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## **Protecting the Spiritual Beliefs of Indigenous Peoples: Australian Case Studies**

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## PROTECTING THE SPIRITUAL BELIEFS OF INDIGENOUS PEOPLES—AUSTRALIAN CASE STUDIES

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*Abstract:* This article examines the extent to which the spiritual beliefs of Aboriginal and Torres Strait Islander Peoples are protected under current Australian law. The first significant recognition by the High Court of Australia of the legal rights of indigenous peoples was in relation to native title over real property. As those peoples define their status and society by reference to their relationship with the land, this article considers the ultimately unsuccessful attempt to protect their spiritual beliefs as an incident of native title law. It reviews a line of intellectual property cases which have been a more fruitful source of protection, as well as the possibilities of the protection of the spiritual beliefs of indigenous peoples under racial vilification laws. With changes to the Australian Constitution to recognize the particular rights of Aboriginal and Torres Strait Islander Peoples currently under consideration, the article concludes with the speculation that specific Federal legislation could achieve the protection of their spiritual beliefs.

### I. INTRODUCTION: THE ABORIGINAL AND TORRES STRAIT ISLANDER PEOPLES OF AUSTRALIA

Carbon-dated human remains provide evidence of at least 60,000 years of the occupation of Australia by Aboriginal and Torres Strait Islander Peoples.<sup>1</sup> When the first white settlers arrived in 1788, an estimated 300,000 to more than one million Aboriginal and Torres Strait Islander Peoples inhabited the Australian continent.<sup>2</sup> Aboriginal society comprised hundreds of language groups of varying sizes.<sup>3</sup> Each language group shared a common language, territory and cultural attributes.<sup>4</sup> Until the formation of the Australian Federation in 1901, the current States and Territories of Australia were separate British Colonies, each pursuing their own policies concerning the recognition or repression of indigenous culture and traditional life.<sup>5</sup> Similar to other colonized countries<sup>6</sup> with indigenous

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<sup>1</sup> Amanda H. Lynch, et al., *Using the Paleorecord to Evaluate Climate and Fire Interactions in Australia*, 35 ANN. REV. OF EARTH & PLANETARY SCI. 215, 228 (2007).

<sup>2</sup> E. Bourke, *Australia's First Peoples: Identity and Population*, in ABORIGINAL STUDIES: AN INTRODUCTORY READER IN ABORIGINAL STUDIES 38 (C. Bourke, E. Bourke & W.H. Edwards eds., 2d ed. 1998).

<sup>3</sup> See R. M. W. DIXON ET AL., AUSTRALIAN LANGUAGES: THEIR NATURE AND DEVELOPMENT (2002).

<sup>4</sup> RICHARD BROOME, ABORIGINAL AUSTRALIANS: BLACK RESPONSES TO WHITE DOMINANCE 9 (2d ed. 1994).

<sup>5</sup> For a recent historiographical review of Aboriginal history, see Bain Attwood, *Aboriginal History, Minority Histories and Historical Wounds*, 14 POSTCOLONIAL STUD. 171 (2011).

communities, there were cyclical periods of tolerance, protection, or even qualified approval interspersed with periods of rejection when attempts were made to eradicate traditional ways and to “assimilate” Aboriginal and Torres Strait Islander Peoples, by seeking to absorb them and deny them any separate identity.<sup>7</sup> Probably the most notorious example of the latter was the policy of forcible removal of Aboriginal children from their parents to be brought up by fostering institutions as members of the white community. This policy commenced in colonial times until as recently as the 1970s.<sup>8</sup>

At the time when the instructions were being prepared by the British Colonial Office for Arthur Phillip, the first Governor of the first Australian Colony, the legal theory which underpinned those instructions was that of William Blackstone,<sup>9</sup> that the Australian continent was “terra nullius”<sup>10</sup> with the consequence that all applicable English laws were immediately in force in the colony. No account was taken of the laws or belief systems of Aboriginal and Torres Strait Islander Peoples, as they would have been if Australia had been regarded as a conquered colony in the Blackstonian sense.<sup>11</sup> In 1788, when the First Fleet of white settlers arrived in Australia, no overarching Aboriginal political system existed to link the many Aboriginal and Torres Strait Islander Peoples to resist colonization.<sup>12</sup> The historical record of Aboriginal Resistance to white settlement, and indeed whether Australia should have been regarded as a conquered or settled colony in the Blackstonian sense, is the subject of a vigorous contemporary debate.<sup>13</sup> However, as far as Australian jurisprudence is concerned, the High

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<sup>6</sup> See, e.g., TASK FORCE THREE: FEDERAL ADMINISTRATION AND STRUCTURE OF INDIAN AFFAIRS, FINAL REPORT TO THE AMERICAN INDIAN POLICY REVIEW COMMISSION, FINAL REPORT TO THE AMERICAN INDIAN POLICY REVIEW COMMITTEE 6-7 (1976).

<sup>7</sup> See the authorities referred to in Tim Rowse, *The Reforming State, the Concerned Public and Indigenous Political Actors*, 56 AUSTRALIAN J. OF POL. & HIST. 66 (2010).

<sup>8</sup> See BRINGING THEM HOME, REPORT OF THE NATIONAL INQUIRY INTO THE SEPARATION OF ABORIGINAL AND TORRES STRAIT ISLANDER CHILDREN FROM THEIR FAMILIES (Canberra, Commonwealth of Australia 1997).

<sup>9</sup> GEORGE CHASE, BLACKSTONE (37) COMMENTARIES, Bk. I, ch. 4, 106-108.

<sup>10</sup> Meaning “land belonging to no one.”

<sup>11</sup> See the discussion in Ulla Secher, *The Mabo Decision—Preserving the Distinction Between ‘Settled’ and ‘Conquered or Ceded’ Territories*, 24 UNIV. OF QUEENSLAND L.J. 35 (2005).

<sup>12</sup> See, e.g., IAN KEEN, ABORIGINAL ECONOMY AND SOCIETY: AUSTRALIA AT THE THRESHOLD OF COLONISATION (2004).

<sup>13</sup> The leading antagonist is Henry Reynolds. See, e.g., HENRY REYNOLDS, FRONTIER: ABORIGINES, SETTLERS AND LAND (1996); KEITH WINDSCHUTTLE, THE FABRICATION OF ABORIGINAL HISTORY: VOLUME ONE, VAN DIEMEN’S LAND, 1803-1847 (2003). Among the avalanche of historiography generated by this controversy are WHITEWASH: ON KEITH WINDSCHUTTLE’S FABRICATION OF ABORIGINAL HISTORY (Robert Manne ed., 2003); STUART MACINTYRE AND ANNA CLARK, THE HISTORY WARS (2004); JOHN DAWSON, WASHOUT: ON THE ACADEMIC RESPONSE TO THE FABRICATION OF ABORIGINAL HISTORY (2004); BAIN ATTWOOD, TELLING THE TRUTH ABOUT ABORIGINAL HISTORY (2005); GENOCIDE AND SETTLER SOCIETY: FRONTIER VIOLENCE AND STOLEN INDIGENOUS CHILDREN IN AUSTRALIAN HISTORY (A. Dirk

Court of Australia in its celebrated 1992 decision *Mabo v. Queensland* (No. 2)<sup>14</sup> held that:

[W]hatever the justification advanced in earlier days for refusing to recognize the rights and interests in land of the indigenous inhabitants of settled colonies, an unjust and discriminatory doctrine of that kind can no longer be accepted . . . It is imperative in today's world that the common law should neither be nor be seen to be frozen in an age of racial discrimination. The fiction by which the rights and interests of indigenous inhabitants in land were treated as non-existent was justified by a policy which has no place in the contemporary law of this country.<sup>15</sup>

This article examines whether this more enlightened attitude, formulated in the context of land law, extends to protecting the spiritual beliefs of Aboriginal and Torres Strait Islander Peoples. As will be seen below, the High Court of Australia took the position in *Western Australia v Ward*<sup>16</sup> that these spiritual beliefs are adequately protected by intellectual property (“IP”) law. This article will show that Australian IP law falls short in this regard, although some faith has been placed in the possibility of the reworking of the international IP environment through the promulgation by the World Intellectual Property Organization (“WIPO”) of international conventions dealing with the protection of traditional cultural expressions and traditional knowledge.

## II. ABORIGINAL SPIRITUALITY

The central tenet of traditional Aboriginal beliefs is the “Dreamtime,” described for the first time by anthropologists in the late nineteenth century to refer to their understanding of the Aboriginal explanation of the creation by of the world by Ancestral Beings who emerged at the dawn of creation from the earth and from spirit homes in the sky.<sup>17</sup> Some Ancestral Beings

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Moses ed., 2005); TONY TAYLOR, *DENIAL. HISTORY BETRAYED* (2008); JAMES BOYCE, *VAN DIEMEN'S LAND* (2008).

<sup>14</sup> (1992) 175 CLR 1 (Austl.).

<sup>15</sup> Frank Brennan S.J., *Mabo and Its Implications for Aborigines and Torres Strait Islanders*, in *MABO: A JUDICIAL REVOLUTION* (M.A. Stephenson & Suri Ratnapala eds., 1993).

<sup>16</sup> [2002] HCA 28 (Austl.).

<sup>17</sup> See Patrick Wolfe, *On Being Woken Up: The Dreamtime in Anthropology and in Australian Settler Culture*, 32 *COMP. STUD. IN SOC'Y & HIST.* 197 (1991). On the other hand, Drahos suggests that it would be preferable to refer to Aboriginal “cosmologies” in describing the connections between different parts or objects of the Aboriginal knowledge system, linking a place, a painting, an object, a word and a ceremony. Peter Drahos, *When Cosmology Meets Property: Indigenous People's Innovation and Intellectual Property*, 29 *PROMETHEUS* 233, 237 (2011).

assumed forms that combined features of humans with other species, such as kangaroos, crocodiles, tortoises or birds.<sup>18</sup> As they traveled over the earth, the Ancestral Beings created the sea and sky and the physical characteristics of the landscape, such as mountains, rivers and waterholes.<sup>19</sup> They also created the sacred rules of human social life and culture that were passed on to human beings.<sup>20</sup> The Ancestral Beings entrusted custodianship of certain areas of land to particular language groups on the condition that they observed these sacred rules. Different tribes or clans have different creator ancestors who are venerated in much the same way as are the sacred figures of, for example, the Christian religion.<sup>21</sup> Dreaming places, or sacred sites, are a constant reminder of the presence and power of the Ancestral Beings and represent the bond between the people and the land.<sup>22</sup> Finally, for Aboriginal Peoples the Dreamtime remains relevant to and connected with the present, and will endure forever.<sup>23</sup>

#### A. *The Wandjina*

The Wandjina<sup>24</sup> are the creator ancestors of a number of the Aboriginal Peoples<sup>25</sup> of the Kimberley region<sup>26</sup> of the northern part of Western Australia.<sup>27</sup> These peoples believe that the Wandjina were the cloud and rain spirits who created the landscape and the animals and peoples within it.<sup>28</sup> The Kimberley Aboriginal Peoples also believe that the

<sup>18</sup> See HOWARD MORPHY, *ANCESTRAL CONNECTIONS: ART AND AN ABORIGINAL SYSTEM OF KNOWLEDGE* 221 (1991).

<sup>19</sup> *Id.* at 220-22.

<sup>20</sup> See LYNNE HUME, *ANCESTRAL POWER: THE DREAMING CONSCIOUSNESS, AND ABORIGINAL AUSTRALIANS* (2002).

<sup>21</sup> See Jeremy Beckett, *Aboriginal Histories, Aboriginal Myths: An Introduction*, 65 OCEANIA 97 (1994); Alan Rumsey, *The Dreaming, Human Agency and Inscriptive Practice*, 65 OCEANIA 116 (1994).

<sup>22</sup> See, e.g., IAN KEEN, *KNOWLEDGE AND SECRECY IN AN ABORIGINAL RELIGION* 211 (1994).

<sup>23</sup> See JENNIFER ISAACS, *AUSTRALIAN DREAMING: 40,000 YEARS OF ABORIGINAL HISTORY* (1980); Deborah Bird Rose, *Consciousness and Responsibility in an Australian Aboriginal Religion*, in WILLIAM H. MORPHY, *TRADITIONAL ABORIGINAL SOCIETY: A READER* 257-69 (Macmillan ed. Melbourne, 1987); Morphy, *supra* note 18; KEEN, *supra* note 22; FRANCOISE DUSSART, *THE POLITICS OF RITUAL IN AN ABORIGINAL SETTLEMENT: KINSHIP, GENDER, AND THE CURRENCY OF KNOWLEDGE* (2000).

<sup>24</sup> Also spelled: Wonjina, Wanjina and Ounjina.

<sup>25</sup> Principally the Mowanjum, Ngarinyin, Worrorra, and Wunambal peoples of the north-western and central Kimberley.

<sup>26</sup> The Kimberley is an area of 423,517 square kilometers (163,521 square miles) in Northwestern Australia.

<sup>27</sup> See the authorities referred to in CHRISTOPH B. GRABER, *WANJINA AND WUNGURR: THE PROPRIETISATION OF ABORIGINAL ROCK ART UNDER AUSTRALIAN LAW*, in *SOZIOLOGISCHE JURISPRUDENZ. Festschrift für Gunther Teubner zum 65. Geburtstag* 275-297 (Caliess Graf-Peter et al. eds., 2009).

<sup>28</sup> See I.M. Crawford, *The Art of the Wandjina: Aboriginal Cave Paintings in Kimberley, Western Australia*, 74 AM. ANTHROPOLOGIST 118 (1972); Charles P. Mountford, *The Art of the Wandjina: Aboriginal Cave Paintings in Kimberley, Western Australia*, 5 MAN 160; *THE ANTHROPOLOGY OF ART: A REFLECTION ON ITS HISTORY & CONTEMPORARY PRACTICE* (Morphy et al. eds., 2005).

Wandjina painted images of themselves in caves and rock shelters throughout the Kimberley region,<sup>29</sup> located adjacent to where the Wandjina chose to die. Wandjina are painted as full-length, or simply head and shoulder, figures with large mouthless faces with enormous black eyes flanking a beak-like nose.<sup>30</sup> In some places, the Wandjina is painted as an animal such as a crocodile, which are endemic to the region.<sup>31</sup> The absence of a mouth represents the idea that Wandjina are so powerful that they do not require speech. If a mouth was to appear on a Wandjina image, this would portend floods and cyclones.<sup>32</sup> A band usually surrounds the head of the Wandjina with outward radiating lines, signifying the feathers that the Wandjinas wore and the lightning that they control.<sup>33</sup>

Today, certain Kimberley Aboriginal Peoples repaint the images in tribal ceremonies in December and January to ensure the continuity of the Wandjina's presence and also to ensure the arrival of the monsoon rains.<sup>34</sup> In addition to its spiritual significance, these repainted images have the practical effect of identifying the continual connection of Aboriginal Peoples with their tribal lands which is significant in Australian Native Title claims. A Native Title claim may be made under the Federal Native Title Act 1993 whereby Aboriginal Peoples can assert rights of access, enjoyment and the protection of places of spiritual and cultural significance in relation to lands which others may wish to use for mining, pastoral, or other commercial purposes.<sup>35</sup> For example, in *Neowarra v State of Western Australia*,<sup>36</sup> the Native Title Tribunal had to consider the Native Title claims of peoples of the Ngarinyin, Wunambal and Worrorra language groups over more than

<sup>29</sup> See Nancy D. Munn, 74 *AM. ANTHROPOLOGISTS* 118 (1972) (reviewing Crawford, *supra* note 28); Ian J. McNiven & Lynette Russell, 'Strange Paintings' and 'Mystery Races:' Kimberley Rock-Art, Diffusionism and Colonialist Constructions of Australia's Aboriginal Past, 71 *ANTIQUITY*, 801, 809 (1997); JOSEPHINE FLOOD, *ROCK ART OF THE DREAMTIME* (Angus and Robertson eds., 1997).

<sup>30</sup> See Crawford, *supra* note 28.

<sup>31</sup> *Id.*

<sup>32</sup> See JOSEPHINE FLOOD, *ROCK ART OF THE DREAMTIME* 32 (1997); *Wandjina*, *ABORIGINAL ART NEWS*, NOV. 23, 2001, available at <http://news.aboriginalartdirectory.com/2001/11/wandjina.php>.

<sup>33</sup> See W. Arndt, *The Australian Evolution of the Wandjinas from Rainclouds*, 34 *OCEANIA* 161 (1964); Valda Blundell, *The Art of Country: Aesthetics, Place, and Aboriginal Identity in North-West Australia*, in DAVID S. TRIGGER & GARETH GRIFFITHS, *DISPUTED TERRITORIES: LAND, CULTURE AND IDENTITY IN SETTLER SOCIETIES* 155–85 (2003).

<sup>34</sup> See David Mowaljarlai & C. Peck, *Ngarinyin, Cultural Continuity: A Project to Teach the Young People Our Culture*, 2 *AUSTRALIAN ABORIGINAL* 71 (1987); Graeme Ward, *Ochre and Acrylic: Conflicting Ideologies and Divergent Discourses in the Issue of Repainting of Aboriginal Imagery*, in *RETOUCH: MAINTENANCE AND CONSERVATION OF ABORIGINAL ROCK IMAGERY, PROCEEDINGS OF SYMPOSIUM O, RETOUCH: AN OPTION TO CONSERVATION?* *AUSTRALIAN ROCK ART RESEARCH ASSOCIATION* 5 (Graeme Ward ed., 1992); Sandra Bowdler, *Repainting Australian Rock Art*, 62 *ANTIQUITY* 517 (1988).

<sup>35</sup> See *UNSETTLING ANTHROPOLOGY: THE DEMANDS OF NATIVE TITLE ON WORN CONCEPTS AND CHANGING LIVES* (Toni Bauman & Gaynro McDonald eds., 2011).

<sup>36</sup> [2003] FCA 1402 (Austl.).

100,000 square kilometres against the State of Western Australia, the West Australian Fishing Industry Council and against a number of pastoral lessees, bauxite miners and a telecommunications company.<sup>37</sup> The claimants asserted that their peoples had occupied the region for as long as 26,000 years.<sup>38</sup> They gathered evidence about the spiritual association of these peoples with their Wandjina creators, and they explained their practice of renewing the paint on the Wandjina images within their respective tribal areas.<sup>39</sup> A 1997 study found that there were often thirty to fifty layers of paint on Wandjina images.<sup>40</sup> A recent review of rock art dating in the Kimberley region provides a range of dates commencing from between 33,000 and 42,000 years ago.<sup>41</sup>

Evidence indicated that the Wandjina was a central feature of the belief systems of the tribes of the region. One witness explained:

[W]e . . . represent Wanjina we are all Wanjina tribe and we tell the story what happened, the story from his time and he left us to look after this country because we are his people, we are his servants to look after and we look after him. . . . He talk for us, we talk for him. All the same, that's what we are here for in this land.<sup>42</sup>

The opponents of the Native Title claim pointed to the lack of uniformity of practice of the three tribes in relation to the laws and customs concerning Wandjina history, tradition and meaning.<sup>43</sup> The Tribunal accepted that from the mosaic of the Aboriginal evidence, which was delivered with differing degrees of proficiency in English, that “Wandjina created the land and waters and what lives on or in them, and laid down laws and customs around which the Aboriginal people have constructed their lives. The evidence discloses the continued prominence of Wandjina beliefs.”<sup>44</sup>

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<sup>37</sup> *Id.* at para. 10.

<sup>38</sup> *Id.* at para. 11.

<sup>39</sup> See, e.g., *id.* at para. 277-85; see also Martin Porr & Hannah Rachel Bell, ‘Rock-Art’, ‘Animism’ and Two-Way Thinking: Towards a Complementary Epistemology in the Understanding of Material Culture and ‘Rock-art’ of Hunting and Gathering People, 19 J. OF ARCHAEOLOGICAL METHOD & THEORY 161 (2012).

<sup>40</sup> *Neowarra*, FCA 1402, at para. 282, referencing A. Watchman, *Dating the Kimberley Rock Paintings*, in KEVIN FRANCIS KENNEALLY, MIKE DONALDSON, KIMBERLEY SOCIETY, ET AL., ABORIGINAL ROCK ART OF THE KIMBERLEY 39-45 (1997)).

<sup>41</sup> See Jane Balme, *Excavation Revealing 40,000 Years of Occupation at Mimbi Caves, South Central Kimberley, Western Australia*, 51 AUSTRALIAN ARCHAEOLOGY 1 (2000); Maxine Aubert, *A Review of Rock Art Dating in the Kimberley, Western Australia*, 39 J. OF ARCHAEOLOGICAL SCI. 573-77 (2012).

<sup>42</sup> *Id.* at para. 168.

<sup>43</sup> *Id.* at paras. 154-59.

<sup>44</sup> *Id.* at para. 177.

In *Neowarra*, the Tribunal explained that each tribe had the sacred obligation to repaint and maintain the Wandjina images within their territories.<sup>45</sup> For the purposes of the Native Title claim, these practices were accepted as part of the matrix of evidence which connected the three tribes to the land which was the subject of the claim.<sup>46</sup>

This article examines the extent to which the spiritual beliefs of Aboriginal Peoples are protected under Australian law.

### B. *Misuse of Wandjina Images*

It has been suggested that sacred images such as the Wandjina perform the same function for Aboriginal Peoples as do images of Christ and the Holy Trinity for Christianity.<sup>47</sup> However, the denigration of Christian belief is sanctioned by the common law offense of blasphemy,<sup>48</sup> whereas non-deistic beliefs do not appear to fall within this protection. For example the colonies of Connecticut,<sup>49</sup> Delaware,<sup>50</sup> Maine,<sup>51</sup> Massachusetts,<sup>52</sup> Maryland,<sup>53</sup> and Pennsylvania<sup>54</sup> had laws which criminalized blasphemy which remained in place after the formation of the United States of America.<sup>55</sup> In each statute the offense was defined by reference to Christianity. Thus, in *The State v. Chandler*,<sup>56</sup> the Supreme Court of Delaware pointed out that “it appears to have been long perfectly settled by the common law, that blasphemy against the Deity in general, or a malicious and wanton attack against the Christian religion individually, for the purpose of exposing its doctrines to contempt and ridicule, is indictable and punishable as a temporal offense.”<sup>57</sup> Although the United States Supreme

<sup>45</sup> *Id.* at paras. 277-85. See also David Mowaljarlai, et al., *Repainting of Images on Rock in Australia and the Maintenance of Aboriginal Culture*, 67 *ANTIQUITY* 690 (1988).

<sup>46</sup> *Id.* at paras. 379-83.

<sup>47</sup> See Glenn Pilkington, *The Wandjina Spirit: From Rock to Wall*, available at [http://www.artsources.net.au/as\\_downloads/newsletter/Summer2006.pdf](http://www.artsources.net.au/as_downloads/newsletter/Summer2006.pdf) (last visited Sept. 3, 2012).

<sup>48</sup> See DAVID LAWTON, *BLASPHEMY* ch. 1 (1993).

<sup>49</sup> JOHN B. DILLON, *ODDITIES OF COLONIAL LEGISLATION IN AMERICA AS APPLIED TO THE PUBLIC LANDS, PRIMITIVE EDUCATION, RELIGION, MORALS, INDIANS, ETC.* 39 (1879) available at <http://www.unz.org/Pub/DillonJohn-1879>.

<sup>50</sup> *Id.*

<sup>51</sup> *Id.*

<sup>52</sup> *Id.* at 31, 33.

<sup>53</sup> *Id.* at 30-31.

<sup>54</sup> *Id.* at 36.

<sup>55</sup> The country’s first blasphemy case, *People v. Ruggles Johson*, 8 Johns 545 (N.Y. Sup. Ct. 1811), involved offensive words denigrating Jesus Christ and his mother.

<sup>56</sup> 1 Del. (1 Harr.) 553 (1837).

<sup>57</sup> Similarly, see the decisions of the Supreme Court the State of Pennsylvania in 1824 in *Updegraph v. Commonwealth*, 11 Serg. & Rawl 394 (Pa. 1824) and in *Zeisweiss v. James, et al.*, 63 Pa. State Rep. 465 (1870); and of the Supreme Judicial Court of Massachusetts in *Commonwealth v. Kneeland*, 20 Mass. (1 Pick.) 206 (1838).



Court in the 1952 case *Joseph Burstyn, Inc. v. Wilson*,<sup>58</sup> held that the New York State blasphemy law was an unconstitutional prior restraint on freedom of speech as it was "...not the business of government in our nation to suppress real or imagined attacks upon a particular religious doctrine...",<sup>59</sup> the Supreme Court of Maine in the 1921 case *State v. Mockus*<sup>60</sup> had held it to be a breach of public peace by word or deed to "expose the God of the Christian religion, or the Holy Scriptures, "to contempt and ridicule" or to "rob official oaths of any of their sanctity, thus undermining the foundations of their binding force."<sup>61</sup>

The potential issue of blasphemy in an indigenous Australian context arose in 2007 when street graffiti depictions of Wandjina appeared in Perth, the State capital of Western Australia.<sup>62</sup> This caused some consternation to the Kimberley Aboriginal Peoples, who were concerned about the unauthorized depictions of Wandjina Spirit.<sup>63</sup> They pointed out the sacred significance of the Wandjina for its traditional custodians, but the Christian context of the offense of blasphemy dissuaded litigation of this issue.<sup>64</sup> It should also be mentioned that even the common law action has been abolished as anachronistic in many common law jurisdictions.<sup>65</sup>

As will be seen below, it has been suggested that IP law is a better vehicle for dealing with the protection of the spiritual beliefs of Aboriginal and Torres Strait Islander Peoples. However, in 1995 the National Indigenous Arts Advocacy Association, Inc. ("NIAAA") reported the unauthorized use of the Wandjina spirit as a logo for a surfboard company.<sup>66</sup> Analyzing the problem as an intellectual property issue, the NIAAA pointed out that authorship was impossible to resolve as it is believed that the paintings were done by the Wandjina themselves. Of course, even if

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<sup>58</sup> 343 U.S. 495 (1952).

<sup>59</sup> *Id.* at 505.

<sup>60</sup> 113 A. 39; 120 Me. 84 (1921).

<sup>61</sup> *Id.* at 41.

<sup>62</sup> Paige Taylor, 'Wandering Wandjinas' Mystery, SUNDAY TIMES, Jan. 4, 2007, available at <http://www.perthnow.com.au/news/western-australia/wandering-wandjinas-mystery/story-e6frg13u-1111112784667>.

<sup>63</sup> See Who Paintin' Dis Wadjina?, a movie produced by Taryne Laffar (Australia 2007) which examines the impact of hundreds of spray-painted images of Wandjinas in Perth and surrounds, available at <http://www.creativespirits.info/resources/movies/who-paintin-dis-wadjina#ixzz2JdgOCeap>.

<sup>64</sup> See Pilkington, *supra* note 47.

<sup>65</sup> See Jeremy Patrick, *The Curious Persistence of Blasphemy*, 23 FLA. J. INT'L L. 187 (2011).

<sup>66</sup> NATIONAL INDIGENOUS ARTS ADVOCACY ASSOCIATION, STOPPING THE RIP-OFFS INQUIRY 5 (1995).

authorship could be resolved, the antiquity of these images also means that they are outside the length of copyright protection.<sup>67</sup>

### III. PROHIBITION OF RACIAL VILIFICATION

The unauthorized use of the sacred images of Aboriginal Peoples could possibly be challenged on the basis that it constitutes actionable racial vilification. However, complaints relying on the Federal Racial Hatred Act 1995 illustrate the limitations of this legislation in protecting the sacred beliefs of Aboriginal and Torres Strait Islander Peoples. The Act inserted a new part into the Australian Racial Discrimination Act 1975 after concerns about racist violence and harassment directed against indigenous peoples.<sup>68</sup> Section 18C(1) provides that it is unlawful for a person to do an act, otherwise than in private, if:

- (a) the act is reasonably likely, in all the circumstances, to offend, insult, humiliate or intimidate another person or a group of people; and
- (b) the act is done because of the race, colour or national or ethnic origin of the other person or of some or all of the people in the group.

Exempted from proscription by Section 18D is anything said or done “reasonably and in good faith”:

- (a) in the performance, exhibition or distribution of an artistic work; or
- (b) in the course of any statement, publication, discussion or debate made or held for any genuine academic, artistic or scientific purpose or any other genuine purpose in the public interest; or
- (c) in making or publishing:
  - (i) a fair and accurate report of any event or matter of public interest; or
  - (ii) a fair comment on any event or matter of public interest if the comment is an expression of a genuine belief held by the person making the comment.

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<sup>67</sup> See Michael Blakeney, *Protecting Cultural Expressions of Indigenous Peoples: The Australian Perspective*, 89 COPYRIGHT WORLD 1, 5-7 (1999).

<sup>68</sup> The Explanatory Memorandum, Racial Hatred Bill 1994 (Cth) stated that the legislation sought to address concerns highlighted by the findings of the HUMAN RIGHTS AND EQUAL OPPORTUNITY COMMISSION, REPORT OF THE NATIONAL INQUIRY INTO RACIST VIOLENCE 387 (1991), which found that racist violence against Indigenous people was an 'endemic' problem in Australia 387; see also N. Poynder, *Racial Vilification Legislation*, 71 ABORIGINAL L. BULL. 4 (1994).

Section 18C has been criticized because “its key words and phrases are sufficiently imprecise in both their definition and application as to make the putative legal standards they embody largely devoid of any core and ascertainable content.”<sup>69</sup> Practically, it is difficult to show that the unauthorized use of Aboriginal spiritual images is an act done “because of the race . . . of the other person.”<sup>70</sup> The words “offend” and “insult” are also vague. And, with the possible exception of cases involving extreme racist conduct, the ambiguity of the section is such that “too many determinations could comfortably and justifiably have been decided the other way.”<sup>71</sup> So far, the case law has been inconclusive.<sup>72</sup>

*Corunna v. West Australian Newspapers Ltd.*,<sup>73</sup> which concerned an application brought by an Aboriginal elder on behalf of a number of Nyungar elders, highlights the challenge of interpreting the Racial Hatred Act’s reasonableness standard. The Nyungar are the Aboriginal People of the Perth region. The case involved the publication of a cartoon in the *West Australian* newspaper which arose from attempts of elders to retrieve the head of an ancestral warrior, Yagan, from the Liverpool Infirmary in England.<sup>74</sup> The cartoon was allegedly demeaning of Nyungar people, particularly in relation to their Dreamtime ancestor Waugyl. The applicant argued that this conduct ought to be judged under Section 18C(1)(a) according to whether the cartoon was reasonably likely to offend a person who was an Aboriginal person of the Nyungar group, even though it may not have offended a reasonable non-Aboriginal person. The respondent argued against the adoption of a reasonable Aboriginal or Nyungar standard and submitted that a “reasonable ordinary reader” of the newspaper was the correct standard by which to judge the offensiveness of the conduct. The Commissioner agreed with the applicant that the appropriate question was whether a “reasonable Nyungar or Aboriginal person” would, in all the circumstances, be offended by the cartoon.<sup>75</sup>

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<sup>69</sup> Dan Meagher, *So Far So Good?: A Critical Evaluation of Racial Vilification Laws in Australia*, 32 FED. L. REV. 225 (2004).

<sup>70</sup> Racial Discrimination Act 1975 (Cth), s 18(C)(1)(a) (Austl.).

<sup>71</sup> *Id.*; see also Wojciech Sadurski, *Offending with Impunity: Racial Vilification and Freedom of Speech*, 14 SYDNEY L. REV. 163 (1992).

<sup>72</sup> See Beth Gaze, *Has the Racial Discrimination Act Contributed to Eliminating Racial Discrimination? Analysing the Litigation Track Record 2000-2004*, 11 AUSTRALIAN J. OF HUM. RTS. 6 (2005); Brad Jessup, *Five Years On: A Critical Evaluation of the Racial Hatred Act 1995*, 6 DEAKIN L. REV. 91 (2001).

<sup>73</sup> [2001] EOC 93-146 (Austl.).

<sup>74</sup> See Hannah McGlade, *The Repatriation of Yagan: A Story of Manufacturing Dissent*, 4 L., TEXT, CULTURE 252 (1998).

<sup>75</sup> [2001] EOC 793-146 at 75, 468 (Austl.).

However, the Commissioner ultimately dismissed the complaint on the ground that the respondent could rely upon the exception in Section 18D, ruling that the newspaper had acted “reasonably and in good faith” in publishing the cartoon, finding that testing the cartoon against “moral and ethical consideration, expressive of community standards,” it did not act outside the “margin of tolerance” allowed under Section 18D.<sup>76</sup> The Commissioner concluded that while it may be argued that the cartoon could be characterized as “exaggerated” or “prejudiced,” it was not sufficiently exaggerated or “prejudiced (having regard to the surrounding circumstances) to breach the standard of reasonableness.”<sup>77</sup> This case has been dismissed as an example of the “reification of dominant racial values” which prioritizes “non-indigenous racial narratives over Indigenous perspectives.”<sup>78</sup> The best that can be said for this case is that it emphasized the looseness of the reasonableness standard.

In contrast, the Commissioner in *Mingli Wanjurri and Others v. Southern Cross Broadcasting Ltd. and Howard Sattler*<sup>79</sup> sustained the complaints, finding a breach of Section 18C.<sup>80</sup> This case concerned a program on the radio station 6PR (owned by the media chain Southern Cross) hosted by the controversial announcer, Howard Sattler.<sup>81</sup> Two persons described as taxi drivers made statements claimed to be derogatory of Nyungar culture and beliefs. The broadcast referred to Nyungar protests about the re-development of a brewery site, recognized by Nyungars as Goonininup, the resting place of the Waugal or Rainbow Serpent. The Rainbow Serpent plays an important role in the belief systems of a number of Australian Aboriginal Peoples, particularly in relation to the creation of waterholes and other resources.<sup>82</sup>

The same Commissioner, who ruled against the Nyungar in the *Corunna* case, determined here that there was a breach of Section 18C. Among his findings were that the broadcast suggested among other things that:

- Nyungar people lie about the existence of religious sites;

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<sup>76</sup> *Id.* at 75, 470.

<sup>77</sup> *Id.*

<sup>78</sup> Anna Chapman, *Australian Racial Hatred Law: Some Comments on Reasonableness and Adjudicative Method in Complaints Brought by Indigenous People*, 30 MONASH UNIV. L. REV. 27 (2004).

<sup>79</sup> [2001] Matter No. 98/69 (Unreported, Commissioner Innes, 7 May 2001 (Austl.)).

<sup>80</sup> See Hannah McGlade, *Race Vilification Before the Human Rights and Equal Opportunity Commission*, 5 INDIGENOUS L. BULL. 8 (2001).

<sup>81</sup> *Id.*

<sup>82</sup> See Erich Kolig, *The Rainbow Serpent in the Aboriginal Pantheon: A Review Article*, 51 OCEANIA 312 (1981).

- The Waugyl should have been killed with a shovel;
- Nyungar religious sites are deserving of the same level of respect as a place where a person had his first sexual experience;
- Nyungar people engaged in urinating, defecating and fornicating in a manner disrespectful of the site's religious significance.

The Commissioner ruled that the “derogatory comments about significant religious figures” could not be exempted and showed a “culpably reckless and callous indifference toward the Nyungar people.”<sup>83</sup> The Commissioner noted that the Nyungar Elders continued to be very hurt and upset by the derogatory and insulting broadcast, which related to religious and cultural matters of great significance to them.<sup>84</sup> They referred to the public nature of the comments and the fact that they were made to many thousands of listeners. In light of these circumstances it was determined that an appropriate award was \$10,000 Australian Dollars (“AUD”) for each complainant, a total amount of \$50,000 AUD.

The *Corunna* and *Wanjurri* cases demonstrate the possibilities and limits of the racial vilification law. Whether the culturally inappropriate, demeaning, or even unauthorized use of the sacred symbols of Aboriginal Peoples can form the basis of a successful complaint under this legislation remains to be seen.

#### IV. CULTURALLY INAPPROPRIATE USE OF SACRED IMAGES

One arena in which the sacred beliefs of Aboriginal Peoples have been protected is in relation to land planning. In *Tenodi v Blue Mountains City Council*,<sup>85</sup> the New South Wales Land and Environment Court considered the unauthorized and inappropriate use of a Wandjina image in an eight-foot sculpture “Wandjina Watchers in Whispering Stone,” erected by the proprietor of a “wellness spa” in a town on the east coast of Australia, some 2500 miles from the Kimberley.<sup>86</sup> It transpired that no environmental planning permission had been obtained for the sculpture under the local land planning laws. Objectors included representatives from both the indigenous and non-indigenous community. Evidence was provided by the objectors about Wandjina's important role in the indigenous culture of the Worrora, Ngarinyin and the Wunambal in the Kimberley for whom “the Wandjina is

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<sup>83</sup> McGlade, *supra* note 80.

<sup>84</sup> See also Natalie Clarke, App. to Intervene, 195/2010, Aug. 10, 2011, available at [http://humanrights.gov.au/legal/submissions\\_court/intervention/clarke.html](http://humanrights.gov.au/legal/submissions_court/intervention/clarke.html).

<sup>85</sup> [2011] NSWLEC 1183 (Austl.).

<sup>86</sup> See Delwyn Everard, *Safeguarding Cultural Heritage—The Case of the Sacred Wandjina*, WIPO MAGAZINE, Dec. 2011, available at [http://www.wipo.int/wipo\\_magazine/en/2011/06/article\\_0003.html](http://www.wipo.int/wipo_magazine/en/2011/06/article_0003.html).

supreme creator, the maker of earth and all upon it. Wandjina brought law that governs marriage relationships to people and land.”<sup>87</sup> They explained that “Wandjina imagery is sacred; it cannot be used by them if it has not been approved.”<sup>88</sup> Specifically, it was pointed out that:

- the applicant is not from their language group and did not obtain permission to use the imagery;
- the depiction of the Wandjina imagery incorporates mouths and the Wandjina is never depicted in this way (this depiction is particularly offensive to them);
- the applicant was using Wandjina imagery for commercial purposes and thereby abusing their indigenous culture for private gain;
- the Blue Mountains Region has its own creational ancestral beings and local Aboriginal groups find it inappropriate to bring these images and interpretation of these images to their country without permission.<sup>89</sup>

The local Gundungurra and Durug people of the Blue Mountains area, who supported the position taken by the Kimberley Aboriginal Peoples, also found the unauthorized use of the Wandjina imagery to be highly offensive.<sup>90</sup>

The Land and Environment Court ruled that the failure of the sculptor to obtain the permission of the Kimberley Aboriginal Peoples was not a matter which fell within the land planning legislation; instead, the prominent location of the sculpture and its public visibility meant that it would offend the “affected community.”<sup>91</sup> This would presumably be the community of the Blue Mountains area, rather than the Kimberley Aboriginal Peoples.

#### V. INTELLECTUAL PROPERTY RIGHTS AS A MEANS OF PROTECTION OF ABORIGINAL SPIRITUAL BELIEFS

In Australia, the most claims to protect the sacred beliefs of Aboriginal and Torres Strait Islander Peoples have been brought in IP law. The first of the IP cases was *Foster v Mountford*,<sup>92</sup> which concerned an anthropology text *Nomads of the Desert*, written to document the life of the Pitjantjatjara People of the South Australian desert and which reproduced

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<sup>87</sup> *Id.* at para. 23.

<sup>88</sup> *Id.*

<sup>89</sup> *Id.* at para. 24.

<sup>90</sup> *Id.*

<sup>91</sup> *Id.* at para. 37.

<sup>92</sup> [1976] 14 *Australian Law Reports* 71 (Austl.).

images which were forbidden to uninitiated members of the Pitjantjatjara.<sup>93</sup> The court in this case was prepared to grant an injunction to prevent the book's distribution in the Northern Territory because the author had been shown these sacred matters in confidence.<sup>94</sup> The problem with breach of confidence as a basis for protecting sacred beliefs is that some confidential communication has to be established. Preventing the unauthorized use of information or paintings and other artifacts in the public domain has to rely on some other field of IP protection. In most cases, this has been copyright law.

The earliest documented example in this regard concerned a graphic design used by the Reserve Bank of Australia which was used on Australia's first decimal currency one dollar note which was introduced in 1967. The design was based on a painting by David Malangi of a Gurrmirringu mortuary feast.<sup>95</sup> An allegation of copyright infringement was made on behalf of the artist and on legal advice Dr. H. C. Coombs, the Governor of the Reserve Bank, provided the artist with \$1000, a gift and a medallion as compensation and reward. An Aboriginal commentator explained that this case was important for publicly fixing "the idea of the Aboriginal painter as an individually recognised art practitioner."<sup>96</sup> The sacred significance of the unauthorized reproduction was not canvassed in this case.

The Reserve Bank of Australia was also involved in *Yumbulul v. Reserve Bank of Australia*<sup>97</sup> which concerned its issuance of a \$10 banknote to commemorate the 1988 bicentennial of white settlement in Australia. The banknote, reproduced the design of a Morning Star Pole created by Terry Yumbulul, a Yolgnu artist.<sup>98</sup> Evidence was presented which established that Morning Star Poles had a central role in Yolgnu I ceremonies commemorating the deaths of important persons and in inter-clan relationships. The particular pole created by Mr. Yumbulul was carved from cotton wood and surmounted with a crown of lorikeet and white cockatoo

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<sup>93</sup> See Christoph Antons, *Foster v. Mountford: Cultural Confidentiality in a Changing Australia*, in LANDMARKS IN AUSTRALIAN INTELLECTUAL PROPERTY LAW 110-25 (Andrew T. Kenyon, Megan Richardson & Sam Ricketson eds., 2009).

<sup>94</sup> See also *Pitjantjatjara Council Inc. v Lowe* [1982] 4 ABORIGINAL L. BULL. 30 (Austl.); see also Garth Nettheim, *Major Test Case: New High Court Land Rights Challenge*, 4 ABORIGINAL L. BULLETIN 11 (1982).

<sup>95</sup> See Kathy Bowrey, *International Trade in Indigenous Cultural Heritage: An Australian Perspective*, in EDWARD ELGAR, INTERNATIONAL TRADE IN INDIGENOUS CULTURAL HERITAGE: LEGAL AND POLICY ISSUES, 296, 409 (Christoph B. Graber, Karolina Kuprecht & Jessica C. Lai eds., 2012).

<sup>96</sup> Djon Mundine, *Some People are Stories*, in DAVID MALINGI, NO ORDINARY PLACE: THE ART OF DAVID MALINGI 34-5 (Susan Jenkins ed., 2004).

<sup>97</sup> [1991] 21 IPR 481 (Austl.).

<sup>98</sup> The Yolgnu are the people of northeastern Arnhem Land in the Northern Territory. See MARI HILL, PEOPLES OF THE NORTH (2008).

feathers, representing the rays of the Morning Star. Painted on the pole was a design representing the yam spirit man who would climb up the pole carrying the spirit of a deceased person to the Morning Star. The Court found the pole to be an original artistic work of Mr. Yumbulul, within the meaning of the Copyright Act. Furthermore, the Court found the artist's copyright in the artifact to have been validly assigned. This finding was sufficient to resolve the claim for breach of copyright.<sup>99</sup>

A novel aspect of this case was that Galpu Clan, of which Terry Yumbulul was a member, jealously guarded the right of a person to make a Morning Star Pole. Mr. Yumbulul had passed through various levels of initiation and revelatory ceremonies in which he learned the Clan's sacred designs and their meanings. During the last initiation rite in which he participated, Mr. Yumbulul was presented with sacred objects, conferring his authority to paint the sacred objects of his people. Following the depiction of Mr. Yumbulul's Morning Star Pole on the commemorative banknote, Mr. Yumbulul was criticized by his people who argued that he had a cultural obligation to their clan to ensure that a pole was not used or reproduced in any way which was offensive in their eyes.<sup>100</sup> Mr. Yumbulul's attempt to set aside the assignment of his copyright in the pole on the ground of unconscionability was unsuccessful. In any event, the assignee could have relied upon a special statutory defense to a copyright infringement action. The trial judge acknowledged that it may be the case that "Australia's copyright law does not provide adequate recognition of Aboriginal community claims to regulate the reproduction and use of works which are essentially communal in origin."<sup>101</sup> He concluded by suggesting that "the question of statutory recognition of Aboriginal communal interests in the reproduction of sacred objects is a matter for consideration by law reformers and legislators."<sup>102</sup> More than twenty years after this case, appropriate legislation addressing Aboriginal interests in protecting sacred works still has not been enacted.

The first post-*Mabo* consideration of copyright law to assimilate Aboriginal concerns about the unauthorized reproduction of sacred Aboriginal images was the Australian Federal Court decision in *Milpurrurru and Others v. Indofurn Party Ltd. & Others*<sup>103</sup> which concerned the importation into Australia of a number of carpets woven in Vietnam which

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<sup>99</sup> *Id.* at 492.

<sup>100</sup> *Id.* at para. 21.

<sup>101</sup> *Id.*

<sup>102</sup> *Id.* at para. 24.

<sup>103</sup> (1994) 30 IPR 209 (Austl.).



incorporated Aboriginal designs. The applicants were three living Aboriginal artists and the Public Trustee claiming on behalf of the estates of five deceased Aboriginal artists. Each of the artists in question had works that were either reproduced in portfolios of Aboriginal art produced for the Australian National Gallery (“ANG”) or in portfolios published by the Australian Government Printer for the Australian Information Service (“AIS”). The first four artists were leading exponents of bark paintings illustrating the beliefs of the Aboriginal Peoples of Central Australia. It was agreed that, among the carpets which were the subject of the action, seven of the eight artworks were reproduced in virtually identical form and color. The final artwork, it was held, was substantially reproduced, albeit in a more simplified form. Evidence was tendered that reproductions of their works were permitted by Aboriginal artists in prestigious publications like the ANG portfolio and the AIS publication, which were designed for the education of members of the white community about Aboriginal culture. In each of the ANG and AIS publications the descriptions of the works made it clear that the subject matter of the works concerned stories of spiritual and sacred significance to the artist. It was additionally submitted that painting techniques and the use of totemic and other images and symbols were in many instances and invariably in the case of important creation stories, strictly controlled by Aboriginal law and custom. It was explained that the right to create paintings and other artworks depicting creation and dreaming stories and to use pre-existing designs and clan totems resided in the traditional custodians of the stories. Because artworks are an important means of recording these stories, it was pointed out that errors in reproduction could cause deep offense.<sup>104</sup>

While *Yumbulul v. Reserve Bank of Australia* established that there are no communal rights to copyright, *Milpurrurru v. Indofurn* considered whether damages could be awarded to a plaintiff because of spiritual harm suffered by the plaintiff and by members of the tribe or clan group due to the wrongful use of sacred images.

Ms. Banduk Marika first raised this question in her depiction of the story related to a site on her clan (Rirratjingu) land, at Port Bradshaw south of Yirrkala in the Northern Territory of Australia, “where our creation ancestors, the Djangkawu, visited on their journey across Arnhem Land.”<sup>105</sup> She explained further that:

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<sup>104</sup> *Id.* at para. 11.

<sup>105</sup> Reproduced in TERRI JANKE, CASE STUDIES ON INTELLECTUAL PROPERTY AND TRADITIONAL CULTURAL EXPRESSIONS 11 (2003).

When the Djangkawu handed over this land to the Rirratjingu they did so on the condition that we continued to perform the ceremonies, produce the paintings and the ceremonial objects that commemorate their acts and journeys. . . . The place, Yalangbara, and the particular story of the Djangkawu associated with it do not exist in isolation. They are part of a complex or “dreaming track” stretching from the sea off the east coast of Arnhem Land through Yalangbara, across the land to the west of Ramingining and Milingimbi.<sup>106</sup>

Her right to use this imagery arose out of her membership of the Yolgnu Clan, the traditional custodians of the Arnhem Land region of the Northern Territory region. She explained by affidavit that “as an artist, whilst I may own the copyright in a particular artwork under Western law, under Aboriginal law I must not use an image or story in such a way as to undermine the rights of all the other Yolgnu.”<sup>107</sup> She submitted that the reproduction of the artwork in circumstances where the dreaming would be walked on was totally opposed to the cultural use of the imagery in her artwork. She explained that the misuse of her artwork had caused her great concern and that if it had come to the attention of her family she could have been subject to a catalog of sanctions ranging from being outcast to a prohibition against further artistic production. Having found an infringement in the copyright of Ms. Marika’s works, in quantifying her damages the Court took into account the potential sanctions to which she may have been subject by her people. No damages could be awarded to any of the deceased artists in relation to the harm suffered by their people. The Judge explained that “statutory remedies do not recognize the infringement of ownership rights of the kind which reside under Aboriginal law in the traditional owners of the dreaming stories and the imagery such as that used in the artworks of the present applicants.”<sup>108</sup>

The issue of the communal rights of Aboriginal Peoples in relation to the harm done to their spiritual beliefs in a copyright infringement context was raised in *John Bulun Bulun & Anor v. R & T Textiles Party Ltd.*<sup>109</sup> This case arose out of the importation and sale in Australia of printed clothing fabric which infringed the copyright of the Aboriginal artist, Mr. John Bulun Bulun, in his work *Magpie Geese and Water Lillies at the Waterhole*. Mr. Bulun Bulun and Mr. George Milipurrurru, both members of the Ganalbingu

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<sup>106</sup> *Id.*

<sup>107</sup> [1994] 30 IPR at para. 14 (Austl.).

<sup>108</sup> *Id.* at para. 128.

<sup>109</sup> (1998) 41 IPR 513 (Austl.).

people, initiated the proceedings. Ganalbingu country is situated in Arnhem Land in the Northern Territory of Australia. Mr. Bulun Bulun sued as legal owner of the copyright in the painting and sought remedies for infringement under the Australian Copyright Act 1968. Mr. Milpurrurru brought the proceedings in his own name and as a representative of the Ganalbingu claiming that they were the equitable owners of the copyright subsisting in the painting.<sup>110</sup>

Mr. Milpurrurru's painting depicted the waterhole Djulibinyamurr, the place from which Barnda, the long-necked turtle creator ancestor of the Ganalbingu people, had emerged. Mr. Bulun Bulun's affidavit explained that his ancestors were granted responsibility by Barnda to maintain and preserve all of the Mayardin (corpus of ritual knowledge) associated with the Ganalbingu land. Part of the artist's responsibility as "Djungayi" or manager of the Mayardin, was to create paintings in accordance with the laws and rituals of the Ganalbingu people. He claimed that the unauthorized reproduction "threatens the whole system and ways that underpin the stability and continuance of [the artist's] society. It interferes with the relationship between people, their creator ancestors, and the land given to the people by their creator ancestor." Mr. Bulun Bulun explained that all of the traditional owners of the Ganalbingu land would have to agree on any exploitation of art works depicting sacred sites, such as the waterhole.<sup>111</sup>

The claim for copyright infringement was accepted by the respondents, and Mr. Milpurrurru's representative action questioned whether the communal interests of traditional Aboriginal owners in cultural artworks, recognized under Aboriginal law, created binding legal or equitable obligations on persons outside the relevant Aboriginal community. The assertion by the Ganalbingu of rights in equity depended upon there being a trust impressed on expressions of ritual knowledge, such as the *Maggie Geese and Water Lillies at the Waterhole*. The Court acknowledged that among African tribal communities, tribal property was regarded as being held on trust by the customary head of a tribal group. However, the court here found no evidence of an express or implied trust created in respect of Mr. Bulun Bulun's art. This was an issue of intention and the court found no evidence of any practice among the Ganalbingu whereby artworks were held in trust.

In an extensive *obiter dictum* in this test case, the Court found the subsistence of a fiduciary relationship between Mr. Bulun Bulun and the Ganalbingu people. This relationship was said to arise from the trust and

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<sup>110</sup> *Id.* at 520.

<sup>111</sup> *Id.* at 518.

confidence by his people that his artistic creativity would be exercised to preserve the integrity of the law, custom, culture, and ritual knowledge of the Ganalbingu. The court concluded that this finding did not treat the law and custom of the Ganalbingu as part of the Australian legal system, rather it treated these matters as part of the factual matrix, characterizing the relationship as one of mutual trust and confidence from which fiduciary obligations arose. Thus, Mr. Bulun Bulun's fiduciary obligation was "not to exploit the artistic work in such a way that is contrary to the laws and custom of the Ganalbingu people, and, in the event of infringement by a third party, to take reasonable and appropriate action to restrain and remedy infringement of the copyright in the artistic work."<sup>112</sup>

However, in dismissing the representative action of Mr. Milpurruru against the respondents, the court ruled that the rights of the Ganalbingu were confined to a right in personam against Mr. Bulun Bulun to enforce his copyright in works against third party infringers. Here, because Mr. Bulun Bulun had successfully enforced his copyright, there was no need for the intervention of equity to provide any additional remedy to the beneficiaries of the fiduciary relationship. The Court speculated that had Mr. Bulun Bulun failed to take action to enforce his copyright, the beneficiaries might have been able to sue the infringer in their own names.<sup>113</sup>

#### VI. REFORM OF AUSTRALIAN INTELLECTUAL PROPERTY LAW TO PROTECT THE SPIRITUAL BELIEFS OF ABORIGINAL PEOPLES

Perceived inadequacies in IP law as a vehicle for the protection of the spiritual beliefs of Aboriginal and Torres Strait Islander Peoples have prompted a number of suggestions for the modification of that law.<sup>114</sup> In a 1994 Issues Paper, *Stopping the Rip-Offs: Intellectual Property Protection for Aboriginal and Torres Strait Islander Peoples*, the Commonwealth Attorney-General's Department analyzed the limitations of the current Australian IP regime in protecting the intellectual property rights of Aboriginal and Torres Strait Islander Peoples. This paper identified several

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<sup>112</sup> *Id.* at 526-27.

<sup>113</sup> *Id.* at 525.

<sup>114</sup> See COMMONWEALTH OF AUSTRALIA, *FOLKLIFE: OUR LIVING HERITAGE*, REPORT OF THE COMMITTEE OF INQUIRY INTO FOLKLIFE IN AUSTRALIA (1987); COUNCIL FOR ABORIGINAL RECONCILIATION, *VALUE IN CULTURES, RECOGNIZING INDIGENOUS CULTURES AS A VALUED PART OF AUSTRALIAN HERITAGE*, KEY ISSUES PAPER NO. 3 (1994); Kathryn Wells, *The Cosmic Irony of Intellectual Property*, 7 *CULTURE & POL'Y: A J. OF THE AUSTRALIAN KEY CENTRE FOR CULTURAL & MEDIA POL'Y* 45-52 (1996); Michael Mansell, *Barricading Our Last Frontier—Aboriginal Cultural and Intellectual Property Rights*, in GALARRWUY YUNUPINGU, *OUR LAND IS OUR LIFE: LAND RIGHTS—PAST, PRESENT AND FUTURE* 195-209 (1997); Cecilia O'Brien, *Protecting Secret-Sacred Designs—Indigenous Culture and Intellectual Property Law*, 2 *MEDIA & ARTS L. REV.* 57-76 (1997); TERRI JANKE, *OUR CULTURE : OUR FUTURE*, REPORT ON AUSTRALIAN INDIGENOUS CULTURAL INTELLECTUAL PROPERTY RIGHTS (1998).

possible approaches to improve the situation, including amendments to the Copyright Act, 1968, which would require a mark to authenticate Aboriginal and Torres Strait Islander creations and special legislation. The Aboriginal and Torres Strait Islander Commission (“ATSIC”) conducted consultations seeking the views of Aboriginal and Torres Strait Islander Peoples on the form and content of any proposed legislation.<sup>115</sup> In early 1996, ATSIC established an Indigenous Reference Group to manage the consultations.<sup>116</sup> In June 1996, it commissioned the Australian Institute of Aboriginal and Torres Strait Islander Studies (“AIATSIS”) to manage the consultations. A report produced by the consultants in June 1997 addressed methods for protecting indigenous knowledge under the patents and copyright systems.<sup>117</sup>

The Moral Rights Act 2000 amended the Australian Copyright Act 1968 to include the protection of the moral rights of attribution and the right to not have a work treated in a derogatory manner. In 2001, the Coalition Federal Government, in its arts policy for the general election of that year, promised that amendments to this moral rights regime would “give Indigenous communities a means to prevent unauthorized and derogatory treatment of works that embody community images or knowledge.”<sup>118</sup> On July 23, 2001, the Government announced an independent inquiry (“Myer Review”) into the contemporary visual arts and craft sector to recommend actions for governments and the sector to enhance their future.<sup>119</sup> The inquiry found that the communal rights of Aboriginal Peoples were ignored in the current moral rights law and that “the right to integrity and prohibition of derogatory treatment of an artistic work embodying traditional ritual knowledge should be extended to include a treatment that causes cultural harm to the clan,” and that there should be amending legislation.<sup>120</sup> In December 2003, a draft Copyright Amendment (Indigenous Communal Moral Rights) bill 2003 was distributed for comment to a number of

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<sup>115</sup> See Michael Davis, *Indigenous Intellectual Property Consultations With Aboriginal and Torres Strait Islander Peoples*, 90 ABORIGINAL L. BULL. 22 (1997).

<sup>116</sup> Terri Janke & Robynne Quiggin, *Indigenous Cultural and Intellectual Property and Customary Law, Background Paper*, 12 ABORIGINAL CUSTOMARY L.—BACKGROUND PAPERS 452 (2006).

<sup>117</sup> Janke, *supra* note 105, at 54-65.

<sup>118</sup> LIBERAL PARTY OF AUSTRALIA, THE HOWARD GOVERNMENT: PUTTING AUSTRALIA’S INTERESTS FIRST: ELECTION 2001—ARTS FOR ALL 21 (2001) in *Indigenous Communal Moral Rights (ICMR)*, <http://ab-ed.boardofstudies.nsw.edu.au/go/aboriginal-art/protecting-australian-indigenous-art/background-information/proposals-for-change/indigenous-communal-moral-rights-icmr/> (last visited Sept. 11, 2012) (quoted in NEW SOUTH WALES GOV’T).

<sup>119</sup> CONTEMPORARY VISUAL ARTS AND CRAFT INQUIRY: REPORT OF THE COMMONWEALTH BY THE CONTEMPORARY VISUAL ARTS AND CRAFT INQUIRY 21 (2002).

<sup>120</sup> *Id.* at 152.

organizations.<sup>121</sup> The bill was criticized for its complexity and the ambiguity of its language<sup>122</sup> and, in February 2006, it was announced that a revised version of the bill would be made available later that year.<sup>123</sup> But, this bill languished, and in 2006, the 215-page *Copyright Amendment Act 2006* was enacted to give effect to the copyright provisions of the *Australia–United States Free Trade Agreement* of 2004.<sup>124</sup> In 2007, a change of government took place. While in opposition, the current Labor government indicated that it would consider implementing the recommendations of the Myer Review.<sup>125</sup> Yet, to date there have been no such developments.<sup>126</sup>

## VII. INDIGENOUS CULTURAL PROTOCOLS

In the absence of legislation Aboriginal and Torres Strait Islander Peoples have promulgated cultural protocols to prescribe appropriate dealings with their cultural artifacts.<sup>127</sup> Although not legally binding, the protocols are important in raising the profile of indigenous peoples sacred beliefs in a cultural context.<sup>128</sup> Additionally, compliance with these protocols is made a precondition for university ethics clearance and for public funding.<sup>129</sup>

## VIII. INDIGENOUS PEOPLES' DECLARATIONS

Frustrated at the lengthy delay in the formulation of both national and international standards for the protection of the IP rights of indigenous peoples, a number of indigenous peoples have taken it upon themselves to formulate those rights. A significant initiative during the UN International

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<sup>121</sup> See Jane Anderson, *Indigenous Communal Moral Rights: The Utility of an Ineffective Law*, 30 *INDIGENOUS L. BULL.* 8 (2004); Jane Anderson, *The Politics of Indigenous Knowledge: Australia's Proposed Communal Moral Rights Bill*, 27 *UNIV. OF NEW SOUTH WALES L.J.* 585 (2004).

<sup>122</sup> For example, J. Lindgren, President of the Australian Copyright Tribunal. See C. Sexton, *In Conversation with the Honourable Justice Lindgren*, *INTELLECTUAL PROPERTY FORUM: JOURNAL OF THE INTELLECTUAL PROPERTY SOCIETY OF AUSTRALIA AND NEW ZEALAND* 8–10 (2004).

<sup>123</sup> SUBMISSION OF INDIGENOUS HIGHER EDUCATION ADVISORY COUNCIL TO AUSTRALIAN GOVERNMENT OFFICE FOR THE ARTS AND IP AUSTRALIA (June 8, 2012), available at [http://www.ipaustralia.gov.au/pdfs/Submission\\_-\\_Indigenous\\_Higher\\_Education\\_Advisory\\_Council.pdf](http://www.ipaustralia.gov.au/pdfs/Submission_-_Indigenous_Higher_Education_Advisory_Council.pdf).

<sup>124</sup> See Kimberlee Weatherall, *Of Copyright Bureaucracies and Incoherence: Stepping Back From Australia's Recent Copyright Reforms*, 31 *MELBOURNE UNIV. L. REV.* 967 (2007).

<sup>125</sup> *Federal Labor Arts Policy Discussion Paper* (July 30, 2006), available at [http://www.alp.org.au/download/now/federal\\_labor\\_arts\\_policy\\_discussion\\_paper.pdf](http://www.alp.org.au/download/now/federal_labor_arts_policy_discussion_paper.pdf).

<sup>126</sup> The Bill was not introduced into the 2012 Australian Parliament and it will be interesting to see whether it is taken up by the principal political parties as an issue for the September 2013 general election.

<sup>127</sup> See JANKE & QUIGGIN, *supra* note 116, at 484.

<sup>128</sup> See Jane Anderson, *The Pragmatic Politics of Protocols*, presented at SHARING THE CULTURAL AND THEORETICAL SPACE, AIATSIS BIENNIAL CONFERENCE ON INDIGENOUS STUDIES (Canberra, Nov. 25, 2004).

<sup>129</sup> See Kathy Bowrey, *Alternative Intellectual Property: Indigenous Protocols, Copyleft and New Juridifications of Customary Practice*, 6 *MACQUARIE L.J.* 65 (2006).

Year for the World's Indigenous Peoples was a Conference on Cultural and Intellectual Property held on Kuku Yalanji Aboriginal land in the Daintree Forest area of Far North Queensland in November 1993 which adopted the *Julayinbul Statement on Indigenous Intellectual Property Rights*.<sup>130</sup> The *Julayinbul Statement* affirmed the unique spiritual and cultural relationship of Indigenous Peoples with the Earth which determined their perceptions of intellectual property. The Statement asserted that "Aboriginal intellectual property, within Aboriginal Common Law, is an inherent inalienable right which cannot be terminated, extinguished or taken." The Statement called on governments to review legislation and non-statutory policies that did not recognize indigenous intellectual property rights and to implement such international conventions that do recognize these rights. The Conference also issued a *Declaration Reaffirming the Self Determination and Intellectual Property Rights of the Indigenous Nations and Peoples of the Wet Tropics Rainforest Area*. This Declaration was primarily concerned with bioprospecting and the intellectual property rights of indigenous peoples to traditional knowledge.

The *Julayinbul Statement* was one of a number of similar declarations issued by Indigenous Peoples. These included the *Mataatua Declaration on the Cultural and Intellectual Property Rights of Indigenous Peoples* issued by the Nine Tribes of Mataatua in the Bay of Plenty Region of Aotearoa, New Zealand in June 1993.<sup>131</sup> The *Mataatua Declaration* recommended in Article 1 that in the development of policies and practices, indigenous peoples should "define for themselves their own intellectual and cultural property and it noted that "existing protection mechanisms are insufficient for the protection of Indigenous Peoples Intellectual and Cultural Property Rights." The *Mataatua Declaration* in Article 2.1 recommended that in the development of policies and practices, States and national and international agencies "should recognize that indigenous peoples are the guardians of their customary knowledge and have the right to protect and control dissemination of that knowledge." A number of similar declarations were issued by groups of Indigenous Peoples in Asia,<sup>132</sup> the Pacific,<sup>133</sup> Africa,<sup>134</sup> and Central<sup>135</sup> and South America.<sup>136</sup>

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<sup>130</sup> Reproduced in *Aboriginal Intellectual and Cultural Property*, Conference Proceedings 25-27 (Queensland Rainforest Aboriginal Network, Jimgarra, Nov. 1993).

<sup>131</sup> THE NINE TRIBES OF MATAATUA IN THE BAY OF PLENTY REGION AOTEAROA NEW ZEALAND, THE MATAATUA DECLARATION ON CULTURAL AND INTELLECTUAL PROPERTY RIGHTS OF INDIGENOUS PEOPLES (N.Z. 1992), available at [http://www.wipo.int/tk/en/databases/creative\\_heritage/indigenous/link0002.html](http://www.wipo.int/tk/en/databases/creative_heritage/indigenous/link0002.html).

<sup>132</sup> Tambunan Statement on the Protection and Conservation of Indigenous Knowledge, February (1995) (Malay.).

<sup>133</sup> Suva Statement on Indigenous Peoples Knowledge and Intellectual Property Rights, (1995) (Fiji).

The culmination of this declaratory activism was the United Nations Declaration on the Rights of Indigenous Peoples (“UNDRIP”), adopted by the General Assembly of the United Nations on September 13, 2007.<sup>137</sup> 143 member states voted in favor of UNDRIP as a non-binding text which sets out the rights of indigenous peoples to “maintain and strengthen their own institutions, cultures and traditions, and to pursue their development in keeping with their own needs and aspirations.”<sup>138</sup> Relevant to the protection of the spiritual beliefs of indigenous peoples is Article 11(2) which requires that “States shall provide redress through effective mechanisms, . . . developed in conjunction with indigenous peoples, with respect to their . . . religious and spiritual property taken without their free, prior and informed consent or in violation of their laws, traditions and customs” and Article 12 which recognized the right of indigenous peoples to “. . . maintain, protect and develop the past, present and future manifestations of their cultures, such as . . . artefacts, designs, ceremonies, . . . and literature . . . .”

Article 31 of UNDRIP recognizes the rights of indigenous peoples to maintain, control, protect and develop their intellectual property over their cultural heritage, traditional knowledge and traditional cultural expressions.

Four UN Member States (Australia, New Zealand, Canada, and the United States) voted against the Resolution adopting UNDRIP and eleven countries abstained. Senator Marise Payne explained the various reasons for the Australian Government’s opposition to the Declaration. She pointed out that “as our laws here currently stand, we protect our Indigenous cultural heritage, traditional knowledge and traditional cultural expression to an extent that is consistent with both Australian and international intellectual property law, and we are not prepared to go as far as the provisions in the text of the draft declaration currently do on that matter.”<sup>139</sup> In other words, Senator Payne seemed to indicate that the Australian Government was opposed to any *sui generis* protection of traditional knowledge. She also indicated the Australian Government’s opposition to “the inclusion in the text of an unqualified right of free, prior and informed consent for

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<sup>134</sup> INTERNATIONAL INDIGENOUS PEOPLES SUMMIT ON SUSTAINABLE DEVELOPMENT KHOI-SAN TERRITORY, KIMBERLY DECLARATION (2002).

<sup>135</sup> Santa Cruz de la Sierra Statement on Intellectual Property, (1994) (Bol.).

<sup>136</sup> THE WORLD CONFERENCE OF INDIGENOUS PEOPLES ON TERRITORY, ENVIRONMENT AND DEVELOPMENT, KARI-OCA DECLARATION (1992), *available at* <http://www.ipcb.org/resolutions/htmls/karioca.html>.

<sup>137</sup> U.N. Declaration on the Rights of Indigenous Peoples, G.A. Res. 61/295, U.S. GAOR, 61st Sess., Supp. No. 53, UN Doc. A/61/53 (Sept. 13, 2007), [http://www.un.org/esa/socdev/unpfi/documents/DRIPS\\_en.pdf](http://www.un.org/esa/socdev/unpfi/documents/DRIPS_en.pdf).

<sup>138</sup> *Id.* at Preamble.

<sup>139</sup> CTH. PARLIAMENTARY DEBATES, Senate 53 (Sept. 10, 2007) (Marise Payne, Senator).



indigenous peoples on matters affecting them,” because the text did “not acknowledge the rights of third parties—in particular, their rights to access indigenous land and heritage and cultural objects where appropriate under national law.”<sup>140</sup> With the change of government in Australia, Prime Minister Kevin Rudd announced on April 3, 2009 Australian support for the Declaration.<sup>141</sup> In 2010, the other three opposing states also indicated their support for the Declaration.<sup>142</sup> However, as will be mentioned below, in the negotiations within WIPO for an international sui generis law to protect traditional cultural expressions and traditional knowledge, Australia, together with the other opponent states, continues to be an unenthusiastic supporter of this proposal.

One unstated reason why Australia, together with the United States, New Zealand and Canada, opposes the kind of rights contained in the UNDRIP is that from the date of the first Indigenous Peoples declaration, the protection of the sacred beliefs, traditional knowledge and traditional cultural expressions of Indigenous Peoples has been linked with the issue of political self-determination. The International Labour Organization (“ILO”) Convention No. 169 concerning Indigenous and Tribal Peoples in Independent Countries, which had entered into force on September 5, 1991 called attention to the distinctive contribution of indigenous peoples to cultural diversity and affirmed the right of indigenous peoples to self-identification. The Kari-Oca Declaration, issued on May 30, 1992 and agreed upon in Brazil by indigenous peoples from the Americas, Asia, Africa, Australia, Europe and the Pacific,<sup>143</sup> asserted that:

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<sup>140</sup> *Id.*

<sup>141</sup> *Experts Hail Australia's Backing of UN Declaration of Indigenous People's Rights*, UNITED NATIONS NEWS CENTRE, Apr. 3, 2009, available at <http://www.un.org/apps/news/story.asp?NewsID=30382>.

<sup>142</sup> New Zealand announced its official endorsement of the Declaration on April 18, 2010. See Pita Sharples, *New Zealand Statement on Adoption of Declaration at UN Permanent Forum on Indigenous Issues*, INDIGENOUS PEOPLES ISSUES AND RESOURCES, [http://indigenouspeoplesissues.com/index.php?option=com\\_content&view=article&id=4850:new-zealand-statement-on-adoption-of-declaration-at-un-permanent-forum-on-indigenous-issues&catid=58:oceania-indigenous-peoples&Itemid=80](http://indigenouspeoplesissues.com/index.php?option=com_content&view=article&id=4850:new-zealand-statement-on-adoption-of-declaration-at-un-permanent-forum-on-indigenous-issues&catid=58:oceania-indigenous-peoples&Itemid=80) (last visited Jan. 18, 2013). Canada announced its official endorsement on Nov. 12, 2010. See *Canada Endorses the United Nations Declaration on the Rights of Indigenous Peoples*, INDIGENOUS PEOPLES ISSUES AND RESOURCES (Nov. 12, 2010), available at [http://indigenouspeoplesissues.com/index.php?option=com\\_content&view=article&catid=52:north-america-indigenous-peoples&id=7509:canada-canada-endorses-the-united-nations-declaration-on-the-rights-of-indigenous-peoples](http://indigenouspeoplesissues.com/index.php?option=com_content&view=article&catid=52:north-america-indigenous-peoples&id=7509:canada-canada-endorses-the-united-nations-declaration-on-the-rights-of-indigenous-peoples). On Dec. 16, 2010, President Obama at the second White House Tribal Conference declared that the United States would sign the declaration. See *VICTORY: U.S. Endorses UN Declaration on the Rights of Indigenous Peoples*, CULTURAL SURVIVAL, Dec. 16, 2013, available at <http://www.culturalsurvival.org/news/united-states/victory-us-endorses-un-declaration-rights-indigenous-peoples>.

<sup>143</sup> See THE WORLD CONFERENCE OF INDIGENOUS PEOPLES ON TERRITORY, ENVIRONMENT AND DEVELOPMENT, *supra* note 136.

We, the Indigenous peoples, maintain our inherent rights to self-determination. We have always had the right to decide our own forms of government, to use our own laws, to raise and educate our children, to our own cultural identity without interference.

Twenty years later on June 19, 2012, on the occasion of the Rio+20 Earth Summit the Kari-Oca 2 Declaration was issued by 500 representatives of Indigenous Peoples from around the world.<sup>144</sup> As with the original Declaration it combined concerns with access to biological resources, intellectual property rights and self determination in the following terms:

As peoples, we reaffirm our rights to self-determination and to own, control and manage our traditional lands and territories, waters and other resources. Our lands and territories are at the core of our existence—we are the land and the land is us; we have a distinct spiritual and material relationship with our lands and territories and they are inextricably linked to our survival and to the preservation and further development of our knowledge systems and cultures, conservation and sustainable use of biodiversity and ecosystem management.

We reject the assertion of intellectual property rights over the genetic resources and traditional knowledge of Indigenous peoples which results in the alienation and commodification of Sacred essential to our lives and cultures.<sup>145</sup>

The assertion by Indigenous Peoples to self determination has also been made by them in submissions to the WIPO IGC on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore. For example at the 6<sup>th</sup> meeting of the IGC in Geneva March 15-19, 2004, the Australian Aboriginal and Torres Strait Islander Commission (“ATSIC”), among a number of Indigenous Peoples organizations,<sup>146</sup> submitted that “[a]n international regime must ensure that the right to prior informed consent of Indigenous peoples is guaranteed and protected, as a fundamental

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<sup>144</sup> See *Kari-Oca 2 Declaration*, INDIGENOUS ENVIRONMENTAL NETWORK—ROAD TO RIO+20 AND BEYOND (June 19, 2012, available at <http://indigenous4motherearthrioplus20.org/kari-oca-2-declaration/>).

<sup>145</sup> *Id.*

<sup>146</sup> Australia (ATSIC), Foundation for Aboriginal and Islander Research Action (FAIRA), Assembly of First Nations, Call of the Earth, Canadian Indigenous Biodiversity Network, Coordinating Body of Indigenous Organizations of the Amazon Basin (COICA), Indigenous Peoples Caucus of the Creators Rights Alliance, Hoketehi Moriori Trust, Rekohu, Aotearoa (New Zealand), International Indian Treaty Council, the Kaska Dena Council and the Saami Council.

principle in the exercise of self-determination and sovereignty of Indigenous Peoples.”<sup>147</sup> ATSIC had been established by the Hawke Labour Government in 1990 as a body to represent the interests of Aboriginal Peoples,<sup>148</sup> but it was abolished in 2004 largely because of allegations of financial mismanagement. Then Prime Minister John Howard explained that, “the experiment in elected representation for indigenous people has been a failure.”<sup>149</sup> and its functions were transferred to a Government Department.<sup>150</sup> The abolition of ATSIC was described by Aboriginal Peoples as “a calculated blow to end prospects for Indigenous self-determination.” In this political context, Australian Government support for the intellectual property aspirations of Indigenous Peoples which have a self determination implication<sup>151</sup> are doomed to failure. This will be the case in other countries, particularly those where Indigenous Peoples have not yet established their right to exist as a defined group.

#### IX. INTERNATIONAL PROPOSALS FOR THE PROTECTION OF INDIGENOUS CULTURAL EXPRESSIONS

A possibility for the protection of the spiritual beliefs of Aboriginal peoples exists within the negotiations at WIPO for an international regime to protect traditional cultural expressions and folklore. Agitation for an international instrument providing for the protection of the cultural and intellectual property rights of indigenous peoples had precipitated a joint UNESCO/WIPO World Forum on the Protection of Folklore which was convened in Phuket, Thailand, in April 1997. One of the results of this Forum was the institution by WIPO of fact-finding missions “to identify and explore the intellectual property needs, rights and expectations of the holders of traditional knowledge and innovations, in order to promote the contribution of the intellectual property system to their social, cultural and economic development” in its 1998-99 biennium. Australia was the first

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<sup>147</sup> See WORLD INTELLECTUAL PROPERTY ORGANIZATION: INTERGOVERNMENTAL COMMITTEE ON INTELLECTUAL PROPERTY AND GENETIC RESOURCES, TRADITIONAL KNOWLEDGE AND FOLKLORE, REGARDING A PROSPECTIVE INTERNATIONAL REGIME (2004), available at [http://www.wipo.int/tk/en/igc/ngo/kdc\\_igc6\\_doc6\\_6.pdf](http://www.wipo.int/tk/en/igc/ngo/kdc_igc6_doc6_6.pdf).

<sup>148</sup> The *Aboriginal and Torres Strait Islander Commission Act 1989* (“ATSIC Act”) established the ATSIC, which took effect on March 5, 1990. See *Aboriginal and Torres Strait Islander Commission Act 1989* (Cth) s 6 (Austl.).

<sup>149</sup> See *Clark Vows to Fight as ATSIC Scrapped*, SIDNEY MORNING HERALD, Apr. 15, 2004, <http://www.smh.com.au/articles/2004/04/15/1081998279884.html>.

<sup>150</sup> Renamed on January 27, 2006 and currently known as the Office of Indigenous Policy Coordination in the Department of Families, Community Services and Indigenous Affairs.

<sup>151</sup> See H. Fourmile, *Aboriginal Heritage Legislation and Self Determination*, 7 AUSTRALIAN-CANADIAN STUDIES, SPECIAL ISSUE 45 (1989).

port of call for this expert mission, and experts visited Darwin and Sydney from June 14-18, 1998.

In a note dated September 14, 2000, the Permanent Mission of the Dominican Republic to the United Nations in Geneva submitted two documents on behalf of the Group of Countries of Latin America and the Caribbean (“GRULAC”) calling for the creation of a Standing Committee on access to the genetic resources and traditional knowledge of local and indigenous communities.<sup>152</sup> “The work of that Standing Committee would have to be directed towards defining internationally recognized practical methods of securing adequate protection for the intellectual property rights in traditional knowledge.”<sup>153</sup> In 2000, WIPO established an Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (“IGC”). In March 2004, the IGC began to consider the ‘objectives’ and ‘principles’ which should animate the protection of traditional cultural express (“TCE”)<sup>154</sup> and this task has continued through all the subsequent sessions of the IGC.<sup>155</sup> Draft articles for a convention on TCEs were prepared for consideration by the 17<sup>th</sup> session of the IGC, December 6-10, 2010.<sup>156</sup> This draft has been the basis of discussions in subsequent sessions of the IGC and the most recent version is that which was presented to the 22<sup>nd</sup> session of the IGC July 9-13, 2012.<sup>157</sup>

In this session, there was agreement that the Preamble in the draft should contain the recognition that the protection of TCEs should aim to recognize and promote respect for the spiritual values of Indigenous peoples and should prevent the misappropriation of their TCEs and empower them to exercise in an effective manner their rights and authority over their own TCEs. However, in the substantive parts of the draft there are a number of options for defining TCEs, the beneficiaries, and scope of protection. This

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<sup>152</sup> See Traditional Knowledge and the Need to Give it Adequate Intellectual Property Protection, World Intellectual Property Organization, Sept. 25-Oct. 3, 2000, WIPO Doc. WO/GA/26/9 Annex I, 10, 26<sup>th</sup> Sess. (2000).

<sup>153</sup> *Id.*

<sup>154</sup> See Traditional Knowledge, Traditional Cultural Expressions and Genetic Resources: The International Dimension, World Intellectual Property Organization, Mar. 15-19, 2004, WIPO Doc. WIPO/GRTKF/IC/6/7, 6th Sess. (2003).

<sup>155</sup> The most recent contribution in this regard is The Protection of Traditional Cultural Expressions/Cultural Expressions of Folklore. Revised Objectives and Principles, WIPO Doc. WIPO/GRTKF/IC/17/4 17th Sess. (2010).

<sup>156</sup> Draft Articles on the Protection of Traditional Cultural Expressions/Expressions of Folklore Prepared at IWG 1, World Intellectual Property Organization, Dec. 6-10, 2010, WIPO Doc. WIPO/GRTKF/IC/17/9, 17th Sess. (2010).

<sup>157</sup> Decisions of the Twenty-Second Session of the Committee, World Intellectual Property Organization, July 9-13, 2012, 22d Sess. (2012), WIPO doc. WIPO/GRTKF/IC/22/4, available at [http://www.wipo.int/edocs/mdocs/tk/en/wipo\\_grtkf\\_ic\\_22/wipo\\_grtkf\\_ic\\_22\\_ref\\_decisions.pdf](http://www.wipo.int/edocs/mdocs/tk/en/wipo_grtkf_ic_22/wipo_grtkf_ic_22_ref_decisions.pdf).

reflects the lack of unanimity of the various blocs of countries involved in the negotiations. The IGC has referred this draft to the General Assembly of WIPO, which will endeavor to fashion a consensus document which in the fullness of time will be referred to a diplomatic conference if it is to become an international convention. As an international organization of member states, the representation of the interests of traditional and indigenous communities within those member states will have to be considered.

X. THE PROTECTION OF SACRED ABORIGINAL IMAGES AND PRACTICES AS AN ASPECT OF NATIVE TITLE LAW

Given that Aboriginal and Torres Strait Islander Peoples define themselves and their existence by reference to their “Country”<sup>158</sup> and given the establishment of native title rights following *Mabo*, it might have been thought that the sacred beliefs of Aboriginal and Torres Strait Islander Peoples might have been protected as a native title right, but this possibility was dashed by the majority judgement of the High Court in *Western Australia v. Ward*.<sup>159</sup>

The first case which raised the issue of Aboriginal communal rights over their tribal lands was *Milirrpum v. Nabalco Pty Ltd.*<sup>160</sup> The Yolngu People, living in Arnhem Land, in the Northern Territory of Australia, brought this case against a company that had obtained a twelve-year bauxite mining lease from the Federal Government. The trial judge acknowledged that “the fundamental truth about the aboriginals’ relationship to the land is that whatever else it is, it is a religious relationship. . . . There is an unquestioned scheme of things in which the spirit ancestors, the people of the clan, particular land and everything that exists on and in it, are organic parts of one indissoluble whole.”<sup>161</sup> The Yolngu’s claim did not succeed because it was not until *Mabo v. Queensland [No 2]*<sup>162</sup> twenty years later that the *terra nullius* doctrine was rejected and the existence of native title was acknowledged by the High Court.

In response to the *Mabo* determination, the Federal Parliament passed the Native Title Act 1993, establishing the Native Title Tribunal to register, hear and determine native title claims according to the principles established by the Act.

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<sup>158</sup> See Drahos, *supra* note 17..

<sup>159</sup> [2002] HCA 28 (Austl.).

<sup>160</sup> (1971) 17 FLR 141, 167 (Austl.).

<sup>161</sup> *Id.* at 167.

<sup>162</sup> (1992) 175 CLR 1 (Austl.).

In *Neowarra v. State of Western Australia*,<sup>163</sup> the Native Title Tribunal referred to the significance of repainting Wandjina images as evidence of the connection of Aboriginal Peoples with the land. This suggests that the spiritual practices of Aboriginal Peoples, inevitably linked to their land, could indeed be regarded as an aspect of native title.

The High Court, in *Yanner v. Eaton*,<sup>164</sup> considered an appeal by a member of the Gunnamulla clan of the Gangalidda tribe from Northern Queensland who was prosecuted under the Queensland 1974 *Fauna Conservation Act* for killing juvenile estuarine crocodiles in Cliffdale Creek in the Gulf of Carpentaria area of Queensland. The Magistrate initially found that the appellant's clan "have a connection with the area of land from which the crocodiles were taken" and that this connection had existed "before the common law came into being in the colony of Queensland in 1823 and . . . thereafter continued."<sup>165</sup> He further found that it was a traditional custom of the clan to hunt juvenile crocodiles for food and that the evidence suggested that the taking of juvenile rather than adult crocodiles had "tribal totemic significance and [was based on] spiritual belief."<sup>166</sup> The Magistrate found the appellant not guilty and dismissed the charge. The Court of Appeal of Queensland set aside the order of the Magistrates Court,<sup>167</sup> on the application of the prosecution and the defense appealed from this decision to the High Court of Australia.

The High Court referred to the observations of Justice Brennan in *R. V. Toohey; Ex parte Meneling Station Party Ltd.*<sup>168</sup> that "Aboriginal ownership is primarily a spiritual affair rather than a bundle of rights," but that "[t]raditional Aboriginal land is not used or enjoyed only by those who have primary spiritual responsibility for it. Other Aboriginals or Aboriginal groups may have a spiritual responsibility for the same land or may be entitled to exercise some usufructuary right<sup>169</sup> with respect to it."<sup>170</sup> The Court observed that "an important aspect of the socially constituted fact of native title rights and interests that is recognised by the common law is the spiritual, cultural and social connection with the land."<sup>171</sup> It held that the

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<sup>163</sup> [2003] FCA 1402 (Austl.).

<sup>164</sup> [1999] HCA 53 (Austl.).

<sup>165</sup> *Id.* at para. 4.

<sup>166</sup> *Id.*

<sup>167</sup> *Eaton v Yanner; Ex parte Eaton* (Unreported, Court of Appeal of Queensland, 27 Feb. 1998).

<sup>168</sup> (1982) 158 CLR 327 (Austl.).

<sup>169</sup> Usufruct, derived from civil law, is a right of enjoyment, enabling a holder to derive profit or benefit from land that either is owned by another, as long as the property is not damaged or destroyed. *See*, "Definition of 'usufruct,'" available at <http://definitions.uslegal.com/u/usufruct/>.

<sup>170</sup> *Id.* at 358.

<sup>171</sup> [1999] HCA 53 at para. 38 (Austl.).

Fauna Act did not extinguish the rights and interests of the Aboriginal appellant and that by operation of Subsection 211(2) of the *Native Title Act* and Section 109 of the Constitution, which provides for the supremacy of Federal over State laws, the *Fauna Act* did not prohibit or restrict the appellant, as a native title holder, from hunting or fishing for the crocodiles he took for the purpose of satisfying personal, domestic, or non-commercial communal needs.<sup>172</sup>

The *Native Title Act* detailed the circumstances in which native title rights might be extinguished by executive action. The High Court in *Western Australia v. Ward*<sup>173</sup> examined the principles of extinguishment in a native title claim by the Miriuwung Gajerrong people over 7,900 square kilometers of land and water in the east Kimberley area of Western Australia and part of the Northern Territory. The Court explained that the relationship between Aboriginal Peoples and the land was sometimes spoken of as “having to care for, and being able to ‘speak for’ country” in the sense “that, at least in some circumstances, others should ask for permission to enter upon country or use it or enjoy its resources.”<sup>174</sup> This case raised the issue of whether this relationship between land and Aboriginal Peoples could be translated into a positive right for Aboriginal peoples to insist upon the protection of their sacred images. Initially, the judge in the Federal Court of Australia had determined native title in favor of the Miriuwung Gajerrong people, recognizing “a right to maintain, protect and prevent the misuse of cultural knowledge of the common law holders associated with the ‘determination area.’”<sup>175</sup> The Full Federal Court disagreed, setting aside the lower court’s decision: “Although the relationship of Aboriginal people to their land has a religious or spiritual dimension, we do not think that a right to maintain, protect and prevent the misuse of cultural knowledge is a right in relation to land of the kind that can be the subject of a determination of native title.”<sup>176</sup> The appellants to the High Court submitted that the Full Court had erred and that the first determination should be restored.

The majority of the High Court pointed out that the first difficulty in the path of that submission was the imprecision of the term “cultural knowledge” and the apparent lack of any specific content given it by factual findings made at trial.<sup>177</sup> The Court acknowledged that, “access to sites where artworks on

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<sup>172</sup> *Id.* at para. 39.

<sup>173</sup> [2002] HCA 28 (Austl.).

<sup>174</sup> *Id.*

<sup>175</sup> Quoted in [2002] HCA 28 at para. 40.

<sup>176</sup> (2000) 99 FCR 316 at 483 [666] (Austl.).

<sup>177</sup> [2002] HCA 28 at para. 58 (Austl.).

rock are located, or ceremonies are performed, the traditional laws and customs which are manifested at these sites answer the requirement of connection with the land,” required by the Native Title Act.<sup>178</sup> However, the High Court ruled that, “it is apparent that what is asserted goes beyond that to something approaching an incorporeal right akin to a new species of intellectual property to be recognised by the common law” under the Act and that:

The “recognition” of this right would extend beyond denial or control of access to land held under native title. It would, so it appears, involve, for example, the restraint of visual or auditory reproductions of what was to be found there or took place there, or elsewhere. It is here that the second and fatal difficulty appears.<sup>179</sup>

The Majority observed that it “is not to say that in other respects the general law and statute do not afford protection in various respects to matters of cultural knowledge of Aboriginal peoples or Torres Strait Islanders.”<sup>180</sup> The general law and statute which the High Court had in mind was exclusively “the law respecting confidential information, copyright, and fiduciary duties,” referring to the intellectual property cases mentioned above, as well as the provision respecting moral rights in Part IX of the *Copyright Act* of 1968.<sup>181</sup> As discussed above, the Australian case law, however, has identified a number of limitations of Australian intellectual property law, and the Myer Review found that the moral rights provisions of the Copyright Act were inadequate for Indigenous Peoples.

Although in his minority decision Mr. Justice Kirby, a leading Australian human rights jurist,<sup>182</sup> agreed with the majority that the right to protect cultural knowledge had not been well defined in the submissions made to the Court because a degree of specificity was required in determining such claims. But he pointed out that this itself might sometimes create problems because of the internal rules of some Aboriginal communities, that cultural knowledge, or at least some of it, may be treated as a secret: “not to be shared with strangers to that community whether indigenous or non-

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<sup>178</sup> Native Title Act 1993, s 223(1)(c) (Austl.).

<sup>179</sup> [2002] HCA 28 at para. 59 (Austl.).

<sup>180</sup> *Id.* at para. 61.

<sup>181</sup> *Id.*

<sup>182</sup> See R.D.M. Pitty, *Michael Kirby: Speaking for Human Rights*, in *GLOBAL CITIZENS: AUSTRALIAN ACTIVISTS FOR CHANGE 160-80* (G. Stokes, R.D.M. Pitty & G. Smith, eds., 2008).



indigenous, indeed sometimes not to be shared even with all members of the community itself.”<sup>183</sup>

Mr. Justice Kirby acknowledged that in the cases thus far, the native title rights claimed had generally related physically to land or waters in a manner analogous to common law property concepts, but that as native title was *sui generis* it not be restricted to rights with precise common law equivalents.<sup>184</sup> He considered that these rights could extend to “restricting the reproduction of a Dreaming story relating to a particular site, where the reproduction could be proved to contravene Aboriginal law.”<sup>185</sup> Mr Justice Kirby noted that in evidence, the Ningarmara appellants described the “land-relatedness” of their spiritual beliefs and cultural narratives,<sup>186</sup> and that Dreaming Beings located at certain sites are narrated in song cycles, dance rituals and body designs. Because this cultural knowledge, as exhibited in ceremony, performance, artistic creation, and narrative, is inherently related to the land according to Aboriginal beliefs, it followed logically that the right to protect such knowledge was related to the land for the purposes of the *Native Title Act*,<sup>187</sup> Mr. Justice Kirby asserted that this construction was consistent with the purposes of the Act, as evinced in the Preamble, including the full recognition of the rich culture of Aboriginal peoples and the acceptance of the “unique” character of native title rights and that it was further supported by Australia’s ratification of the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights.<sup>188</sup> He quoted from the Draft United Nations Declaration on the Rights of Indigenous Peoples for the proposition that such rights include the right of indigenous people to have “full ownership, control and protection of their cultural and intellectual property.”<sup>189</sup>

Mr. Justice Kirby rejected the misgivings of the majority that the right claimed was “akin to a new species of intellectual property” pointing out that it must be accepted that the established laws of intellectual property are ill-equipped to provide full protection of the kind sought in this case.<sup>190</sup> The perceived inadequacies of Australian intellectual property law, even in its reformed condition to protect the sacred beliefs of aboriginal peoples has led

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<sup>183</sup> *Id.* at para. 577.

<sup>184</sup> *Id.* at para. 577.

<sup>185</sup> *Id.* at para. 578.

<sup>186</sup> *Id.* at para. 580.

<sup>187</sup> *Id.* Justice Kirby referred to evidence of the land-relatedness in the Federal Court decision in *Western Australia v. Ward* (2000) 99 FCR 316 at 539-540 [865] (Austl.).

<sup>188</sup> [2002] HCA 28 at para. 581 (Austl.).

<sup>189</sup> *Id.*

<sup>190</sup> *Id.* at para. 582 (referring to *Yumbulul v Reserve Bank of Australia* (1991) 21 IPR 481 at 484, 490 as an example).

to calls for this protection to be guaranteed by *sui generis* legislation. These calls have been made by Indigenous Peoples themselves and in the context of negotiations at the World Intellectual Property Organization (“WIPO”).

#### XI. THE PROTECTION OF ABORIGINAL SPIRITUAL BELIEFS WITHIN PROTECTED CULTURAL LANDSCAPES

The protection of significant cultural locations provides the opportunity for the protection of land associated with the spiritual beliefs of Aboriginal and Torres Strait Islander Peoples. The UNESCO World Heritage Convention (“WHC”), when promulgated in 1972, sought to facilitate the protection of monuments and sites of “outstanding universal value.”<sup>191</sup> Subsequently, it was acknowledged that the Convention should expand beyond architectural monuments such as Angkor Wat and embrace sites with significance for cultural heritage.<sup>192</sup> The recognition of cultural landscapes as an explicit category of cultural heritage was recognized in the 1992 version of the Operational Guidelines adopted by UNESCO’s World Heritage Committee.<sup>193</sup> The Guidelines provided for the protection of organically evolved landscapes that result from “an initial...religious imperative” and which have developed “by association with and in response to it a natural environment,” and retaining “an active social role in contemporary society.”<sup>194</sup> An Australian example of such a cultural landscape is the Uluru Kata Tjuta National Park, in the Northern Territory, which was added to the World Heritage List as a place of sacred significance to the Anangu Aboriginal People. It has been observed that “the material forms of Uluru and Kata Tjuta incorporate the actions, artefacts and bodies of ancestral beings celebrated in Anangu religion and culture through narratives, elaborate song cycles, visual arts, and dance.”<sup>195</sup> The numerous paintings in the rock shelters at the foot of Uluru (Ayers Rock) were identified as physical embodiments of “Tjukurpa,” which is the spiritual philosophy of the Anangu.<sup>196</sup> These spiritual sites are protected through a Board of Management which has been established for the National Park and

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<sup>191</sup> 1037 U.N.T.S. 151 (entered into force Dec. 17, 1975).

<sup>192</sup> See CRAIG FOREST, *INTERNATIONAL LAW AND PROTECTION OF CULTURAL HERITAGE* (2010).

<sup>193</sup> World Heritage Comm. Operational Guidelines for the Implementation of the World Heritage Convention, para. 23, UNESCO Doc. WHC. 2 (1992) 23 available at <http://whc.unesco.org/archive/opguid e92-en.pdf>.

<sup>194</sup> World Heritage Comm. Operational Guidelines for the Implementation of the World Heritage Convention, para. 10(ii), Annex 3, UNESCO Doc. WHC. 08/01, 2008 (1992) available at <http://whc.unesc o.org/archive/opguide08-en.pdf>.

<sup>195</sup> Graham Calma & Lynette Liddle, *Uluru-kata Tjuta National Park: Sustainable Management and Development*, in UNESCO, *CULTURAL LANDSCAPES: THE CHALLENGES OF CONSERVATION* 104, 105 (World Heritage Papers No. 7, Paris, World Heritage Centre, 2003).

<sup>196</sup> *Id.*

administered by the Aboriginal Central Land Council. These bodies maintain the traditional ceremonial activities of the Anangu and control that the access of visitors to spiritual sites respects the spiritual values of the Anangu<sup>197</sup> and can be closed to tourists when ritual activities are taking place.

Most Australian States and Territories have heritage legislation establishing registers which list known sites of spiritual significance to Aboriginal and Torres Strait Islander Peoples, although commentators have suggested that in practice this legislation masks the obliteration of Indigenous heritage.<sup>198</sup> The most significant instance of the failure of heritage legislation to protect a sacred Aboriginal site was the exemption from protection of the development of a marina and associated bridge on Hindmarsh Island (Kumarangk), situated in the Murray River delta in South Australia. This was opposed by a group of women of the Ngarrindjeri People claiming to be the custodians of secret “women’s business” concerning the creation and renewal of life for which the island had traditionally been used. An application for Ministerial protection was sought under the Federal Aboriginal and Torres Strait Islander Heritage Protection Act 1984. This was referred by the Minister for report under the Act, but a declaration based on this report was quashed in the Federal Court.<sup>199</sup> In May 1995, the South Australian media carried reports on the “secret women’s business” and on June 16, 1995 the South Australian Government appointed a Royal Commissioner inquire into and report on whether any aspect of the “women’s business” was a fabrication. The Royal Commissioner, Judge Iris Stevens’ principal findings were that there was “no suggestion” of “women’s business” at Hindmarsh Island and that these beliefs had been concocted in order to persuade the federal government to ban the Hindmarsh Island Bridge.<sup>200</sup> On the publication of the Royal Commissioner’s Report the Aboriginal Legal Rights Movement applied to the Minister for a further order to prevent the Hindmarsh Island Bridge from being built. This he granted, and appointed Justice Jane Matthews of the Federal Court to prepare a second report. Her report<sup>201</sup> was on the basis that her appointment

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<sup>197</sup> *Id.* at 107-09.

<sup>198</sup> *See, e.g.*, the commentators cited by Bowrey, *supra* note 95, at 427.

<sup>199</sup> *Chapman v Minister for Aboriginal and Torres Strait Islander Affairs*, (1995) 133 ALR 74 (Austl.).

<sup>200</sup> REPORT OF THE HINDMARSH ISLAND BRIDGE ROYAL COMMISSION 292 (Adelaide, South Australian Government Printer, 1995).

<sup>201</sup> PROFESSOR C. SAUNDERS, REPORT TO THE MINISTER FOR ABORIGINAL AND TORRES STRAIT ISLANDER AFFAIRS ON THE 1984 SIGNIFICANT ABORIGINAL AREA IN THE VICINITY OF GOOLWA AND HINDMARSH ISLAND (KUMARANGK) PURSUANT TO SECTION 10(4) OF THE ABORIGINAL AND TORRES STRAIT ISLANDER ACT 37 (Canberra, AGPS, 1994).

was incompatible with her judicial office.<sup>202</sup> There was then a change of Federal Government and the newly appointed Government then enacted the Hindmarsh Island Bridge Act of 1996 to prevent any further reference to the secret women's business in evaluating the development of Hindmarsh Island. The Ngarrindjeri challenged the legislation in the High Court on the basis that it was discriminatory to declare that the Heritage Protection Act applied to sites everywhere but on Hindmarsh Island, claiming that this was invalid discrimination on the basis of race. The High Court decided that the Hindmarsh Island Bridge Act had successfully removed the Hindmarsh Island area from the purview of the Racial Discrimination Act.<sup>203</sup> The final episode in this saga was a defamation action successfully brought by the developers of the Hindmarsh Island marina against environmental groups and other critics of the development.<sup>204</sup> In his first decision, Judge von Doussa stated that he was not satisfied that the claims of "secret women's business" had been fabricated<sup>205</sup> and the Ngarrindjeri and their supporters took this as a vindication of their position, although controversy still clouds the issue.<sup>206</sup>

A perceived current failure of the Western Australian heritage legislation is its approval for the construction of an extensive natural gas mining facility on the Burrup Peninsula (Murujuga), which contains the world's largest outdoor rock engraving site, dating back some 30,000 years.<sup>207</sup> Extensive destruction of this rock art has already been reported.<sup>208</sup>

## XII. THE FUTURE

Section 51 (xxvi) of the Australian Constitution gives the Commonwealth government power to make special laws for peoples of any race. On August 10, 1987, Prime Minister Hawke announced the formation of a Royal Commission to investigate the causes of deaths of Aboriginal people while held in State and Territory goals. The 1991 Report of the

<sup>202</sup> *Wilson v Minister For Aboriginal and Torres Strait Islander Affairs* (1996) 189 CLR 1 (Austl.).

<sup>203</sup> *Kartinyeri v The Commonwealth* (1998) HCA 1 (Austl.).

<sup>204</sup> *Chapman v Conservation Council of SA & Others*, [2002] SASC 4 (Austl.).

<sup>205</sup> John von Doussa, *Reasons for Decision: Thomas Lincoln Chapman and Ors v Luminis Pty Ltd*, 088 127 085 and ors, Federal Court of Australia, No. SG 33 OF 1997 (2001).

<sup>206</sup> See Steven J. Hemming, *'Inventing Ethnography'* in Richard Nile and Lyndall Ryan, *Secret Women's Business: The Hindmarsh Affair* 20 J. OF AUSTRALIAN STUDIES 25, 25-39 (1996); CHRIS KENNY, *IT WOULD BE NICE IF THERE WAS SOME WOMEN'S BUSINESS: THE STORY BEHIND THE HINDMARSH ISLAND AFFAIR* (1996); MARGARET SIMONS, *THE MEETING OF THE WATERS—THE HINDMARSH ISLAND AFFAIR* (2003); *LISTEN TO NGARRINDJERI WOMEN SPEAKING* (Diane Bell ed., 2008); DOREEN KARTINYERI & SUE ANDERSON, *DOREEN KARTINYERI: MY NGARRINDJERI CALLING* (2009).

<sup>207</sup> See Robin Chapple, *The Dampier Archipelago and Burrup Peninsula: The Values of Indigenous Heritage*, paper presented at Parks and Protected Areas Forum, Fremantle, Western Australia, Sept. 24, 2007, available at <http://www.dampierrockart.net/2007-09-24%20Burrup%20Heritage%20Paper.pdf>.

<sup>208</sup> *Aboriginal Rock Art Site Vandalised*, AUSTRALIAN GEOGRAPHIC, Mar. 2, 2011.

Royal Commission recommended that all political leaders and their parties recognize that reconciliation between the Aboriginal and Torres Strait Islander peoples and other Australians must be achieved if community division, discord and injustice to Indigenous Australians were to be avoided.<sup>209</sup> In April 1991, the Constitutional Centenary Conference recommended that among other things the reconciliation process should seek to secure the rights of Aboriginal and Torres Strait Islander peoples through changes to the Constitution.<sup>210</sup>

The current Chief Justice of the High Court of Australia, Robert French, who was the trial judge in *Yumbulul v. Reserve Bank of Australia*,<sup>211</sup> observed that “the question of statutory recognition of Aboriginal communal interests in the reproduction of sacred objects is a matter for consideration by law reformers and legislators.”<sup>212</sup> He endorsed the recommendation of the Constitutional Commission that Section 51 (xxvi) of the Constitution be replaced by a provision empowering the Federal Parliament to make laws with respect to Aboriginal and Torres Strait Islander Peoples “based not on race but on the special place of those peoples in the history of the nation.”<sup>213</sup>

In late 2010, Australia’s National Report to the UN Human Rights Council for the purpose of Universal Periodic Review confirmed the Australian Government’s commitment to the recognition of Aboriginal and Torres Strait Islander peoples in the Australian Constitution and had appointed an Expert Panel to provide options on the form of the amendment to the Constitution which would achieve this result.<sup>214</sup> In December 2010, the Prime Minister announced the membership of an Expert Panel on Constitutional Recognition for Indigenous Australians. The Expert Panel’s Report of January 2012 recommended replacing Section 51 (xxvi) with the power to allow the Federal Parliament to make laws with respect to Aboriginal and Torres Strait Islander Peoples.<sup>215</sup> The Expert Panel reported that its consultations established that “Aboriginal cultures need to receive

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<sup>209</sup> See REPORT OF THE ROYAL COMMISSION INTO ABORIGINAL DEATHS IN CUSTODY (Canberra, Commonwealth Government, 1991), available at <http://www.austlii.edu.au/au/other/IndigLRes/rciadic/#national>.

<sup>210</sup> Statement Constitutional Centenary Conference 1991, reproduced in C. SAMPFORD & T. ROUND, BEYOND THE REPUBLIC MEETING THE GLOBAL CHALLENGES TO CONSTITUTIONALISM 263 (2001).

<sup>211</sup> [1991] 21 IPR 48 (Austl.).

<sup>212</sup> *Id.* at 492.

<sup>213</sup> Hon. Justice Robert French, *The Race Power: A Constitutional Chimera*, in H.P. LEE & G. WINTERTON, AUSTRALIAN CONSTITUTIONAL LANDMARKS, MELBOURNE 206 (2003).

<sup>214</sup> See Human Rights Council, Draft report of the Working Group on the Universal Periodic Review Australia, UN Doc. A/HRC/WG.6/10/L.8 (2011).

<sup>215</sup> RECOGNISING ABORIGINAL AND TORRES STRAIT ISLANDER PEOPLES IN THE CONSTITUTION, REPORT OF THE EXPERT PANEL, Jan. 2012, available at [http://www.youmeunity.org.au/uploads/assets/3446%20FaHCSIA%20ICR%20report\\_text\\_Bookmarked%20PDF%2012%20Jan%20v4.pdf](http://www.youmeunity.org.au/uploads/assets/3446%20FaHCSIA%20ICR%20report_text_Bookmarked%20PDF%2012%20Jan%20v4.pdf).

greater constitutional protection.”<sup>216</sup> It is feasible that with the change to the Australian Constitution, Federal legislation could achieve the protection of the spiritual beliefs of Aboriginal and Torres Strait Islander Peoples. This would be legislation in which their spiritual beliefs would be protected as a *sui generis* right, rather than as a subsidiary category of some other body of law. This legislation would establish as a matter of substantive principle, the right of indigenous peoples to maintain the integrity of their spiritual beliefs from misappropriation, misrepresentation, adulteration and demeaning use. A threshold issue will be the identification of those spiritual beliefs. This will obviously involve some input from the representative bodies of indigenous peoples both in the formulation of the legislation and in its administration.

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<sup>216</sup> *Updegraph*, 11 Serg. & Rawl 394 (Pa. 1824).