ARTICLES
White Law, Black Art

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This article examines the issues surrounding the appropriation of indigenous culture, in particular art. It discusses the nature and context of Aboriginal and Torres Strait Islander art in Australia in order to establish why appropriation and reproduction are important issues. The article outlines some of the ways in which the Australian legal system has attempted to address the problem and looks at the recent introduction of the Label of Authenticity. At the same time, the article places these issues in the context of indigenous self-determination and examines the problematic use of such concepts as "authenticity." Finally, the article looks beyond the Label of Authenticity and existing law of intellectual and cultural property, to sketch another possible solution to the problem.

1 INTRODUCTION

> Appropriation occurs when someone else speaks for, defines, describes, represents, uses or recruits the images, stories, experience and dreams of others for their own. Appropriation also occurs when someone else becomes the expert on your experience and is deemed more knowledgeable about who you are than you yourself.[1]

The appropriation and unauthorised reproduction of aspects of Aboriginal and Torres Strait Islander culture is an area of great concern and importance for indigenous peoples.[2] In recent years, such issues have gained increasing attention from indigenous artists and organisations, as well as academic and social commentators. The issues covered by this broadly defined area are wide-ranging and interlinked. They range from repatriation of relics and remains from museums, through protection of heritage sites, to cheap tourist tee shirts and traditional biodiversity knowledge. As a whole, the area has engendered much debate in the past few years, particularly in relation to the law's response to such problems, and a number of solutions have been proposed. This article hopes to add both to the debate and to the solutions.

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Issues concerning indigenous art cannot be unlocked from more "unpalatable" issues, such as native title, indigenous rights, and recognition of the extreme socioeconomic disadvantages indigenous peoples suffer. The significance of an examination of appropriation of indigenous culture lies in its relationship to colonising practices. "Appropriate" means to "make one's own." The colonisers of Australia appropriated the land of the indigenous inhabitants and claimed sovereignty, they appropriated children of mixed parentage and placed them in homes, they appropriated traditional law and replaced it with the Anglo-Australian legal system, and they appropriated moveable cultural objects and placed them in museums and art galleries. Appropriation of art must be viewed within this larger context of systemic colonisation.

This thesis will focus on the particular problems raised by unauthorised reproduction of Aboriginal and Torres Strait Islander art,[3] and the recently introduced response to these problems: the Label of Authenticity. Section 2 will examine unauthorised reproduction and its significance to indigenous peoples and artists in particular. It will identify concerns and needs of indigenous peoples with respect to protection of their culture in the context of self-determination and will survey the current legal mechanisms that have addressed the problem. Section 3 will first discuss the Label of Authenticity. It will then look beyond the Label, taking into account the implications of the *Mabo & Others v. State of Queensland* decision, to sketch a broadly conceived model that attempts to address issues of appropriation and unauthorised reproduction in a way that will further indigenous self-determination.

2 UNAUTHORISED REPRODUCTION AND ITS SIGNIFICANCE TO INDIGENOUS PEOPLES

2.1 ABORIGINAL AND TORRES STRAIT ISLANDER ART IN CONTEXT

2.1.1 Concerns and Needs of Indigenous People

The concerns and needs of indigenous people as regards their intellectual and cultural property vary, depending both on the people involved and the nature of the property or interest. The term *intellectual and cultural property* is itself problematic, reliant as it is on Western notions of property and the legal regimes thereby implied. It is therefore useful to recognise this, and accept that it is merely a blanket term encompassing a range of concepts.

The difference between Western notions of intellectual and cultural property and those of indigenous peoples is highlighted by the definition arrived at in the *Our Culture: Our Future* report.[4] This report, by Terri Janke, provides an excellent and extensive coverage of indigenous cultural and intellectual property rights in all

their manifestations. This report was commissioned by the Aboriginal and Torres Strait Islander Commission (ATSIC) and the Australian Institute of Aboriginal and Torres Strait Islander Studies (AIATSIS) and involved widespread consultation with indigenous and nonindigenous people, communities, and advocacy groups. The definition is as follows:

> "Indigenous Cultural and Intellectual Property Rights" refers to Indigenous Australians' rights to their heritage. Such rights are also known as "Indigenous Heritage Rights."
>
> Heritage consists of the intangible and tangible aspect of the whole body of cultural practices, resources and knowledge systems that have been developed, nurtured and refined (and continue to be developed, nurtured and refined) by Indigenous people and passed on by Indigenous people as part of expressing their cultural identity. . . . The heritage of an Indigenous people is a living one and includes items which may be created in the future based on that heritage.[5]

Based on this definition, *Our Culture: Our Future* compiles a general list of the major concerns for indigenous people. This thesis will focus on the appropriation of indigenous art and cultural expression; however, other related concerns include unauthorised use of secret/sacred material; appropriation of indigenous languages and spirituality; appropriation of indigenous biodiversity knowledge; collection of natural resources; lack of control over human genetic material; access to and management of land sites; documentation of indigenous peoples' cultures; and the high resale value of artworks from which indigenous artists do not profit.[6]

These issues stem from concerns about the place of indigenous culture in wider Australian culture and its particular importance to indigenous people. The need for indigenous people to have control over their intellectual and cultural property is part of an ongoing struggle for self-determination.

2.1.2 Art and the Dreaming

In 1802, Jean-Baptiste Lescenault, botanist on French explorer Nicolas Baudin's Tasmanian expedition, came across a pile of bark, which appeared to him to be a knocked-down hut. Upon examining it he realised it was a carefully arranged mass of bark covering a mound. The bark was covered with deliberately drawn lines, similar to the tattoos of the Tasmanian Aborigines. When he found pieces of bone in the mound, Lescenault realised he had found a burial place, and carefully rearranged the bark. Lescenault had "discovered" Aboriginal "art" but, in the process, he had disturbed a burial ground, which no doubt would have distressed greatly the group whose burial place it was.[7]

Lescenault's brush with Aboriginal culture represents the continuing failure of the West to grasp the complex relationship between art and spirituality in indige-

nous cultures. In order to understand much traditional art, it is first necessary to understand the concept of the Dreaming.[8] The words *Dreaming* and *Dreamtime* refer to an elaborate religious concept shared by all Aboriginal peoples, although it may be differently expressed or named. The Dreaming is as much a dimension of reality as a period of time. It exists in the past, present, and future, and refers to origins and powers located in places and things.[9] It focuses on the activities and journeys of the supernatural beings and creator ancestors, who travelled across the world, creating landscapes and laying down the laws of social and religious behaviour. The all-pervasive powers of the ancestral beings are present in the land, animals, and individuals. They are activated by ceremonies and art.[10]

The events of the Dreamtime provide the great themes of indigenous art.[11] Art is an expression of knowledge in Aboriginal and Torres Strait Islander societies and hence is a statement of authority. The use of traditional inherited designs allows artists to assert their identity, rights, and responsibilities. Traditional societies are organised in complex kin groups and moieties, which vary from group to group. These affiliations determine conduct and carry differing rights and responsibilities to land, ceremonies, and Dreamings. These are carried over into the making of art for the public domain, and regulate the ways in which artists can use certain designs.[12] For example, well-known artist Lili Hargraves Ngarrayi is permitted to paint only the desert budgerigar. If she dares to paint a different Dreaming, she states her people will "sing [her] to death."[13] Interpretations of the paintings may vary, depending on which clan or moiety has produced it. Each clan has its own paintings which reflect its unique relationship with the ancestral beings who created the landscape.[14]

2.1.3 Aboriginal and Torres Strait Islander Art and White Australia

The above is a very brief outline of the significance of indigenous art and fails to do justice to its complexity and importance. However, it should be clear that art is more to indigenous culture than decoration or creativity; rather, it is inextricably interwoven into religion, the land, and social structure. Aboriginal and Torres Strait Islander art has also played an important mediatory role since contact with white settlers. During the first half of the twentieth century, several leaders of mission stations, as well as anthropologists, encouraged the Aboriginal people of their areas to produce art that they could then sell or collect.[15] Trade of objects, particularly of weapons, began upon the arrival of the First Fleet; indigenous artists were in turn influenced by colonial experiences and Western techniques and styles. Western attitudes towards art have similarly evolved. By applying Western values to art production, indigenous artists have become well known as individuals, even though art has traditionally been a communal activity. Indigenous art collectors began by classifying works as "primitive" art, and the labels of "Aboriginal" and "authentic" were applied to art that was, or appeared to be, precontact. Living

Aboriginal and Torres Strait Islander people were thought to produce an inauthentic assimilated art.[16]

Interest in indigenous art continued to grow between the wars, and craft production became an important source of income for some indigenous people. Artefacts were produced primarily for tourist markets.[17] It is now recognised that most of the "traditional" art in Western museums and galleries was produced for sale by indigenous people affected by colonisation and contact with Europeans.[18] By the 1970s, the labelling of indigenous art in the "fine art" context as "primitive" was beginning to break down, and a new category of "contemporary Aboriginal art" emerged. Another label of "urban Aboriginal artist" was also created for southeast Aboriginal artists.[19]

As the market for indigenous art grows among nonindigenous Australians and overseas buyers and tourists, art has become both an economic and a cultural relationship between indigenous and nonindigenous Australians. In 1997, ATSIC's National Aboriginal and Torres Strait Islander Cultural Industry Strategy estimated the indigenous arts and crafts market to be worth almost $200 million per year.[20]

For the Western coloniser, indigenous cultural objects, paintings, and designs fall into a category of "art," which shifts with the fashion of the day. For indigenous peoples, art is part of the land, religion, and relationships. For both it has become an important economic relationship. Consequently, indigenous art lies at the crossover point of two cultures, and hence is a powerful site of conflicting discourses. Once this conflict is identified, its potential to be a tool of decolonisation can be explored.

2.2 AUTHENTICITY, APPROPRIATION, AND SELF-DETERMINATION

As Aboriginal art gained increasing attention in both fine art and tourist markets, two interconnected issues emerged: authenticity and appropriation. Appropriation and reproduction of Aboriginal artworks and designs can arise in a number of contexts. The most immediately apparent example is the boomerang, which has been featured in advertising for Expo 88, has appeared in airline advertising, and formed the major part of the Olympic logo. Other examples are fraudulent representations that art works are by particular artists; the unauthorised use of Aboriginal designs in the tourist market, such as on tee shirts or tea-towels; and the bastardisation of Aboriginal designs (such as the x-ray koala). In each of these cases, producers (usually non-Aboriginal) make use of Aboriginal motifs and designs for economic gain. In some situations this may be inappropriate; in others it may be misleading and deceptive. Most importantly, it may be in breach of traditional indigenous customary law.

Issues of appropriation are inextricable from issues of authenticity. At the tourist or popular art end of the market, unauthorised reproductions, "rip-offs,"

and bastardised designs may carry misleading swing tags that claim the work is "influenced" or inspired by Aboriginal designs. These allow unscrupulous dealers to reap a profit from elements of Aboriginal heritage and devalue it along the way. At the "fine art" end of the market, authenticity represents the concern of buyers that they are getting the "real thing." In this context, the problem of authenticity may be related to the practices of making the artwork. Western conceptions regarding the creation of a work will often not apply to Aboriginal artists. In the West one artist may hold the rights to an image and then allow other people to manufacture or paint it. For indigenous people art is often a communal activity, and a group may work on a particular piece. Problems then arise for Western notions of authenticity when the work is attributed to one artist or particular members of the group who may not have put paintbrush to canvas, or when the painting is later "touched up" by other people or non-Aboriginal collaborators.[21] However, under Aboriginal law it is entirely appropriate for senior artists and custodians of the Dreaming to allow other artists to work under their supervision.[22] Indeed, it may be contrary to Aboriginal law to attach the name of the person who did most work on the painting, as it would be to bestow Dreaming rights upon that person, which cannot be done without the consent of other holders of the Dreaming.[23]

Other related issues include works that are sold as possessing spiritual or mythological significance but do not; works of inferior quality, which are genuinely by major artists; paintings not painted in areas where they are identified as having originated; works by nonindigenous people claiming to be indigenous; and—the most extreme example—works that deliberately counterfeit the works of a famous artist by adopting his or her style.

Two examples of the problematic nature of Aboriginal art and ownership may be found among the prominent Utopia group of artists. Kathleen Petyarre became involved in controversy after winning the 1996 Telstra National Aboriginal and Torres Strait Islander Art Award. Her non-Aboriginal former de facto husband, Ray Beamish, claimed authorship of the work. An official enquiry found that, although Beamish had assisted Petyarre, Petyarre remained the owner and author of the design.[24] Journalist Susan McCulloch describes in the *Weekend Australian* how Emily Kam Kngwarreye has become embroiled in similar controversy.[25] During the peak of Kngwarreye's career in the early 1990s, between two hundred and four hundred works were going out to dealers in her name. Alice Springs art adviser Rodney Gooch believes that only a half to two-thirds of these works were actually produced by her. Some of these "Emily school" paintings were produced by highly talented artists and were approved of by Kngwarreye. Others were simply fabricated. Gooch understands the motivation of those people who are good at what they do but can make more money pretending the paintings are Kngwarreye's. "It's a tough life out there" he told the *Weekend Australian,* "and if you can put colour

on canvas and make them look like Emily's for food or grog, you'll do it." "Touching up" and collaboration by non-Aboriginals is particularly prevalent in the case of senior artists, who may no longer have the ability to produce works of their former quality.[26]

2.2.1 Self-Determination

Indigenous cultural issues are inextricably tied to issues of self-determination. ATSIC explicitly links the two, stating as follows:

> ATSIC's approach to culture and heritage is grounded in the principle of self-determination. Rights of ownership, control over management of the various expressions of cultural heritage, and financial returns which may flow from the use of cultural or intellectual property should be in the hands of those to whom the culture belongs.[27]

In recent decades the impetus towards self-determination in the international sphere has been growing at an ever-hastening rate. In international law, self-determination is recognised in Article 1 of both the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR). Australia is signatory to both agreements. Two major documents of the past few years have advocated that indigenous cultural issues be dealt with by colonising nations. The UNESCO Report on the Protection of the Cultural and Intellectual Property of Indigenous Peoples of 1993 is one. The other is the United Nations Draft Declaration on the Rights of Indigenous Peoples. Article 31 of the Draft Declaration states, "Indigenous peoples, as a specific form of exercising their right to Self-Determination, have the right to their internal and local affairs, including culture, religion, education, [and] information." This is linked to culture in Article 12: "Indigenous peoples have the right to practice and revitalize their cultural traditions and customs. This includes the right to maintain, protect and develop the past, present and future manifestations of their cultures." An essential aspect of self-determination is self-government. Article 33 characterises the "right to self-government or autonomy in matters relating to internal and local affairs, including culture, religion, education, information, media, health, housing, employment, social welfare, economic activities, land and resources management, environment and entry by non-members" as a specific form of exercising indigenous peoples' right to self-determination.

At present, the Draft Declaration represents the views of its leading indigenous drafters. As it makes its way through UN treaty processes it can be expected to change and its more strongly expressed sentiments to be diluted. In 1998, Cabinet decided to downgrade support for the Draft Declaration to support for "self management," rather than self-determination. There was no consultation with ATSIC over this change in terminology.[28] In addition, Australia's recent rejection

of the UN treaty process suggests that this treaty will not be implemented in the foreseeable future. Notwithstanding this negative prognosis, it can be argued that the multilateral discussion of indigenous rights that has continued since the 1970s in the UN and other authoritative international venues has created an emergent customary norm concerning indigenous rights, regardless of treaty ratification.[29] E. I. Daes states, "Nowadays it is almost impossible to deny that the right of self-determination has attained true legal status."[30] It is this emergent norm that will compel the Australian government to take notice of indigenous rights.

One of the most useful examinations of the principle of self-determination is that of indigenous scholar S. James Anaya. Anaya rejects as misguided the wedding of self-determination and independent statehood, particularly in the context of indigenous peoples.[31] He sees self-determination as "a universe of human rights precepts concerned broadly with peoples, including indigenous peoples, and grounded in the idea that all are equally entitled to control their own destinies."[32] As a concept it "derives from philosophical affirmation of the human drive to translate aspiration into reality, coupled with postulates of inherent human equality."[33] There are two aspects to self-determination as it relates to indigenous peoples: substantive and remedial. The remedial aspect of self-determination focuses upon remedying the harms of colonisation, and thus is manifested by processes of decolonisation.[34] The substantive side of self-determination consists of two phenomenological aspects: constitutive and ongoing. Constitutive self-determination requires participation, consent, and a political order that reflects the collective will of the peoples concerned. Ongoing self-determination requires a governing order in which people and groups can make meaningful choices in all spheres of life, and can live and freely develop on a continuing basis.[35]

Mick Dodson, in his first report as Aboriginal and Torres Strait Islander Social Justice Commissioner, echoed these principles:

> Correctly understood, every issue concerning the historical and present status, entitlements, treatment and aspirations of Aboriginal and Torres Strait Islander peoples is implicated in the concept of self-determination. The reason for this is that self-determination is a process. The right of self-determination is a right to make decisions. These decisions affect the enjoyment and exercise of the full range of freedoms and human rights of Indigenous peoples.[36]

2.3 INDIGENOUS ART AND THE LAW

Before turning to the Label of Authenticity and other possible solutions to the problems and concerns raised above, we must examine the ways in which the legal system currently protects indigenous art from unauthorised reproduction and appropriation. The most useful are intellectual property regimes and, in particular, the law of copyright.

2.3.1 Intellectual Property

In recent decades a number of cases have been litigated successfully. In 1989 Johnny Bulun Bulun brought an action against tee shirt manufacturers who had pirated his artworks under the Copyright Act 1968 (Cth), and the Trade Practices Act 1974 (Cth). The matter was settled in his favour.[37] Terry Yumbulul was not so successful in his claim against the agent who negotiated an agreement to use his artistic work "Morning Star Pole" on the ten-dollar bank note.[38] Yumbulul complained that he had not given permission to reproduce his work in that context and that he had no such authority to do so, because permission to reproduce the work lay with the relevant tribal owners. The judge found copyright subsisted in the work but rejected his argument that the permission did not extend to the particular use of the work by the Reserve Bank of Australia.

George Milpurrurru and other artists were also successful in their claim against a company involved in reproducing artworks, or parts of artworks, by well-known artists onto woolen carpets.[39] Johnny Bulun Bulun also brought another action against a textiles company reproducing his artworks.[40] These two cases are notable for the judicial creativity of the decisions. In the former case, *Milpurrurru v. Indofurn,* Justice von Doussa in the federal court emphasised that trial evidence explained the importance of creation stories and dreamings and their secret or sacred nature. He also recognised that the rights to paintings and techniques will often reside in traditional owners or custodians on behalf of the community.[41] Justice von Doussa acknowledged the significance of the Aboriginal custom of holding the artist responsible for any breach of traditional law that may occur through unauthorised reproduction,[42] and he emphasised the seriousness of the present breach, in which the reproduction of the image was in a context totally opposed, and offensive, to its cultural use.[43]

However, as the judge decided the case solely on the principles of copyright law, the real significance of this recognition of Aboriginal customary law lay in the remedies awarded: a lump sum to be held communally and divided up as the appellants saw fit. Equal damages were awarded to all the living artists, as requested, and extra damages, reflecting the "cultural damage," were also awarded.[44]

The most recent of these cases sought to extend the principles yet further. In *Bulun Bulun v. R & T Textiles* counsel for Bulun Bulun argued that the work incorporated matter sacred to the Ganalbingu people and that the Ganalbingu people held copyright in the work either as a fiduciary or on trust, because they had power under customary law to control the production of the corpus of ritual knowledge.[45] Justice von Doussa, again on the bench, rejected the existence of a trust but found a fiduciary relationship to exist between Bulun Bulun and the Ganalbingu people. However, this relationship gave the Ganalbingu rights against only the copyright owner and did not vest equitable ownership of the copyright in the clan.

These cases appear to represent successful attempts to extend the principles of copyright to indigenous art. The growing judicial recognition of issues specific to

Aboriginal and Torres Strait Islander art and an increased willingness to address these issues with some degree of creativity are positive steps. However, there are many problems involved in applying copyright law and other aspects of intellectual property rights to indigenous artists, problems which have been extensively critiqued.[46]

One major difficulty is the difference between indigenous attitudes towards property and art and those European attitudes that inform the law of intellectual property. Briefly, where Aboriginal people see cultural heritage and art as "collectively owned [and] socially based,"[47] the legal system characterises "property" as fiercely individualistic and economically constituted. Intellectual property law balances the interests of the individual author against those attributed to the universal public domain. It is fundamental that ideas remain in the public domain, and are incapable of ownership.[48] It is only the expression of these ideas that the law protects. In indigenous communities, rights to images may be distributed among several individuals or groups and may encompass ephemeral manifestations, such as body painting or oral traditions. Thus, the case of indigenous art—in which the idea itself is as essential, if not more so, as its visual expression—falls outside the conceptual parameters of the law.

The law of copyright is inherently unsuitable for indigenous peoples. Specific problems are the requirements of originality, fixation, and duration of term. For works that have been achieved communally, and for pre-existing traditional designs, there may also be difficulty in identifying an owner. The recently passed "moral rights" legislation may overcome some of these difficulties,[49] but it extends only to individual, not community, interests.[50] Nor does it address oral, ceremonial, or other nonfixed forms of heritage.

Even where the requirements are satisfied and copyright is found to subsist and be infringed, as in the cases described above, problems remain in the discursive limitations of the legal system. The acceptance of evidence of traditional practice and custom is a progressive step for the judiciary to have taken. However, the use made of this evidence forms part of a continuing colonial narrative, informed by colonial mentality and enshrined in the law. Although evidence concerning indigenous custom formed a substantial part of Justice von Doussa's decision in *R & T Textiles*, Justice von Doussa explicitly states that the recognition he accorded these laws and customs in finding a fiduciary relationship was to treat those laws not as part of the legal system but as part of the factual relationship.[51] Thus, indigenous participants are required to phrase their claims in terms the legal system can understand in order to gain relief. Indigenous practice and law are incorporated into the court's analysis, but only to describe victimisation and damage, against which the legal system can provide relief.[52] In *R & T Textiles*, Justice von Doussa explicitly introduces paternalistic strategy, claiming he has "no hesitation in holding that the interest of the Ganalbingu people in the protection of that rit-

ual knowledge from exploitation which is contrary to their law and custom is deserving of the protection of the Australian legal system."[53]

A second strategy evident in the cases is the restricted reading given to "indigenous art." The notion of "art" is a Western cultural construction.[54] The law of copyright protects Western conceptions of "art" and identifies it as an individual endeavour. In *Indofurn*, the artists were able to fulfill the requirement by being famous, exhibited, and published in the nonindigenous world. In *R & T Textiles*, much emphasis was placed on Bulun Bulun's description of the link between art and the land. As the argument based on a native title claim was not seriously considered in the case, it appears that this evidence was included merely for illustrative purposes. Hence, the characterisation of indigenous artworks, coupled with a lack of authority attributed to indigenous law, continues the narrative of primitivism and victimisation. The "success" of these cases may be viewed as another paternalistic strategy, by which the white knight of the Australian legal system saves indigenous culture from exploitation. In the process it reconfigures indigenous practice into a narrative of law and culture which is itself an appropriation.[55]

Other avenues in intellectual property law have been canvassed. The Designs Act 1906 protects artistic works made into three-dimensional articles or objects. This protection is limited in use for Aboriginal peoples, as the design must be registered and the duration of protection is only sixteen years.[56] The breach-of-confidence action, as was used in *Foster v. Mountford,*[57] has also been suggested as providing redress for revealing or reproducing secret or sacred information.[58] However, this action protects only information that has not yet reached the public domain.[59] On a more practical note, even where intellectual property rights are found to subsist, it does not mean that they can be enforced. The costs of litigation, both financial and otherwise, are high; and the results, uncertain.[60]

Under intellectual property law, and as far as economic interests go, indigenous artists are as well protected as nonindigenous Australians. However, spiritual and cultural interests are another matter altogether and need to be accommodated differently. Another solution that has been suggested is to achieve this through changes to heritage legislation.[61]

2.3.2 *Statutory Protection*

Cultural heritage legislation has been enacted in each of the Australian states and the Northern Territory. Legislation has also been enacted at the federal level, in the form of the Aboriginal and Torres Strait Islander Heritage Protection Act 1984 (Cth) (ATSIHPA). This act is concerned with the preservation and protection of areas and objects of particular significance to Aboriginal and Torres Strait Islanders, in accordance with their tradition.

The main concern of indigenous people is the failure of the federal legislation, and most of the states' legislation, to recognise indigenous peoples as own-

ers of their own heritage. Another problem is the emphasis on items' being "significant" and "in accordance with Aboriginal tradition."[62] This has a stultifying effect on cultural heritage regimes, by continuing to place conceptions of indigenous people in an unchanging and dying culture, denying their dynamic potential for development. The burden of proving the existence of a tradition may be especially difficult for urbanised Aboriginal and Torres Strait Islanders and effectively divides indigenous people into categories of traditional or urban, denying authenticity to the latter group.[63]

In addition to the discursive undermining of indigenous voice, bureaucratic structures interfere with the operation of the federal Act. Designed as the last bulwark against the desecration of sacred objects and sites, no declaration made under the Act has withstood judicial review, and the Act has failed to save a single heritage site when faced with determined opposition by a state or territory government.[64] The Hindmarsh Island case provides a potent example of how the administrative procedures of the Act, and Commonwealth interference, may be used to undermine preservation decisions.[65]

Although there have been some positive results from cultural heritage legislation,[66] the legislative regime remains flawed. By establishing a mode of protection based on Anglicised views of the value of heritage and the means of its administration, the regulating legislation creates a narrative that forces indigenous people to represent their beliefs in a way that can be understood by the system. The significance of indigenous law is reduced to evidentiary status, and there is no structure for indigenous input into decision making.

The minister may compulsorily acquire Aboriginal cultural property under threat, but this property is vested in the Aboriginal community only for the purpose of being held on trust for it. No outright vesting of ownership is contemplated by the act, which continues to assume that preservation and protection by the Crown is the most desirable end. The legislation posits its own authority and cannot address claims to authority that fall outside the sovereignty recognised by the legal system.[67] Consequently, the extension of the legislation to protect spiritual and cultural aspects of cultural works, both traditional and contemporary, would merely be stretching an already imperfect model.

3 TOWARD INDIGENOUS SELF-DETERMINATION

3.1 THE LABEL OF AUTHENTICITY

Proposals to develop an indigenous "authenticity trade mark" were first made in the 1980s, and many submissions to *Our Culture: Our Future* supported this idea. *Our Culture: Our Future* recommended implementing such a mark, and at the same time the National Indigenous Arts Advocacy Association (NIAAA) began to de-

velop an authenticity mark. NIAAA launched its Label of Authenticity in November 1999, for implementation in January 2000. The Label of Authenticity is a national certification trade mark that can be placed on art or cultural products produced by Aboriginal people.[68] NIAAA envisages that the mark will help promote Aboriginal and Torres Strait Islander art and cultural products, as well as deter production and sales of "copy-cat" and "rip-off" designs and products.[69]

NIAAA is a nonprofit national arts and cultural services and advocacy association. It has developed the label with the assistance of ATSIC and the support of the Aboriginal and Torres Strait Islander Arts Board of the Australia Council. NIAAA will be the registered owner of the label trade mark until an independent nonprofit national organisation is established to manage the label.[70]

3.1.1 How will the Label of Authenticity operate?

Indigenous artists who want to sell and market their work will apply to the Label of Authenticity Registry for permission to use the label. They will have to declare that their products were made by an Aboriginal or Torres Strait Islander person or group who, *identified* as an Aboriginal and Torres Strait Islander, could claim a *belonging* to the story, had *knowledge* of, and *respect* for, the culture, and took *responsibility* for what was created. The Label of Authenticity will usually be attached to another label, which bears a trading or business name, indicating the source of the product and quality of "authenticity." The other label or promotional materials utilising the Label of Authenticity will need to include a description of the work of art and product (or service) on which it is reproduced; the name of the artist or artists; and the country, language, or place of residence of the artist or artists.[71] The Label of Authenticity will guarantee that the work is derived from a work of art created by an Aboriginal and Torres Strait Islander person or people and has also been reproduced or produced and manufactured by Aboriginal and Torres Strait Islander people who satisfy the definition of "authenticity."

3.1.2 What are the Benefits?

NIAAA believes that the label will assist artists to receive a fair and improved return on sales from arts and cultural products. It hopes that consumers will learn more about traditional and contemporary styles of art and stories from across Australia, recognise products from Aboriginal and Torres Strait Islander people speaking in the proper way about their stories, and identify goods and services of Aboriginal and Torres Strait Islander origin in preference to "copy-cat" products. It further hopes that wholesalers, retailers, manufacturers, and distributors will be encouraged to buy, sell, and enter into licensing arrangements for authentic products created by Aboriginal and Torres Strait Islander people.[72]

Marianna Annas believes that the label will give indigenous people a "marketing advantage." The object is to "assist consumers to buy authentic cultural

products and thereby improve the economic benefits flowing to Indigenous people from the commercial use of their culture."[73] Annas points out that the label is not intended to address the shortcomings of the Copyright Act, but rather to deter misleading and deceptive conduct and passing off. The label will provide an immediate indication of the product's authenticity at the market level, in contrast to lengthy and costly litigation procedures.[74] Moreover, even if there is infringement to be litigated, this will be carried out by the registering authority (currently NIAAA), which has greater resources and better information than individual artists or communities. Education is an essential aspect of the label's introduction, to promote the use of the mark by eligible suppliers. Annas claims that the label will be at its most effective when only nonauthentic goods lack it.[75]

Another positive development is that the definition of "authenticity" that will be used to determine eligibility for the label is determined entirely by reference to standards developed within Aboriginal communities. The purpose of the marks is to indicate "quality, accuracy, or other characteristics including (in the case of goods) origin, material or mode of manufacture."[76] According to the legislation, distinguishing a product by reference to the racial origin or community origin is not workable because the certifiable quality must be identifiable in the product. Hence, "authenticity" must be the quality being certified.[77]

The definition of authenticity that will prescribe eligibility has been formulated in consultation with individuals and communities across Australia. This research indicated that authenticity is a declaration by indigenous Australian artists of identity with, belonging to, knowledge about, respect for, and responsibility towards the works of art they create. According to the draft discussion paper by Kathryn Wells, the research consultant appointed by NIAA, it is important not to confuse "'authentic'" with ideas about what is "'real,'" "'traditional,'" or modern. The definition is based in a work of art created by an indigenous person who claims a belonging to a story, based on respect and responsibility for that culture.[78] Annas points out that, because the traditional custodians have the authority to determine who may use, create, see and reproduce designs and images, the applicable criteria are "inextricably bound to a complex cultural structure."[79]

The five key words, identity, belonging, knowledge, respect, and responsibility, allow communities an important autonomy within which the cultural structure, with its customary laws and relationship, may operate in force. That the criteria for the label do not distinguish between different "types" of art based on their consumers is also positive. Distinctions of "fine" and "tourist" art are based on European notions of what constitutes art, whereas indigenous peoples are unlikely to make these distinctions.[80]

3.1.3 Unresolved Problems

Despite the attractions of the Label of Authenticity, it fails to provide a complete solution to the issues raised by appropriation. The first problem with the label is

its compulsory aspect. The label will be of little use until all artists, producers, and manufacturers of indigenous art and cultural products are using the same label to denote authenticity. However, indigenous artist Brenda L. Croft likens this to the "Dog Tag" system, a government pass that indigenous peoples once needed to hold while travelling, stating that they were not full citizens. It is her belief that the label carries similar connotations, particularly in its association with the concept of "authenticity." Croft points out that Aboriginal and Torres Strait Islander artists have worked hard to explode notions of what constitutes "authentic" art, because of its implications of confinement and inclusion/exclusion. The Label of Authenticity conflates identifiable authorship with authenticity, and in doing so it plays into nonindigenous notions of what constitutes "Aboriginality."

The label creates a generic, homogenous notion of Aboriginality and encourages both a belief in a single "authentic" indigenous experience and a reliance on swing-tags to denote this. Another effect is to label as "inauthentic" the indigenous artist or producer who refuses to buy access to the label.

Croft also believes that the failure of the label to distinguish between fine art and tourist or merchandise art, although previously noted as a positive aspect, has drawbacks. She points out that reputable dealers and art and craft centres provide documentation authenticating works, which may even include video tapes. Therefore, the fine art end of the market has far less need of the label than the merchandising end.[81]

There have, however, been incidents of forgery at the fine art end of the market. In cases such as the previously mentioned example of Emily Kam Kngarrreye, and more recently, Clifford Possum Tjapaltjarri, the Label may be of assistance in inhibiting unscrupulous dealers and preventing forgery. Nonetheless, it is less likely that the label could have protected Kathleen Petyarre from the accusations of Beamish. Vivien Johnson believes that the label is more likely to represent restrictions on artists to sell paintings done or approved by them, and that nothing is more unlikely than that artists, such as Clifford Possum, will be prepared to brook interference in their business, however well meaning.[82]

At the merchandising end of the market the label will do little to assist in the case of images like the boomerang, which have long ago been absorbed into mainstream culture. In cases such as *Indofurn* and *R & T Textiles* it may be of some assistance in preventing customers from buying goods without the label, but only after extensive consumer education and only if the label becomes ubiquitous.

Another problem is the criteria required to gain use of the label. Any Aboriginal and Torres Strait Islander person may obtain a licence to use the label, regardless of the cultural integrity of the product. This is beneficial in that it does not require certain qualities in products, which might have served to trap indigenous culture in traditional styles and designs, but rather allows art and culture to develop diffusely. However, it does allow indigenous peoples to appropriate imagery that does not belong to them, or to create generic designs for use on mer-

chandise with adverse effects on cultural integrity.[83] The proposition that indigenous people may rip off other indigenous people is a contentious and sensitive issue, yet it should be addressed. The lack of willingness to deal with such issues perpetuates the view that there is a homogenous indigenous community with common ideals and interests. However, NIAAA goes some way to recognising the potential problem and warns against it in the guidelines for the label.[84]

Other underlying assumptions are particularly problematic. The legal actions supporting certification marks are the tort of passing off, or misleading and deceptive conduct under section 52 of the Trade Practices Act. Thus, the mark protects the consumer or purchaser of the good against being "ripped off." For a policy that declares itself aimed at the protection of indigenous interests, the legal solution is addressing the problem from the wrong angle. The legal wrong is done to the consumer and to the marketplace, not to the artists, who may be culturally and economically harmed by the fraud.

The creation of a registry body which can bring actions on behalf of artists when the mark is copied, or fraudulent or appropriated works are discovered before they reach the marketplace, has the advantage of easing many of the burdens of litigation. However, the negative aspect of this body is to remove individual autonomy from the artist, who must get his or her work licensed to become part of a legally recognised entity. Although it is true that other forms of protection such as copyright will continue to operate, the effect of creating a legal entity for the specific purpose of protecting against appropriation may act to invalidate claims brought outside that structure. Also, remedies will continue to address economic damage, not spiritual or cultural harms.

Moreover, just as in the case of copyright and heritage protection law, the extension of existing legal categories to accommodate indigenous interests incorporates artists into the colonial legal system and denies legitimacy to indigenous laws that may govern the use of particular designs or styles. "Authenticity" is dictated by whether a product carries a label, not by its own inherent characteristics and symbolism. If artists' works are appropriated, they become victims, in the legal narrative, and only the certification authority can save them. In this way, the legal system reconfigures the claims of indigenous peoples into a narrative of paternalism.

These criticisms do not mean to suggest that the indigenous organisations that have worked hard at introducing the Label of Authenticity are labouring under some kind of "false consciousness," or that they have not selected the best of the currently possible solutions to the problem of appropriation. The Label of Authenticity is an innovative approach to making the legal system work for indigenous peoples. It is hoped that the Label will assist in reducing the number of cheap imitations on offer at tourist outlets and will provide invaluable assistance to people, both foreigners and nonindigenous Australians, who do not wish to sup-

port the "rip-off" industry by buying their wares, and who do wish to support the art and culture of indigenous Australians. However, it suffers from a number of limitations and flaws, as does every other attempt to apply existing legal constructs to the issue of appropriation. It is simply impossible to address the problem in a meaningful and lasting way in the context of the Anglo-Australian legal system as it stands. Issues of art and appropriation must be dealt with in the context of self-determination.

3.2 LOOKING FOR SOLUTIONS BEYOND THE LABEL OF AUTHENTICITY

Recognising the limitations of the Label of Authenticity leads logically to the search for a system of protecting and controlling the use of indigenous art and images that accords with the ideals of self-determination. One suggestion has been to use the landmark decision of *Mabo v. State of Queensland.*[85]

3.2.1 Aboriginal and Torres Strait Islander Rights and the Mabo Decision

In 1992 the High Court of Australia recognised the native title of the Meriam people to areas of the Murray Island. Stating that native title survived the Crown's acquisition of sovereignty, the Court held that the Crown had radical title to the land, burdened by continuing rights of Aboriginal people.[86] Justice Brennan's leading judgment characterised native title as being ascertained according to the laws and customs of indigenous people who, by those laws and customs, have a "connexion" to the land.[87] The rights of native title can be possessed only by inhabitants or their descendants and are dependent on these people's remaining identifiable as a community living under its own laws and customs.[88] Native title can also be extinguished if a clan or group loses its connexion to the land by ceasing to acknowledge their own laws and customs.[89]

The application of the *Mabo* decision to issues of appropriation of indigenous imagery would require it to be extended beyond land. Former Aboriginal and Torres Strait Islander Social Justice Commissioner Mick Dodson characterises the decision as a positive step towards the recognition of indigenous culture. He states that, "native title is an opportunity to create a less intrusive system, because instead of creating criteria and making the Aboriginal system of law fit into them, native title is a recognition of indigenous law."[90]

Despite positive reactions to *Mabo*, there are serious problems with using these decisions to protect against appropriation. The view that art comes under native title as an "incident" in land leads to the logistical problem that, if indigenous rights to designs are confined to indigenous territories, then they are of little use in combating unauthorised reproduction in national and international markets.[91]

More fundamentally, the *Mabo* decision fails to overcome problems of eurocentrism and paternalism found in other legal solutions. The concept of native

title is based on precontact "connexion" with the land and descent from precontact owners. Native title will no longer exist where the tide of history has "washed away any real acknowledgment of traditional law."[92] The result is to reify the characterisation of Aboriginal authenticity as existing in a precontact and primitive model. As well as "freezing" indigenous culture, the decisions, although based on the recognition of indigenous law and culture, do not attribute any authority to such structures except insofar as the legal system recognises them as existing facts. Moreover, native title rights will be recognised only to the point that they do not "fracture the skeleton of principle which gives the body of our law its shape and internal consistency."[93] Even if such rights did once exist, they may have since been extinguished by inconsistent legislation.[94]

This is illustrated in the *R & T Textiles* decision. Bulun Bulun claimed in his statement, on behalf of the Ganalbingu people, that the Ganalbingu were the traditional owners of the land at the time of sovereignty and that his right to paint and reproduce his work was an incident of this traditional ownership.[95] However, Justice von Doussa rejected the argument:

> The principle that ownership of land and ownership in 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 stands in the road of the foreshadowed argument.[96]

Justice von Doussa added that even if customary laws regarding ownership had existed at the time of the Crown's assertion of sovereignty, they had since been amended by the Copyright Act 1968. To concede ownership of the copyright to the Ganalbingu people would "involve the creation of rights in indigenous peoples which are not otherwise recognised by the legal system of Australia."[97]

The Court's treatment of the native title argument in *R & T Textiles* illustrates two important points. The first is that the tool of legislative extinguishment is one of the legal system's strongest tools for denying indigenous rights. By relying on sovereignty and precedent, the legal system invokes its very foundations to reject present-day claims. Consequently, it is clear that whatever steps forward *Mabo* has made, the techniques and rhetoric of the High Court's decision will be more useful in refusing indigenous rights than they will be in developing them. Secondly, the justice's attitude illustrates a major sticking point for the creation of indigenous rights in art and culture: namely, the perception that this would give Aboriginal and Torres Strait Islander peoples advantages not enjoyed by nonindigenous Australians.

Equality before the law is a fundamental tenet of the Australian legal system and is, as it should be, jealously guarded. However, equal treatment does not constitute equal justice in the context of indigenous rights. Rather, it is important to recognise that, although all Australians have the same rights before the law, they ex-

ercise them differently. The question of indigenous rights is not about a demand made of "the law" by a special interest group, but an "interaction between legal systems with different organising systems."[98] The conflict is not who owns what, but a clash of world views.[99]

3.2.2 A Role for Mabo?

Mabo's limitations mean that neither the common law approach to native title rights nor the statutory avenue is likely to be of much assistance in laying the foundations for indigenous peoples' rights to control the use of their culture. Indigenous sovereignty and international norms of self-determination were not referred to in the judgments, and, although the doctrine of *terra nullius* was exploded with respect to property, the Court did not question the legality of the Crown's acquisition of sovereignty.[100] However, by recognising the fictitious nature of *terra nullius* and, hence, the continuance of indigenous sovereignty in relation to land, the High Court, albeit unintentionally, has laid the foundations of indigenous sovereignty and the right to self-determination in the common law. The next steps will be highly political and hence must come from the legislative and executive arms of government.

3.2.3 The Road to Decolonisation and Self-Determination

Decisions such as *Mabo* and the copyright cases have paved the first stones in Anaya's model of remedial self-determination. The next steps must be substantive. The constitutive aspect should include not only the recognition of the laws and customs of different communities, clans, and moieties for dealing with their cultural heritage and its contemporary manifestations but should also include decisions on how to apply them in contemporary society. The ongoing aspect would be the implementation of these laws and customs, direct enforceability against infringers, and the ability to change and adapt these rules and customs in accordance with changes and adaptations of indigenous cultures. This section will formulate one way in which substantive self-determination could be realised.

The recognition of customary law was examined in extensive detail in 1986 by the Australian Law Reform Commission.[101] The commission's report (hereinafter ALRC Report) focussed on substantive and procedural matters in the areas of family law and criminal law, not addressing heritage and art. It concluded that Aboriginal customary laws should be recognised, in appropriate ways, by the Australian legal system, against the background and within the framework of the general law. The ALRC Report was comprehensive and made a great many recommendations, none of which have been officially adopted by the legislatures. However, it was made prior to *Mabo* and so does not take into account the shifting landscape of indigenous rights in the courts.

The question that arises from this is, how might customary law play a role in

allowing indigenous peoples greater control over their art? Clearly, recognition of customary law as it relates to art and culture is but one part of developing self-government procedures for indigenous peoples. Anaya characterises self-government as "allowing indigenous peoples to achieve meaningful self-government through political institutions that reflect their specific cultural patterns and permit them to be genuinely associated with all decisions affecting them on a permanent basis."[102] Leaving aside the current debate over self-government through a treaty, the focus of this section will be upon methods of self-determination as they relate specifically to indigenous art and culture, while recognising the need for self-determination in the wider context of indigenous self-government.

This article submits a "working model," painted in broad brush strokes, for the purposes of encouraging discussion and argument. The first step of the model will be recognition by the general law that rights to control the ways in which indigenous art is used attach to those particular artworks and are based in customary laws. The second step will be the establishment of a special nonadversarial process to enforce those rights. For ease of reference this process will be termed a "tribunal." Although this suggestion of a tribunal to be set up specifically to deal with a certain type of indigenous issue may appear radical, similar suggestions have been made before. Lowitja O'Donohue, former Chair of the Aboriginal and Torres Strait Islander Commission, has suggested using tribunals in the context of community justice.[103] More recently, the Senate Legal and Constitutional References Committee in its Inquiry into the Federal Government's Implementation of the Stolen Generations Report, *Bringing Them Home*, has advocated establishing a tribunal to settle disputes brought by so-called stolen children.[104] The Senate Reference Committee received a great number of submissions regarding the establishment of a tribunal to compensate victims of the past government policy of indigenous child removal and ended by endorsing such a tribunal.[105] The Minority Report of the Australian Democrats Party also endorsed the establishment of a tribunal.[106]

This Senate Reference Committee Report was handed down in November 2000. Consequently, its discussion of the merits and demerits of compensating indigenous peoples through a tribunal is of particular use in framing the outlines of the model proposed in the context of indigenous art. There are obvious differences between the situation of the stolen children and the problem of appropriation of indigenous art. The latter will usually involve disputes between private individuals or companies and is not a matter of governmental compensation. Financial harm, as well as cultural harm, will often be at issue. Yet there is a central similarity in that both the appropriation of children and the appropriation of art involve loss and dispersal of indigenous culture and assimilation to nonindigenous culture. Both situations involve a dawning recognition of this assimilation as constituting damage or harm. Moreover, insofar as both involve contemporary conflict between in-

digenous and nonindigenous cultures, the model of the tribunal proposed by the Senate Reference Committee and the discussion of issues surrounding it are of value for informative and comparative purposes, as well as for illuminating the current position of an important Senate committee.

It must be emphasised at the outset that this is merely an example of a possible response and obviously requires a great deal of thought, discussion, and consultation with artists and communities before it could be put into practice. As the ALRC Report points out, there is no point in suggesting or implementing solutions that do not have the acceptance and endorsement of Aboriginal and Torres Strait Islander peoples.[107] Furthermore, for any solution to promote self-determination, it must have been developed by indigenous people themselves. The role of nonindigenous people is to make a space for indigenous autonomy within the existing system.

3.2.4 Tribunal for Resolving Disputes Concerning Indigenous Art and Culture: Role and Powers

The proposed tribunal's jurisdiction would be triggered whenever the rights attaching to a particular artwork or design were appropriated or otherwise misused. For the tribunal to be effective, appearance at the tribunal would need to be compellable by the general law and its decisions binding under the general law.

The tribunal would have a number of roles. A central aim would be to promote dialogue and coordination among claimants, offenders, and other relevant parties.[108] The tribunal should have the power to order or recommend all forms of reparation, including monetary damages, acknowledgment and apology, guarantees against repetition, and measures of restitution.[109] Monetary damages would recognise the breach of customary law and compensate the victim in the usual manner of the law. However, other remedies may provide more appropriate solutions. The tribunal could recommend that an apology be made, or that certain artists or communities be acknowledged as owners of the design and that royalties be paid. Guarantees against repetition could operate in conjunction with interim injunctions. Claims for restitution, in the present context, could include funding to language, cultural, and history centres; funding to reestablish indigenous identity;[110] educational programmes, or advertising campaigns. Of course, restitutionary measures would depend entirely on the type of damage suffered and may rarely be called into use.

A particularly important consideration is who would make the decisions and upon what basis. Anaya emphasises that self-determination measures should "reflect specific cultural patterns." Traditional punishments for misuse of tribal designs vary greatly. As was noted in *Indofurn*, punishment could be as severe as spearing or banishment,[111] or in the case of artist Lili Hargraves Ngarrayi, her people could "sing her to her death."[112] However, it is more likely that such issues would come to the tribunal when they involved a conflict between indigenous and non-

indigenous use of an artwork or design. Consequently, tribunal members should be neutral and specially trained. There should be both indigenous and nonindigenous members, either in equal numbers, or with a greater number of indigenous members. Elders, and those with the appropriate authority and knowledge from relevant communities, would have special roles as advisers on the relevant customary law applying to that design or art work. The tribunal would then apply customary rules and procedures to characterise the damage that had occurred and to find an appropriate response.

The proposed tribunal method adopts customary law as a regulating norm on its own terms, not as legal pluralism to be fixed in legislation or interpreted by the common law courts. It recognises that traditional indigenous punishments and dispute-resolving mechanisms may not follow Western conceptions of the administration of justice. As the ALRC Report points out, indigenous communities may not adopt the concept of "punishment" for wrongdoers, but rather one of "consequences."[113] The tribunal method also allows for interaction between indigenous and nonindigenous communities. The tribunal would be able to apply customary law to decide the nature of the wrong, such as the spiritual or cultural harm that has been done. However, sanctions would be those appropriate to the culture of the wrongdoer, such as an injunction or a fine for nonindigenous Australians. It could also be a role of the tribunal to negotiate between claims of archaeologists and communities in the case of relics, rock paintings, and secret/sacred places.

It is essential that the tribunal be highly flexible. By refusing to apply a single standard and procedure to all indigenous groups, but rather allowing communities to develop their own, it would be able to accommodate and respect cultural and linguistic needs. A further advantage would be the ability to address the issue of standing, allowing a *group* to claim ownership of a design, contrary to common law principles. This would be useful in the case of unauthorised reproduction of traditional figures, such as Mimi, Wandjina, and Quinkin.[114] Although much of the discussion so far has implicitly related to preexisting or traditional designs, it is important to recognise that many indigenous artists do not live in traditional communities and do not work only with traditional media and styles. By failing to recognise these artists, we risk "reifying or 'fossilising'" indigenous art through a concern with traditional "authenticity."[115] Hence, any solution must also extend to these artists. The specific concerns of damage and harm may be closer to those of nonindigenous artists, but they ought to be addressed in the same arena as those of traditional artists, so as not to "ghettoise" such artists between cultures.

Where existing common and statute laws, such as copyright or trade mark law, would apply in relation to an artwork, the tribunal should not displace the operation of such laws. The tribunal should not become a means of depriving indigenous artists of their rights under the general law. Rather, it should ensure that the strict legal requirements of such laws do not discriminate against indigenous

claims, and that the remedies offered are sufficient and appropriate to the types of harm suffered.

Many further questions arise from this working model. If tribunal members are applying laws other than those of the common law, constitutional issues could arise. There is no constitutional provision to apply laws other than the common law and legislature. In the narrow context of this specific tribunal, it would be necessary for the federal court to make provision for a quasi-judicial body. In the broader, aspirational, context of indigenous self-government, constitutional amendment would be essential.

3.2.5 Other Tribunal Issues: Authority and Evidence

Other issues to be addressed include the burden of proving the existence of customary law, ascertaining who has knowledge and authority to speak,[116] and overcoming or respecting the secrecy of certain matters.[117] Giving authority to the relevant elders of the community as tribunal advisers might avoid some of these problems, yet issues still remain. The first is the dispersal of control over art among different groups, as this presents difficulties in identifying and locating the relevant traditional Aboriginal owners.[118] Intellectual Property lawyer Dean Ellinson points out that there are often several groups that own and have rights and responsibilities in respect of one preexisting design, and the views of the different groups may not be uniform.[119] Another problem is that traditional customary law is not homogenous in strength or context, and it is constantly in a state of change. Some Aboriginal owners may be prepared to breach the customary law to improve their desperate economic position; some may accept alteration or additions to designs, whereas others may not.[120] These are important issues any new system would need to address.

In the context of the Stolen Generations tribunal, both the Public Interest Advocacy Commission (PIAC) and the Human Rights and Equal Opportunity Commission (HREOC) submitted that the tribunal should adopt relaxed rules of evidence in an attempt to avoid "unfairness" that results from requiring claimants to prove events on the basis of availability and accuracy of written records and firsthand oral evidence.[121] PIAC further submitted that claimants be allowed to give evidence in their own language, that the tribunal engage interpreters, and that claimants have the option of having the application heard in camera or in public.[122]

The Minority Report of the Australian Democrats looks at section 119 of the Veterans' Entitlement Act 1986 (Cth) as an analogous situation to removal of children. This statute establishes a Repatriation Commission which, under section 119,

> (a) is not bound to act in a formal manner and is not bound by the rules of evidence, but may inform itself on any matter in such manner as it thinks just;

(b) shall act according to substantial justice and the substantial merits of the case, without regard to legal form and technicalities; and
(c) without limiting the generality of the foregoing, shall take into account any difficulties that, for any reason, lie in the way of ascertaining the existence of any fact, matter, cause or circumstance, including any reason attributable to:
(i) the effects of the passage of time, including the effect of the passage of time on the availability of witnesses; and
(ii) the absence of, or the deficiency in, relevant official records.[123]

The Minority Report recommended a similar flexibility for the Stolen Generations tribunal, and it is equally applicable to the tribunal proposed here.[124]

The relaxation of normal evidentiary requirements has its risks. One such risk is to the validity of claims, as many fear that nondeserving claimants will manipulate the system to their own advantage. However, in the context of the veterans' compensation scheme such objections were not allowed to defeat the public policy purpose of such schemes.[125] Evidentiary requirements and due process safeguards of the Australian general law embody essential tenets of equality before the law, fairness, and human rights guarantees. If these were to be abandoned to give meaning and authority to customary law, it would be essential that other safeguards be put in their place. One such safeguard is the availability of administrative review on questions of law, including whether the requirements of natural justice or procedural fairness were met.

3.2.6 Mediation and Alternate Dispute Resolution

Another possibility is the inclusion of a mediation process in the operation of the tribunal. This was recommended by the Australian Democrats and canvassed by the Senate Reference Committee Report. The National Sorry Day Committee submitted that an Aboriginal and Torres Strait Islander Mediation Commission be established as a statutory body, to hear the grievances of the indigenous people.[126] Its commissioners would be both indigenous and nonindigenous, and decisions of the commission would be binding unless overturned by a vote of Parliament.

The Democrats' Minority Report looks at processes of alternate dispute resolution (ADR) used in conjunction with court-based adjudication. ADR techniques include confidential prehearing conferences and mediation. Common characteristics of ADR include an emphasis on flexibility, collaboration, and consensual outcomes, assisted but not imposed by a neutral third party.[127] Although risks associated with ADR include possible imbalances of power and limited enforceability of outcomes, ADR processes may be useful in reducing costs and settling cases without public, more time-consuming hearings. The Minority Report points out that the Canadian government is piloting ADR schemes to resolve claims

made by former Indian residential schools against the government for physical and sexual abuse.[128]

ADR processes may also be of use in the proposed indigenous art tribunal. Negotiated or mediated outcomes may be more appropriate, as well as time and cost saving, when an infringement is imminent but has not yet occurred, or when solutions more flexible than damages are appropriate. An ADR body would need to be empowered to negotiate different forms of compensation and other agreements, like acknowledgment of ownership or access to designs or sites of significance.[129]

It will be necessary to take care that any new system does not set up an alternate form of authority to traditional patterns, so as to remove autonomy and not add to it. The proposed tribunal would incorporate procedures for determination and decision making by tribunal members, albeit in a less formal and more flexible manner than existing courts and tribunals permit, allowing for discussion of particular harms and for the application and enforceability of customary laws and appropriate responses. In addition, there could be ADR and mediation procedures, should they be more appropriate for resolution of the issues.

The establishment of bodies developed and administered by indigenous people applying customary law in accordance with that custom is fraught with complex issues and possible conflicts. Such a tribunal would also be expensive to establish and run. However, the difficulties of bridging the gap between world views does not mean it ought not to be attempted. This article submits that a system of this kind is the only way that indigenous peoples will be able to control the use of their culture in a way that meaningfully furthers self-determination. It could exist apart from negotiated self-government agreements but would be a much more powerful tool of self-determination if it were combined with it. Such a method does not mimic customary law in the common law, or replicate it in legislation. It offers the opportunity not only to listen to indigenous voices, but also to treat them as authoritative and to respect indigenous laws as an alternate legitimating norm.

4 CONCLUSION

> [A]ccepting the reality of being a coloniser means agreeing to be a non-legitimate privileged person, that is, a usurper. To be sure, a usurper claims his place and, if need be, will defend it by every means at his disposal. This amounts to saying that at the very time of his triumph, he admits that what triumphs in him is an image which he condemns. His true victory will never be upon him: now he need only record it in the laws and morals.[130]

The growing recognition of indigenous art and traditions within the broader Australian community was recently demonstrated in the opening and closing ceremonies of the Sydney 2000 Olympic Games, as well as in the large number of indigenous art exhibits that formed part of the Olympics cultural package. Yet, unauthorised reproductions in the tourist market continue, as do "authenticity scandals" in the fine art market. The lack of understanding of, and respect for, indigenous culture that perpetuates this is reflected in the legal structures that continue to be informed by a colonial mentality. Tony Davies states, "Law fails to deal with appropriation because it does not address the basic conditions of appropriation."[131] This is because Anglo-Australian law is premised on nonrecognition of indigenous sovereignty.[132] By responding only to those aspects that fall into legal categories, the legal system rewrites indigenous art as a Western construction, and its peculiarly indigenous aspects are ignored. The legal system engages in appropriation of its own by becoming the "expert" and sole manner of recourse.[133]

The law must make a space for indigenous voices to act upon their concerns and implement their right to self-determination. "Accommodation" of indigenous peoples within existing structures is not enough. The change this article advocates is radical. It involves more than tweaking legislation, expanding common law actions, and reeducating judges. It goes beyond the admission of oral testimony or the awarding of damages based on "cultural harm." The "working model" is not offered as a perfect solution. It is merely the beginning of a search that goes beyond the presently existing legal system to address the concerns of indigenous peoples. The aim is not to prevent nonindigenous people from dealing with indigenous art, but rather to negotiate, so far as possible, mutually agreeable terms on which this can be done.

As issues regarding indigenous/nonindigenous relations continue to arise in the courts, legislature, executive branch, and media, they are invariably characterised as "Aboriginal problems" rather than "White problems."[134] The issue is usually cast aside as too politically "hot." Yet, the indigenous search for self-determination, whether through culture, land, human rights, or any other avenue, is never just an "Aboriginal problem," nor just a "White problem."

In the past, cultural appropriation has been central to colonisation. For indigenous peoples, art is more than an aesthetic endeavour with economic consequences. It expresses a relationship to land and to other people. It is central to religious expression in its ceremonial significance. It is a product of the law and often portrays the law. This is why addressing the conditions of cultural appropriation must now be central to decolonisation.

An examination of cultural appropriation and unauthorised reproduction of indigenous art can reveal the ways in which the legal system continues to fail indigenous people. These concerns cannot be separated from more contentious issues, such as land rights and extreme socioeconomic disadvantage. However, an examination of the issues surrounding art can also lead to a more positive recog-

nition that the Western manner of regarding art, culture, land, and property is neither the only nor the most constructive way to do so. Responsibility towards the artworks created and the dreamings which they depict is a central aspect of indigenous art. It is not a central tenet of the Anglo-Australian legal system of intellectual property, which is about apportioning blame, and converting it into an economic relation. In this respect alone, Western society could learn a great deal from indigenous culture.

It is to be hoped that these issues can also lead us to an understanding of where other cultures and world views differ from our own, and how we can share them to the benefit of both cultures. In addressing the conditions of appropriation, we must evolve a new legal system, one to which peoples beyond the colonial relation can relate and which gives a voice to those groups hitherto excluded from its processes. The legal system both informs and is informed by the norms of contemporary society. It is not the only tool that will accomplish the shift in perception necessary for decolonisation and indigenous self-determination, but it is a powerful one. Education, discussion, trust, and respect will also play important roles. This is our responsibility.

NOTES

1. Loretta Todd, Notes on Appropriation, 16:1 *Parallelogramme* 24, 24 (1990).

2. I will use *indigenous* in its generic meaning to refer both to the Aboriginal and Torres Strait Islander peoples of Australia and, in other contexts, the indigenous peoples of the world. I will use *Aboriginal* to refer to indigenous Australians from the mainland.

3. The definition of indigenous art in this paper is intended to cover a broad range of cultural expression, including artistic works, designs, images, rock art, bark painting, sand painting, song, dance, story, and ceremony.

4. Terri Janke, *Our Culture: Our Future—Report on Australian Indigenous Cultural and Intellectual Property Rights* (Michael Frankel & Company, Melbourne 1998).

5. *Id.* at 11–12.

6. *Id.* at 19–42.

7. Howard Morphy, *Aboriginal Art* 322 (Phaidon, London 1998).

8. *Id.* at 67.

9. *Id.* at 68–72.

10. Wally Caruana, *Aboriginal Art* 10 (Thames & Hudson, Singapore 1993).

11. *Id.* at 10.

12. *Id.* at 15.

13. Ali Gripper, Tribal Law That Keeps Lili's Dots in Check, *Sydney Morning Herald*, 26 September 2000, at 5.

14. Morphy, *supra* note 7, at 154.

15. Judith Ryan, *Spirit in Land: Bark Paintings from Arnhem Land* 10 (National Gallery of Victoria, 1990).

16. Morphy, *supra* note 7, at 320.

17. *Id.* at 366.

18. *Id.* at 321.

19. *Id.* at 380.

20. Janke, *supra* note 4, at 13.

21. Susan McCulloch, Authentic Forgery: The Faking of Aboriginal Art, *Weekend Australian*, 7–8 October 1995, "Review," at 1.

22. C. Nicholls, What Is Authorship? 25:4 *Australian Law Journal* 187, 187 (2000).

23. Vivien Johnson, The "Aboriginal Art Scandals" Scandal 20:1 *Artlink* 32 (2000).

24. Morphy *supra* note 7, at 309.

25. McCulloch, *supra* note 21, at 1.

26. *Id.* at 1.

27. *Recognition, Rights, Reform: A Report to Government on Native Title Social Justice Measures* 6.3 (ATSIC Homepage, <www.atsic.gov.au> 1995).

28. ATSIC Media Release, 9 May 2000.

29. S. James Anaya, *Indigenous Peoples at International Law* 49–58 (Oxford University Press, New York 1996).

30. Erica Irene Daes, Some Considerations on the Right of Indigenous Peoples to Self-Determination, 3 *Transnational Law and Contemporary Problems* 1, 3 (1993).

31. Anaya, *supra* note 29, at 80.

32. *Id.* at 75.

33. *Id.* at 75.

34. *Id.* at 83.

35. *Id.* at 82. *See also* L. June McCue, *Treaty Making from an Indigenous Perspective: A Ned'u'ten Canadian Treaty Making Model* (LL.M. Thesis, Faculty of Law, University of British Columbia 1998).

36. ATSIC Media Release, *supra* note 28.

37. Bulun Bulun v. Nejlam Pty. Ltd. (unreported, Federal Court, NT, 1989); C. Golvan, Aboriginal Art and the Protection of Indigenous Cultural Rights, [1992] 7 EIPR 227.

38. Yumbulul v. Reserve Bank of Australia and Others [1991] 21 IPR 481.

39. Milpurrurru & Ors v. Indofurn Pty. Ltd. & Ors. (1994) 30 IPR 209.

40. John Bulun Bulun & Anor. v. R & T Textiles Pty. Ltd. (1998) 41 IPR 513.

41. *Indofurn,* (1994) 30 IPR at 214.

42. *Id.* at 214.

43. *Id.* at 215.

44. *Id.* at 247.

45. *R & T Textiles*, (1998) 41 IPR at 513.

46. *See* Cecilia O'Brien, Protecting Secret-Sacred Designs—Indigenous Cultural and Intellectual Property Law, 2 *Media & Arts Law Review* 57 (1997); Jill McKeough and Andrew Stewart, Intellectual Property and the Dreaming, *Indigenous Australians and the Law* (E. Johnson et al., eds., Cavendish, Sydney 1996); Kamal Puri, Cultural Ownership and Intellectual Property Rights Post-*Mabo*: Putting Ideas into Action, 9 *Intellectual Property Journal* 293 [1995]; Colin Golvan, Aboriginal Art and Copyright—An Overview and Commentary Concerning Recent Developments, 1 *Media & Arts Law Review* 151 (1996); Colin Golvan, Aboriginal Arts and the Protection of Indigenous Cultural Rights, 2:56 *Aboriginal Law Bulletin* 5 (1992); Dean Ellinson, Unauthorised Reproduction of Traditional Aboriginal Art, 17:2 *University of New South Wales Law Journal* 327 (1994); Amanda Pask, Cultural Appropriation and the Law: An Analysis of the Legal Regimes Concerning Culture, 8 *Intellectual Property Journal* 57 [1993]; Nicholas Blackmore, The Search for a Culturally Sensitive Approach to Legal Protection of Aboriginal Art, 17:2 *Copyright Reporter* 57 (1999).

47. O'Brien, *supra* note 46, at 58.

48. *Id.*

49. Copyright Amendment (Moral Rights) Act 2000.

50. McKeough and Stewart, *supra* note 46, at 70.

51. *R & T Textiles*, (1998) 41 IPR at 530.

52. Tony Davies, Aboriginal Cultural Property? 14 *Law in Context* 1, 12 (1996).

53. *R & T Textiles*, (1998) 41 IPR at 530-31.

54. Clifford argues that "art and culture emerged after 1800 as mutually reinforcing domains of human value, strategies for gathering, marking off, protecting the best and most interesting creations of 'Man.'" James Clifford, *The Predicament of Culture* 234 (Harvard University Press, Cambridge, MA, 1988).

55. Davies, *supra* note 52, at 5.

56. Puri, *supra* note 46 at 320; McKeough and Stewart, *supra* note 46, at 73.

57. Foster v. Montford (1976) 14 ALR 71.

58. Puri, *supra* note 46, at 325–26.

59. McKeough and Stewart, *supra* note 46, at 72.

60. *Id.* at 67.

61. Golvan, Aboriginal Art and the Protection of Indigenous Cultural Rights, *supra* note 46, at 7–8.

62. Aboriginal and Torres Strait Islander Heritage Protection Act (ATSIHPA), section 4.

63. Henrietta Fourmile, The Need for an Independent Inquiry into State Collections of Aboriginal and Torres Strait Islander Cultural Heritage, 56:2 *Aboriginal Law Bulletin* 3, 5 (1992).

64. Russell Goldflam, Between a Rock and a Hard Place: The Failure of Commonwealth Sacred Sites Protection Legislation, 74:3 *Aboriginal Law Bulletin* 13, 13 (1995).

65. This situation arose when a private company and the local council sought to build a bridge in Ngarrindjeri country. The Ngarrindjeri urged the Minister to exercise his power to make a declaration under the ATSIHPA, and he requested a report. Subsequently, claims were made of "secret women's business" at the site. On the basis of the first report, the minister made a declaration, but it was quashed by the federal court on grounds of the Minister's failure to comply with administrative requirements. The South Australian government appointed a Royal Commission to investigate, which found the "women's business" to be a fabrication. The Commonwealth Minister then appointed Justice Mathews to prepare a second report, but the High Court held that the act did not authorise the appointment of a judge. Wilson v. Minister for Aboriginal and Torres Strait Islander Affairs, (1996) 138 *Australian Law Journal* 220. See Maureen Tehan, A Tale of Two Cultures, 21:1 *Australian Law Journal* 10 (1986); N. Hancock, Disclosure in the Public Interest, 21:1 *Australian Law Journal* 19 (1996).

66. Janke, *supra* note 4, at 83.

67. Davies, *supra* note 52, at 15.

68. Trade Marks Act 1995 (Cth), Part 16.

69. Label of Authenticity (para 5, NIAAA, <http://www.niaaa.com.au/label.html>, cited 2 August 2000).

70. *Id.* at para. 28.

71. *Id.* at paras. 17–20.

72. *Id.* at paras. 7–14.

73. Marianna Annas, The Label of Authenticity: A Certification Trade Mark for Goods and Services of Indigenous Origin, 3:90 *Aboriginal Law Bulletin* 4, 4 (1997).

74. *Id.* at 5.

75. *Id.* at 8.

76. Trade Marks Act 1995 (Cth) §169.

77. Annas, *supra* note 73, at 7.

78. Kathryn Wells, Draft Discussion Paper on the Proposed Authenticity Trade Mark (Promoting and Marketing Aboriginal and Torres Strait Islander Culture), October 1996, quoted in Annas, *supra* note 73, at 6.

79. Annas, *supra* note 73, at 6.

80. Shelly Wright, Intellectual Property and the "Imaginary Aboriginal," *in Indigenous Peoples and the Law* 129, 146 (G. Bird, G. Martin, and J. Nielsen eds., The Federation Press, Sydney 1996).

81. Brenda L. Croft, Labelled—Buyer be Aware, 20:1 *Artlink* 84, 85 (2000).

82. Johnson, *supra* note 23, at 35.

83. Croft, *supra* note 81, at 85.

84. Copyright: Questions and Answers, para. 5 (NIAAA, <http://www.niaaa.com.au/copyright_qa_sheet.html>).

85. Mabo & Others v. State of Queensland [No. 2] [1991–1992] 175 CLR 1.

86. *Id.* Brennan C.J. at 48–50, Deane and Gaudron JJ. at 81, Toohey J. at 183.

87. *Id.* per Brennan C.J. at 70.

88. *Id.* per Brennan C.J. at 58.

89. *Id.* per Brennan C.J. at 60.

90. Michael Dodson, Indigenous Culture and Native Title, 21:1 *Australian Law Journal*, 2 (1996).

91. Sally McCausland, Protecting Aboriginal Culture in Australia: Looking for Solutions in the Canadian Experience, 140 (LLM thesis, Faculty of Law, University of British Columbia 1997).

92. *Mabo,* [1991–1992] 175 CLR 1, per Brennan C.J. at 60.

93. *Id.* per Brennan C.J. at 29.

94. *Id.* per Brennan C.J. at 68.

95. *R & T Textiles,* (1998) 41 IPR at 522–23.

96. *Id.* at 524.

97. *Id.* at 525.

98. Pask, *supra* note 46, at 64–65.

99. *Id.* at 64.

100. Henry Reynolds, *Aboriginal Sovereignty* 3 (Allen & Unwin, Sydney, 1996).

101. *Recognition of Aboriginal Customary Law,* Report No.31, The Law Reform Commission, Australian Government Publishing Service, Canberra, 1986. The ALRC Report takes "Aboriginal customary laws" to comprise the body of rules, values, and traditions, more or less clearly defined, that were accepted as establishing standards or procedures to be followed and upheld in traditional societies and that continue to exist in various forms today (76).

102. Anaya, *supra* note 29, at 112.

103. Lowitja O'Donoghue, Customary Law as a Vehicle for Community Empowerment, *Indigenous Law Forum* 60 (Australian Government Publishing Service, Canberra 1995).

104. This refers to Aboriginal and Torres Strait Islander children and children of mixed parentage who were removed from their parents and communities and placed in homes under government policy, which peaked between 1910 and 1970. There has been much historical and sociopolitical debate in recent times as to the extent of this policy, the number of people affected, and whether the government should today compensate those children who were removed.

105. Senate Legal and Constitutional References Committee, *Healing: A Legacy of Generations—The Report of the Inquiry into the Federal Government's Implementation of Recommendations Made by the Human Rights and Equal Opportunity Commission in "Bringing Them Home"* 261 (Parliament of the Commonwealth of Australia, ATSIC Homepage, <www.atsic.gov.au/issues/bringing-them-home/bringhome/main-page.htm> Nov. 2000).

106. *Id.* at 311.

107. ALRC Report, *supra* note 101, at vol. 1, 14; and at vol. 2, chapter 39.

108. *Healing: A Legacy of Generations, supra* note 105, at 240 (Public Interest Advocacy Centre's Submission to Committee).

109. These functions of a tribunal were suggested in the context of Stolen Generations (*see Healing: A Legacy of Generations*, *supra* note 105, at 240–41) but may be adapted for use in the present context.

110. Suggested in context of Stolen Generations; *id.* at 241.

111. *Indofurn*, (1994) 30 IPR at 215, per von Doussa J.

112. Gripper, *supra* note 13.

113. ALRC Report, *supra* note 101, at vol. 1, 366.

114. Stephen Gray, Freedom or Fossilisation: Proposed Legislative "Protection" for the Work of Aboriginal Artists, Paper delivered at the Fiftieth Anniversary Conference, Australasian Law Teachers' Association, *Cross Currents: Internationalism, National Identity and Law*, para. 21 (1995) (at Australian Legal Information Institution Website <http://www. austlii.edu.au>, last updated 26 July 2001).

115. *Id.* para. 2.

116. ALRC Report, *supra* note 101, at vol. 1, 479.

117. *Id.* at 483.

118. Dean Ellinson, Unauthorised reproduction of traditional Aboriginal art, 17:2 *University of New South Wales Law Journal* 327, 335 (1994).

119. *Id.* at 337.

120. *Id.* at 338.

121. *Healing: A Legacy of Generations, supra* note 105, at 242.

122. *Id.* at 242–243.

123. *Id.* at 319–20.

124. *Id.* at 320.

125. *Id.* at 320.

126. *Id.* at 246.

127. *Id.* at 323.

128. *Id.* at 323.

129. *See id.* at 242.

130. Albert Memmi, *The Colonizer and The Colonized* 52 (Beacon Press, Boston 1965).

131. Davies, *supra* note 52, at 25.

132. *Id.* at 25.

133. Todd, *supra* note 1, at 24.

134. J. Frideres, A New Perspective on an Old Problem: The Macro-Model, *Native People in Canada: Contemporary Conflicts* 301 (J. Frideres ed., Prentice-Hall Canada, Scarborough 1983).