This file includes notes and a powerpoint presentation by Dr Sarah Holcombe to the Lunchtime seminar hosted by LESANZ Canberra and CSIRO, 17th November 2009.

The presentation is titled 'Translating Indigenous rights into the action and language of research'.

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CSIRO / LSE seminar abstract
17th November
Dr Sarah Holcombe (Research Fellow, ANU)

Translating Indigenous rights into the action and language of research
The Declaration on the Rights of Indigenous Peoples was endorsed by the Australian government earlier this year, although it had been adopted by the UN almost two years prior. Translating this rights discourse into enabling resources in the area of research is a growing area of attention. There is also a growing recognition that Indigenous knowledge of the environment has something to teach western science. However, creating the space where this knowledge sharing can occur is challenging, not least because there are fundamental differences in these knowledge systems.

The seminar will provide an overview of the content of a range of resources, such as the DKCRC ‘Aboriginal Knowledge and Intellectual Property Protocol’ and the ‘Guidelines for Indigenous Ecological Knowledge Management’ in the NT, in which I have been engaged in co-developing. I will then discuss the process of the development of these resources through workshops and focus groups – which were just as important as the final products. The culturally inclusive forums were collaborative, incorporating several kinds of discourse in order to facilitate shared understandings among participants of the specialised language of intellectual property and the international language of rights. Recognition of the history of exploitation and the misappropriation of Indigenous knowledge in research was an important first step in the process, as was the recognition that Indigenous peoples own their knowledge and the right to manage it and gain from its use.

Dr Sarah Holcombe bio'
A Research Fellow at the National Centre for Indigenous Studies (NCIS) at the ANU, Sarah is a social anthropologist with twenty years research experience in remote and very remote areas of the Northern Territory, Western Australia and western Queensland. This research has been a balance of applied and academic anthropology with eight of these years spent working as a regional anthropologist for, respectively, the Central and Northern Land Councils. Before joining the NCIS, Sarah was a Research Fellow at the ANU Centre for Aboriginal Economic Policy Research (CAEPR) and social science coordinator for the Desert Knowledge CRC. Sarah’s PhD field research, in the mid 1990s, was in the small Central Australian community of Mt Liebig. Research interests include the engagement of Aboriginal organisations with development issues such as mining; Aboriginal governance, Succession processes and re-territorialisation; the dynamics of the "inter-cultural" and social change; collaborative research methodologies and the ethical management of Indigenous knowledge and intellectual property in research.
LSE Seminar: CSIRO Entomology, Black Mountain, Canberra

Introduction

The Declaration on the rights of Indigenous peoples – which I’ll refer to from here-on as The Declaration – is potentially a powerful instrument for Indigenous peoples. However, there is no point having rights unless they can be exercised and likewise, unless those who need to have them recognised and activated are aware that such rights exist. The Declaration is one of several normative international instruments that I have found useful in managing research practice, which also include the Convention for the Safeguarding of intangible cultural heritage and the Ethno-biological Code of Ethics. (slide 2)

When the Declaration was endorsed by UN member states over 2 years ago, Australia was one of only four states to vote against it. The other countries who voted against it were also settler colonial states and include the United States, Canada and New Zealand.¹ Like Australia, however, I understand that NZ has also recently endorsed the Declaration. The Australian government and these same settler countries also chose not to ratify the UNESCO ‘Convention for the Safeguarding of Intangible Cultural Heritage’ in 2006. Unlike the Declaration, the Convention is a binding instrument, which another 117 member states chose to ratify. Rob Williams, a Native American Professor of law at the University of Arizona, analysed the shared politico-legal histories of these 4 countries in relation to why they chose not to endorse the Declaration. For my purposes here, his analysis also applies to the issue of non-ratification of the Convention. He notes that the 4 countries are all inheritors of the English common laws ‘doctrine of discovery’. He analysed the ‘implementation gap’ in the protection and promotion of Indigenous people’s human rights in these countries through the lens of this shared colonial era legal legacy, which continues to inform domestic legislation and case law in these

¹The vote was 143 countries in favour, 4 against and 11 abstaining – abstaining countries were Azeerbaijan, Bangladesh, Bhutan, Burundi, Colombia, Georgia, Kenya, Nigeria, Russian Federation, Samoa, Ukraine.
countries. (see slide Mabo versus Qld decision – I have borrowed this slide from Williams as it illustrates this active legacy in Australia in the Mabo decision – slide 3)

This seminar is in two parts. The first section will trace the epistemological contours of this settler colonial genealogy as it underwrites our research engagement with Indigenous peoples today. This lays the foundation for appreciating the differences between modern western science as a knowledge system – as our knowledge system, and the Indigenous knowledge systems that we have come to engage with. The methods that we bring with us to our research are not innocent or neutral; they are fundamentally normative – laden with our own moralities, belief systems and epistemologies. Being reflective about these is crucial in engaging effectively with Indigenous peoples.

In the second section I’ll begin by briefly outlining the processes by which several Indigenous Knowledge and IP resources were developed, followed by their framework and core content. This will include some discussion of articles in the Declaration that I have found helpful, with a focus on the articles that relate to Indigenous people’s traditional knowledge and Intellectual Property.

In her now classic text, “Decolonising Methodologies”, the Maori academic Linda Tuhiwai Smith articulates how - from the vantage point of the colonised – the term ‘research’ is inextricably linked with imperialism and its colonial outposts. The question concerning the epistemological merits of Indigenous knowledge versus modern western science has been viewed “through imperial eyes”. And thus (slide 4),

“it assumes that western ideas about the most fundamental things are the only possible ideas to hold, certainly the only rational ideas, the only ideas that make sense of the world, of reality, of social life and of human beings. It is an approach to Indigenous people that still conveys a sense of innate superiority…” (Tuhiwai Smith 2003:56)
She talks of “colonising knowledges”: effectively different value systems competing with the settler knowledges winning. Other than realising the different values and approaches Indigenous Australians and non-Indigenous scientists / researchers will bring to bear on a research project, power structures are embedded in our knowledges. As Patrick Wolf noted, the colonial thesis was that “Indigenous peoples were superfluous within Australia as a settler-colonial economy... (1999:3).

The fact that Australian Indigenous people managed the land in relatively subtle, often unseen ways, to the European observer suggested that they were without technologies. The evolutionary perspective that Indigenous Australians, would either die away or be assimilated was underwritten by the value of ‘technological might makes epistemological right’ (per Maffie 2008); that is, those who commanded the more powerful technologies – in this case the settlers - directed the future. Even today there are strong perceptions that if given the ‘opportunity’ Indigenous people will be assimilated by modernity. Modernity holds within it deep philosophical assumptions. There is value in exploring these and to do so we have to explore our own modern scientific epistemological assumptions and our understandings of truth. Here, I’m taking the liberty of assuming that those here today would call themselves scientists or at least have a formal education that has included western science.

My own discipline of social anthropology is not immune from this colonial history. The colonisation of various countries, including Australia, was facilitated by the work of anthropologists. I especially enjoy the native American – Vine Deloria’s – perspective on anthropologists: “the fundamental thesis of the anthropologist is that people are objects for observation, people are then considered objects for experimentation, for manipulation and eventual extinction ...”(1969:81)- so they must be recorded as quickly as possible...Although this may have been published in 1969 – and we have the luxury of hindsight – there is still, today, much to be engaged by with this critical thesis and anthropologists have been just as guilty – if not more so – of ‘stealing knowledge’ as other researchers. I’ll talk about this issue of knowledge ownership and the western intellectual property system in the following section.
Debbie-Bird Rose has talked of a ‘fundamental philosophical gap between European cultures of conquest and Aboriginal cultures of balance’ (1996: 11). Here I’ll name some of these philosophical differences and to do so I’ll draw on the recent work of native American philosopher James Maffie and his definition of an ethnoepistemology which I found resonates with Australian Indigenous epistemology. Like, Tuhuwai Smith, he problematises the assumptions within western epistemologies. All modern western science (aka mainstream academic research) is underpinned by the epistemological assumptions of the researcher. This is the case in all of the sciences and most especially the hard sciences – which tend to operate on a truth seeking basis. That is; the researcher will have a hypothesis they are seeking to prove or disprove in the field or the lab. This hypothesis is underpinned by the assumption that reality is structured and unified by a single set of timeless laws or essences; such that the cosmos is a universe.

Many other non-western cultures, however, such as classical Confusianism, Indigenous North and Mesoamerican and as I argue, classical Indigenous Australian philosophy, all reject this metaphysical picture and understand rather a pluriverse (Maffie 2008:10). As Maffie notes, in the West the notion of a universe dates at least to Plato’s metaphysical realm where reality is characterised by being, not becoming. That which is permanent, static and timeless is real; that which is impermanent, mutable and timed is not. Laws, structure and essences do not change and are ontologically fundamental – the modern sciences of physics and chemistry are keys underpinning this epistemological order. All else is ontologically derivative and reducible to them. This picture also assumes an ontological appearance / reality distinction; that which changes is only apparently real, while that which is static is really real. Maffie indicates that this metaphysical picture has traditionally shaped two epistemological assumptions; knowledge of reality consists of the correct theoretical apprehension of the fundamental timeless ontological order of reality, and explanation consists of situating events or objects in terms of this order (1998:10-11).
These western philosophies distinguish knowing in terms of the values they promote: knowledge becomes effectively an ideological position.

*(show slide 5– IK vs MWS)* – I’ll leave this summary slide up while I discuss these differences in more detail.

(ppt) – to summarise:

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<td>Outcome oriented</td>
</tr>
<tr>
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<td>Orthodoxy</td>
</tr>
<tr>
<td>Relational (family-centric)</td>
<td>Individualistic</td>
</tr>
<tr>
<td>Local and particular</td>
<td>Global and generalisable</td>
</tr>
</tbody>
</table>

Some of these qualities or traits are of course exercised amongst any general population – amongst individuals - to a greater or lesser extent. The outcome oriented individual versus the process oriented individual is a classic example. However, the issue at hand here is the way these qualities are valued, fostered and institutionalised in western societies. Modern western science teaches us to manage time – academics to corporates know about KPIs (Key Performance Indicators). Formal education inculcates us to produce in a timely manner – we live with deadlines and we seek certainty in everything we do.

That Indigenous people’s can be perhaps surprisingly accommodating and perhaps often not ask questions or engage with the issues we find so compelling needs to be recognised as an epistemological position; not a limitation or intellectual weakness on their part. In the classical Indigenous knowledge system there is no one true
order or fundamental set of irreducible principles from which truth can be compared; reality is processive, not static. These philosophies conceive knowing and understanding in practical terms of knowing how to do things, not in theoretical terms of knowing that certain facts, truths or laws obtain.

Indeed, according to Maffie when construing these differences - we should be thinking of Indigenous knowledges as practice centred; as concerned with orthopraxy, rather than orthodoxy. He quotes Vine Deloria and Wildcat: “[Native American] Indians use a peculiar way of maintaining a metaphysical stance that can be best described as ‘suspended judgement’ (2008:18).

Indigenous Knowledge concerns how one conducts oneself in the world. It is not about producing rational argument or deductive-nomological explanations, and the inability to produce these is not considered an epistemological shortcoming in these lived worlds. So to generalise - process, rather than outcome, and how one lives – not what one believes - tend to be signifiers of Indigenous knowledge systems. Likewise, for the Indigenous philosophies at discussion here – the knowing how to live locally and foster human relations is also of fundamental value. However, as Maffie indicates; “The fact that modern western science has succeeded in mastering one particular set of natural relationships [in the hard sciences] does not entail that it is epistemologically superior to non-western knowledge systems that focus on different relationships” (Maffie 2008:12).

For example, my research experience for my PhD compelled me to decentre my own western epistemology of “appearance versus reality”. Whereas I might see only bush – alive for me only in ecological and aesthetic terms, my Aboriginal friends saw family members; “that Tjapangati – he’s over there – in that river red gum”. Sacred sites – as places on the landscape - do not only embody people – they are that person. In many regions of Australia, such as in the NT, kinship terms are used extensively to describe the land itself – so that land is kin. Land as the embodiment of past generations, is literally related to those who own it. Therefore if a family with a particular sub-section affiliation or ‘skin’, such as Tjapangati/ Tjapanangka will, if
fulfilling a range of other criteria, have primary rights to the country that is also of this skin (IEK Guidelines 2009:7).

The concept that Aboriginal knowledge is holistic tends to emerge from this interrelationship between people and land. The Dreaming, or Tjukurrpa in western desert languages, encapsulates this cosmology; the pre-ordained nature of people’s relationship to the environment – to each other and to the unseen forces that have shaped them and continue to. That people are interconnected with the environment is also appreciably gaining more ground in western science, as we realise that it is not simply a ‘resource’ there for the taking, as some disconnected object. That land is kin, in Indigenous epistemologies, engenders not only attachment for the place / the land, but respect for it and an attitude that it must be looked after – you way you would look after a relative. Again, this perspective that the land is sentient and responsive is also gaining ground in western science.

**Part 2:**
Given these epistemological differences between Indigenous knowledge and modern western science – what are some research tools developed to manage them and work with them? The resources I’ll talk about today, I have been closely involved with developing; they include the Desert Knowledge CRC ‘Aboriginal Knowledge and IP Protocol’ and the ‘Guidelines for IEK Management in the NT’. *See slide 6 – the DKCRC resources first with supporting resources were also developed – read slide.*

*More recently – slide 7 – read slide.* From the discussion about the holistic structure of Indigenous knowledge - it is probably apparent that the concept of IEK is not a real one – ecological knowledge is intertwined with other knowledge. We kept the term however – as the resources are focused on land management practitioners.

Before outlining the key content of these resources - I’ll briefly discuss **the process of their development** (see slide 8) – specifically the DKCRC resources.
In working with Indigenous peoples in research the process of undertaking the research is as important as the final research products. And this was also the case with the development of these resources, which were developed in close collaboration with Aboriginal people. A range of small focus groups and larger workshops were held – the first half of which were specifically informative about research ethics and Aboriginal rights. A foundational element of the focus groups and final workshop was a presentation on the various areas of intellectual property (copyright, patents, trademarks, and designs, etc) and their relevance in managing and/or protecting Aboriginal knowledge. In this way the focus groups and the workshop clarified where formal IP tools were helpful in managing Aboriginal knowledge and when ethical research practice is a more appropriate management tool. The empowerment process for participants was a crucial element of it. Ensuring that Aboriginal participants knew what their rights were in relation to managing and controlling their knowledge and what their reasonable expectations should be about researchers practice and the research outcomes, underpinned the Protocol revision (Holcombe 2008:4 DKCRC conference paper).

Becoming aware of the questions to ask of a researcher and the expectations by way of benefit sharing that one has a right to, was part of the two-way learning of these focus groups and workshops. I understand that a common experience of many researchers (including those in government) is that an Aboriginal person - most notably in remote areas - will rarely answer a question with one of their own, to enquire about the point of the question. Rather they will either answer it as best that they can (often being polite) – or the question will be greeted with silence. So developing resources for university researchers was not the only priority – but rather a first step. Indigenous peoples also need to be able to ensure that they can implement a best practice approach and monitor the activities of researchers – so translating these resources from the technical language of research and ethics, into plain English, was equally important during the development of the DKCRC resources.
and there are copies of the Aboriginal Knowledge and IP community guide to look at on the table here.\(^2\)

Ensuring that there were Aboriginal voices and perspectives in these resources was essential, as Patrick Wolf noted “...where survival was a matter of not being assimilated, positionality is not just central to the issue – it is the issue. In this settler-colonial context, the question of who speaks, goes far beyond liberal concerns with equity, dialogue or access to the academy” (1999:3).

I also have some copies of a conference paper I gave in late 2008, that outlines the processes we engaged with to revise the Protocol or its on the web ... see the slide. So if your interested in further detail about the content of these focus groups and workshops – which Aboriginal people and organisations participated and this collaborative approach – then the powerpoints are also on-line – under DKCRC social science workshops.

The skeletal content of the resources
Now onto the content of the resources:
Acknowledgement of past misappropriation / respect ...\(^3\).

I’ll talk to the slides here: slides 9, 10, 11, 12 – and the IP slides 13 and 14.

Managing IP and recognising and protecting IK:
So TK notices and limited licenses are potentially ways for Indigenous peoples to utilise IP laws to protect their knowledge. There are a range of cases – such as the ‘Bulun Bulun versus R and T textiles case’ (1998) – where Aboriginal people have been able to uphold their responsibilities to the wider group or clan. In this case a clan design was made into a carpet without the consent of the Aboriginal custodian

\(^2\) Thus – the process of developing these resources for me – was also concerned with this other way of knowledge ... not just the outcome – but the value of the engagement – and the sharing of knowledge during this process of moving toward the outcome.

\(^3\) Unlike South Africa we never have had a reconciliation and truth tribunal – so we are compelled to do this on an inter-personal level and through the development of regional protocols and guidelines.
of the design. It became known as the Bulun Bulun equity case. It recognised that the Johhny Bulun Bulun had a responsibility to his clan to ensure that communally owned traditional designs contained in his painting were properly used (Janke, Beyond Guarding Ground 2009:10). This case started the trend of traditional custodian’s notices.

Maffie’s intellectual program is about “Dispersing power and democratizing knowledge” (Maffie 2008:26 – 27), when one is researching with marginalised peoples (such as Indigenous people) – sharing power in research is fundamental. One key way in which this is done is though the ethical management of intellectual property. However, for fundamentally the same epistemological reasons that the ideology and methods of modern western science tend not to translate well in the inter-cultural context (leading to misunderstandings, etc) – the intellectual property regime tends to not translate well. It was developed for modern western science and the neoliberal politic of knowledge as a commodity on the free market.

### Slide 15

<table>
<thead>
<tr>
<th>Non-Indigenous</th>
<th>Indigenous</th>
</tr>
</thead>
<tbody>
<tr>
<td>Written knowledge</td>
<td>Generally orally transmitted</td>
</tr>
<tr>
<td>Emphasis on economic rights (the economic value of knowledge)</td>
<td>Emphasis on preservation and maintenance of culture</td>
</tr>
<tr>
<td>Individually based – created by individuals</td>
<td>Socially based – created through the generations via the transmission process</td>
</tr>
<tr>
<td>Intellectual property rights are owned by individual creators or their employees and research companies</td>
<td>Communally owned but often custodians are authorised to use and disseminate</td>
</tr>
<tr>
<td>Intellectual property can be freely transmitted and assigned – usually for economic returns – for asset time, in any medium and in any territory</td>
<td>Generally not transferable, but transmission if allowed, is based on a series of cultural qualifications</td>
</tr>
<tr>
<td>Intellectual property rights holders can decide how or by whom the information can be transmitted, transferred to assigned</td>
<td>There are often restrictions on how transmission can occur, particularly in relation to sacred or secret material</td>
</tr>
<tr>
<td>Intellectual property rights are generally compartmentalized into categories such as tangible, intangible, arts and cultural expression</td>
<td>An holistic approach, by which all aspects of cultural heritage are interrelated.</td>
</tr>
</tbody>
</table>
Non-Aboriginal notions of intellectual property versus Aboriginal notions of Aboriginal cultural and intellectual property (adapted from Janke 1998:75 and taken from the DKCRC Breifing paper 5 – Aboriginal knowledge and Western Knowledge and IP rights).

As Janke has noted recently, it is not sufficient for Indigenous peoples to have to rely on creative lawyers using inadequate laws to protect their cultural and intellectual property (2009, Beyond Guarding Ground).

See slide 16
The Declaration recognises this limitation:

Article 31 (1). Indigenous peoples have the right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions, as well as the manifestations of their sciences, technologies and cultures, including human and genetic resources, seeds, medicines, knowledge of the properties of flora and fauna, oral traditions, literatures, designs ... They also have the right to maintain, control, protect and develop their intellectual property over such cultural heritage, traditional knowledge, and cultural expressions.

Article 31 (2). In conjunction with Indigenous peoples, States shall take effective measure to recognise and protect the exercise of these rights.

When we developed these research management resources we started with the assumption that Aboriginal people own their own knowledge – but as you can see implementing this statement is more complex than it appears.

See Slide 17
Certainly one of the reasons a Howard government minister gave for not supporting the Declaration were ‘concerns over the extension of Indigenous intellectual property rights under the Declaration as unnecessary under current international
and Australian law’ (Hansard 10 Sept 2007, in Wikipedia). However, the existing IP system does not work effectively to manage and protect Indigenous knowledge at all.

In 2 submissions earlier this year - in relation to the Hawke Interim Review of the Environmental Protection and Biodiversity Conversation Act (EPBC Act 1999) and Australia’s Biodiversity Conservation Strategy 2010-2020, Matthew Rimmer, Terri Janke and myself, noted that there are currently no regulatory mechanisms, laws or policies that specifically provide rights to Indigenous peoples over their Indigenous knowledge and intellectual property. Our submissions – as do the protocols and guidelines – were aimed at ensuring that Indigenous knowledge holders are engaged with in a manner that recognises their prior rights over their own knowledge and intellectual property.

- Inadequacy long recognised, even within WIPO.
- UN Permanent Forum on Indigenous Issues has been considering this for some time > in 2007 called for submissions to consider whether their ought to be a shift in the focus of protection of ITK away from IP law to protection via Customary Law
- Develop an international sui generis system recognising that ITK is not simply a different type of IP > rather a completely different entity.
- DKCRC put a submission in:
  
  
  C-UN-Submission-Nov-2007.pdf

I’ll leave it there. Thanks
‘Translating Indigenous rights into the action and language of research’

Lunchtime seminar 17/11/09: LESANZ Canberra and CSIRO

Sarah Holcombe, Research Fellow
National Centre for Indigenous Studies, ANU
“Translating Indigenous rights into the action and language of research”

- Declaration on the Rights of Indigenous Peoples – UN

- Convention for the Safeguarding of Intangible Cultural Heritage – UNESCO
  http://unesdoc.unesco.org/images/0013/001325/132540e.pdf

- International Society of Ethnobiologists (ISE) Code of Ethics
  http://ise.arts.ubc.ca/_common/docs/ISE%20COE_Eng_rev_24Nov08.pdf
3) ‘Translating Indigenous rights into the action and language of research’

Mabo vs Qld (1992)

“…The great voyages of European discovery opened to European nations the prospect of occupying new and valuable territories that were already inhabited… To these territories the European colonial nations applied the doctrines relating to acquisition of territory that was terra nullius…Various justifications for the acquisition of sovereignty over the territory of “backward peoples” were advanced. The benefits of Christianity and European civilization had been seen as a sufficient justification from medieval times. See Williams, The American Indian in Western Legal Thought (1990) and Johnson v. McIntosh (1823).”

Excerpt from “Why Australia, Canada, New Zealand, the United States and Nobody Else Voted Against the UN Declaration on the Rights of Indigenous Peoples: Understanding the “Implementation Gap” in the English Common Law Settler States”. Rob Williams ANU Dialogue 3/12/07.
4) ‘Translating Indigenous rights into the action and language of research’

Decolonising Methodologies: Research and Indigenous Peoples:

“it assumes that western ideas about the most fundamental things are the only possible ideas to hold, certainly the only rational ideas, the only ideas that make sense of the world, of reality, of social life and of human beings. It is an approach to Indigenous people that still conveys a sense of innate superiority…” (Tuhiwai Smith 1999:56)
5) Adapted from James Maffie “In the end, we have the Gatling Gun, And they have not: Future Prospects of Indigenous Knowledges” (2008)

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6) ‘Translating Indigenous rights into the action and language of research’

**Resources developed:**

- Aboriginal Knowledge and IP Protocol plus a range of supporting resources;
- AKIP Protocol Community Guide,
- Good Manners Guide to working with Aboriginal People in Research,
- Aboriginal Research Engagement Protocol,
- Schedule of Rates of Pay for Aboriginal workers in research,
- Free Prior Informed consent forms
- Plain English briefing papers on ethics, IP etc
7) ‘Translating Indigenous rights into the action and language of research’

• 2008-2009: with colleagues Terri Janke and Michael Davis we were engaged by the NRM Board NT to develop 3 resources to manage IEK and IP under the brief: “Indigenous cultural and Intellectual Property Protocols for IEK management”.

• 1) “Guidelines for IEK Management: including repatriation and archiving” (Holcombe, for researchers)
• 2) “Maintain and Strengthen Your Culture: Handbook for Working with IEK and IP” (Davis, for Aboriginal Land Management practitioners)
• 3) “Report on the current status of IEK and IP in the NT” (Janke, for government, policy makers)
8) ‘Translating Indigenous rights into the action and language of research’

Process as important as Outcome:

• Educative element > where formal IP tools are helpful in managing Aboriginal knowledge and when ethical research practice is a more appropriate management tool.

• Empowerment process for participants was a crucial element

• Two-way learning

• Developing resources for Aboriginal people just as important as for researchers

• refer to 2008 conference paper for more detail:

9) ‘Translating Indigenous rights into the action and language of research’

Skeletal content (Protocol / Guidelines):

**Preamble:** acknowledging > past exploitation / misappropriation of TK and IP
- Acknowledging > Indigenous people own their knowledge

**Ethics:** Have their own customary protocols that manage knowledge – its acquisition and transfer. These local protocols > observed, understood, respected and engaged with.

**Confidentiality:** DKCRC protocol overrides all other clauses

**Free Prior Informed Consent:** full disclosure, consent offered without coercion or pressure, process of gaining is educative on both sides, not a one-off > ongoing

**Benefit Sharing:** research must produce negotiated benefits and reinforce self-determination
- ‘active protection’ *(talk about further next slides)*, paid appropriate and agreed rates, co-develop a ‘research engagement protocol’.

**Application and use of the research:** ‘How can Aboriginal people use the research?’
- Opportunities for capacity building, create useful and relevant research outputs.
10) ‘Translating Indigenous rights into the action and language of research’

IEK as Practise: crucially IEK is about practise (of culture), rather than just content.

• This principle underpins the Guidelines
• Informs all stages of them – collection / storage and archiving / repatriation
• The principle of ‘active protection’ that these Guidelines promote necessitates that researchers are supportive of:

1) Engaging with the knowledge holders and relevant community;
2) Ensuring that data is in an accessible form; and
3) Encouraging opportunities for inter-generational knowledge transmission: for intangible knowledge transfer.
11) Total and Indigenous Australian age pyramids 2001 and 2009

This graph illustrates the youthful age of the Indigenous population, where the highest proportions of the population are under 24 years of age. Less than 10% of the Indigenous population over the age of 60, whereas there is a relatively uniform demographic in the non-Indigenous population.

12) ‘Translating Indigenous rights into the action and language of research’

Skeletal content (Protocol / Guidelines):

Documentation: correctly provenancing data – only anonymous if people request. Local knowledge loses value if generalised. Traceable to their origins.

Storage and Access: local storage places (keeping places/libraries) > deposited with communities, dual locations, public vs private databases (‘prior art base’), research products must be accessible upon request.

Attribution and due credit: acknowledged in accordance with preference, due credit, consider joint authorship > does not mean joint copyright.

• Different materials have different copyright laws:
  • eg reports/publications copyright usually vests with funding agency (CSIRO)/research body (CRC), unless other arrangements are made
  • Researchers who hold copyright hold a fiduciary duty to safeguard integrity of the knowledge > display ‘TK Notice’ in conjunction with any copyright.
13) ‘Translating Indigenous rights into the action and language of research’

**Traditional knowledge notice:**
Such a mechanism could be to include an “Aboriginal story notice” or “Traditional knowledge notice”.

• An example of a notice used in a published book on Aboriginal plant knowledge:
“The language and information contained in this book includes traditional knowledge, traditional cultural expression and references to biological resources (plants and animals) of the Manyjilyjarra and Warnman people. The information is published with the consent of Manyjilyjarra and Warnman traditional custodians, for the purposes of general education and language maintenance purposes” (Holcombe IEK Guidelines p.16).
14) ‘Translating Indigenous rights into the action and language of research’

Optional paragraphs to allow researchers a limited licence if appropriate:

“Use and reference is allowed for the purposes of research or study provided that full and proper attribution is given to the author, knowledge holder and traditional custodial group. No commercial use by educational institutions is authorized without prior consent and negotiation of rights”.

“This information should not be used commercially in any way including in tourism, food technology including bush tucker applications, medicines, pharmaceutical products, health and beauty products, storytelling or as trade marks, patents and designs, without observing the Aboriginal cultural protocols of prior informed consent, attribution to traditional Indigenous communities, cultural integrity, and the sharing of benefits”.
15) Indigenous notions of cultural and intellectual property versus Non-Indigenous notions of intellectual property (adapted from Janke 1998:75 and taken from the DKCRC Briefing paper 5 – Aboriginal knowledge and Western Knowledge and IP rights).

Indigenous Cultural and Intellectual Property
1) Generally orally transmitted
2) Emphasis on preservation and maintenance of culture
3) Socially based – created through the generations via the transmission process
4) Communally owned but often custodians are authorised to use and disseminate
5) Generally not transferable, but transmission if allowed, is based on a series of cultural qualifications
6) There are often restrictions on how transmission can occur, particularly in relation to sacred or secret material
7) An holistic approach, by which all aspects of cultural heritage are interrelated.

Non-Indigenous Intellectual Property
1) Written knowledge
2) Emphasis on economic rights (the economic value of knowledge)
3) Individually based – created by individuals
4) IP rights are owned by individual creators or their employees and research companies
5) IP can be freely transmitted and assigned – usually for economic returns – for asset time, in any medium and in any territory
6) IP rights holders can decide how or by whom the information can be transmitted, transferred to assigned
7) IP rights are generally compartmentalized into categories such as tangible, intangible, arts and cultural expression
16) UN Declaration on the Rights of Indigenous Peoples

Article 31(1). Indigenous peoples have the right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions, as well as the manifestations of their sciences, technologies and cultures, including human and genetic resources, seeds, medicines, knowledge of the properties of flora and fauna, oral traditions, literatures, designs … They also have the right to maintain, control, protect and develop their intellectual property over such cultural heritage, traditional knowledge, and cultural expressions.

Article 31(2). In conjunction with Indigenous peoples, States shall take effective measure to recognise and protect the exercise of these rights.
17) ‘Translating Indigenous rights into the action and language of research’

- Howard government opposition to the Declaration: ‘concerns over the extension of Indigenous Intellectual Property rights under the Declaration as unnecessary under current international and Australian law’.
- Current IP laws inadequate: in 2 submissions earlier this year: there are currently no regulatory mechanisms, laws or policies that specifically provide rights to Indigenous peoples over their Indigenous knowledge and intellectual property.
- Inadequacy long recognised, even within WIPO.
- UNPFII has been considering this for some time > in 2007 called for submissions to consider whether their ought to be a shift in the focus of protection of ITK away from IP law to protection via Customary Law.
- Develop an international sui generis system recognising that ITK is not simply a different type of IP > rather a completely different entity.