REGULATING RIGHTS:
The Case of Indigenous Traditional Knowledge

by Erin Mackay

INTRODUCTION
While Indigenous peoples seeking to protect their knowledge have recourse to rights or protection in existing Anglo-Australian laws, there is no overarching protection of the very wide range of tangible and intangible things that Indigenous peoples have variously described as traditional knowledge, cultural expressions, or Indigenous Cultural and Intellectual Property (‘ICIP’). This lack of protection was illustrated most recently by the current controversy over Wandjina Watchers in the Whispering Stone — a statue in Katoomba NSW that was commissioned by a non-Indigenous person and misuses the image of a wandjina, which is sacred to Kimberley-based Indigenous groups. This controversy also highlights a lack of understanding, and at times, lack of effective dialogue about culture. This article argues for the introduction of a sui generis instrument to protect Indigenous traditional knowledge, and considers some of the regulatory issues surrounding such an instrument.

WHAT IS TRADITIONAL KNOWLEDGE AND WHY DOES IT REQUIRE EXTRA PROTECTION?
Terri Janke and Robynne Quiggin have explained that ICIP or traditional knowledge rights may include those involving the management of lands, safeguarding sacred sites, enjoyment of full and proper attribution, and prevention derogatory and offensive uses. Also included are rights relating to the control of transmission of knowledge to Indigenous and non-Indigenous peoples, and the right to control and benefit from the commercial use of Indigenous traditional knowledge in accordance with traditional customary laws. This knowledge comprises content that may be protected by several different Anglo-Australian laws, but these aspects are not necessarily divisible, for example, because of the relationship between much tangible and intangible knowledge.

The Indigenous Art and the Law Project at the Indigenous Law Centre (ILC) has examined protection of Indigenous traditional knowledge under the Copyright Act 1968 (Cth). While cases such as Bulun Bulun v R & T Textiles Pty Ltd raised the profile of Indigenous culture and the need for its protection, the shortcomings of copyright law cannot be overcome. For example, copyright is not geared towards protecting interests that: belong to a group; are not expressed in material form; or that require protection in an unlimited temporal sense (for example, because such rights are intergenerational in nature). In short, copyright was not designed to protect culture, and is not structurally equipped to provide such protection. Moreover, although copyright is the law most frequently appealed to for protection in the context of Indigenous culture — particularly in the context of Indigenous art — many similar problems also exist with respect to other intellectual property laws such as patent and trademark, and native title and cultural heritage laws. The shortcomings of these laws are discussed in detail elsewhere.

If it is accepted that the dominant legal system does not provide adequate protection of traditional knowledge rights — in part because individual laws do not provide adequate protection, and in part because, taken together, existing laws provide protection that still is piecemeal in nature — the question then arises, is what is the best way to protect these rights? This question raises a range of regulatory issues central to the rights protection of Indigenous peoples. For example, what is the place of international laws and mechanisms for Indigenous rights? Can voluntary measures, such as protocols and codes, ever provide effective rights protection? Is it appropriate for the state to be involved in regulating Indigenous rights? And, should traditional knowledge be on the agenda for the expert panel to be established later in 2010 to consider constitutional recognition of Indigenous peoples in the Australian Constitution, assuming that the panel’s terms of reference will extend beyond preambular recognition to rights protection?

THE INTERNATIONAL SPHERE
There are a number of international agencies that have considered Indigenous rights — including the United Nations (‘UN’) Permanent Forum on Indigenous Issues, the World Intellectual Property Organisation Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore; and the Special Rapporteur on the Human Rights and Fundamental Freedoms of Indigenous Peoples. There also are several international rights instruments that promote the protection of the traditional knowledge rights of Indigenous peoples. These include the United Nations Declaration on Human Rights, the International Covenant on Civil and Political Rights,
and the International Covenant on Economic, Cultural and Social Rights. Perhaps most notable — both for its focus and the process whereby it was developed — is the Declaration on the Rights of Indigenous Peoples, endorsed by the UN General Assembly in September 2007 and by the Australian Government in April 2009. Article 31(1) of the Declaration deals with Indigenous peoples’ rights to the maintenance, control, protection and development of cultural heritage, traditional knowledge and traditional cultural expressions, including the manifestations of their sciences, technologies and cultures. Importantly, art 31(2) requires states to take effective measures to ensure the ongoing recognition and protection for the rights contained in art 31(1).

The Declaration draws on existing international law but is an aspirational document at international law. In Australia, international legal instruments gain effect when ratified (rather than endorsed) by the executive and enacted by the Australian Parliament. This has not taken place with respect to the Declaration. However, in the 2010 Vincent Lingiari lecture, Associate Professor Megan Davis encouraged the use of the Declaration in Australian courts and government negotiations. Davis stated that evidence of its use ‘is measured by courts, scholars, the UN and international lawyers in international law to determine how persuasive and how binding particular norms of the Declaration are’. For example, asking courts to consider the Declaration as a guide to statutory construction may enhance its precedential value. Thus, in the domestic sphere, the search for rights protection is bolstered by the Declaration together with other relevant international instruments.

DOMESTIC SELF-REGULATION

Self-regulatory mechanisms increasingly fill the regulatory space with respect to Indigenous traditional knowledge, particularly as it is expressed through art. Self-regulation in the visual arts arena was endorsed in 2007 by a Senate Standing Committee. Key self-regulatory mechanisms include the Australia Council protocols that encourage ethical conduct when dealing with Indigenous peoples. The National Indigenous Cultural Authority (‘NICA’), a body proposed by Terri Janke, potentially could play a role in developing standards for ‘appropriate use to guard cultural integrity’. The ability for such a body to play a role in enforcing such standards, however, is curtailed for the reasons discussed in this section. As the NICA is not in operation, this section pays particular attention to the most recent, national manifestation in this area—the Australian Indigenous Art Commercial Code of Conduct (‘the Code’), for which membership opened in mid-2010.

The Code is designed to promote fair and ethical trade with artists. It is voluntary, but regulates Indigenous art dealers—including agents, wholesalers, retailers, auction houses art galleries or art centres — that choose to be signatories. At the time of writing, there were 24 signatories to the Code, and four ‘supporter members’ who are bodies or individuals who do not deal with artists but agree with the principles contained the Code. In signing up, dealers make a number of commitments, including that they will deal with artists on a conscionable basis, use artwork agreements, and be respectful to Indigenous cultural practices. The Code includes a process for handling complaints against members, with ultimate sanctions all related to Code membership — expulsion, suspension, or the imposition of conditions on membership. The Code is to be reviewed in 2012 to ‘determine whether it is an effective tool in addressing unscrupulous and unethical behaviour in the Indigenous visual arts industry’.

The Australia Council protocols, and the section in the draft Code dealing with respect for Indigenous culture, are extremely valuable in their expression of Indigenous voices and interests. Such mechanisms also may raise awareness of the existence and importance of this law and knowledge, and can exert pressure on the behaviour of interested parties. For those with negotiating power, codes and protocols may form the basis of private rights contained in contracts between Indigenous peoples and those interested in paying for their work. Notwithstanding this, there are serious problems in relying on self-regulation for full and effective protection of rights in the context of Indigenous traditional knowledge rights.

One issue is that high-level protocols rarely provide sufficiently detailed guidance on the steps that need to be taken to achieve articulated outcomes, so it may be difficult for participants to determine how to comply, and even if they should be complying. The self-regulatory level of Professor John Braithwaite’s influential responsive regulation pyramid can be effective in certain industries — for example, because codes are developed in proximity to the industry, are flexible, and may promote the collective interests of an industry — and the outcome of the Code’s review will be instructive in terms of whether its operation does in fact further its objectives of reducing exploitation of Indigenous artists. However, the Code does not endeavour to protect Indigenous traditional knowledge rights as more broadly construed by Indigenous peoples. And this is a sticking point — there is no single traditional knowledge ‘industry’ to regulate. Individuals, organisations and agencies may misuse traditional knowledge, not always appreciating the effects of such misuse, and not always to further their own commercial aims. The furore over the Wandjina statute, which was erected by an ostensibly well-meaning individual, is but one example here.
Even in cases where there is an identifiable industry, self-regulation may not be the best option. Professor Arie Frieberg states that self-regulation works best in contexts where there are: no strong public interest concerns; the problem is of low impact or significance; and the problem can be fixed by the market. Arguably, rights protection for Indigenous traditional knowledge does not fit any of these categories.

Frieberg also finds that self-regulatory mechanisms are most likely to succeed where there are, amongst other things: adequate and achievable coverage of the relevant industry, a cohesive industry with motivated participants, and evidence that voluntary participation can work. First, there is no doubt that many participants in the Indigenous visual arts industry are committed to the principles of the Code. However, there are far more than 24 dealers in Indigenous art in Australia, and the recent media debate against the introduction of resale rights, at times directed specifically towards Indigenous and the recent media debate against the introduction of resale are far more than 24 dealers in Indigenous art in Australia, are committed to the principles of the Code. However, there are far more than 24 dealers in Indigenous art in Australia, and the recent media debate against the introduction of resale rights, at times directed specifically towards Indigenous art, may give rise to the concern that many dealers are not committed to furthering the rights of Indigenous artists. Also, while compliance with voluntary instruments may be a relevant factor with respect to securing funding — for example, from the Australia Council — voluntary measures are not effective in regulating parties that are not already complying with, or have an interest in complying with, the requirements contained in such instruments. Further, implicit in the (necessary) limitation of Code sanctions to membership is the presumption of an overriding consumer interest in the Code and its principles. It is not clear whether those purchasing Indigenous art treat the Code-membership of dealers as an overriding consideration. The existence of only four supporter members of the Code may be one indication that there is a fair way to go on this front. Given the complex nature of historical and contemporary relationships between Indigenous and non-Indigenous Australians, voluntary industry measures may not be capable of building sufficient public understanding on this issue.

LEGISLATION

The best way to protect traditional knowledge rights in a holistic sense, therefore, may be to enact domestic legislation. This has been called for by several commentators. For Indigenous rights, however, there are particular issues that need to be considered. Legislation must be crafted so that it does not treat all Indigenous peoples as one group — Indigenous peoples, and laws to do with traditional knowledge, are not the same across Australia. Another issue is the role of the state in regulating Indigenous rights, and in particular, the risk of ‘giving away’ culture through its codification. In the 1986 landmark report The Recognition of Aboriginal Customary Laws, the Australian Law Reform Commission remarked that:

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

This issue is not limited to domestic legislation, with Professor Mick Dodson and Olivia Barr suggesting that, in the international sphere, a body such as the International Court of Justice may usefully settle disputes yet may also ‘usurp the power of interpretation and therefore law-making power from Indigenous peoples’.

Notwithstanding this, legislation has teeth. It allows rights to be enforced. The best way to further the aim of enforceable traditional knowledge rights, therefore, may be to consider the introduction of federal sui generis legislation, but to draft that legislation in broad terms so that it contains relevant standards. This may be one way to ensure meaningful rights protection but also to promote agreements — based on relevant codes, protocols, customary laws and the Declaration—to protect the traditional knowledge of Indigenous peoples.

Of course, in accordance with the Westminster principle of parliamentary supremacy, legislation is not infallible. This has been demonstrated most recently by the (continued) suspension of the Racial Discrimination Act 1975 (Cth) by the Northern Territory National Emergency Response Act 2007 (Cth). The best outcome for Indigenous peoples may involve the anchoring of rights in the Australian Constitution, although given the herculean nature of constitutional change, this will require an iterative discussion. Given the proposed referendum on constitutional recognition of Indigenous peoples, the time may be right to commence such a conversation.

CONSULTATION

What should be the content of a preferred instrument? On this question, as well as the question on form, consultation with a wide range of Indigenous peoples is essential. Views may differ on the following issues, depending on which group relevant peoples belong to, and the location, age, gender, interests and other things relevant to those consulted. The existence of differing views is a healthy marker of a democratic society and underlines the importance of consultation rather than proving the argument that consultation in this area is ‘too difficult’.  

In this context, particular issues requiring consultation include: who should be able to exercise any rights protected
under a sui generis instrument; the duration of any rights protection; how rights should be enforced; how rights should be managed; what kind of registration system, if any, should be established; whether Indigenous groups, individuals or a managing body should receive the proceeds of benefit sharing; what happens when rights over traditional knowledge can be claimed by more than one group or individual; what protection should be afforded to derivative knowledge; and what exceptions and limitations should be included? Importantly, what body will administer such a legislative scheme — for example, what should be the involvement of the proposed NICIA, or bodies currently working in this area, such as the Artists in the Black Service of the Arts Law Centre of Australia?

These are only some initial issues. Many others may arise in a consultation process, and careful attention should be paid to matters as they arise, even if these do not appear to fit the template. Consultation requires careful design, attention to method, and negotiation of access. It must be imbued with a flexibility that allows for evolution of process and form. Consultation also requires clear articulation to stakeholders of what can be achieved and how information will be used, as well as feedback to those who were consulted. Moreover, it is necessary to consult with a wide range of both Indigenous and non-Indigenous stakeholders, as there may be conflict of interests between those who are affected by such laws. A comprehensive consultation process will be an enormous and costly task, and it should not be left to non-government bodies to conduct this consultation without appropriate support or financial assistance.

CONCLUSION

Whilst there are compelling arguments for the Australian Government to enact broadly drafted legislation to provide sui generis protection of Indigenous traditional knowledge rights, an appropriate process for determining the form and content of a sui generis rights instrument is integral to any recommendation for its introduction. Not only is such a consultation process essential to ensure satisfactory compromise on the issues outlined above, the very process of designing such an instrument may serve an educative purpose around traditional knowledge rights. And, importantly, if such a process is effectively designed and the right stakeholders engaged, it may enhance much-needed dialogue and understanding between Indigenous and non-Indigenous peoples on the question of culture.

Erin Mackay directs the Indigenous Art and the Law project at the Indigenous Law Centre. She also is a PhD scholar in the UNSW School of Law.

2 See, eg, Robyn Ayres, ‘The Wandjina Case Demonstrates the Lack of Protection for Indigenous Culture’ (Sept 2010), ART+Law. This issue also will be discussed in detail in a forthcoming article in this publication.
5 For many of the findings of this project, see Mackay above n 4.
6 (1998) 86 FCR 244.
7 Mackay above n 4, 2–10.
9 The existence of several rights bodies involved in the development of rights may result in the fragmentation of rights recognition and protection even at the international level—for example, how does the intellectual property focus of WIPO discussions mesh with the customary laws focus of the UN Permanent Forum on Indigenous Issues? This touches on a more fundamental conceptual issue—what is an appropriate conceptual framework of any alternative basis for rights protection?
11 Opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) (see especially art 27).
12 Opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976) (see especially art 15).
15 Davis above, n 13.
16 Megan Davis, 17th Vincent Lingiari Lecture (Presented at Charles Darwin University, Darwin, 19 August 2010).
17 Ibid.
22 Indigenous Australian Art Commercial Code of Conduct (2010), i.
25 Ibid, 7.2, 7.3.
26 Ibid, i.
30 Freiberg, above n 25, 29.
34 Australian Law Reform Commission, The Recognition of Aboriginal Customary Laws (ALRC 31), [202].
37 See, eg, George Williams and David Hume, People Power (2010), Ch 2.