# ABORIGINAL SELF-DETERMINATION VS THE PROPERTISATION OF TRADITIONAL CULTURE: THE CASE OF SACRED WANJINA SITES

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In 2003, the strong belief in Wanjina and Wunggurr[1] helped the Aboriginal people in the Kimberleys, Western Australia, to win one of the biggest land claim cases in Australian history. According to Australian common law, the Indigenous community had to show not only that the belief in Wanjina and Wunggurr is the common feature of identification of the Ngarinyin, Wunambal and Worora people of the central and northern Kimberley area in Western Australia, but also that they had been living according to the traditions residing in these beliefs since before the arrival of the first British settlers in Western Australia. With the decision, *Neowarra v Western Australia* ('*Neowarra*'),[2] Justice Ross Sundberg of the Federal Court of Australia assigned native title to the successful Wanjina–Wunggurr community over a part of the determination area of more than 7200 square kilometres.[3]

The central and northern Kimberley region is the home of the famous Wanjina pictographs. The rapid expansion of tourism in this region is considered to be a new threat to the sacred rock art sites.[4] Many tourists travel to the area expecting to see the Wanjinas as promised in the advertisements. The Wanjina–Wunggurr people, however, fear that unauthorised visits may offend the Wanjinas and that tourists will vandalise the sacred sites.[5] The Wanjina–Wunggurr people are thus interested in legal remedies that prevent the Wanjina from being visited and reproduced, and sacred rituals from being disturbed by people who have not received their prior consent. Consequently, during the proceedings, the applicants put forward a claim for a right to prevent inappropriate viewing, hearing or reproduction of secret ceremonies, artwork, song cycles and sacred narratives. The applicants argued that this claim was part of their native title rights. Sundberg J, however, rejected the claim stressing that the claimed right is not a right in relation to land of the kind that can be the subject of a determination of native title. The judge, referring to case law of the Australian High Court, explained that the claimed right would go beyond denial or control of access to land held under native title and entail 'something approaching an incorporeal right akin to a new species of intellectual property to be recognised by the common law under par (c) of s 223(1) [*Native Title Act 1993* (Cth) ('NTA')]'.[6]

This finding points to the difficulties of modern Australian law in coping with the inextricable connection between the traditional cultural expressions ('TCE') of the Indigenous people and their land, which result in shortcomings in effectively protecting secret and sacred TCE against desecration and misappropriation. More generally, it is an example of the collisions between modern law and traditional patterns of social organisation, which are typical of postcolonial societies in which the relationship between the law of the colonisers and the law of the colonised has not been sufficiently clarified. This paper first aims to shed light on the collisions between the land-tied cultural traditions of the Wanjina–Wunggurr community and modern law from the perspective of 'propertisation', a theory which is currently gaining ground in sociolegal studies. Second, the relationship between the common law doctrine of native title and intellectual property ('IP') law is analysed and the shortcomings of both concepts and further legal remedies in effectively protecting and preserving the sacred rock art sites are identified. Finally, these shortcomings are reflected against the backdrop of recent developments at the level of international law in the field of Indigenous peoples' rights and cultural expressions, in particular the adoption of the *Declaration on the Rights of Indigenous Peoples* by the UN General Assembly in 2007.

## I Collisions Between Land-tied Cultural Traditions and Modern Law

When James Cook and Joseph Banks took possession of New South Wales ('NSW') in 1770 they considered it to be *terra nullius*, meaning that there was no population which had established a right to possess the territory.[7] According to the historian Alan Frost, the British neither considered NSW to be uninhabited nor did they act inconsistently when they refused to conclude a treaty with the Indigenous people, as they had done previously with the inhabitants of their other colonies.[8] Rather to Cook and Banks the Indigenous people did not seem to have attained a level of civilisation comparable to that of the Indigenous peoples in other parts of the world colonised by the British.[9] This impression was gained because the Indigenous people did not wear clothes, wandered around, did not live in houses, had not enclosed the country for the practice of agriculture and used only simple tools to meet basic needs. In the view of Frost, the British would have negotiated a treaty to settle the Botany Bay area, had they 'known that the Aborigines were not truly nomadic, that they had indeed mixed their labour with the land, and that they lived within a complex social, political, and religious framework.'[10]

However, this original misconception of Aboriginal culture and erroneous failure to conclude a treaty was not rectified by the more recent administrators of the colony, although it had grave consequences for the colonised people. Legally speaking, the *terra nullius* doctrine implied that Australia was a 'settled colony',[11] ie, a territory without settled inhabitants of its own and without settled law.[12] Since there was no settled law, the settlers brought the law of England with them to the new colony. The same occurred in all Australian colonies formed in the years to come.[13] It is one of the sinister chapters of Australian history[14] that the concept of *terra nullius* was not abolished until 1992 with the *Mabo* decision of the Australian High Court.[15] *Mabo* did 'not revisit the mode or the validity of the acquisition of sovereignty'.[16] However, with the introduction of the concept of native title, the High Court 'reconsidered how the law was received' in Australia. The new concept of native title acknowledged the possibility of 'private rights' of Aboriginal inhabitants existing at the time of white settlement.[17] Since *Mabo*, Aboriginal people putting forward a native title claim have had to prove: 1) the existence of a distinct community; 2) a traditional connection with or occupation of the land at issue under the laws and customs of the group; and 3) the maintenance of this connection.[18]

Because the Kimberley area is about 3000 kilometres away from the centre of the first British settlement in NSW, the Wanjina–Wunggurr people were one of the last groups of Aboriginal poeple to be colonised. Sovereignty in Western Australia was not asserted by the British Crown until 1829.[19] The 'invasion' of the Kimberley region by white settlers led to a tragic confrontation between rifles and spears. Governments in Western Australia protected the expanding greed of the cattle industry for land with mounted police 'to help the few pastoralists remove numerous indigenous people from the vast areas of the Kimberley.'[20] The resistance of the 'wild red men' of the Kimberley area was futile against the bullets of police and settlers.[21] In the decades to come, the Ngarinyin, Wunambal and Worora people became victims of many racially motivated murders that went unreported because of the remoteness of the Kimberley region. More blatant frontier violence was restrained only after the public outcry caused by the infamous Forrest River massacre of 1926.[22] Aboriginal survivors of the British settlement were removed from their lands[23] and forced to 'work as virtual slaves' for the white pastoralists, 'or they would be "civilised" in the Christian missions being established on the coast.'[24] The result of British settlement in the Kimberley region was the massive disruption of an Aboriginal culture that had existed for more than 60 000 years.

However, as the anthropologist Valda Blundell put it, 'the Wanjinas continued to instruct [the Ngarinyin, Wunambal and Worora] in their dreams'.[25]As detailed anthropological evidence in *Neowarra* demonstrated, the strong belief in Wanjina and Wunggurr still constitutes the fundament of the culture of the Ngarinyin, Wunambal and Worora people.[26] According to this belief, the Wanjinas are the creator beings of the three peoples. The Wanjinas created the Ngarinyin, Wunambal and Worora in the Lalai[27] and transformed themselves into paintings at the many rock art sites of the Kimberley region. In the words of Sundberg J, the evidence produced in the case revealed the continued prominence of beliefs that the 'Wanjina 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.'[28]

Closely related to Wanjina is Wunggurr. Wunggurr is the sacred life force[29] and is often represented by the Rainbow Serpent who inhabits deep waterholes. A Wunggurr place is described by members of the Ngarinyin, Wunambal and Worora people as the place where a boy is born out of

a waterhole in his father's dream.[30] For the people of the Wanjina everything has its origin in the land. The land is the beginning and the end. The land is sacred. Paddy Neowarra, the Chairman of the Ngarinyin Aboriginal Corporation, described the importance of the land in a speech delivered to rock art specialists of the United Nations Educational, Scientific and Cultural Organization (UNESCO) in 1997 as follows:

> Everything comes from underneath the ground, the rain, the lightning, the people. They go up to the sky and come back down, but everything starts from underneath. They reflect each other, the top and the bottom. We are the people with the story and the feeling from underneath the ground.[31]

In the Lalai, the Wanjina came out from underneath the ground to transform themselves into rock art. The rock paintings are made of ochres and charcoal. In the days before the British settlement, and to a lesser degree later on, the Wanjina people have been 'freshening up' Wanjina paintings in order to keep the colours bright. The freshening up is an obligation and an exclusive right of certain male members of the community. During the legal proceedings, Paddy Neowarra, a person under such obligations, gave evidence at one of the rock art sites that the painting he was pointing out had been put there by Wanjina. He said:

> [W]e just got to come along and renew him again when he falling to – when everything and paint coming off. That's our law and that's how we keep it. And that's what was given to us from the old people. You've got to take care of it and look after it and always remember that.[32]

By keeping the paintings fresh and bright, 'the world would remain fertile, rain would fall, plants and animals would be abundant, and men would be able to find the spirits of their children at Wunggurr sites'.[33] The freshening up and repainting was done whenever the paintings needed it. In *Neowarra*, Sundberg J considered the evidence presented by Aboriginal and scientific experts sufficient to show that this practice had been continued after settlement by white people in the Kimberley area.[34] The refreshing and repainting of the Wanjina became the decisive element of proof demonstrating that the claimants had been living according to traditions residing in Wanjina and Wunggurr beliefs until the day of the proceedings. Hence, the Wanjina rock paintings were the critical evidence that allowed Sundberg J to conclude that the three requirements of proof of native title listed above had been met by the Ngarinyin, Wunambal and Worora people.

The recognition of the Wanjina people's native title over a vast area in the Kimberley region can certainly be seen as a success for the claimants. However, the outcome of this case masks the unresolved problems of British colonisation in Australia. From an Aboriginal perspective, the problem of native title is its logical inconsistency. Although the source of native title is not the common law but the traditional laws and customs,[35] the assumption that sovereignty was acquired by the Crown at the moment of British settlement is not questioned. If constructed consistently, native title would require recognition of 'a form of sovereignty' of the colonised people.[36] In reality, however, the law of the traditional inhabitants is subjugated under the law of the colonisers and treated as an element of fact, not law.[37]

Not only are the traditional laws and customs depreciated, but also the modern law of the colonisers is used as the frame within which the patterns of Aboriginal social organisation are reconstructed.[38] As a consequence, the complex relationship of Aboriginal people with their land is subordinated under modern law's concepts of property and ownership. Problems related to using the law of the colonisers as a frame within which to perceive and to deal with the cultural traditions of the colonised have been addressed in law and the social sciences under the title of 'propertisation'.[39] In the next section we will use the 'propertisation critique' as an analytical scheme to identify major shortcomings of modern law in effectively protecting the sacred cultural expressions of the Aboriginal people, and of the Wanjina–Wunggurr people in particular.

## II Propertisation and the Protection of Aboriginal Rock Art Sites Under Australian Law

Propertisation has recently been introduced into the sociolegal literature as a term to describe and criticise processes limiting access to commons, public goods and public domains by the means of property-like legal tools in the areas of economics, science, technology, culture and communication.[40] According to the historian Hannes Siegrist, propertisation is in transition from a political catchword towards a scientific concept of law and of the social and cultural sciences.[41] Propertisation has proved to be a useful concept inter alia in criticising the processes of privatisation and commodification driven by expanding IP legislation at the national and international levels.[42] The critique is also useful for analysing colonial

institutional transfers[43] including the framing of traditional culture within Western law, which is informed by concepts of property.[44] Framing TCE within a property law paradigm has been criticised as a subjugation of Indigenous culture under Western law. We will show in this section that many of the shortcomings in the Australian law on TCE can indeed be explained as a consequence of viewing Aboriginal culture through the propertisation lens.

Under Australian law, the protection of secret and sacred Aboriginal rock art sites is fragmented. Rather than providing a comprehensive set of rights protecting a whole way of land-tied Indigenous life, diverse aspects of traditional Aboriginal culture are incoherently covered by three different branches of Australian law, including IP, native title and cultural heritage law. This fragmentation is a consequence of squeezing Aboriginal culture into the narrow compartments of Western property law doctrine.

A major failure of the three approaches that Australian law offers to protect Indigenous culture is that they miss the centrality of land in the Aboriginal world outlook – as described above with regard to the Wanjina–Wunggurr people. According to Michael Brown, for Aboriginal people in general, 'land is inseparable from any aspect of Aboriginal culture. Therefore, rights in land create rights in everything else, including ideas, design styles, rituals, and even biological species.'[45] However, Aboriginal people do not conceptualise rights in land in terms of property, ie, as something that has an exclusive owner and serves commercial purposes, but rather 'in terms of community and individual responsibility'.[46] As the following quotation from Sundberg J in *Neowarra* demonstrates, this difference is difficult to capture with the narrative of modern law:

> While the [Aboriginal] witnesses … do not use the common law expression 'possess, occupy, use and enjoy the land to the exclusion of all others', that is what the rights and entitlements of which they gave evidence amounts to.'[47]

Whereas modern concepts of property conceive of land as something owned by human beings, from a traditional perspective it is just the opposite: Aboriginal people strongly believe that human beings (like everything else) belong to the land.[48] Consequently, Indigenous people find 'heritage' a more appropriate term than 'intellectual and cultural property' to describe their land-tied cultural knowledge. Heritage in this sense is conceived by Indigenous people as a 'bundle of relationships, rather than a bundle of economic rights'.[49] We will see below that the Indigenous concept of 'heritage' is distinct from the concept used in modern law's heritage protection legislation.[50]

Siegrist distinguishes between individualistic and collectivistic propertisation. Efforts to apply IP or native title to protect TCE show typical features of individualistic propertisation. Cultural heritage legislation, on the other hand, is an emanation of collectivist propertisation, ie, a semantic and functional extension of the concept of ownership and the inclusion of collective rights of action or property of states, peoples and communities into the concept.[51]

In the following sub-sections we will criticise, one by one, all three approaches from a propertisation perspective.

### A Intellectual Property

From the perspective of the propertisation critique, efforts to apply IP-type legal instruments for protecting traditional knowledge ('TK') and TCE result in a perception of Indigenous creative expressions as 'commodities owned by individuals produced for potential economic benefits'.[52] With regard to traditional culture in Australia, this view disregards the fact that Aboriginal modes of social organisation do not view creative expressions as objects possessed by subjects but rather as media maintaining a reciprocal relationship between landscape, spiritual ancestors and custom.[53] In more detail, the following three aspects of the failure of IP law to accommodate the particulars of traditional perspectives appear to be consequences of subjugating Indigenous creativity under a Eurocentric view of (intellectual) property concepts.

First, an IP-type framework is based on a separation of distinct categories, including patent law and copyright law, requiring traditional creativity to be seen either from a technological (natural science) perspective or a cultural one, whereas in the reality of Indigenous peoples these aspects are closely interrelated and should not be separated.[54] In *Neowarra*, extensive anthropological evidence and testimonials by Indigenous experts gave account of the holistic worldview of the Ngarinyin, Wunambal and Worora people and demonstrated the continuing importance of the Wanjina traditions in many aspects of the lives of the Indigenous people. Similarly to the Aboriginal people in Australia, the First Nations of Canada and Maori of Aotearoa/New Zealand

also resist this separation 'because it does not conform to their sense of the interconnectedness of things'.[55]

Second, IP-type approaches reveal methodological flaws, including limited terms of protection, fixation requirements and reliance on individual authorship. The *Copyright Act 1968* (Cth) ('*Copyright Act*') does not distinguish between Indigenous and non-Indigenous artistic works and there is no recognition of Aboriginal laws and customs.[56] As the result of an amendment in 2004, the *Copyright Act* provides for a term of protection of 70 years after the death of the author.[57] Wanjina rock art, however, is much older than this. Hence, there is no right of the Wanjina people under the *Copyright Act* to prevent photographs of the rock art from being taken, disseminated and commercialised. Furthermore, under the *Copyright Act*, works must be reduced to 'material form'[58] in order to be protected by copyright.[59] Hence, Wanjina songs or stories, which have never been recorded, will not be protected.[60] If such a story or song is recorded for the first time (with or without prior consent from the Indigenous community) by a third person, this person is recognised by Australian law as the owner of the copyright on the recording, whereas the story or song remains unprotected.[61] The *Copyright Act* also provides for some economic rights for performers, generally requiring the consent from a performer to record or broadcast a live performance.[62] However, sacred Wanjina rituals and ceremonies are not meant to be disturbed at all. In these cases, copyright protection will not be sufficient to prevent trespass on sacred sites or disturbance of religious rituals.[63] Finally, individual authorship is presupposed by the *Copyright Act*.[64] However, no individual author of the Wanjina paintings can be identified since they have been created by the Wanjinas and the consecutive generations of Aboriginal custodians who have been looking after the pictographs are not 'authors' either from an Aboriginal or from a modern legal perspective.[65]

Third, IP law constructs TK and TCE in terms of commodities and exclusive rights. The Wanjina people, however, conceive of their cultural knowledge in terms of shared responsibility rather than ownership and find the commodification of sacred ritual objects and practices to be deeply offensive.

The problem underlying all these shortcomings is that the modern legal narrative of IP and copyright is imposed on Aboriginal forms of social organisation on the premise that Aboriginal sovereignty is abrogated.[66]

### B Cultural Heritage

It is a general feature of the legislation on cultural heritage that inventories and documentation are envisaged as major means of protecting endangered artefacts, sites or landscapes.[67] When applied to Indigenous heritage, governments therewith authorise themselves to define the object and scope of protection. From the perspective of propertisation theory, several aspects of heritage legislation as applied to Indigenous peoples can be criticised. First, heritage legislation tends to perpetuate rather than overcome the legacies of colonisation since it makes colonised peoples' heritage available for appropriation into the cultural language of a colonising state.[68] Incorporating an Indigenous artefact or site into a government inventory symbolically makes it the property of the dominant culture. Second, the concept of ownership is used to create collective rights of action or property of states rather than of Indigenous communities.[69] The argument that cultural heritage is owned by all the people of a state (or, in certain cases, by humankind) is rejected by Indigenous peoples who believe that 'ownership' of cultural heritage should belong to the local community of origin.[70] In Australia, a related problem is that the ultimate authority is vested in a government Minister with wide discretionary power to decide on matters of Indigenous heritage.[71] A third shortcoming of heritage law lies in its tendency towards a reification of cultural expressions.[72] Documentation of artefacts consists in the fixation of living heritage at a particular point in time and excludes the possibility of its continuing evolution.[73] Fourth, inventory and documentation would not be in the interest of a community wanting to keep certain TCE secret.[74] Finally, the focus of heritage law is on scientific and historical values rather than on spiritual ones. That is, heritage legislation involves determinations to be made on the basis of a certain mindset, which will normally be that of the dominant non-Indigenous culture. Consequently, a rock, a hill or a billabong considered to be sacred by an Indigenous people is hardly likely to make it into a government inventory.[75] In fact Wanjina and Wunggurr places and rock art sites are neither listed in the national inventory[76] nor in the inventory of Western Australia.[77]

As in many postcolonial contexts there is a discrepancy in the use of the concept of cultural heritage between Aboriginal people and Australian law. Whereas Aboriginal people define cultural heritage comprehensively as the totality of cultural practices and (tangible and intangible) expressions of a community, Australian law operates under a much narrower

definition with a focus on tangible objects.[78] According to the *Australian Constitution*, both the Commonwealth and the States have the power to adopt legislation to acquire cultural property.[79] Since both levels have made abundant use of their competences the result is a 'disparate framework of cultural heritage laws' and little coherence between State and Commonwealth legislation.[80] With regard to the situation in the Kimberley region, the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth) ('CHA') and the *Aboriginal Heritage Act 1972* (WA) ('WAHA') are the most relevant pieces of heritage legislation. Whereas the purpose of the CHA is to preserve and protect objects in Australia of particular significance to Aboriginal people, the WAHA prohibits any interference with Aboriginal sites, unless authorised by the relevant State Government Minister.

David Ritter has provided a devastating critique of the WAHA from the perspective of critical legal theory. In his view, an analysis of the WAHA in operation reveals a system permitting the colonising power to 'continue to do with Aboriginal places and materials exactly what it wants'.[81] One of his main criticisms relates to the discretionary power of the Minister. While it is generally illegal for non-Aboriginal people to interfere with Aboriginal sites, the Minister may authorise such activity. Under s 18 of the WAHA, the Minister may even 'legalise the destruction of an Aboriginal site when a land owner makes an application to that effect', regardless of how sacred it may be to the Aboriginal poeple concerned.[82] Also, the penalties available under the WAHA, amounting to a maximum of $1000 are not sufficient to deter vandals.[83] According to Ritter 'there have been few successful prosecutions' in the more than 30 years the WAHA has been in force. Conversely, the Minister has granted permission to disturb an Aboriginal site in most cases where applications were made under s 18.[84] Ritter concludes that the WAHA 'is an instrument for the ongoing colonisation and subjugation of Indigenous peoples that denies the legitimacy and validity of Aboriginal people making political decisions about their land.'[85]

How does the WAHA relate to the CHA? In the *Tickner v Bropho* case, the Federal Court of Australia said that the idea informing the enactment of the CHA was 'that it would be used as a protective mechanism of last resort where State and Territory legislation was ineffective or inadequate to protect heritage areas or objects'.[86] In practice, however, it seems that the CHA is applied whenever 'the assessment by the Australian Government of competing public interests involved in the protection of Aboriginal heritage differs from that of a State or Territory'.[87] The CHA is thus generally perceived to be the most important heritage legislation in Australia.[88]

The analysis of the CHA in the abstract does not cast much light on how this legislation operates in practice. According to s 4 of the CHA, the purpose of the CHA is to preserve and protect areas and objects that are of particular significance to Aboriginal people from injury or desecration. An object is taken to be injured or desecrated if it is used or treated in a manner inconsistent with Aboriginal tradition (s 3(2)). If there is an immediate threat to a site, the Minister may make a temporary emergency order under s 9. A permanent order under s 10 can only be made after receipt of an expert report on the place in question.[89] In the case of *Wamba Wamba*, the Federal Court held that although the power of the Minister to make an order is 'facultative and not imperative', he must decide whether or not to take action where he has received a bona fide application for a protective declaration.[90]

However, as the Hindmarsh Island affair demonstrated,[91] 'protections existing in heritage legislation at either federal or state level could and would be overridden if they conflict with other interests.'[92] After several years of proceedings under the CHA and several court rulings, which were unable to decide whether the proposed building of a bridge between Hindmarsh Island and the mainland at Goolwa in South Australia would desecrate Aboriginal sites,[93] the Australian Parliament passed the *Hindmarsh Island Bridge Act 1997* (Cth) in 1997, exempting the building of the Hindmarsh Bridge from the ministerial objection process.[94] This allowed the bridge to be built; it was opened in 2000. The Hindmarsh case shows in a nutshell why Aboriginal people in Australia have little confidence in heritage law as a means to protect their sacred sites effectively.[95] According to David Ritchie, the aspiration of the Aboriginal people in Australia would be to have 'control over their cultural heritage'.[96]

### C Native Title and Intellectual Property

With regard to native title doctrine, the critique on propertisation is closely linked with the critique on *issue framing* in postcolonial settings. Issue framing is an often overlooked consequence of asymmetrical power distribution in relations between Indigenous and modern patterns of social organisation.[97] Issue framing is the power, as Gunther Teubner and Andreas Fischer-Lescano have pointed out, to determine

the 'categories in which politics and law in the centres of modernity perceive the problem of traditional knowledge in peripheral societies'.[98] In other words, the question whether a legal issue can be drafted in a way that would accurately embody the requests of a claimant is dependent on the frame of law and politics in a certain society. In postcolonial contexts, the specific problem is that the narrative of law providing the frame for the issues to be brought to court is a narrative created by the colonisers rather than by the colonised.[99] Indigenous peoples' lawyers, who 'necessarily depend upon the issue framing given by the courts before which they stand', will thus face insurmountable obstacles.[100]

Propertisation occurs in native title law since the legal issue, ie, the *quaestio iuris*, must be framed by Aboriginal claimants under the categories of property and ownership. In this respect, issue framing may impose both procedural and substantive constraints. In Australian land claim cases, the procedural aspects have become evident in 'the manner in which Aboriginal peoples are expected to demonstrate links with the land'.[101] For example, the affidavits of Aboriginal witnesses have often been excluded by Australian judges as mere 'hearsay' whereas the opinions of anthropologists, who had acquired their knowledge from interviews with Aboriginal people, were accepted as expert evidence.[102] With regard to substance, issue framing is also a quandary for Aboriginal people who invoke native title law when fighting for their rights. We have emphasised above the logical inconsistency of native title, which does not recognise sovereign rights of Aboriginal people although its source is Indigenous custom rather than common law.[103] Consequently, if Aboriginal claimants choose to bring a native title case before a court, they implicitly accept that their claim is squeezed into a doctrinal frame necessarily subjugating Indigenous laws and custom under the property and ownership centred categories given by the common law.

In *Neowarra*, the problem of issue framing became noticeable in the unsuccessful invocation of the concept of native title by the Wanjina–Wunggurr community as a means to protect sacred Wanjina paintings and ceremonies performed at Wanjina places. In order to protect and preserve the sacred TCE and to object to any visual or auditory recording or reproductions of what was to be found or took place there, the community claimed a native title right to 'use, maintain, protect and prevent the misuse of cultural knowledge of the Wanjina–Wunggurr community in relation to the claim area'.[104]

Sundberg J rejected this claim, referring to the 2002 judgment of the Australian High Court in *Ward*.[105] In *Ward* the High Court said that a right to maintain and protect cultural knowledge and to prevent its misuse, including the inappropriate viewing, hearing or reproduction of secret ceremonies, artwork, song cycles and sacred narratives, is not a right in relation to land of the kind that can be the subject of a determination of native title.[106] The majority of the High Court held:

> To some degree, for example respecting access to sites where artworks on 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 found in par (b) of the definition in s 223(1) of the NTA. However, 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 par (c) of s 223(1). 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.[107]

The majority decision in *Ward* went on to quote the decision of the Federal Court in *Bulun Bulun v R & T Textiles Pty Ltd*,[108] where von Doussa J observed that a fundamental principle of the Australian legal system was that the ownership of land and ownership of artistic works are separate statutory and common law institutions.[109] According to von Doussa J, recognising cultural knowledge in land would amount to fracturing a so-called 'skeletal principle' of the Australian legal system in the way highlighted by Brennan J in the *Mabo* decision of the High Court.[110] In this refusal of the common law to acknowledge the inextricable link of Indigenous knowledge with the land, the collision between modern law and Indigenous customs becomes salient. Again, Aboriginal culture seems to be the default loser when it is subjugated under a propertisation paradigm.

Because of the common law doctrine of precedent, Sundberg J had no other choice in *Neowarra* than to follow the High Court, although he seemed to be sympathetic with the claimants' concerns. After all, he acknowledged a native title-based right of the Wanjina people to repaint rock art and look after the sites as long as this practice does not conflict with the overriding rights of pastoral leaseholders.[111] This

finding remains clearly within the parameters of the majority judgment in *Ward* and Sundberg J did not refer to the minority judgement in *Ward*, delivered by Kirby J. There, Kirby J did not agree with the majority of the High Court regarding the separation between IP and native title.[112] Regarding the right to protect cultural knowledge, Kirby J distinguished a right to restrict access to a physical area of land or waters from a right to restrict access to representations, images or oral accounts relating to such land or waters.[113] According to Kirby J, not only the first but also the second is a right in relation to land or waters:

> The relationship between the right and the land or waters need not be physical although, obviously, it is easier to prove it if a physical element is shown. It has been accepted that the connection between Aboriginal Australians and 'country' is inherently spiritual and that the cultural knowledge belonging to Aboriginal people is, by indigenous accounts, inextricably linked with their land and waters, that is, with their 'country'. … If this cultural knowledge, as exhibited in ceremony, performance, artistic creation and narrative, is inherently related to the land according to Aboriginal beliefs, it follows logically that the right to protect such knowledge is therefore related to the land for the purposes of the NTA.[114]

Kirby J argued that this construction is consistent with the purposes of the NTA, as evidenced by the words of its preamble, 'including the full recognition of the rich culture of Aboriginal peoples and the acceptance of the "unique" character of native title rights'.[115] According to Kirby J, his construction is further supported by the instruments of international law ratified by Australia 'which expressly provide for the protection of fundamental human rights'. In his view, such rights include the right of Indigenous peoples to have 'full ownership, control and protection of their cultural and intellectual property', as provided by the then Draft UN *Declaration on the Rights of Indigenous Peoples*.[116]

Kirby J's reference to the Draft Declaration is thought-provoking if one considers the recent reassessment of Australia's role in this field of international law. We will discuss this issue below.

## III Overcoming the Problems of Propertisation

The preceding sections have shown that all three approaches available under Australian law to preserve or protect sacred Aboriginal sites or cultural expressions have considerable shortcomings. At their root is the fact that Indigenous laws and customs are subjugated under Western law and its concept of property rather than recognising the Aboriginal peoples' right to self-determination over cultural heritage. Against this backdrop, we suggest exploring modes of Aboriginal self-determination or self-government in cultural matters as a means to overcome problems of propertisation in Australia. However, since we do not want to support secessionist aspirations, the concept of self-determination needs to be clarified. Accordingly, in the following sections we will first discuss the relationship between the concepts of self-determination and shared sovereignties. The latter concept is supported by Indigenous scholars and leaders as well and has been introduced as an offer of reconciliation in Australia. Second, we will discuss recent developments in international law with respect to the protection of both Indigenous peoples' human rights and creative expressions.

### A Self-Determination and Shared Sovereignties

Paul Chartrand, a Canadian Indigenous scholar, introduced the concept of *shared sovereignties* as a means for reconciliation in Australia in a keynote address to the biennial conference of the Australian Institute for Aboriginal and Torres Strait Islander Studies in 2007. Chartrand emphasised that the recognition of self-determination is an essential part of the concept of shared sovereignties.[117] Introduced to further the goal of reconciliation between Aboriginal peoples and the Australian governments, the concept of shared sovereignties, explains Chartrand, 'requires respect for the right of self-determination of the indigenous peoples and of the equal right of self-determination of the population of the State'.[118] Shared sovereignty means that the Aboriginal people accept the *de facto* governance by the governments of Australia over Indigenous peoples while requiring at the same time that the Aboriginal peoples have a right to self-determination. Chartrand emphasises that self-determination must not be understood in a secessionist way but rather as the right of the Aboriginal people

> to aspire to live according to their own visions of the good society, inspired by their own concepts about the universe and the values that ought to inform the way that good relations are to be established and maintained within families, communities, and the Nation-State.[119]

The right of a people to choose its political status within a state is known in international law as 'internal self-

determination'.[120] Although internal self-determination is usually given a political connotation, it has also been interpreted more broadly to refer to the economic, social and cultural development of a people.[121] However, as Ana Filipa Vrdoljak emphasises, Indigenous peoples have rejected the term 'internal self-determination' as not having a basis in international law. Instead they seem to prefer the concept of self-government as a specific form of exercising their right of self-determination.[122] According to Chartrand:

> the concept of 'shared sovereignty' is an inherent part of the concept of Aboriginal self-government. Wherever and whenever the concept or right of Aboriginal self-government is respected and recognised the concept of 'shared sovereignty' is also necessarily respected and recognised.[123]

In his seminal account, Chartrand provides a sophisticated reconstruction of the origin and development of the concept. The notion of shared sovereignties as Chartrand sees it has it origins in the analysis of the Aboriginal right of self-government by Canada's Royal Commission on Aboriginal Peoples ('RCAP') in its *Final Report* of 1996.[124] This was followed by the judicial adoption of the RCAP analysis by a minority of two justices of the Supreme Court of Canada in the *Mitchell* case in 2001.[125] For the RCAP it is important to distinguish between self-determination and self-government:

> Although closely related, the two concepts are distinct and involve different practical consequences. Self-determination refers to the right of an Aboriginal nation to choose how it will be governed – whether, for example, it should adopt separate governmental institutions or join in public governments that embrace Aboriginal and non-Aboriginal people alike. Self-government, by contrast, is one natural outcome of the exercise of the right of self-determination and refers to the right of peoples to exercise political autonomy. Self-determination refers to the collective power of choice; self-government is one possible result of that choice.[126]

Chartrand goes on to discuss a number of factors indicating that the principle of shared sovereignties might also find acceptance in Australia, above all because it 'seems to be acknowledged as a legitimate aspiration by Indigenous leaders and commentators'.[127] He agrees that it is an open question how the principle of shared sovereignty could practically influence legal and political developments in Australia. In our view, if applied to issues of Indigenous heritage (in the sense that Aboriginal people understand the term), the principle of shared sovereignty would require recognising an autonomous right of self-government in matters of Indigenous cultural heritage. Cultural self-government could be a strategy for overcoming propertisation, ie, the squeezing of Aboriginal cultural knowledge and practice into the narrow compartments of property-centred Western law. It may offer a better way to meet Aboriginal aspirations to autonomously develop suitable schemes for the protection and preservation of sacred sites and land-tied religious rituals in a comprehensive way.

## B Recent Developments in International Law

### 1 *Declaration on the Rights of Indigenous Peoples*

The reach and impact of the right of self-determination is controversial in international law. On the one hand, self-determination of peoples is guaranteed as an international human right in art 1 of the UN *Covenant on Civil and Political Rights* ('CCPR').[128] On the other hand, it is still not clear whether art 1 is merely a vague political principle or a genuine right.[129] Moreover it is a matter of considerable controversy whether Indigenous communities are 'peoples' in the sense of art 1[130] rather than 'minorities' in the sense of art 27 of the CCPR.[131] Although Indigenous peoples reject their classification as minorities, current articulations of Indigenous peoples' cultural rights rely strongly on art 27 of the CCPR.[132] The only binding international human rights convention expressly and specifically containing rights of Indigenous peoples is the *International Labour Organization Convention on Indigenous and Tribal Peoples, Convention No 169* (1989) ('*ILO Convention 169*').[133] Article 8(2) of *ILO Convention 169* provides that Indigenous peoples 'shall have the right to retain their own customs and institutions, where these are not incompatible with internationally recognised human rights'. However, the direct legal impact of *ILO Convention 169* is slight, since it has been ratified by only 20 states.[134]

In light of these uncertainties, it is important to note that the *Declaration on the Rights of Indigenous Peoples* ('DRIP') specifically endorses both the collective right of self-determination (art 3) and the collective right of self-government (art 4). The Declaration was adopted by the UN General Assembly on 13 September 2007. One hundred and forty-three UN Member States voted in favour, 11 abstained and four – Australia, Canada, New Zealand and the United States – voted against the instrument.[135] Although not a

binding instrument, the DRIP opened a new chapter in the debates on Indigenous issues in international law and policymaking. This will also be true for Australia, which, after a change of government, endorsed the Declaration on 3 April 2009.[136] In a statement made on the occasion of the Australian Government's announcement of its support for the DRIP, Michael Dodson, alluding to the right of self-determination, said that taking particular articles out of context would unnecessarily raise anxieties about the Declaration. According to Dodson:

> All of its parts make this document one. It has to be approached in this way. No state need be concerned of its content but should embrace it as a framework for public policy, law and practice in partnerships of good faith with Indigenous peoples within their territories.[137]

Indeed, with regard to the scope of the right of self-determination, art 46(1) of the DRIP confirms that nothing in the Declaration shall dismember or impair the territorial integrity and political unity of sovereign and independent states. Moreover, art 46(2) determines that the rights of the Declaration shall be subject to the limitations determined by law.

As the Australian Government considers how to implement the Declaration, one option would be to conclude a national treaty. As suggested by Chartrand, such a treaty could incorporate the principle of shared sovereignties.[138] With a view to tackling propertisation of Aboriginal heritage, the treaty could acknowledge Aboriginal cultural self-government. Such a claim is supported by a number of provisions in the DRIP, which can be read as a fold-out of the collective right of self-government in cultural matters, respecting the comprehensive approach of Indigenous peoples towards their cultural heritage. Article 25 of the Declaration provides that:

> indigenous peoples have the right to maintain and strengthen their distinctive spiritual relationship with their traditionally owned or otherwise occupied and used lands, territories, waters and coastal seas and other resources and to uphold their responsibilities to future generations in this regard.

This provision is of particular importance since it acknowledges the centrality of land in Indigenous culture. Regarding the specific problems of propertisation encountered in the Wanjina case, arts 11 and 12 are most pertinent. Using almost identical language, both articles refer to the rights of Indigenous peoples to maintain, protect, develop or have access to sacred sites as part of their right to practice and revitalise their cultural traditions and customs (art 11) and/or their right to manifest, practise, develop and teach their spiritual and religious traditions, customs and ceremonies (art 12). With a view to implementing the rights acknowledged, art 11(2) stipulates that 'states shall provide redress through effective mechanisms'. Finally, art 31 of the DRIP requires states to take effective measures to recognise and protect cultural heritage, traditional knowledge and TCE of Indigenous peoples.

The new Declaration is a comprehensive affirmation of the most important inherent rights and interests of Indigenous peoples. Although it does not create new rights, it provides, according to the UN Permanent Forum on Indigenous Issues, 'a detailing or interpretation of the human rights enshrined in other international human rights instruments of universal resonance – as these apply to indigenous peoples and indigenous individuals.'[139] The document resulted from more than 20 years of negotiations conducted within the competent UN agencies. Since many Indigenous peoples participated in the negotiations it sufficiently represents their view. Although not a binding legal instrument, the Declaration will provide guidance to governments of postcolonial states who are willing to engage in a reconciliation process. As discussed above, the recognition of the collective right of self-government in cultural matters would be a precondition to tackling propertisation of Indigenous heritage.

### 2 The WIPO IGC Draft Provisions

In 2000, the General Assembly of the World Intellectual Property Organization ('WIPO') established the Intergovernmental Committee on Genetic Resources, Traditional Knowledge and Folklore ('WIPO IGC'). The WIPO IGC took up its work in 2001 and has since met 14 times. So far, it has neither been able to establish a working definition of the terms TK and TCE nor has it agreed on policy objectives of the protection of TK and TCE.[140] In 2005, the Secretariat of the WIPO IGC prepared two sets of draft provisions for the *sui generis* protection of TK and TCE,[141] which have subsequently been the subject of controversial discussion at several meetings of the Committee.[142]

The WIPO IGC drafts are an important step towards overcoming some of the above outlined problems of

propertisation of Indigenous culture,[143] although they separate TK from TCE.[144] They provide for a *sui generis* model of IP protection, which departs in many respects from a classical approach based on exclusive individual rights and embodies elements of customary legal systems as desired by Indigenous peoples.[145] Above all, the draft on TCE rests on the concept that TCE derive their significance from community recognition rather than from an individual's mark of creativity.[146] Moreover, the draft empowers the TCE-holding community to autonomously decide what a TCE is and how it would best be protected and thus respects aspirations towards Indigenous self-government to a certain extent.[147] Article 7 does not require any reduction to a material form and protection of TCE exists automatically from the moment of its creation. With regard to the level of protection, the traditional owners of the TCE may choose between three different categories. Article 3, defining the scope of protection, distinguishes between: a) TCE of a particular value or significance; b) other TCE; and c) secret TCE. For a TCE to be recognised as a TCE of particular value, registration and notification is required, as prescribed in art 7. For TCE that is registered, the relevant community can prevent inter alia 'the reproduction, publication, adaptation, broadcasting, fixation' or any other use. With regard to secret TCE, governments shall provide 'adequate and effective legal and practical measures to ensure that communities have the means to prevent the unauthorized disclosure, subsequent use of and acquisition and exercise of IP rights over secret traditional cultural expressions' (art 3(c)). Finally, art 6 provides that protection of TCE should endure for as long as the TCE continue to meet the criteria for protection under art 1, ie, for TCE referred to in art 3(a) as long as they remain registered, and for TCE referred to in art 3(c) as long as they remain secret.

The WIPO IGC drafts provide for a framework at the level of international law, which would be implemented by national governments, and thus leaves enough leeway for fine-tuning according to the specific situations in different jurisdictions. If the WIPO principles were to be made effective in Australia, the Wanjina–Wungurr people would have the right to decide how the Wanjina rock art sites should be protected. Since many of these sites and many rituals performed nearby are not meant to be looked at or listened to by non-Indigenous people, the Wanjina people would probably choose to protect them under the categories of secret TCE. Consequently, the pictographs and ceremonies would be protected against unauthorised disclosure, subsequent use and appropriation by third parties. Sacred Wanjina expressions not considered secret would have to be registered by the Wanjina–Wunggurr people to ensure that the community had a 'right to say no' on the basis of the principle of prior and informed consent.

According to Wend Wendland, the draft provisions draw upon the registration and notification mechanisms as found in patent law or trademark law.[148] If they are adopted, it will be important to make sure that these requirements can be implemented in such a way that no unnecessary financial or technical stakes are set, which could prevent the TCE-holding Aboriginal community from seeking such registration. In this context it is important to stress that according to art 7(b)(i) any intellectual property rights that may be created in any recording or other fixation of TCE which is necessary for registration or notification 'should vest in or be assigned to the relevant community'. This seems to be a lesson learnt from cases where the registration of TK created IP rights for ethnobotanists or archaeologists rather than for the legitimate owners of such material.[149]

With regard to the implementation of the drafts into national law, the question arises whether it is sufficient to require 'adequate and effective legal and practical measures' of implementation. As the Wanjina case shows, effective protection of land-tied TCE would sometimes call for acknowledging the rights of Indigenous peoples to deny access to sacred sites where artworks are located or ceremonies are performed. Such problems reveal the limitations of a fragmented approach to TCE (and TK). Hence, for the situation in Australia, the WIPO draft would not be a substitute for Aboriginal claims for a higher degree of self-government within the concept of shared sovereignties.[150]

## IV Conclusion

The above analysis has revealed that the Australian law currently applicable to the protection of Aboriginal cultural knowledge is flawed and, in the case of sacred Wanjina sites, fails to provide effective protection for the rock art and the ceremonies performed at the sites. Most of the identified shortcomings can be explained as being a result of seeing Aboriginal culture through the property lens. In essence, propertisation occurs because the traditional laws and customs of the Aboriginal people are subjugated under the property-centred modern Australian law, rather than fully respecting the centrality of land in their world outlook and way of life. This has become visible in all three

branches of Australian law that are relevant for protecting Aboriginal culture, namely, IP, native title and cultural heritage law. Rather than squeezing Aboriginal culture into a property-based frame, modern law should acknowledge that only the Aboriginal people know which Indigenous heritage must be protected and how this should be done. The crucial issue is epistemological sovereignty of different forms of social organisation. This means that a kind of self-determination would be required to overcome the problems of propertisation.

Since we do not think that a drive towards secession would be in the favour of either Australia or the Aboriginal people, we suggest that adopting the concept of shared sovereignties, as recently introduced by Indigenous scholars, could be the solution. This proposal understands the concept of shared sovereignties as an Aboriginal offer for reconciliation requiring the acknowledgement of the right of self-government in return for accepting the de facto governance of the Australian government over Indigenous peoples. With respect to areas of culture, the collective right of self-government would empower the Aboriginal people to protect the whole land-tied Indigenous culture in a comprehensive manner, rather than referring to fragmented aspects of IP, cultural heritage and native title law. As was suggested by Paul Chartrand, the conclusion of a national Aboriginal treaty is a possible procedure for implementing the concept of shared sovereignty and, consequently, the Aboriginal right of cultural self-government. It would be the responsibility of the Australian state to provide for the necessary funds to help Aboriginal and Torres Strait Islander people to implement their policies of cultural self-government. Recent developments in international law, including the adoption of the DRIP and Australia's recent support for this instrument, show that the time is ripe to begin a new chapter in the debate on Aboriginal heritage.

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1 Wanjina and Wunggurr are distinct features of the spiritual belief and traditions of the Ngarinyin, Wunambal and Worora people in the Kimberley region of north-western Australia. For a characterisation of Wanjina and Wungurr see section I below.

2 *Neowarra* [2003] FCA 1402.

3 For about one third of the determination area, the rights of the community were declared to be exclusive. For the remaining two thirds, Sundberg J found the community's native title rights to coexist with the rights of pastoralist leaseholders to use the same land for defined agricultural purposes. According to the judgment, in situations of conflict between native title and pastoralist leases, the latter prevail.

4 More than half a million tourists visit the Kimberley region each year and further growth of the tourism sector is expected. See Valda Blundell and Donny Woolagoodja, *Keeping the Wanjinas Fresh* (2005) 201.

5 Ibid.

6 *Neowarra* [2003] FCA 1402, [485].

7 Alan Frost, 'New South Wales as Terra Nullius: The British Denial of Aboriginal Land Rights' in Susan Janson and Stuart MacIntyre (eds), *Through White Eyes* (1990) 65, 71.

8 Ibid 74–76. On the distinction between inhabited and uninhabited lands around 1788, see also Henry Reynolds, 'Native Title and Historical Tradition: Past and Present' in Bain Attwood (ed), *In the Age of Mabo: History, Aborigines and Australia* (1996) 17, 24.

9 Frost, above n 7, 72.

10 Ibid 74. According to John Locke's theory of property, a man who mixes his labour with land becomes its owner. See George Couvalis and Helen Macdonald, 'Cultural Heritage, Property, and the Position of Australian Aboriginals' (1996) 14(2) *Law in Context* 141, 142–143.

11 On the legal implications of the distinction between a settled and a conquered colony see Kamal Puri, 'Copyright Protection for Australian Aborigines in the Light of Mabo' in M A Stephenson and Suri Ratnapala (eds), *Mabo: A Judicial Revolution* (1993) 132, 146–147.

12 Lisa Strelein, *Compromised Jurisprudence: Native Title Cases Since Mabo* (2006) 2.

13 Sarah Joseph and Melissa Castan, *Federal Constitutional Law: A Contemporary View* (2nd ed, 2006) 14.

14 On the decisions of the Privy Council in 1889 and of the Australian High Court in 1913 and 1971 confirming the validity of *terra nullius*, see Reynolds, above n 8, 18–19.

15 *Mabo v Queensland (No 2)* (1992) 175 CLR 1.

16 Strelein, above n 12, 3. See also Joseph and Castan, above n 13,

14; Noel Pearson, '204 Years of Invisible Title' in M A Stephenson and Suri Ratnapala (eds), *Mabo: A Judicial Revolution* (1993) 75, 82.

17 Strelein, above n 12, 3.

18 Strelein, above n 12, 13.

19 *Neowarra* [2003] FCA 1402, [12].

20 Jeff Doring, *Gwion Gwion: Secret and Sacred Pathways of the Ngarinyin Aboriginal People of Australia* (2000) 14.

21 Ibid 14.

22 Brian Fitzgerald, '"Blood on the Saddle": The Forrest River Massacres, 1926' (1984) 8 *Studies in Western Australian History*.

23 Blundell and Woolagoodja, above n 4, 14.

24 Doring, above n 20, 14.

25 Blundell and Woolagoodja, above n 4, 15.

26 See the report of the anthropologist expert Valda Blundell, as quoted in *Neowarra* [2003] FCA 1402, [87]–[90].

27 Also known as Larlan, Dreaming or Dreamtime; see *Neowarra* [2003] FCA 1402, [90]; Blundell and Woolagoodja, above n 4, 25.

28 *Neowarra* [2003] FCA 1402, [177].

29 Blundell and Woolagoodja, above n 4, 28–31.

30 *Neowarra* [2003] FCA 1402, [178]; Blundell and Woolagoodja, above n 4, 28.

31 Paddy Neowarra, 'Our Paintings Are Our Life' in Sylvia Kleinert and Margo Neale (eds), *The Oxford Companion to Aboriginal Art and Culture* (2000) 123.

32 *Neowarra* [2003] FCA 1402, [277].

33 Blundell and Woolagoodja, above n 4, 32.

34 *Neowarra* [2003] FCA 1402, [209].

35 In *Mabo v Queensland (No 2)* (1992) 175 CLR 1, Brennan J said (at [65]): 'Native title has its origin in and is given its content by the traditional laws acknowledged by and the traditional customs observed by the indigenous inhabitants of a territory. The nature and incidents of native title must be ascertained as a matter of fact by reference to those laws and customs.'

36 Pearson, above n 16, 82, note 55.

37 See also Tony Davies, 'Aboriginal Cultural Property?' (1996) 14(2) *Law in Context* 1, 15, 20.

38 Ibid 3, 9–10.

39 Hannes Siegrist, 'Die Propertisierung von Gesellschaft und Kultur' in Hannes Siegrist (ed), *Entgrenzung des Eigentums in modernen Gesellschaften und Rechtskulturen* (2007) 9, 20, 36–37, referring to Franz von Benda-Beckmann, 'Propertization in Indonesien: Parallele und gegenläufige Entwicklungen' in Hannes Siegrist (ed), *Entgrenzung des Eigentums in modernen Gesellschaften und Rechtskulturen* (2007) 99, 100–104.

40 See the various contributions in Hannes Siegrist (ed), *Entgrenzung des Eigentums in modernen Gesellschaften und Rechtskulturen* (2007).

41 Siegrist, above n 39, 36–37.

42 See parts IV and V in Siegrist, above n 40; Olufunmilayo Arewa, *Culture as Property: Intellectual Property, Local Norms and Global Rights*, Northwestern Public Law Research Paper No 07-13 (2007) <http://ssrn.com/abstract=981423> at 30 November 2009.

43 Benda-Beckmann, above n 39.

44 Arewa, above n 42; Gunther Teubner and Andreas Fischer-Lescano, 'Cannibalizing Epistemes: Will Modern Law Protect Traditional Cultural Expressions?' in Christoph Beat Graber and Mira Burri-Nenova (eds), *Intellectual Property and Traditional Cultural Expressions in a Digital Environment* (2008) 17, 19.

45 Michael F Brown, *Who Owns Native Culture?* (2003) 209.

46 Erica-Irene Daes, *Discrimination Against Indigenous Peoples – Study on the Protection of the Cultural and Intellectual Property of Indigenous Peoples*, [26], UN Doc E/CN.4/Sub.2/1993/28 (1993).

47 *Neowarra* [2003] FCA 1402, [379].

48 Puri, above n 11, 136; Kerrin Schillhorn, *Kulturelle Rechte indigener Völker und Umweltvölkerrecht – Verhältnis und Vereinbarkeit* (2000) 53; Johanna Gibson, *Community Resources. Intellectual Property, International Trade and Protection of Traditional Knowledge* (2005) 227.

49 Daes, above n 46, [26].

50 See section II(B) below.

51 Siegrist, above n 39, 46–47; Thomas Dreier, 'Verdichtungen und unscharfe Ränder – Propertisierungstendenzen im nationalen und internationalen Recht des geistigen Eigentums' in Hannes Siegrist (ed), *Entgrenzung des Eigentums in modernen Gesellschaften und Rechtskulturen* (2007) 172, 187–189.

52 Peter Shand, 'Scenes from the Colonial Catwalk: Cultural Appropriation, Intellectual Property Rights, and Fashion' (2002) 3 *Cultural Analysis* 47, 62.

53 Christoph Beat Graber, 'Can Modern Law Safeguard Archaic Cultural Expressions? Observations from a Legal Sociology Perspective' in Christoph Antons (ed), *Traditional Knowledge, Traditional Cultural Expressions and Intellectual Property Law in the Asia-Pacific Region* (2009) 159, 164.

54 Daes, above n 46, [21], [31], [164].

55 Shand, above n 52, 60.

56 The Australian Government announced in 2003, 2004 and 2006 its intention to amend the *Copyright Act* by an Indigenous Communal Moral Rights Bill. The plan was to entitle Indigenous communities to 'take legal action to protect against inappropriate, derogatory or culturally insensitive use of copyright material' and give them 'legal standing to safeguard the integrity of creative works embodying traditional community knowledge and wisdom'. The Bill was not passed. See Richard Alston, Daryl Williams and Philip Ruddock, 'Indigenous Communities To Get New Protection For Creative Works' (Press Release, 19 May 2003).

57 The amendment, effective since 1 January 2005, was introduced as a consequence of a Free Trade Agreement between Australia and the United States. Before the amendment, copyright lasted for 50 years after the death of the author. See Australian Copyright Council, 'Duration of Copyright' <http://www.copyright.org.au/g023.pdf> at 30 November 2009.

58 See *Copyright Act 1968* (Cth), ss 22, 10(1) (definition of 'material form'). See also Puri, above n 11, 141–142.

59 This fixation requirement exists in Australian law although, according to the *Berne Convention*, art 2.2, national laws need not provide that fixation is a general condition for protection. See WIPO, *Consolidated Analysis of the Legal Protection of Traditional Cultural Expressions/Expressions of Folklore*, Background Paper No 1 (2003) 41–42 <http://www.wipo.int/export/sites/www/tk/en/publications/785e_tce_background.pdf> at 30 November 2009.

60 For Shand (above n 52, 64), this is a consequence of copyright methodology neglecting the fact that for sacred Aboriginal expressions the ideas behind them may be more important than the material form.

61 Terri Janke, *Our Culture: Our Future: Report on Australian Indigenous Cultural and Intellectual Property Rights*, Michael Frankel & Co for Aboriginal and Torres Strait Islander Commission (1998) 54; Puri, above n 11, 142.

62 As a result of the Free Trade Agreement between Australia and the United States, moral rights for performers whose performances are captured on sound recordings were introduced into the *Copyright Act* and became effective with Australia's ratification of the WIPO *Performances and Phonograms Treaty*, 36 ILM 76 (1997) (adopted 20 December 1996) ('WPPT') on 26 July 2007. It seems that the implications of art 2(a) of the WPPT, extending performers rights to 'recordings of expressions of folklore', were not discussed in the latest review of the *Copyright Act*. See Kimberlee Weatherall, '"Pretend-y Rights": On the Insanely Complicated New Regime for Performers' Rights in Australia, and How Australian Performers Lost Out' in Fiona Macmillan and Kathy Bowrey (eds), *New Directions in Copyright Law: Volume 3* (2006) 171, note 58.

63 See Janke, above n 61, 61.

64 In *Bulun Bulun v R & T Textiles Pty Ltd* (1998) 157 ALR 193, von Doussa J held that the individual artist alone was the owner of the copyright. However, this copyright was 'impressed with a fiduciary obligation that the artist owed to his community to preserve the religious and ritual significance of the work'. Christoph Antons, 'Folklore Protection in Australia: Who is Expert in Aboriginal Tradition?' in Elke Kurz-Milcke and Gerd Gigerenzer (eds), *Experts in Science and Society* (2004) 85, 91. For an extensive discussion of individuality and originality in case law involving copyright in Aboriginal culture pre-dating *Bulun Bulun*, see Davies, above n 37, 3–13.

65 As Shand ( above n 52, 64–5) has rightly emphasised, Indigenous 'artists' generally do not perceive themselves as individual authors in the sense of the Western concept since their 'work may be subject to controls and they themselves are answerable to the people for whom they speak'. Moreover, many of the languages of Indigenous peoples do not have a singular noun meaning 'artist' but rather identify individuals or groups of individuals who are 'knowledgeable in the way of songs' or 'knowledgeable in the legends and histories'.

66 See Davies, above n 37, 25.

67 At the international level, inventories play a crucial role in the various conventions UNESCO has adopted to protect tangible and intangible cultural heritage, including the *Convention Concerning the Protection of the World Cultural and Natural Heritage*, opened for signature 16 November 1972, 1037 UNTS 151 (entered into force 17 December 1975); the *Convention on the Protection of the Underwater Cultural Heritage*, opened for signature 2 November 2001, 41 ILM 40 (2002) (entered into force 2 January 2009); and the *Convention for the Safeguarding of the Intangible Cultural Heritage*, opened for signature 17 October 2003 (entered into force 20 April 2006).

68 See Shand, above n 52, 52.

69 Couvalis and Macdonald, above n 10, 157.

70 David Ritchie, 'Australian Heritage Protection Laws: An Overview' in Julie Finlayson and Ann Jackson-Nakano (eds), *Heritage and Native Title: Anthropological and Legal Perspectives* (1996) 28, 29–31; Janke, above n 61, 79.

71 David Ritter, 'Trashing Heritage: Dilemmas of Rights and Power in the Operation of Western Australia's Aboriginal Heritage Legislation' (2003) 23 *Studies in Western Australian History* 195, 195–196; Aliza Taubman, 'Protecting Aboriginal Sacred Sites: The Aftermath of the Hindmarsh Island Dispute' (2002) 19(2) *Environmental and Planning Law Journal* 140, 152, 156; Janke, above n 61, 82; Mark Harris, 'The Narrative of Law in the Hindmarsh Island Royal Commission' (1996) 14(2) *Law in Context* 115, 120; ibid 31.

72 Christoph Beat Graber, 'Using Human Rights to Tackle Fragmentation in the Field of Traditional Cultural Expressions: An Institutional Approach' in Christoph Beat Graber and Mira Burri-Nenova (eds), *Intellectual Property and Traditional Cultural Expressions in a Digital Environment* (2008) 96, 98.

73 Ritter, above n 71, 204–207; Janke, above n 61, 26, 81.

74 Silke von Lewinski (ed), *Indigenous Heritage and Intellectual Property: Genetic Resources, Traditional Knowledge and Folklore* (2nd ed, 2008) 524; Michael F Brown, 'Heritage Trouble: Recent Work on the Protection of Intangible Cultural Property' (2005) 12(1) *International Journal of Cultural Property* 40, 48–49.

75 According to an example provided by Ritchie (above n 70, 30), existing heritage legislation in Australia tends to focus on sites that have been identified by non-Aboriginal scientific experts, whereas places significant for Aboriginal people include unmodified landscape features. See also Taubman, above n 71, 142, and for the situation in Western Australia, Ritter, above n 71, 199–203. An exception at the international level would be the immense rock formation of Uluru and rock domes of Kata Tjuta, which are listed in UNESCO's inventory of world natural and cultural heritage. The UNESCO listing does not prevent 100 000 tourists every year from climbing Uluru, although the Anangu, its traditional owners, consider this to be sacrilege. See Paul Toohey, 'Push to Stop Tourists Climbing Uluru', *The Australian* (online), 8 July 2009 <http://www.theaustralian.com.au/news/push-to-stop-tourists-climbing-uluru/story-0-1225747473429> at 30 November 2009.

76 For the national list of heritage places in Western Australia see Department of the Environment, Water, Heritage and the Arts, *Heritage Places in Western Australia* <http://www.environment.gov.au/heritage/places/wa/list.html> at 30 November 2009.

77 For the State of Western Australia register of heritage places see Heritage Council of Western Australia <http://register.heritage.wa.gov.au/> at 30 November 2009.

78 Janke, above n 61, 77. Australia has not ratified the 2003 UNESCO *Convention for the Safeguarding of the Intangible Cultural Heritage*, opened for signature 17 October 2003 (entered into force 20 April 2006).

79 Ritchie, above n 70, 31.

80 Janke, above n 61, 77.

81 Ritter, above n 71, 208.

82 Ibid 197, 199. The application is first considered by the Aboriginal Cultural Material Committee which makes a recommendation to the Minister.

83 Ibid 197. See also Blundell and Woolagoodja, above n 4, 277, note 175.

84 Ritter, above n 71, 207.

85 Ibid 208.

86 *Tickner v Bropho* (1993) 40 FCR 183, [2].

87 Ben Boer and Graeme Wiffen, *Heritage Law in Australia* (2006) 270; see also Taubman, above n 71, 146.

88 Boer and Wiffen, above n 87, 269; Heather McRae et al, *Indigenous Legal Issues* (3rd ed, 2003) 403.

89 Boer and Wiffen, above n 87, 270; McRae et al, above n 88, 403; Harris, above n 71, 120.

90 *Wamba Wamba Local Aboriginal Land Council v Minister Administering the Aboriginal and Torres Strait Islander Protection Act 1984* (1989) 23 FCR 239.

91 For a detailed discussion of the affair see Brown, above n 45, 173–204.

92 McRae et al, above n 88, 404.

93 Harris, above n 71, 116; Boer and Wiffen, above n 87, 272; Joseph and Castan, above n 13, [6.100].

94 Joseph and Castan, above n 13, [14.30].

95 Ritchie, above n 70, 29; Taubman, above n 71, 141, 146, 151 (with further references); Ritter, above n 71, 200.

96 Ritchie, above n 70, 28.

97 Harris, above n 71, 118–119, 135–136.

98 Teubner and Fischer-Lescano, above n 44, 19.

99 Harris, above n 71, 115.

100 According to Teubner and Fischer-Lescano (above n 44, 19), this dependency may provide the opportunity to connect to existing legal regulations and may also open scenarios for incremental legal innovations. However, 'it does bind [Indigenous peoples' lawyers] too closely to the conceptual system of the special legal field they are dealing with and precludes them effectively from exploring the real dimensions of the conflict and from finding solutions tailored to these problems.'

101 Harris, above n 71, 119.

102 Antons, above n 64, 91–98. In *Neowarra*, testimonials of Aboriginal witnesses were sometimes used to complement expert opinions provided by anthropologists. See, eg, *Neowarra* [2003] FCA 1402, [25]. However, with regard to determining the significance of Wanjina and Wungurr for Aboriginal culture, Sundberg J made extensive use of Aboriginal expertise (at [164]–[185]).

103 See above n 35 and accompanying text.

104 *Neowarra* [2003] FCA 1402, [485].

105 Ibid 487.

106 See Gibson, above n 48, 241.

107 *Western Australia v Ward* (2002) 213 CLR 1, [59].

108 (1998) 157 ALR 193.

109 In *Bulun Bulun v R & T Textiles Pty Ltd* (1998) 157 ALR 193, von Doussa J said (at [524]): '[t]he principle that ownership of land and ownership of artistic works are separate statutory and common law institutions is a fundamental principle of the Australian legal system which may well be characterised as "skeletal"'.

110 In *Mabo v Queensland (No 2)* (1992) 175 CLR 1, Brennan J said (at [43]): 'However, recognition by our common law of the rights and interests in land of the indigenous inhabitants of a settled colony would be precluded if the recognition were to fracture a skeletal principle of our legal system.'

111 *Neowarra* [2003] FCA 1402, [484].

112 Gibson, above n 48, 242.

113 *Western Australia v Ward* (2002) 213 CLR 1, [579].

114 Ibid [580].

115 Ibid [581] (emphasis in original).

116 Ibid.

117 Paul Chartrand, *Reconciling Indigenous Peoples' Sovereignty and State Sovereignty*, AIATSIS Research Discussion Paper 26 (2009) <http://www.aiatsis.gov.au/research/docs/dp/DP26.pdf> at 30 November 2009.

118 Ibid 22.

119 Ibid.

120 Sarah Joseph, Jenny Schultz and Melissa Castan, *The International Covenant on Civil and Political Rights: Cases, Commentary and Materials* (2nd ed, 2004) [7.13]–[7.14]. For a general analyses of Indigenous sovereignty parallel to the sovereignty of the state from the perspective of international law see Federico Lenzerini, 'Sovereignty Revisited: International Law and Parallel Sovereignty of Indigenous Peoples' (2006) 42 *Texas International Law Journal* 155.

121 Allan Rosas, 'The Right of Self-Determination' in Asbjørn Eide, Catarina Krause and Allan Rosas (eds), *Economic, Social and Cultural Rights* (2nd rev ed, 2001) 111, 115; Joseph, Schultz and Castan, above n 120, [7.14].

122 Ana Filipa Vrdoljak, 'Self-Determination and Cultural Rights' in Francesco Francioni and Martin Scheinin (eds), *Cultural Human Rights* (2008) 41, 75.

123 Chartrand, above n 117, 19.

124 Canada, Royal Commission on Aboriginal Peoples, *Report of the Royal Commission on Aboriginal Peoples* (1996).

125 *Mitchell v Canada* [2001] 1 SCR 911.

126 Royal Commission on Aboriginal Peoples, above n 124, vol 2, 174–5, as quoted in Chartrand, above n 117, 9.

127 Chartrand, above n 117, 20.

128 *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976), art 1, which is formulated in language identical to that of art 1 of the *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976), reads as follows: 'All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development'. On art 1 CCPR, see Human Rights Committee, *General Comment No 12*, 21st sess (1984), reprinted in *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, 134, UN Doc HRI/GEN/1/Rev.6 (2003). Self-determination of peoples also appears in the *Charter of the United Nations*. See Rosas, above n 121, 113.

129 Thomas D Musgrave, *Self Determination and National Minorities* (1997) 90.

130 There is no universally acknowledged definition or list of criteria for a 'people' in international law. See Joseph, Schultz and Castan, above n 120, [7.06] on art 1 CCPR.

131 The Human Rights Committee on the one hand insists on a clear distinction between art 1 and art 27 of the CCPR, the latter explicitly protecting minority rights. See Human Rights Committee, *General Comment 23*, 50th sess, [2], UN Doc CCPR/C/21/Rev.1/Add.5 (1994). On the other hand, in its *Concluding Observations on Canada*, the Committee noted in the context of article 1(2) CCPR that 'the situation of the aboriginal peoples remains "the most pressing human rights issue facing Canadians"' and that the right to self-determination requires 'that all peoples must be able to freely dispose of their natural wealth and resources'. See Human Rights Committee, *Concluding Observations: Canada*, 65th sess, [8], UN Doc CCPR/C/79/Add.105 (1999).

132 Vrdoljak, above n 122, 71–2.

133 *International Labour Organization Convention Concerning Indigenous and Tribal Peoples in Independent Countries (No 169)*, opened for signature 27 June 1989, 1650 UNTS 383 (1989) (entered into force 5 September 1991).

134 Fourteen of the states that have ratified the Convention are in South America or Central America.

135 See UN General Assembly, 'United Nations Adopts Declaration on the Rights of Indigenous Peoples' (Press Release, 13 September 2007) <http://www.un.org/ga/61/news/news.asp?NewsID=23794> at 30 November 2009.

136 See Jenny Macklin, Minister for Families, Housing, Community Services and Indigenous Affairs, 'Statement on the United Nations Declaration on the Rights of Indigenous Peoples' (Press Release, 3 April 2009) <http://www.jennymacklin.fahcsia.gov.au/internet/jennymacklin.nsf/content/un_declaration_03apr09.htm> at 30 November 2009. See also Michael Dodson, 'Australian Government Announcement on the UN Declaration on the Rights of Indigenous Peoples' (Speech delivered at Parliament House, Canberra, 3 April 2009) <http://www.un.org/esa/socdev/unpfii/documents/Australia_endorsement_UNDRIP_Michael_Dodson_statement.pdf> at 30 November 2009; Australian Human Rights Commission, 'United We Stand – Support for United Nations Indigenous Rights Declaration a Watershed Moment for Australia' (Press Release, 4 April 2009) <http://www.hreoc.gov.au/about/media/media_releases/2009/21_09.html> at 30 November 2009.

137 Dodson, above n 136.

138 Chartrand, above n 117, 21.

139 See UN Permanent Forum on Indigenous Issues, *Declaration on the Rights of Indigenous Peoples: Frequently Asked Questions* <http://www.un.org/events/indigenous/2008/pdfs/declaration.pdf> at 30 November 2009.

140 Martin Girsberger, 'Legal Protection of Traditional Cultural Expressions: A Policy Perspective' in Christoph Beat Graber and

Mira Burri-Nenova (eds), *Intellectual Property and Traditional Cultural Expressions in a Digital Environment* (2008) 123, 133; Wend B Wendland, '"It's a Small World (After All)": Some Reflections on Intellectual Property and Traditional Cultural Expressions' in Christoph Beat Graber and Mira Burri-Nenova (eds), *Intellectual Property and Traditional Cultural Expressions in a Digital Environment* (2008) 150, 159; Christoph Beat Graber and Martin Girsberger, 'Traditional Knowledge at the International Level: Current Approaches and Proposals for a Bigger Picture that Include Cultural Diversity' in Hansjörg Seiler and Jörg Schmid (eds), *Recht des ländlichen Raums: Festgabe der Universität Luzern für Paul Richli zum 60. Geburtstag* (2006) 243, 260.

141 For TCE, the draft provisions are contained unaltered in the Annex of documents WIPO/GRTKF/IC/8/4 (8 April 2005); WIPO/GRTKF/IC/9/4 (9 January 2006); WIPO/GRTKF/IC/10/4 (2 October 2006); WIPO/GRTKF/IC/11/4(c) (26 April 2007); WIPO/GRTKF/IC/12/4(c) (6 December 2007).

142 At the eighth, ninth, 10th , 11th , 12th and 13th sessions of the IGC, the draft provisions were welcomed by some members and severely criticised by others. See Wendland, above n 140, 159.

143 See section II(A) above.

144 The main reason for upholding this separation is to facilitate the interoperability of the new instruments with existing IP instruments, which are divided into two main branches, protecting either copyrights (and neighbouring rights) for literary and artistic works or industrial property, encompassing patents, trademarks, geographical indications, etc.

145 Michael Dodson, Special Rapporteur and Member of the Permanent Forum on Indigenous Issues, *Report of the Secretariat on Indigenous Traditional Knowledge*, UN Doc E/C.19/2007/10 (2007); and, generally, Janke, above n 61. Nonetheless, during the IGC's deliberations Indigenous communities have expressed their concerns that the draft provisions would undermine their traditional laws and customs. Wendland, above n 140, 164.

146 According to art 1, TCE can be created either by communities or individuals and art 2 provides that Indigenous communities are the principal beneficiaries of protection. Wendland, above n 140, 171.

147 Anthony Taubman, 'Saving the Village: Conserving Jurisprudential Diversity in the International Protection of Traditional Knowledge' in Keith E Maskus and Jerome H Reichman (eds), *International Public Goods and Transfer of Technology Under a Globalized Intellectual Property Regime* (2005) 521, 563. This idea is respected in the open definition of TCE as provided by article 1.

148 Wendland, above n 140, 179.

149 For the example of the commercialisation of recording of traditional Central African forest music made by scholars and realised as anthropological and ethnomusicological documents see Steven Feld, 'Pygmy Pop: A Genealogy of Schizophonic Mimesis' (1996) 28 *Yearbook for Traditional Music* 1, 9–11; see also Janke, 1998, 54.

150 See section III(A) above.