

INDIGENOUS TRADITIONAL KNOWLEDGE AND NATIVE TITLE

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I INTRODUCTION

Indigenous traditional knowledge is difficult to define. It is a living system of information management which has its roots in ancient traditions. It relates to culture and artistic expression and to physical survival and environmental management. It controls individual behaviour, as it does community conduct. In short, it is a concept that essentially defies description in Western terms,¹ but which lies at the heart of Indigenous society. Despite the crucial nature of this knowledge, it remains virtually unprotected under the Australian legal system. The only safeguards that exist have been awkwardly extracted from Western doctrines which have distinctly different conceptual backgrounds from that of Indigenous traditional knowledge. Consequently, they provide only a partial and essentially inappropriate solution to the problem. This article addresses this fissure in the law and proposes that protection can, and indeed must, be found within the scope of native title.

In *Mabo v Queensland [No 2]* ('*Mabo*'),² by a six to one majority, the High Court held that the Indigenous occupants of the Murray Islands were 'entitled as against the whole world to possession, occupation, use and enjoyment of the lands of the Murray Islands'.³ The reasoning that led to this finding saw the abandonment of the doctrine of terra nullius and the acknowledgment of Indigenous rights to land which had existed prior to the acquisition of

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1 I use the term 'Western', however, the word 'eurocentric' is adopted by Marie Battiste and James (Sa'ke'j) Youngblood Henderson in *Protecting Indigenous Knowledge and Heritage: A Global Challenge* (2000) 22. They see eurocentrism as the imaginative and institutional context that informs contemporary scholarship, opinion and law and which has historically taken Europe as the centre of progress and innovation: 22.

2 (1992) 175 CLR 1.

3 Ibid 76.

sovereignty by the British Crown in the form of 'native title'.⁴ Native title was broadly defined by the Court as a recognition by the common law of the connection Indigenous people have with the land – a connection which must be ascertained as a matter of fact by reference to Indigenous law and custom.

Following the handing down of the judgment, the Commonwealth Government set up a Committee of Ministers charged with the responsibility of formulating a response to the legal and policy issues generated by the decision. The result was the enactment of the *Native Title Act 1993* (Cth) ('*Native Title Act*'), which has the objective of providing a framework for the recognition and protection of native title rights. The Act provides a definition of native title that draws directly on the common law position.⁵

In this article I argue that, despite two recent decisions of the Federal Court that would have us believe otherwise,⁶ native title law does have the scope to recognise and protect traditional knowledge. Further, I argue that, in fact, the language in *Mabo* and the *Native Title Act* demands this acknowledgment, and that anything less would make a mockery of the reasoning behind the 'recognition' of Indigenous law and custom that occurred in those two key legal developments. To support this conclusion, I investigate the nature of physical native title rights, and argue that they are better understood as consequential upon, or flowing from, knowledge rights. As it is traditional knowledge which informs Indigenous interactions with the land and environment, it is this knowledge which gives native title its character. I argue, therefore, that native title more closely resembles an intellectual right from which certain physical entitlements flow, and that native title should be not only broadened but reconceptualised.

In the final section of this article I refute the argument that knowledge rights cannot be recognised within the scope of native title because to do so would fracture a skeletal principle of our legal system.⁷ This argument, the only one which has been presented as a serious obstacle to recognition of Indigenous knowledge rights within native title law, is derived from Justice Brennan's reasoning in *Mabo* and demonstrates a desire to protect the essential doctrines of our legal system while acknowledging Indigenous law and custom.⁸ I argue that the wrong approach has been taken by the Federal Court, particularly in *Bulun Bulun v R & T Textiles* ('*Bulun Bulun*'),⁹ and that in fact, native title, when understood from an Indigenous perspective and appropriately conceptualised, fits comfortably within the skeleton of our legal structure as it is implied by the

4 These rights and interests will be recognised if they have not been extinguished by the valid exercise of sovereign power or the loss of connection with the land (whether by physical separation or the abandonment of traditional laws and customs).

5 Since this time, a series of major native title claims have passed through the Federal and High Courts and the *Native Title Act* has been exposed to one major set of amendments in the form of the *Native Title Amendment Act 1998* (Cth), which does not affect the key provisions of the *Native Title Act* discussed in this article.

6 *Bulun Bulun v R & T Textiles* (1998) 41 IPR 513; *Western Australia v Ward* [2000] 99 FCR 316.

7 See *Bulun Bulun v R & T Textiles* (1998) 41 IPR 513, 528.

8 See *Mabo* (1992) 175 CLR 1, 30.

9 (1998) 41 IPR 513.

principle of equality before the law – an integral part of our legal system, and a principle which *would* be fractured if traditional knowledge rights were not to be recognised. To begin with, however, I offer a brief introduction to the nature and characteristics of Indigenous knowledge systems – an essential starting point that has arguably not been embraced in recent Federal Court decisions.

II THE NATURE OF TRADITIONAL KNOWLEDGE

It is impossible for me to provide a complete explanation of the nature of Indigenous knowledge. This is partly because I come from an outside perspective, being non-Indigenous and having never lived within an Indigenous community. It is also because there exist within Australia hundreds of different Indigenous communities which now, or at one time, had their own language,¹⁰ and were adapted to their environment in different ways.¹¹ A further problem in understanding Indigenous knowledge from a Western point of view, is that it does not fit the processes of categorisation which we often use to separate culture, heritage, law, and the natural and spiritual worlds.¹² Indigenous knowledge systems are better understood as practical, personal and contextual units which cannot be detached from an individual, their community, or the environment (both physical and spiritual).¹³

That being said, a process of description and identification of common features across Indigenous communities seems to be a legitimate method for the purposes of this article. Michael Davis, in a recent paper on approaches to the protection of traditional knowledge, listed the following features as common characteristics of Indigenous knowledge systems:

- the holding of communal rights and interests in knowledge;
- a close interdependence between knowledge, land and spirituality;
- the passing down of knowledge through generations;
- oral exchange of knowledge, innovation and practices according to customary rules and principles; and

10 The Australian Bureau of Statistics reported in 1995 that 74 per cent of Aboriginal people in the Northern Territory can fluently converse in an Aboriginal language: Australian Bureau of Statistics, *National Aboriginal and Torres Strait Islander Survey 1994: Detailed Findings* (1995) 4.

11 Francesco Capotorti, *Study on the Rights of Persons Belonging to Ethnic, Religious and Linguistic Minorities* (1991) [561]: 'Precise universal definition ... would be nearly impossible to attain in the current state of global realities, and would in any event not contribute perceptibly to the practical aspects of defending groups from abuse'.

12 See Battiste and Youngblood Henderson, above n 1, 36.

13 The strength of Indigenous identity in Australia is demonstrated by reports released by the Australian Bureau of Statistics which show that nearly 75 per cent of all Aboriginal people recognise their traditional lands, 60 per cent identify with a clan, tribal or language group and 30 per cent live on their traditional lands: Neil Lofgren, 'Common Law Aboriginal Knowledge' (1996) 3 *Indigenous Law Bulletin* 4, 6.

- the existence of rules regarding secrecy and sacredness which govern the management of knowledge.¹⁴

Traditional knowledge may include knowledge of medicinal plants, animal habitats and behaviours, weather patterns, sacred places for ceremonial purposes and sources of sustenance (both physical and spiritual). It may include knowledge of social relationships, ceremonial practices, symbolic expression and the Dreamtime. Traditional knowledge may also link these things. For example, by establishing a relationship (through Dreamtime stories) between certain places and people – a connection which may be vital to the survival of a community, because it has the effect of imposing sustainable environmental practices or providing safe places for women to give birth.

One other point is important to make here: ‘traditional knowledge’ is an unfortunate term in some respects because ‘traditional’ may be seen as implying something old or outdated, or as standing in contrast to something vital and contemporary.¹⁵ However, the point has been made by many Indigenous and non-Indigenous commentators alike that the word ‘traditional’ should not imply that such knowledge remains frozen in the past. Traditional knowledge is best understood as a system which has developed over thousands of years and which is based on a complex fabric of existing practices and understandings.¹⁶

III THE CURRENT LACK OF PROTECTION

A Cultural Knowledge

Keeping in mind the holistic and fluid nature of traditional knowledge, it is fair to say that the legal framework in Australia does not adequately protect Indigenous interests in this area.¹⁷ The little protection there is primarily comes from an unsatisfactory forcing of Indigenous systems into existing intellectual

14 Michael Davis, ‘Indigenous Rights in Traditional Knowledge and Biological Diversity: Approaches to Protection’ (1999) 4(4) *Australian Indigenous Law Reporter* 1, 5.

15 See generally Henry Lewis, ‘Traditional Ecological Knowledge: Some Definitions’ in Nancy Williams and Graham Baines (eds), *Traditional Ecological Knowledge: Wisdom for Sustainable Development* (1993).

16 Davis, above n 14, 5. The point has also been made that continual adaptation has been an important survival strategy for Indigenous systems confronted with destructive colonial forces: Heather McRae, Garth Nettheim and Laura Beacroft, *Indigenous Legal Issues: Commentary and Materials* (2nd ed, 1997) 77. For example, traditional knowledge may incorporate the use of technology such as motorised fishing boats or cars for fishing and hunting.

17 The problem has been the subject of continual discussion, inquiry and recommendation. See especially Commonwealth, Department of Home Affairs and the Environment, Working Party on the Protection of Aboriginal Folklore, *Report of the Working Party on the Protection of Aboriginal Folklore* (1981); Australian Law Reform Commission, *The Recognition of Aboriginal Customary Law*, Report No 31 (1986) vols 1 and 2; Department of Aboriginal Affairs, *Report of the Review Committee: The Aboriginal Arts and Craft Industry* (1989); Commonwealth Attorney-General’s Department, *Stopping the Rip-offs: Intellectual Property Protection for Aboriginal and Torres Strait Islander Peoples* (Issue Paper, October 1994); Terri Janke, *Our Culture Our Future: Proposals for the Recognition and Protection of Indigenous Cultural and Intellectual Property* (1997).

property laws¹⁸ and equitable obligations.¹⁹ The approach is clearly untargeted and inappropriate, as a brief consideration of the case law reveals.

In 1940, Charles Mountford, an anthropologist, spent some time working and living with the Pitjantjatjara people of the Northern Territory. During his stay, ritual knowledge of deep cultural and religious significance was revealed to him. He recorded this information and later published it, without permission, in his book *Nomads of the Australian Desert*.²⁰ The Pitjantjatjara people knew that if the knowledge (intended only for the initiated) was published it would cause serious disruption to their culture and society, and so fought to prevent distribution of the information. They succeeded in establishing that the information had been given to Mountford in confidence and that publication was a breach of this confidence.²¹

This case illustrates, on the one hand, a successful use of breach of confidence law to protect Indigenous cultural knowledge, as the distribution of sacred material was prevented. On the other hand, it is limited to its facts. To establish an action in breach of confidence an applicant must show: that the information was of a confidential nature; that it was imparted in circumstances where there was an obligation of confidence; and that there was an unauthorised use of that information to the detriment of the applicant.²² Not all Indigenous knowledge is of a confidential nature. For example, ecological knowledge and knowledge expressed through artwork may not attract protection. Breach of confidence can therefore only provide protection for a limited part of Indigenous knowledge and only in certain circumstances. It does not provide appropriate and comprehensive protection.

In *M v Indofurn* ('*Indofurn*'),²³ a number of Indigenous artists successfully argued that their copyright had been breached after their paintings were copied from a catalogue, reproduced onto carpets in Vietnam, and then imported into Australia for distribution. The designs used imagery derived from each artist's traditional community knowledge.²⁴ The defendants relied on two main arguments: first, that the works were not 'original' precisely because they were

18 These intellectual property laws, developed in Europe in the 15th century, and fuelled by technological innovation (such as the invention of the printing press), evolved to reward individual invention, encourage trade development and protect economic interests. They consist of specific rights, granted by the state, to inventive or creative individuals to own, use or dispose of their intellectual property as a reward for sharing their contributions with society. In contrast, traditional knowledge systems have developed to facilitate survival and preserve cultural and social structures. The potential for conflict is obvious. See Jill McKeough and Andrew Stewart, *Intellectual Property in Australia* (2nd ed, 1997) 271.

19 The distinction must be made here between the recognition of a sui generis knowledge right under the banner of native title and the essentially unsuccessful attempts that have been made to protect traditional knowledge within an existing knowledge rights framework, such as copyright law.

20 Charles Mountford, *Nomads of the Australian Desert* (1976).

21 *Foster v Mountford* (1977) 29 FLR 233. Another case involving Mountford's work, *Pitjantjatjara Council and Peter Nguangu v Lowe* (Unreported, Supreme Court of Victoria, Crockett J, 26 March 1982) resulted in a similar decision.

22 *Coco v AN Clark (Engineers)* [1969] RPC 41.

23 (1994) 54 FCR 240.

24 Copyright laws are a specific set of rights (including the right to prevent others from reproducing works), granted by the *Copyright Act 1968* (Cth) solely to identifiable, individual author(s) of original works.

based on traditional motifs; and second, that there had been no substantial reproduction of the works because they had simplified the designs for use on the carpets. Justice von Doussa rejected both these arguments, noting the intricacy of the particular works, the amount of skill involved in producing them and the obvious similarities that existed between the originals and the reproductions. His Honour made a collective award of damages to the artists in recognition of the collective custodianship of knowledge in the works.

While the Indigenous claimants were also successful in this case, it is clear that the decision relied heavily on the specific works involved. If a court were to view a work as being less complex or skilled, or a reproduction as significantly altering an original design, while still relying on traditional knowledge, there would be no protection. In *Indofurn*, von Doussa J made a concerted effort, based on the particular facts, to recognise Indigenous knowledge systems. Another judge, in another fact scenario, may not show the same flexibility. While solutions can only be found by moulding Indigenous philosophies to fit Western legal structures (for example, the recognition of communal rights through an award of damages), no genuine²⁵ protection can exist.²⁶

In *Bulun Bulun*, a senior custodian of information expressed in a painting created by the plaintiff asserted that custodians of Indigenous traditional knowledge should have a right to bring an infringement action independently of the copyright owner.²⁷ This right would be an acknowledgment of their role in the creation of artworks. The Federal Court held that this recognition could be achieved through the construction of a fiduciary duty owed by the artist to their community, but that such a duty does not, without more, vest an equitable interest in the ownership of copyright in a community. The community's primary right, in the event of a breach of duty by a fiduciary, is an action *in personam* against the artist.²⁸ Therefore, if an Indigenous artist successfully protects their personal copyright, their community will have no right to intervene.

Once again, this decision is problematic because it fails to recognise the unique nature of Indigenous knowledge structures in attempting to incorporate them into existing legal doctrines. Instead of a real recognition of a different system of knowledge management, the decision distorts the Indigenous perspective by placing communal rights second to individual rights.²⁹ And because the equitable right in the community is only a derivative of the artist's

25 'Genuine' in this sense refers to the fact that when protection of Indigenous knowledge systems involves a process of selecting only certain characteristics of the system, such as communal ownership, for protection, the result will only ever be a piecemeal and limited safeguard.

26 The juxtaposition of the *Copyright Act 1968* (Cth), with its focus upon individual originality, and Indigenous traditions of communal ownership of designs and symbols, was recognised in *Yumbulul v Aboriginal Artist's Agency* (1991) 21 IPR 481, 490, where French J found 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'.

27 The native title claim made concurrently in this case is discussed in more detail below in Part VII(B).

28 *Bulun Bulun* (1998) 41 IPR 513, 533.

29 In that a custodian's rights are only derivative of a copyright action, whereas the reverse is true from an Indigenous perspective, which would see the custodian as the primary rights holder.

copyright, it is also exposed to all the deficiencies discussed in relation to *Indofurn*.³⁰

B Bioprospecting³¹

There is no case law to illustrate even partly successful attempts by Indigenous Australians to protect their environmental, medical or nutritional traditional knowledge. An example of the exploitation occurring is an agreement signed between the Western Australian Government and Amrad, a Victorian pharmaceutical company, ensuring Amrad's access to a plant known as smokebush, which may prove useful in developing an anti-AIDS drug. There is no provision in this agreement for benefits to flow to Indigenous communities living on or owning land in the areas in which smokebush is found, despite the fact that that smokebush is known to be used medicinally by the Indigenous people concerned.³² The same pharmaceutical company has also signed a confidential agreement with the Northern Land Council and the Tiwi Land Council to enable research into the medicinal properties of plants found on Aboriginal lands in the Northern Territory.³³ Terri Janke, in her recent proposal for recognition and protection of Indigenous cultural and intellectual property, suggests that another major concern is the use of traditional nutritional knowledge which is of increasing interest to the food industry.³⁴

In these areas, the *Patents Act 1990* (Cth), the only potential solution, does not provide the broad protection that Indigenous people require for their traditional knowledge. The Act reflects the economic focus of Australian intellectual property laws, and is unable to protect knowledge until it is turned into an economically viable 'invention' through a process of 'manufacture' which is novel and involves an 'inventive step'.³⁵

30 There are also problems of material form and protection in perpetuity that arise when attempts are made to protect traditional knowledge under copyright law.

31 Literally, this means the exploration of an area in search of organic matter. However, the word has been adopted in a more colloquial sense to describe the way in which scientists are now sweeping the globe and its various populations (in particular, Indigenous communities) in search of organic material and ways of using organic material (such as traditional medicines produced from native plants or animals) in the hope that they will discover a substance or process which can be developed into a commodity.

32 Stephen Gray, 'Vampires Around the Campfire: Indigenous Intellectual Property and Patent Laws' (1997) 22 *Alternative Law Journal* 60, 60.

33 Henry Fourmile, 'Protecting Indigenous Intellectual Property Rights in Biodiversity' in *Ecopolitics IX: Conference Papers and Resolutions* (1995) 39. According to one study which surveyed 119 commercial, plant-based drugs, 74 per cent of these were previously known or used in traditional medicine: Norman Farnsworth, 'Screening Plants for New Medicines', cited in Janke, above n 17, 27.

34 See Janke, above n 17, 27, where she mentions the book and television series *The Bush Tucker Man*, as an example of the uncontrolled use of information with no return for the original custodians of the knowledge.

35 *Patents Act 1990* (Cth) s 18. Ironically, however, it does provide protection for patentees who create products based on traditional knowledge. Copyright law and design law also appear incapable of providing any holistic protection for environmental knowledge: Gunnar W G Karnell 'Protection of Results of Genetic Research by Copyright or Design Rights?' [1995] 17 *European Intellectual Property Review* 355, 357.

This brief discussion reveals a disturbing lacuna in our legal system.³⁶ Indigenous knowledge systems form the basis of Indigenous societies – societies which have already been weakened, and in many places destroyed, by colonisation – and yet, no comprehensive protection for this vital knowledge exists. Breach of confidence may provide a solution, but only in very specific circumstances. Senior custodians of knowledge may be able to rely on a fiduciary duty to protect their heritage, but only when an Indigenous artist does not pursue their own copyright action. Copyright law may provide some protection, but only when its preconditions, developed to protect Western notions of creation, are met. Patent laws are essentially inaccessible and inappropriate for Indigenous people. I would argue that leaving a gap in the law such as this involves an acceptance of unequal treatment before the law. While one section of society has their particular intellectual or knowledge based rights protected under appropriate laws, another group has the same rights essentially ignored,³⁷ despite the fact that a potential solution *can* in fact be found within native title law.

IV THE SCOPE OF NATIVE TITLE

It has been repeatedly noted by commentators that native title can, and does, encompass a set of rights that go beyond real property rights.³⁸ David Bennett has commented that, '[a]s important as land is, the foundation of native title is broader than "real estate"'.³⁹ In the leading judgment in *Mabo*, Brennan J stated:

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 with reference to those laws and customs.⁴⁰

Justices Deane and Gaudron further observed that it is preferable 'to recognise the inappropriateness of forcing native title to conform to traditional common law concepts and to accept it as *sui generis* or unique'.⁴¹

Subsequent native title cases have accepted this reasoning. In *Ward on behalf of the Miriuwung and Gajerrong People v WA and NT* ('*Ward*'),⁴² Lee J

36 A complex framework of cultural heritage legislation also exists (for example, the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth) and the *National Parks and Wildlife Act 1974* (NSW)), which provides protection for Aboriginal and Torres Strait Islander heritage. However, there is little uniformity within this legislation, ownership of Indigenous cultural heritage and property is not vested in Indigenous communities, and the focus of protection is placed on tangible cultural property.

37 For further discussion of equality before the law see below Part VII.

38 Davis, above n 14, 6; Stephen Gray, 'Wheeling, Dealing and Deconstruction: Aboriginal Art and Land Post-*Mabo*' (1993) 3 *Arts and Entertainment Law Review* 5; Kamal Puri, 'Copyright Protection for Australian Aborigines in the light of *Mabo*' in Margaret Stephenson and Suri Ratnapala (eds), *Mabo: A Judicial Revolution* (1993) 132, 159.

39 David Bennett, 'Native Title and Intellectual Property' (Issues Paper No 10, Native Title Research Unit, Australian Institute of Aboriginal and Torres Strait Islander Studies, April 1996) 5.

40 (1992) 175 CLR 1, 58.

41 *Ibid* 89.

42 (1998) 159 ALR 483.

recognised that native title does not conform to common law concepts of property and is to be regarded as 'sui generis'.⁴³ In the High Court case *Yanner v Eaton*, the joint majority judgment emphasised that '[n]ative title rights and interests must be understood as what has been called "a perception of socially constituted fact"'.⁴⁴ Justice Gummow referred to communal native title as 'the collective rights, powers and other interests which may be exercised in accordance with the community's traditional laws and customs'.⁴⁵ In *The Commonwealth v Yarmirr* ('*Croker Island Case*'), Merkel J concluded that native title is a recognition of 'the relationship between the community of Indigenous people and the land defined by reference to that community's traditional laws and customs'.⁴⁶

Section 223 of the *Native Title Act* states:

- (1) The expression 'native title' or 'native title rights and interests' means the communal, group or individual rights and interests of Aboriginal peoples or Torres Strait Islanders in relation to land or waters, where:
- (a) the rights and interests are possessed under the traditional laws acknowledged, and the traditional customs observed, by the Aboriginal peoples or Torres Strait Islanders; and
 - (b) the Aboriginal peoples or Torres Strait Islanders, by those laws and customs, have a connection with the land or waters; and
 - (c) the rights and interests are recognised by the common law of Australia.
- (2) Without limiting subsection (1), 'rights and interests' in that subsection includes hunting, gathering, or fishing rights and interests.

The definition of native title offered in the *Native Title Act* links back to the common law definition of native title which has its genesis in Justice Brennan's statement in *Mabo*.

From the case law and statutory references it can be seen that native title rights are a completely unique concept and that their nature and scope has not been specifically outlined, but is left to be established in each case according to the customs and traditions of the relevant native title claimant group.⁴⁷ The definition makes no specific exclusions; the only limitations on the variety of traditional interests or rights that can be recognised are those in s 223(1) of the *Native Title Act*: they must be possessed under the traditional laws acknowledged and observed by native title claimants, they must connect the claimants to the land, and they must be recognised by the common law.

However, some specific rights have been included in the *Native Title Act*: the rights or interests in hunting, gathering and fishing. This inclusion, which is not intended to limit the broad definition,⁴⁸ clearly takes native title rights beyond real property rights, or land rights, and marks an intention by the Federal

43 Ibid 498-9. His Honour concluded that '[n]ative title at common law is a communal "right to land" arising from the significant connection of an Indigenous society with land under its customs and culture': 508.

44 (1999) 166 ALR 258, 270 (Gleeson CJ, Gaudron, Kirby and Hayne JJ).

45 Ibid 281.

46 (1999) 168 ALR 426, 491. The Privy Council has also recognised the sui generis nature of Indigenous rights: *Amoudu Tijani v Secretary Southern Nigeria* [1921] 2 AC 399, 409 (Viscount Haldane).

47 See Chris Cunneen and Terry Libesman, *Indigenous People and the Law in Australia* (1995) 114.

48 See *Native Title Act 1993* (Cth) s 223(2).

Parliament to recognise the unique character of native title. A body of case law which has followed the decision in *Mabo* further expresses this intention, and provides examples of the types of rights that have so far been recognised by the common law as sui generis native title rights.

In *Yanner v Eaton*, the High Court found that the appellant was not directly affected by the provisions of the *Fauna Conservation Act 1974* (Qld), which regulates the taking of wild animals, and could use traditional hunting methods to catch juvenile estuarine crocodiles as an exercise of his native title rights.⁴⁹ The High Court in reaching this decision noted that it was a traditional custom of the appellant's clan to hunt juvenile crocodiles rather than adult crocodiles, because they had tribal totemic significance, drawn from spiritual belief.⁵⁰ The majority decision also drew attention to s 211 of the *Native Title Act*, which lists a class of activities that would normally require a permit or license but which may be carried on by native title holders without legislative permission. The class of activities interestingly includes hunting, fishing, gathering and cultural or spiritual activities.⁵¹ This not only supports the intention expressed in s 223(2) that the specific rights mentioned are not intended to limit the broad nature of native title, but seems to broaden its scope even further.⁵²

In the *Croker Island Case*, the central issue was whether the common law could recognise native title in respect of the sea. At first instance, Olney J found that communal native title is recognisable in relation to the sea and sea bed, at least within the twelve nautical mile limit of Australia's territorial waters.⁵³ The decision was upheld on appeal to the Full Federal Court, and the applicant's rights were held to include: the right to fish, hunt and gather within the claim area for the purposes of satisfying personal, domestic and non-commercial communal needs (including the need to observe traditional cultural and spiritual laws and customs); a right of access to the sea, and sea-bed, for the purposes of visiting and protecting places within the claim area which were of cultural or spiritual importance; and, most significantly, the right to safeguard cultural and spiritual knowledge. This collection of rights confirms the unique and self-generating character of native title rights.⁵⁴

The decision of the Federal Court in *Western Australia v Ward* ('*Miriuwung-Gajerrong Case*')⁵⁵ is particularly interesting. Justice Lee, at first instance, listed the rights which constituted native title in the case at hand as including: 'the

49 (1999) 166 ALR 258, 258 (Gleeson CJ, Gaudron, Kirby and Hayne JJ).

50 Ibid 259.

51 Section 211(3)(a)(d).

52 Section 211(3)(e) leaves the possibility of more detailed and additional activities being recognised as it includes 'any other kind of activity prescribed for the purposes of this paragraph'. Interestingly, in Canada, a distinction is increasingly being drawn between 'Aboriginal title' and 'Aboriginal rights'. This was first seen in *R v Sparrow* [1990] 1 SCR 1025, where a right to fish was recognised without referring to Indigenous title to the land. Again in *R v van der Peet* [1996] 2 SCR 507 and in *Delgamuukw v British Columbia* [1997] 3 SCR 1010, the court noted that Aboriginal rights can exist independently of Aboriginal land title: 138 (Lamer CJ, Cory and Major JJ concurring).

53 *Yarmirr v Northern Territory* (1998) 82 FCR 533, 545.

54 An appeal from the Full Court's decision was lodged before the High Court, and the case was heard from 6-9 February 2001. Judgment is reserved.

55 (2000) 99 FCR 316.

right to maintain and protect places of importance under traditional laws, customs and practices in the “determination area” and ‘the right to maintain, protect and prevent the misuse of cultural knowledge of the common law holders associated with the “determination area”’.⁵⁶ (This last right is a direct recognition of the ability of native title to encompass a general right of protection for traditional knowledge.) However, on appeal, the majority of the Federal Court held that the right to protect cultural knowledge could not be classified as a ‘right in relation to land that can be the subject of a determination’,⁵⁷ yet offered no real explanation for this finding. Justice North (in dissent) found that the anthropological evidence in the case highlighted ‘how the secular and spiritual aspects of the Aboriginal connection with land are twin elements of the rights to land’⁵⁸ and upheld Justice Lee’s decision.⁵⁹ With respect, the majority’s reversal of Justice Lee’s finding is worrying, and it is interesting to note that the Miriung and Gajerrong people have been granted special leave to appeal to the High Court on this point.

With the exception of the majority’s decision in the *Miriung-Gajerrong Case*, the case law discussed here suggests that the right to protect traditional knowledge from misuse or exploitation can fit comfortably within the scope of native title. While it is not expressly included, neither are a whole series of other rights which have been recognised as part of native title both under the *Native Title Act* and within the case law. If the courts were to recognise some rights and not others in an apparently random manner, this would seem to undermine Justice Brennan’s conclusion that native title rights are sui generis and are given their content by the traditional laws and customs of Indigenous claimants.

V SATISFYING THE DEFINITION OF NATIVE TITLE

While it is relatively easy to argue that native title has the scope to incorporate traditional knowledge rights, it can also be argued that the case for incorporation is actually assisted by the definition of native title (ie the three central requirements of native title) set out in the *Native Title Act*.

The only limits on native title rights established by the *Native Title Act* are that:

- (1) any rights and interests recognised must be possessed under the traditional laws acknowledged, and the traditional customs observed, by native title claimants;
- (2) native title claimants, by those laws and customs, must have a connection with the land or waters; and
- (3) those rights and interests must also be recognised by the common law.⁶⁰

56 *Ward v Western Australia* (1998) 159 ALR 483, 639-40.

57 *Miriung-Gajerrong Case* (2000) 99 FCR 316, 483.

58 *Ibid* 540.

59 *Ibid* 542.

60 *Native Title Act 1993* (Cth) s 223; see above n 52 and accompanying text.

First, let us assume that a group of native title claimants exists who can establish that they maintain a system of traditional laws and customs which are acknowledged and observed within their community, and that their claim is based on those laws and customs.⁶¹

Secondly, it must be established that, by those laws and customs, the group has a connection with the land or waters over which title is claimed. Across Indigenous communities in Australia a link clearly exists between law, custom and knowledge, and the land. According to Ronald Berndt:

Life came from and through the land, and was manifested in the land. The land was not an inanimate 'thing', it was and is alive ... the precious essence we call life came out of the Dreaming, mediated through spirit beings and sustained in its material form by what the land had to offer ... Aboriginal religion is essentially land-minded and land-centred ... mythic beings are specifically linked with particular places and sites. Their adventures as told in song and myth, and danced out in ritual, covered all aspects of the land over which they travelled, shaping and naming and humanising what there is within that land today.⁶²

Kado Muir states: 'the consideration of physical connection as a separate heading to spiritual relationships with country is entirely artificial as the spiritual relationship of Aboriginal people to country permeates their entire interaction with country'.⁶³

The picture that emerges on examination of the relationship between law and custom, traditional knowledge and the land, is one of a body of information which is focused on the land and is expressed through ritual and ceremony, such as song, dance and art. Let us imagine that the group of claimants seeks to have their traditional knowledge, as expressed in their artwork, protected. Stephen Gray has examined the relationship between art and land in Aboriginal law based on the analysis of Yolngu art undertaken by anthropologist Howard Morphy.⁶⁴ Gray found that the connection between art and the land in Yolngu culture is so strong that one could assert with some justification that art and land are the same, or at least, as Morphy puts it, that they are 'two sides of the same coin'.⁶⁵ Gray goes on to relate how particular designs are specific to certain clans and certain locations within their territory. The knowledge contained within them is divulged only at certain times to certain individuals as a form of control by clan members over their land. The knowledge is power over the land, and the knowledge is held within the design.⁶⁶ Thus the relevant knowledge is possessed as part of traditional law and custom and connects the holders of the knowledge to the land.

61 For example, the Miriung and Gajerrong people claiming native title in the *Miriung-Gajerrong Case*.

62 Ronald M Berndt, 'Traditional Concepts of Aboriginal Land' in Ronald M Berndt (ed), *Aboriginal Sites, Rights and Resource Development* (1982) 2.

63 Kado Muir, 'This Earth has an Aboriginal Culture Inside: Recognising the Cultural Value of Country' (Issues Paper No 23, Native Title Research Unit, Australian Institute of Aboriginal and Torres Strait Islander Studies, July 1998) 5.

64 Howard Morphy, *Ancestral Connections: Art and an Aboriginal System of Knowledge* (1991).

65 Gray, above n 38, 7.

66 *Ibid.*

The final requirement, that native title rights or interests must also be recognised by the common law, may initially appear to be only a small hurdle as the reasoning in *Mabo* seems to suggest that any number of rights or types of rights can be recognised: according to Brennan J, native title must be simply ascertained as a matter of fact with reference to traditional laws and customs. In *Mabo*, the Court also took the view, following the authority of Privy Council cases,⁶⁷ that the traditional interests of Indigenous Australians were to be respected even though those interests were of a kind as yet unknown to the common law. In other words, the High Court held that all native title rights were sui generis in character, could not be equated with previously existing common law doctrines, and yet could be recognised by the common law.⁶⁸ This reasoning (supporting the recognition of novel rights) was not specifically confined to novel land rights, and thus there appears little reason why it cannot be applied to the recognition of knowledge rights, which are in fact integral to Indigenous relationships with the land.

Consider the novel nature of the native title rights already recognised by the courts which, although they do not depend on Crown grant, are rights to land visible to the common law. The decision in the *Croker Island Case* in particular demonstrates the incredible flexibility of the common law. The finding in that case, that native title rights to the sea and sea-bed will be recognised to at least the twelve mile territorial limit, was arrived at despite the fact that the common law does not, of itself, apply beyond the low tide watermark. Justice Olney, at first instance, specifically based the recognition of native title in the case on the expansion of the sphere of visibility of the common law resulting from the operation of the *Native Title Act*.⁶⁹

This reasoning offers an interesting foundation upon which to build an argument for the recognition of traditional knowledge rights. Even if it could be argued that the common law does not directly recognise Indigenous knowledge rights because they are somehow more novel than Indigenous land rights, and so beyond the visibility of the law, the counter-argument could be made that the operation of the *Native Title Act* in fact extends the operation of the common law by its implicit acknowledgment of the sui generis nature of native title, enabling it to recognise and embrace new rights.⁷⁰

However, in the recent decision in the *Miriuwung-Gajerrong Case*, Beaumont and von Doussa JJ appeared to reject such an argument by overturning Justice Lee's finding that the right to maintain, protect and prevent the misuse of cultural knowledge could be considered a native title right.⁷¹ Their Honours referred to the High Court decision in *Fejo v Northern Territory* ('*Fejo*') where the majority stated that 'the rights of native title are rights and interests that relate to the use of the land by the holders of native title'.⁷² Justices Beaumont

67 (1992) 175 CLR 1, 54.

68 Puri, above n 38, 156.

69 *Yarmirr v Northern Territory* (1998) 82 FCR 533, 542.

70 See above Part IV.

71 (2000) 99 FCR 316, 483.

72 (1998) 195 CLR 96, 128.

and von Doussa concluded that the common law can only 'protect the physical enjoyment of rights and interests that are of a kind that can be exercised on the land, and does not protect purely religious or spiritual relationships with the land'.⁷³ Their Honours stated that a right to maintain, protect and prevent the misuse of cultural knowledge is not a burden on the radical title of the Crown, but rather a personal right residing in the custodians of cultural knowledge.

This decision lies in stark contrast with the determination in the *Croker Island Case* which, in addition to its flexible approach to common law recognition, granted the specific right to 'safeguard' cultural knowledge. This protection was recognised by Olney J at first instance,⁷⁴ and upheld on appeal to the Full Federal Court where it was said that the right to access the sea and sea-bed within the claimed area, for the purpose of safeguarding the cultural and spiritual knowledge of the native title holders, was to be considered a native title right. While this right is based on access, it reveals the capacity of the common law to acknowledge a right of protection of Indigenous knowledge.

The decision in the *Miriuwung-Gajerrong Case* in comparison appears, with respect, unpersuasive. Justices Beaumont and von Doussa did not advert to their earlier decision in the *Croker Island Case*, and did not discuss the inseparable nature of physical native title rights and traditional knowledge, choosing instead to rely on the High Court reasoning in *Fejo*. They also offered no explanation for labelling communal knowledge rights as 'personal'. The conclusion, it is submitted, is that the approach taken in the *Miriuwung-Gajerrong Case* is arbitrary in its view of the development of Indigenous rights. I would argue that the common law clearly has the capacity to recognise and protect knowledge rights, and it is unclear why the Court appears to have chosen not to in this case.

The conditions required to prove a native title right can clearly be met by Indigenous claimants seeking to protect their traditional knowledge. Where the knowledge still exists and is used, it unquestionably connects Indigenous communities to the land, and in fact *is* the link between Indigenous people and the land. The common law has the capacity to recognise the sui generis nature of Indigenous knowledge systems just as it has recognised the sui generis nature of the physical relationship Indigenous people have with the land. The only real, express limitation on recognition is Justice Brennan's insistence that the recognition of a novel interest be restricted by the need to protect the integrity of the skeleton of principle that holds the Australian legal system together (a limitation discussed below),⁷⁵ although this limitation was not employed as the basis of the decision of the majority in the *Miriuwung-Gajerrong Case*.

73 *Miriuwung-Gajerrong Case* (2000) 99 FCR 316, 348.

74 *Yarmirr v Northern Territory* (1998) 82 FCR 533, 562.

75 Apart from the skeleton of principle, the only other impediment to recognition by the common law will arise where the traditional laws and customs are 'so repugnant to natural justice, equity and good conscience that judicial sanctions under the new regime must be withheld': *Mabo* (1992) 175 CLR 1, 61 (Brennan J). It is hard to imagine that this could be applicable in the case of recognition of traditional knowledge rights.

VI NATIVE TITLE RIGHTS ARE BASED ON TRADITIONAL KNOWLEDGE

I have argued that the definition of native title has the potential to encompass knowledge rights, and that recognition can be justified using the criteria in the *Native Title Act*. In this section, I will argue that, in fact, native title rights are given their character and substance by traditional knowledge and that they are, in essence, knowledge rights. In this sense, physical native title rights are themselves better understood as consequential upon, or flowing from, knowledge rights, rather than as a disconnected set of independent rights to do certain things on the land or water.

David Bennett has suggested that it is Indigenous intellectual property that distinguishes a native title right to hunt, fish or gather from another form of right to do the same:

Traditional or customary hunting, fishing or gathering are specific processes ... [I]t is conducting these activities in accordance with traditional practices that separates them from other forms of the same activities. Or to put this another way, it is the intellectual property of a group in terms of their traditional knowledge which divides a native title right to hunt, fish or gather from other forms of the same activity.⁷⁶

So, for example, what is it that distinguishes a native title right to fish, as was recognised in the *Croker Island Case*, from the common law public right to fish in the same waters? The Federal Court's language suggests that it is the traditional laws and customs of the native title claimants: 'The native title rights and interests ... are the rights and interests of the common law holders, in accordance with and subject to their traditional laws and customs to fish, hunt and gather within the claim area'.⁷⁷ The same type of reasoning is evident in the majority's judgment in *Yanner v Eaton* in relation to the native title right to hunt estuarine crocodiles.⁷⁸ Justice North in the *Miriuwung-Gajerrong Case* commented that a right to hunt is meaningless without a place to hunt.⁷⁹ In the same way, a right to hunt is meaningless without the knowledge of how to hunt.

Bennett explains that the kind of knowledge that generates a native title right to hunt or fish may include what and what not to hunt, when and when not to hunt, and where and where not to hunt.⁸⁰ In response to this, it could be argued that this type of knowledge is not an expression of Indigenous law but simply knowledge acquired through time spent living in a certain area and environment,

76 Bennett, above n 39, 4.

77 *Croker Island Case* (1999) 168 ALR 426, 601-2.

78 See generally (1999) 166 ALR 258 (Gleeson CJ, Gaudron, Kirby and Hayne JJ).

79 (2000) 99 FCR 316, 515.

80 Bennett, above n 39, 4. For example, among the Yanyuwa of Borroloola in the Northern Territory there is total prohibition on hunting the 'quiet' water snake because it is thought to maintain waterholes: Richard Baker 'Traditional Aboriginal Land Use in the Borroloola Region' in Nancy Williams and Graham Baines (eds), *Traditional Ecological Knowledge: Wisdom for Sustainable Development* (1993) 139. Among the Aranda, totemism and the concern for the preservation of species had the effect of limiting hunting during breeding seasons and droughts: David Bennett, 'Animal Rights and Aboriginal Concepts' in David Croft (ed), *Australian People and Animals in Today's Dreamtime: The Role of Comparative Psychology in the Management of Natural Resources* (1991) 66.

that is, knowledge that does not rely on Indigenous law or custom but which arises out of a relationship with a place acquired over time. It could be said that fishermen exercising their public common law right to fish have their own knowledge of what, when and where to hunt. Such an argument would be valid in its identification of the relationship Indigenous people have developed with place over time, but would ignore the integrated nature of Indigenous knowledge, which links the legal and physical to the spiritual. It would ignore the rituals which may be involved in learning and expressing the knowledge of when and where to fish and the totemic relationship to animals such as was recognised in *Yanner v Eaton*. It is difficult to imagine a traditional physical right to hunt or fish existing without the knowledge which gives it its content. It can therefore be argued that physical native title rights derive their legitimacy from traditional knowledge rather than vice versa.⁸¹

This conclusion has several implications. The first is that, in a sense, Indigenous knowledge rights are already implicitly protected through the recognition and protection of their physical expression. This is true in so far as claimants are given the right to express the knowledge by, for example, hunting and fishing, and to pass the knowledge on to others who can maintain the tradition. However, it ignores the fact that other cultural expressions of the knowledge, such as paintings, dance, ritual and the protection of sacred sites, remain unprotected but still play a fundamental role in maintaining the knowledge which feeds the right.

The second implication is that native title rights are better understood as knowledge rights from which flow certain physical rights. Consider Western copyright law. Copyright is an intellectual right from which flows certain physical rights such as the right to exclusively reproduce a work, perform it in public or make an adaptation.⁸² It is an intellectual or knowledge right, but creates certain physical rights, which derive their legitimacy from the intellectual input involved in creating works.

Consider also the rights conferred under patent laws and the way these have been engaged. Generally speaking, patent law constructs an intellectual, personal property right, from which flows physical rights such as the right to make, sell, hire or otherwise dispose of patented products, or a product generated by a patented method or process.⁸³ In the United States, these laws have been used to register a pesticide derived from the seeds of a neem tree, a plant native to India (the pesticidal qualities of which have been known and relied upon for centuries by the Indigenous people of the area).⁸⁴ In Australia, the example of Amrad's

81 The Australian Law Reform Commission, Mary Fisher, 'Aboriginal Customary Law: The Recognition of Traditional Hunting, Fishing and Gathering Rights', Reference on Aboriginal Customary Law Research Paper No 15 (1984).

82 See the *Copyright Act 1968* (Cth) s 31(1)(a) — this section relates to literary, dramatic and musical works. Consider also the physical rights that flow from intellectual property rights conferred under the *Plant Breeder's Rights Act 1994* (Cth) s 11: a plant breeder gains the right to produce and reproduce a plant, condition it for the purpose of propagation, sell the plant, and import and export the material. These are all physical rights flowing from a knowledge right.

83 See the *Patent Act 1990* (Cth) s 13, sch 1.

84 McKeough and Stewart, above n 18, 336.

development of an anti-AIDS drug from the smokebush has already been mentioned.⁸⁵ These examples reveal that the law recognises certain physical rights as being consequential upon a knowledge right in the context of patent law, but does not recognise a similar right for the traditional knowledge held by Indigenous people, who are often the source of the information which provides the basis for patented products. Constructing native title as a bundle of disparate physical rights allows for this type of exploitation.

Just as copyright and patent rights draw their legitimacy from the intellectual input involved in creating works or products, physical native title rights draw their legitimacy from Indigenous knowledge. One cannot acquire the right to exclusively reproduce a work under copyright law unless a special relationship can be established with the work based on knowledge and intellectual processes. Similarly, a native title right to fish will not be recognised unless a claimant can prove they have a special relationship with the place where they fish: a special relationship which is based on traditional knowledge. The failure of the courts to recognise this similarity has resulted in the uneasy emergence of a bundle of physical rights which seem to derive their legitimacy from an uncomfortable analogy with rights already present in our legal matrix rather than through a recognition of their sui generis, knowledge based character.⁸⁶

This current approach is potentially damaging both to Indigenous rights and to the integrity of our legal system. It is damaging to Indigenous rights because it limits the types of interests that can be claimed to those which can be made analogous to Western concepts (despite the broad provisions of the *Native Title Act*). It is damaging to the integrity of the legal system because, as native title law develops, it is increasingly harder to justify why the law is apparently capable of recognising some rights and not others. Just as it would be very difficult to properly justify the recognition of a right to reproduce a work under copyright law when it was not sourced in the intellectual nature of the right, it is very difficult to justify physical native title rights which have been disconnected from their foundation: Indigenous knowledge. Pursuing such an approach to native title is likely to eventually leave native title law looking like an artificial and unsupported construct of the common law, rather than a justifiable recognition of sui generis Indigenous rights.⁸⁷ To avoid such a result, I believe that native title rights must be recognised and reconceptualised as knowledge rights from which flow physical rights.⁸⁸

85 See above n 32 and accompanying text.

86 For example, an independent right to walk onto land and visit a certain site is arguably understood and accepted because it bears some resemblance to an easement.

87 Consider the division in the Federal Court in the *Miriuwong-Gajerrong Case* and the majority's awkward conception of native title as a 'bundle of rights' which are vulnerable to 'partial extinguishment'.

88 An acceptance of the characterisation of native title as a knowledge right may also lead to the acceptance of native title rights as capable of surviving physical extinguishment, if knowledge can be proven to survive within a community. In this context, it is interesting to again consider the Canadian authorities which accept that Indigenous rights can exist independently of Indigenous land interests per se: see above n 52.

VII PROTECTING THE SKELETON OF PRINCIPLE

Having argued that native title is more appropriately characterised as a knowledge right upon which the physical rights that have been recognised thus far by the courts are based, I will now seek to refute the argument that knowledge rights cannot be recognised within the scope of native title because to do so would fracture the skeleton of principle of our legal system. It is submitted that this argument, relied upon by von Doussa J in *Bulun Bulun*, is the only significant obstacle to recognition of Indigenous knowledge rights which has been offered by the courts. However, an examination of its content and its application in *Bulun Bulun* reveals it to be no impediment at all. In fact, I will argue in conclusion that it is *non*-recognition of Indigenous knowledge rights that would ultimately fracture the integrity of our legal system.

A The Construction of the ‘Skeleton of Principle’ Rule

While *Mabo* was a radical decision in many respects it also expressed a conservative approach to recognising Indigenous rights. Running through the judgments is a clear desire to find a solution that would provide acknowledgment within the existing legal framework. One expression of this restraint was Justice Brennan’s development of the ‘skeleton of principle’ rule.⁸⁹ In careful terms, his Honour outlined why his judgement would not be a radical departure from the principles on which the Australian legal system is based:

In discharging its duty to declare the common law of Australia, this Court is not free to adopt rules that accord with contemporary notions of justice and human rights if their adoption would fracture the skeleton of principle which gives the body of our law its shape and internal consistency.⁹⁰

His Honour went on to state:

It is not possible, a priori, to distinguish cases that express a skeletal principle and those which do not, but no case can command unquestioning adherence if the rule it expresses seriously offends the values of justice and human rights (especially equality before the law) which are aspirations of the contemporary Australian legal system. If a postulated rule of the common law expressed in earlier cases offends those contemporary values, the question arises whether the rule should be maintained and applied. Whenever such a question arises, it is necessary to assess whether the particular rule is an essential doctrine of our legal system and whether, if the rule were to be overturned, the disturbance to be apprehended would be disproportionate to the benefit flowing from the overturning.⁹¹

In my opinion, Brennan J is suggesting that when a new principle is argued for (for example, the recognition of indigenous traditional knowledge rights as part of native title), if it conflicts with a fundamental principle (or principles) which can be identified as skeletal principles of the Australian legal system, then the general disturbance caused by overruling those fundamental principle(s), either generally or in a particular case, must be weighed against the potential benefits flowing from the recognition of the new principle. In this section I will argue

⁸⁹ *Mabo* (1992) 175 CLR 1, 30.

⁹⁰ *Ibid* 29.

⁹¹ *Ibid* 30.

that if recognising Indigenous traditional knowledge rights is equated with upholding the fundamental principle of equality before the law (as I believe it can be), then any principles with which it comes into conflict must be weighed against the requirement of equality before the law – a balancing process that often (understandably) favours equality.

B Application of the Rule in *Bulun Bulun*

In *Bulun Bulun*, the custodians of the traditional knowledge at issue in the case argued that they had an interest in artistic works which used their knowledge as an incident of their native title interest in the land to which the knowledge related. There had been no determination of native title in the relevant area at the time of the decision and so von Doussa J was unable to make any direct finding in relation to this argument. However, he did discuss the claim in obiter, referring to Justice Brennan's findings in *Mabo* that

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.⁹²

Justice Von Doussa went on to state that,

[i]n order to be successful, the applicants' foreshadowed argument that a right of ownership arises in artistic works and copyright attaching to them as an aspect of native title would appear to require that the Court accept that the inseparable nature of ownership in land and ownership in artistic works by Aboriginal people is recognised by the common law. The 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' and stand in the road of acceptance to the foreshadowed argument.⁹³

Although only dicta, it is useful to examine this argument, as it provides one of the few examples of a court considering the skeleton of principle rule. First, it is arguable whether in fact a skeletal principle was in danger of being fractured in *Bulun Bulun*. Justice von Doussa suggested that the principle that would be fractured if the court were to recognise Indigenous knowledge systems was the principle 'that ownership of land and ownership of artistic works are separate statutory and common law institutions'.⁹⁴ With respect, the apparent 'conflict' identified here may be deceptive.

Native title entails a recognition of Indigenous relations to land which is sui generis, and cannot therefore be equated with common law 'ownership' of land. Further, Indigenous knowledge attracts no specific statutory protection. It is a unique system of information management that currently lacks any general protection under Australian law. While native title rights do not involve common law 'ownership' of land and Indigenous knowledge attracts no specific protection (statutory or otherwise), it is hard to see how a conflict may arise

92 *Bulun Bulun* (1998) 41 IPR 513, 521.

93 *Ibid.*

94 *Ibid.*

between a common law and statutory right.⁹⁵ The question that should be asked is whether the *sui generis* and unprotected entity of Indigenous traditional knowledge can be recognised and protected as a native title right.

But second, and more importantly, I would question the narrow reference to Justice Brennan's skeleton of principle rule, which takes no account of the balancing test which is integral to its application and which can be used to determine whether a principle of our legal system, despite the fact that it is a skeletal principle, can be held to be inapplicable and effectively overruled. I will return to this criticism in Part VII(D) below.

C Subsequent Interpretation

The *Croker Island Case* provides another example of an application of the skeleton of principle rule. At first instance, Olney J concluded that the common law could not recognise native title rights of exclusive possession or rights to control access to the sea because such rights would be contrary to the public right to fish and navigate, and would thereby fracture a skeletal principle of our legal system.⁹⁶ On appeal, this decision was upheld by a majority in the Federal Court. However, the majority's decision also drew on international law in identifying the skeletal principles at issue in the case:

A power to exclude members of the public as now claimed would, in our opinion, contradict these common law principles [to fish and navigate] which, along with the right of innocent passage, are, we think, of sufficient importance to warrant their characterisation as 'skeletal' in the sense meant by Brennan J.⁹⁷

Neither Olney J, nor the majority on appeal, discussed the balancing test Brennan J proposed in *Mabo* in any detail, simply declaring the common law rights to fish and navigate, together with the international right of innocent passage, to be 'skeletal principles'. As such, they provide an example of what may be considered a skeletal principle, but no further insight into interpreting Justice Brennan's reasoning. However, Merkel J, in the minority on appeal, came to the conclusion that the common law was capable of recognising exclusive possession in the form of an exclusive Indigenous fishery in the area.⁹⁸

His Honour began by proposing that it was not principles but 'policies' which lay at the core of Justice Brennan's reasoning:

When Brennan J referred to recognition not being accorded in circumstances that would 'fracture a skeletal principle' of the legal system, his Honour was not referring to a principle of the common law but rather, to the underlying policies (ie the skeleton) of the common law that have given rise to certain of its rules and therefore to its 'shape and consistency'.⁹⁹

95 I would also query whether the principle identified by von Doussa J is in fact a 'skeletal' principle. However, in light of my principal criticism, this point is less important.

96 *Yarmirr v Northern Territory* (1998) 82 FCR 533, 134-5.

97 *Croker Island Case* (1999) 168 ALR 426, 477 (Beaumont and von Doussa JJ).

98 *Ibid* 546.

99 *Ibid* 545.

He concluded that the 'policy' or 'skeletal principle' underlying the common law right of navigation was 'freedom' of the seas and tidal waters.¹⁰⁰ Justice Merkel then distinguished between recognition of a 'kind or type' of right or interest and a specific right or interest that may be claimed in a specific case and which, if proven, may reveal itself as non-detrimental in practice to the skeleton of principle.¹⁰¹ 'Such issues may have to be worked out on a case by case basis by reference, inter alia, to the practical consequences that are likely to flow from recognition by the common law, and therefore s 223(1) of the [*Native Title Act*], of the particular native title right claimed.'¹⁰² His Honour concluded that the recognition of an exclusive Indigenous fishery, whilst inconsistent with the common law right to fish and navigate, did not, in this case, fracture any skeletal principle of the legal system, stating: 'I do not accept that principle or public policy mandate non-recognition by the common law of native title to a several fishery'.¹⁰³

Justice Merkel's judgment indicates the potential flexibility of the application of the skeleton of principle rule. Employing his Honour's reasoning, even if recognition of Indigenous knowledge rights within native title somehow interfered with, for example, the need for a division between statutory intellectual property laws and common law property rights,¹⁰⁴ it could be argued that the 'policy' underlying this division would not be fractured by recognition. If this argument did not succeed, it would still be possible to propose that, in a specific case, a right to protect traditional knowledge could be recognised if *in practice* it would not fracture the skeleton of the legal system.

I would argue that the skeleton of principle need not stand in the way of a characterisation of native title as an essential knowledge right. The discussion above suggests that such a characterisation would see native title developed as a unique style of intellectual right one which, like copyright or patent rights, generates certain physical rights. Indigenous rights have already been recognised in *Mabo*, and such a style of right is already present in our legal matrix.¹⁰⁵ It is hard to see how such a progression in the law could be seen as interfering with the integrity of our legal structure, or policies underpinning this structure, to such an extent that the obvious and vital benefits flowing from it for Indigenous people could be outweighed by any 'disturbance' caused by recognising such rights.

D Equality Before the Law

It is unfortunate that none of the cases discussed apply the balancing test required by the skeleton of principle rule. The approach that should be taken, it

100 Ibid 546.

101 Ibid.

102 Ibid 547.

103 Ibid 559.

104 The position taken by von Doussa J in *Bulun Bulun*.

105 The point must be stressed here that a characterisation of native title as a knowledge right would resemble intellectual property rights only in their structure (being a knowledge right from which physical rights flow). In its detail it would be quite unique, being generated by Indigenous law and custom.

is submitted, is to consider the skeleton of principle rule in its entirety. I believe that recognising Indigenous knowledge rights is synonymous with ensuring the application of the principle of equality before the law. The current lack of protection of such knowledge – knowledge which lies at the heart of the survival of Indigenous communities – can clearly be contrasted with the protection afforded to non-Indigenous Australians, and reveals a disturbing inequality of treatment. Recognising this entails an investigation into the importance of the principle of equality to the integrity of the structure of our legal system, and a subsequent weighing of this against other structural principles which are identified in a particular case to determine which should prevail.

The principle of equality before the law is clearly a fundamental element of the Australian legal system. The rationale behind *Mabo* was clearly that of equality before the law:

The preferable rule equates the Indigenous inhabitants of a settled colony with the inhabitants of a conquered colony in respect of their rights and interests in land ... Indigenous people's rights are to be recognised and fully respected.¹⁰⁶

Stepping further back, in *Mabo v Queensland [No 1]*,¹⁰⁷ the High Court held that the effect of the legislation at issue in the case (the *Queensland Coast Islands Declaratory Act 1985* (Qld)) was to deny equality before the law to the Meriam people with respect to their right to own property, and was therefore discriminatory and hence invalid under the *Racial Discrimination Act 1975* (Cth). Justices Brennan, Toohey and Gaudron explained:

By extinguishing the traditional rights characteristically vested in the Meriam people, the 1985 Act abrogated the immunity of the Meriam people from arbitrary deprivation of their legal rights in and over the Murray Islands. The Act thus impaired their human rights while leaving unimpaired the corresponding human rights of those whose rights in and over the Murray Islands did not take their origin from the laws and customs of the Meriam people.¹⁰⁸

The Meriam people were found to enjoy their human rights of ownership and inheritance of property to a 'more limited' extent than others who enjoyed the same human right.¹⁰⁹ Such a situation was clearly intolerable because it constituted a denial of equality before the law. The decision demonstrates that equality before the law requires recognition of the unique history and relationship that Indigenous Australians have with the land.¹¹⁰ Subsequently, in *Western Australia v The Commonwealth*,¹¹¹ the High Court ruled that the *State Land (Titles and Traditional Usage) Act 1993* (WA) was invalid as it denied

106 *Mabo* (1992) 175 CLR 1, 56 (Brennan J); see also 82 (Deane and Gaudron JJ) and 182 (Toohey J).

107 (1988) 166 CLR 186.

108 *Ibid* 218.

109 *Ibid*.

110 See Richard Bartlett, 'Racism and the Constitutional Protection of Native Title in Australia: The 1995 High Court Decision' (1995) 25 *University of Western Australia Law Review* 127.

111 (1995) 128 ALR 1.

equality before the law to Indigenous people and was inconsistent with the provisions of the *Racial Discrimination Act 1975* (Cth).¹¹²

More generally, the attainment of equality before the law has been the subject and recommendation of numerous influential reports.¹¹³ It is also the subject of a rich collection of anti-discrimination legislation.¹¹⁴ The doctrine of equality is also considered a fundamental principle of the common law.¹¹⁵ In *Leeth v The Commonwealth*,¹¹⁶ the doctrine was recognised by the High Court. Justices Deane and Toohey referred to the 'essential or underlying theoretical equality of all persons under the law', which 'is and has been a fundamental and generally beneficial doctrine of the common law and a basic precept of the administration of justice under our system of government'.¹¹⁷

The right to equality of treatment before the law is also guaranteed by the *International Covenant on Civil and Political Rights*,¹¹⁸ to which Australia is a signatory. More generally, Australia has ratified a number of instruments which expressly guarantee the right to cultural integrity for Indigenous people.¹¹⁹ The terms of these instruments do not directly form part of our skeleton of principle but various High Court decisions suggest that they may be used as a legitimate guide in developing the common law.¹²⁰ The reasoning in the *Croker Island Case* also provides direct evidence of the ability of the courts to draw upon international obligations in determining what constitutes the skeleton of principle.¹²¹

In summary, it is clear that equality before the law is a fundamental principle of the Australian legal system. It forms an integral part of native title reasoning, is a primary goal of law reform efforts, finds expression in legislation, and is a

112 The *Racial Discrimination Act 1975* (Cth) was enacted to give effect to the *International Convention on the Elimination of All Forms of Discrimination*, opened for signature 21 December 1965, 660 UNTS 195 (entered into force 4 January 1969). Article 2(1)(d) of the Convention imposes obligations on parties 'to guarantee the right to everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law'. The High Court upheld the enactment of the *Racial Discrimination Act 1975* (Cth) as a valid exercise of the legislative power of the Commonwealth with respect to 'external affairs' in *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168 and *Gerhardy v Brown* (1985) 159 CLR 70.

113 See Australian Law Reform Commission, *Equality Before the Law*, Discussion Paper No 54 (1993); Australian Law Reform Commission, *Multiculturalism and the Law*, Report No 57 (1992); New South Wales Law Reform Commission, *People with an Intellectual Disability and the Criminal Justice System*, Issues Paper No 8 (1992) ch 5; Royal Commission into Aboriginal Deaths in Custody, *National Report* (1991); Access to Justice Advisory Committee, *Access to Justice: An Action Plan* (1994).

114 For example, the *Sex Discrimination Act 1984* (Cth), *Disability Discrimination Act 1992* (Cth), *Anti-Discrimination Act 1977* (NSW), and *Equal Opportunity Act 1995* (Vic).

115 See Paul Ames Fairall, 'Imprisonment Without Conviction in NSW: *Kable v DPP*' (1995) 17 *Sydney Law Review* 573, 575.

116 (1992) 174 CLR 455.

117 *Ibid* 485; see also *ibid* 502, where Gaudron J stated that 'all are equal before the law' and that the principle is 'fundamental to the judicial process'.

118 Opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976).

119 For example, the *Convention for the Prevention and Punishment of Genocide*, 1951 ATS 2, *International Convention on the Elimination of All Forms of Racial Discrimination*, 1975 ATS 40, and the *Convention on Biological Diversity*, 1993 ATS 32.

120 See especially *Minister for Immigration v Teoh* (1995) 183 CLR 273. This is also supported by comments in *Mabo* (1992) 175 CLR 1, 42 (Brennan J).

121 (1999) 168 ALR 426, 477.

crucial part of Australia's international obligations. The fracturing of such a principle would undeniably have a far-reaching and destructive impact. It must therefore be accorded considerable weight in Justice Brennan's balancing test. Thus protecting a rule that requires the separation of intellectual property and real property rights at the expense of ensuring equality before the law would result in a disturbance to the structural integrity of our legal system which would be disproportionate to the benefit gained from protecting the rule requiring separation.

I believe that continued non-recognition of Indigenous knowledge rights within native title law would itself fracture the principle of equality before the law. When the skeletal principle rule is considered in its entirety, and the principle of equality before the law accorded its due weight, the scale begins to tip unmistakably in favour of the principle of equality. So far, in fact, to suggest that non-recognition would do more harm to the integrity of the legal system, by fracturing the principle of equality before the law, than could ever occur as a result of recognition.

VIII CONCLUSION

In conclusion, I would argue that native title law must take a new direction. The Federal Court's reluctance to recognise a right to protect traditional knowledge within the scope of native title is worrying. Traditional knowledge systems are essential for Indigenous cultural survival, yet they remain virtually unprotected. Native title law clearly has the capacity to incorporate a right of protection of traditional knowledge (and in fact, I have argued, demands recognition of such a right), yet it has been declared powerless to construct such a right. The one argument that has been used to justify the denial of recognition – the need to protect the integrity of the skeleton of principle – has been only partially employed, and consequently (I believe) incorrectly applied. I have further argued that comprehensive consideration of Justice Brennan's 'skeletal principle' test, in fact confirms the need to recognise a native title right to protect traditional knowledge. Further, I have argued that it is non-recognition that will lead to the eventual fracture of the skeleton of principle through the damage it causes to the principle of equality before the law.

Two solutions present themselves. First, a right to protect traditional knowledge could be recognised as a distinct interest and added to the bundle of rights that is native title. Alternatively, and more appropriately I believe, native title rights could be recognised for what they are: fundamentally knowledge rights. Just as intellectual property rights are constructed as knowledge rights from which flow certain physical entitlements, native title rights could be conceptualised in a similar way. This latter solution is preferable because it legitimises recognition – a legitimacy that has, thus far, been missing from native

title reasoning. The legitimacy of this solution, however, ultimately depends on the fact that it involves a characterisation of Indigenous rights which is actually informed by the Indigenous laws and customs that it aims to acknowledge and protect.