ATSIC

CHAIRMAN

CH 20040302

Mr Brenton Holmes
Secretary
Senate Select Committee on the Free Trade
Agreement between Australia and the United States
Parliament House
CANBERRA ACT 2600

Dear Mr Holmes

I refer to your invitation to make a submission to the inquiry on the Australia – US Free Trade Agreement (AUSFTA).

Aboriginal and Torres Strait Islander Services (ATSIS), on behalf of the Aboriginal and Torres Strait Islander Commission (ATSIC), commissioned a study of the issue by the Australian Centre for Intellectual Property in Agriculture (ACIPA) in 2003. ACIPA made recommendations in its subsequent report *Protecting and Promoting Indigenous Interests* on what should be the objectives of the AUSFTA for Indigenous people and also proposed specific exemptions to protect indigenous interests in relation to goods and services, government procurement, investment and intellectual property.

After its recommendations were endorsed by the ATSIC Board, ACIPA's report was submitted to the Minister for Trade, the Hon Mark Vaile MP, before the AUSFTA negotiations were concluded as a contribution towards safeguarding the economic and intellectual property interests of Indigenous people.

I am pleased to report that the Minister and his Department gave serious consideration to the Report and held a number of discussions with ATSIS officers. While not all of the Report's proposals have been adopted in the AUSFTA text, the Minister made it clear to ATSIC that there is nothing in AUSFTA that will affect in any way Australia's ability to take whatever action is necessary to protect Indigenous interests should the need arise.

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ATSIC publicly released *Protecting and Promoting Indigenous Interests* because of the recent discussion about the impact of AUSFTA on indigenous people and to assist the Parliamentary inquiries into the AUSFTA. The full text of the ACIPA report was placed on line on 6 April 2004 at http://www.atsic.gov.au/issues/Inquiries/AUS_US_free_trade.asp

A précis of the Report is attached for the Committee's convenience.

Yours sincerely

Lionel Quartermaine
Acting Chairman

10 MAY 2004

PRECIS OF REPORT PREPARED BY THE AUSTRALIAN CENTRE FOR INTELLECTUAL PROPERTY IN AGRICULTURE ON THE

AUSTRALIA – US FREE TRADE AGREEMENT

(PROTECTING AND PROMOTING INDIGENOUS INTERESTS)

ATSIS asked the Australian Centre for Intellectual Property in Agriculture (ACIPA) to provide them a report on the likely impact of the proposed Australia-US Free Trade Agreement (AUSFTA) on Australia's Indigenous People. ACIPA is a partnership of distinguished trade lawyers and economists based at Griffith University and the Australian National University. They noted that it is difficult to foresee the future consequences of any such agreement over the long term, particularly for Indigenous people, but made a series of recommendations.

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EXECUTIVE SUMMARY

In general terms FTAs begin by broadly providing for the removal of a wide range of trade barriers between the nations that are Parties to the agreement. Barriers to trade in goods, services, investment and the use and protection of intellectual property rights are removed. The idea is that economic growth is stimulated by the removal of tariffs on goods and of restrictions on the provision of services and investment between the Parties. An FTA also has the effect of substantially limiting the legislative and policy options available to a member nation. The capacity to provide subsidies and provide preferential treatment to industries and groups to deal with regional unemployment or to stimulate and encourage the growth of new industries can be greatly limited. Quarantine measures, and the restriction on the trade of dangerous or culturally significant goods can also be limited. For that reason FTAs contain extensive lists of general and specific exemptions from the general operation of the agreements. Much of the attention of the Parties negotiating the agreement is centred on the exemptions, which is also the focus of this report.

There are specific exemptions for Indigenous people under the chapters in AUSFTA dealing with investment and government procurement. Other exemptions that do not specifically refer to Indigenous people may also exempt government policies and legislation for Indigenous people. If relevant exemptions which appear in the Singapore-Australia FTA (SAFTA) also appear in AUSFTA, this will go at least some distance in maintaining policy options for government.

Although these specific exemptions are to be applauded for allowing governments to maintain wide policy discretions to enable them to continue to undertake steps to overcome Indigenous disadvantage and to enable Indigenous spiritual and cultural life to flourish, it is likely that

there are gaps in the presently proposed exemptions which may unintentionally constrain government options. AUSFTA will likely operate for a considerable period of time, and so it is useful to imagine it as a kind of quasi-constitutional document that will mark out a range of limitations upon the exercise of legislative and administrative power. For that reason AUSFTA's provisions are to be understood as being relatively enduring and capable of being interpreted in the future in ways that we cannot fully anticipate at this time. Similarly, those who were involved with writing the Australian Constitution in the late 19th century could not have anticipated the way in which many of the provisions they wrote were to be interpreted in the future. The North American Free Trade Agreement (NAFTA) is less than a decade old and yet already there are indications that some of its provisions may potentially be interpreted in unanticipated ways.

The potential for unintended consequences, and exemption gaps which may inappropriately limit government policy options for Indigenous people requires, in our view, a broad overarching exemption clause for Indigenous people in AUSFTA. If this is not achievable, the alternative is for a comprehensive range of specific exemptions to be set out in AUSFTA.

ACIPA recommend a broad exemption in the Objects chapter of AUSFTA for Indigenous people in the following terms:

> Exemption for Indigenous People
>
> Nothing in this Agreement shall be construed as preventing a Party from adopting or maintaining a measure for its Indigenous people.
>
> If a particular measure benefits or will benefit a Party's Indigenous people as well as its non-Indigenous people, the measure may apply or be applied regardless of any contrary provision of this Agreement if the preponderant purpose or effect of the measure is for the benefit of the Indigenous people.

For the purposes of this Agreement, an Australian Indigenous person means a person of the Aboriginal race of Australia or a descendent of an Indigenous inhabitant of the Torres Strait Islands.

The reasons for providing any exemption for Indigenous people is because of their unique status as the original occupants of Australia, with their history, culture – indeed their entire heritage – being connected solely to Australia. In addition, the Australian Government needs to be able to continue to adopt a wide range of measures to overcome the serious and pervasive social and economic disadvantage of Indigenous people without fear of breaching AUSFTA. Chapter 1.6 highlights data from a recent Productivity Commission report which provides some indices of the extent of the social and economic disadvantage being suffered by Indigenous people. One indicator that starkly illustrates the disadvantage being suffered is the fact that the life expectancy of Indigenous people is around 20 years lower than that for the total Australian population.

If a broad exemption for Indigenous people is not provided for in AUSFTA, the next alternative is to include specific exemptions in relevant chapters of the Agreement. ACIPA recommend that the exemption language be framed in the broadest terms to allow maximum policy latitude for governments to address the serious and enduring nature of the disadvantage being suffered by Indigenous people.

ACIPA's recommended exemptions, compared with those that were included in SAFTA, are as follows:

CHAPTER	AUSFTA	Our Proposal
Objectives		Nothing in this Agreement shall be construed as preventing a Party from adopting or maintaining a measure for its Indigenous

		people. If a particular measure benefits or will benefit a Party's Indigenous people as well as its non-Indigenous people, the measure may apply or be applied regardless of any contrary provision of this Agreement if the preponderant purpose or effect of the measure is for the benefit of the Indigenous people. For the purposes of this Agreement, an Australian Indigenous person means a person of the Aboriginal race of Australia or a descendent of an Indigenous inhabitant of the Torres Strait Islands.
Trade in Goods **Trade in Goods (cont)**		That an exemption be provided for "measures for Indigenous people and organizations, including for the protection of the cultural and spiritual heritage of Indigenous people".
Government Procurement	Exemptions apply (c) [for measures] necessary to protect intellectual property; (g) for the health and welfare of its	It is recommended that an exemption apply "to any measure with respect to Australia's Indigenous people".

	indigenous people; and (h) for the economic or social advancement of its indigenous people.	
Trade in Services	Australia reserves the right to adopt or maintain any measure according preferences to any indigenous person or organisation or providing for the favourable treatment of any indigenous person or organisation in relation to acquisition, establishment or operation of any commercial or industrial undertaking in the service sector.	It is recommended that an exemption apply "to any measure with respect to Australia's indigenous people". It is also recommended that a reservation be included in the same terms as that contained in SAFTA Annex 4-II(A).
Investment	Australia reserves the right to adopt or maintain any measure with respect to investment that accords preferences to any indigenous person or organisation or providing for the favourable treatment of any indigenous person or organisation. For the purpose of this reservation, an indigenous person means a person of the Aboriginal race of Australia or a descendent of an	Nothing in this Chapter shall be construed as preventing a Party from adopting or maintaining a measure relating to its Indigenous people.

	indigenous inhabitant of the Torres Strait Islands.	
Intellectual Property		Nothing in this Chapter shall be construed as preventing a Party from adopting or maintaining a measure relating to its Indigenous people.

CHAPTER 1

BACKGROUND

1.1 THE WTO AND FREE TRADE AGREEMENTS

Free Trade Agreements generally take the form of bi-lateral agreements between countries in which they agree to reduce or abolish trade barriers between each other. On the face of it these agreements are in breach of the most favoured nation principle contained in the World Trade Organisation's General Agreement on Tariffs and Trade. The WTO was established on 1st January 1995 and succeeded the General Agreement on Trade and Tariffs (GATT). GATT was a "temporary" multilateral agreement which came into existence in 1947 pending the establishment of the International Trade Organisation under the auspices of the United Nations. However ideological and other differences led to the abandonment of the ITO, leaving GATT as the primary multilateral mechanism for reducing international trade barriers. GATT lacked any substantial organisational base and was dogged by weak enforcement mechanisms. The establishment of the WTO overcame a number of these weaknesses by providing a permanent central organisational structure based in Geneva and a more rigorous enforcement process through the Dispute Settlements Body.

The WTO administers a number of multilateral agreements, including GATT 1994 (which updates GATT 1947), the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) and the General Agreement on Trade in Services (GATS). The foundational document is GATT, which deals with trade in goods. The cornerstone principles reflected in GATT are most favored nation (MFN) and national treatment.

GATT allows a number of specific exceptions, including:

- customs unions
- free trade areas
- preferences to developing countries

1.2 FREE TRADE AGREEMENTS

Free Trade Agreements are agreements between two or more nations in which each member nation agrees not to continue measures, or impose measures in the future, that will constrain free trade between them, subject to exemptions specified in the FTA. In other words it constitutes an agreement that effectively directs and limits each member nation's policies and legislative powers in relation to issues covered by the FTA. Any alleged breach of the agreement will allow a party to seek an order from a tribunal allowing retaliatory measures to be taken or requiring the payment of compensation. In NAFTA and the Singapore-Australia (SAFTA). FTA breaches of the chapter dealing with investments will also allow a foreign investor from a Party nation to take action before a tribunal seeking compensation for harm done to their investments in breach of the FTA. The compensation can potentially be in amounts of millions of dollars.

FTAs are generally conscious of the wide-ranging limitations they place upon legislative and administrative power, and so an FTA will typically reserve a raft of specified measures from the operation of the FTA. Existing legislative and policy measures typically will be exempted or reserved, and the entitlement to introduce new policy and legislative measures in the future will be reserved.

There are over 170 FTAs in force, with a further 70 operational agreements about which the WTO have not been officially notified. It is expected that there will be nearly 300 FTAs in force by 2005.

The rationale for this is provided by Article XXIV.4 of GATT:

> The contracting parties recognize the desirability of increasing freedom of trade by the development, through voluntary agreements, of closer integration between the economies of the countries parties to such agreements.

1.3 NAFTA

The North American Free Trade Agreement (NAFTA) came into operation on January 1, 1994, forming the world's largest free trade zone. It sought to eliminate nearly all tariffs between the US and Canada by 1998 and aims to eliminate most tariffs between the US and Mexico by 2008. It also aims to remove many non-tariff barriers, such as import licenses. NAFTA deals with issues other than barriers to trade in goods; it also covers government procurement, investment and intellectual property.

Canada has a general exemption for its aboriginal peoples under Appendix 2 to NAFTA. The reservation is expressed in general terms and applies in relation to the chapters dealing with Investment and Cross-Boarder Trade in Services. In relation to Investment, the reservations apply to the NAFTA provisions dealing with national treatment, most favoured nation, local presence, performance requirements, and senior management and boards of directors. The reservations regarding Cross-Border Trade in Services and Investments apply to the national treatment and most favoured nation provisions. The reservation provision states:

> Canada reserves the right to adopt or maintain any measure denying investors of another Party and their investments, or service providers of another Party, any rights or preferences provided to aboriginal peoples.

Note here that the exemption is expressed very broadly as applying to "any rights or preferences provided to aboriginal peoples".

1.4 AUSTRALIA-SINGAPORE FTA

A free trade agreement has recently come into effect between Australia and Singapore; SAFTA.

An exemption specifically referring to Australia's Indigenous people appears in Article 15 under the chapter dealing with Government Procurement:

> ***Opportunities for Indigenous persons***
>
> Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail or a disguised restriction on international trade, nothing in this Chapter shall prevent Australia from promoting employment and training opportunities for its indigenous people in regions where significant indigenous populations exist.

A reservation also appears in Annex 4-II(A). Australia reserves measures relating to Chapter 7 (Trade in Services) and Chapter 8 (Investment) dealing with market access and national treatment. The terms of the reservation are that:

> Australia reserves the right to adopt or maintain any measure according preferences to any indigenous person or organisation or providing for the favourable treatment of any indigenous person or organisation in relation to acquisition, establishment or operation of any commercial or industrial undertaking in the service sector.
>
> Australia reserves the right to adopt or maintain any measure with respect to investment that accords preferences to any indigenous person or organisation or providing for the favourable treatment of any indigenous person or organisation.

> For the purpose of this reservation, an indigenous person means a person of the Aboriginal race of Australia or a descendent of an indigenous inhabitant of the Torres Strait Islands.

The existing Australian measures that are reserved are legislation and ministerial statements at all levels of government including Australia's foreign investment policy, which encompasses the *Foreign Acquisitions and Takeovers Act 1975* and the *Native Title Act*.

A further reservation specifically referring to Australia's indigenous people applies to broadcasting and audiovisual, entertainment and cultural services regarding market access and national treatment. The reservation states that:

> Australia reserves the right to adopt or maintain any measure with respect to:
>
> - the creative arts, cultural heritage and other cultural industries, including audiovisual services, entertainment services and libraries, archives, museums and other cultural services;
> - broadcasting and audiovisual services, including measures with respect to planning, licensing and spectrum management, and including:
> - services offered in Australia;
> - international services originating from Australia.

The term "creative arts" is defined as including "indigenous traditional practice and contemporary cultural expression", and "cultural heritage" is defined as including "ethnological, archaeological, historical, literary, artistic, scientific or technological moveable or built heritage, including the collections which are documented, preserved and exhibited by museums, galleries, libraries, archives and other heritage collecting institutions".

There are other reservations that do not specifically refer to Indigenous people, but which have the effect of retaining legislative and policy mechanisms and options for Indigenous people.

The reservation reserves social welfare, public education, public utilities and health programs. This would cover an extensive range of programs to improve the social and economic conditions of Indigenous people. There may however be programs unique to Indigenous people that are designed for their social and economic advancement that might not be characterised as social welfare. Programs to promote Indigenous businesses or programs requiring mining and other companies to employ Indigenous people in remote areas might not be covered by the reservation.

1.5 AUSTRALIA-US FTA

The proposed Australia-US Free Trade Agreement (AUSFTA) will aim to reduce trade barriers between the US and Australia in relation to trade in goods, services and investment. The Agreement will aim to reduce tariffs in goods to zero, and remove a wide range of barriers to trade in services and to investments. Similarly, provisions will be made to remove any discriminatory intellectual property rights between residents in the US and Australia.

If AUSFTA comes into existence, it is likely to be in operation for some considerable period of time. Its broad capacity to limit the effective exercise of legislative and administrative power means that it should be considered as a kind of quasi-constitutional document, capable of wide interpretation. For that reason it is recommended that the exemption and reservation clauses be cast in broad "constitutional" terms. This is because it is difficult to anticipate at this time the kinds of measures a future legislature may seek to initiate to overcome the social and economic disadvantages of Indigenous people and the range of measures

that a government may seek to introduce to protect and enhance Indigenous traditions and culture.

1.6 WHY SHOULD RESERVATIONS EXIST FOR INDIGENOUS PEOPLE?

There are 460,000 Indigenous Australians, who comprise 2.36 % of Australia's total population. The Federal Parliament has on a number of occasions recognised the necessity of introducing special measures for the protection and advancement of the interests of Australia's Indigenous people.

The Australian Productivity Commission recently stated that the motivation for their report on overcoming Indigenous disadvantage "is the vision of an Australia in which Indigenous people come to enjoy the same overall standard of living as other Australians — that they are as healthy, live as long and are as able to participate in the social and economic life of the nation".[1] Achieving this will continue to require special measures for Indigenous people to overcome their present social and economic disadvantage. The Productivity Commission observed that the life expectancy of Indigenous people is around 20 years lower than that for the total Australian population.

The policy and legislative measures required to overcome such extensive disadvantage covers a range of fields including special measures, but unlike other OECD countries, which do provide Treaty rights for Indigenous citizens, Australia provides no treaty rights. Private sector initiatives to assist Indigenous and other minority groups in the United States and Canada are strongly developed, but they are not yet strongly developed in Australia.

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[1] *Overcoming Indigenous Disadvantage: key indicators 2003* Report Australian Productivity Commission Steering Committee for the Review of Government Service Provision, November 2003. www.pc.gov.au/gsp/reports/indigenous/keyindicators2003/keyindicators2003.pdf

Australia does provide for commonwealth and some state assistance programs and mining royalty equivalents for mining on Aboriginal lands in the Northern Territory.

1.7 EFFECTS OF AUSFTA ON INDIGENOUS PEOPLE

AUSFTA will affect the Australian Government's capacity to enact measures for Indigenous people across a wide range of areas. The AUSFTA covers a range of topics that will affect Indigenous people. For example the chapters titled: Trade in Goods will impact upon the exporting of items that are of cultural significance to Indigenous people; Government Procurement – the provision of housing, and other infrastructure and essential utility services such as water, sewerage and electricity to Indigenous communities; Trade in Services – special treatment regarding the provision of Indigenous education, health and other services; Investment – native title and employment schemes requiring mining companies to employ Indigenous workers, and traditional hunting and fishing rights; Intellectual property – group moral rights, rights to protect Indigenous traditions and knowledge as exemplified in artistic and other works, rights to protect intellectual property in genetic resources obtained from Indigenous lands or Indigenous traditional knowledge.

CHAPTER 2

A BROAD EXEMPTION CLAUSE FOR INDIGENOUS PEOPLE

2.1 BROAD EXEMPTION

Australia's Indigenous people hold a unique status as its original occupants. They were dispossessed of their lands, and many were alienated from their families and their culture. The social indicators for Indigenous people are markedly poorer than those for the rest of the population across a wide range of indicators, as we mentioned in the previous chapter. For that reason Government programs and initiatives have been undertaken, and will need to continue to be undertaken, across a wide range of fields to redress the severe social, cultural and economic disadvantages being suffered. As noted above, the Canadian Government ensured that a very broad exemption to protect Canadian Aboriginal peoples was included in the NAFTA agreement. ACIPA therefore recommended that a broad exemption be provided for in AUSFTA to enable programs to redress the disadvantage.

A broad exemption clause will affect the way in which AUSFTA's terms are likely to be interpreted, and who is likely to be involved in its interpretation. Essentially, AUSFTA will be interpreted by the two Government Parties (the US and Australia) to assist in deciding whether proposed legislation or policy is likely to breach the Agreement. AUSFTA will also be interpreted by an independent Tribunal if a dispute arises regarding the Agreement.

A broad exemption for Indigenous people appearing in the objects provisions of AUSFTA would mean (if appropriately worded) that there would be no restraint imposed on government by the agreement in relation to any measures that are adopted for Indigenous people.

As an illustration of the significance of broad exemption clauses, in the *SD Myers* arbitration case a US company complained that Canadian environmental laws amounted to an expropriation of their investments in breach of NAFTA. Tribunal member Bryan Schwartz found that Article 1110 of NAFTA, which provides for compensation for expropriation, should be read in the context of NAFTA's overall environmental construction, including the preamble. Evidence of NAFTA's concern to preserve policy options on the environment include Article 104 which appears in NAFTA's Objects. Article 104 states that in the event of inconsistency between a number of listed UN environmental protection conventions and NAFTA, the environmental conventions prevail.[2] Schwartz emphasised the need for a purpose and effect analytical approach to interpreting NAFTA. This approach leads interpreters to pay particular regard to the overall purpose of the FTA.

Further support for the purposive approach appears in the Vienna Convention on the Law of Treaties, which is binding on interpreters of NAFTA (and likely AUSFTA as well).

If AUSFTA were to state in a broadly worded clause in its Objects chapter that each Party retains, in effect, full freedom to implement measures for its Indigenous people, then the interpreter of the operational provisions of AUSFTA would be required to read down those specific provisions in the light of the objects clause. If it is made evident in AUSFTA that the Agreement preserves the right for the Australian government (at least) to undertake a wide range of measures to address the special needs and disadvantage of Indigenous people, this will go a considerable distance in allaying concerns that AUSFTA might contain

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[2] *S.D. Myers, Inc. v. Government of Canada, In a NAFTA Arbitration under the UNCITRAL Arbitration Rules, Partial Award*, (November 13, 2000); see Dr. Howard Mann and Dr. Julie A. Soloway "Untangling the Expropriation and Regulation Relationship: Is there a way forward?" Report to the Ad Hoc Expert Group on Investment Rules and the Department of Foreign Affairs and International Trade March 31, 2002 www.dfait-maeci.gc.ca/tna-nac/regulation-en.asp

provisions that could be interpreted or invoked in a way that would restrain policy and legislative measures for Indigenous people.

Consequently, ACIPA's approach was to recommend in the first chapter of AUSFTA, which deals with Objectives and General definitions, the following clause be inserted:

> Exemption for Indigenous People
>
> Nothing in this Agreement shall be construed as preventing a Party from adopting or maintaining a measure for its Indigenous people.
>
> If a particular measure benefits or will benefit a Party's Indigenous people as well as its non-Indigenous people, the measure may apply or be applied regardless of any contrary provision of this Agreement if the preponderant purpose or effect of the measure is for the benefit of the Indigenous people.
>
> For the purposes of this Agreement, an Australian Indigenous person means a person of the Aboriginal race of Australia or a descendent of an Indigenous inhabitant of the Torres Strait Islands.

ACIPA recommend that broad exemption language be used to avoid the possibility of a person who is interpreting the clause reading down its scope.

If the government were to, say, procure Indigenous art works or items of Indigenous spiritual significance for the purposes of preventing them from being procured by US buyers, this might be characterised as providing for cultural or spiritual protection rather than health and welfare, or economic and social advancement, and therefore constitute a breach of AUSFTA. A broader exemption clause would require the interpreter to only consider whether a measure was for Indigenous people. Once that criterion is satisfied, the exemption would apply.

If the Parties do not accept the broad exemption, the second best option is to apply specific exemptions in all relevant chapters. The risk in applying

specific exemptions is that an item for exemption is overlooked during the drafting of the Agreement, making it difficult to correct in the future. This risk can be reduced by including a broad exemption clause for Indigenous people in each relevant chapter of AUSFTA. The way in which this might be done, and the rationale for so doing is set out in the remaining chapters of this report.

CHAPTER 3

TRADE IN GOODS

3.1 BACKGROUND

In the case of NAFTA, the explanatory note states that:

> ***Import and Export Restrictions***: All three countries will eliminate prohibitions and quantitative restrictions applied at the border, such as quotas and import licenses. However, each NAFTA country maintains the right to impose border restrictions in limited circumstances, for example, to protect human, animal or plant life or health, or the environment. Special rules apply to trade in agriculture, autos, energy and textiles.

3.2 ISSUES

The AUSFTA chapter on Trade in Goods may affect Indigenous people in relation to

1. agricultural and other subsidies; and
2. prohibition of the export of items of spiritual and cultural significance.

AUSFTA is likely to prohibit export subsidies on all goods. Low interest rate loans and grants to assist the development of Indigenous business operations, including cattle and other agricultural operations, and craft or artwork, which lead to goods being exported to the US may be found to be subsidies which (in the absence of an exemption clause) would be prohibited under AUSFTA.

Indigenous people may also seek to have items of significant spiritual and cultural significance banned from Australian export. The Singapore-

Australia FTA provides an exemption for measures "imposed for the protection of national treasures of artistic, historic or archaeological value". It is not clear whether that exemption is sufficiently wide to cover items of significance to Indigenous people. Australia presently prohibits the export of such items under the *Protection of Movable Cultural Heritage Act 1986*, which prohibits the export of "objects relating to members of the Aboriginal race of Australia and descendants of the Indigenous inhabitants of the Torres Strait Islands".

3.3 RECOMMENDED CLAUSE

ACIPA's approach is to recommend that an exemption be provided for "measures for Indigenous people and organizations, including for the protection of the cultural and spiritual heritage of Indigenous people".

3.4 RATIONALE

This clause is required to enable the Parties to maintain existing and enable future measures for the protection of objects of significance to Indigenous people. The clause also allows for measures that would otherwise potentially breach AUSFTA, such as low interest loans and other subsidies for Indigenous agricultural operations and other Indigenous operations leading to the exporting of goods.

CHAPTER 4

GOVERNMENT PROCUREMENT

4.1 INTRODUCTION

Government procurement may be used as a means for promoting industry development and in particular, assisting the development of domestic industries. Other Free Trade Agreements in which Australia has entered have adopted special exceptions, including adopting special provisions for Indigenous peoples. Thus, in the Singapore-Australia Free Trade Agreement (SAFTA), an "essential security" provision was included together with the following:

> Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail or a disguised restriction on international trade, nothing in this Chapter shall prevent Australia from promoting employment and training opportunities for its indigenous people in regions where significant indigenous populations exist.[3]

Significantly, SAFTA also provides for small to medium enterprises, which could have significant potential for Australia's Indigenous peoples. The provision provides:

> Nothing in this Chapter shall prevent the Parties from using government procurement to promote industry development including measures to assist small and medium enterprises (SMEs) within their territory to gain access to the government procurement market.[4]

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[3] *Singapore-Australia Free Trade Agreement* ch 6 art 15.
[4] *Singapore-Australia Free Trade Agreement* ch 6 art 16.

In its domestic arrangements, Australian Commonwealth procurement policy has been devolved to agencies and authorities under the *Financial Management and Accountability Act 1997* (FMA Act) and a core policy of "value for money" adopted (see Commonwealth, *Commonwealth Procurement Guidelines & Best Practice Guidance* (2002)). For those Commonwealth entities outside the framework of the FMA Act (such as some bodies under the *Commonwealth Authorities and Companies Act 1997* (CAC Act)), they have responsibility for their own procurement, subject to a power of Ministerial direction (if ever it is exercised in respect of procurement). For Indigenous peoples, both FMA Act agencies and some CAC Act bodies would be involved in procurement and affected by AUSFTA.

4.2 ISSUES

Government procurement can be used to assist Indigenous businesses and to promote Indigenous employment and investment in Indigenous peoples' enterprise. The AUSFTA proposes exemption for Indigenous people:

> (g) for the health and welfare of its indigenous people; and
>
> (h) for the economic or social advancement of its indigenous people.

ACIPA's approach is to recommend a broader exemption clause that does not limit future policy options for Indigenous people.

4.3 RECOMMENDED CLAUSE

ACIPA's approach is to recommend that an exemption apply "to any measure with respect to Australia's Indigenous people".

4.4 RATIONALE

The recommended clause seeks to provide a consistently broad exemption for Indigenous people throughout AUSFTA. The exemption would allow for the continued operation of various schemes designed to benefit

Indigenous people, including for example the Commonwealth-State Housing Agreement.

The limitations with the presently proposed wording are:

(a) The meaning of Indigenous peoples, and in particular, that these terms are not confined in a way that might undermine the objectives of any government procurement for the benefit of Indigenous peoples. For example, a procurement decision may benefit non-Indigenous peoples (such as a new school building or road in a town with a mix of Indigenous and non-Indigenous peoples) and so should not be invalidated merely by benefiting only some peoples who are Indigenous;

(b) The health and welfare and economic and social advancement of Indigenous peoples might not be interpreted beneficially taking into account the likely outcome of any procurement decision;

(c) When interpreting this text and the various measures, the potential conflict between the various measures should be resolved beneficially in favour of Indigenous peoples. But the present wording does not ensure this outcome. Problems arise, for example, if there was a procurement decision requiring the balancing of measures necessary to protect intellectual property with those for the advancement of economic and social advancement (such as the recognition of a moral or other right to a patented traditional medicine). The present wording does not ensure that measures for Indigenous peoples will take preference;

(d) It is unclear what 'arbitrary and unjustifiable discrimination between the Parties' means and whether this is the lowest common denominator standard between the Parties, assuming the Parties are the US and Australia. Perhaps, there should be clarification that Australia should not be prevented from adopting or maintaining

any measure for the health and welfare and economic and social advancement of its Indigenous peoples;

(e) It is not clear how national treasures of artistic, historic or archaeological value are to be determined so that procurement measures may be adopted or maintained for their protection. Perhaps there should be clarification that these are assessments that take into account the social, cultural and economic considerations of Indigenous peoples affected by the decision and that their value may not be economic; and

(f) It should be confirmed and clarified that CAC Act bodies are part of government procurement and the AUSFTA. For example, the Aboriginal and Torres Strait Islander Commission is a CAC Act body (see *Aboriginal and Torres Strait Islander Commission Act 1989* s 6) and its procurement decisions implementing programs for Aboriginal persons and Torres Strait Islanders should be excluded from AUSFTA.

CHAPTER 5

TRADE IN SERVICES

5.1 BACKGROUND

The 1995 WTO General Agreement on Trade in Services (GATS) was the first multilateral counterpart to GATT, relating to trade in services. The GATS is a framework agreement that imposes minimal obligations of general application. Instead, it contemplates a "positive list" approach to services liberalisation, with each Member making sector-specific undertakings to liberalise market access and national treatment for each of the modes of supply listed in the agreement.

This enables Members to consider carefully the implications of liberalising particular services sectors before making new undertakings.

The Services chapter of the AUSFTA takes a very different approach. Like the SAFTA, the AUSFTA takes a "negative list" approach to services liberalisation. The negative list approach requires the removal of restrictions for *all* services sectors in respect of *all* covered modes of supply, unless those restrictions or sectors are *expressly excluded* from coverage. The negative list approach results in wider and less predictable undertakings.

The liberalisation undertakings in respect of services trade focus on market access, national treatment, and domestic regulation. The general national treatment obligation would require that US citizens and entities be treated the same as Australian service providers for all sectors (and vice versa in the case of the US). The obligation expressly extends to *de facto* discrimination, in cases where the treatment of service providers is formally identical but has the effect of favouring local suppliers. Market access commitments would require that no quotas or limitations be

imposed on US services provided in Australia in all sectors that are not expressly excluded.

The Services chapter obligations apply to a wide range of service supply activities, including production, distribution, marketing, sale and delivery; access to and use of distribution, transport, or telecommunications networks. Obligations apply to potentially restrictive measures that are taken by governments and by non-governmental bodies exercising delegated power. This would include the activities of Indigenous Land, Housing or Cultural Corporations.

It would appear that the AUSFTA would remove restrictions in respect of cross-border supply (for example by the provision of professional services via email or internet), supply by consumption abroad (for example US nationals using Australian tourism, health care or educational services in Australia, and vice versa) and presence of natural persons (that is, the delivery of services using nationals of the other Party who are physically present).

This is narrower that the SAFTA, which adopts the GATS model for modes of supply including the establishment by the service suppliers of one party of a "commercial presence" in the territory of the other party. The exclusion of a "commercial presence" mode of supply from the services chapter is explained by the inclusion of an all-encompassing investment chapter in the AUSFTA. Moreover, the current draft Services chapter expressly extends its liberalisation obligations to investments in service industries covered by the Investment chapter. This means that investments in service industries enjoy the protection of both the investment provisions and the market access and national treatment provisions in the services chapter.

The scope of the negative list approach, combined with the broad definition of services, measures affecting the supply of services, and the various modes of supply, makes it imperative that a broad exemption

protecting the supply of services for and by indigenous people be included.

5.2 ISSUES

Removal of market access restrictions

The Services chapter prohibits the adoption or maintenance of measures that limit the number of services suppliers, including quotas, exclusive service suppliers and economic needs tests. Governments or government-funded corporations insisting that certain services be provided only by indigenous people would likely contravene the market access obligations. The government funding of Indigenous housing, employment and health services that insist upon local indigenous governance and control, or culturally appropriate service suppliers, might also be regarded as a market access restriction.

Public services

Many of the services essential for health and social welfare of Indigenous Australians are currently provided by government authorities. These essential public services include provision of public housing, water, education, and health for indigenous people. The remote location of many Indigenous communities, the high levels of historical disadvantage, and current inequities in Indigenous and non-Indigenous health standards all require high levels of government funding. It is essential that the AUSFTA safeguards Australia's rights to maintain and enhance the provision of such services for Indigenous Australians.

The AUSFTA excludes from the disciplines of the Services Chapter services supplied "in the exercise of governmental authority". This phrase appears to exempt public services from liberalisation obligations, but is defined ambiguously as "any service which is supplied neither on a commercial basis, nor in competition with one or more service suppliers." This language is identical to that contained in the GATS, where it has

given rise to considerable speculation over whether government services in sectors that are supplied by both public and private suppliers (like education, health and prisons) are subject to GATS disciplines. DFAT has dismissed this concern,[5] but the WTO Secretariat has expressed the view that the GATS would apply to government services that are offered by both public and private suppliers.[6] As noted above, the precise interpretation of this definition is less important under the GATS positive list approach, because GATS Member governments can refrain from making any undertakings in respect of services sectors in which they play a role.

The positive list approach of the AUSFTA means that clearer exemptions are required to ensure that current and future preferential arrangements for the government supply of services to Indigenous people are not subject to market access or national treatment obligations.

Right to regulate service providers

In order to ensure that market access and national treatment concessions are not undermined by the imposition of burdensome or discriminatory domestic regulations, both the GATS[7] and SAFTA[8] have included strict disciplines on domestic regulation of service suppliers. Regulations must be based on objective criteria, such as competence and the ability to supply the service, and must not be "more burdensome than necessary to ensure the quality of the service". The AUSFTA adopts the same language. Unless the phrase "quality of the service" is interpreted broadly, these disciplines might not permit requirements that services are

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[5] Committee Hansard, 2 October 2003, 431 (Gosper DFAT), quoted in Senate Foreign Affairs, Defence and Trade References Committee, *Voting on Trade* (2003), 67.

[6] WTO, *Note by the Secretariat, Health and Social Services*, 18/9/98, S/C/W/50 and WTO, *Note by the Secretariat, Environmental Services*, 6/7/98, S/C/W/46.

[7] GATS Article VI:4 and 5.

[8] SAFTA, Article 11(5) and (6).

provided in a culturally appropriate way, for example employment or training programs to be provided by Indigenous personnel, or in accordance with indigenous protocols, for example restrictions on use by tourism operators of certain lands for spiritual or cultural reasons.

Recommendations on services

ACIPA have recommended that ideally, the AUSFTA should reject the negative list approach to liberalisation of trade in services, since the future scope and implications of such undertakings are too difficult to assess. In the alternative, however, the Agreement should include both an exemption in its text, and a reservation in its list of horizontal reservations.

The SAFTA Annex 4-11(A) reserves Australia's right to:

> adopt or maintain any measures according preferences to any Indigenous person or organization or providing for the favorable treatment of any Indigenous person or organization in relation to acquisition, establishment or operation or any commercial or industrial undertaking in the service sector.

This exempts both existing and future non-conforming measures from the operation of the Services chapter. ACIPA have recommended that the same provision be included in the AUSFTA. Since the long-term goal of such Agreements is to review and wind back the scope of these reservations, however, it is recommended that an exemption also be included in the text of the Services Chapter itself. This will ensure that measures relating specifically to services for Indigenous Australians can only be removed by amendment of the Agreement itself.

5.3 RECOMMENDED CLAUSE

ACIPA have recommended that an exemption apply "to any measure with respect to Australia's indigenous people".

ACIPA also recommended that a reservation be included in the same terms as that contained in SAFTA Annex 4-II(A), outlined above.

5.4 RATIONALE

The recommended clause seeks to provide a consistently broad exemption for Indigenous people throughout all chapters of the AUSFTA. The recommended reservation protects existing a future measures with the aim or effect of affording preference to Indigenous service providers.

CHAPTER 6

INVESTMENT

6.1 BACKGROUND

The Investment chapter in AUSFTA will likely have wide scope and have a considerable and enduring impact on Australian public policy. At a minimum, AUSFTA will provide for national treatment for investors so that United States and Australian investors will be treated in the same way as local investors in each other's countries. This is presently provided for in the Singapore-Australia FTA (SAFTA). AUSFTA, like NAFTA, may well go further than this and provide that foreign investors be treated in "accordance with international law, including fair and equitable treatment and full protection and security"; and entitle investors to compensation whenever their investment has been "expropriated".

Investment is defined very broadly to include any expectations of profit or gain, including an authorization or license, even where it has involved minimal financial outlay or commitment. The obligations of the Investment chapter apply to all phases of investment, including establishment, where no existing commitment has been made or financial outlay has yet been incurred.

6.2 ISSUES

Investment chapters in FTAs, and particularly the Investment chapter in NAFTA – chapter 11 – are generally criticized for providing private investors with broad rights to sue national governments for any perceived reduction in their profitability or expected economic gains. These issues and their implications for Indigenous Australians are discussed below.

National Treatment

The Australian Commonwealth and some State and local governments provide financial incentives, including tax concessions and rate relief to attract the establishment of certain industries. This includes incentives for the creation of new enterprises to encourage Indigenous employment and training. The national treatment requirement would oblige governments to offer the same incentives to foreign investors as are available to domestic investors, even though they may not intend to implement the same Indigenous development objectives.

For example, if the Commonwealth government provided a start-up grant of $30,000 to a new tourism company that was managed and controlled by Indigenous people and employed Indigenous people, it is arguable that the NT requirement would create an expectation that a US tourism firm should receive the same benefit, even if it did not meet the requirements of Indigenous control and employment. The language of the AUSFTA national treatment clause provides that treatment must be no less favorable to that accorded to domestic investors *in like circumstances.* This could be interpreted to cover investors in the same industry sector or region. In the example above, the "like circumstances" could be investors in tourism. An alternative interpretation could be that it restricts national treatment to investors meeting the same social or economic criteria, so that only a US company that was prepared to vest control in Indigenous people and employ Indigenous people would be entitled to the benefits of National Treatment. The ambiguity of the "in like circumstances" language has been resolved in favor of the party seeking National Treatment in WTO disputes. ACIPA therefore argue that this language should therefore be clarified in the AUSFTA.

Compensation for Expropriation

A foreign investor can seek compensation if their investments have been expropriated by the domestic government, even if the expropriation takes

the form of reduced profitability resulting from the imposition of domestic environmental, health or other regulations with social policy objectives. For example, if a US mining company holds an exploration or mining lease in Australia which is argued to hold special Indigenous historical, cultural or spiritual significance, but which was not identified as such at the time the rights were acquired, the imposition of new requirements to uphold those Indigenous values may reduce the profitable use to which the land might be put for mining purposes, and therefore allow a claim for compensation for the expropriation of the investment.

Some critics have suggested that this may discourage the Australia government from introducing new measures that restrict the use of land or other activities for the benefit of Indigenous Australians, where such measures could reduce the profitability of US investments. The risk of regulatory "chill" exists, even if the measure appears not to breach the FTA, because the government fears that they *might* be successfully sued by a foreign investor.

The AUSFTA attempts to clarify the circumstances in which social and environmental policy initiatives will be considered indirect expropriation. The relevant Annex of AUSFTA provides that:

> **[Annex XX-B**
>
> **EXPROPRIATION**
>
> 1. The Parties confirm their shared understanding that Article XX.7 [Expropriation and Compensation](1) is intended to reflect customary international law concerning the obligation of States with respect to expropriation.
>
> 2. An action or a series of actions by a Party cannot constitute an expropriation unless it interferes with a tangible or intangible property right or property interest in an investment.

3. Article XX.7 [Expropriation and Compensation](1) addresses two situations. The first is direct expropriation, where an investment is nationalized or otherwise directly expropriated through formal transfer of title or outright seizure.

4. The second situation addressed by Article XX.7 [Expropriation and Compensation](1) is indirect expropriation, where an action or series of actions by a Party has an effect equivalent to direct expropriation without formal transfer of title or outright seizure.

(a) The determination of whether an action or series of actions by a Party, in a specific fact situation, constitutes an indirect expropriation, requires a case-by-case, fact-based inquiry that considers, among other factors:

(i) the economic impact of the government action, although the fact that an action or series of actions by a Party has an adverse effect on the economic value of an investment, standing alone, does not establish that an indirect expropriation has occurred;

(ii) the extent to which the government action interferes with distinct, reasonable investment-backed expectations; and

(iii) the character of the government action.

(b) Except in rare circumstances, non-discriminatory regulatory actions by a Party that are designed and applied to [US: protect] [A: address] [A: achieve] legitimate public welfare objectives, such as public health, safety, and the environment, do not constitute indirect expropriations.]

The rare circumstances in which regulatory action might still be considered expropriation are not identified. Moreover, the indicative list

of policy objectives does not include Indigenous Australians, so the example provided above may not fall within this clarification and may thus constitute a compensable expropriation. ACIPA recommend that the annex should expand the scope of "legitimate public welfare measures" to include "public health, safety, the environment, and Indigenous history, welfare, and culture."

Performance Requirements

Performance requirements are measures set by a government aimed at capacity building or developing a local community or sector. They include requirements that an enterprise includes a specified proportion of domestic inputs to a product or service, or that a specified proportion of the goods or services be exported. It includes requirements about local content, trade-balancing, import-substitution, foreign exchange limits and export limits. The US is seeking to remove or limit those requirements (subject to exemptions specified in the chapter) as they might affect the US, but as against all other nations. In other words, the proposed AUSFTA would remove performance requirements for US investors into Australia, but maintain them for investors from other countries. As noted above, these undertakings apply to the establishment phase, or rights of access, for investors, as well as existing investments.

The AUSFTA appears to permit the parties to impose requirements to locate production, supply a service, train or employ workers, construct or expand particular facilities, or carry out research and development. ACIPA argues that it is essential that this right be retained in order to ensure that foreign investment advances Australia's development priorities for its Indigenous population.

Fair and equitable standards of protection

We understand that the AUSFTA also includes investor rights to "fair and equitable treatment" and "full protection and security". An identical

clause in NAFTA has been the subject of considerable scrutiny in NAFTA investor-state litigation. NAFTA tribunals have taken a very expansive interpretation of these phrases, the effect of which is to potentially accord investors greater rights under the NAFTA than would be available through domestic judicial settlement processes. The NAFTA tribunal in *O'Keefe v. Loewen Group, Inc*[9] found the requirement for fair and equitable treatment to have been breached based on claims that a United States domestic court had not dealt with its private contractual dispute with a local firm in a discriminatory manner. Rather than appeal against the US domestic court's decision according to domestic United States judicial process, the investor chose instead to make a claim that its investment had been denied fair and equitable treatment. If this investor right were included in AUSFTA, and applied as it was in *Loewen,* it would mean that *foreign* investors would have greater rights to protection in Australia than Australian investors.

AUSFTA may attempt to place some limits upon the broad potential scope of the fair treatment and international law requirements.

Investor State Dispute Settlement

The uncertainty surrounding investment liberalization under NAFTA is due in large part to the inclusion of investor-state dispute settlement (ISDS) rights. Disputes are decided in one of two international arbitration panels originally set up for the resolution of disputes between private, rather than public, bodies. Neither body – UNCITRAL nor ICSID – provide the levels of openness of national courts. This means that investors can sue governments seeking public money and seeking rulings on the appropriateness of public policy decisions, but members of the public are not informed of the disputes or afforded the opportunity to be heard.

The inclusion of such measures is clearly advantageous to investors: they

[9] No. 91-67-423 (Miss. Circ. Ct. 1st Jud. Dist., Hinds County 1995).

are free to pursue complaints directly against the host government, without first convincing their own government of the merits of their claim. The alternative view, however, is that it vests power in investors to litigate in support of their own private interests without having to weigh the political or social dimension of the measure complained of. This, it is argued, forces national governments to undertake costly defenses of domestic measures, and exposes them to compensation claims for acts of legitimate domestic regulation.

There is substantial evidence to suggest that foreign corporations have attempted to use the investment chapter of NAFTA to discourage governments from implementing new policy measures. Been and Beauvais cite the following examples:

- US manufacturer, Ethyl Corporation, brought a $200 million claim in 1997 alleging that a Canadian ban on the importation of its gasoline additive MMT violated Chapter 11. Canada settled the claim before the NAFTA tribunal reached the merits, agreeing to rescind the ban, issue a public statement conceding that the government had no evidence that MMT causes harm, and pay Ethyl approximately $13 million;
- RJ Reynolds and other US tobacco companies threatened a Chapter 11 claim for "hundreds of millions of dollars" in 1994 if Canada adopted plain-packaging legislation to discourage teen smoking. They argued that the plain-packaging requirement would expropriate the value of their trademarks. The action did not proceed because the Canadian Supreme Court struck down the regulation because it violated constitutional free speech;
- A task force established by several major American pesticide manufacturers threatened to bring a Chapter 11 claim in response to a proposed ban on the use of twenty-eight pesticides within the province of Quebec. Quebec's Environment Minister, André

Boisclair, has refused to back down on the regulations for now;[10]

- *Metalclad v Municipality of Guadalcazar.* The US Metalclad Corporation was awarded US $16.7 million (later reduced to $15.6 million), because a local municipality refused it permission to build a 650,000-ton/annum hazardous waste facility on land already so contaminated by toxic wastes that local groundwater was compromised.

According to Been and Beauvais

> Whether and to what extent such tactics will be effective in the future will depend on how NAFTA tribunals address future expropriation claims. At present, however, the uncertainty over how far NAFTA can be pushed to provide protection for property owners, together with federal, state and local regulators' unfamiliarity with NAFTA and its [investor-state dispute resolution] procedures, and regulators' concerns both about the expense of defending against NAFTA claims and about their potential liability for compensation awards, make NAFTA a useful threat for those who oppose environmental and land use regulation.[11]

The NAFTA experience shows that the investor rights, set out in the discussion above, granted by an FTA will be vigorously enforced by private investors, potentially at the expense of domestic regulation and public policy, and at considerable cost to the public purse.

ACIPA argue that this emphasizes the importance for Australia of not simply adopting the same treaty language as that used in NAFTA. Additional safeguards must clarify the scope of these investor rights. If investor-state dispute settlement rights are included, ACIPA recommend

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[10] V Been and JC Beauvais "The Global Fifth Amendment? Nafta's Investment Protections and the Misguided Quest for an International 'Regulatory Takings' Doctrine" (2003) New York University Law Review 30 at pp.132-34.

[11] *Ibid* at 134.

that:

1. a requirement that investors may only access the AUSFTA process once they have exhausted domestic remedies;

2. a limitation on the use of AUSFTA dispute settlement for claims of discriminatory treatment, excluding claims for expropriation.

6.2 EXEMPTION FOR INDIGENOUS PEOPLE

Australia's provision in the Investments chapter exempts measures for Indigenous people, along the lines of a reservation in SAFTA. The reservation states:

> Australia reserves the right to adopt or maintain any measure according preferences to any indigenous person or organization or providing for the favorable treatment of any indigenous person or organization in relation to acquisition, establishment or operation of any commercial or industrial undertaking in the service sector.
>
> Australia reserves the right to adopt or maintain any measure with respect to investment that accords preferences to any indigenous person or organization or providing for the favorable treatment of any indigenous person or organization.
>
> For the purpose of this reservation, an indigenous person means a person of the Aboriginal race of Australia or a descendent of an indigenous inhabitant of the Torres Strait Islands.

We support the Australian government for taking this course. ACIPA recommend that the provision should be more broadly expressed. A concern is that the second paragraph, which deals with investments, refers only to measures with respect to investments that accords preferences or favorable treatment to any indigenous person or organization. Although that offers considerable scope, it does require the Australian Government in defending any action for breach of AUSFTA to establish that the

measure will accord a preference or favorable treatment. Technical arguments may arise if, for example, the Government requires a US mining venture to employ Indigenous people from a nearby town in a remote area (otherwise a potential breach of the ban on performance requirements). Questions may arise as to whether the measure amounts to being a "preference" or whether it amounts to "favorable treatment" in terms of the investment. ACIPA recommend a more general clause:

> Nothing in this Chapter shall be construed as preventing a Party from adopting or maintaining a measure relating to its indigenous people.

We note that there is an exemption in NAFTA regarding investment measures relating to national treatment and most favored nation as follows:

> Canada reserves the right to adopt or maintain any measure denying investors of another Party and their investments, or service providers of another Party, any rights or preferences provided to aboriginal peoples.

6.3 RECOMMENDED CLAUSE

ACIPA recommend that the following clause be inserted:

> Nothing in this Chapter shall be construed as preventing a Party from adopting or maintaining a measure relating to its Indigenous people.

6.4 RATIONALE

The Investments chapter has wide-ranging potential effect. The chapter could greatly impede government policies and legislation designed to assist Indigenous people. It is therefore recommended that a widely expressed exemption clause be inserted in the chapter.

CHAPTER 7

INTELLECTUAL PROPERTY

7.1 BACKGROUND

Intellectual property law has the potential to play a key role in protecting and promoting Indigenous creations. While intellectual property law already plays a role in protecting Indigenous artistic creations, there are many areas, such as the protection of traditional scientific, technical and medical knowledge, where the potential is yet to be fully realized. Given this, it is important that the AUSFTA not limit the future possibility of the Australian government to legislate to protect, promote, and encourage respect for Indigenous creations and cultural expressions.

A notable feature of intellectual property protection is that impacts on a wide range of areas; from the scientific through to the artistic and cultural. It also draws upon and achieves a number of policy goals and outcomes ranging from the protection of human rights and personality through to systems design to encourage investment in research and commercialization. One of the consequences of this is that intellectual property law has the potential to interact with a range of other areas. In the context of the AUSFTA, this means that it can impact on policy regarding Indigenous people under the Intellectual Property chapter itself, as well as in relation to other chapters, including Investment and Government Procurement. SAFTA and NAFTA do not have provisions directly referring to Indigenous intellectual property rights. This oversight should not be repeated in AUSFTA, particularly as there is a risk that the Investment and other chapters may be interpreted as being subject to the Intellectual Property chapter in certain circumstances. Avoiding uncertainty of this nature requires an explicit exemption for

Indigenous people in relation to their existing and potential future intellectual property rights and interests.

We outline in this chapter some of the existing intellectual property rights of Indigenous people and potential future measures that might be adopted (in the absence of any FTA limitations) for Indigenous people. We also provide a recommended exemption clause at the conclusion of the chapter.

7.2 ISSUES

7.2.1 Copyright

Copyright law provides protection for creators of literary, dramatic, musical and artistic works. Copyright is an economic right that gives the copyright owner the right to be remunerated for certain uses of their work. For example, a copyright owner has the right to control reproduction and broadcasts of their works and the dissemination of their works over the Internet. Copyright law in Australia currently provides protection for Indigenous creations in so far as they satisfy the criteria of originality, material form and connection with Australia.

(a) Material form

At present Australian copyright law provides that for a work to be protected, it must be reduced to 'material form'.[12] This means, for example, that an oral speech will not attract copyright protection unless it is reduced to a material form, for example, it is written down on paper or is recorded or videotaped.

One problem that has arisen in relation to Indigenous creations is that many creations (or 'works' as they are called in copyright) are not fixed in a material form. For example, many forms of Indigenous communities' cultural and traditional knowledge, such as stories and songs, are handed down from generation to generation and commonly remain in an oral

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12 Section 31 *Copyright Act* 1968 (Cth).

form. If this knowledge remains in oral form, it will not attract copyright protection. One of the problems in this context is that it is the person responsible for transcribing the oral material into material form, rather than the creator of that oral story, that has copyright over the creation.[13] As one commentator noted:

> " ...the person putting the story into material form is recognized as the copyright owner of the written stories. It does not matter whether that person is Indigenous or not, or whether he or she comes from the relevant community. Copyright does not recognise the bounds placed on reproduction of Indigenous arts and cultural material under Indigenous customary law, as the artist or the recorder of the story becomes the unencumbered, exclusive owner of copyright in the work." [14]

Under current intellectual property law, Indigenous individuals and communities can only receive protection against unauthorised reproduction of their oral traditions if they satisfy elements of the breach of confidence laws, or if they are able to restrict use through contractual arrangements (see below).

Given this, it is important that the AUSFTA does not hamper the ability of the Australian Government to amend Australian copyright law to provide more effective protection for Indigenous cultural expression if it so wishes.

(b) Ownership

The Australian Copyright Act sets out the general rule that the author is the first owner of copyright. There are a series of exceptions that cover situations where copyright works are created in the course of employment

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13 Section 35(2) *Copyright Act* (1968). See also section 98(1) & (2) *Copyright Act* (1968) and section 22(4) *Copyright Act* (1968) which ascribes legal ownership to the maker of a film or audiotape of a previously unpublished story or dance.

14 Janke, T., 'Our Culture, Our Future: Report of Australian Indigenous Cultural and Intellectual Property Rights" (1998), 54.

or are commissioned by a third party. While the Copyright Act recognises that a work may be created by more than one creator (eg joint authors), it does not recognise communal ownership of copyright works. It is well accepted that Indigenous works are generally communally based and therefore current copyright law is ill-equipped to protect such rights. As Janke highlights:

> 'Indigenous Cultural and Intellectual Property is collectively owned, socially based and evolving continuously. A great number of generations contribute to the development of Indigenous cultural heritage. Each particular group has ownership rights over its particular inherited cultural heritage.'[15]

Clearly it would advantageous if copyright law was able to be modified to accommodate communal ownership in the future.

(c) Duration

The level of protection available for a copyright work differs depending on the type of work in question. In Australia, generally speaking, copyright expires fifty years after the death of the author of the work. In contrast, in the US, copyright protection expires *seventy* years after the death of the author. There would few problems for Indigenous Australians if the scope of protection was similarly extended to life plus seventy years in Australia. In some cases, it could be argued that copyright protection should extend beyond life plus 50 (or 70) years to some longer period (or even in perpetuity). It has even been suggested

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15 Janke, T., *'Our Culture, Our Future: Report of Australian Indigenous Cultural and Intellectual Property Rights'* (1998), 8.

that there is a need to protect folklore for an indefinite period.[16] This is based on the fact that a community's existence is not limited in time.[17]

7.2.2 Moral rights

Typically, moral rights are defined in opposition to copyright. Copyright provides the copyright owner with an alienable economic right to control reproductions and other uses of their works. In contrast, moral rights provide specific protection to authors, their reputation, and in some cases the work itself.[18] Moral rights are personal to the creator and serve to protect the reputation of the author. They are non-economic rights that are distinct from copyright, and often justified on similar non-economic grounds.[19]

As with many legal regimes, moral rights perform, or at least are said to perform, a number of different roles. At the most general level, moral rights provide protection for authors and their works. This is particularly important where creators no longer own copyright in their works, or where they 'no longer own the physical items in which their copyright is embodied, and who therefore do not have an opportunity to contract with

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16 UNESCO/World Intellectual Property Office (WIPO) *Model Provisions for National Laws on the Protection of Folklore Against Illicit Exploitation and Other Prejudicial Actions.* 1982. A4.2.1 *Definition of folklore* The Model Provisions do not expressly define folklore, but they do use the term.

As noted by Attorney General s Department, *Stopping the Ripoffs: Intellectual Property Protection for Aboriginal and Torres Strait Islander Peoples - An Issues Paper*, 12.

18 'In fact, the moral rights regime is based on similar foundations to the copyright regime, which relies on... recognising private proprietary rights'. Banks, C., 'The more things change the more they stay the same: The new moral rights legislation and Indigenous Creators' (2000) 9(2) *Griffith Law Review* 347.

19 Moral rights are based in the Continental romantic notions of authorship, one of which likens the creation of an author to a child based on notions of natural law, from which the 'good manners' argument also stems. S Ricketson, *The Law of Intellectual Property: Copyright, Designs and Confidential Information,* LBC Information Services, 1999, [10.15].

users for the protection of those rights.[20] Moral rights are also said to embody 'standards of good conduct to be applied between creators and users'.[21] More specifically, moral rights play an important role in ensuring the 'truth and authenticity in intellectual and artistic expression'[22] Moral rights also function 'to raise awareness in an educative way of the need to respect the creativity of authors and artists.'[23] Moral rights are also said to promote the author's reputation by ensuring that they get appropriate public recognition and that this is in the form that the author desires.[24] It has also been suggested that moral rights 'encourage harmony and good nature in our social relations and improve the overall performance of human intercourse'[25].

Australian law recognises three moral rights. These are the right of attribution of authorship, the right of integrity of authorship, and the right

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20 V Morrison, The New Moral Rights Legislation, (Dec 2000) 18:4 *Copyright Reporter* 170, 178.

21 Ricketson, S., *The Law of Intellectual Property: Copyright, Designs and Confidential Information,* LBC Information Services, 1999, [10.15]

22 Ricketson, S. *The Law of Intellectual Property: Copyright, Designs and Confidential Information,* LBC Information Services, 1999, [10.15]

23 Attorney General's Department 'Copyright: New Law Protecting Authors' Moral rights, available at http://www.ag.gov.au/www/securitylawHome.nsf/Web+Pages/4CB104F0C2FDEO2F visited 12/7/02, 2

24 Ricketson, S. *The Law of Intellectual Property: Copyright, Designs and Confidential Information,* LBC Information Services, 1999, p 8 [check][10.70]

25 Ricketson, S. *The Law of Intellectual Property: Copyright, Designs and Confidential Information,* LBC Information Services, 1999, [10.15]

against false attribution.[26] Generally speaking, moral rights in literary works continue in force until copyright ceases to exist in the work. [27]

The right of attribution

The right of attribution provides that authors have the right to be identified as author of their works[28] in relation to certain specified uses of the work (so-called 'attributable acts').[29] For literary works, the right applies where the work is reproduced, published, performed, communicated to the public, or adapted.[30] The author of a work may be identified by any reasonable form of identification[31], so long as it is clear and reasonably prominent.[32] An identification will be reasonably prominent if it is included on each reproduction, adaptation or copy in such a way that a person acquiring the item would have notice of the author's identity.[33]

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26 The moral rights recognised under the Act are not transmissible by assignment, by will, or by devolution by operation of law: see section 195AN(3) Copyright Act 1968 (Cth). However, if the author of a work dies, the author's moral rights (other than the right of integrity of authorship in respect of a cinematograph film) may be exercised and enforced by the author's legal personal representative: section 195AN(1) Copyright Act 1968 (Cth).

27 Section 195AM(2) Copyright Act 1968 (Cth).

28 In relation to literary works, the right of attribution applies to works that were made before the commencement of the moral rights regime (*viz* 21 December 2000) However, the right only applies to acts carried out after the 21 December 2000
Copyright Act 1968 (Cth)., s195AZM(2)

29 Section 193 Copyright Act 1968 (Cth).

30 Section 194(1) Copyright Act 1968 (Cth).

31 Section 195 (1) Copyright Act 1968 (Cth).

32 Section 195AA Copyright Act 1968 (Cth).

33 Section 195AB Copyright Act 1968 (Cth). It is the person who deals with the work, or who authorises the dealing: section 195AVA which sets out the factors that are taken into account when determining whether an authorisation has taken place in a way

The right of integrity of authorship

The second moral right granted to authors is the right of integrity of authorship[34]. In essence this means that the author has the right not to have their work subject to derogatory treatment in relation to certain specified uses of the work.[35] For literary works, derogatory treatment either means the doing of anything that results in the material distortion of, the mutilation of, or a material alteration to the work that is prejudicial to the author's honor or reputation[36] or the doing of anything else in relation to the work that is prejudicial to the author's honor or reputation.[37] Thus this right covers both derogatory treatment of the works itself and the derogatory treatment in the use of the work but in both cases the derogatory treatment must be prejudicial to the authors' honour or reputation.[38] In relation to literary works, the right of integrity arises where the work is reproduced, published, performed, communicated to the public, or adapted.[39]

The right not to have authorship of a work falsely attributed

The third moral right recognized in Australian copyright law is the right of an author not to have authorship of their work falsely attributed.[40] The

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that requires attribution who must attribute the author: Section 195AO Copyright Act 1968 (Cth).

34 Section 195AI(1)-(2) Copyright Act 1968 (Cth).

35 In relation to literary works (other than those included in films), the right of integrity subsists in respect of works made before or after the commencement of the *Copyright Amendment (Moral Rights) Act* 2000 (which is 20 December 2000).

36 Section 195AJ(a), 195AL(a) Copyright Act 1968 (Cth).

37 Section 195AJ(b), 195AL(b) Copyright Act 1968 (Cth).

38 R. Reynolds and N Stoianoff, *Intellectual Property Text and Essential Cases,* Federation Press 2003, 228.

39 Section 195AQ(3) Copyright Act 1968 (Cth).

40 Section 195AC(1) Copyright Act 1968 (Cth). This right subsists in works made before or after the 21 December 2000. However, the

right against false attribution gives the author a right to prevent someone else affixing or inserting another's name to a work (or a reproduction of a work) in a way that falsely implies that the person is the author of the work, and to prevent commercial dealings with the work carrying a false attribution.[41]

(a) Community moral rights

One of the problems with existing moral rights legislation in Australia is that it focuses on the individual author, rather than a community (or some other group). While there have been some efforts (primarily through case law) to protect Community interests in traditional stories, this has proved to be problematic. One of the most interesting proposals currently being examined by the Australian Government is the introduction of moral rights that are owned by a community, rather than an individual. The proposal was made in the context of ongoing debate over protection of the rights and interests of Indigenous artists in Australia. This proposal has received widespread support, including the Report of the Visual Arts and Craft Inquiry recommended that 'relevant Commonwealth government departments take action in relation to the protection of Indigenous material, including': the extension of moral rights to Indigenous groups[42].

The extension of moral rights to take account of community interests may prove to be an effective, useful and inexpensive way for Indigenous

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right only applies in relation to acts of false attribution done after that date. Section 195AZN(1) Copyright Act 1968 (Cth).

41 Section 195AG Copyright Act 1968 (Cth). This is subject to the requirement that the offender knows that the work has been altered.

42 Recommendation 4 of the Report of the Visual Arts and Craft Inquiry (outlined in Issue 124 of *Copyright World*, October 2002) recommended that 'relevant Commonwealth government departments take action in relation to the protection of Indigenous material, including':

- the extension of moral rights to Indigenous groups;
- misappropriation of Indigenous cultural imagery and iconography;
- importation of works purporting to be of Indigenous origin; and
- exportation of Indigenous art under cultural heritage provisions.

Communities to retain control over their traditional knowledge. It is important the AUSFTA does not hamper future efforts to protect Community moral rights.

(b) Droit D'Suite (Royalty Resale)

A number of jurisdictions confer a special right on artists, known as the 'droit de suite', that enables them to participate in the profits gained from the sales of their works[43]. The purpose of the right is to encourage and sustain the production of unique art-forms. Artists who produce paintings and sculptures have traditionally only received remuneration from the one-off sale of the original. A special right is seen as desirable to rectify the imbalance created in favor of cultural products disseminated by reproduction. More specifically, it is argued that by conferring a right of reproduction copyright privileges authors of printed works over artists' whose works are not susceptible to exploitation by means of sale of copies; some other right is needed to secure a revenue stream for such artists.

The 'droit de suite' (literally translated as the right to follow the work) enables artists to claim a portion of the price for which a work is resold. The idea is that an artist may sell a painting for a low price at a time when they are unknown and have little bargaining power. In due course, as the artist's reputation develops, the painting may be resold for continually increasing sums. The droit de suite enables the artist to claim a proportion of the increased value. The right is seen to be justified not only because it encourages creation, but also because the artist is conceived (through the authorial link) as being responsible for the increase in value (economic

[43] The first legal recognition of such a right occurred in France in 1920. See L. de Pierredon-Fawcett, The Droit de Suite in Literary and Artistic Property: A Comparative Law Study (1991). For discussion of the emergence of the right in the broader context of structural changes in the French art market, see D. Booton, 'A Critical Analysis of the European Commission's Proposal for a directive Harmonising the Droit de Suite' [1998] IPQ 165, 166 ff.

success of their works). Consequently, although the right is essentially economic, it is sometimes categorized as a 'moral right' .

Article 14ter of the Berne Convention encourages the recognition of such rights, and most European countries do so.[44] There is also currently a proposal for the introduction of a droit d'suite in Europe[45].

At present Australia does not have a resale royalty right in its Copyright legislation. However, there are currently debates about the need for the introduction of a Droit D'Suite right. Such a right would prove to be particularly important for many Indigenous artists, especially where their works have become sought-after at the international level. This is because in some instances, Indigenous artworks appreciate in resale value over time, but the artist receives no benefit from the profitable resale of his or her work. A recent example was that of Johnny Warangkula Tjupurrula. One of his paintings was purchased in the 1970s for $150. In June 1997, it was sold for $206,000. The artist, Johnny Warangkula Tjupurrula, was not entitled to any share of the money[46]. It is important the AUSFTA does not hamper future efforts to introduce a right of resale in Australia.

7.2.3 Patents

Patents provide 20-year protection over certain types of inventions.[47]A patent is granted after the application is examined by the relevant bureaucratic agency. In Australia, this Government Agency is IP Australia. For the most part, there are few areas within patent law where Indigenous issues need special attention. Often Indigenous knowledge or material does not meet the requirements of the patent legislation because

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[44] Belgium, Denmark, France, Germany, Italy, Luxembourg, Portugal, Spain and Sweden. Proposed Resale Right Directive, Recital 8.

[45] Proposed Resale Right Directive, Recital 8-13.

[46] Janke, T., 'Our Culture, Our Future: Report of Australian Indigenous Cultural and Intellectual Property Rights" (1998), 54.

[47] Section 67 *Patents Act* 1990 (Cth).

the knowledge or material is not novel and does not involve an inventive step. The key exception is where Indigenous knowledge is used in the creation of novel drugs, pharmaceuticals, and other patented products. While there are many other potential situations in which Indigenous knowledge may be used or abused, most recent discussion have arisen in relation to its use in relation to biological resources.

The question of whether or not, and if so how, biological resources (both *in situ* and *ex situ*) ought to be managed in Australia has been an issue for over a decade. In part this has been prompted by the realisation of the potential value of Australia's biological resources[48]. As with many other countries, the policy trigger for these discussions about access to genetic resources was the 1993 *Convention on Biological Diversity*[49]. The ongoing discussions about access to genetic resources were also triggered by technological and scientific advances, initially mechanism based screening and more recently genomics and combinational chemistry[50], that made it easier for scientists to identify bioactive compounds in naturally occurring substances. Over time these advances have led to the increased use of biological materials in the development of new products, notably pharmaceuticals, botanical medicines, crops, crop protection, and horticulture: a practice variously known as biodiscovery, bioprospecting, or biopiracy (depending on one's standpoint).

While the steps that are undertaken in the creation of a biologically based product varies from case to case, nonetheless it may be helpful to provide

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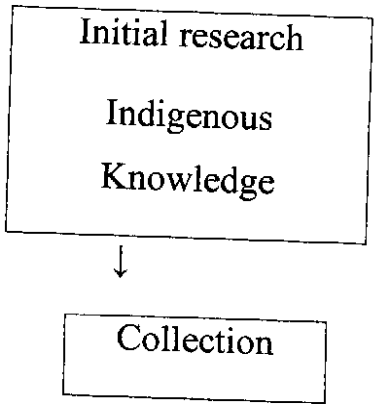
[48] Australia is one of the 17 mega-biodiverse countries in the world with many endemic species. 1 hectare of the Daintree rainforest in Queensland is said to have more flowers than all of North America.

[49] Article 15 of the *Convention on Biological Diversity* deals with access to genetic resources. Article 8(j) requires states to 'respect preserve and maintain knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity and to promote their wider application with the approval and involvement of the holders of such knowledge, innovations and practices and encourage the equitable sharing of benefits arising from the utilization of such knowledge, innovations and practices'.

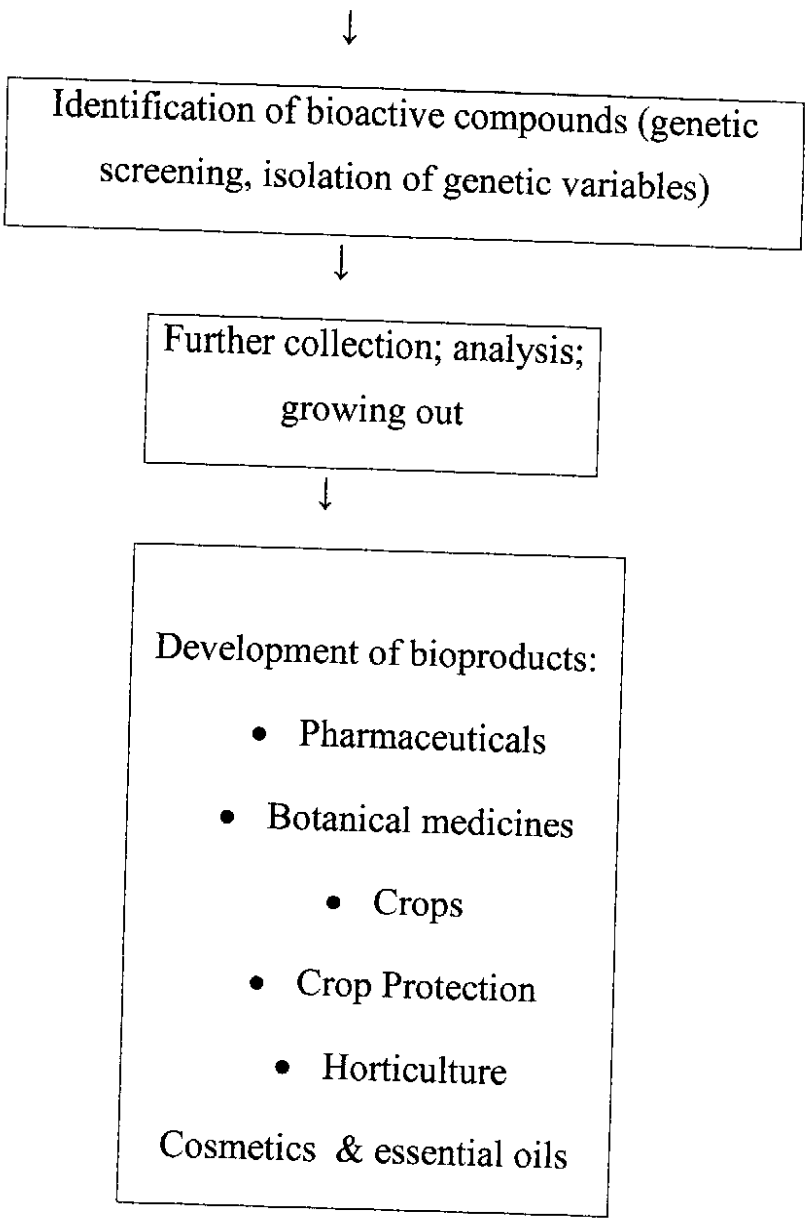
[50] See K. ten Kate and A. Wells, *Preparing a National Strategy on Access to Genetic Resources and Benefit-sharing* (2002), 59-60. See also K. ten Kate and S. Laird, *The Commercial use of Biodiversity: Access to genetic resources and benefit-sharing* (London: 1999).

a caricature of the processes that may be involved (*see Figure 1*). In some situations, researchers may target a particular biological entity such as a species of sponge, a hyperthermophilic microbe, or the bark from a particular type of tree. In these circumstances the researchers may engage a specialist organization to collect the biological samples for them. Alternatively, they may collect the materials themselves. The inspiration to explore a particular line of research may come from a range of sources including articles in scientific journals, conferences, field work, on-going research, or Indigenous knowledge. While in some cases researchers may target specific biological materials, in other cases, however, the process of collection is more haphazard: a bioprospector may simply collect biological material from an area in the hope that they will unearth something valuable. After the relevant biological samples have been collected, they are often transferred to a third party to identify the potential chemical compounds and possible candidates for drug discovery. The isolated compounds may then be transferred to another organization to carry out further research. Occasionally, this will lead to the development of a new product, such as a drug, a herbicide, or a botanical medicine. At this stage, the relevant party may apply for patent protection, undertake clinical tests, and begin marketing[51]. In recent years, a number of new products have been developed that are based upon or derived from biological resources in Australia[52]. **Figure 1**



[51] In other cases, an organisation may collect, screen, carry out further research, and patent the resulting inventions.

[52] See *Queensland Biodiscovery Policy Discussion Paper* (Brisbane: 2002), 3.



The patent system that currently operates in Australia is made up of a number of well-known features. These include the process of registration that plays such an important role in demarcating the scope of the intangible property; a body of experts that perform a variety of roles including the translation of technical information into the appropriate format; and a series of rules, concepts, techniques, and procedures that control a range of factors from the type of creations that are protected through to the scope of protection granted to patentees. Another important, but often neglected, aspect of the patent system relates to the way it is perceived. While the way the patent system is seen may not

impact upon its daily operation, it does influence what we demand or expect from it, as well as what we imagine it is capable of achieving.

While there is no denying the important role that patents play in macroeconomic policy, there is no reason why the patent system, as a regulatory tool, should only be used in the pursuit of economic ends, nor any reason why 'external' factors such as the impact of technology on the environment or health should not fall within the core remit of the patent system. That is, there is no compelling reason why the various practices, rules and concepts that have been developed and fine-tuned over the last couple of centuries or so should only be used for economic ends. Given that modern patent law already performs a number of, sometimes surprising, non-economic roles, this is not as alien a proposal it might first appear. For those who require an older lineage, there are also many examples from pre-modern patent law where the grant of a patent was used by the Crown to achieve political and personal, rather than economic, ends.

If we see the patent system not merely as a tool of economic policy, but more generally as a technique of government policy, we can more readily appreciate the potential that it has to be used in the pursuit of a number of different goals. While in time this may lead us to modify existing rules and practices, the main change that is required is in the way that we think of the patent system and what we imagine it is capable of achieving. While reconsidering the way we think about patents opens up a number of possibilities, in this context we wish to focus on the way that patents can help to bolster and protect Indigenous knowledge. In effect, what is proposed is to use the potential that exists within the patent system to overcome the shortfalls in the existing Commonwealth schemes. More specifically, what is being argued is that it is possible to make it a condition of patentability that applicants be required to obtain prior informed consent whenever they make use of Traditional knowledge., It is also being proposed that prior informed consent be obtained from

Indigenous access providers. Provisions of this nature have been introduced in a number of different jurisdictions: notably in the European Union[53], Denmark[54], Brazil[55], Costa Rica[56], the Andean Pact Countries (Bolivia, Colombia, Ecuador, Peru and Venezuela)[57], the *Convention on Biological Diversity*[5859], and have been proposed in India[60]. For example, Recital 27 of the *EU Biotechnology Directive* provides that:

'Whereas if an invention is based on biological material of plant or animal origin or if it uses such material, the patent application should, where appropriate, include information on the geographical origin of such material, if known; whereas this is without prejudice to the processing of patent applications or the validity of rights arising from granted patents'[61].

In thinking about making prior informed consent and disclosure of the geographical origin of genetic resources conditions of patentability, there are a number of subsidiary issues that need to be considered. An

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[53] Recitals 25 and 26, EU *Biotechnology Directive (Directive 98/44/EC of the European Parliament and of the Council of 6 July 1998 on the Legal Protection of Biotechnological Inventions).*

[54] Para 3 of the Danish Patent Law (changed by order no. 1086 of 11 December 2000).

[55] *Provisional Measure on the Genetic Heritage, Associated Traditional Knowledge and Technology Transfer, Provisional Measure No 2. 186-16, 23 August 2001* (published in Official Journal No 163; 24 August 2001, Section 1, pp 11-14).

[56] Article 81, *Biodiversity Law (No 7788)* of Costa Rica (enacted 27 May 1998).

[57] Andean Decision No 391 of 16 August 1996, Andean Community of Nations (2 July 1996): establishing a Common Regime on Access to Genetic Resources.

[58] See Article 15(5) of the Convention on Biological Diversity (which contain provisions to encourage the disclosure of the country of origin of the genetic resources and of the origin of traditional knowledge, innovations and practices of indigenous and local communities in applications for intellectual property rights).

[59] *Access to Biological Resources in Commonwealth Areas* (Canberra: 2000), 88 recommended that IP Australia consider amending patent law to require proof of source and, where appropriate, prior informed consent, as a prerequisite for granting a patent.

[60] *The Patents (Second Amendment) Bill* 1999, Clause 17 amendment to section 25, *The Patents Act* 1970.

[61] Recital 26 of the EU *Biotechnology Directive* provides 'Whereas if an invention is based on biological material of human origin or if it uses such material, where a patent application is filed, the person from whose body the material is taken must have had an opportunity of expressing free and informed consent thereto, in accordance with national law'.

important threshold question that needs to be addressed is when would an applicant need to make a disclosure? That is, what type of relationship must there be between biological resources and a patented invention before an applicant would be required to obtain prior informed consent and to disclose the geographical origin of genetic resources? Once the threshold question has been addressed, it is also important to consider the consequences if an applicant fails to obtain the necessary prior informed consent or meet the relevant disclosure requirements. In thinking about making prior informed consent and disclosure of origin conditions of patentability, there are a number of problems that need to be addressed. For example, consideration needs to be given to the potential costs of such a proposal on both applicants and on the patent office. While this is an important consideration, research in other jurisdictions has shown that many patents already include information about biological resources used in the creation of the patented invention. As such, a proposal of this nature would not be as onerous as it might first appear[62]. Another potential problem relates to the fact that in many circumstances it will be difficult, if not impossible, for a patentee to determine the provenance of the underlying genetic resources. This will particularly be the case where biological samples have been in circulation for a long time[63]. While this problem should decrease over time (as the way genetic resources are collected and transferred change), nonetheless it still needs to be addressed. One way in which this problem could be overcome is if applicants were able to make a statutory declaration that they have undertaken all reasonable steps to determine the origin of the relevant biological materials, but have been unable to ascertain the provenance of

[62] To some extent this begs the question of why there is a need for such a scheme in the first place.

[63] Where traditional knowledge is used, objections will be invariably be raised about the difficulties of ascertaining the party from whom appropriate prior informed consent should be obtained.

the material.[64] Irrespective of the way that these questions are answered, it is crucially important that the AUSFTA does not hamper the ability of the Australian Government to amend domestic law in this way.

To summarise, biodiscovery is the process whereby scientists use naturally occurring substances in the creation of new products, such as new drugs or herbicides. In some situations, Indigenous knowledge is used to identify valuable bioleads that underpin the creation of these new products. Over the last decade or so, a number of attempts have been made to ensure that Indigenous peoples are able to control the use that is made of their traditional knowledge in such circumstances. This is reflected in the Convention on Biological Diversity (CBD). One approach that has been mooted as a way of protecting Indigenous knowledge in this context is by amending patent law to ensure that whenever Indigenous knowledge or resources are used in the process of creating a new invention, a patent will not be granted unless the applicant can show that they have the prior informed consent of the relevant owners and (possibly) also that there be a benefit sharing agreement in place. While no such laws exist in Australia it is important that the AUSFTA does not hamper the ability of the Australian Government to amend domestic law in this way. Similar rationale applies in relation to Plant Breeders Rights Legislation.

7.2.4 Trade Marks

Trade mark law gives the trade mark owner a monopoly over words, symbols or devices that are used to distinguish their goods and services from those of other traders. Trade marks also serve a consumer protection role in that they inform members of the public of the origin, source or in some cases quality of goods or services. To be registered as

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[64] In a sense this is similar to the obligation on applicants to disclose relevant prior art that is known to them.

a trade mark, Indigenous cultural material would have to be used in the course of trade, which, it has been suggested, is not appropriate to the cultural significance or the traditional use of such material.[65] It is important that the AUSFTA does not hamper the ability of the Australian Government to amend Australian Trade Mark law to provide more effective protection for Indigenous cultural expression, if it so wishes.

(a) Protection of Indigenous works and culturally significant symbols

Another area where it may be in necessary to develop specific reservations in the AUSFTA is in relation to the protection of Indigenous works and culturally significant symbols, names and words. In some situations, there are good reasons why certain marks, words or symbols should not be registered as trademarks. This would be the case, for example, where the use was culturally offensive, inappropriate or demeaning. In some jurisdictions (such as New Zealand), special procedures exist to ensure that culturally significant Maori words or symbols, that are registered by those who not entitled to use such marks, are able to be removed from the Trade Marks Register.

(b) Geographical Indications

One area of law that offers some hope for the protection of Indigenous creation is offered by the law of geographical indications (or GIs). While this form of intellectual property is usually associated with agricultural products and foodstuffs, it has been linked to other products (such as Swiss watches). A key feature of GI protection is that it recognises and protects the relationship that a product has with its place of origin. Another important feature of GI protection is that the right is granted to a collective, rather than a particular individual. The connection to place (or country) and the fact that the right is granted to collectives mean that GI-

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65 Janke, T., 'Our Culture, Our Future: Report of Australian Indigenous Cultural and Intellectual Property Rights' (1998), XXIII.

style law has the potential to provide effective and relevant legal protection over a range of Indigenous artistic, cultural and technological creations.

7.2.5 Breach of Confidence

Breach of confidence laws may be used if Indigenous cultural material has not previously been published. For this to occur, the applicant would need to show:

- The information has the necessary quality of confidence about it.
- The information was imparted in circumstances where there was an obligation of confidence.
- There was an unauthorized use of that information to the detriment of the party communicating it.[66]

While there are a number of limitations on the ability of breach of confidence to protect Indigenous creations, in certain circumstances it may provide some protection. This can be seen, for example, in *Foster v Mountford*,[67] the Court granted an injunction in favour of members of the Pitjantjatjara Council, who took the action to stop the publication of a book in the Northern Territory. The book contained information that was of deep religious and cultural significance to the Pitjantjatjara people, including photographs. The court found that the information was given to Mountford in confidence. The Pitjantjatjara people were concerned that continued publication of the book in the Northern Territory could cause serious disruption to their culture and society should the book come into the hands of the uninitiated. The court granted an injunction in favour of members of the Pitjantjatjara Council, who took the action to stop the publication of a book in the Northern Territory. It is important that the

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66 Janke, T., 'Our Culture, Our Future: Report of Australian Indigenous Cultural and Intellectual Property Rights" (1998), 73.

67 (1977) 14 ALR 71.

AUSFTA does not hamper the ability of the courts to continue to provide such remedies where they feel it necessary.

7.3 RECOMENDATION

ACIPA has recommended that the following clause be inserted:

> Nothing in this Chapter shall be construed as preventing a Party from adopting or maintaining a measure relating to its Indigenous people.

CHAPTER 8

CONCLUSION

AUSFTA will have wide-ranging impacts upon Australian public policy making. Australia's Indigenous people suffer considerable disadvantage, as confirmed by the social indicators identified in a recent study by the Productivity Commission. Indigenous people are also continuing to rebuild their cultural and spiritual connection with their lands and their communities. A considerable range of policy and legislative measures are required to support this process and bring the standards of health, education and social order in line with the non-Indigenous community. We have attempted to identify a number of the existing and future measures that need to remain in the hands of the Australian federal and state governments to achieve those purposes. There is a risk that AUSFTA will severely limit the government's capacity to continue measures to improve the economic and social status of Indigenous people unless appropriate exemptions appear in AUSFTA. We have attempted to identify specific exemptions in circumstances where we have not seen a draft of the proposed agreement as a whole. ACIPA therefore emphasised that the preferred approach should be to provide a general overarching exemption for Indigenous people.

ACIPA advise that even with time and sufficient consideration, it is not possible for anyone to fully anticipate the way in which AUSFTA will operate and be interpreted in the future. It is for that reason that ACIPA emphasized the need to provide a broad exemption to allow government the policy flexibility to address the widespread and entrenched nature of

the social and economic disadvantage of Indigenous people. ACIPA has recommended:

CHAPTER	Our Proposal
Objectives	Nothing in this Agreement shall be construed as preventing a Party from adopting or maintaining a measure for its Indigenous people. If a particular measure benefits or will benefit a Party's Indigenous people as well as its non-Indigenous people, the measure may apply or be applied regardless of any contrary provision of this Agreement if the preponderant purpose or effect of the measure is for the benefit of the Indigenous people. For the purposes of this Agreement, an Australian Indigenous person means a person of the Aboriginal race of Australia or a descendent of an Indigenous inhabitant of the Torres Strait Islands.
Trade in Goods	That an exemption be provided for "measures for Indigenous people and organizations, including for the protection of the cultural and spiritual heritage of Indigenous people".
Government Procurement	It is recommended that an exemption apply "to any measure with respect to Australia's Indigenous people".
Trade in Services	It is recommended that an exemption apply "to any measure with respect to Australia's indigenous people". It is also recommended that a reservation be included in the same terms as that contained in SAFTA Annex 4-II(A).
Investment	Nothing in this Chapter shall be construed as preventing a Party from adopting or maintaining a measure relating to its Indigenous people.

Intellectual Property	Nothing in this Chapter shall be construed as preventing a Party from adopting or maintaining a measure relating to its Indigenous people.