domestic interests.

This has put many developing countries in a very difficult position when attempting to negotiate in the WTO – whether on trade or around TRIPS. Despite repeated refusal on the part of developed nations to concede unfair advantages in the form of agricultural subsidies, developing nations simultaneously have to defend their economies against the introduction of a single IPR regime designed to suit multinational rather than domestic businesses.[22]

In general, all these developments focus on facilitating rights of trade for states and fail to prioritise Indigenous rights to maintain or re-assert authority over resources and Traditional Knowledge. Further, they either fail to incorporate Indigenous peoples as equal parties or provide limited stakeholder status for these discussions, so Indigenous interests and perspectives receive limited recognition.

Possible IPR options for Traditional Knowledge holders

While there may be options within IPR for Traditional Knowledge holders, it has to be remembered that Indigenous peoples' rights in Traditional Knowledge differ from conventional intellectual property rights in a number of important ways. These include:

- They are communal rights, often vested in clan, family or other socio-political groups
- They cannot be readily associated with a single, identifiable individual creator, author or producer (e.g. rock paintings)
- They are managed and owned in accordance with customary rules and codes of practice, and are usually not sold or alienated in ways that conventional intellectual rights can be (e.g. secret/sacred items)

22 Kate Prendergast *Intellectual Property Rights: Do they work for the Poor?* 2 August 2005, http://www.islam-online.net/English/Science/2005/08/article01.shtml accessed 9.9.05

- They include rights in all forms of Traditional Knowledge such as intangible cultural products and expressions, all of which are not protected under conventional intellectual property laws (language, stories, music)
- Indigenous Traditional Knowledge is usually transmitted orally, and therefore not subject to the same requirements regarding material forms that pertain to conventional intellectual property systems (as above)
- Indigenous Traditional Knowledge is usually held by the owners and their descendents in perpetuity, rather than for limited periods.[23]

Traditional Knowledge is holistic and based on Indigenous rights and obligations derived from customary law, in contrast to the IPR system which vests rights to commercial benefit in creators. It has been argued by a number of Indigenous people, including Mick Dodson[24] that the term 'intellectual property' is a concept of western legal systems and it is not an appropriate label when considering the rights of Indigenous people. Dodson's view is confirmed by the fact that Indigenous people want a range of cultural issues protected.

With these limits in mind, the following sections describe a number of different intellectual property rights (IPRs), who owns them, how they come to be owned, what they provide to the owner, and how IPRs may, or may not be useful for protecting Traditional Knowledge.

Copyright (Copyright Act 1968 (Cth))

Copyright is a specific intellectual property right granted over literary, dramatic, artistic and musical works, sound recordings, films and published editions.[25] There is no need to register copyright, as it exists as soon as a work is created in material form. Copyright in literary, dramatic, musical and artistic works lasts for 70 years after the death of the author. So, where the author is the copyright owner, the author or their heirs manage their copyright for that period.

Copyright owners can assign or licence their rights. When a copyright owner assigns his or her copyright, the person or company to whom the rights are assigned becomes the copyright owner. When a copyright owner licenses the copyright, generally he or she is legally allowing another person or company to use the work for a certain purpose, over a set period of time and for an agreed fee.

Copyright has been used by Indigenous artists to stop the misappropriation of their work and of the underlying Traditional Knowledge embodied in the work. One important example of the use of copyright was *Milpurrurru and Others* v *Indofurn Pty Ltd and Others*,[26] commonly known as the Carpets Case. In this case the artists brought legal action against a company which had reproduced their artworks on carpets and sold them without the artist's permission. The artists explained to the

23 This collection of characteristics is drawn from the work of Terry Janke *Our Culture: Our Future: Proposals for the Protection and Recognition of Indigenous Cultural and Intellectual Property*, 1999; Michael Davis *Indigenous Peoples and Intellectual Property Rights, Research Paper No. 20, 1996-97, Canberra, Information and Research Services, Department of the Parliamentary Library*, 1997; Sonia Smallacombe *Think Global, Act Local: Protecting the Traditional Knowledge of Indigenous Peoples, Journal of Indigenous Policy*, 2006 and others

24 Professor Mick Dodson is Chair of the Australian National University Institute for Indigenous Australia.

25 This list gives a general idea of the material in which copyright can subsist

26 (1994) 30 IPR 209

judge that their work expressed important Traditional Knowledge and that they had serious responsibilities within their community to ensure that knowledge was only used in appropriate ways. Similar concerns were expressed to the court in *Bulun Bulun* v *R & T Textiles*.[27]

To gain copyright protection a work must meet certain criteria. These include material form or being in fixed form, and having an identifiable author. These requirements mean that some important forms of Traditional Knowledge have not gained IPR protection. For instance, the traditional owners of areas in which rock art occurs cannot assert copyright over the rock art because they cannot identify an individual creator or artist, and issues arise about the expiration of the copyright period. In other examples, orally transmitted Traditional Knowledge may be unable to gain copyright protection because it has not been reduced to fixed or material form. In other words the Traditional Knowledge has not been recorded in writing, painting, symbols, photography, film or sound recording.[28] Other issues arise where the process of reducing the Traditional Knowledge to material form was done by a person who was employed to do so. The copyright in the literary, dramatic, musical or artistic work, sound recording of film, may belong to the employer.[29] The operation of copyright law can provide some protection for owners of Traditional Knowledge, where they are also the owner of copyright in the work. But copyright law can also operate to create difficulties over ownership of Traditional Knowledge for Indigenous people. For example, a researcher may obtain a legally enforceable right through recording, in writing or recordings, the Traditional Knowledge of Indigenous people. See *Foster* v *Mountford* below.

In some instances, the Copyright Act provides for legal agreements to alter the more general operation of the Act. This applies to copyright arrangements arising out of the creation of works during employment, for example.[30] So, a researcher and his or her employing institution may arrange to assign the copyright in works created through research with Indigenous Traditional Knowledge holders in the relevant Indigenous people.

Copyright owners may also have moral rights. Moral rights refer to rights belonging to the individual author[31] of a work[32] or film to proper acknowledgement as the author[33], and the right not to have the work treated in a derogatory manner.[34] The extent to which moral rights can provide protection for the rights of Traditional Knowledge holders has not yet been established in law in Australia.

Moral rights may be a way for Traditional Knowledge holders who are also the author of a work to enforce acknowledgement as authors and proper treatment of their work. Legislation is currently proposed to recognise communally held Indigenous moral rights.[35] The extent of protection available to Traditional Knowledge holders, specifically the application of the right to underlying Traditional Knowledge in work or film have not yet been tested in Australia.

27 (1998) 41 IPR 513

28 In other cases copyright in a sound recording is owned by the maker, and copyright in films is owned by the producer.

29 This will generally be so, unless there is an agreement to alter this arrangement.

30 *Copyright Act 1968* (Cth) section 35 (3), (4), (5) and (6)

31 *Copyright Act 1968* (Cth) section 190

32 A literary, dramatic, musical or artistic work within the meaning of the *Copyright Act 1968* (Cth)

33 Copyright Act 1968 (Cth) section 193

34 *Copyright Act* 1968 (Cth) section 195AI. *The Copyright Act 1968* (Cth) section 195AJ defines derogatory treatment', in relation to a literary, dramatic or musical work as: (a) the doing, in relation to the work, of anything that results in a material distortion of, the mutilation of, or a material alteration

to, the work that is prejudicial to the author's honour or reputation; or (b) the doing of anything else in relation to the work that is prejudicial to the author's honour or reputation.

35 A Bill for Indigenous Communal Moral Rights is currently being considered by the Commonwealth Government.

The following examples highlight some of the issues which have arisen for the Indigenous authors and their descendents as a result of issues arising from unsuitable copyright arrangements (Namatjira's case) and the failure to properly attribute authorship (Unaipon's case).

Copyright in an artistic work: Albert Namatjira

The copyright interest in the artistic works of the famous Aboriginal artist Albert Namatjira was passed by the artist to a publisher in 1957. When the artist passed away, the Northern Territory Public Trustee of the Northern Territory Government authorised the sale of Namatjira's copyright to the publisher as part of the administration of his estate. The artist's descendents have not been able to benefit from or control the uses of the copyright in Mr Namatjira's work.

'Senator Aden Ridgeway of the Democrats has called on the Federal Government to enter into discussions with the Northern Territory Government to buy back the copyright in Albert Namatjira's works. He argued that exclusive control of the use and reproduction of his works should be restored to his descendants, as well as the receipt of all financial benefits that result from the use and reproduction of his works under copyright protection.

The Senator said, 'By doing this, we will all be rewarded, because finally, belatedly, we will be showing Albert Namatjira the reverence that he has always deserved. We will be protecting his legacy for future generations'.

Senator Aden Ridgeway argued that the copyright in Albert Namatjira's art works should be protected in perpetuity. He was concerned that the legal protection of Namatjira's works provided by the Copyright Act 1968 (Cth) will expire in 2009, bringing to an end the ability of the copyright owner to exercise an exclusive right to use and reproduce his works, or to allow others to do so in return for a financial benefit.

In the case of Albert Namatjira, this means that by 2009, fifty years after his death, the copyright in his paintings will expire. His works will enter the public domain, just at the time that they are likely to be enjoying the financial benefits that tend to follow in the wake of a retrospective exhibition of this kind. The potential for this to cause concern to the Namatjira family is exacerbated by the fact that most of his paintings are held in private collections - not public art galleries - which, especially in Australia, tend to implement strict guidelines and protocols associated with the reproduction of artists' works.[36]

Copyright in a Literary Work: David Unaipon's work[37]

'David Unaipon (1872–1967) was a Ngarrindjeri man from Raukkan (Point McLeay) Mission in South Australia. He is renowned as the first Aboriginal person to have become a published author.'

36 Matthew Rimmer, 'Albert Namatjira: Copyright and Traditional Knowledge, InCite, Australian Library and Information Association, http//www.alia.org.au/publishing/incite/2003/06 albert.namatjira.html accessed 12.12.05

37 Melissa Jackson, *The Heritage Collection 2004, Nelson Meers Foundation*, State Library of New South Wales, page 42

'Unaipon's stories describe religious and spiritual similarities between Aboriginal and European cultures, with a focus on Creation stories. Over time, he submitted this material section by section to Sydney publishers Angus and Robertson, who paid him a sum of £150. The sections were then edited and joined into a book. A typescript copy was made, and Unaipon even submitted a grand photograph of himself for the frontispiece and wrote a foreword, but the book was not published in his name at that time.

The copyright for Unaipon's work was sold to anthropologist and Chief Medical Officer of South Australia, William Ramsay Smith, who edited the work slightly and published it under his own name in London in 1930, under the title Myths and Legends of the Australian Aboriginals. It is not known why Angus and Robertson decided to sell the copyright for the manuscript rather than publish with Unaipon as principal author. It is also not known if Unaipon knew about the sale of his work. There is no record of him having anything to do with Angus and Robertson or Ramsay Smith after 1925. No acknowledgment of Unaipon's work on the manuscript was made. The book was finally published in Unaipon's name, using his original title, in 2001.'

Patents (Patents Act 1990 (Cth))

Patents provide legal protection for the rights of inventors in relation to their invention. The purpose of patents is to provide a system which gives monopoly rights as an incentive for innovations in products and services. A patent grants the inventor monopoly rights to exploit the invention for a period of time. After that time the details of the invention are disclosed to the public and other people may use the information to reproduce the invention and benefit financially from it.

An inventor must apply for a patent and must meet certain requirements to succeed in their application. The Patents Act 1990 (Cth)[38] states that an invention will be a patentable invention[39] if it:

- is a 'manner of manufacture'
- (i) is novel; and
  (ii) involves an inventive step
- is useful
- has not been the subject of secret use.

Traditional Knowledge can be utilised in inventions, which become the subject of patent applications. Traditional Knowledge is made available during research and development in a range of different fields.

The unauthorised use of Traditional Knowledge and practices in the invention of new products, services and processes is a serious problem for the following reasons:

- It fails to recognise the collective rights and interests of the Traditional Knowledge holders
- It fails to recognise and respect customary law obligations in relation to Traditional Knowledge

38 Section 18(1) of the *Patents Act 1990* (Cth)

39 There are two kinds of patent, a standard patent and an innovation patent. An application for an innovation patent must involve an innovative step rather than an inventive step. The right granted by an innovation patent are different from those granted by a standard patent.

- It fails to acknowledge the contribution of Traditional Knowledge holders, owners and custodians in the invention
- It fails to financially reward the Traditional Knowledge holders, owners and custodians

One recent example of unauthorised use of Traditional Knowledge in the production of an invention is the development of drugs work based on the hoodia cactus and the Traditional Knowledge of the San people of southern Africa.

> *As hunter-gatherers the San have survived directly from the land for centuries already. In the past, however, we had control over land and natural resources, so our ancestors had what they needed to survive despite a dry climate and any other difficult conditions they might have faced. They learnt to be attentive to what was happening with the weather, the land and the animals; they became keenly aware of rainfall patterns, game movements and veld-food availability. These skills enabled us to survive.*
>
> *When other groups in the region also became aware of the land's richness in resources, they occupied much of the richest land. Our ancestors were dispossessed of their land. Not being regarded as equals of the new 'landowners', they were killed, forced into slavery on their own land or otherwise driven into marginal areas. Though nearly all San groups around the region lost their land base and some almost lost their language too, the elderly San continued passing on to the younger generations the Traditional Knowledge of fauna and flora.*[40]

Hoodia Gordonii and the San of Southern Africa[41]

> *The South African research organisation CSIR researched the properties of many plants. The CSIR scientists isolated P57, the appetite-suppressant molecule in the Hoodia Gordonii plant. The CSIR patented hoodia. In 1997, the CSIR licensed the UK-based Phytopharm, which in turn licensed drug giant Pfizer the following year for P57 development and global marketing, while the CSIR kept the patent.*
>
> *Given rising obesity trends in the Western world, the market for this natural anti-hunger drug could reach billions of dollars. In July 2001, describing research progress on P57, a Pfizer spokesperson in the UK linked the Hoodia to the San but said they were extinct. An international outcry followed and the South African San Council, set up in November 2001 and representing the Khomani, the !Xun and the Khwe, threatened a lawsuit. Negotiations with the CSIR followed and the San demanded recognition of their knowledge and a share of benefits.*
>
> *'We played quite a hard ball, we pleaded and demanded and cajoled and we got a good deal,' said the San's legal counsel, Roger Chennels, recalling how both sides bargained. A human rights lawyer, Chennels had processed land claims and other rights issues for the San for a decade.*

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40 'Celebrating the Fruits of San Traditional Knowledge' Speech delivered by Kxao Moses ‡OMA Chairperson of the Board of Trustees of the Working Group of Indigenous Minorities in Southern Africa (WIMSA) to the San Hoodia Benefit-sharing Celebration at Molopo Lodge, South Africa, on 24 March 2003, http://www.wimsanet.org/infpub%5Clibrary%5CCelebrating%20the%20Fruits%20of%20San%20traditional.pdf accessed 6.8.05

41 Adapted from 'Marginalised San Win Royalties from Diet Drug', Integrated Regional Information Networks, UN Office for the Co-ordination of Humanitarian Affairs, http://www.irinnews.org/report.asp?ReportID=33086&SelectRegion=Southern_Africa&SelectCountry =SOUTH_AFRICA accessed 6.8.05

'The San are the first and the last people: first on the land but their social statistics are at the bottom of the ladder,' said Chennels. Poverty, disease, alcoholism and lack of education and jobs are rampant - conditions that are not uncommon among many indigenous peoples.

The resonance of the case for South Africa, with its history of dispossession of African people and devaluation of their culture, is huge.

'We apologise to the San for having ignored them,' said Dr Marthinus Horak, manager of CSIR's bioprospecting programme, speaking at a workshop on biopiracy held during the World Summit on Sustainable Development in Johannesburg last year.

The CSIR will pay the San eight percent of milestone payments made by its licensee, Phytopharm, during the drug's clinical development over the next three to four years. The San could earn six percent of all royalties if and when the drug is marketed, possibly in 2008.

Already R259,066 (US $32,000) has been paid. Milestone payments for the San could reach between R8 to R12 million (US $1 million to US $ 1.4 million) while royalties could top R60 million (US $7.4 million) annually during the 15 to 20 years before a patent expires.

It took three years of 'tough negotiations', in the words of San Council chairman Petrus Vaalbooi, to reach a deal. The San plan to spend the money on education, skills development and create jobs for their people, who are among the most marginalised and poorest in the region.

'We need jobs first, and second, education in our language,' said Tina Witbooi, 23, a local trainee tracker.

Since colonial settlers imposed Afrikaans and English, the San language was driven to near extinction, so the San Institute records the language and, most importantly, gets the elders to teach it to children.

Some of the last speakers were at the ceremony, their faces sculpted by weather, sun and age in the reddish-copper colours of the Kalahari.

Ragel van Rooi walked aided by a stick painted with traditional San symbols. She wore a colourful flowered skirt. A pale blue scarf framed her wise eyes. Van Rooi did not know her age but neighbours estimated she must be about 70.

'I am happy that others can benefit from our plants,' she said, when asked about the meaning of the day to her.

'Yes, but it would be wrong if fat white people overseas get slim thanks to us while our children go hungry and uneducated,' replied Magdalena Kassie, 30, a community development facilitator with the South Africa San Institute in Upington, 225 km away.

> *'We lost our land and language, we were killed, driven out and demeaned,' said Kxao Moses, WIMSA[42] chair and a San from Namibia. 'This agreement is a positive example, for once people are not exploiting us, as was the norm.'*

Traditional Knowledge gathered through research and collection activities sometimes contributes to the development of an invention, product or process and a successful patent application. In general the rights holders in the patent will be determined by agreements reached during the research, collection and development phase. It is important that Traditional Knowledge holders receive legal and commercial advice so that their interests in a project to which they have contributed are properly represented and protected. It is equally important that this advice be available prior to disclosure of Traditional Knowledge, in accordance with the principle of free, prior and informed consent (see Appendix A).

Plant Breeders' Rights (Plant Breeders' Rights Act 1994 (Cth))

Plant Breeders' rights give plant breeders the exclusive commercial rights to market a new plant variety or its reproductive material. Such rights allow the plant breeder to produce, reproduce, sell and distribute the new plant variety, and to receive royalties from the sale of the plant or sell the rights to do so. Holders of plant breeders' rights can prevent others from selling seeds of that variety. Applications are costly, and the applicant must provide extensive information requiring considerable labour, expense and expertise.

For instance, the applicant must provide:

- Descriptions of the plant sufficient to establish a prima facie case that the variety is distinct from other varieties of common knowledge
- Particulars of the location at which and manner by which the variety was bred
- Particulars of the names (including pseudonyms) by which that variety is known and sold (in Australia)
- Particulars of any [plant breeders' rights] granted in that variety (in Australia) as well as of any application.[43]

Trademarks and geographic indicators (Trademarks Act 1974 (Cth))

The main use of trademarks and geographic indicators as a protective measure for Traditional Knowledge is in cases where the Traditional Knowledge has been incorporated into a product or service with a commercial purpose. Examples include nutraceuticals, food products, arts and crafts. The main purpose of a trademark or indicator in such cases would be to protect commercial interests in the product or service, rather than protecting the Traditional Knowledge itself.

A trademark is a sign that is used, or is intended to be used, to distinguish one trader from others. A sign may include a letter, a word, name, signature, numeral, device, brand, heading, label, ticket, an aspect of packaging, shape, colour, sound or scent, or a combination of any of those things.[44] It can be a valuable marketing tool such as QANTAS, Uncle Toby's Super Series, Redheads etc. Registration of a trademark gives the registered owner exclusive use of the trademark. The same

42 The Working Group of Indigenous Minorities in Southern Africa: see www.san.org.za

43 Terri Janke and Robynne Quiggin, Background Paper 12, *Indigenous Intellectual and Cultural Property and Customary Law*, Western Australian Law Reform Commission 2005, page 49. Adaptation of M Lotz 'Indigenous Plants, Indigenous rights: A Discussion of Problems Posed for Protecting Indigenous Intellectual Property' which summarises section 26 of the Plant Breeders Act (Cth) 1994 .

44 Section 6 of the *Trademarks Act* 1995 (Cth)

word(s) may be registered as business names and trademarks by different people. However, the registered trademark owner can sue the business owner for infringing the trademark if the business name owner uses it on goods or services similar to those covered by the trademark registration.

Some Indigenous names that are registered trademarks in Australia are: Indigenous Sport Program, Indigenous Dreamings, Batchelor Institute of Indigenous Tertiary Education, ANU Institute for Indigenous Australia, etc.

Geographic indicators are branding mechanisms applied to goods or services to indicate their quality, reputation or other factor associated with their place of origin. Examples include Cognac Brandy and Stilton Cheese.

During the late 1990s the National Indigenous Arts Advocacy Association (NIAAA) administered an Indigenous mark for artists, called the Label of Authenticity. The Label operated for a number of years, before coming to an end. Indigenous arts centres also employ the use of marks to brand and market their artwork.

Breach of confidence

The laws of breach of confidence are intended to ensure that if a person is told some secret information, and that person can reasonably be expected to know that the information was secret, there is an obligation of confidentiality on the person.

One example of a successful use of breach of confidence law in relation to Traditional Knowledge is shown below:

Foster v Mountford (1976) 14 ALR 71

> *In Foster v Mountford members of the Pitjantjatjara Council obtained an interlocutory injunction, on the basis of breach of confidence, to restrain the publication of a book entitled Nomads of the Australian Desert. The plaintiffs successfully argued that the book contained information that could only have been supplied and exposed in confidence to the anthropologist Dr Mountford. The plaintiffs also successfully argued that the 'revelation of the secrets contained in the book to their women, children and uninitiated men may undermine the social and religious stability of their hard-pressed community'. Copyright infringement could not have been employed by the plaintiffs because the work in question (i.e. the book), was not written by them and they had not acquired copyright in it.*[45]

Trade Practices (Trade Practices Act 1974 (Cth))

The Trade Practices Act 1974 (Cth) states that it is unlawful to engage in misleading or deceptive conduct. The Australian Competition and Consumer Commission (ACCC) administers the Act and has prosecuted souvenir manufacturers for marketing their products as Aboriginal when there were in fact only a few Aboriginal people engaged in the making of the products.[46] The successful prosecution of traders for misleading and deceptive conduct may have good implications for the

45 International Trade Law and Intellectual Property Branch, Business Law Division, Attorney-General' s Legal Practice, *Stopping the Ripoffs, Intellectual property protection for Aboriginal and Torres Strait Islander People*, Issues Paper, October 1994. http://www.ag.gov.au/agd/WWW/securitylawHome.nsf/Page/Publications_Intellectual_Property_Stopping_the_Rip_Offs_Report#7

46 *ACCC v Australian Icon Pty Ltd*, Federal Court, 6 May 2004 Cooper J, ACCC v Australian Aboriginal Art Pty Ltd & Ors, Federal Court, 4 May 2004 Cooper J.

prosecution of people who mislabel or misrepresent the authenticity of their goods and services. For example, if a company produced and marketed a cosmetic stating that it was developed using Traditional Knowledge or products and this was not true, there may be a breach of the Trade Practices Act. The ACCC has also prosecuted a number of traders who have acted unconscionably in their dealings with Aboriginal people.[47] These have generally been where a trader has taken advantage of a person's lack of education to gain a financial benefit.

3. Developments concerning access to biological resources and protection of Traditional Knowledge

One of the areas of substantial growth in relation to Traditional Knowledge is in relation to biological resources and their genetic characteristics. There has been some state legal regulation of access to biological resources and Traditional Knowledge. Much of this work has been a part of Australia's implementation of its obligations under the Convention on Biological Diversity.

While there is no one specific mechanism available for use by Indigenous peoples, a number of mechanisms, standards and rights should be considered by Indigenous people and organisations seeking to access their Traditional Knowledge. The first mechanism discussed here is contracts. Contracts are used to regulate relationships between groups. In relation to Indigenous people and Traditional Knowledge they are used to regulate access to resources and knowledge and benefit-sharing in any outcomes of the project or process.

Contracts and agreements

Contractual agreements are legally binding documents between two or more groups, usually referred to as the 'parties' to the agreement. In relation to Traditional Knowledge, they are generally used to outline and enforce access and benefit-sharing agreements as well as trade secrets. Sources for sample contractual clauses include the World Intellectual Property Organization (WIPO) Contracts Database http://www.wipo.org/globalissues/databases/contracts and Michael A Gollin, *Elements of Commercial Biodiversity Prospecting Agreements, in Biodiversity and Traditional Knowledge: Equitable Partnerships in Practice*. Sarah A Laird, ed. London, Earthscan, 2002.

Contractual arrangements covering Traditional Knowledge may explain or clarify the following points:

- Who the parties are to the agreement
- The duration of the agreement
- What knowledge is included in the agreement
- How the knowledge will be used
- What restrictions will be placed on the use of the knowledge
- What restrictions will be placed on confidentiality
- The specifics for benefit-sharing[48]

47 As a result of prosecution by the ACCC one businessman has been banned from trading in the Northern Territory due to his unconscionable conduct in connection with the supply of educational materials and household goods to eight Indigenous consumers. Federal Court Justice Mansfield found that Mr Keshow has not only engaged in unconscionable conduct against the eight consumers identified by the ACCC but in a broader sense acted unconscionably against consumers living in Indigenous communities in the Northern Territory. http://www.accc.gov.au/content/index.phtml/itemId/596327/fromItemId/684967 accessed 1.12.05

48 The preceding dot points are adapted from Stephen Hansen, and Justin VanFleet, American Association for the Advancement of Science (AAAS) Traditional knowledge and Intellectual Property: A Handbook on Issues and Options for Traditional knowledge Holders in Protecting their Intellectual Property and Maintaining Biological Diversity, Washington, 2003, at 30

- Mechanisms for checking that each party has fulfilled its commitment
- Dispute resolution provisions
- How any tangible material such as blood samples or plant samples will be stored and ultimately disposed of
- How the documented Traditional Knowledge arising from the project will be stored.

Some advantages of contractual arrangements include:

- Flexibility: they can be made about any lawful subject matter and for a range of reasons
- The parties agree to the terms
- Where there is a dispute over the contract, parties can rely on dispute resolution terms of the contract or seek a judgement in their favour.

Contracts might make provision for: 'up front payments, training, licenses, technology transfer, royalties, establishing of trust finds and other financial and non-monetary forms of benefit-sharing.'[49] Fourmile points out that '[a]greements are considered to be an important means of distributing costs, benefits and risks.'[50]

Agreement making is occurring widely, including in Australia. It is important that contract and agreement processes involving Indigenous people are underpinned by the principles of free, prior and informed consent.

There are concerns about contracts which regulate access to Indigenous resources – including Traditional Knowledge – including the following:

- There is an inadequate source of best practice standards for incorporation into contracts and the relevant international standards are not applied often enough.
- Contracts are generally not subject to the same levels of transparency and regulation as government policies as they are often private and confidential. Consequently there is no obligation to abide by these agreements, nor is there pressure to incorporate national or international standards into these agreements.
- There is the unequal bargaining power between Indigenous peoples and others. For example, Indigenous groups often have no access to technical expertise and advice. A final concern is that the contract only binds the parties to the agreement, not other parties who may have an interest in the particular venture.

Contracts and agreements highlight an issue about lack of consistent standards at national and regional levels for regulating access to biological resources and protection of Traditional Knowledge. There are emerging regional and national laws, and proposed laws that set standards.

One example of an attempt to import international standards into a multilateral agreement is the Andean Pact Decisions 391 and 486.[51]

49 Henrietta Fourmile, Developing a Regime to Protect Indigenous Traditional Biodiversity-Related Knowledge, Balayi: Culture, Law and Colonialism, Vol 1-1, 2000

50 Henrietta Fourmile, Developing a Regime to Protect Indigenous Traditional Biodiversity-Related Knowledge, Balayi: Culture, Law and Colonialism, Vol 1-1, 2000

51 The following excerpt is from http://www.law.unimelb.edu.au/ipria/research/trad_know.html#Andean

Andean Pact Decision 391: Common System on Access to Genetic Resources (1996)

The IPRIA web site has provided the following summary:

> *In 1996, the Andean Community Member Countries (Bolivia, Colombia, Ecuador, Peru and Venezuela) adopted Decision 391: Common System on Access to Genetic Resources which is the first sub-regional access and benefit-sharing legislative measure in response to Article 15 of the CBD. The agreement was developed to ensure that national access regulations are uniform and consistent with the identified minimum standards.*
>
> *The Andean Pact Common System on Access requires applicants seeking access to obtain the prior informed consent of, and share benefits with, both the Competent National Authority and indigenous, Afro-American and local communities. The Pact provides a common framework to all Member Countries for regulating access to genetic resources.*
>
> *Must apply for access to genetic resources to the Competent National Authority in the country where the resources are located and enter into a contractual arrangement.*
>
> *Where access to genetic resources or their derivatives, includes access to Traditional Knowledge, prior informed consent of these communities is required.*
>
> *Recognises the rights and decision-making capacities of Indigenous, Afro-Americans and local communities with regard to their Traditional Knowledge, practices and innovations connected with genetic resources.*
>
> *In September 2000, the Andean Community adopted a new intellectual property rights system: Decision 486 to bring the Andean countries in line with the WTO Agreement on Trade-Related Aspects of IPRs. Decision 486 provides that patent applications for a product or process obtained from Traditional Knowledge of indigenous, Afro-American or local communities of any of the Member States shall include a copy of the document licensing or authorising its use from the community (in accordance with Decision 391). Non-compliance with access regulations gives rise to a possible cancellation of any intellectual property (Article 75).*

Access and benefit-sharing

Henrietta Marrie[52] identifies two issues which need to be addressed in any agreement. These are access and benefit-sharing. In relation to the first, Marrie notes that the principle of free, prior and informed consent is of paramount importance. On the second, she notes that all parties' interests would need to be considered and calculated. Parties to agreements relating to the development of new products, services and processes could include Traditional Knowledge holders and their communities, researchers, collectors, producing companies and national and state governments.[53] Where Traditional Knowledge holders wish to share elements of their Traditional Knowledge, they should receive an equitable sharing of any benefits arising from use. Provision of benefits should

52 Formerly Fourmile

53 Henrietta Fourmile, Developing a Regime to Protect Indigenous Traditional Biodiversity-Related Knowledge, Balayi: Culture, Law and Colonialism, Vol 1-1, 2000

not be dependent upon commercial use. Benefits should be negotiated which recognise the entire contribution provided by the Traditional Knowledge holders, including their role as experts, the use of their country, access to their Traditional Knowledge, and their roles as taxonomists, ethnobotanists and collectors.

International standards have been developed which can be used as guidance by Indigenous peoples negotiating agreements. At the First International Conference on the Cultural and Intellectual Property Rights of Indigenous Peoples in 1993, the Mataatua Declaration on the Cultural and Intellectual Property Rights of Indigenous Peoples was drafted. The Preamble states:

> *… the first beneficiaries of Traditional Knowledge (cultural and intellectual property rights) must be the direct indigenous descendants of such knowledge.*

More recently the World Intellectual Property Organization[54] has developed a *Summary of Draft Policy and Core Principles*. Principle A5 states that protection of Traditional Knowledge should reflect the balancing of interests between those who 'develop, preserve and sustain Traditional Knowledge' and those who 'use and benefit from Traditional Knowledge'. This Principle states that holders of Traditional Knowledge should be entitled to fair and equitable sharing of benefits arising from its use.[55]

Serious concerns have been raised about the effectiveness of benefit-sharing and the extent to which it actually contributes anything of value to Traditional Knowledge holders, especially in relation to the use of genetic resources. There are a number of reasons for these concerns including:

- States and their governments assert sovereignty over resources, and the sharing of benefits with Indigenous peoples is increasingly regulated by the state
- Benefit-sharing is generally dependent on successful commercialisation which is never guaranteed
- Indigenous people's bargaining power is frequently not maximised in negotiations.

The San Benefit-sharing Negotiations

The second round of negotiations on benefit-sharing options and strategies was attended by the South African San Council, representatives of WIMSA, SASI, the Department of Science and Technology and the CSIR, and a few specialists in the field of indigenous Traditional Knowledge. The workshop was followed by a series of meetings between representatives of the San Council and the CSIR, which led to draft agreements and eventually to the final version of a benefit-sharing agreement.

The press release issued jointly by the San Council (WIMSA's South African chapter) and the CSIR explained the terms of the agreement as follows:

54 Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional and Folklore

55 Intergovernmental Committee on Intellectual Property and genetic Resources, Traditional knowledge and Folklore - Protection of Traditional knowledge - Summary of Draft Policy and Core Principles, Principle A5 Where the Traditional knowledge is associated with genetic resources, the Principles requires that benefit-sharing should be consistent with measures established in accordance with the Convention on Biological Diversity.

'The CSIR will pay the San eight percent of all milestone payments it receives from its licensee, UK-based Phytopharm, as well as six percent of all royalties that the CSIR receives once the drug is commercially available. Milestone payments are subject to agreed technical performance targets of P57 during its clinical development over the next three to four years, and royalties are based on sales, which are not set to commence before 2008. This benefit-sharing model ensures that the San will receive equitable benefits if the drug is successfully commercialised, and is based on established international benefit-sharing models for the pharmaceutical industry. Factors such as the size of the global anti-obesity market and the percentage of total market that the potential new drug could capture, are typically factors which determine the translation of the royalty percentage into monetary value.'

The agreement states that the income received will be paid to the San Hoodia Benefit-sharing Trust to be formed by the South African Council, which as WIMSA's affiliate represents not only the South African San communities but all San communities in the region. It was agreed that the trust should consist of three South African San Council representatives appointed by the council, three representatives of other San stakeholders in the region appointed by WIMSA, a South African professional appointed by the San Council and approved by WIMSA, a representative of WIMSA, a CSIR representative appointed by the CSIR or its nominee, and a non-voting observer appointed by the Department of Science and Technology or its nominee.

In accordance with the San aspirations as expressed by the WIMSA General Assembly, the agreement stipulates as the trust's aims and objectives the following, among others: '... to use income received from the CSIR for the general upliftment, material advancement, development, education and training of the San community; ... to support projects and institutions dedicated to advancing research into, and protection of, the Traditional Knowledge and heritage of the San peoples; ... and to ensure that the benefits paid to the San in accordance with this Trust Deed are shared in accordance with the highest degree of diligence, transparency and equity.'[56]

At the time of writing, none of the major drug companies which licensed the use of the drug have plans for its ongoing commercial use. If there is no ongoing commercial use, the benefit-sharing arrangements may provide no actual benefits to the San.

Marrie recommends Indigenous people consider the following when thinking about an agreement for the use of their land, knowledge or resources:

- What is to be protected
- The nature of the material
- Its ownership; who will protect it
- Against whom will protection be enforced.[57]

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56 'San Rights Vis-a vis the Hoodia Succulent', WIMSA Report on Activities, WIMSA Annual *Report 2002 -2003* http://www.san.org.za/wimsa/ar2002_3/annualrep10.htm

57 Henrietta Fourmile, Developing a Regime to Protect Indigenous Traditional Biodiversity-Related Knowledge, Balayi: Culture, Law and Colonialism, Vol 1-1, 2000

The answers to these questions will be determined by the kind of agreement being negotiated. If the main purpose is to secure strong financial returns then effective benefit-sharing clauses will be needed. If the main purpose is to prevent unauthorised use of Traditional Knowledge, then Indigenous people will need to be able to negotiate strong clauses which limit access.[58]

One example of agreement making, which is regarded by many as successful is the agreement over the research and patenting of genes from the Mamala tree, which grows across the Pacific region. In this instance, the agreement has been reached between the University of California and Samoa.

Samoa to benefit from AIDS drug[59]

> *In an agreement that is being lauded as a model for drugs developed from ethnobotany efforts, the University of California at Berkeley and the tiny Pacific Ocean island nation of Samoa will share equally in royalties from the sales of an anti-AIDS drug derived from the genes of the Samoan native mamala tree, it was announced yesterday (September 30).*
>
> *'What's so important about this agreement is that the University of California is recognizing the intellectual contribution of the healers of Samoa and considers them a partner in this endeavor,' Jay Keasling, a professor of chemical engineering at Berkeley, told* The Scientist*. Keasling will be leading the research to isolate and clone the genes responsible for producing the drug in the mamala tree, which he said would lead to microbial production of it.*
>
> *Prostratin is extracted from the bark of the tree and has long been used by native healers in the two-island Pacific nation, which is inhabited by fewer than 200,000 people, to treat hepatitis. 'I think it is another step in… [redressing] past wrongs that have been part and parcel of first-world dealings with third-world countries when it comes to dealing with plant medicines and native cultures,' Barefield said.*
>
> *Under a separate agreement, ARA will return 20% of any profits from the plant-derived form of the drug to Samoa. Prostratin forces the HIV out of reservoirs in the body, thus allowing anti-retroviral drugs to attack it.*
>
> *Paul Cox, director of the Institute for Ethnobotany at the National Tropical Botanical Garden in Hawaii, has studied the tree and its use by native healers for the past 2 decades. 'This is a very positive example of how a biodiversity-rich country has partnered with a major university to develop its genetic resources. I think other nations may seek to establish similar partnerships,' Cox, who is an ARA board member, told* The Scientist *in an e-mail.*
>
> *Ethnobotanist Mark Plotkin, president of the Amazon Conservation Team, lauded the agreement, which will provide money to villages and families of healers, who taught Cox how to use the tree. 'That's the way it should work. It's a step beyond, 'We'll cut a check for the government, and everything's cool,'' he says.*

58 Henrietta Fourmile, Developing a Regime to Protect Indigenous Traditional Biodiversity-Related Knowledge, Balayi: Culture, Law and Colonialism, Vol 1-1, 2000

59 Harvey Black, 'Samoa to Benefit from AIDS Drug', *News from The Scientist, The Scientist*, 2004, 5(1):20041001-02, http://www.the-scientist.com/article/display/22433/

Any proposed licensing agreement between the university and a pharmaceutical company using the Berkeley researchers' results to make the drug will require the company to make the drug available in the developing world either free, at cost, or at 'very nominal profit,' says Carol Mimura, director of Berkeley's technology licensing office.

Australian developments in and benefit-sharing[60]

Australia has undertaken obligations to implement the Convention on Biological Diversity in relation to access and benefit-sharing. As part of its implementation of the third object of the CBD – 'fair and equitable sharing of the benefits arising out of the utilisation of genetic resources' – the Australian government has developed a number of policies.

These include *The National Strategy for the Conservation of Australia's Biological Diversity*. Objective 1.8 of the National Strategy relates to Biological Diversity and Aboriginal and Torres Strait Islander Peoples.

The Objective states: Recognise and ensure the continuity of the contribution of the ethnobiological knowledge of Australia's indigenous peoples to the conservation of Australia's biological diversity.

The Objective is to be achieved through a number of Actions. Action 1.8.2 relates to access and benefit-sharing. It states:

1.8.2 Use and benefits of traditional biological knowledge

Ensure that the use of traditional biological knowledge in the scientific, commercial and public domains proceeds only with the cooperation and control of the traditional owners of that knowledge and ensure that the use and collection of such knowledge results in social and economic benefits to the traditional owners. This will include:

- Encouraging and supporting the development and use of collaborative agreements safeguarding the use of Traditional Knowledge of biological diversity, taking into account existing intellectual property rights
- Establishing a royalty payments system from commercial development of products resulting, at least in part, from the use of Traditional Knowledge.

This Action has been incorporated into the *Nationally Consistent Approach for Access to and the Utilisation of Australia's Native Genetic and Biochemical Resources* (NCA). The NCA provides General Principles to underpin development or review of legislative, administrative or policy frameworks or other mutually agreed arrangements in Australian jurisdictions for access to biological resources.

General Principle 7 states a commitment to provide frameworks which:

Recognise the need to ensure the use of Traditional Knowledge is undertaken with the cooperation and approval of the holders of that knowledge and on mutually agreed terms.

60 The NCA and the draft EPBC Act Regulations are discussed under National Approaches below

Principle 11 provides for consultation with Indigenous peoples. It states that frameworks will be developed:

> … in consultation with stakeholders, Indigenous peoples and local communities.

The Nationally Consistent Approach provides guidelines for the Commonwealth to work with State and Territory governments to provide a framework for access and benefit-sharing under which legislative regimes, administrative mechanisms and policy will be developed.

Draft regulations: *Environment Protection Biodiversity Conservation Act* 1999

The *Environment Protection Biodiversity Conservation Act 1999* provides a statutory regime for implementing Australia's obligations under the Convention on Biological Diversity. New regulations pursuant to section 301 of the EPBC Act are proposed. The regulations will create a legislative framework for access to resources on Commonwealth lands. The regulations require that access to Indigenous owned land in Commonwealth areas will only be allowed where the Indigenous owners have entered into a benefit-sharing agreement with the party seeking access. Some state and territory governments have developed law and policy. These are all discussed below under 'National Approaches'.

4. Local, state, territory, national and international approaches

Local and regional

There are many approaches to protecting Traditional Knowledge at local and regional levels. These include protocols, guidelines and codes of conduct. They also include databases and registries, defensive measures to challenge patent applications, and combinations of the protocols and legal measures. The principle of FPIC is closely related to the right of Indigenous people to full and effective participation in matters affecting their interests.

The Central Land Council General Research Protocol

Another example of local and regional measure to protect Traditional Knowledge is the Protocols and Guidelines developed by the Central Land Council. These documents provide for Traditional Owners within the CLC region to regulate activities that occur on their lands and protect their Traditional Knowledge rights and interests.

All applications for research activities must have obtained, through the CLC, the prior informed consent of the Traditional Owners. To assist the CLC in seeking prior informed consent from Traditional Owners, applicants who wish to obtain a permit to enter Aboriginal land in order to conduct research should provide to the CLC full details of the proposed project such as how the project will benefit Indigenous people and whether it involves media activities. Applicants must also provide full details in their application of any plans for publication and dissemination and include details of any collaborative approaches to publication with Aboriginal people. Copies of all research results and outputs shall be made available, in an appropriately accessible form, to Aboriginal people upon request. This is an example of how a regional organisation has sought to strengthen the requirement for free, prior and informed consent in the context of research activities in Aboriginal communities.

The CLC protocol uses the term ‘Indigenous cultural and intellectual property’ to include Traditional Knowledge. While there are undoubtedly important relationships between Traditional Knowledge and Indigenous cultural and intellectual property, the Protocol does not explore these relationships.

For example paragraphs 4.2 and 4.3 of the General Research Protocol set out the conditions and requirements that researcher and others must commit to, when working on Aboriginal land:

- Applications for research projects must demonstrate a commitment to respect and uphold the rights of Aboriginal people, under their Traditional Law, to full ownership and control over any Indigenous cultural and intellectual property that is in existence prior to the conduct of the project. This includes rights in Indigenous cultural knowledge.
- Applications must demonstrate a commitment to negotiating fully and equitably with Aboriginal people who are involved in the research, and in protecting the rights and interests of Aboriginal people in any intellectual property that results from the research.

Defensive protective measures

In recent years, defensive protection measures have been used to frustrate patent applications because they show that the information on which the patent is based is not novel. Although not strictly a legal protection, defensive disclosure mechanisms are an adjunct to the legal structure set up by the patent system. They are generally used by Traditional Knowledge holders to record their Knowledge in a registry or database. This can be used to defeat a patent application by showing that the information is not new, or novel, as it is part of the prior art base.[61] However, the downside of this action is that recording Traditional Knowledge in a private registry or database may not classify it as part of the prior art base because it may not be sufficiently publicly available. Further, recording Traditional Knowledge in a publicly available registry or database may make use of the information very difficult to control.

Some Indigenous people favour the patenting of Traditional Knowledge by Indigenous people to avoid misappropriation of Traditional Knowledge by others. The advantage to this defensive patenting strategy is that the Traditional Knowledge holders retain control over the Knowledge and invention for a period of time. The disadvantage is that development of a patentable invention may be time consuming, costly and require skills which are unavailable to the Traditional Knowledge holders. Further, the period of time during which the Knowledge is confidential is limited, once the patent expires the knowledge is in the public domain, and the patent will generally be expensive to obtain and maintain.

Databases and other recording mechanisms

The following is an example of a practical way to collect and disseminate Traditional Knowledge.

The Ashkui Project – working with the Innu People of Labrador

> *Over the past five years, a partnership between the Innu Nation, Environment Canada, the Gorsebrook Institute of Saint Mary’s University and Natural Resources Canada has been exploring new ways to connect Innu knowledge and western science. Our*

61 Prior art is a term which refers to knowledge which is known prior to the creation of the invention or the filing of the patent application.

approach uses the conceptual category of a Cultural Landscape Unit (CLU) as the basis for generating new knowledge about the biophysical make-up of Labrador. This method starts with Innu knowledge and terminology for an element of the landscape that has value and meaning for them and then builds a knowledge base of that feature from a number of perspectives.

The first step in this project is the collection of Innu knowledge on the biological and environmental components of Ashkui, the conceptual boundaries of the Ashkui, the land use characteristics of the Ashkui and the sociological importance of the Ashkui. The knowledge gained from these elder interviews is continually reshaping the overall direction of the project and the perspectives of the partners.

Following the initial Innu knowledge collection, a co-researcher concept was implemented as a means of building capacity in the Innu community. The co-researcher, Jack Selma, was interested in working with western scientists and took on an active role in the overall design of the research aspects of the project. Through the participation of the co-researcher, the project established a place in the Innu community with a dedicated link between the Innu and the western scientists. Through numerous dialogues with elders and hunters, the co-researcher was able to determine the dominant Innu concerns and also to help select appropriate research areas. The role of the co-researcher has expanded throughout the life of the project. Responsibilities now include planning of monitoring and research activities, preparing, developing and presenting project reports within the Innu community and at scientific meetings, liaising with elders, hunters, families and children in the community, assisting in translation of interviews and providing field assistance and logistic support. To enhance the capacity development opportunities, the co-researcher concept has evolved into an environmental guardians program. Through this program, eight Innu have been employed full time in ecological research initiatives and a community specific training program is being developed. This training program is modular in design, is delivered in the community, combines classroom and field training and will in the near future provide the students with University accreditation. Four modules (forest management, fisheries management, GIS and collecting TEK information) have already been developed and delivered while a series of other modules are in preparation.

An important concept of the Ashkui project is to develop creative products that can provide project value for the Innu community. Although traditional scientific publications are a part of the project, the main focus is to develop a series of other community based projects. These products include a variety of poster and other hard copy products that can be displayed and distributed within the Innu community. All Innu knowledge interviews have been recorded on both video and audio tape and copies of all interviews are provided back to the community. Additionally, all interview data has been translated, transcribed and encoded in a qualitative research software application called QSR Nudist. This application allows easy searching and selection of segments from interviews based on a researcher established indexing system.

Interactive CD-Roms about Ashkui have been produced both as communication tools and as educational products for the Innu school system. The educational products have been developed along with the Innu teachers and combine Innu faces, voices and culture with the views of the western scientists. These multi-media products are extremely valuable and for the first time have provided the Innu teachers with technology based teaching products. During the spring of 2002, the educational CD-Rom product was evaluated by a number of Innu school children and teachers. The overall impression was highly positive and the suggested changes in the product have been implemented.

Geographic information systems (GIS) have also been used to develop a long term record of both Innu and western science knowledge of Ashkui. Recently, these data have been made available, with password protection, on the Internet using on-line mapping software. Although the use of technology has value, it is also recognized that many Innu, particularly the elders, do not have ready access to these technologies. To overcome this issue, the Labrador Atlas project was implemented which is developing a hardcopy version of the GIS system. This will allow elders and others to stack transparent layers of Innu and western science knowledge on top of base maps to create the map product of interest to them. An extension of the atlas work is the development of a spatial modelling technique that combines all of the Innu knowledge into a composite Innu values layer that can be used within the environmental assessment process without risking confidentiality and control of the underlying knowledge. If successful, this approach could for the first time see Innu knowledge used effectively to influence environmental decision making in Canada.

Remote sensing through the use of a variety of satellite imagery products is also an important product line for the project. Spatial and temporal patterns of Ashkui are mapped using RADARSAT, while other forms of imagery are used to investigate changes in land cover. These products have been used to promote development exclusion zones, investigate the potential of ice safety mapping and recently to identify caribou migration patterns.[62]

A study conducted by the United Nations University[63] into the benefits of databases and registries as legal protection measures reached the following conclusions:

Depending on the specific objectives of any regime, registers and databases may play a substantial role in protection of TK. They can amongst other things, serve to:

- *Promote documentation. Preserve and maintain TK.*
- *Provide a means to assist patent search procedures and identify prior art*
- *Identify communities which might be entitled to benefit-sharing, and assign exclusive rights*
- *Provide the means for recording the existence of TK over which positive rights have been recognized under national or customary law*
- *Serve as the mechanism for obtaining protection of TK through sui generis database protection.*

62 Geoff Howell, Dave Wilson Jack Selma, The Ashkui Project - Using Cultural Landscapes to Link Labrador Innu Knowledge and Western Science http://www.saasta.ac.za/scicom/pcst7/howell.pdf

63 UNU-IAS, The Role of Registers and Databases in the Protection of Traditional knowledge: A Comparative Analysis http://www.ias.unu.edu/binaries/UNUIAS_TKRegistersReport.pdf

However, databases and registers alone do not provide a means for the effective protection of TK. Rather they must be seen as one element or mechanism in a wider system of TK governance including customary law and practice, national access and benefit-sharing legislation, and sui generis TK law and policy.

Development of any TK regime must be guided by the customary law and practice of indigenous peoples and local communities. Considering the number and diversity of indigenous peoples and local communities and consequently the diversity of their customary laws and practices, any international system for the protection of TK must be based upon flexibility, sensitivity to local realities and adaptability.

There is a need for the full participation of indigenous peoples in the development not only of registers per se but also in the process for development of any regime, sui generis or otherwise, for the protection of TK. All reasonable efforts need to be made to ensure that prior informed consent is obtained from the relevant indigenous peoples for inclusion of their TK in databases or registers, whether TK is in the public domain or not. For information not already in the public domain, prior informed consent should be a mandatory condition of inclusion of information in any database for scientific or commercial use whether or not the relevant database is open or subject to restricted access.

Explicit institutional policies need to be developed by museums, botanical gardens, universities, companies and all entities working with biological materials and related TK. Acceptance of the rights of indigenous peoples over their TK should be a precondition for access to databases and registers. Database owners of existing databases holding TK should consider the development of a common code of conduct to govern the holding of TK. To this end, database owners should consider adopting a system establishing a fiduciary obligation to hold any TK in trust for the benefit of indigenous people. In the development of any such policies database owners should liaise closely with indigenous peoples.

Databases and registers provide a good opportunity for benefit-sharing with indigenous peoples and local communities through repatriation of information in user-friendly format and where possible in local languages.

National governments and international organisations should: review existing law and policy with a view to the development of more sensitive and directed prior art search procedures; consider possibilities for adopting interim measures which reduce pressure on indigenous peoples and their knowledge systems by creating obligations for users to demonstrate prior informed consent as a condition for scientific and commercial use of TK; give attention to the ongoing discussions on user measures within the framework of the Convention on Biological Diversity (CBD), and to proposals for the negotiation of an international regime on access to and benefit-sharing of genetic resources (ABS); and ensure that intellectual property regimes are supportive of the CBD and human rights.

Combined Approach: Songman Circle of Wisdom[64]

A new accreditation protocol, which allows Aboriginal people to protect their rights, resources and knowledge, has been launched in Western Australia. Chairman of the Songman Circle of Wisdom (SCW), Dr Richard Walley states: 'We as indigenous people must protect our knowledge, our intellectual property and our heritage.'

The first venture to implement the non-profit SCW protocol is a partnership between Aveda and Australian sandalwood distributor Mount Romance (each of which has donated $50,000 to support the launch of SCW). After discovering the Indian sandalwood it used was unsustainable and unethical, Aveda switched its sourcing to Australia. Now it buys all its sandalwood from a small Aboriginal community, Kutkabubba, and pays a premium on top of the state-controlled price, which goes to the community. 'This has given us more money now, which we're going to use to make our community better,' explains Kutkabubba elder and sandalwood harvester Ken Farmer. If this model works, the SCW certification mark could appear on products from around the world.

'When we go into these partnerships, we don't go with weakness saying, 'Please, Mr Aveda' or 'Please, Mr Consumer - help us',' says Walley. 'We go in saying, 'We are a strong group of people who've got a philosophy. We know this culture, we know this land, we can help you – not you help us. We can help you'.'

State and Territory

Queensland

The Queensland government has developed law and policy for biotechnology. *The Code of Ethical Practice for Biotechnology in Queensland* provides for compliance with the *Native Title Act 1993* (Cth) 'with respect to the collection of samples from areas where native title rights and interests exist' and for negotiation of reasonable benefit-sharing arrangements with Indigenous persons or communities where in the course of biodiscovery and research the Queensland government obtains and uses Traditional Knowledge.[65]

The Queensland Code makes the following commitment not to engage in 'biopiracy':

> *'Biopiracy' refers to the appropriation of developments or discoveries in the area of biological resources, including agricultural germ plasm, by another party without consent. We note concerns that some biotechnology research has involved the appropriation of germ plasm that have long been identified, developed and used by others including indigenous farmers. We agree not to practice 'biopiracy'. (Code of Ethical Conduct for Biotechnology in Queensland, paragraph 22)*

Full and effective recognition of Indigenous Traditional Knowledge would require a meaningful implementation of free, prior and informed consent and not merely a statement of intention not to practice biopiracy.

64 This information is from Liz Hancock, 'Beating Beauty's Ugly Side: On the Ethics of Cosmetics', *The Guardian*, 8 January 2005, p 43 at http://www.williams.edu/go/native/cosmetics.htm on August 25 2005

65 Department of Innovation and Information Economy, Queensland Government, *Code of Ethical practice for Biotechnology in Queensland*, Brisbane, 2001, page 9

The Queensland government has enacted the Biodiscovery Act 2004 (Qld). The Act requires biodiscovery entities to prepare a Biodiscovery Plan for approval by the Department of State Development and Innovation. The draft *Guidelines for Preparing a Biodiscovery Plan* require disclosure of whether Traditional Knowledge or Indigenous intellectual property has been used or may be used, in relation to any of the biodiscovery activities (including determining what biological sample(s) can/cannot be collected); and if so:

- In relation to which biodiscovery activities
- Has or will a benefit-sharing agreement or some other arrangement be negotiated with the Traditional Knowledge holder, if so, please provide details of the agreement or proposed agreement including:
- Timeframes, e.g. the date of the agreement or an indicative date for negotiation of the agreement
- The benefits (monetary and/or non-monetary) that have been negotiated with the Traditional Knowledge holders.

The Northern Territory

The Northern Territory has developed a draft *Policy for Access to Biological Resources for Bioprospecting in the Northern Territory*. The draft policy makes reference to the principles set out in the Convention on Biological Diversity, and the Bonn Guidelines. The draft policy provides that 'benefit-sharing agreements are to be entered into to ensure that any benefits (direct and indirect) arising from the use of biological and genetic resources and their derivatives are shared fairly and equitably.' Agreements will be made with the relevant land holder. The Policy includes Guiding Principles.

Guiding Principle 2 states:

> *Ensure that any use of Traditional Knowledge [not in the public domain] is undertaken with the cooperation and approval of the holders of that knowledge, to include the prior informed consent of the custodians of that knowledge and on mutually agreed terms.*

Guiding Principle 2 embodied in The Northern Territory's policy bears some similarities to the proposed Commonwealth Environment Protection and Biodiversity Conservation Amendment Regulations proposed by the Commonwealth government and discussed below.[66]

National

Environment Protection and Biodiversity Conservation Amendment Regulations[67]

The regulations cover the equitable sharing of benefits arising from the use of biological resources, and they establish an access regime. The party who is seeking access to biological resources in Commonwealth areas must apply for an access permit (to be issued by the Minister). The applicant must negotiate a benefit-sharing contract with Indigenous owners that covers commercial and

66 The *Environment Protection and Biodiversity Conservation Amendment Regulations* was a result of a recommendation of the Commonwealth Public Inquiry into Access to Biological Resources in Commonwealth Areas. http://www.law.unimelb.edu.au/ipria/research/trad_know.html#Phillipines (accessed 6 October 2005)

67 This extract is from http://www.law.unimelb.edu.au/ipria/research/trad_know.html#Phillipines (accessed 6 October 2005)

other aspects with the provider of the biological resources. The decision of Indigenous owners of biological resources to deny access to their resources is not reviewable. The Minister will issue a permit if he or she is satisfied that:

- An environmental assessment was undertaken
- Access would be ecologically sustainable
- Benefit-sharing contract addresses prior informed consent of any Indigenous owners of biological resources; mutually agreed terms; and adequate benefit-sharing arrangements including protection for and valuing of Traditional Knowledge

Nationally Consistent Approach for Access to and the Utilisation of Australia's Native Genetic and Biochemical Resources (NCA)[68]

On 11 October 2002, the fourteen Commonwealth, State and Territory Ministers of Australia constituting the Natural Resource Management Ministerial Council endorsed the NCA.[69] The NCA makes adoption of the Bonn Guidelines[70] explicit in its preamble in which all Australian governments state their acceptance of the invitation by the Convention on Biological Diversity to apply the Guidelines. The connection is further reinforced by including key elements of the Guidelines among the features of the NCA.

The NCA includes a set of principles to underpin the development of legislative, administrative or policy frameworks in Commonwealth, states and territories. The principles also aim to deliver important elements of the National Strategy for the Conservation of Australia's Biodiversity. One aspect of the NCA is Indigenous biodiversity knowledge.

The foreword to the NCA states that frameworks for access and benefit-sharing must respect Indigenous people's special knowledge of biodiversity and ensure that Indigenous people have a choice and means to share their knowledge on fair and equitable terms.[71] It is noted in the Introduction that the NCA makes a significant contribution to achieving objective 1.8.2 of the National Strategy, which requires that use of Traditional Knowledge proceeds only with the cooperation and control of traditional owners and ensures that use will provide social and economic benefit to traditional owners. (See previous section on Australian Developments in Access and Benefit-sharing in this paper.)

However, the NCA reflects the principle of state sovereignty over natural resources and the importance of protecting the state's returns from its biological property. The Goal of the NCA is:

> *To position Australia to obtain the maximum economic, social and environmental benefits from the ecologically sustainable use of its genetic and biochemical resources whilst protecting our biodiversity and natural capital.*

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68 The following extract is from Terri Janke and Robynne Quiggin, Background Paper No 12, *Indigenous Cultural and Intellectual Property and Customary Law* Western Australian Law Reform Commission page 61(see also previous section on Australian Developments in Access and Benefitsharing in this paper)

69 Australian Government, Department of the Environment and Heritage, Understanding the Nationally Consistent Approach for Access to and the Utilisation of Australia's Native Genetic and Biochemical Resources (2003) <http://www.deh.gov.au/biodiversity/science/access/nca/pubs/understanding.doc>1. now located at http://www.deh.gov.au/biodiversity/publications/access/nca/pubs/understanding.pdf (accessed 10 October 2005)

70 See International section later in this paper

71 Natural Resource Management Ministerial Council, Nationally Consistent Approach For Access to and the Utilisation of Australia's Native Genetic and Biochemical Resources (adopted 11 October 2002) 1

Australia has yet to properly develop effective measures to recognise, protect and provide equitable benefits for the use of Traditional Knowledge. As discussed above there is a range of developments in environmental and conservation law, and to some extent in IPR laws. Achievement of real and meaningful recognition and protection requires a more creative approach such as *sui generis* regimes. *Sui generis* regimes are being implemented in other jurisdictions beyond Australia.

Sui generis regimes

Sui generis literally means 'of it own kind' and consists of a set of nationally recognised laws and other forms of protections. A *sui generis* system could be defined and implemented differently from one country to another. A *sui generis* system might be defined to create legal rights that recognise any associated Traditional Knowledge relating to genetic resources and promoting access and benefit-sharing. On example is the Costa Rica Biodiversity Law.

A *Sui generis* System in Costa Rica

The Costa Rican Biodiversity Law recognises the unique nature of Indigenous Knowledge:

The State expressly recognises and protects, under the common denomination of sui generis community intellectual rights, the knowledge, practices and innovations of indigenous peoples and communities related to the use of components of biodiversity and associated knowledge. This right exists and is legally recognised by the mere existence of the cultural practice or knowledge related to genetic resources and biochemicals; it does not require prior declaration, explicit recognition nor official registration; therefore it can include practices which in the future acquire such status.

National Legislation of Costa Rica, Biodiversity Law, Article 82 Ley No. 7788: 1998

The Julayinbul Statement on Indigenous Intellectual Property Rights (1993)

In 1993 the *Julayinbul Statement* on Indigenous Intellectual Property Rights was issued by delegates to the Julayinbul Conference held at Jingarra in north eastern coastal Australia.

The Statement should be read in its entirety, but can be summarised as follows:

> *The Statement outlines the relationship between Indigenous Peoples and the environment. The Statements reaffirms the right of self-determination, in particular, in relation to intellectual property, and states that it should only be used in accordance with Aboriginal Common Law.*

International

There are a number of international declarations and other documents, which set out standards for ethical dealings with Indigenous peoples' Knowledge. These include the Draft Declaration on the Rights of Indigenous Peoples and several others.

Draft Declaration on the Rights of Indigenous Peoples

The Declaration should be read in its entirety. It provides for a wide range of Indigenous rights including in relation to Indigenous Traditional Knowledge (for example Articles 12, 13 14 and 29). It also provides for the right to self-determination, which importantly allows Indigenous people to control decision making in regard to their Traditional Knowledge (Articles 1, 2 and 3). These Articles are set out in Appendix B.

The Mataatua Declaration on Cultural and Intellectual Property Rights Indigenous Peoples[72]

The First International Conference on the Cultural & Intellectual Property Rights of Indigenous Peoples was held in Whakatane, Aotearoa, New Zealand, 12–18 June 1993. Over 150 delegates from fourteen countries attended, including Indigenous representatives from Ainu (Japan), Australia, Cook Islands, Fiji, India, Panama, Peru, Philippines, Surinam, USA, and Aotearoa.

The Conference met over six days to consider a range of significant issues, including; the value of Traditional Knowledge , biodiversity and biotechnology, customary environmental management, arts, music, language and other physical and spiritual cultural forms. On the final day, the following Declaration was passed by the Plenary.

The Declaration reaffirms that Indigenous Peoples of the world have the right to self-determination and in exercising that right must be recognised as the exclusive owners of their cultural and intellectual property.

> *The Declaration recognises also that Indigenous Peoples are capable of managing their Traditional Knowledge themselves, but are willing to offer it to all humanity provided their fundamental rights to define and control this knowledge are protected by the international community.*
>
> *The Declaration asserts that the first beneficiaries of Traditional Knowledge (cultural and intellectual property rights) must be the direct indigenous descendants of such knowledge, and declares that all forms of discrimination and exploitation of indigenous peoples, Traditional Knowledge and indigenous cultural and intellectual property rights must cease.*

The Declaration then states a series of recommendations to Indigenous peoples, States, Nations and International Agencies in relation to biodiversity and customary environmental management and cultural objects, and finally a set of recommendations are made to the United Nations.

The Convention on Biological Diversity: the Bonn Guidelines and the Akwe:kon Guidelines[73]

The sixth conference of the parties of the Convention on Biodiversity adopted the Bonn Guidelines on Access to Genetic Resources and Fair and Equitable Sharing of the Benefits Arising out of their Utilization (Bonn Guidelines). The Guidelines are voluntary. They identify the steps in the process of access and benefit-sharing, and emphasise the need for the prior informed consent of the nation in which the resources are located.[74] The Bonn Guidelines make a number of references to Indigenous peoples and local communities, and to Traditional Knowledge. All provisions are subject to the national legislation in force in each member state. Clause 31 states:

72 http://www.tebtebba.org/tebtebba_files/susdev/ik/mataatua.html

73 The following extract is from Terri Janke and Robynne Quiggin, Background Paper No 12, *Indigenous Cultural and Intellectual Property and Customary Law* Western Australian Law Reform Commission pages 82-82

74 'Bonn Guidelines on Access to Genetic Resources and Fair and Equitable Sharing of the Benefits Arising Out of Their Utilization' (Bonn Guidelines), Introduction. Indigenous Cultural and Intellectual Property and Customary Law 83

Respecting established legal rights of indigenous and local communities associated with the genetic resources being accessed or where Traditional Knowledge associated with these genetic resources is being accessed, the prior informed consent of indigenous and local communities and the approval and involvement of the holders of Traditional Knowledge, innovations and practices should be obtained, in accordance with their traditional practices, national access policies and subject to domestic laws.

Subject to national legislation, the Bonn Guidelines require the parties to ensure that the commercialisation and any other use of genetic resources should not prevent traditional use of genetic resources,[75] and support measures, as appropriate, to enhance Indigenous and local communities' capacities to represent their interests fully at negotiations.[76]

Indigenous peoples and local communities are regarded as stakeholders and states are encouraged to seek their views in relation to access, benefit-sharing, mutually agreed terms, and the development of national strategy, policies or regimes on access and benefit-sharing.[77] The guidelines recommend the establishment of national consultative groups, comprising relevant stakeholders including Indigenous peoples and local communities, in order to facilitate their involvement.[78]

The parties have also endorsed the Akwe:kon Voluntary Guidelines for the Conduct of Cultural, Environmental and Social Impact Assessments Regarding Developments Proposed to Take Place, or Which Are Likely to Impact on Sacred Sites, and on Land and Waters Traditionally Occupied or Used By Indigenous and Local Communities.[79] In Decision VII/16 the Conference of the Parties encourages governments to initiate a legal and institutional review of matters related to cultural, environmental and social impact assessment, with a view to exploring options for incorporation of these guidelines into national legislation, policies and procedures.[80] Parties are also requested to use the guidelines as appropriate.[81] The purpose of the Akwé: Kon Voluntary Guidelines includes the following reference to the Traditional Knowledge of Indigenous peoples:

[T]he purpose of these Guidelines is to provide a collaborative framework within which Governments, Indigenous and local communities, decision makers and managers of developments can … take into account the Traditional Knowledge, innovations and practices of Indigenous and local communities as part of environmental, social and cultural impact-assessment processes, with due regard to the ownership of and the need for the protection and safeguarding of Traditional Knowledge, innovations and practices.[82]

75 Bonn Guidelines, ibid, Cl 11 (iii)

76 Ibid, cl 11 (vii)

77 Ibid, cl 18. Special Rapporteur, Erica Irene Daes notes that there is considerable developing international law which recognises Indigenous people's status as rights holders, not just stakeholders in relation to natural resources: see E/CN.4/Sub.2/2004/30 Prevention of Discrimination and Protection of Indigenous peoples: Indigenous Peoples' Permanent Sovereignty Over Natural Resources, 13

78 Bonn Guidelines, ibid, cl 19

79 Report of the Seventh Meeting of the Conference of the Parties to the Convention on Biological Diversity (UNEP/CBD/COP/7/21, 13 April 2004) n 57. (Pronounced 'agway -goo'. A holistic Mohawk term meaning 'everything in creation' provided by the Kahnawake community located near Montreal, where the guidelines were negotiated.)

80 Ibid, Decision VII/16, [2] 260.

81 Ibid [3].

82 Ibid, Annex, 261.

Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore – Protection of Traditional Knowledge – Summary of Draft Policy and Core Principles[83]

This document is long, but should be read in its entirety. The following is a list of subject headings used in the document to give an idea of its content. A number of Indigenous groups have criticised the Draft Policy and Core Principles for having a commercial focus and not going far enough to protect and Traditional Knowledge in accordance with customary law principles. It does however provide some strong guidance on issues of misappropriation and other problems faced by Traditional Knowledge holders.

I. POLICY OBJECTIVES

The protection of Traditional Knowledge should aim to:

- Recognize value
- Promote respect
- Meet the actual needs of holders of Traditional Knowledge
- Empower holders of TRADITIONAL KNOWLEDGE
- Support Traditional Knowledge systems
- Contribute to safeguarding Traditional Knowledge
- Repress unfair and inequitable uses
- Concord with relevant international agreements and processes
- Promote innovation and creativity
- Promote intellectual and technological exchange
- Promote equitable benefit-sharing
- Promote community development and legitimate trading activities
- Preclude the grant of invalid IP rights
- Enhance transparency and mutual confidence
- Complement protection of traditional cultural expressions

II. CORE PRINCIPLES

A. General guiding principles

[These principles should be respected to ensure that the specific principles concerning protection are equitable, balanced, effective and consistent, and appropriately promote the objectives of protection. Each principle is followed here by a brief description of the possible effect of the principle; a more complete description is provided in Annex II of document WIPO/GRTRADITIONAL KNOWLEDGEF/IC/7/5]

A1: Principle of responsiveness to the needs and expectations of TRADITIONAL KNOWLEDGE holders

A2: Principle of recognition of rights

A3: Principle of effectiveness and accessibility of protection

83 83 http://www.wipo.int/edocs/mdocs/Traditional knowledge/en/wipo_grTraditional knowledgef_ic_7/wipo_grTraditional knowledgef_ic_7_5-annex1.pdf

A4: Principle of flexibility and comprehensiveness

A5: Principle of equity and benefit-sharing

A6: Principle of consistency with existing legal systems

A7: Principle of respect for and cooperation with other international and regional instruments and processes

A8: Principle of respect for customary use and transmission of Traditional Knowledge

A9: Principle of recognition of the specific characteristics of Traditional Knowledge

B. Specific substantive principles

B1: Protection against misappropriation

Suppression of misappropriation

General nature of misappropriation

Acts of misappropriation

General protection against unfair competition

Recognition of the customary context

B2: Legal Form of Protection

B3: General scope of subject matter

B4: Eligibility for protection

B5: Beneficiaries of protection

B6: Equitable compensation and recognition of knowledge holders

B7: Principle of Prior Informed Consent

B8: Exceptions and limitations

B9: Duration of protection

B10: Application in time

B11: Formalities

B12: Consistency with the general legal framework

B13: Administration and enforcement of protection

B14: International and Regional Protection

Organisation of African Unity Model Law (2000)[84]

The Organisation of African Unity passed the African Model Law for the Protection of the Rights of Local Communities, Farmers and Breeders, and for the Regulation of Access to Biological Resources.

The Model Law:

- Aims to prevent loss of traditional medicinal plants (the basis of health care), seed and natural fibres and colours (basis of arts and crafts of local communities).

84 The following is extracted from http://www.law.unimelb.edu.au/ipria/research/trad_know.html#Andean

- Ensures that local communities, farmers and plant breeders can contribute to and benefit from the sustainable development of the region.
- Provides the basis to enable Member States to enact national law in accordance with their national interest, economic development objective and political orientation.
- Prioritizes the need for regulating access to biological resources, community knowledge and technologies and the implications of intellectual property rights as entrenched in the TRIPS agreement.

The Model Law does not affect traditional systems of access, use or exchange of biodiversity. Access to knowledge and technologies by and between local communities is also safeguarded. Prior informed consent is a cornerstone of access; the consent of the State and local communities is required for access to biological resources.

Benefit-sharing arising out of the use of biological resources, community knowledge, technologies, innovations or practices is recognised as a right of local communities.

State must guarantee that a specific percentage (minimum 50%) of any financial benefits returns to the local community. Non-financial benefits may include:

- Participation in research and development in order to develop capacity
- Repatriation of information on the biological resources accessed
- Access to the technologies used to study and develop the biological resource.

This Model law needs to be applied at a national level. The preamble establishes that it is the duty of the State and its people to regulate access to biological resources, and to community knowledge and technologies. The preamble also acknowledges the need to implement the provisions of the CBD concerning Traditional Knowledge.

Proposed Pacific Model Law

The proposed *Traditional Biological Knowledge, Innovations and Practices Act* provides a model for a legislative regime to protect the rights of owners of traditional biological knowledge, innovations, and practices. The Act proposes establishment of a National Competent Authority to maintain a database of knowledge, innovations and practices. Ownership over knowledge, innovation and practice will be recognised based on a group's 'history and traditions and customs and usage' of the knowledge, innovation or practice. Access to knowledge, innovations and practices will be regulated by the National Competent Authority. In the event of a dispute, a Traditional ownership tribunal may be convened to resolve the dispute.

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PART C: ENGAGEMENT BEGINS WITH ENGAGEMENT: STRATEGIES FOR ENGAGING ABORIGINAL PEOPLE AND RAISING AWARENESS OF ABORIGINAL TRADITIONAL KNOWLEDGE

1. Introduction

Aboriginal Australian peoples – the only truly long-term residents of desert country in Australia – are significant for the Desert Knowledge Cooperative Research Centre (DKCRC). They have lived successfully in desert country over a long historical period and today's desert Aboriginal people have inherited deeply complex knowledge systems. These embody knowledge practices which include appropriate ways of living in arid country, which we refer to as Aboriginal Knowledge or Aboriginal Traditional Knowledge. They are not simply about content or tradition; the practices are active, continuing, negotiated and contextualised in the lives of people and their countries.

Aboriginal Traditional Knowledge may briefly be described as:

- Intellectual systems and cultural foundations that are highly contextualised or localised and which are about the place of the individual and the family in the here and now; which needs to be properly engaged by outside interests and properly interpreted
- A complex set of interrelationships between groups of Indigenous peoples and their respective countries, which is therefore inseparable from discrete groups of people as a 'body of knowledge' on its own
- A generational legacy that is both spiritual and secular and that transcends individual ownership
- Ways of doing things and ways of being
- Accountable, political and protected by managers or control systems that are integral to the way family and larger groups function.[85]

Aboriginal Traditional Knowledge is clearly in no way inferior or secondary to the Western traditions and both are culturally and historically contingent traditions. One is not the standard against which the other can or should be measured. Using and acknowledging this knowledge, however, involves more than recognising Intellectual Property in the Western sense because different concepts of 'ownership' apply.

Some aspects of this knowledge have been well documented by anthropological and linguistic researchers. It has yet, however, to engage at the same level with the physical sciences – environmental science, climatology, geology, mineralogy, botany, physiology, nutritional science, hydrology – or disciplines as disparate as economics or psychology.

It is likely that research in these and other fields in the Western scientific tradition would benefit from meeting and engaging with Aboriginal Knowledge. More specifically, the DKCRC research programs are likely to be more relevant to more people in desert regions in Australia – and more embedded in the context which is the focus of research – if engaging Aboriginal people and their

85 85 See Part A above

knowledge is a priority. In the broadest sense, however, that involvement could be a model of the ways people from different cultures in deserts interact, exchange resources and information and collaborate in a shared vision.

The project is therefore not just about creating 'awareness' of the role of Aboriginal Knowledge in research, policy and programs concerning desert peoples. For DKCRC, this also means considering where Aboriginal Knowledge fits within the systems and processes of its own governance and operations. This is likely to be a complex process as it involves:

- Developing understandings in non-Indigenous scientific, administrative and other communities of precisely what Aboriginal Knowledge is, how it works and how it might be applied
- Developing understandings among Aboriginal communities of the potential value of their knowledge both within and outside their own country
- Supporting the Aboriginal owners of the knowledge to prevent its inappropriate use or exploitation
- Supporting and promoting information exchanges between Aboriginal desert peoples
- Developing appropriate support structures for community-based research
- Facilitating an exchange of views across cultural divides.

The Alice Springs workshops have raised a number of issues about Aboriginal Knowledge and its use and the subsequent Position Paper has explored it further. The critical issues from the workshop go beyond simple awareness of Aboriginal Knowledge because the participants, many of them Aboriginal people, shared an understanding that the knowledge is not separate from the people or the routine practices of their day-to-day lives. Awareness of Aboriginal Knowledge starts with awareness of and engagement with Aboriginal people.

For Aboriginal people to take part equitably in research there are wider questions than simply the question of raising awareness of and then protecting Aboriginal Knowledge. These questions devolve from a widespread acceptance throughout Aboriginal Australia of complex politics of knowledge in which identity derives from rights to land, history and modes of representation (art, performance, music, language, etc) and the value that Aboriginal peoples place on building relationships as an essential feature of exchanging knowledge and generally doing business.

They also arise from a continuing history of poor relationships with researchers and research organisations.[86] There are Aboriginal towns today, for instance, that are overburdened with multiple research projects. And many researchers are still in too much of a hurry to get a project up and running to consider the real needs of Aboriginal participants.

It is likely that, in the past, desert Aboriginal peoples have unwittingly exchanged elements of their Knowledge without deriving any benefits to family and community. It is unlikely that they will willingly share knowledge today unless they are in a trusting relationship with the people who might want to use that knowledge.

86 See 'A History to Overcome' below

Rather than simply considering ‘awareness’, the workshop discussions have focussed on the need for ‘engagement’ at a more fundamental level in:

- Building relationships and creating partnerships
- Planning to do things the right way
- Dialogue – sharing knowledge and information
- Respect – for authority and customary law
- Acknowledgment – appropriately valuing Aboriginal Knowledge.

Significantly, this engagement process needs to be a sustained effort and one that survives beyond the life of the DKCRC. It should be handed on to the successors of the DKCRC as a set of model, but negotiable, procedures. This would be an important legacy for the DKCRC to leave behind. It is sadly more often the case that good practices depart with the winding up of a project or an organisation and Aboriginal people face the task of convincing another set of people of the need to operate in certain ways in Aboriginal country.

Aboriginal participants have underlined the importance of serious and sustained engagement and particularly raised the need for:

- Agencies to take the time to do things the right way
- Aboriginal people designing and implementing explicit arrangements for DKCRC to engage their Knowledge and to engage Aboriginal peoples
- Systems for managing research to minimise intrusion on Aboriginal peoples
- Mechanisms to develop truly informed consent
- The need for succession planning, which would leave subsequent research organisations with model systems.

2. A history to overcome

Any discussion of the relationship between Aboriginal peoples and research organisations must confront the widespread distrust of research among Indigenous peoples. This distrust has been well-documented internationally and in Australia.[87]

This poor relationship is not confined to any one field of research, although the social sciences and health spring to mind as particularly significant examples. No discipline is exempt, however and all have come under scrutiny from leading Indigenous thinkers and people in communities alike.

The problem often begins with the failure of researchers to recognise Aboriginal Knowledge and its practice. There was a tendency throughout much of the latter part of the 19th and much of the 20th centuries to see Aboriginal people as objects of study and, spurred by the belief that Aboriginal people were dying out, researchers recorded in great detail highly personal information about them often simply for the sake of recording it. Much medical research in the earliest days dealt with the weighty questions of whether Aboriginal people were physiologically distinct from other human beings.[88]

87 Dunbar et al, Indigenous Research Reform Agenda Monographs 1-4, CRCATH, Darwin 2002

88 See Thomas, DP, ‘Reading Doctors’ Writing’, Aboriginal Studies Press, Canberra 2003

Field researchers are no better prepared today on the whole. Research agencies rarely have adequate training in working with Aboriginal people. Without any insights into the vagaries of cross-cultural communication, or without an appreciation of the need to respect local ways of doing things, many researchers try vainly to make the environment fit what they know. It is an understatement to say that this creates difficulties: failure to adapt to Aboriginal ways of doing and failure to recognise Aboriginal knowledge for what it is can spell disaster for the well-meaning researcher. The question of hierarchies of knowledge arises, with some researchers consistently positioning non-Indigenous people as 'leaders' and Indigenous people as 'assistants'. Some non-Indigenous researchers appear to believe that that they do a much 'better' job than Indigenous researchers.

In more recent times both researchers and representatives of Government departments have approached more recognisable (to them) forms of authority – elected local government bodies particularly – for approval of proposals and policies without recognising the limitations of elected bodies. Generally they are likely to have no real authority over country and their operations may not be based on Aboriginal Knowledge. In doing so, they have ignored the more relevant Aboriginal lines of authority and failed to recognise the highly artificial and culturally inappropriate nature of 'communities'. Less scrupulous people have simply sought the approval of selected individuals. The net result in both instances is the same: the interests of the people who hold Aboriginal Knowledge is likely to have been undermined.

Aboriginal people have consistently pointed out that non-Aboriginal peoples set research agendas and research questions in isolation from Aboriginal peoples and apparently without recognising their rights to determine agendas and ask research questions of their own. In doing so they may misinform, or at best inadequately explain the purpose of the research. Information gathered may also be misused and outright theft of information and resources continues.

Rarely is there time and space for Aboriginal people to sit down and discuss, either locally among themselves or regionally with other Aboriginal people, what research is and what it means to have researchers on their country. With reference to the DKCRC particularly, there has been no time and space for desert Aboriginal peoples to develop and articulate their own broad research agenda. This omission has significant effects, and Aboriginal people are left feeling pressured into accepting it. The pressure intensifies where an Aboriginal town becomes a locus for several projects, all of which may compete for people's time and attention. This could be avoided by proper planning.

Further difficulties arise where researchers subscribe to representations of Aboriginal life and culture which privilege a pre-contact, prelapsarian Aboriginality, and which devalue contemporary Aboriginal cultures. Aboriginal people today live within their cultures, which are often not exactly those cultures described by explorers in the 19th Century or anthropologists in the 20th.

Poor research practices[89] are characterised by a failure to:

- Seek informed consent through appropriate mechanisms, including negotiation and using interpreters to help clarify meanings and broker cultural differences

89 See Thomsen, P, 'Using Your Senses to Make Sense', CRCATH and Menzies School of Health Research, Darwin 2004

- Design appropriate feedback mechanisms and inform communities and individuals involved of outcomes
- Acknowledge Indigenous peoples' contributions and positioning people as anonymous 'informants' instead of as 'collaborators' or 'co-researchers'
- Compensate individuals/groups for use of expertise, time and other resources.

Sometimes the rhetoric of engagement and collaboration fails to match the reality, and statements on 'commitment' fail close scrutiny. Rather than properly engage, some agencies rely on the good will generated by exceptional individuals working in the field or on the fact that they may have isolated projects that meet appropriate standards, but fail to incorporate their approaches in policy and procedure. What is required is a system-wide approach and a balanced research agenda and research program that accommodates and acts upon Aboriginal directions.

It is not the purpose of this paper to define how desert Aboriginal peoples view DKCRC. It is unlikely, however, that the DKCRC has avoided the consequences of this legacy, the involvement of Aboriginal organisations and people as DKCRC partners, associates and Board members notwithstanding. As part of an audit of its current engagement strategies, DKCRC should canvass the views of Aboriginal people to find answers to this question and demonstrably address those views in ways that are meaningful and which will build sustainable and productive relationships.

3. Where does DKCRC stand?

The DKCRC defines its purpose as:

> *'... to develop informal and formal knowledge, Indigenous knowledge and Western research to increase social, economic and cultural capital in desert communities'.*

The DKCRC Overview (downloaded from www.desertknowledgecrc.com.au) identifies Aboriginal organisations as partners or associate partners in the enterprise and Aboriginal people as Board members. Apart from references to 'local knowledge' and 'Indigenous knowledge', it is less than specific about the role Aboriginal Knowledge might play and the value the organisation places on it. Similarly, it is less than specific about the roles Aboriginal peoples may play, beyond broad statements about the involvement of 'desert Australians, Indigenous and non-Indigenous'. And it is a moot point whether the activities of Aboriginal people are included in the phrase 'desert livelihoods'.

There are isolated DKCRC projects which are actively engaging Aboriginal people and their views. The Protocols project, the Plants for People projects, the Cultural Knowledge of Water project, the Capacity Building for Effective Collaboration in Research project and this scoping project are using well thoughout processes of engagement and considering Aboriginal views as integral to their research. As pointed out earlier, however, this falls short of a comprehensive approach which would see Aboriginal people and their knowledge intersecting with every aspect of DKCRC's systems, processes and projects.

The DKCRC needs to audit its own processes and systems to see how its broad commitment to engagement is – or is not – put into practice. Among other questions that need to be asked, the DKCRC must continue to ask:

- What it feels are its responsibilities to the owners of Aboriginal Knowledge
- Whether the reality matches the intention to engage
- Whether the processes it has initiated meet the need.

If they do not meet the need, the next question is over the extent to which DKCRC is prepared to go to meet it. It might also ask what the role of Aboriginal people is in setting the overall agenda.

This is emphatically not a criticism of DKCRC. It is a 'reality check' that any organisation hoping to work with Aboriginal peoples and their knowledge needs to give themselves in a systematic and continuing way in order to avoid complacency and truly meet the needs of a large part of its constituency.

4. How to engage?

This paper has already canvassed the elements of successful engagement as being:

- Building relationships and creating partnerships
- Planning to do things the right way
- Dialogue - sharing knowledge and information
- Respect – for authority and customary law
- Acknowledgment – appropriately valuing Aboriginal Knowledge

Successfully addressing these elements requires systematic mechanisms and processes that are organisation-wide, rather than solely project-related. Few research agencies have managed to cover all of these, but an appropriately high standard of practice in engagement would include:

- Demonstrably valuing Aboriginal Knowledge in a formal charter and putting the charter into action
- Creating and fostering dialogue both between different groups of Aboriginal people and between Aboriginal peoples and researchers to develop and promote an Aboriginal research agenda
- Allowing both adequate time and human and financial resources to develop mechanisms and processes for engaging Aboriginal Knowledge and Aboriginal peoples
- Recognising relationship-building as a key element in fostering awareness of Aboriginal Knowledge and giving it a high priority
- Training and supporting non-Indigenous workers in working with Aboriginal people,[90] communicating across cultures and preparing them to appreciate and act on local ways of doing business
- Facilitating full and equal involvement of Indigenous people in determining the broad research agenda, in proposing research projects and in considering proposals specifically involving Aboriginal Knowledge or directly impinging on Indigenous peoples and their communities

90 This is happening in DKCRC's project Capacity Building for Effective Collaboration in Research

- Supporting full and equal involvement of Indigenous people in research and other activity – on-ground jobs and not merely ‘advisory’ or ‘reference’ roles, recognition of prior learning and current expertise[91], skills development, acknowledgment of joint project leadership/ authorship
- Developing internal support mechanisms, such as an Aboriginal or Indigenous Forum and a mentor system
- Rethinking research methodology, practice, and accountability in line with local Aboriginal perspectives and aspirations[92]
- Placing Aboriginal people in key leadership positions within the organisation, with full responsibility for budgets, policy and procedures
- Recognising the right to fully informed consent and explicitly a right to informed refusal
- Devising defined benefit-sharing arrangements and appropriate levels of recompense from commercial development of Aboriginal Knowledge
- Recognising and supporting the role played by exercising ownership of Aboriginal Knowledge and control over its use in community development and capacity-building
- Making sound arrangements for the parties to monitor and evaluate processes and systems, including regular audit and reporting against indicators.[93]

Agencies that have attempted to apply some of these elements include:[94]

- National Health and Medical Research Council – a high-level all-Indigenous health forum; an Aboriginal-initiated project developing a community guide to working with research
- Cooperative Research Centre for Aboriginal Health (formerly Aboriginal and Tropical Health) – an Aboriginal majority Board; Aboriginal involvement through Board and partners in determining the research agenda; capacity building strategies; funding for Indigenous community-initiated projects; Aboriginal models of communication; Indigenous research reform
- Tropical Savannas CRC – Aboriginal community-based regional and local projects; an Aboriginal land and sea managers’ forum as an agenda-setting mechanism as well as support and information exchange; Indigenous research fellow, project leaders and project steering groups
- Rainforest CRC – collaborative development of Aboriginal cultural and natural resource management plan; promotes Aboriginal natural resource management.

DKCRC might examine more closely the performance of these other organisations as well as itself and, with the issues listed earlier in mind, might well ask:

- Whether the rhetoric of engagement matches the reality as far as it is able to judge
- Whether DKCRC’s current approach matches or surpasses these approaches
- What DKCRC needs to do to remedy any discrepancies.

91 This is a significant feature of DKCRC’s Cultural Knowledge of Water project with Anmatyerr people

92 See both the Capacity Building and Cultural Knowledge of Water projects

93 This list is based on comment in Dunbar et al; from Franks C et al, ‘Yarning about research with Indigenous peoples: A workshop report’, CRCATH, Darwin 2002

94 See Appendix C for more detail

5. How best to communicate awareness of Aboriginal Knowledge? And to whom?

Communicating awareness is not an event, but a series of processes, the most important of which is relationship building. This should be the foundation of DKCRC communications activity.

DKCRC needs to communicate awareness of Aboriginal Knowledge:

- Internally – to partners and associate partners, staff, research teams, consultants and others associated with DKCRC
- Aboriginal communities and organisations in the region
- Externally – to the broader community in the desert region.

The internal awareness campaign engages the scientific, administrative and managerial/governance components of the DKCRC and should:

- As far as possible characterise Aboriginal Knowledge and outline the laws and practices which support it (at local, regional, national and international levels)
- Create awareness of issues that may support or impede its production and use
- Consider how the rights of knowledge owners might be supported and whether standard, or *sui generis* approaches – or both – would apply
- Contribute to DKCRC policy and procedures (the proposal for an engagement strategy is already doing this) by promoting an examination of research practice.

The Aboriginal community awareness campaign engages people and organisations in the region and should:

- Discuss Aboriginal Knowledge and its potential importance to DKCRC
- Outline implications of its use for Aboriginal people
- Outline how the rights of knowledge owners would be strengthened and given sustained support
- Foster and create a community information-sharing forum or forums to develop an Aboriginal research agenda and to inform DKCRC policy and procedures

Broader community awareness is an essential element of the awareness campaign. If DKCRC is to use Aboriginal Traditional Knowledge, then widely promoting its value is an essential corporate responsibility. It is part of the process of reconciliation between the Aboriginal and non-Indigenous peoples of Australia's desert regions.

The content of the Aboriginal Knowledge awareness campaign needs to be negotiated with Aboriginal people, but its key elements could include:

- Organisational statement on the value of Aboriginal Knowledge at Board level (attached)
- Policies and then procedures for dealing with Aboriginal Knowledge, with publication of papers from this project as policy foundation
- Allocations of time, funding and human resources appropriate to a sustained effort, including provision for interpreters and translators as and when appropriate
- Comprehensive, well-written and well-designed in-house reference material, some of which may involve collaboration with Institute for Aboriginal Development for work in languages, including:

- A plain language users' guide to Aboriginal Knowledge – what it is, what it involves and what measures exist or may be proposed for supporting the rights of Knowledge holders
- Issues papers and workshop guides
- Posters and other visual aids[95]
- Appropriate photographs, design elements and content for DKCRC web site
- Short videos/DVDs on Aboriginal Knowledge (some may already have been done) in the major languages of the region for use in workshops, meetings and for advertising on BRACS and other local media
- Regional workshops for knowledge owners to share experiences
- Workshops in partner organisations
- Sustained training for all staff in engagement, cross-cultural communication and working to local imperatives and ways of doing things
- A major workshop in Alice Springs for all parties
- Mainstream media exposure with skilled and trained spokespeople, including science communicators, Aboriginal Board members and other Aboriginal people
- Evaluation, and, where appropriate, modification of policy and procedures.

6. Select Bibliography

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95 See Appendix D: Poster Proposal

Appendix A

Free, Prior and Informed Consent

At the international level, there are some examples of FPIC:

International Labor Organisation (ILO) Convention on Indigenous and Tribal Peoples in Independent Countries 169/1989

This Convention refers to the principles of FPIC in the context of relocation of indigenous peoples. In Articles 6, 7 and 15, the Convention aims at ensuring every effort is made by the States to fully consult indigenous peoples in the context of development, land and resources.[96]

Convention on Biological Diversity (CDB)

Articles 8(j) calls upon contracting states 'to respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities … And promote their wider application with the approval and involvement of the holders of such knowledge, innovations and practices'.

UN Draft Declaration on the Rights of Indigenous Peoples

This emerging instrument on the rights of Indigenous people that explicitly recognises the principle of FPIC in Articles 1, 12, 20, 27 and 30. These Articles refer to Indigenous peoples' right to determine and develop priorities and strategies for the development or use of their lands, territories and other resources. FPIC is included in issues such as forced relocation (10), cultural and intellectual property (12), legislative and administrative measure taken by States that affect Indigenous peoples (20), Indigenous peoples' lands, territories and resources (27) and development planning (30).

Draft declaration on the Rights of Indigenous Peoples of the Organisation of American States

Articles XVII and XXIII say that States must obtain FPIC prior to any project affecting indigenous peoples' lands, territories and resources, particularly in connection with the development, utilisation or exploration of mineral, water or other resources.

Convention on the Elimination of Racial Discrimination

In 1997, the UN Committee on CERD made general recommendations on State obligations and Indigenous rights under the convention and called upon States to 'ensure that members of indigenous peoples have rights in respect of effective participation in public life and that no decisions directly relating to their rights and interests are taken without their informed consent (GR XXIII 51 concerning indigenous peoples adopted at Committee's 1235th Meeting). In 2000, in its concluding observation on Australia's report, CERD reiterated 'its recommendation that the State party ensure effective participation by indigenous communities in decisions affecting their land rights, as required under article 5C of the Convention and the General Recommendations XXIII Of the Committee which stresses the importance of ensuring the 'informed consent' of indigenous peoples'.

96 Ibid p4

United Nations Forum on Forests (UNFF)

Have reaffirmed the principles of respect for indigenous peoples' rights to their land and territories and FPIC expressed through their own representative institutions, including the right to say no.

Rio Declaration

Article 22 explicitly notes that 'indigenous peoples and their communities have a vital role in environmental management and development because of their knowledge and traditional practices. States should recognise and duly support their identity, culture and interests and enable their effective participation in the achievement of sustainable development'.

Philippines: The Indigenous Peoples Rights Act (1997)

This Act recognises the right of FPIC of indigenous people affecting their lands and territories including exploration, development and use of natural resources, research-bioprospecting, displacement and relocation, archaeological explorations, community based forest management and entry of military.

Australia

Examples of FPIC include the Draft regulations under the Environment Protection and Biodiversity Conservation Act 1999 (Cth), which provide that if a party wants to access Indigenous-owned lands in Commonwealth areas for bioprospecting purposes, access will only be given where the Indigenous owners have given informed consent to a benefit-sharing agreement.

At the state and territory level, examples of FPIC include the Draft Policy for Access to Biological Resources for Bioprospecting in the Northern Territory, which provides that 'any use of Traditional Knowledge [not in the public domain] is undertaken with the cooperation and approval of the holders of that knowledge, to include the prior informed consent of the custodians of that knowledge, and on mutually agreed terms.'

The Commonwealth Code of Ethical Practice for Biotechnology in Queensland requires the free prior informed consent of the land owner prior to dealing with samples.[97] The Code ensures compliance with the Native Title Act 1993 (Cth) and states:

> *… where in the course of biodiscovery and research we obtain and use Traditional Knowledge from indigenous persons or communities, we will negotiate reasonable benefit-sharing agreements with these persons or communities.*[98]

The provisions of the Biodiscovery Act 2004 (Qld) apply to State owned land, and not apply privately owned freehold title or title equivalent to ownership which was acquired under the Native Title Act 1993 (Cth) or privately owned freehold title. This Act requires a Biodiscovery Plan be submitted and approved by the State government authority. The Biodiscovery Plan requires the disclosure of some information relating to Indigenous people, but does not require free prior informed consent prior to access.

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97 Department of Innovation and Information Economy, Queensland Government, Code of Ethical practice for Biotechnology in Queensland, Brisbane, 2001, page 9.

98 Ibid

Appendix B

Draft Declaration on the Rights of Indigenous Peoples

Article 1

Indigenous peoples have the right to the full and effective enjoyment of all of the human rights and fundamental freedoms, which are recognized in the *Charter of the United Nations* and in the human rights law.

Article 2

Indigenous individuals and peoples are free and equal to all other individuals and peoples in dignity and rights, and have the right to be free from any kind of adverse discrimination, in particular that based on their indigenous origin or identity.

Article 3

Indigenous people have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

Article12

Indigenous peoples have the right to practice and revitalize their cultural traditions and customs. This includes the right to maintain, protect and develop the past, present and future manifestations of their cultures, such as archaeological and historical sites, artefacts, designs, ceremonies, technologies and visual and performing arts and literature, as well as the right to restitution of cultural, intellectual, religious and spiritual property taken without their free and informed consent or in violation of their laws, traditions and customs.

Article13

Indigenous peoples have the right to manifest, practice, 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 use and control of ceremonial objects; and the right to repatriation of human remains.

States shall take effective measures, in conjunction with the indigenous peoples concerned, to ensure that indigenous sacred places, including burial sites, be preserved, respected and protected.

Article14

Indigenous peoples have the right to revitalize, 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.

States shall take effective measures, especially whenever any right of indigenous peoples may be affected, to ensure this right and to ensure that they can understand and be understood in political, legal and administrative proceedings where necessary through the provision of interpretation or by other appropriate means.

Article 29

Indigenous peoples are entitled to the recognition of the full ownership, control and protection of their cultural and intellectual property.

They have the right to special measures to control, develop and protect their sciences, technologies and cultural manifestations, including human and other genetic resources, seeds, medicines, knowledge of properties of fauna and flora, oral traditions, literatures, designs and visual and performing arts.

Article 30

Indigenous peoples have the right to determine and develop priorities and strategies for the development or use of their lands, territories and other resources, including the right to require that States obtain their free and informed consent prior to the approval of any project affecting their lands, territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources. Pursuant to agreements with the indigenous peoples concerned, just and fair compensation shall be provided for any such activities and measures taken to mitigate adverse environmental, economic, social, cultural or spiritual impact.

Appendix C

Research agencies and their engagement with Indigenous peoples

National Health and Medical Research Council

NHMRC supports Indigenous people through its Aboriginal and Torres Strait Islander Health Forum which is chaired by Aboriginal doctor and researcher Professor Ian Anderson and whose members are Indigenous members of the NHMRC's committees, including the Australian Health Ethics Committee. The role of the Forum is clearly defined as:

- Monitoring implementation of NHMRC strategies and reporting through the Council's performance measurement framework
- Identifying and prioritising emerging issues for Council consideration
- Improving coordination, integration and alignment of research, ethics and advice
- Supporting effective internal and external relationships
- Promoting NHMRC achievements in Indigenous health

One NHMRC project initiated by an Indigenous researcher and monitored by a largely Indigenous steering committee specifically recognises both the history of poor relationships with research, and the need to empower Indigenous peoples and communities to make informed choices about participation in, or rejection of, research proposals. *Keeping track of research* is a community guide to research ethics and the issues arising from approaches by research institutions and individual researchers. Its content came from a workshop involving people from community-based health organisations, who identified the steps in the research process and the information needs of communities at each stage of developing research projects. The guide has been trialled in workshops and interviews with people in Indigenous community-based health organisations and Indigenous researchers. After more than 12 months in development, including extensive periods of community contribution and comment and consequently amendments to both content and design, it is soon to be printed.

Bearing in mind that the Forum is a group of Indigenous people involved in research at a high level, it makes sustained and effective effort to:

- Maintain contact with grass-roots people and organisations
- Seek community perspectives on research agendas and ethical positions
- Seek endorsement for its activities from Indigenous people and organisations repeatedly and consistently.

CRC for Aboriginal Health (and its predecessor the CRC for Aboriginal and Tropical Health)

Relevant features of the CRCAH approach, inherited from its predecessor CRCATH, and outlined at www.CRCah.org.au, include:

- An Aboriginal majority Board with an independent Aboriginal Chair and two other independent Aboriginal members
- Aboriginal involvement in determining the health research agenda

- An Indigenous capacity-building strategy as the centre of its education and Training function covering the spectrum from VET traineeships through undergraduate cadetships to post-graduate study awards and involving organisational support and mentoring
- Funding for Indigenous researchers and projects initiated by communities
- A requirement on research project designers to identify the role and status of Indigenous team members, including what professional development they may be involved in over the course of the project

The involvement of Indigenous people, a key element in the success of the original funding bid and the re-funding for second term, was highlighted in the CRCATH's Fifth Year Review. While it seeks to engage Aboriginal peoples, the CRCAH does not yet appear to incorporate Aboriginal Knowledge in much of its health research, except where it has acknowledged the health benefits of 'traditional' diet as opposed to post-contact diet.

One notable exception is the Exploring the Connections project, which was a funded Aboriginal-controlled research project into the connections between maternal education and infant health. The Indigenous researchers came up consistently with a repudiation of the assumed position that it is formal education (literacy, numeracy, schooling attainment), which is the relevant factor here, rather than traditional education (i.e. knowledge of kin, country, connections, and history).

Another project – initiated by the Health Department – investigated child growth in a remote Aboriginal community with the aid of a community-based research team. The Yolngu workers actually changed the nature of the research question from how children grow physically to a more holistic inquiry into the conditions required at community level for cultural, physical and emotional development. The project in fact led to the development of a Family Centre for the community, starting with a play school group and parental support program.

CRCATH instigated a process of reflection (the Links project), led by an Aboriginal researcher, into what became known as the Indigenous Research Reform Agenda. Involving a substantial literature search and continuing discussions – much like this scoping project, but on a longer time scale – the project team produced a series of monographs and a final report outlining the parameters of the problem and proposing means by which CRCATH could position itself for reform. Central to the process was the idea of replacing the researcher-led agenda with agendas defined by Indigenous people, operating under Indigenous direction and approaching research from an Indigenous perspective.

The process arose after an internal workshop (the Yarning workshop) had scoped the ground and suggested approaches to talking about research. Subsequently an Aboriginal man who had been involved in health research for a decade and who was at the time Chair of the Aboriginal Ethics Committee was also encouraged to write his views of research and Aboriginal people. The resulting publication was widely distributed.

CRCATH also sponsored research into cross-cultural communication through the Sharing the True Stories project. That study has emphasised:

- The need to engage Indigenous perspectives on wellness and ill-health and to incorporate 'whole stories' from Indigenous and non-Indigenous people in interactions
- The need for shared learning processes or exchanges of knowledge that occur on a truly equal basis.

In other words, health professionals need to spend more time explaining Western views of how the body functions in order to explain to Indigenous people their interpretation of the effects of particular medical conditions. At the same time, they should listen carefully to Indigenous explanations of these phenomena and accept Indigenous people discussing their conditions in a context that includes the impact illness has on social and cultural obligations. This is an example of research which succeeded because Aboriginal co-researchers insisted upon an Indigenous model of communication (understood as the collaborative building of shared understandings) rather than the western model of communication (as a transfer of knowledge from a knowing professional to an unknowing client).

Among other research projects on communication between health professionals and Aboriginal clients is the 2001 study 'Forgetting Compliance', which concluded that the health professions need to spend more time thinking about how they delivered their services instead of looking for other reasons why Aboriginal people did not 'comply' and they should specifically engage Indigenous concerns to help improve health outcomes.

Tropical Savannas CRC

Tropical Savannas has a number of Indigenous land management projects across Northern Australia, among them:

- The Aboriginal Pastoralists project in the Kimberley, investigating approaches to land management and their implications for sustainable planning
- Building community capacity for weed and feral animal management in the central coastal area of Arnhem Land
- Improving communication between Cape York Aboriginal communities and non-Indigenous researchers
- Supporting traditional owners in North Kimberley to develop a management strategy for the region on their own terms
- Support for traditional owners in the Upper Daly region to deal with land management problems
- Weed management in catchments throughout the Northern Land Council region

The CRC is the host organisation for the North Australian Indigenous Land and Sea Management Alliance (NAILSMA), a forum also supported by land councils and community-based ranger groups. NAILSMA brings together remote area Aboriginal and Torres Strait Islander land and sea managers and promotes their involvement in land management decision-making and the use of Aboriginal Traditional Knowledge. It is also considering how on-ground land and sea managers can set research agendas based on their own needs and how they can engage with non-Indigenous researchers.

Tropical Savannahs CRC also has an Indigenous Research Fellow, Indigenous project leaders and Indigenous steering groups for the three major project areas in Indigenous research: Integrating research and Indigenous land management, Improving cross-cultural engagement and Indigenous ecological knowledge.

Rainforest CRC

Based in North Queensland, the rainforest CRC defines working with local and Indigenous communities as one of its key areas of expertise. It says: '[The CRC] has undertaken a major contribution to the local and regional protection of Aboriginal Intellectual property and Traditional Knowledge and builds bridges between western research methodologies and practices and Indigenous research methodologies. With this experience, the CRC has the people and the expertise to involve Indigenous people and communities.'

Rainforest CRC has also supported Aboriginal traditional owners from the region in developing Caring for Country and Culture: the Wet Tropics Aboriginal Cultural and Natural resources management plan, which is three years in the making and involves collaboration between Aboriginal landowners, regional research institutions and government agencies. The plan developed out of a workshop in Cairns in 2002. The workshop identified these particular factors as contributing to the low level of Aboriginal involvement in natural resource management:

- Inadequate consultation
- Poor Indigenous representation in the planning process
- Seriously defective regional structures.

A Rainforest CRC publication Yalanji-Warranga Kaban – Yalanji People of the Rainforest Fire Management Book evolved from a collaboration between Yalanji people and the CRC. It is published in English and Yalanji, the first ever publication in the language and explores traditional nature resource management.

CSIRO

CSIRO is in the final stages of developing a strategy for engaging Indigenous peoples in its activities. The organisation engaged a consultant late last year and has conducted final stage workshops to examine the proposed strategy. As a partner in DKCRC, the CSIRO may wish to share the detail of the strategy when it is finally accepted by its Board and distributed for wider consumption.

These examples will have some relevance to DKCRC, whether they are 'successful' or not. They present, among other things, solid evidence that research and other agencies – Australian and overseas alike - have begun to recognise the need to consider carefully the role of Indigenous peoples in their organisations and ways in which they might approach engagement with Indigenous peoples. They also encapsulate recognition that engagement is not an event, but a series of sustained processes. It has to be planned for, nurtured and maintained. It is a dynamic process, as the building of relationships usually is.

Appendix D

Poster Proposal

Visual aids are an element of any successful awareness campaign. Posters are particularly useful if they are well-designed and well thought out: they can capture in a single image a wealth of impressions, which will not date.

The important thing is to rely on the image to promote the message that Indigenous Knowledge is an intrinsic part – a foundation even – of DKCRC's approach to using Desert Knowledge to develop solutions for living in Australia's arid regions.

Words should be kept to a minimum. As a suggestion, the only words to appear on any of the posters could be 'Desert Knowledge' and the words accompanying the DKCRC and CRC program logos.

Clearly, where people appear in the posters, there is the possibility that their images may cause distress should they pass away. This needs to be factored into design and photo briefs.

Suggested images, all with the footer 'Desert Knowledge' are:

- People firing country
- Women and children digging for tucker
- Women and children gathering grasses, seeds and fruit
- Men hunting – perhaps an over-the-shoulder image of someone looking at kangaroo tracks
- Public ceremony
- A painting of country, which could be a painted or pecked image on a rock face, or a painting on canvas, or someone in the act of painting – perhaps an overhead shot
- A council meeting
- Older people telling stories to kids
- People at a waterhole
- Aboriginal stockmen working cattle

One poster could incorporate a number of images, like the highly successful series done by the Aboriginal and Torres Strait Islander Commission some years ago, which are still highly successful in promoting particular messages.

The print run should be big enough to cope with wide internal distribution, the use of the posters, or at least the images, on fixed display materials and possibly for sale as a DKCRC publication (to schools etc).