Secrets to Cultural Identity; legal and institutional mechanisms to better support Torres Strait Islanders to maintain their cultural secrets

A dissertation submitted by

Christopher N McLaughlin[1]

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[1] Solicitor registered to practice law in the State of Queensland, Australia admitted on the Roll of Practitioners of the Supreme Court of Queensland and High Court of Australia. LLB (JCU). LLM (UNE). PhD Candidate at the University of New England, Armidale, New South Wales, Australia.

ABSTRACT

Torres Strait Islanders are a proud People with a strong physical and spiritual connection to their lands and waters in the Torres Strait, Australia. They present a unique and rich set of values, beliefs, geography, language and cultural practice, inextricably-linked to their cultural identity and vastly distinct from first-nation Australian Aboriginal peoples and the multi-cultural Australian mainland. Torres Strait Islanders practice a unique form of secrecy (*Yagasin*) applied towards the concealment and controlled revelation of sensitive Indigenous knowledge comprising the very building-blocks of their civilisation (their cultural secrets), itself cultural practice deriving from their traditional laws and customs acknowledged, connecting them spiritually to their lands and waters.

Most Australian statutory, common law and equitable legal mechanisms have proven ill-equipped to protect cultural secrets in their *sui generis* form and effectively remediate for spiritual impairment; the instruments fail to appreciate the primacy of the Indigenous spiritual world and communal interests distinct from Eurocentric proprietary interests in the physical world. When Indigenous people lose control of cultural secrets they are also likely to lose cultural identity, autonomy and power to control their own lives, rendering them helpless in the face of complex modern-day, ever-evolving political and economic relations.

This thesis explores legal and institutional mechanisms that may better support Torres Strait Islanders to protect their cultural secrets. The author argues that Native Title law is poised to emerge as the leading contender, best-equipped to provide tailored legal and institutional protection of Torres Strait Islander cultural secrets. Such a law would apply a regime which is neither an institution of the common law nor a form of common law tenure but nevertheless recognised by common law; it would provide a vital intersect with Torres Strait Islander traditional law and custom widely acknowledged.

CERTIFICATION OF DISSERTATION

I certify that the ideas, results, analyses, and conclusions reported in this dissertation are entirely my own effort, except where otherwise acknowledged. I also certify that the work is original and has not been previously submitted for any other award, except where otherwise acknowledged.

Signature of Candidate Date 2 Nov 2018

Christopher Neil McLaughlin

ENDORSEMENT

Nov 3 2018

Signature of Supervisor Date

Prof. Paul Martin

Signature of Supervis Date

Prof. Mark Perry

2nd November 2018

Signature of Supervisor Date

Dr. Jacqueline Williams

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I do not assert that any of the views expressed or reproduced in this research are representative of the wider views of Torres Strait Islanders, however, I have engaged widely to validate, to the extent practicable, that the issue at the heart of this research exists and requires examination.

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GLOSSARY

The following terms are used frequently throughout this thesis and are ascribed the following meaning by the author.

Aboriginal peoples	First-nation Aboriginal peoples of Australia.
ailan lore and *ailan kastom*	Torres Strait Islander *Ailan Tok* terms, translated into English to mean 'island law and island custom', signifying the traditional laws and customs of Torres Strait Islander people.
Ailan Tok (or Yumplatok)	Torres Strait Islander Creole language.
cultural identity	Core understanding of oneself; a sense of what we identify ourselves as, through and with.
cultural practice	Traditional practice in accordance with laws and customs of a society, as acknowledged (including *ailan lore* and *ailan kastom*).
external interference	Any act or omission by persons outside Indigenous community, which adversely affects the continued exercise of *cultural practice* by those within the Indigenous community.
Islanders	Colloquially in the Torres Strait refers to Torres Strait Islander people.
Native Title	A Western legal declaration/ recognition of rights in favour of identified Indigenous Australians as surviving annexure of sovereignty by the British on settlement of Australia in 1770.
NTA	*Native Title Act 1993* (Cth) codifying in statute the native title regime in Australia.
privacy	An inter-related but distinct concept from *secrecy;* one may claim *privacy* as a legal right (eg, in the contents of a diary), but actively exercise the practice of *secrecy* to conceal and control revelation of sensitive information (eg, by hiding the diary, writing it in code, or locking it up). *Privacy* is a legal reply to the cultural practice of *secrecy.*
secrecy	The cultural practice of asserting concealment and controlled revelation of sensitive information. *Cultural secrecy* is used to signify a distinction between the nature and incidents of *Islander* and Anglo-Australian notions of *secrecy* as *cultural practice*.

secrets	The sensitive information the subject of *secrecy* assertion. *Cultural secret* is used to signify a distinction between the nature and incidents of *Islander* and Anglo-Australian notions of *secret*.
sui generis	A Latin phrase translated to English to mean 'of its own kind'.
Torres Strait/Zenadth Kes	A region to the north of Cape York Australia, and south of the Western Province of Papua New Guinea.
Torres Strait Islanders	Widely describes a distinct people of the *Torres Strait*/*Zenadth Kes*.
traditional owner	A common law holder of *Native Title*.
usufructuary	An interest non-proprietary in nature.
Yagasin	A *cultural practice* stated in *Torres Strait Islander Kulkalgaw Ya* language translated to English to mean 'not to say anything'. The language term is used interchangeably throughout this thesis with *cultural secrecy* to signify *cultural practice* arising out of *ailan lore* and *ailan kastom.*

ACRONYMS AND ABBREVIATIONS

AIATSIS	Australian Institute of Aboriginal and Torres Strait Islander Studies
ALRC	Australian Law Reform Commission
Cth	Commonwealth of Australia
DOGIT	Deeds of Grant in Trust
IBIS	Islander Board of Industry Services
ICCPR	International Covenant on Civil and Political Rights
FCAATSI	National Advancement of Aborigines and Torres Strait Islanders
HREC	Human Research Ethics Committee
ICCPR	International Covenant on Civil and Political Rights
ILO	International Labour Organisation
LMS	Calvinist Evangelical London Missionary Society
NAC	National Aboriginal Conference
NACC	National Aboriginal Consultative Committee
OAIC	Office of the Australian Information Commissioner
RNTBC	Registered Native Title Prescribed Bodies Corporate
Qld	Queensland
SIC	Summer Institute of Linguistics
the AIS	Australia Information Service
the ANG	Australian National Gallery
UDHR	Universal Declaration of Human Rights
UNDRIP	United Nations Declaration on the Rights of Indigenous People
WIPO	World Intellectual Property Organisation

CHAPTER 1: INTRODUCTION

1.1 The Torres Strait ('Zenadth Kes')

Torres Strait Islander culture retains its past strengths, whilst incorporating changes brought by historical events. A pragmatic and resilient maritime people, with a unique origin and history and relationship to modern Australia, Torres Strait Islanders have created their own syncretic culture that is distinctive, vital and enduring. When Islanders reflect upon their cultural heritage, they are often unaware of the many elements that have flowed into it and do not recognise their own genius as a people for choosing, adapting and elaborating new elements without compromising their generations-old core cultural values.

Anna Shnukal, 2001[2]

[2] Anna Shnukal, 'Torres Strait Islanders' (2001) 100 *Multicultural Queensland* 21.

1.1.1 The Research

1.1.1.1 The Issue

According to a study undertaken in March 2017 by The Torres Strait Island Regional Council,[3] which polled 517 Islander community respondents: [4] Thirty one per cent of community respondents indicated that they believed that over the past 10 years (2008-2017), cultural practice in the Torres Strait had grown stronger (been practiced more often) compared to the decade prior (1998-2007); a quarter of respondents (25%), considered that it was on the decline (practiced less often) than the prior decade; and 44 per cent of community respondents considered that conditions remained unchanged.[5] More than half (55%) of respondents considered that Government laws were insufficient to properly protect and empower cultural practice in the Torres Strait. This community response, capturing the views of over 20% of the total adult Islander population living within the Torres Strait region, prompted me to seek a better understanding of the role that cultural practice plays in remote Indigenous communities, including in the protection of underlying cultural secrets, their influence upon the strength of underlying cultural identity as a people, and the adequacy of legal protections available. The issue examined by this research is loss of control of Islander cultural secrets by external interference.

1.1.1.2 External Interference

On 8 March 2012, the ABC's 7.30 Report aired a story depicting graphic images of the slaughter of turtle and dugong in remote islands of the Torres Strait in accordance with widely acknowledged and accepted Indigenous hunting practices and techniques passed down generation to generation under traditional law and custom (*ailan lore* and *ailan kastom*).[6] The scenes were covertly captured by an animal activist who had posed as a tourist and had requested of local Islander residents, in exchange for payment, to experience Islander cultural practice to which local Indigenous hunters obliged. The story stimulated mass public outcry on a national

[3] At which time I was engaged by the Torres Strait Island Regional Council as Chief Executive Officer.
[4] All respondents were over the age of 18 at the time of participation in the poll.
[5] Torres Strait Island Regional Council, *Community Survey* (2017).
[6] Torres Strait Islander Creole terms translated to English to mean *island law* and *island custom*.

level which culminated in the Queensland government intervening and placing before the Parliament on 19 June 2012, the *Animal Care and Protection and Other Legislation Amendment Bill 2012* (Qld) with the sole aim of amending the *Animal Care and Protection Act 2001 (Qld)* to remove statutory exemptions from prosecution[7] for animal cruelty offences for acts or omissions done under recognised Indigenous cultural practice.[8] The *Animal Care and Protection and Other Legislation Amendment Act 2012* (Qld) was subsequently assented to on 21 September 2012 and is now law in Queensland.

This story prompted me to begin to think about the nature and incidents of Islander traditional interests, such as those of traditional hunting and fishing, and how and to what extent those interests, and potentially others, were adversely affected by external interference, such as by legislative decree. I began to consider whether the impact of external interference could cut deeper than, for example, simply legislating restriction to promote more palatable hunting and fishing techniques. What other Islander *sui generis*[9] interests may be affected?

I then wondered what other forms of external interference may occur in remote modern Islander communities, such as those prevalent in a technological social-media age where information is capable of instantaneous transmission over many varied mediums and where the transition from the private to public sphere can be instantaneously facilitated to a global audience. In this new age, maintaining any form of secrecy is becoming increasingly complex. There is a heightened risk of systematic and inadvertent revelation of secrets. A question which flowed from this observation was whether Islander and non-Islander (ie. Western) categorisations of what is 'secret' were convergent or divergent, and whether cultural practices in accordance with traditional laws and customs acknowledged already existed within Islander community to control the revelation of cultural secrets long before Western influence. I reflected upon my experience living and working in the Torres Strait for over a decade. Initially I reflected upon the Islander cultural practice of 'death notifications', which are triggered upon the death of a family member, charging predetermined members of the deceased's family with sole responsibility for

[7] *Animal Care and Protection Act 2001* (Qld) ('*ACPA*') s 18.
[8] Ibid s 8.
[9] *Sui generis* is a Latin phrase which means *of its own kind.*

notifying other family members of the death to the exclusion of all others. I observed that such cultural practice is clouded in a veil of cultural secrecy, deriving uniquely from traditional laws and customs of Islanders, mandating that such matters must remain secret pending the pre-determined cultural trigger. I was aware of countless incidences in which the media, police and other entities external to community had played a role in contravening death notification protocol because of external interference. These contraventions were a single example of many cultural practices seemingly concealed by a veil of cultural secrecy operating within modern Islander community but originating long before Western contact.

Two initial questions arose from my observation:

1. Do Islanders and Anglo-Australians view secrecy and categorisations of secret differently?
2. Does Australian law adequately protect Islander views of secrecy and categorisations of secret?

These two questions formed the basis of my initial literature review on the issue, as described in Chapter 3. It is prudent however, before embarking upon the literature review, to frame the Torres Strait landscape.

1.1.2 Geography

The Torres Strait spans an area of approximately 48 000 square kilometres, 150 kilometres in width at its narrowest point between the tip of the Cape York Peninsula, Australia, and the Western Province of Papua New Guinea.[10] About 15 000 years ago, when the Ice Age came to an end, the land bridge originally connecting the tip of Cape York Peninsula, Australia, through the area now known as the Torres Strait, to Western Papua New Guinea, submerged beneath a rising sea. The first inhabitants of the Torres Strait region migrated from the Indonesian archipelago soon after the Ice Age.[11] The Torres Strait today consists of a cluster of 274 islands, 17 of which are inhabited. Each island has a varied topography and ecosystems, from mangrove, alluvial sedimentary deposits deriving from the Papua New Guinea Fly River system to the north, to sparse, granite mountainous islands to

[10] Torres Strait Island Regional Council, *Our geography* (2016) < http://www.tsirc.qld.gov.au/our-communities/our-geography/>.
[11] John Singe, *The Torres Strait: People and History* (University of Queensland Press, 1979) 1.

the west, tropical, sandy cay islands centrally, and jungle, volcanic islands to the East.[12] The traditional name for the region is *Zenadth Kes,* but is still referred to widely within and outside the Region as *the Torres Strait*. Figure 1.1 is a current map of the Torres Strait region and Table 1.1 lists the names of the islands.

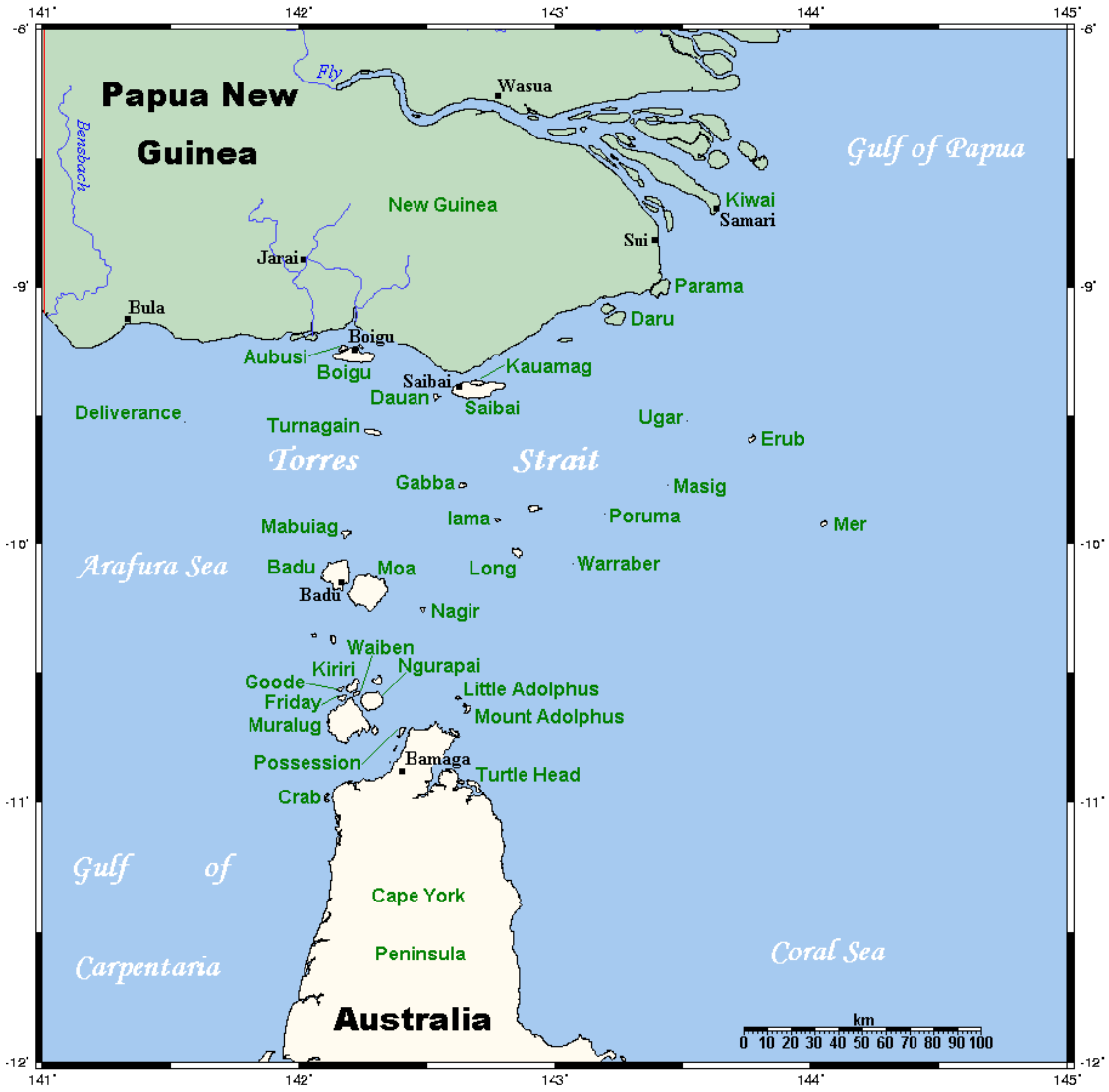

Figure 1.1: Map of the Torres Strait
(Source: Wikipedia, *Torres Strait* <https://en.wikipedia.org/wiki/Torres_Strait>

Table 1.1: Names of the inhabited islands of the Torres Strait

Traditional Name	English Name	Traditional Name	English Name
Badu	Mulgrave	Moa	Banks
Boigu	Talbot	Muralag	Prince of Wales
Dauan	Mt Cornwallis	Ngarupai	Horn
Erub	Darnley	Poruma	Coconut
Keriri	Hammond	Saibai	-
Mabuiag	Jervis	Ugar	Stephen

[12] Torres Strait Island Regional Council, above n 5.

Masig	Yorke	Waiben	Thursday
Mer	Murray	Warraber	Sue
		Iama	Yam

At the time of writing this thesis, the Torres Strait was accessible to mainland Australia by propeller passenger aircraft via a primary airport located on *Ngarupai* (Horn Island) which connects passengers with smaller propeller aircraft and helicopters to the outer islands of the Torres Strait and water ferries to the inner islands. Travel between the remote island communities of the Torres Strait is primarily by small propeller aircraft, helicopter, small private vessel or dinghy or large freight barge. Most communities in the outer-islands have airstrips, however two communities only have helicopter landing pads.[13] Freight is primarily received via barge at ramps and jetties, operating between the Torres Strait and the closest major Australian mainland city some 2 000 kilometers away (as the crow flies), namely Cairns. Smaller packages can be transported by fixed-wing aircraft or helicopter to the outer-islands. Barge ramps and landings are tidal due to surrounding reef and tidal conditions; this results in some islands receiving mail, packaged goods and groceries as infrequently as monthly.[14] Potable water is collected at man-made lagoons, often supplemented by desalination plants, underground freshwater wells or residential water tanks, and treated via water treatment plants, resulting in water being available to residents for as few as four hours per day in some communities because of year-round water restriction. Most islands have reticulated underground sewer-systems; however, some outer-islands remain on stand-alone septic or biocycle systems. Each island has a landfill for the collection and consolidation of its solid waste.

1.1.3 People

1.1.3.1 Hunting, Fishing and Trade

Torres Strait Islanders, often identifying as ‘Islanders’ (a term which shall be adopted interchangeably for the purposes of this thesis), are a distinct people from the first-nation Aboriginal peoples of mainland Australia, but with close historical trade ties to them. Islanders have a generally closer genealogy to South Pacific and

[13] Ugar (Stephen) Island and Dauan (Mt Cornwallis) Island.
[14] Ugar (Stephen) Island.

Papua New Guinea nations peoples. Islanders have rich traditional cultural practice, formed by their very varied ethnic influences. They pride themselves on being people of the sea. They were historically – and remain today – highly-skilled hunters and fishermen on and beneath the sea, although they were also very skilled agriculturalists, farmers and cultivators on land. As a generalisation, Islanders from central communities were fishermen, eastern Islanders were farmers and cultivators, and western Islanders were hunters of turtle, dugong, geese, ducks, pigs and fish.[15]

Islanders have historically preferred to hunt smaller fish to larger fish. This is because the smaller fish are easier to catch in high volumes and, absent refrigerators, they, historically, had insufficient space to store larger fish. Fish were generally consumed while fresh and excesses shared among community. To this day, smaller fish, even sardines and white fish, comprise a staple of a traditional meal, although now that refrigerators are readily available, bigger fish, such as mackerel and coral trout, frequent the family table. Fish are plentiful all year round and are a sustainable resource. In the past, Islander diet varied dependent on resource-availability in the Torres Strait because of varied environmental conditions, but staples generally included seafood (dugong, turtle, fish, crabs, crayfish (lobster) and prawns) and cultivated island fruit, vegetables and grains (including rice, sweet potato, taro, bananas and yams). Western Islanders also farmed pigs, ducks and geese. These foods remain a staple in today's Islander diet, supplemented by other food groups readily available at the local supermarket.[16]

Islanders historically traded with mainland Aboriginal peoples, exchanging cowrie, bailer, trochus and pearl shell (and even human heads as part of common headhunting practices), for Aboriginal people turtle oil, red ocre and strong spears. The same goods were traded with neighbouring Papuans from Papua New Guinea for sago leaves for skirts, cassowary feathers, birds of paradise, and hulls for sailing.[17]

1.1.3.2 Language

Islanders typically speak one or more of two dominant languages native to the Torres Strait depending on geographical location:

[15] Singe, above n 11, 7–8.
[16] Ibid.
[17] Ibid 4.

- *Kalaw Lagaw Ya* ("KLY")*, Kalau Kawau Ya* ("KKY")*, Kulkalgau and Kawalgau Ya*; a western-central language and spoken within the south-western, western, northern and central islands[18] with origin from mainland Australian Aboriginal peoples; or
- *Meriam Mer;* spoken by the eastern cluster of islands[19] with origin from Papua New Guinea and other South Pacific nations.[20]

Pacific 'Pidgin English', or the *lingua fanca* (shared-language) of the South Pacific fisheries, was said to have been creolised in around the 1890's by the children of Erub (Darnley) Island in the Torres Strait (who were taught by South Pacific Missionary teachers), spreading then to the Anglican Church of England Mission on Moa Island (St Pauls), established for South Pacific Islanders. This new language is today known as Torres Strait Creole (referred to as *Ailan Tok* by Islanders) and spoken widely. *Ailan Tok* is a shared language amongst Islanders. Although superficially similar to English, it is actually closer to the original Torres Strait languages. It is only since the 1990's that English has been spoken widely in the Torres Strait, however *Ailan Tok* remains the primary form of inter-island communication today.[21]

1.1.4 History

The Torres Strait, prior to European contact, was said to have been a violent place with inter-island raids, warfare and massacres at the hands of Papua New Guinea marauders. Human heads were greatly valued socially and religiously and traded inter-island and with neighbouring nations. Raids, ambushes and massacres frequent Islander-stories and legends. Bows, arrows and clubs were the weapons of choice of Islanders, made of stone, shell and wood. It is said that ritual cannibalism was rife and human heads were favoured as both currency and cuisine, particularly in the cannibalistic *Malo-Bomai*[22] cult originating on Mer Island.[23] Attacks at the northern

[18] Thursday, Horn, Prince of Wales, Hammond, Badu, Moa, Mabuiag, Poruma, Warraber, Iama, Masig Islands.
[19] Mer, Ugar, Dauan, Saibai, and Boigu Islands.
[20] Torres Strait Island Regional Council, above n 5.
[21] Shnukal, above n 2.
[22] *Bomai* is said to be a secret name known only to initiated cult members, however is said to have lost this categorisation in modern-day Torres Strait.
[23] Singe, above n 11, 6.

islands from Papuan marauders was common to many communities. Population control was practiced using infanticide, particularly on the eastern islands of Mer and Erub Islands.[24] Alarmingly, in the years following European contact, the Torres Strait would remain a violent place, until relatively modern-day.[25]

The Torres Strait region was named after Spaniard navigator Captain Luis Vaz de Torres who passed through the Strait in 1606 on his way to Manilla in the Philippines, predating Captain James Cook who claimed British sovereignty over the eastern part of Australia in 1770 at Possession Island, also within the Torres Strait region and off the tip of Cape York Peninsula, Australia.[26] Captain Torres shot two Islander men while passing through the central islands and abducted two Islander women, taking them back to Spain during his expedition. The Spaniards are said to have been the first Europeans to have had first contact with Islanders and, sadly, European contact in the centuries thereafter under British rule did not improve the Islander experience. In 1770, Captain James Cook of the Royal British fleet sailed through the Endeavor Passage into the Torres Strait, recording, on 22 August that year, that he had seen his first 'Indian' armed with a bow and bundle of arrows, along with pearl oyster shell breast plates. Cook was drawn to the mainland by 'a great number of smokes', indicating a dense population of Aboriginal peoples, far more so than Islander populations in the Torres Strait. Tuined Island within the Torres Strait was renamed Possession Island by Cook. Cook's voyage paved the way for many more ships to navigate the Torres Strait passage to mainland Australia.[27]

In 1863, the first European settlement was established on Albany Island, on the Cape York Peninsula. Later that year, the settlement was relocated to the adjacent mainland community of Somerset. Beche-de-mer (sea cucumber) fisherman (also known as Trepangers), began to relocate into the Torres Strait from mainland Australia in a westward expansion of the Pacific trade, setting-up camps on some islands. A number of subsequent cataclysmic events, however, arguably set the course towards modern-day Torres Strait.

[24] Ibid 7–8.
[25] Ibid.
[26] Torres Strait Island Regional Council, above n 5.
[27] Singe, above n 11, 15.

1.1.4.1 The Foreign Raiders

In 1870, when pearl shell was discovered in commercial quantities in the Torres Strait and the pearl shell rush began, thousands of foreign seamen, mainly from the South Pacific Islands, Philippines and Europe, began to pour into the Torres Strait in the pursuit of fortune. They were soon replaced by indentured labour from Indonesia, Singapore and Japan. Islander-communities were increasingly being harassed and abused by these foreign seamen who would regularly raid islands, armed with weapons in pursuit of food and resources, such as timber to power their curing fires and steam-powered vessels. These raids became progressively more severe, to the point where Islander women were being kidnapped and reportedly sexually abused, Islander men beaten to death, and when communities sought to take up unsophisticated arms and defend themselves, massacres were reported at the hands of the more technologically-advanced foreign raiders, armed with muskets.[28]

1.1.4.2 Christianity

A year later in 1871, Christian missionaries from the Calvinist Evangelical London Missionary Society (LMS) landed by vessel on Erub (Darnley) Island. The first Christian religious service in the Torres Strait was conducted on Erub Island on 1 July 1871 and is celebrated annually to this day as a public holiday in the Torres Strait as the 'Coming of the Light' festival'. The festival is said to symbolise the acceptance of 'civilisation'; a new religion and a new life. LMS opened the first Western Christian school two years later in 1873 on Erub Island, taught by South Pacific Islanders. The Torres Strait was originally seen by LMS as a stepping-stone to evangelising Papua New Guinea, which was LMS's primary goal. Ancillary to LMS's New Guinea intentions, the missions on-island would assist to manage conflict between the Islanders and their foreign raiders;[29] the violent incursions are said to have made Islanders more susceptible to the lure of Christianity to help curb the barrage of violence. Islander-life was about to change dramatically.

Mission Courts were set up on the islands, and clothing became mandatory for Islanders for the first time. Women were made to wear neck to foot 'mother-hubbards' – being long, wide, loose-fitting gowns with long sleeves and a high neck,

[28] Ibid 59.
[29] Ibid 57.

intended to cover as much skin as possible – or face the Mission Court. Islander men, women and children were said to be beaten regularly and severely for the most trivial of offences.[30] Traditional song and dance were suppressed by the missionaries as they were considered heathen practices. Traditional artefacts were destroyed. Islanders were made to adopt European surnames. Common names adopted included Joe (Badu), Tom (Boigu), Billy (Poruma), Charlie (Mer), and Harry (Iama), and others arising out of employment, such as Bosun (Mer), Pilot (Erub), Cook (Erub), and Captain (Erub). Others adopted were biblical references such as Levi (St Pauls), David (Iama), Jacob (Saibai), Reuben (Erub) and Matthews (Mabuiag). Ugar Island, named Stephen Island by William Bligh, sailing master to Cook, then adopted Stephen as a family name. Less and less common became Islanders with a single name to the point that today, it is virtually unheard of.[31]

By 1914, the monies generated in the Torres Strait by LMS were syphoned-off to fund their Papua New Guinea missions which were reported to be in bad shape. Bishop White of the Anglican Church of England reportedly, that year, made a monetary offer too good to refuse to the languishing LMS, which gladly sold-out of the Torres Strait. The Church of England opened its Torres Strait Mission in 1915. Catholic and Presbyterian churches were, however, built on Thursday Island in the mid-1880s, however most Islanders remained devout Anglican Church of England followers until the post-war rise of other Christian denominations.[32]

1.1.4.3 Annexation

The State of Queensland separated from the State of New South Wales on 10 December 1859.[33] In 1871, the then Queensland Premier, Sir Arthur Palmer, proposed that the boundaries of Queensland extend beyond the tip of Cape York by some 100 kilometres to encompass the Torres Strait, which was approved by the British Imperial Government on 24 August 1872.[34] This was, purportedly, primarily to protect fisheries potential in the Torres Strait from neighbouring Papuan exploitation, and unlikely aimed at protecting the Islanders.[35] In December 1876, the

[30] Ibid 60–61.
[31] Ibid 62–63.
[32] Shnukal, above n 2.
[33] Ibid.
[34] Singe, above n 11, 63.
[35] Ibid.

settlement at Somerset was relocated to Thursday Island which was proclaimed to be a government reserve for public purposes. Government buildings immediately began to be constructed on Thursday Island. Pearler huts were removed at the direction of the Queensland Government, and new applications for pearler infrastructure was refused. By about 1882, there were only four private residences on Thursday Island, the remainder being government infrastructure; however, the Government was under immense pressure to enable more private occupation. By proclamation from the United Kingdom on 24 June 1879, the Torres Strait was formally annexed by the Crown by Letters Patent from London. The process was initiated by the then Premier of Queensland, John Douglas (who later became the Resident Magistrate of the Torres Strait to be based on Thursday Island) and confirmed by the then Premier T MacIllwraith.[36] Papua New Guinea was annexed in 1884 by similar British proclamation and became British New Guinea, primarily as a further line of defence and buffer to the British jewel (Australia), against an increasing German threat. Both mainland Cape York, Australia and British New Guinea were responsible to the Queensland Governor.[37]

By 1885, two hotels were established on Thursday Island. It was around this time that significant private settlement was occurring rapidly on Thursday Island, with 40 private allotments offered for private sale by the Government. By 1890, there were 142 houses on Thursday Island, and 526 residents.[38] At annexation, Islanders became British subjects, and their lands were said to have been surrendered to the Crown as a continuation of the Eurocentric legal fiction that was *Terra Nullius'* (translated from Latin to English to mean 'nobody's land') which legally justified dispossession of Indigenous sovereignty of Australia in 1788.[39] This position was later found to be a legal fiction.[40] Thursday Island remains to this day the governance and commercial hub for the region; a daily painful reminder to all Islanders of the ultimate betrayal of faith.[41] It would, however, soon come to pass that the abuses suffered at the hands of the foreign raiders and missionaries would appear short-lived compared to the

[36] John Burton and Torres Strait Regional Authority, *History of the Torres Strait up to Full Annexation in 1879* <http://www.tsra.gov.au/the-torres-strait/general-history/>.
[37] Singe, above n 11, 113–114.
[38] Ibid 86–90.
[39] Shnukal, above n 2.
[40] *Mabo v Queensland (No.2)* (1992) 175 CLR 1 ('*Mabo (No.2)*')
[41] Ibid.

prolonged dispossession, discrimination and oppression later inflicted by their perceived 'protectors': the Queensland government.

In the early 1900's, many Islanders were consolidated from smaller islands to larger ones, often forcefully by the Queensland government and the Church, where communities began to 'Westernise' with the construction of modern infrastructure including schools, homes, churches, shops and a stable water-supply. Thursday Island remained the government hub of the Torres Strait region, by this time housing a hospital, artillery battery, post office, and a school with 70 students and two teachers.[42]

1.1.4.4 Protectionism

John Douglas began his tenure as Government Resident Magistrate (former Premier of Queensland) in the Torres Strait in 1884, to be based on Thursday Island (concurrently holding the appointment of Special Commissioner for British New Guinea). Douglas took the view that the Torres Strait, in whole or in part, should become part of British New Guinea and secede from Australia, primarily because he considered Islanders to have far more in common with New Guinea than mainland Australia. He also did not think that Queensland law was suitable for regulating Islanders. However, the Queensland Government originally rejected this view because of the financial opportunity for Queensland from the pearling and fisheries sectors.[43] The British and Queensland governments later in 1898 agreed to 'cut free' what they considered to be *troublesome* Boigu, Saibai and Dauan Islands of the Torres Strait, to enable them to secede to New Guinea; however because of the gross delay in the process, the secession was blocked procedurally in 1901 when Queensland became a State of the Commonwealth of Australia. A change in border would now require approval of the Commonwealth Parliament and a national referendum. It all became too hard for Queensland and the proposal was dropped; thus, the border remains the same today.[44]

Douglas admired Islanders and opposed their becoming subject to the *Aboriginal Protection and Restriction of the Sale of Opium Act 1897* (Qld) ('*Opium Act*.') when

[42] Singe, above n 11, 95.
[43] Ibid 115.
[44] Ibid 116.

it was enacted by the State of Queensland in 1897. The *Opium Act* brought mainland Aboriginal peoples in Queensland (including Islanders) under the protection and control of the Queensland government and ushered in a new age of protectionist and segregation policy in Australia. The *Opium Act* was based on the Social Darwinism theory that portrayed races as distinct, with some races considered not to have progressed through all stages of development. The *Opium Act* operated on the premise that Aboriginal people needed paternalistic care and control by members of a 'superior' culture,[45] justifying control over the management of their affairs, access to alcohol, finances and marriage, to name but a few.[46]

This was a time when, throughout Australia, there was a push to outlaw 'coloured-labour', something the North Queensland economy had become quite reliant upon. The Chinese were used to exploit the Goldfields of Cape York, the Kanaka labour for the beginning of the sugar industry, and the South Sea, Malay and Filipino labour for fisheries.[47] In response, North Queensland toyed with the idea of seceding from Southern Queensland in order to extend the coloured-labour trade, however, on 31 March 1904, the Commonwealth outlawed South Pacific labour, sending all South Pacific Islanders home, with the exception of those who were married in Queensland, owned land or property, or had been resident for no less than 20 years. A reserve was established for South Pacific Islanders in 1904 on Moa Island, in the Torres Strait, later becoming the St Paul's Anglian Mission (today know as St Paul's community).[48]

The *Opium Act* also appointed a local Protector to Thursday Island two years later in 1899, who was the then shipping master in charge of the Shipping Office on Thursday Island, appointed a Protector of Aboriginals by Walter E Roth, Northern Protector.[49] The Protector, at the outset, had limited authority, restricted mainly to fisheries. Prior to 1899, the islands of the Torres Strait were governed independently by *Mamooses* (island leaders) via a totemic clan Chieftain system. This was replaced

[45] Ibid 528; Shelley Bielefeld, 'Compulsory Income Management and Indigenous Australians: Delivering Social Justice or Furthering Colonial Domination' (2012) 35 *UNSW Law Journal* 522.
[46] Fiona Campbell, *Special Measures and Racial Discrimination: A Study of the Cape York Welfare Reform.* (James Cook University, 2016) 20.
[47] Singe, above n 11, 96–97.
[48] Ibid 98.
[49] Report of the Government Resident, 'Thursday Island' (QVP, 1900, Vol 1, 1053, 1899).

by Douglas in 1899 with Island Councils, taking effect from 1907. This was the beginning of modern Western governance in the Torres Strait, notwithstanding that at the time, Island Councils did largely govern their own affairs – including policing and Island Courts – subject to the satisfaction of the Queensland government (and the Church).[50]

With the death of Douglas in 1904 on Thursday Island, the Protector was bestowed more far-reaching powers in the Torres Strait by the Queensland government. The Government Resident was abolished in 1917. First island reserves were gazetted in 1912, the last in 1926 as part of a movement to segregate Islanders from Australians on the mainland. Superintendent-teachers were appointed to all island schools to oversee the reserves, as quasi-agents for the Protector. A curfew and pass system was instituted, meaning that inter-island travel could only occur with the approval of the local superintendent-teacher. Islander wages were placed under the Protector's control and could only be accessed upon the Protector's permission for the wider Islanders on the reserve.[51] This power was extended in 1901 to include the Protector's right to manage all property belonging to Islanders. The Protector was also responsible for forced relocations to reserves of Islanders.[52] In 1901, marriage between an Aboriginal (or Islander) with any non-Indigenous person, could not be celebrated without the express permission of the Protector (or a superintendent teacher). This was later extended in 1939 to include any marriage between two Aboriginal people (or Islanders).[53] Islander Wills were only valid if they had been approved and witnessed by the Chief Protector or authorised delegate.[54]

By 1915, excluding Thursday Island and Moa Island reserves, there was an alarmingly low total population of approximately 2000 island residents, mainly on the islands of Erub, Mer, Badu, Masig and Mabuiag in the Torres Strait, most of which were considered at the time to be South Sea Islander or descendants thereof. It is important to reflect on how close Islanders actually came to annihilation as a

[50] Shnukal, above n 2.
[51] *Aboriginal Protection and Restriction of the Sale of Opium Acts Amendment Act*, 1934 (25 Geo. V. No. 38), QGG, 3 January 1935, 37 ('*Opium Act*').
[52] Shnukal, above n 2.
[53] Ibid.
[54] 37The *Opium Act* s 31

people.[55] It may be open for interference that if not for the Church and subsequent annexation, they may not have survived the bombardment of foreign raiders at all. Notwithstanding their marginal survival as a people, however, Islander culture had been effectively decimated and, in the years to come, what remained would continue to be 'trampled down by mindless ethnocentrism'.[56]

Bishop White, in around 1914, reported that 'Heathenism' was rife in the eastern islands, specifically on Mer Island. The old religions prior to the introduction of Christianity were still apparent in communities and practiced widely, albeit underground and out of the view of the missionaries. In 1928, a superintendent teacher on Mer Island, A Davies, was taken by local Meriam people to visit a nearby island called Waier, which was also the resting place of Waiet, said to be the founder of the *Malo-Bomai* cult of Mer Island, himself originating from the western islands. While the Meriam people fished nearby, Davies climbed the volcanic rocks up to a cave where he is said to have been the first person to view Waiet, an image said to be composed of turtle shell, human bones, vegetable fibre, shells and decorated coconuts. Davies is said to have secretly removed the artefacts and placed them into his bag, returning to the group and then back to Mer Island. The desecration later became known to Meriam leaders who insisted upon their return immediately. Davies refused. The Meriam people tried *pouri pouri*[57] (black magic) on Davies and threatened him with death, however Davies still refused to return the artefacts and eventually took them with him when he left the Torres Strait. The cultural heritage is now located in the Queensland Museum and, to this day, has not been returned to Mer Island.[58] This most fundamental desecration clearly demonstrates the total lack of authority that Island Councils and community Elders had over government officials of the day, and the total lack of respect and acknowledgement the Protector and his servants had of the old ways.

The 1920s saw the Queensland government operating public schools on each island (as opposed to Church-run schools), run by the Home Secretary's Department. By way of comparison, the mainland Australian Queensland schools were at the same

[55] Singe, above n 11, 98.
[56] Ibid 99.
[57] A term from the *Meriam Mer* language.
[58] Ibid.

time run by the Department of Public Instruction. A mere rudimentary education was offered in the Torres Strait and it was not expected or encouraged that Islander children would study beyond primary school, at which time boys were expected to go and work on fishing boats, and women to surrender to domestic duties. In 1904, the former LMS missionary, Reverend Frederick Walker, registered a private trading company called Papuan Industries Ltd with headquarters on Badu Island, in the Torres Strait. The company aimed to encourage Islanders to participate as boat owners and crew to service the company. Loans were provided by the company to facilitate this. In July 1930, the Office of the Chief Protector, on behalf of the Queensland government, bought the company (using funds from the Aboriginals Provident Fund administered by him; a fund set up out of Islander wages), and renamed it Aboriginal Industries Ltd. In 1934, the company became the Aboriginal Industries Board and established grocery shops on the islands, renaming to the Islander Board of Industry Services (IBIS) soon thereafter. [59] IBIS remains the primary grocery store in the Torres Strait today, servicing not only the Torres Strait region, but also mainland Cape York Aboriginal communities under the brand CEQ. Islanders were grossly underpaid as fishermen, which resulted in the 1936 declaration of strike by the company boat crews. This was the first known uprising by Islanders against their new captors.

Island Councils continued and councillors met for the very first time together face-to-face on Masig (Yorke) Island on 23 August 1937, making a series of demands of the Queensland government, including the first recorded plea for self-governance via Island Councils. Two years later, on 12 October 1939, the protection legislation was repealed and the *Torres Strait Islanders Act 1939* (Qld) passed, for the first time recognising Islanders as a distinct race of people from mainland Aboriginal people. Islanders were then regulated by a newly formed Department of Native Affairs, a sub-department of Health and Home Affairs. Blocks of land were sold off by the Queensland government on Thursday Island for general settlement. Thursday Island became a multi-cultural melting-pot of Europeans, Maori, Rotumans, Filipinos, Japanese, Solomon and Vanuatu Islanders, Malays, Chinese, Sri Lankans, and Australian Aboriginal people, to name just a few. A census of Thursday Island in

[59] Ibid 100.

1893 shows that, out of a total population of 1441 people, 362 (25%) were European.[60]

1.1.4.5 World War II

Pre-World War II, Thursday Island, like most Queensland towns, was racially segregated. Schools, swimming pools, dance halls, open air movie theatres and hotels usually had two entrances and separate seating for non-Indigenous and Indigenous people. Curfews existed for Islanders, but not for non-Indigenous people. Inter-racial relationships were disapproved of. This continued until the early 1980's. War was declared between Australia and Japan in December 1941. Japanese families were rounded-up on Thursday Island and sent to mainland internment camps (even Australian-born Japanese citizens). *Ngarupai* (Horn Island) was bombed by the Japanese in 1942 because it had the main airstrip. Over 800 able-bodied Islander men fought in World War II, with their parents, wives and children abandoned by Australian authorities to fend for themselves, absent their primary hunting and fishing breadwinner. Fisheries not only brought in a small amount of money for Islanders but, more importantly, fed their families. Absent food, Islander families were left starving. The defence of the Torres Strait and New Guinea, in which the Islanders of the Torres Strait Light Infantry Battalion played a significant role, was vitally important for ensuring that northern Australia was not invaded. Islanders were paid only 1/3 the European soldier rate and no family allowance but full repatriation costs were covered. Islanders were not permitted to advance beyond the rank of Corporal. Further strikes were staged in 1943 and 1944, similar to the strike in 1936, to demand full pay and to end discrimination. The army raised pay to 2/3 European rate, but decreased repatriation costs to 2/3. It was not until 1983 that the Australian Government sought to compensate Islanders and Aboriginal people for gross underpayment of wages, commencing in 1984 and continuing with instalments over the three consecutive years.[61]

1.1.4.6 Assimilation

During the period of post-war decolonisation, the protectionist policies came under sustained attack in Australia and overseas. Queensland and Australian government

[60] Shnukal, above n 2, 8.
[61] Ibid.

policies became assimilationist as there was now little reason to confine Islanders to reserves. In 1965, the discredited Queensland Department of Native Affairs was replaced by the Department of Aboriginal and Islander Affairs under the *Aborigines' and Torres Strait Islanders' Affairs Act 1965* (Qld). Travel restrictions were finally lifted for Islanders. Islanders were still, however, unable to vote in Federal or Queensland elections until 1962 (and 1964 respectively – however, Islanders were very active in various organisations which arose post-World War II to support Indigenous self-determination and rights, such as the National Aboriginal Consultative Committee (NACC), the National Aboriginal Conference (NAC), the Federal Council for the Advancement of Aborigines and Torres Strait Islanders (FCAATSI). [62]

In the first post-war Commonwealth census in 1947, Islanders were described as 'Polynesian'. In 1954 and 1961 censuses, Islanders were described as 'Pacific Islanders', and in the 1966 census as 'Aboriginal' and thus excluded from official census figures. Neither Aboriginal peoples nor Islanders were entitled to vote in Australia until 1962 by way of the *Commonwealth Electoral Act* .In the 1967 referendum, section 127 of the *Australian Constitution* was repealed allowing Indigenous people to be included in the census and giving the federal parliament power to make laws in relation to Indigenous people.[63] Only in the 1971 census were Islanders first counted as such. In 1966, 97 per cent of Islanders resided in Queensland, dropping to 78 per cent in 1971, and 57 per cent in 1996. The population of Islanders in Australia was recorded at 28 744 in 1996, being less than 10 per cent of the Australian Indigenous population.[64] In the 2016 Census, out of a total 649 200 Aboriginal and Islander people counted, 90.9 per cent were Aboriginal (590 056), 5 per cent Torres Strait Islander (32 345), and 4.1 per cent identified as both Aboriginal and Torres Strait Islander (26 767).[65]

With the passage of the *Land Act (Aboriginal and Islander Land Grants) Amendment Act 1982* (Qld), reserves were able to be revoked and replaced with Deeds of Grant in Trust (DOGIT), managed by local Island Councils for and on behalf of the

[62] Ibid.
[63] Ibid.
[64] Ibid.
[65] Australian Bureau of Statistics, *Census,* (2016).

islander inhabitants particularly concerned with the land (with the exception of Murray (Mer) Island). From 1985, 15 communities were transferred to DOGIT. In 1984, the *Community Services (Torres Strait) Act 1984* (Qld) was passed and renamed the then Island Advisory Council to the Island Co-ordinating Council and brought regulation of Island Councils under the Director of Aboriginal and Islander Advancement under the Secretary for Community Services.[66] Murray (Mer) Island, one of the 17 inhabited islands of the Torres Strait, is home to the landmark 1992 High Court of Australia decision of *Mabo (No.2),*[67] determining the existence of Native Title for the very first time in Australia at common law and dispelling the *Terra Nullius* legal fiction. Reserve was not transferred to DOGIT on Mer Island given the rejection by the Mer Island Community Council and community of Mer Island, ahead of the *Mabo (No.2)* decision.

The Torres Strait is today governed by three tiers of government, as is typical throughout Australia: Commonwealth, State and Local Government. On 14 March 2008, the former outer-Island Councils (set up by Douglas), were amalgamated into one Local Government, today regulated under the *Local Government Act 2009* (Qld), namely the Torres Strait Island Regional Council. The Torres Shire Council is another local government which regulates the inner-islands of the Torres Strait, including Thursday Island, Horn Island and Prince of Wales. The Northern Peninsula Area Regional Council is responsible for the adjoining Australian coastal mainland tip of Cape York communities, including Bamaga, Seisia and the area including Somerset and Albany Island, being the original government hub prior to the move to Thursday Island in 1877. The Commonwealth Government is represented in the Torres Strait by the Torres Strait Regional Authority.[68] The three tiers of government are presently in talks over new governance arrangements for the Torres Strait region, a negotiation which essentially commenced from the first declaration by Island Councils in 1937; however, such arrangements are beyond the scope of this thesis, though they nonetheless have potential to bring about significant long-lasting and beneficial self-determination opportunities for the region.

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[66] Singe, above n 11.
[67] *Mabo (No.2).*
[68] Established under the *Aboriginal and Torres Strait Islander Act 2005* (Cth).

It was not until the 2008 Federal Government apology by the then Prime Minister Kevin Rudd that past atrocities towards our first nation peoples, Aboriginal peoples and Islanders alike, were acknowledged and a National Apology offered.[69]

1.1.5 Culture

Barely a month before the High Court of Australia decision of *Mabo* was handed down, the official Torres Strait flag, designed by the late Bernard Namok, was first flown in May 1992. The flag depicted in Figure 2[70] has, at the top and bottom, two green horizontal stripes, separated by a wider blue stripe bounded by two thin black lines. In the centre is a white *dhoeri* (traditional headdress of white seabird feathers) encompassing a five-pointed star. The upper and lower green borders represent the northern and southern mainlands. Blue represents the waters of the Strait, which separate inhabitants from both mainlands and nourishes them, both physically and spiritually. Black represents the people, their colour their defining characteristic in the eyes of Europeans and the basis of separate and unequal treatment for so many generations. White represents Christianity, which is said to have brought civilisation to the Region. The *dhoreri* represents *ailan kastom* or 'island custom', the second great unifier. The five-pointed star originally represented the five island groups and the sea voyages that sustained and linked them, but today it is usually interpreted as the five major political divisions united in one administrative entity.[71]

[69] Kevin Rudd, 'Apology to Australia's Indigenous peoples' (Speech delivered at Parliament House, Canberra, 13 February 2008); note also Paul Keating, 'Redfern Speech (Year for the World's Indigenous People)' (1992) 10 Redfern Park, Sydney; Whitlam, Edward Gough, *Policy Speech by the Prime Minister of Australia* (Blacktown Civic Centre, 1974).

[70] Copyright held by the Torres Strait Island Regional Council on assignment by the Late Bernard Namok, designer, (May 1992).

[71] Shnukal, above n 2.

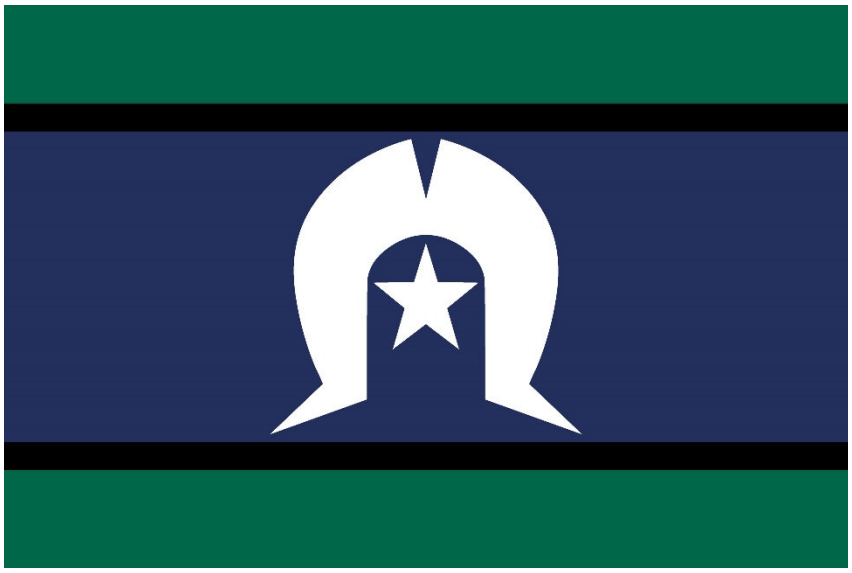

Figure 1.2: Torres Strait Flag ©

Prior to Western colonisation, Islanders were not a single homogenous group but, instead, each island had its own set of cultural and linguistic differences, linked only by trade, warfare and ceremonial exchange with Papua New Guinea and Cape York, Australia.[72] Within the Torres Strait, there are five distinct groups of Islanders:

1. *Saibailgal* (lower western islanders),
2. *Maluilgal* (mid-western islanders),
3. *Kaurareg* (lower western islanders),[73]
4. *Kulkalgal* (central islanders) and
5. *Meriam Le* (eastern islanders).

In recognition of the historical ties between the Torres Strait and Papua New Guinea, the Australian and Papua New Guinea governments entered into a Treaty in 1978 ('*The Torres Strait Treaty*'), becoming active in February 1985, recognising traditional ties between the people of Papua New Guinea and Islanders, allowing the free passage of residents between the two nations absent Passports or Visas for 'traditional activities', such as gardening, collection of food, hunting, traditional fishing, religious and secular ceremonies or gathering for social purposes (eg, marriage celebrations or settlement of disputes), and barter and market trade.[74] The

[72] Ibid.
[73] It is noted that the *Kaurareg* people of mainland Australia generally identify themselves as Aboriginal people and generally adopt the Aboriginal flag.
[74] Torres Strait Island Regional Council, *Treaty with PNG* (2016), <http://www.tsirc.qld.gov.au/our-communities/treaty-png>; Department of Immigration. *'Guidelines for Traditional Visitors Travelling Under the Torres Strait Treaty'.*

Treaty was widely opposed in the Torres Strait and, in fact, the then Premier, Sir Bjelke- Petersen, on the day of signing the Treaty in Sydney, Australia, was served a High Court writ by Islander Carl Wacando, an *Erubam Le* man, seeking to challenge the Treaty. It was thought by government that this Treaty, somewhat freeing the border between Australia and Papua New Guinea might enable better social interaction between the two nations; however, for Islanders, this was seen as yet another incidence of external interference by the Crown in dealing with its lands and waters absent their consent.[75]

1.2 The Issue, Aims and Significance of the Study

1.2.1 The Issue

The issue at the core of this research is the loss of control of Islander cultural secrets by external intervention. External intervention for the purposes of this thesis is any act which impinges, or threatens to impinge, upon an assertion by Islanders of a traditional right to maintain concealment and controlled revelation of their culturally-sensitive Indigenous knowledge including but not limited to its use, possession, dissemination, exploitation, disclosure, publication or reproduction, absent their prior informed consent to such, in accordance with their traditional laws and customs acknowledged. External intervention may take, for example, the form of commercial exploitation, media publication or government legislative impairment of Islander cultural secrets.

1.2.1.1 Aim

The aim of this research is to identify legal and institutional mechanisms to better support Torres Strait Islanders to maintain their cultural secrets.

1.2.1.2 Significance

In identifying legal and institutional mechanisms to better support Torres Strait Islanders to maintain their cultural secrets, Torres Strait Islander cultural identity may be preserved. This argument is expanded upon in Chapter 4 (4.2 Value of Cultural Secrets).

[75] Shnukal, above n 2, 11.

1.3 Structure

This thesis is structured as follows:

Chapter 1 Introduction: paints a landscape of the Torres Strait for the reader, its geography, people, history and culture. The chapter sets forth the issue at the core of this research as well its aims and significance.

Chapter 2 Methodology: explains the thesis questions and methodology adopted to answer them.

Chapter 3 Literature Review: provides a summary of the literature published on the topic in order to demonstrate the author's requisite familiarity and expertise and with the topic, thus informing the thesis questions, scope and method.

Chapter 4 Results: presents the findings of the study. The findings are split into three parts, together calibrated towards answering the thesis questions:

> ***4.1 - Nature of Cultural Secrets:*** Explores the unique nature of Islander cultural secrets and the cultural practice of concealment and controlled revelation thereof (known as *Yagasin*), vis-à-vis normative Western notions of secrecy.
>
> ***4.2 - Value of Cultural Secrets:*** Explores the value of cultural secrets as assessed through the lens of prominent anthropological and ethnographic scholars, and demonstrates, by interpreting those findings, the potential for catastrophic impact where control of cultural secrets is lost.
>
> ***4.3 - Legal Protection of Cultural Secrets:*** Examines various domestic Australian and international legal and institutional mechanisms to determine their effectiveness in the legal protection of Islander cultural secrets.

Chapter 5 Synthesis of Results: provides a synthesis of the findings of the study described in Chapter 4.

Chapter 6 Conclusion: seeks to answer the thesis questions and present recommendations as well addressing potential limitations of the research and opportunities for future extension thereto.

CHAPTER 2: METHODOLOGY AND THESIS QUESTION

2.1 Methodology

2.1.1 Human Research Ethics

This research follows the AIATSIS Guidelines for Ethical Research in Indigenous Studies,[76] and the Australian Code for the Responsible Conduct of Research[77] and the Guidelines for Ethical Conduct in Aboriginal and Torres Strait Islander Health Research.[78] Evidence of this is in:

- the inclusion of the perspectives and experiences of Islanders from many different groups;
- the provision of research information and results in plain English; and
- the voluntary compliance with the decision-making and consent procedures of the many different Islander groups involved in this project.

I obtained the University of New England's Human Research Ethics Committee's (HREC) approval to the research. Unconditional HREC approval was given 31 March 2016. There has been no deviation from the methodology and scope approved by HREC.

The primary risk in this research was the inadvertent disclosure of Islander cultural secrets otherwise sought to be protected by it. To combat this risk, I undertook early identification and classification of which aspects could be published and which could not. I achieved this by embarking upon early face-to-face interviews with Islander participants specifically chosen from Islander leadership, with interview questions aimed at informing me of the nature and incidents of Islander cultural secrets, including how and in what circumstances I may publish such findings at large. Commitments were made to the Islander participants to refrain from publishing aspects which would impinge upon Islander traditional law and custom, and the confidence participants instilled in me. All interviews were recorded electronically, reduced to writing and transcripts endorsed by each participant as true and correct.

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[76] Australian Institute of Aboriginal and Torres Strait Islander Studies, *Guidelines for Ethical Research in Indigenous studies* (Australian Institute of Aboriginal and Torres Straight Islander Studies., 2013).

[77] National Health and Medical Research Council (NHMRC), *Australian Code for the Responsible Conduct of Research: Revision of the Joint NHMRC/AVCC Statement and Guidelines on Research Practice* (National Health and Medical Research Council, 2007).

[78] NHMRC, Values, 'Ethics: Guidelines for Ethical Conduct in Aboriginal and Torres Strait Islander Health Research''(2003) *Canberra: National Health and Medical Research Council.*

To further mitigate risk to participants of this research, their contributions have been de-identified with participant consent.

This research was conducted at the request of senior Torres Strait Islander community members elected to the Torres Strait Island Regional Council (Council), together representing the outer-island region of the Torres Strait, being the third tier of government in Australia (local government). Council is comprised of 15 Torres Strait Islander councillors and a mayor. The research was conducted specifically to identify options Torres Strait Islander peoples might have to protect secrets they see as important. It was not within the scope of this research to decide what secrets do or do not justify legal protection. Instead, the research seeks to identify what current legal and institutional mechanisms might be available to Torres Strait Islanders, should they decide to utilise Australian law, to protect their *sui generis* interests.

Although this thesis does observe anthropological, ethnographic and behavioural scientific works of others suitably qualified to make academic contribution in those diverse disciplines, those mixed-methods have not been applied in this thesis. On the contrary, this thesis is primarily a work of legal scholarship, informed by mixed-methods, including social scientific (by use of semi-structural interviews). Other mixed methods observed, including anthropological, ethnographic and behavioural scientific, are not intended to prove anything but rather to develop an understanding of, and to frame-up, the legal issues to which the legal scholarship will be applied in chapter 4.3 (Legal Protection of Cultural Secrets).

2.1.2 Methodology

I have undertaken a desktop study of legal theory and literature, undertaking interviews and discussions with Islanders to help identify legal and institutional mechanisms to better support Islanders to maintain their cultural secrets. The following mixed-methods have been applied to this legal scholarship.

2.1.2.1 Environmental Law informed approach

Laws are not made and applied in a vacuum. Utilising an approach informed largely by environmental law scholarship, particularly studies concerning indigenous and minority group interests in the environment, and human rights aspects of environmental issues, I was led to consider empirical social, environmental, political

and economic considerations and outcomes that form the context within which laws operate. [79] For example, this encouraged me to draw upon social science in, for example, anthropology, ethnography and the behavioural sciences, in order to explore differing value-systems between ethnic groups, our core biases as humans and how each affect our interactions within a complex polity. I considered this understanding as vital, because to fail to understand inherent barriers to effective legal and institutional protection of interests different to those of a majority group, would make it very difficult to effectively answer the thesis question and develop effective mechanisms to support legal protection thereof. To apply the law merely as an instrument, absent consideration of the critical framework for understanding it, opens the work to the criticism of being in 'resolutely single-minded pursuit of an end*'* and 'dilettantism'.[80] I approached this research with a commitment to applying methodologies that are best suited to the type of questions being asked.[81] This required application of mixed methods drawing on the perspectives of specialists in diverse fields and of remote Islander communities to frame the legal issues.

2.1.2.2 Engaged Scholarship

Andrew Van de Ven describes engaged scholarship as a 'participative form of research for obtaining the views of key stakeholders to understand a complex problem'.[82] By its method of exploring differences in viewpoints, argues Van de Ven, engaged scholarship exposes knowledge that is more penetrating and insightful than when researchers work alone. Values may differ based upon individual contexts – including but not limited to ethnicity. I worked in partnership with Islanders and community stakeholder organisations in the Torres Strait to help me understand, from an Islanders' perspective, their values, their challenges in maintaining those values, and their aspirations as a people. Engaged scholarship prescribes research involving others to leverage different perspectives to learn about a problem. It requires negotiation, mutual respect and collaboration to produce a learning

[79] Paul Martin and Donna Craig, 'Accelerating the Evolution of Environmental Law through Continuous Learning from Applied Experience' in Paul Martin and Amanda Kennedy, *Implementing Environmental Law,* (2015) 27. 10

[80] David Feldman cited in Elizabeth Fisher et al, 'Maturity and Methodology: Starting a Debate about Environmental Law Scholarship' (2009) 21(2) *Journal of Environmental Law* 213.

[81] Ibid.

[82] Andrew H Van de Ven, *Engaged Scholarship: A Guide for Organizational and Social Research* (Oxford University Press on Demand, 2007).

community. This is achieved by firmly grounding the research problem or question in a real-world scenario, underpinning the research with alternate theories, evaluating those theories through collection of relevant evidence, and communicating and applying the findings to the research problems.[83]

Engaged scholarship methods have ensured the integrity of the research question and problem-definition, by basing these on reported Islander-lived experience. Accordingly, evidence-gathering has been facilitated via qualitative methods using semi-structured interviews with members of the Islander leadership. This research was undertaken with the knowledge and endorsement of peak Torres Strait Islander authorities,[84] in partnership with Islanders, for the primary benefit of Islanders.

Specifically, semi-structured interviews were conducted with Islander community leaders over a twelve-month period between 2016 and 2017. These leaders consisted of upstanding political (current and former Mayors, Deputy Mayors and Councillors), spiritual (priests) and cultural (elders) members of Islander community. Open-ended questions were used in the interviews which were conducted in a comfortable and relaxed setting chosen by each participant. Interviews were recorded and spoken in a combination of English and Islander Creole. All interviews were transcribed into English and forwarded to participants to ensure the accuracy in transcription, with corrections made accordingly to the transcript by me where requested. Participants were de-identified to protect their identities with the consent of each participant. The interviews provided me with valuable insights into the transition from traditional to modern Islander-life and culture, the nature and incidents of cultural practice, including that of secrecy (*Yagasin*), as well as Islanders' categorisation of secret, their challenges as a people and their perspectives on the effectiveness of legal protections thereof. This narrative enquiry primarily provided the basis for the development of the discussion in 4.1: Nature of Cultural Secrets. The data also proved vital for ensuring that whatever recommendations were made in Chapter 6 (Conclusion) aligned with real Islander perspectives, values, challenges and aspirations and not merely those perceived by outsiders.

[83] Ibid.
[84] Torres Strait Island Regional Council.

2.1.2.3 Doctrinal Analysis

I used applied doctrinal analysis to analyse Australian/Western legal norms and statements of law relevant to the situations being investigated.[85] Hutchinson and Duncan define 'doctrinal research (as) research into the law and legal concepts'.[86] Legal concepts and principles from judicial cases, legislation, rules and norms are included as doctrine. Doctrine is also defined by combinations of these factors and the way in which they work alongside each other based on practices of interpretation. Doctrines may vary from abstract theory to decisions which are binding on lower courts (*ratio decidendi*) or non-binding (*obiter dicta*).[87] Legal rules are doctrinal because they are applied consistently and develop over time through the doctrine of precedent, under which a court is obliged to follow principles from previous court decisions from courts of equal or higher jurisdiction when deciding on similar sets of facts.[88]

A problem-based doctrinal research methodology is used by legal practitioners and law students to deal with a specific legal problem, usually involving the following steps:

a. establishing the facts;
b. identifying the legal issues;
c. analysing the issues to identify the relevant law;
d. reading background documents (eg, legal dictionaries, textbooks, papers on law and policy reform, loose-leaf services, commentary and journals);
e. examining primary materials (eg. legislation, delegated legislation second reading speeches, explanatory memorandum and case law); and
f. synthesising the factual issues in light of the law to arrive at a tentative conclusion.[89]

This approach is used by judges. Judges may also consider the broader application and use of their decision and reasoning beyond the current case before them.

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[85] Terry Hutchinson and Nigel Duncan, 'Defining and Describing What We Do: Doctrinal Legal Research' (2012) 17 *Deakin Law Review* 83, 116–117.
[86] Ibid 85.
[87] Ibid 111, 114.
[88] Ibid 84–85.
[89] Ibid 106

Academics using doctrinal research methodology are not necessarily seeking concrete answers, but rather exploring theoretical aspects of the law .[90] Doctrinal research is limited by its focus on 'privileged voices', namely those of judges, academic commentators and the legal practitioner, rather than the voices of all socio-economic and ethnic groups, which here would include Islanders.[91] The mixed-methods methodology I have used is intended to better understand the views of Islanders. Very few of these privileged voices reflect the lived experiences of Islanders.[92] The discussion under heading 4.3 (Legal Protection of Cultural Secrets) applies legal theory and doctrinal analysis.

In summary, this research is primarily a work of legal scholarship, informed by mixed-methods. Environmental law scholarship places an emphasis on the observation of the context within which the legal issues are seated. This context, whether founded in anthropological, ethnographic or behavioural scientific disciplines, are observed by me in this study, with findings reported primarily in Chapter 4 (4.1 Nature of Cultural Secrets and 4.2 Value of Cultural Secrets). Engaged Scholarship methods have been used to define the nature of the *sui generis* problem under examination from the perspective of those primarily affected, namely Islanders. Doctrinal analysis methods enabled the identification of the legal issues, analysis and evaluation of relevant law, and the application of legal concepts and principles to the *sui generis* problem.

2.2 Thesis Questions

The question that is the focus of this study is:

> **What legal and institutional mechanisms might better support Torres Strait Islanders in Australia to maintain their cultural secrets?**

Two sub-questions underpin the main research question (each addressed in Chapter 4 (4.3 Legal Protection of Cultural Secrets):

1. **What are the legal and institutional impediments to effective protection of Torres Strait Islander cultural secrecy in Australia under normative Western legal regimes?**

[90] Ibid 107.
[91] Ibid 117.
[92] Campbell, above n 46.

2. **Can Native Title law better support Torres Strait Islanders to protect their cultural secrets**?

CHAPTER 3: LITERATURE REVIEW

This chapter discusses the literature considered by me in developing and shaping the thesis questions, scope and methods presented in Chapter 2.

3.1 Ethnographic Variance

Do Islanders and Anglo-Australians, view secrecy and categorisations of secret differently?

In 2004, James Q Whitman undertook a comparative study of the variance between European, Asian and North American cultures with a specific focus on their respective ideas of privacy. Some examples of the variance identified by Whitman included acceptance of:

- the disclosure of personal matters with strangers, such as salaries by Americans;
- the disclosure of credit reporting information and consumer by Americans;
- the distribution of nude images of celebrities by Americans;
- public nudity by Europeans;
- female attendants in men's washrooms by Europeans;
- government deciding what names parents may give their children by Europeans; and
- telecommunications interceptions or 'wire-tapping' by Europeans.[93]

It was clear from the comparative study that 'Americans and continental Europeans perceive privacy differently'.[94] Whitman found that variance in the realm of privacy ideals came about not from the legal notions of privacy directly but were 'rooted in much larger and much older differences in social and political traditions … It is a contrast between two conceptions of privacy … as an aspect of dignity and privacy as an aspect of liberty'.[95] At its core, continental privacy protection is the protection of a right to 'respect' and personal 'dignity' or 'informational self-determination' – the right to control information disclosure about oneself; that is the right to project ones' image as one sees fit and be shielded against unwanted public exposure.[96]

[93] James Q Whitman, 'The Two Western Cultures of Privacy: Dignity Versus Liberty' (2004) *Yale Law Journal* 1151, 1156–1159.
[94] Ibid 1159.
[95] Ibid 1161.
[96] Ibid.

Australian privacy law has the protection of dignity and respect at its very core.[97] By contrast, America's conception of privacy is premised on notions of 'liberty', that is a freedom from intrusion by the State within one's own walls.[98]

The Transatlantic comparative study demonstrates that there are many factors which influence a society's' predisposition to, and interaction with, others. America and Europe, although fundamentally differing in cultural predisposition, remain allies on the international stage by developing, what Mathieson describes as, an 'overlapping consensus':[99] the notion that we can each support a principle from our own perspective while understanding the perspectives of others. The concept is equally applicable in the context of interaction between majority and minority interests operating within a single polity. Indigenous persons have 'disparate worldviews each formed and guided by distinct histories, knowledge traditions, values, interests, and social, economic, and political realities'.[100] 'It is fundamental in a pluralistic world that one cannot expect for people to share the same values, metaphysical or spiritual perspectives and beliefs'.[101] 'Western systems of governance are fundamentally enshrined in atomistic, liberal, individualist and capitalist ideology, focusing on the rights of the individual. Conversely, Indigenous ideology is premised on socialist theory, namely a focus on communal rights, collective creation, and innovation as a social, spiritual and cultural obligation'.[102] It is, therefore, likely that ideas of privacy – or secrecy, for that matter – and the categorisation of what is private or secret thereunder, may differ substantially between diverse ethnic groups.

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[97] Ibid.
[98] Ibid.
[99] Kay Mathiesen, 'Indigenous Peoples' Rights to Culture and Individual Rights to Access' (2008) < http://www.academia.edu/2720647/Indigenous_Peoples_Rights_to_Culture_and_Individual_Rights_to_Access>.
[100] Ibid citing Ermine, below n 180.
[101] Ibid.
[102] C McLaughlin, 'Native Title: A Registrable Interest Under Torrens*'* (Paper submitted as part of LLM at the University of New England, 2013, 3, citing Taubman; see also, Heather McRae and Garth Nettheim, 'Indigenous Legal Issues: Commentary and Materials' (2003) 136 <https://ro.uow.edu.au/lawpapers/603/>.

3.2 Adequacy of Australian Law

Does Australian law adequately protect Islander views of secrecy and categorisations of secret?

3.2.1 Australian Privacy Law and Intellectual Property Law

Australian privacy law generally describes 'privacy' as the veil separating the private and public spheres. Where privacy is invaded, the veil is pierced, allowing private information to spill out into the public sphere. Privacy is a fine balancing act, weighing up the rights and interests of the individual to retain privacy against the rights and interests of the public to transparency. Privacy can be violated absent trespass, liberty infringement or contact with the person whose privacy is compromised.[103] 'Privacy is a good that people can enjoy only at the expense of others'.[104] 'The onus of justification for the privacy lies on the advocate of restraint and not on the person so restrained'.[105]

Absent privacy, the individual becomes predictable. Predictability provides others with strategic advantage over the advocate for restraint. In such an instance, the right to privacy is a fundamental element to ensure a level playing field and to avoid unfair advantage. Keeping 'ones cards close to ones chest' is fundamental to self-determination of any individual because it protects the individual's autonomy, intimacy, dignity and identity.[106] Navigating the tensions between polar concepts of privacy and transparency is not always simple and it is for this reason national statutory intervention has occurred in most jurisdictions in the public sector to strike a balance between the private and public spheres.[107] Other forms of individual privacy are also recognised and protected by statute in Australia, including but not

[103] Chandran Kukathas, 'Cultural privacy' (2008) 91(1) *The Monist* 68, 71.
[104] Ibid.
[105] Ibid 72 citing Benn.
[106] Ibid 73.
[107] *Privacy Act 1988* (Cth) s 14; *Information Privacy Act 2009* (Qld); *Right to Information Act 2009* (Qld); *Information Act 2002* (NT); *Privacy and Personal Information Protection Act 1998* (NSW); *Freedom of Information Act 1991* (SA); *Personal Information Protection Act 2004* (Tas); *Freedom of Information Act 1991* (Tas); *Information Privacy Act 2000* (Vic); *Freedom of Information Act 1982* (Vic); *Freedom of Information Act 1992* (WA).

limited to private health records,[108] spent criminal convictions,[109] whistle-blowers,[110] and work-seekers information[111] or surveillance, and monitoring of telecommunications.[112] Privacy of the individual is given statutory protection under the *Privacy Act 1988* (Cth) ('i') in Australia. The decision only to recognise and protect the rights of individuals in the *Privacy Act* is explained in the Preamble to the Act, referring primarily to human rights under the *International Covenant on Civil and Political Rights* ('*ICCPR*').[113] The Preamble of the *Privacy Act* also makes reference to Australia's obligations at international law 'to give effect to the right of persons not to be subjected to arbitrary or unlawful interference with their privacy, family, home or correspondence' and to protect 'privacy and individual liberties'.[114]

In 2003, the District Court of Queensland heard the matter of *Grosse v Purvis* ('*Grosse*'),[115] a civil case concerning allegations of 'stalking' and assertions of 'invasion of privacy' incidental thereto. Skoien J recognised the existence of a common law action in the tort of 'invasion of privacy', for which substantial damages were awarded in the amount of $178 000. In finding a tort of invasion of privacy, Skoien J referred to the High Court of Australia decision of *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* ('*Lenah*'),[116] a case which dispelled the finding in *Victoria Park Racing and Recreation Grounds Co Ltd v*

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[108] *Health Records and Information Privacy Act 2002* (NSW); *Health Services (Conciliation and Review) Act 1995* (WA); *Health Records (Privacy and Access) Act 1997* (ACT).

[109] *Criminal Law (Rehabilitation of Offenders) Act 1986* (Qld); *Criminal Records (Spent Convictions) Act 1992* (NT); *Criminal Records Act 1991* (NSW); *Annulled Convictions Act 2003* (Tas); *Spent Convictions Act 1988* (WA); *Spent Convictions Act 2000* (ACT).

[110] *Whistleblowers Protection Act 1994* (Qld).

[111] *Private Employment Agents (Code of Conduct) Regulation 2005* (Qld).

[112] *Telecommunications (Interception and Access) Act 1979* (Cth); *Invasion of Privacy Act 1971* (Qld); *Police Powers and Responsibilities Act 2000* (Qld); *Surveillance Devices Act 2007* (NT); *Telecommunications (Interception) Northern Territory Act 2001* (NT); *Listening Devices Act 1984* (NSW); *Workplace Surveillance Act 2005* (NSW); *Telecommunications (Interception and Access) (New South Wales) Act 1987* (NSW); *Crimes (Forensic Procedures) Act 2000* (NSW); *Listening and Surveillance Devices Act 1972* (SA); *Telecommunications (Interception) Act 1988* (SA); *Listening Devices Act 1991* (Tas); *Telecommunications (Interception) Tasmania Act 1999* (Tas); *Surveillance Devices Act 1999* (Vic); *Telecommunications (Interception) (State Provisions) Act 1988* (Vic); Surveillance Devices Act 1998 (WA); *Telecommunications (Interception) Western Australia Act 1996* (WA); *Listening Devices Act 1992* (ACT).

[113] *International Covenant on Civil and Political Rights* ('*ICCPR*') Opened for signature16 December 1966, [1980] ATS 23, (entered into force on 23 March 1976).

[114] Australian Law Reform Commission, *Australian Privacy Law and Practice* (ALRC Report 108, 2008), 7.3.

[115] [2003] QDC 151 (16 June 2003) ('*Grosse*').

[116] (2002) 208 CLR 199 ('*Lenah*').

Taylor[117] that there could be no actionable right for invasion of privacy in Australia.[118] Callinan J in *Lenah,* referred to Professor William Prosser's paper[119] which relevantly encapsulated the rationale behind the tort, being:

> It is not one tort, but a complex of four. The law of privacy comprises four distinct kinds of invasion of four different interests of the plaintiff, which are tied together by the common name, but otherwise have almost nothing in common except that each represents an interference with the right of the plaintiff, in the phrase coined by Judge Cooley, 'to be let alone'. Without any attempt to exact definition, these four torts may be described as follows:
>
> 1. Intrusion upon the plaintiff's seclusion or solitude, or into his private affairs.[120]
> 2. Public disclosure of embarrassing private facts about the plaintiff.[121]
> 3. Publicity which places the plaintiff in a false light in the public eye.[122]
> 4. Appropriation, for the defendant's advantage, of the plaintiff's name or likeness.[123]

Skoien J in *Grosse* found that the general principle of privacy was that 'one who invades the right of privacy of another is subject to liability for the resulting harm to the interests of the other'.[124] In finding a tort of invasion of privacy, Skoien J considered that it was a logical step in the development of contemporary common law in Australia, just as the common law tort of trespass morphed into an action in

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[117] [1937] HCA 45; (1937) 58 CLR 479 ('*Victoria*').
[118] *Lenah*, (2002) 208 CLR 199 per Gummow and Hayne JJ, with whose reasons Gaudron J agreed, 78.
[119] Ibid per Callinan J, 323.
[120] *One who intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another person or his private affairs or concerns, is subject to liability to the other for invasion of his privacy, if the intrusion would be highly offensive to a reasonable person.*
[121] *One who gives publicity to a matter concerning the private life of another is subject to liability to the other for invasion of his privacy, if the matter publicised is of a kind that*
(a) would be highly offensive to a reasonable person, and
(b) is not of legitimate concern to the public'
[122] *One who gives publicity to a matter concerning another that places the other before the public in a false light is subject to liability to the other for invasion of his privacy, if*
(a) the false light in which the other was placed would be highly offensive to a reasonable person, and
(b) the actor had knowledge of or acted in reckless disregard as to the falsity of the publicised matter and the false light in which the other would be placed.'
[123] W L Prosser, 'Restatement (second) of torts' (1977) *American Law Institute* 652A.
[124] *Grosse* per Skoien J, 431.

negligence.[125] Skoien J then eloquently went on to particularise the elements of an action in the tort of invasion of privacy, being:

> (a) a willed act by the defendant,
> (b) which intrudes upon the privacy or seclusion of the plaintiff,
> (c) in a manner which would be considered highly offensive to a reasonable person of ordinary sensibilities,(d) and which causes the plaintiff detriment in the form of mental psychological or emotional harm or distress or which prevents or hinders the plaintiff from doing an act which she is lawfully entitled to do.*[126]*

The remedy for an action for common law breach of privacy are compensatory damages, to which aggravated and exemplary damages are available in extreme cases of conscious wrongdoing in contumelious disregard of another's rights,'[127] as well as injunctive relief.[128] The question, then, is how Australian privacy laws serve to protect privacy in *sui generis* cultural practice as deriving from traditional laws and customs of Islanders? As demonstrated above, Australian privacy law is particularly focused on addressing rights of individuals in the context that such rights are arguably akin to quasi-proprietary rights and capable of codification; a symptom of Eurocentricity. A right to privacy has been construed as 'a right to be let alone'.[129] Such concept would inferably exclude groups from privacy protection.

Some examples of communal interests in privacy recognised and practiced widely in Indigenous communities include the viewing or disclosure of information to a defined category of people, for example, women of an Indigenous group,[130] and the delivery of death notifications or the broadcasting of the name or image of an Indigenous person who is deceased.[131] In some instances, the law itself is considered private.[132] Further, the legal protection of communal rights to privacy would serve to:

(a) Assist ethnic minorities with controlling the dissemination of their information and, thus, empower them to share such information on terms acceptable to

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[125] Ibid, per Skoien J, 442.
[126] Ibid 444.
[127] Ibid 481 citing *Whitfield v De Lauret & Co Ltd* [1920] HCA 75; (1920) 29 CLR 71, 77.
[128] Ibid. per Skoien J, 492.
[129] Mathiesen, above n 99, citing Samuel D Warren and Louis D Brandeis.
[130] ALRC Report 108, above n 114, citing *Wilson v Minister for Aboriginal & Torres Strait Islander Affairs* (1996) 189 CLR 1.
[131] Ibid citing Special Broadcasting Service, *SBS Codes of Practice* (2006), [1.3.1].
[132] McRae et al, above n 102, 133–134.

them. Such concept inherently reduces the propensity for exploitation (eg. bio-piracy).

(b) Promote a notion of 'collective autonomy'[133] or 'cultural autonomy',[134] a concept which encapsulates 'a right to one's origins and histories as told from within the culture and not as mediated from without'. [135]

(c) Promote the formation of intimate relationships by selectively revealing private details about oneself and cultural secrecy; therefore, it is a means of modulating friendship and freedom to define oneself absent revealing every thought.[136] In a group context, cultural secrecy gives its members capacity to form relationships and to engage in certain social and cultural activities internally and externally of the group.

On a Western construction, privacy is not a concept premised on any communal rights attaching to the group or culture *per se*, other than a right to protect the respect and dignity of individuals encompassing it.[137] It is clear that fundamental rights to dignity and respect are appropriated 'when someone else speaks for, tells, describes, represents, uses, or recruits the images, stories, experiences, dreams of others for their own'.[138] The assertion has, at its foundation, the premise that privacy is 'a commitment to a set of conventions – or even an etiquette – that makes civilised life possible, but without closing the door to more substantial engagement when necessary'.[139]

This fixation of the common law to prescribe proprietary rights to individuals (over groups) has been a significant hurdle to the enablement by Australian common law and legislative regimes to adequately encapsulate legal protections for *sui generis* minority interests. This engrained Eurocentricity constrains many legal regimes often cited by legal scholars and practitioners alike as feasible options for protection of *sui generis* minority interests, because of their core focus on the individual (to the exclusion of communal interests) or mandatory requirements for disclosure (or codification) of secrets in order to afford legal protection, including but not limited

[133] Mathiesen, above n 99.
[134] Ibid citing Todd, Loretta.
[135] Ibid.
[136] Mathiesen, above n 99, citing Charles.
[137] Kukathas, above n 103, 78.
[138] Mathiesen, above n 99, 138.
[139] Kukathas, above n 103, 80.

to: intellectual property (including copyright, designs, trademarks, patents, confidential information and moral rights); privacy; and equitable regimes (including equitable estoppel, misleading and deceptive conduct, and unjust enrichment). The protection of communal rights to privacy have traditionally been advocated in one of two ways, either in the application of existing Australian privacy laws in the assertion that such rights are intimately connected to the identity, dignity and autonomy of Indigenous people – individually, collectively or both[140] – or more akin to intellectual property or cultural heritage laws – expressed through music, dance, song, ceremony, symbols, designs, narratives and poetry.[141]

In *Western Australia v Ward*, it was argued by the plaintiff that Indigenous cultural knowledge was 'akin to a new species of intellectual property'.[142] The argument failed as the principles sought to be applied to protect the *sui generis* Indigenous interests were of Eurocentric construct. Kirby J summarised this challenge by positing that 'the established laws of intellectual property are ill-equipped to provide full protection of the kind sought'.[143]

Furthermore, the adequacy of Australian privacy law to protect Indigenous law and custom was considered as part of the 2008 ALRC Report 108 into *Australian Privacy Law and Practice*, building on its findings from the 1986 and 1995 Inquiries into the *Recognition of Aboriginal Customary Laws* (ALRC 31) and *Designs* (ALRC 74), respectively.[144] Many submissions to the ALRC Report 108 considered the effect of ethnographic variance between underlying Eurocentric ideology embodied in Australian privacy law and those according to traditional laws and customs of Indigenous people.[145] In 2007, an inquiry into the Indigenous visual arts and craft sector was undertaken by the Senate Standing Committee for the Environment,

[140] ALRC Report 108, above n 114, 7.25.
[141] Ibid, citing Stephen Gray.
[142] *Western Australia v Ward* (2002) 213 CLR 1 at 59, 582 ('*Ward*').
[143] Ibid 582.
[144] Australian Law Reform Commission, *The Recognition of Aboriginal Customary Laws*, ALRC 31 (1986), [213]; Australian Law Reform Commission, *Designs*, ALRC 74 (1995), [1.17]
[145] Arts Law Centre of Australia, *Submission PR 450,* 7 December 2007; New South Wales Aboriginal Justice Advisory Council, *Submission PR 501,* 20 December 2007; Queensland Government, *Submission PR 242,* 15 March 2007; Centre for Law and Genetics, *Submission PR 127,* 16 January 2007; Legal Aid Commission of New South Wales, *Submission PR 107,* 15 January 2007.

Communications, Information Technology and the Arts.[146] The Committee made recommendations for the recognition of the complexity of the issues in the area and that 'the Commonwealth introduce appropriate legislation to provide for the protection of Indigenous cultural and intellectual property rights'.

As part of its Report 108, the ALRC found that but for potentially Article 27 of the *ICCPR*, 'the majority of the foundational international instruments that form the basis of international law and domestic Australian human rights law do not provide for the direct protection of group rights'.[147] OECD's *Explanatory Memorandum to the Guidelines on the Protection of Privacy and Transborder Flows of Personal Data* stated that 'it is debateable to what extent people belonging to a particular group (ie, mentally disabled persons, immigrants, ethnic minorities) need additional protection against the dissemination of information relating to that group'.[148] ALRC also found that 'the vast majority of overseas jurisdictions do not attempt to protect the privacy of groups'.[149] Importantly, ALRC did not find that this was indicative of a lack of need for such laws in those jurisdictions to adequately provide for minority ethnic groups, nor did it consider the inherent complexities in achieving the protection of such *sui generis* rights from the position of an ethnic minority.

Some jurisdictions do recognise communal rights, such as those recognised in the African Charter of Human and Peoples' Rights[150], and the United Nations Declaration on the Rights of Indigenous Peoples stating "Indigenous peoples have…the right to maintain, protect, and have access in privacy to their religious and cultural sites."[151] Whilst adopted by 143 member States in the United Nations, Australia was one of four nations that originally voted against. Following the 2007 Federal election however, the Federal Labour Government, at a ceremony held at Parliament House on 3 April 2009, formally adopted the UNDRIP and all 46 Articles therein.

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[146] Senate Standing Committee on Environment Communications Information Technology the Arts, *Indigenous Art: Securing the Future (Australia's Indigenous Visual Arts and Craft Sector)* (2007).
[147] ALRC Report 108, above n 114, 7.5.
[148] Ibid citing OECD.
[149] Ibid, 7.5 citing Lee A Bygrave.
[150] *African Charter on Human and Peoples' Rights,* 27 June 1981, OAU Doc CAB/LEG/67/3 rev 5, (entered into force generally on 21 October 1986), eg, arts 19–24.
[151] *United Nations Declaration on the Rights of Indigenous Peoples,* GA Res 61/295, 61st see, UN Doc A/RES/61/295, (2007), art 12(1).

The ALRC 108 Report further acknowledged that "International human rights law recognises that certain ethnic and cultural groups within a community may have particular needs that require protection. For example, the *ICCPR* recognises the need to protect the cultural, religious and language rights of certain ethnic and cultural groups'.[152] Article 27 of the *ICCPR* specifically states:

> In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language,

In the lead up to its study, the ALRC inquired, by way of an Issues Paper, entitled *Review of Privacy (IP 31),* whether the *Privacy Act 1988* (Cth) should be amended to accommodate a collective or group right to privacy. The ALRC was aware of explicit privacy protection at common law for Indigenous groups[153] and limited legislative protection in the Northern Territory.[154] The ALRC concluded that 'the development of express privacy protocols that respond to the particular privacy needs of those groups, rather than amendment to the Privacy Act, was the more effective and appropriate solution'.[155] The ALRC received submission from numerous individuals and entities as part of the wider inquiry, however it was Associate Professor Lee Bygrave who advocated strongly for the protection of collective rights to privacy in specifically arguing:

> It is fairly easy to establish that the core principles of the Privacy Act are logically capable of being extended to protect data on collective entities. Further, it is fairly easy to establish that collective entities are capable of sharing most, if not all, of the interests of data subjects which the Privacy Act directly or indirectly safeguards.[156]

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[152] ALRC Report 108, above n 114, 7.7 citing Article 27 of the *ICCPR*.
[153] ALRC Report 108, above n 114, at 7.8 citing *Aboriginal Sacred Sites Protection Authority v Maurice; Re the Wurumungu Claim* (1986) 10 FCR 104, 107. See also the discussion on the relevant case law in Australian Law Reform Commission, New South Wales Law Reform Commission and Victorian Law Reform Commission , *Uniform Evidence Law,* ALRC 102 (2005), [19.125–19.126].
[154] *Information Act 2002* (NT), ss 50, 56.
[155] ALRC Report 108, above n 114 at 7.10.
[156] ALRC Report 108, above n 114 at 7.11 citing L Bygrave, *Submission PR 92,* 15 January 2007.

Associate Professor Bygrave counselled the ALRC against treating 'collective entities … as an undifferentiated mass' because they do not all 'play the same economic, political, legal and social roles, nor have the same goals and recourses'.[157] He advocated that 'all countries should seriously consider giving collective entities some data protection rights.'[158] A clear majority of stakeholders who made submission did, however, oppose extension of privacy protections to groups.[159] The ALRC concluded:

> 7.18 Any extension of the right to privacy to a group would cause problems of logic, law and policy. It would require a fundamental and radical change to the scope and operation of the Privacy Act to provide direct protection to the privacy of groups. This does not mean, however, that such a realignment of the Privacy Act cannot or should not occur, if there is a compelling case for such realignment.
>
> 7.19 Without detracting from the universality of human rights, there is a relatively broad acceptance that particular rights can attach to members of a group of people united by, for each, ethnic or religion.[160] That is, it is generally recognised that the individuals from certain groups may have needs that are peculiar to those groups.[161] This may result from a group suffering historical

[157] Ibid.
[158] ALRC Report 108, above n 114, 7.12 citing Bygrave.
[159] Public Interest Advocacy Centre, *Submission PR 548,* 26 December 2007; Office of the Privacy Commissioner, *Submission PR 499,* 20 December 2007; Queensland Government, *Submission PR 490,* 19 December 2007; Australian Government Department of Health and Ageing, *Submission PR 273,* 30 March 2007; Australian Bankers' Association Inc, *Submission PR 259,* 19 March 2007; Telstra, *Submission PR 185,* 9 February 2007; Australian Privacy Foundation, *Submission PR 167,* 2 February 2007; New South Wales Council for Civil Liberties Inc, *Submission PR 156,* 31 January 2007; National Australia Bank and MLC Ltd, *Submission PR 148,* 29 January 2007; AAMI, *Submission PR 147,* 29 January 2007; Law Society of New South Wales, *Submission PR 146,* 29 January 2007; AXA, *Submission PR 119,* 15 January 2007; Institute of Mercantile Agents, *Submission PR 101,* 15 January 2007; Australian Bureau of Statistics, *Submission PR 96,* 15 January 2007; Electronic Frontiers Australia Inc, *Submission PR 76,* 8 January 2007; Office of the Privacy Commissioner, *Submission PR 215,* 28 February 2007; Australian Competition and Consumer Commission, *Submission PR 178,* 31 January 2007; Confidential, *Submission PR 165,* 1 February 2007; Queensland Council for Civil Liberties, *Submission PR 150,* 29 January 2007.
[160] ALRC Report 108, above n 114, 7.19. This is exemplified in instruments such as Africa's principal human rights treaty, the *African Charter on Human and Peoples' Rights*, (above n 150). The Preamble to the Charter recognises that 'fundamental human rights stem from the attributes of human beings which justifies their national and international protection and on the other hand that the reality and respect of peoples' rights should necessarily guarantee human rights'.
[161] *ICCPR*, art 27.

discrimination or disadvantage. Alternatively, it may flow from the particular cultural beliefs or requirements of a group.[162]

7.20 Australian law has long recognised that, in order to ensure that all members of the community enjoy substantive equality, it is sometimes necessary to make laws that are targeted towards individuals who share particular characteristics.[163] For example, the *Racial Discrimination Act 1975* (Cth) permits the adoption of 'special measures', which operate as follows:

> Special measures taken for the sole purpose of securing adequate advancement of certain racial or ethnic groups or individuals requiring such protection as may be necessary in order to ensure such groups or individuals equal enjoyment or exercise of human rights and fundamental freedoms shall not be deemed racial discrimination, provided, however, that such measures do not, as a consequence, lead to the maintenance of separate rights for different racial groups and that they shall not be continued after the objectives for which they were taken have been achieved.[164]

7.21 Instead of amending the Privacy Act, there are other, more appropriate, methods of dealing with the privacy rights of groups. The vast majority of stakeholders opposed extending the Act's protection directly to cover Indigenous or other racial, cultural or ethnic groups. As noted in submissions and consultations, such an extension of the Privacy Act could have undesirable consequences. For example, it could result in a group asserting privacy rights in a way that conflicts with the interests of individual members of the group. While it may be possible to reconcile conflicts between individual and collective rights in some circumstances,[165] in the ALRC's view such conflicts would be particularly difficult to resolve in the context of privacy protection.[166]

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[162] David Feldman, *Civil Liberties and Human Rights in England and Wales* (Oxford University Press, 2002) 13–14.

[163] Ryszard W Piotrowicz and Stuart Kaye, *Human Rights in International and Australian Law* (Butterworths Australia, 2000) 12.23.

[164] *Racial Discrimination Act 1975* (Cth) s 8(1), incorporating *International Convention on the Elimination of all Forms of Racial Discrimination*, 7 March 1966, [1975] ATS 40, (entered into force generally on 4 January 1969) art 1(4).

[165] Leighton McDonald, 'Can Collective and Individual Rights Coexist' (1998) 22 *Melbourne University Law Review* 310, 323–336. See also United Nations Human Rights Committee, *Kitok v Sweden: Communication No 197/1985*, UN Doc A/43/40 (1988).

[166] ALRC Report 108, above n 114, 7.18–21.

Although it was not within the terms of inquiry for ALRC to recommend to government legislative reform to protect cultural practice deriving from traditional laws and custom, it did recommend that a further inquiry be undertaken by government 'to determine whether the Australian Government should introduce a rights framework for the traditional laws and customs of Indigenous groups'.[167] Specifically, the ALRC recommended that such inquiry should address:

1. Whether such a framework is desirable;
2. If so, what types of rights should be protected through such a framework;
3. The most appropriate mechanism through which to recognise such rights;
4. The methods for establishing rights and determining disputes among rights-holders; and
5. The relationship between such a framework and other Australian laws.

It is apparent from Australia's peak law reform Council that there is a flavour for reform in this arena, albeit likely not in Australian privacy law. Absent a legal privacy regime in Australia adequately equipped to recognise and protect *sui generis* cultural practice according to traditional laws and customs acknowledged, I considered it more appropriate to consider alternate protection opportunities prior to developing privacy law reform proposals contrary to ALRC's clear recommendations to government.

3.2.2 A Hybrid Model

Martin and Jeffrey assert that Indigenous *sui generis* rights and interests 'arise from a "cocktail" of long-standing common law principles, combined with statutory instruments which define and develop long-standing civil rights',[168] and that Indigenous knowledge is capable of protection in Australia by combined use of common law, equitable and statutory mechanisms.[169] Such a hybrid model, in my opinion, fails to:

1. recognise the inherent non-proprietary, social and spiritual nature of many *sui generis* Indigenous rights and interests; and

[167] Ibid 7.50.
[168] Paul Martin and Michael Jeffery, 'Using a Legally Enforceable Knowledge Trust Doctrine to Fulfil the Moral Obligation to Protect Indigenous Secrets' (2007) 11 *New Zealand Journal of Environmental Law* 1, 3.
[169] Ibid 6 – confidential information, equitable estoppel, misleading and deceptive conduct and unjust enrichment.

2. recognise *sui generis* Indigenous rights and interests as communal rights (as opposed to rights held and enforceable by individuals);
3. grant legal standing to groups to bring such actions in a court of competent jurisdiction; and
4. appreciate the complexity, unfamiliarity, and cost in successfully navigating these legal regimes by the often unsophisticated and under-resourced claimant.

The hybrid model anticipates protection by multiple, typically Eurocentric and complex legal principles to allow remedial action for economic loss of Indigenous people for unlawful use of Indigenous knowledge, otherwise known as 'bio-piracy', including but not limited to damages, injunctions or specific performance.[170] There are many instances, however, where Indigenous interests are equally impeded, however no external financial benefit is obtained by the advocate against restraint, nor financial loss sustained by the advocate for restraint. I argue that such instance occurs in the case of breach of 'cultural secrecy'. I assert that the limitation in the protection of *sui generis* cultural secrecy in Australia is not in application of established Australian legal principles but rather in the selection of which legal principles to apply.

3.2.3 Native Title Law

The landmark High Court of Australia decision of *Mabo and Ors v the State of Queensland (No. 2)* ('*Mabo*')[171] first recognised the survival of pre-existing *sui generis* interests in land and waters surviving annexation of sovereignty in 1770.[172] *Mabo* recognised that 'the content of native title, its nature and incidents, will vary from one case to another. It may comprise what are classified as personal or communal usufructary rights involving access to the area of land in question to hunt for or gather food, or to perform traditional ceremonies'.[173] These personal or communal usufructary rights extend beyond rights to exclusive possession of land, to

[170] Ibid. 18.
[171] Ibid.
[172] 1 August 1879 for the Torres Strait where sovereignty was annexed by the passage of *The Queensland Coast Islands Act 1879* (Qld).
[173] *Mabo (No.2)*, per Brennan J 58.

rights to hunt, fish and gather,[174] extended by statute to encompass 'communal, group or individual rights and interests of Indigenous persons to land and waters where possessed under traditional laws acknowledged and traditional customs observed provided such laws and customs connect the Indigenous persons to lands and waters'.[175] The common law recognises that the concept of Native Title is not stagnant, and may evolve over time and retain its protection at law.[176] Likewise, 'ideas of privacy have shifted and mutated over time'.[177] The ALRC found that 'scientific, agricultural, technical, and ecological knowledge, and knowledge related to and contained in items of moveable and immovable cultural property, also form part of Indigenous laws and customs'.[178]

Native Title is determined at common law and administered under the *Native Title Act 1993* (Cth) ('*NTA*') and is held by Registered Native Title Prescribed Bodies Corporate (RNTBC) for and on behalf of individual common law holders of Native Title (Traditional Owners).[179] Therefore, there is an inherent recognition at common law and statute of *sui generis* communal rights and interests, held on trust by groups for and on behalf of its beneficiaries, and actionable by such groups with standing for and on behalf of such beneficiaries, or directly by affected traditional owners themselves.

Native Title law, therefore, is capable of:

1. recognising and protecting not only individual proprietary rights, but also communal usufructuary rights;
2. compensating not only for economic loss, but also non-economic spiritual loss; and
3. granting legal standing to groups to assert breach of communal rights (in addition to asserting individual rights) in a court of competent jurisdiction.

Following a full scholarly examination of these principles and more in Chapter 4 (4.3 Legal Protection of Cultural Secrets), I consider that Native Title law is poised to

[174] Ibid per Toohey J 100; *Ward* (2002) 191 ALR per Gleeson CJ, Gaudron, Gummow and Hayne JJ.
[175] *Native Title Act 1993* (Cth) ('*NTA*') s 223(2).
[176] *Mabo (No.2)* per Brennan J, 61; per Deane and Gaudron JJ, 110; per Toohey J, 192; *Yanner v Eaton* [1999] HCA 53 per Gummow J, 68.
[177] Whitman, above n 93, 1154.
[178] ALRC Report 108, above n 114, 7.25 citing Terri Janke.
[179] *Native Title (Prescribed Bodies Corporate) Regulations 1999* (Cth).

emerge as the leading contender, best-equipped to provide tailored legal and institutional protection of Torres Strait Islander cultural secrets, applying a regime which is neither an institution of the common law, nor a form of common law tenure, but nevertheless recognised by it, providing a vital intersect with Torres Strait Islander traditional law and custom widely acknowledged.

3.3 Thesis Development

Based on the literature, I observed that:

1. Different ethnic groups may define secrecy, and that which is secret, differently;
2. A diversity in definition of secrecy, and in that which is secret, may result in varying degrees of effectiveness in legal protection within a single polity; and
3. Some existing Australian laws may be more predisposed to effectively protecting Islander cultural secrecy (ie, native title), than others (ie, privacy and intellectual property).

These observations were the basis for the thesis question:

> **What legal and institutional mechanisms might better support Torres Strait Islanders in Australia to maintain their cultural secrets?**

The answers to two sub-questions were thus identified to address the legal issues:

1. **What are the legal and institutional impediments to effective protection of Torres Strait Islander cultural secrecy in Australia under normative Western legal regimes?**
2. **Can Native Title Law better support Torres Strait Islanders to protect their cultural secrets?**

Three other issues emerged as important to a proper examination of the legal issues.

1. **What are the nature and incidents of Islander cultural secrecy?**
2. **How does Islander cultural secrecy differ from normative Western notions of secrecy?**
3. **Why is maintaining cultural secrets important?**

Answering these questions would assist in understanding the significance and value of the issues and in addressing the legal questions.

CHAPTER 4: RESULTS

4.1 Nature of Cultural Secrets

4.1.1 Introduction

Absent a clear understanding of the interests, one cannot reasonably hope to achieve adequate legal protection. Attempts to protect an ideal, value and belief-system disparate to our own may inadvertently result in its disfigurement and distortion to fit a preconfigured legal and institutional protection regime. In this part, I will define secrecy and the nature and incidents of secrets sought to be protected thereunder as they pertain to Islander culture. In the first instance, however, I will consider behavioural factors which challenge our propensity as humans to understand ethnically-diverse concepts.

4.1.2 Cognitive Bias

Our perspectives on any given subject are influenced by our life experiences, and the ideals, values and belief-systems we have been taught, grown-up with and generally been around.[180] Accordingly, we each see the world through different lenses. Each of these lenses, whether acknowledged by us or not, influence our perspective on the world and, in turn, our interactions with and acceptance of others. We are, after all, human beings with inherent cognitive biases.[181] It is entirely conceivable that something seemingly as uncontroversial as the term 'secrecy' to one may encompass something entirely different to another.

Everyone has secrets. We can place these secrets into categories, such as spiritual, emotional, familial, health, financial, sexual, cultural, to name just a few. If one speaks with one's immediate family members, provided they have shared proximity over an extended period, there will likely be a high degree of shared categories of perceived secrets. This is because they view secrets in a similar way because of shared-experience and shared environmental conditions. As we continue outwards, beyond the confines of our household, social networks, cities, states, and country, shared ideals, values and belief-systems become more divergent. We see the world differently to others, to varying degrees, because we lack formative shared

[180] Willie Ermine, 'The Ethical Space of Engagement' (2007) 6 *Indigenous Law Journal* 193.
[181] Daniel Kahneman, *Thinking, Fast and Slow* (Macmillan, 2011).

experiences and contexts. This phenomenon was effectively tested in a comparative study undertaken by Whitman in 2004 by comparing variance between European, Asian and North American subjects with a specific focus on their respective ideas of privacy. Some examples (as already discussed in Chapter 1) of this variance identified by Whitman included an acceptance of:

1. the disclosure of personal matters with strangers, such as salaries by Americans;
2. the disclosure of credit reporting information and consumer by Americans;
3. the distribution of nude images of celebrities by Americans;
4. public nudity by Europeans;
5. female attendants in men's washrooms by Europeans;
6. government deciding what names parents may give their children by Europeans; and
7. telecommunications interceptions or 'wire-tapping' by Europeans.[182]

Similarly, in 2006 Kumaraguru and Cranor conducted a comparative study between Indian and United States citizens to assess their respective ideas of privacy.[183] The results concluded significant variance in privacy ideals in the subjects interviewed, with Americans more concerned than Indians regarding:

1. provision of personal health information online;
2. trust in businesses and government;
3. publicly posting of university grades; and
4. publicly posting detailed information about individuals who had made train reservations.[184]

In 2012, Kymaraguru expanded his original sample size to 10 000, finding that religion and mobile phone numbers carried less privacy in the East than the West. [185]

[182] Whitman, above n 93, 1156_1159.
[183] Ponnurangam Kumaraguru and Lorrie Cranor, *Privacy in India: Attitudes and Awareness*, Privacy Enhancing Technologies < V 2.0. Tech. rep., PreCog-TR-12-001, PreCog@IIIT-Delhi, 2012. http://precog.iiitd.edu.in/research/privacyindia/>.
[184] Blase Ur and Yang Wang, *A Cross-Cultural Framework for Protecting User Privacy in Online Social Media*, Proceedings of the 22nd international conference on World Wide Web companion. 2, citing Kumaraguru and Cranor, Privacy Enhancing Technologies.
[185] Ponnurangam Kumaraguru and Niharika Sachdeva, 'Privacy in India: Attitudes and awareness v 2.0' (2012) <http://dx.doi.org/10.2139/ssrn.2188749>.

It became clear from the comparative studies that 'Americans and continental Europeans perceive privacy differently'.[186] Whitman found that variance in the realm of privacy perception came about not from the legal notions of privacy directly but 'rooted in much larger and much older differences in social and political traditions … It is a contrast between two conceptions of privacy as an aspect of dignity and privacy as an aspect of liberty'.[187] At its core, continental privacy protection is the protection of a right to 'respect' and personal 'dignity' or 'informational self-determination' – the right to control information disclosure about oneself; the right to project ones image as one sees fit and be shielded against unwanted public exposure.[188] Australian privacy law similarly has the protection of dignity and respect at its very core.[189] By contrast, America's conception of privacy is premised on notions of 'liberty'; a freedom from intrusion by the State within one's own walls.[190] There are many factors which influence a person and, in turn, a society's predisposition to and interaction with others. America and Europe, although fundamentally differing in cultural predisposition, remain allies on the international stage by developing what Rawls describes as an *overlapping consensus*: we can each support a principle from our own perspective while understanding the perspectives of the others.[191]

Similarly, Kumaraguru concluded that human beings have 'disparate worldviews each formed and guided by distinct histories, knowledge traditions, values, interests, and social, economic, and political realities'.[192] 'It is fundamental in a pluralistic world that one cannot expect for all people to share the same values, metaphysical or spiritual perspectives and beliefs'.[193] It may be possible to place ethnicity in a box to some degree, such that 'Western systems of governance are fundamentally enshrined in atomistic, liberal, individualist and capitalist ideology, focusing on the rights of the individual. Conversely, that Indigenous ideology is premised on socialist theory, namely a focus on communal rights, collective creation, and innovation as a social,

[186] Whitman, above n 93, 1159.
[187] Ibid 1161.
[188] Ibid.
[189] *Grosse* [2003] QDC 151 (16 June 2003); *Lenah* (2002) 208 CLR 199.
[190] Whitman, above n 93, 1161.
[191] John Rawls, 'The Idea of an Overlapping Consensus' (1987) 7 *Oxford Journal of Legal Studies* 1, 1.
[192] Ermine, above n 180, 188.
[193] Mathiesen, above n 99.

spiritual and cultural obligation'.[194] Just as nation-states can be observed to differ on fundamental construction of ideals and values, they can nonetheless often achieve overlapping consensus in order to foster a working relationship on the international stage. It may, therefore, be a reasonable inference that ethnic minority and majority groups within a single polity may also find overlapping consensus.

If we accept that we each have inherent biases formed by our histories, knowledge traditions, values, interests and social, economic and political realities, then the laws and institutions we create may also be flawed by those biases.[195] As Australian political leadership inherently represent the ethnic-majority by operation of Westminster democracy in Australia, absent a commitment by the majority to better understand minority ideals, values and belief-systems, these ethnically-diverse interests risk continuation of being overlooked, disregarded or adversely impacted by law-making and public policy. It is, therefore, imperative that the majority acquire understanding of the ideals, values and belief-systems of the ethnic-minority in Australia before effective legal protection can be realised for such minority interests.

The next section considers the variance between normative Western and Islander notions of secrecy and their respective categorisation as secret.

4.1.3 Nature and Incidents

4.1.3.1 Secrecy

Secrecy is the act of 'keeping a secret from someone by blocking information about it, or evidence of it, from reaching them and to do so intentionally: to prevent him from learning it, and thus from possessing it, making use of it, or revealing it'.[196] 'Secrecy is a methodology for concealment of secrets, which may include the use of codes, disguises, camouflage and the practices of concealment'.[197] 'Albeit not present in every secret or every practice of secrecy, the concepts of sacredness,

[194] Taubman, Antony, 'Indigenous Innovation: New Dialogues, New Pathways') in *Indigenous Peoples' Innovation: Intellectual Property Pathways to Development.* (Canberra: ANU E Press, 2012) <https://www.nintione.com.au/?p=3497>.
[195] Ermine, above n 180.
[196] Sissela Bok, *Secrets: On the Ethics of Concealment and Revelation* (Vintage, 1989) 6.
[197] Ibid.

intimacy, privacy, silence, prohibition, furtiveness, and deception influence the way we think about secrecy'.[198]

Notwithstanding that each of these concepts form a family of related meanings, Bok, a psychology and philosophy scholar, posits that they are not always present together in any single instance of secrecy. To this end, secrecy cannot be defined too narrowly.[199]

> Secrecy must be seen as a neutral definition; neither good nor bad. Indeed, a degree of concealment or reveal accompanies all that human beings do and say. In so accepting, in determining what is good and what is bad requires an examination of the precise practices of secrecy in question, rather than assumption.[200]

At its elementary level, 'secrecy is a social practice, that is, a situational, relational and mobile tactic, shaped by permutations of saying and not saying, withholding and disclosing'.[201] Hardon and Posel posit:

> [A]cts of concealment are inherently relational. They depend on one's trust in the other, that (s)he will keep the secret too. Hence the salience of questions of loyalty and betrayal, which are linked to the making of communities of secrecy … the practice of secrecy produces moral economies of conscious disclosure and withholding. The condition under which information is shared or withheld, with whom and to what degree, is often a conscious calculus of moral gain and loss.[202]

Secrecy in Islander communities, is known interchangeably with the term *Yagasin*. The term in Islander *Kulkalgaw Ya* language can be translated in English as 'not to say anything'. Common with *Yagasin*, 'secrecy is a relational practice, embedded in a social context with truth-telling and histories of power at its core. It is 'constitutive of sociality',[203] that is, secrecy is a manifestation of cultural practice. By actively keeping secrets utilising a distinct methodology, Islanders are exercising their

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[198] Ibid.
[199] Ibid 7.
[200] Ibid 9.
[201] Anita Hardon and Deborah Posel, *'Secrecy as Embodied Practice: Beyond the Confessional Imperative*' (2012) 14 (*sup1*) *Culture, Health & Sexuality* S1, S6.
[202] Ibid S5.
[203] Ibid S3

cultural practice. Secrets derive from social dynamics of power. Making and keeping of secrets can be a defensive response to avoid social stigma, or it may also be a tactic to assert an advantage. To have no capacity for secrecy is to lose control over how others see you – it leaves one open to coercion.[204]

How and why our cultural practice of secrecy is exercised is determined by our way of life; our culture. No matter the subject of our secrets, whether an adverse medical diagnosis, a chess strategy, a pregnancy, a birthday present for another, our sexuality, a mistake made at work, a work meeting attended by a select few to the exclusion of all others, our bank account details, a magic trick, or a family cooking recipe, each is protected by the social practice of concealment and controlled revelation thereof, aimed principally towards either avoiding social stigma, or gaining an advantage vis-à-vis others. Indeed, the extent to which a society's members together hold shared perspectives on the categorisation of secrecy, generally determines that society's amenability to accepting the exerciser's categorisation of the subject as secret, and thus not compelling its revelation. Conversely, in revisiting the issue at the core of this study, namely external interference into cultural secrecy of Torres Strait Islanders, where an ethnic-majority may not consider such act of an ethnic-minority to attract secrecy protection, its revelation may be compelled, sometimes by legislative decree, to the detriment of the ethnic-minority.

> Cultural practice is the lifeblood of Islander culture, said to be indistinguishable from their shared cultural identity as an ethnically-diverse people. It is the point of difference and similarity between individuals in a group, groups in an ethnicity, and ethnicities in a nation. Cultural practice manifests itself through a variety of human expression, including language, song, dance, story, artworks, cooking, and the methods and techniques used therein, as an embodiment of fundamental shared ideals, values and belief-systems of Islanders. It is explained that cultural identity is who Islanders are, however their cultural practice shapes and moulds who they are, and the two concepts are therefore inseparable. [205]

[204] Ibid S4, citing Bok above n 196; David Nyberg, *The Varnished Truth: Truth Telling and Deceiving in Ordinary Life* (University of Chicago Press, 1993).
[205] Interview with Participant 3 (Torres Strait, 27 April 2016).

'Cultural practice is about existence as a people; it doesn't matter where they are, their kinship to country is intact and society recognises the uniqueness of their place.'[206] Traditional law and custom of Islanders is known as *ailan lore* and *ailan kastom,* which, in many parts of the Torres Strait, still take precedence today and strongly influence community decision-making over and above Western majority law'.[207] *Yagasin* is a method of cultural practice recognised as deriving from Islander *ailan lore* and *ailan kastom*. It is a unique cultural practice facilitating the concealment of secrets, and controlled revelation thereof.

Dominant Australian culture of Eurocentric origin demonstrates a predominantly capitalist mentality, where its members tend to be judged on the jobs they hold, the houses they live in, the cars they drive and the 'things' they possess in order to assess their place in society.

> Conversely, Islander culture revolves around the social and spiritual ideology, where every member of that community has a spiritual role to play, which is in no way diluted by the capitalist factors in dominant culture. For instance, a local Councillor (arguably the highest status in the Torres Strait), may be influenced greatly by a community elder who is unemployed, living in social housing and receiving government welfare. Economic status is not significant. Progression 'up the corporate ladder' is not important to most Islanders. People are respected for how they conduct themselves, rather than for the positions they hold or the things they have. What is important is their position in the spirit-world, rather than their status in the physical world.[208]

There is a clear expectation as spiritual members of community that they be involved in community spiritual callings. These may include but are certainly not limited to involvement in cultural activities such as song, dance, art, story-telling, land management, teaching, parenting, or governance. Employment (and wealth creation generally) can conflict with these fundamental cultural commitments. It is said by some Islanders, that the weight of cultural expectation is immense.[209] Battiste posits:

> [The] personal and tribal experience with their immediate environment and with their personal and intense interaction with the spiritual world provide the core

[206] Interview with Participant 4 (Torres Strait, 26 May 2016)
[207] Ibid.
[208] Ibid.
[209] Ibid.

> foundations for their knowledge … All the products derived from the Indigenous mind represent a wealth of knowledge, which is in a constant state of flux and dependent on the social and cultural flexibility and sustainability of each nation. Indigenous knowledge represents a complex and dynamic capacity of knowing, a knowledge that results from knowing one's ecological environment, the skills and knowledge derived from that place, knowledge of the animals and plants and their patterns within that space, and the vital skills and talents necessary to survive and sustain themselves within that environment.[210]

> *Yagasin* is offended when people talk about something that is culturally not supposed to be talked about. Even when what is said may be factually correct; saying it without appropriate approval, such as from community elders, influences the weight placed on that Indigenous knowledge shared and the integrity of the person revealing it, both of which will be greatly diminished. A breach of *Yagasin* may result in the offender(s) losing their place in the heart of the Islander spirit-world.[211]

In addition to this fear of loss of place exists a fear of spiritual retribution by way of black magic (*pouri pouri).* Losing place in the spirit world, or status within Islander home (*Ged)* is the ultimate consequence or punishment in Islander culture. Families effectively disown members for breaches, resulting in a loss of place, loss of social and political status, and cultural identity for the offending individuals. This can sometimes result in the punishment of temporary or permanent 'banishment' from community, notwithstanding a lack of legal basis in Queensland under dominant Western law.[212]

4.1.3.2 Secrets

Bok posits that *'*anything can be secret so long as it is kept intentionally hidden, set apart in the mind of its keeper as requiring concealment'.[213] 'Secrets, and the apparatus for their protection [Secrecy], have become entrenched in contemporary culture and politics … The secret, then is a familiar part of the public culture of

[210] Marie Battiste, 'Research Ethics for Chapter Protecting Indigenous Knowledge and Heritage' (2016) 111 *Ethical Futures in Qualitative Research: Decolonizing the Politics of Knowledge* 116.
[211] Interview with Participant 4 (Torres Strait, 26 May 2016).
[212] Ibid.
[213] Bok, above n 196, 5

everyday life and its political ordering'.[214] Secrecy is a manifestation of cultural practice,[215] applied towards the protection of sensitive information (the secret). Although the premise of secrecy may generally have conflated as between ethnically-diverse groups into a common definition (ie. to keep something secret)[216], the characteristics of individual secrets protected thereunder, may differ significantly.

Bellman, in her 1984 study of the Kpelle People of West-Africa, discovered that the secrets surrounding *Poro* male initiation ceremony are to be held only by those who have been initiated. Women are strictly forbidden to be involved in the ceremony. It is widely acknowledged, however, in Kpelle culture, that women have full knowledge of the ceremony techniques notwithstanding their exclusion from it. To this end, it was concluded by Bellman that *Poro* secrecy has less to do with content (the techniques and methods used), and more to do with its form (who may and may not participate in it).[217]

Similarly, Charles Piot in his 1993 study of the Kabre People of West Togo, found that women working in the fields of men at sorghum harvest are rewarded with large baskets of grain. In exchange, during the hunger season, women return the gesture by making beer for the men. However, the grain and beer are not delivered to the recipient in person and generally facilitated by another in secret. The method of secrecy arises out of the women's desire not to be seen by others as poor or reliant on the men. Likewise, the men drink the beer with friends without revealing its true origin as they are ashamed of being viewed by others as unable to sustain themselves in times of poor harvest. In this case, everyone in the community knows about the practice and the technique used (the content), however the exchange relation is concealed (the form).[218] To this end, only particular aspects of day-to-day cultural practice is secret. Determination of the extent requires examination on a practice by practice basis – beyond the scope of this thesis.

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[214] Alison Young, 'The Art of Public Secrecy' (2011) 35(1) *Australian Feminist Law Journal* 57, 3.
[215] Hardon and Posel, above n 197, S6.
[216] Bok, above n 192.
[217] Beryl Larry Bellman, 'The Language of Secrecy. Symbols and Metaphors in Poro Ritual' (New Brunswick, NJ: Rutgers University Press, 1984).
[218] Hardon and Posel, above n 201, S4, citing Piot.

Secrecy as cultural practice, is therefore prescribed over techniques (content) and/or exchange-relation (form) of other cultural practices, in order to control the use and dissemination of sensitive information imparted through those practices (the secret); in turn affording advantage or avoiding social stigma. The distinction between content and form of secrets is an equally-important consideration in Islander cultural practice.

4.1.3.3 Torres Strait Islander Cultural Secrets

This research has, at its very core, the tensions between concealment and revelation, particularly the need to ensure that Islander secrets are not inadvertently revealed in breach of the principles sought to be protected by it. As has already been foreshadowed in this section and will now be demonstrated, secrecy does not attach to all aspects of sensitive Islander cultural practice. Guided by Islander Elders who participated in this research, for the most part, only specific aspects of said Islander cultural practice contain information considered secret by Islanders. The author will now provide examples of Islander cultural practice containing aspects in which *Yagasin* is evoked, taking great care to ensure that those aspects the subject of *Yagasin* are not disclosed contrary to the interests of Islanders. Although there is commonality in some cultural practice throughout the Torres Strait, such practice may vary island to island.[219]

Language

Although cultural practice generally remains strong and vibrant within Islander communities, there are aspects at risk of being lost – as is the case for many Indigenous and ethnic-minority groups around the World. Forty-four per cent of respondents to the 2017 Torres Strait Island Regional Council Community Survey considered that a loss of language was the greatest risk to Islander cultural practice.[220] The most commonly spoken tongue in the Torres Strait is presently Torres Strait Islander Creole (*Ailan Tok)*.

[219] *Akiba on behalf of the Torres Strait Islanders of the Regional Seas Claims Group v State of Queensland* (No.2) [2010] FCA 643; 204 FCR 1 *IAkiba (No.2)*' per Finn J at para 319 and 441.
[220] Torres Strait Island Regional Council, above n 5.

Discriminative policies of past governments, as discussed in Chapter 1, are said to be the cause of today's infrequent use of *Ailan Tok*. Stories are told of policies prohibiting the speaking of language of those forcibly relocating from remote Torres Strait communities to take up employment on mainland Australia or within government 'hub' communities in the Torres Strait, such as Thursday Island in the 1960's and 1970's. The children of that generation refrained from speaking language because of government policies of oppression, assimilation and segregation. Schools did not allow Islander language to be taught or practiced. Families had the English language so engrained into them at work and at school that *Ailan Tok* was an abbreviated form of English, easily spoken and understood between Islanders and non-Indigenous people. There existed a great fear of reprimand by the Protector and their superintendents. There were myths that the Protector was able to almost supernaturally peer into the homes of Islanders, and so people did not speak language at home. It is said that the Protector paid Islanders to do his bidding, thereby leveraging the trust Islanders had for one another in such an oppressive environment and in doing so, revealing secrets, removing advantage, in turn breaking down community cohesion.[221]

This was an era when Islanders could not hold land while pearling migrants could. Government policies of segregation were rife, including Indigenous and non-Indigenous toilets and taps, dedicated lines and closing times at the local pubs, and Indigenous reserves and Indigenous curfews prior to the 1967 Constitutional Referendum. Breaches of these policies would result in Islanders being thrown in jail for the night and reportedly beaten up on the way there or dropped off on curfew lines and made to walk the rest of the way home. The Torres Strait became a melting-pot of ethnic minority groups.[222] These were the days where the despondency of Islanders was forged under an engrained belief that nothing they said mattered. Islanders were made to believe in the superiority of their non-Indigenous leaders and instructed to listen and not to speak; they showed respect by keeping their head down, giving no eye contact, saying nothing, and nodding their heads whether they agreed or not. Many of those who endured this treatment are still alive today, and some remain in leadership, tormented by the days of old. Many of the

[221] Interview with Participant 3 (Torres Strait, 27 April 2016).
[222] Ibid.

government agencies, local, state and Commonwealth, operate from Thursday Island in the Torres Strait; an enduring memory of discrimination, with one such suburb even named 'Quarantine'.[223]

Some Islanders link religion to the decline in the cultural practice of language in the Torres Strait. Missionaries deemed many cultural practices evil and prohibited their practice, including the native tongue.[224] As a result of a history of oppression and discrimination described in part 1.1.4, many Islanders, even today, remain very cautious using language while in the presence of non-Indigenous people. The existence of language is not denied by Islanders to outsiders, however its practice remains restricted by whom and in whose presence, it may be spoken (form).

Ailan Dance

Islander *ailan* dance was a casualty of discriminative government policies of the day in the 1960s and 1970s due to disconnection from homeland of many Islanders and being implanted in an unfamiliar and oppressive environment. *Ailan* dance became practiced only at major events, such as tombstone openings[225] and weddings. Today, within the outer-island communities of the Torres Strait, *ailan* dance is a regular opportunity.[226] For the same reasons as language, the existence of *ailan* dance is not denied by Islanders to outsiders, however its practice remains restricted in form by whom and in whose presence it may be exercised. There are also aspects of *ailan* dance attracting *Yagasin* restriction with respect to techniques (choreography) as between Islander communities themselves or even as between tribes within those communities. *Ailan* dance is likened, in some Islander communities, as going in to battle, being highly competitive and highly technical. *Yagasin* is practiced to avoid the revelation of dances as between competing Islander groups to maintain competitive advantage. Furthermore, other dances are widely restricted by *Yagasin* as depicting other sensitive historical cultural events.[227] The existence of *ailan* dance is not denied by Islanders to outsiders, however its practice remains restricted by

[223] Ibid.
[224] Interview with Participant 4 (Torres Strait, 26 May 2016).
[225] Tombstone openings are a cultural practice usually occurring many years after a person passes away once the temporary frame structure built around the grave at the time of funeral starts to rot and break down, and the casket has broken down and the soil settled, where a permanent structure or monument is installed at the site commemorating their life. Families save up for these events (supplemented by community fundraising) over many years which come at significant expense.
[226] Interview with Participant 3 (Torres Strait, 27 April 2016).
[227] Interview with Participant 4 (Torres Strait, 26 May 2016).

whom and in whose presence, it may be spoken (form), and in some instances, the techniques used (content).

Ailan Adoption

Ailan adoption entails the practice of adoption of children outside the legal adoption system regulated by Government. In accordance with traditional practice, children are adopted-out to within or outside Islander family structures for the child to be raised as their own. Traditionally, the biological parents have no involvement in the child's life and the adoption is not spoken about. For all intents and purposes, the adopted parents are the biological parents. Presently in Queensland, this arrangement is not reflected on the child's birth certificate. It is for this reason that children are often not provided their birth certificate, which becomes an impediment to formal identification in future years. Only the adopted parents, traditionally, have authority to share details of the biological parents with the child should they so wish. Not even the brothers and sisters of the adopted child may disclose the adoption due to *Yagasin* restriction. There generally is an age considered old enough to understand the reasons for *ailan* adoption (generally high school).[228] Often, *ailan* adoption occurs where the biological parents have children at a young age and the grandparents then intervene to become the adopted parents of the child; however, circumstances do vary. Other examples include a couple's inability to have children, or to replace a person being married out of a family.[229] Any biological parents allowed to be part of the child's family are referred to only as 'auntie' or 'uncle'.[230] Biological families do not engage in manhood or womanhood initiation ceremonies regarding their adopted child.[231]

It is being reported more regularly that these secrets are being disclosed contrary to the principles of *Yagasin*, often through family conflict.[232] Because legal adoption systems do not recognise traditional adoption, in modern society it is becoming more problematic, affecting traditional inheritance in the context of sometimes competing Wills and associated succession law. It has been reported that families are being torn

[228] Interview with Participant 4 (Torres Strait, 26 May 2016).
[229] Interview with Participant 3 (Torres Strait, 27 April 2016); see also *Akiba (No.2)* per Finn J at para 199.
[230] Interview with Participant 4 (Torres Strait, 26 May 2016).
[231] Ibid
[232] Interview with Participant 3 (Torres Strait, 27 April 2016).

apart based on greed or jealously of family members who may revert to asserting rights under succession law, circumventing rights flowing under *ailan lore* and *ailan kastom*. Inheritance is generally not challenged while the deceased is still alive because of the cultural *Yagasin* ramifications, however these conflicts occur after the passing of an Elder. There are some instances of children being removed in later life by biological parents outside the region from adopted parents under false pretence and then not returned. Those adopted parents have been left without legal right and financial resources to bring the child home. Until the law recognises and protects *ailan* adoption, it is anticipated by Islanders that the practice will continue to diminish.[233] The existence of *ailan* adoption is not denied by Islanders to outsiders, however its practice remains restricted by whom and in whose presence, it may be exercised and specific instances discussed (form).

Hunting and Fishing

There is little more central to Islander *ailan lore* and *ailan kastom* than hunting and fishing. Islanders rarely throw excess catch back into the ocean because it is shared around the community, but also, and more fundamentally, it is seen that the ocean has provided and thus it would be disrespectful to throw it back and to do so will bring bad luck.[234] Fisheries legislation regulating 'bag limits' for fish, or prohibiting and restricting catch of certain species, are therefore at odds with Islander tradition and custom. Exemptions do apply for traditional fishing (non-commercial) under the *Native Title Act 1993* (Cth).[235]

Hunting techniques are passed down generation to generation. The techniques have been developed over thousands of years, and it is only with technological advancement over the past decades that Islanders have begun to see the replacement of oars for outboard motors, harpoons for steel and galvanised nails. Islander leadership is often asked to consider more 'humane' alternatives to traditional fishing techniques, such as the captive bolt gun method. Their response however is consistently: 'why should we change our practice?' Islanders have hunted in this manner for thousands of years. The continuance of that practice is fundamental to

[233] Interview with Participant 3 (Torres Strait, 27 April 2016).
[234] Singe, above n 11, 128.
[235] *NTA* s 211,

their cultural identity; their history defines their present and their future. It is explained that to expect an Islander to stand upon the bow of a boat and shoot turtle and dugong with a rifle is not their way, regardless of arguments regarding humane killing.[236]

It is widely acknowledged by Islanders that there are minorities who go to extremes and take more than their fill. However, do we cancel everyone's driver's licenses because of the few who misbehave? Hunting continues today, substantially in the same manner as it occurred one thousand years ago and still respects, at its very core, the spiritual relationship between man, sea and animal. Traditional hunting provides a spiritual and anthropological dimension. Elspeth Young writes:

> [F]oraging and hunting [allows Indigenous women and men] to express profound environmental knowledge stretching back over many generations, and continually reinforces their beliefs in the spiritual value of such knowledge; it is also an important medium of education, whereby both spiritual and ecological knowledge is handed on to succeeding generations.[237]

Turtle and dugong are spiritual totems[238] of some Islander clans and, as such, the people have the highest degree of respect for the animals, notwithstanding they hunt and consume them. Islanders consume the majority of turtle and dugong body parts with any remaining parts returned to the sea. It is a spiritual belief of Islanders that where respect is shown towards animals taken from the sea, the sea will provide for future generations.

Dugong occur in large numbers in certain locations in the Torres Strait. Each herd has a leader. That leader is said to be the 'whistle dugong', known as the *Dhangal*.[239] As the tide rises and the dugong come onto their feeding grounds of sea grass, the lead dugong will swim ahead. He will investigate the grounds alone to check for sufficient resources for the herd and check for safety. The herd will wait in the safety of the deep water. Once satisfied, the lead dugong will whistle the herd and the herd

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[236] Interview with Participant 3 (Torres Strait, 27 April 2016).
[237] Young, Elspeth et al, 'Caring for country: Aborigines and land management' (1991) *Australian National Parks and Wildlife Service, Canberra* 168
[238] A Totem is an animal or plant that serves as an emblem of a group of people, such as a family, clan, group, lineage, or tribe, reminding them of their ancestry.
[239] A *Kalaw Kawaw Ya* language term.

will follow. Islander hunters are said to be attuned to this sound. The same process occurs when the herd is leaving the feeding ground for deep water. Islander hunters are also trained to hear the exhalation of dugong and some very experienced hunters are said to be able to smell the exhalation.[240] Dugongs are hunted generally from dinghies, harpooning them when they come to the surface to breathe.[241] The harpoon is aimed midway up the back of the dugong, embedding a barbed metal head a few centimetres into the flesh. A rope is connected to the harpoon and the boat and uncoils as the dugong swims away, dragging the boat with it. Once the animal tires, the dugong is generally drowned by holding its head underwater for several minutes, or keelhauled (held by its tail on its back in the water) until it drowns.[242]

During the months before and after Christmas, the female sea turtle comes upon land to lay her hundred-or-so eggs. Many trial holes are dug by sea turtles above high tide, generally amongst scrub and grasses, before laying her eggs and covering them. Trained hunters follow the trial holes to the laying ground, sending spears into the ground. Once they find a wet mash, they suspect hidden eggs. Islander hunters seek out both turtle eggs and meat. Sea turtles are approached by dinghy and the hunter will generally jump from the dinghy onto the animal and loop a rope around a forelimb or hook the animal's shoulder just beneath the skin with a steel hook.[243] The condition of the animal is often assessed by externally assessing the colour and build of the chest of the animal.

Turtles are often kept alive until time of consumption, and are tethered in water enclosures or flipped on their shells in the interim. [244] When the later technique is used, the animal is laid in the shade with a damp sack bag placed over its chest to maintain satisfactory body temperature.[245] Turtles are often not killed until time of consumption in order to ensure that families may enjoy the traditional meal of *Dinagaun.*[246] Upon slaughter of a turtle, the blood begins to rapidly congeal. *Dinagaun* requires the continued flow of blood within the animal until just before

[240] Singe, above n 11. 129.
[241] Robert Earle Johannes and J Wallace MacFarlane, *Traditional Fishing in the Torres Strait Islands* (CSIRO Division of Fisheries, Marine Laboratories, 1991) 26–31.
[242] Ibid.
[243] Interview with Participant 3 (Torres Strait, 27 April 2016).
[244] Ibid.
[245] Ibid.
[246] Otherwise known in Western culture as 'Black Pudding'.

time of consumption. To this end, the animal must remain semi-conscious and is usually stunned with a blow to the head prior to harvest. Each wing is then removed from the animal systematically whilst the blood is flowing, followed by opening of the chest cavity.[247] Every part of a turtle and dugong is consumed by Islanders and nothing goes to waste.

'There are many interconnected and essential aspects to Islander traditional cultural practice. For instance, in hunting practices, Islander hunters are taught how traditional hunting tools are used, and how to utilise the wind and the waves to their advantage'.[248] Primarily, however, traditional hunting and fishing enables kinship; a connection with land and sea. Hunting and fishing, and the traditional techniques utilised therein, enable the passing of knowledge from one generation to another'.[249] As with many other Islander cultural practices, the practice of hunting and fishing have as much if not more to do with how it is done (methodology) rather than the outcome (purpose), which may be able to be replicated in some other manner to the same or similar end. On the contrary, the techniques and methodology are more about harnessing methods proven as an effective medium for passing on traditional knowledge generation to generation. The existence of traditional hunting and fishing practice is not denied by Islanders to outsiders, however its practice remains restricted in form by whom and in whose presence, it may be exercised (form).

Witchcraft and Sorcery (Maid)

As a seeming-exception to the rule, the very existence of the cultural practice of witchcraft and sorcery (*Maid*[250]) is the subject of *Yagasin.* I discuss this secret practice on the basis that it is already on the public record and has been the subject of much commentary, and further that the Islander participants to this research did not consider the writer's commentary to breach *Yagasin.*

It is said that *pouri pouri* can be used for good or bad. Good medicine saves lives; bad medicine takes lives. *Pouri pouri* is said to pass down from generation to generation via bloodline. It is generally not spoken about but regarded in the Torres Strait as a practice continuing in the shadows. The general principle of bad *pouri*

[247] Ibid.
[248] Interview with Participant 4 (Torres Strait, 26 May 2016).
[249] Ibid.
[250] A *Meriam Mer* term.

pouri is that an individual will place a curse on a person or object, and if the person touches the person or object, they will suffer sickness or even death. The traditional practice of bad *pouri pouri* prohibits the sharing of cultural knowledge with others, whether good medicine or bad.[251] It is believed that breaking cultural protocol can result in bad *pouri pouri* to be used as a punishment.

There are places within the Torres Strait which are said to be tainted by bad *pouri pouri*; they are abandoned and locals do not venture near. There are stories of magical chants and words (*zogo mir*[252]) being used by bad *pouri pouri* men to lure people out of their homes to harm them. Good *pouri pouri* can be used to heal, or attract successful fishing, harvest or hunting. Good *pouri pouri* men (medicine men) are often sourced to lift curses caused by bad *pouri pouri*.[253]

There is a general fear amongst Islanders that the very mention of *pouri pouri,* may result in a curse being placed on them. It is said that bad *pouri pouri* is trained from master to apprentice, and that practice begins on small animals. It is said that those practicing bad *pouri pouri* can be detected by body odour as they are observed to rarely bath. Community members disregard the odours, however, in fear of spiritual reprisal.[254] Many community members to this day still carefully discard hair from their hairbrushes and finger nail clippings in fear they could be used against them for bad *pouri pouri* by, for example, burning them or disposing on the reef. *Pouri pouri* remains strong within Islander culture and continues to be used as the primary explanation for illness, death, success or failure.[255]

One such story depicting Islander *pouri pouri* heralds from the legend of *Gelam*[256], the basis for Meriam (People of Mer Island) traditional belief. It is said that within the sheer volcanic rocks which tower above the township (Gelam Hill), there are sacred caves. It is said that the caves are protected by a giant snake with a red light blazing from its skull, said to be protecting mountains of jewels and cascades of crystal water. It is said that only one man, a Rotuman *pouri pouri* man, has ever

[251] Interview with Participant 3 (Torres Strait, 27 April 2016).
[252] A *Meriam Mer* term.
[253] Ibid.
[254] Ibid,
[255] Singe, above n 11. 145.
[256] A *Meriam Mer* term.

entered the caves. It is said by the Meriam People that on at least one occasion, annual scrub burn-off travelled too close to the rocks and caverns and the ground shook. There are stories of *Gelam* at night changing from a young man in a red *lava lava,*[257] transforming into the form of a large black dog. People speak of hearing the padding of his paws and his breath as he passed their homes.

The *Zogo le* on Mer Island, practicing *Malo's law*, were recorded prior to 1871 to practice *pouri pouri* routinely, including ritual cannibalism.[258] Furthermore, the reporting of sickness (sometimes terminal) is also greatly impacted by negative community perceptions of *pouri pouri*. Diseases such as cancer often go unreported and undiagnosed by modern medicine because of a fear of social stigma of having being adversely affected by *pouri pouri*. It is widespread that even upon diagnosis, families do not discuss sickness of members even between themselves, and that resulting deaths can come as a shock even to those closest to the deceased.

The existence of witchcraft and sorcery is often denied by Islanders, not only to outsiders but also within community – likely to avoid the social stigma which attaches to it and their belief that to discuss may result in spiritual reprisal. Both techniques used (content) and exchange-relation (form) are considered secret.

Sacred Stories, Sites and Artefacts

Much secrecy surrounds many stories and sacred sites in the Torres Strait. Islanders are a very spiritual people and have a deep connection with those who have sadly passed. In some instances, there is a close correlation between sacred stories and artefacts, and witchcraft and sorcery. Stories, for instance, may describe sacred areas, the subject of *pouri pouri,* with those areas all but abandoned by residents, and rarely spoken of. Furthermore, the telling of sacred stories, or touching of sacred artefacts, may themselves evoke *pouri pouri.* There are many stories told and sacred sites evidencing a painful past, from community massacres at the hands of Papua New Guinea raiders[259] to creation stories. These sacred sites, stories and artefacts explain the past and maintain cultural identity and relevance; however, some may not be photographed and shared outside community. The existence of sacred stories, sites and artefacts is not denied by Islanders to outsiders, however its practice remains

[257] Also known in community today as a 'calico'.
[258] Singe, above n 11.142–143.
[259] Dauan Island rock paintings

restricted by *Yagasin* governing by whom, and in whose presence, they may be told, recorded, or accessed (form).

Sorry Business

> One of the practices that remains strong in Islander community is sorry business; how the news of the deceased is passed on to community or family members and how community and family grieve, and the processes followed leading up to the funeral, the burial and speakers for family and the tombstone opening ceremony.[260]

Generally, families will not share news of members with terminal illnesses with others. This is why deaths often come as a shock to Torres Strait communities.[261] 'When there is death, there are processes Islanders go through at certain times and information can be made public after those processes. People have to be notified by the right people'.[262] The existence of sorry business is not denied by Islanders to outsiders, however its practice remains restricted by *Yagasin* which governs by whom and in whose presence information may be revealed (form).

Initiation Ceremony

'Initiation ceremonies exist in Islander culture, welcoming boys to manhood and girls to womanhood. There are pre-ceremony practices which occur under *ailan lore* and *ailan kastom* for marriages, followed then by the Christian aspects'.[263] These ceremonies are strictly the subject of *Yagasin,* with women excluded from male initiations and men excluded from women initiations. Much like the Kpelle People of west Africa mentioned earlier, the existence of the initiation ceremony is not denied by Islanders to outsiders. It appears that the techniques (content) are well-known to most members of the Islander community, however, its practice remains restricted by *Yagasin* governing by whom and in whose presence, it may be performed (form).

4.1.3.4 Cultural Purpose vs. Technique

It is clear from the examination in this section that not all aspects of Islander cultural practice are secret. In fact, little attempt is made to deny the existence of most

[260] Interview with Participant 4 (Torres Strait, 26 May 2016).
[261] Ibid.
[262] Ibid.
[263] Interview with Participant 4 (Torres Strait, 26 May 2016).

cultural practice in the Torres Strait (but for witchcraft and sorcery (*Maid*)). What is central to all Islander cultural practice, however, is a purity in how it is practiced, by whom, and in what circumstances. As has been demonstrated earlier in this chapter, the purpose of cultural practice for an Islander is to maintain connection with both their physical and spiritual worlds.[264] Such connection is facilitated by many prescribed traditional techniques and interactions flowing across a wide variety of cultural practice. The most fundamental of those practices in maintaining connection to land and sea and in turn preserving core cultural identity and indigeneity, often evoke *Yagasin.*

Thiriet argues that cultural practice technique may be forcibly changed without losing its traditional connection – for instance through legislative intervention – provided its purpose is maintained.[265] Thiriet does, however, concede that 'a more difficult situation arises when it is precisely the method that has a cultural significance'.[266] Thiriet's concession encapsulates the rule not the exception thereto for Islanders in so far as it is the precise method and technique of Islander cultural practice which achieves the two-tiered purpose (physical and spiritual). It is not difficult to argue, as Theriet has in the context of hunting and fishing, that Islander technique could conceivably be altered to accommodate more humane practices (from a Western perspective), such as using the captive bolt gun for dugong and turtle. Maintaining purpose demands both worlds be satisfied, not only the physical sustenance that the hunt brings, but also the spiritual journey. The way cultural practice occurs, by whom, and in what circumstances is vitally important to maintaining Islander connection to country. Notwithstanding that the techniques used (content) in traditional Islander hunting practice may not in all instances attract *Yagasin*, the exchange-relation, that is by whom and in whose presence those techniques may be exercised (form), may attract *Yagasin*. It is this prescribed exchange-relation (form), in conjunction with techniques used (content), which enables efficient and effective knowledge transfer, and has done so for thousands of years. To this end, cultural purpose and technique go hand in glove.

[264] Interview with Participant 4 (Torres Strait, 26 May 2016).
[265] Dominique Thiriet, 'Tradition and Change-Avenues for Improving Animal Welfare in Indigenous Hunting' (2004) 11 *James Cook University Law Review* 159.
[266] Ibid.

The techniques embodied in Islander cultural practice prescribe tried, tested and battle-hardened techniques for both physical survival as a people and spiritual relevance on country, passed down as Indigenous knowledge generation to generation. These techniques are subject to evolution and do not live in a bubble and can adapt to the ever-changing world around them. These techniques ensure the survival of culture and, to that end, are precisely why evolution of such practice must be community-driven and not forced by external interference.

So where does *Yagasin* fit in to all of this? *Yagasin* is cultural practice in its own right which prescribes what Indigenous knowledge is secret and how, by whom and in what circumstances it may be disseminated to other members of that group. Indigenous knowledge is integral to 'community social norms, customary law and protocols, cosmology but also coaction with the land'.[267]

> Secrecy provides empowerment to the few, against the many. Many secrets derive from the social dynamics of power. Making and keeping of secrets can be a defensive response to avoid social stigma, or it may also be a tactic to assert an advantage. To have no capacity for secrecy is to lose control over how others see you – it leaves one open to coercion.[268]

Yagasin may, in the context of the non-exhaustive list of examples of Islander cultural practice described in this section:

- prohibit the speaking about witchcraft and sorcery (*Maid*);
- prescribe who may speak language;
- prescribe who may engage in *ailan* dance, *ailan* adoption, and hunting and fishing;
- prohibit the sharing of *ailan dance* techniques with other communities;
- prescribe who may share sacred stories, and access sacred sites and artefacts;
- prescribe who may disclose sorry business; and
- prescribe who may participate in initiation ceremony.

Yagasin, therefore, is Islander cultural practice of secrecy; the concealment and controlled revelation of sensitive information. The *Yagasin* protocol is not in and of

[267] Natalie P Stoianoff, 'Navigating the Landscape of Indigenous Knowledge–A Legal Perspective' (2012)., 24-25.
[268] Hardon and Posel, above n 201 S4, citing Bok, above n 196; Nyberg, above n 204.

itself secret, but that which it seeks to protect is. It ensures that those with access to sacred Indigenous knowledge hold sufficient community standing so as to be entrusted with its dissemination to the next generation. It is a survival story. What then are the Islander secrets protected by the *Yagasin* cultural practice? Suffice to say, secrets exist wherever the dissemination of Indigenous knowledge is restricted by *Yagasin* to select individuals, to be shared in prescribed circumstances. *Yagasin* may, therefore, prescribe the concealment and controlled revelation of secrets such as:

- the identities of those persons said to be practicing *pouri pouri* in community;
- the choreography of an *ailan dance;*
- the identities of those persons said to have been adopted under *ailan adoption;*
- the passing of a loved one; or
- the identities of those participating in initiation to manhood and womanhood, and prescription of those entrusted to impart Indigenous knowledge (ie. elders).

The severity in consequence for breaching *Yagasin* protocol reflect the importance of concealment and controlled revelation thereof to Islander survival as a people, both physically and spiritually. To this end, any legal protection of cultural secrets must have, at its core, the protection of cultural practice in its entirety (physical and spiritual) and the traditional techniques inclusive; the two are inextricably-linked. There must, of course, be limits set on the legal protection of such interests, which shall be discussed in section 4.3. With an appreciation of the uniqueness of Islander *Yagasin* and the secrets sought to be protected by it, I will, in the next section, demonstrate the value of maintaining secrets in modern Islander-life.

4.2 Value of Cultural Secrets

4.2.1 Introduction

> As the conceptualisation of culture has diverged from the relations and practice that inform the daily lives of ordinary people, it has maintained its defining characteristic as a unique and exclusive set of secrets under the control of a select few.
>
> Martha Rohatynsky,[269]

This section discusses a case study demonstrating the importance of ethnic-minority groups maintaining their cultural secrets, and the role each member of that community plays, particularly in circumstances of adversity. I compare the status of Torres Strait Islanders vis-à-vis the Ömie People of the neighbouring Northern Province of Papua New Guinea (the Ömie), exploring the advantage secrets contribute to the successes of ethnic-minority groups and, conversely, in their demise if lost. Associate Professor Marta Rohatyskyj, anthropologist at the University of Guelph, Ontario, Canada, undertook a study into the Ömie between 1973 to 1990.[270] Rohatyskyj's study documents the transformative shift from widely-observed Ömie cultural practice of 'sex affiliation' in 1973 to a point where, in 1990, its very historical existence is vehemently denied by its members.[271]

4.2.2 A Brief History of Papua New Guinea

It is said that humans arrived in Papua New Guinea approximately 60 000 years ago, likely from Southeast Asia during the Ice Age when the sea was lower and distances between land masses shorter. The first Europeans were likely to have been Portuguese or Spanish navigators in the early part of the 16th Century. In 1526 to 1527, the Portuguese explorer Jorge de Menezes accidentally sailed past the main island, naming it "Papua" after a Malay word describing the frizzy hair of Melanesian People. The Spaniard Yñigo Ortiz de Retez applied the term 'New Guinea' in 1545 because of its resemblance to islands on the African Guinea coast.[272]

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[269] Marta Rohatynskyj, 'Culture, Secrets, and Ömie History: A Consideration of the Politics of Cultural Identity' (1997) 24(2) *American Ethnologist* 438.
[270] Ibid 452.
[271] Ibid 438.
[272] Wikipedia. *History of Papua New Guinea* <https://en.wikipedia.org/wiki/History_of_Papua_New_Guinea#Independence>.

In 1883, the Colony of Queensland, Australia, attempted to annex the southern half of Papua New Guinea; however, this was not approved by the British Government. Following German settlement to the north of New Guinea in 1884, a British protectorate was proclaimed that year over the southern coast, named British New Guinea and annexed outright in 1888. Possession was given to the Commonwealth of Australia in 1902, and in 1905 British New Guinea became the Territory of Papua, with formal Australian administration commencing in 1906.

Papua remained under British possession until Independence in 1975.[273] In 1920, the Commonwealth of Australia assumed mandate from the League of Nations to govern the former German territory of German New Guinea until the Japanese invasion in December 1941 suspended Australian administration. Much of the Territory of New Guinea was also then occupied by the Japanese until recapture in the final months of World War II in 1945. Following surrender of the Japanese, civil administration of all of Papua New Guinea was restored under the *Papua New Guinea Provisional Administration Act (1945–46)*.[274] Elections occurred in 1975, resulting in the formation of a ministry headed by Chief Minister Michael Somare. Papua New Guinea became self-governing on 1 December 1973, achieving independence on 16 September 1975. In 1977, Chief Minister Somare was elected Papua New Guinea's first Prime Minister.[275]

4.2.3 The Ömie

In 1997, the Ömie were reported to number only about 1500, equally divided between the mouth of the Wawaga Valley (the Upper Kumusi River Valley) and the length of the Mawoma River Valley in the Oro Province, northern Papua New Guinea. The *Wawaga Ömie* were historically distinct from the neighbouring *Wawaga Barai*. The *Mawoma Ömie* considered themselves distinct from the neighbouring *Managalase Plateau* People. However, the groups had traditional ties – generally through marriage and were on friendly terms. The Ömie and its friends, however, historically engaged in warfare with the neighbouring *Orokaiva* group known as, the *Uve*. The Ömie lived in local group hamlets comprised a set of

[273] Ibid.
[274] Ibid.
[275] Ibid.

brothers, their wives and their children.[276] 'Ömie traditional life were aimed at securing the cooperation of the ancestors in the pursuit of human and garden fertility and the success of the hunt'.[277] Many pre-independence Ömie were involved in the *asisi'e* cult, worshipping the spirit of the dead.

4.2.3.1 Sex Affiliation

Sex affiliation refers to the Ömie 'way of conceptualising local group membership as sex-specific, the female belonging to the group of the mother and the male to that of the father', essentially linking gender and local group identity. Prior to European contact, differences were recognised in language and custom between themselves and neighbouring communities. Following Australian colonial administration, those unique differences were effectively poured into a single ethnic melting-pot by the coloniser.[278]

Pre-independence on 6 September 1975, sex affiliation was observed by Rohatyskyj to exist among the Mawoma Ömie. The study found that 'females belonged to the anie, the local plant emblem group, of the mother, and that males belonged to the anie of the father'.[279] The majority of the population were observed to adhere to this traditional practice, consistent with cultural beliefs of the Ömie of biological and social ties between same-sex parent and child. Post-independence in around 1990, Rohatyskyj reported that Ömie informants widely denied such connections (and further vehemently denied that it had ever existed in their culture). Rohatyskyj concluded in her research that such a change 'can be linked to fundamental changes in the way Ömie conceptualise social groups, land, land rights, male agency, and the opposition between sexes'.[280] The post-independence study found that males tended to align with their ma'i ma'i (or land-based totems inherited from senior males), rather than anie (plant emblem). The anie had "taken on the function of validating inheritance rights to land, which was not the case pre-independence.[281]

[276] Rohatynskyj, above n 269, 440.
[277] Ibid 447.
[278] Ibid 440.
[279] Ibid 441.
[280] Ibid.
[281] Ibid 442.

Ma'i Ma'i names were considered *mairi'e* (sacred), their locations being the abode of ancestral spirits. The *Ma'i Ma'i* names were considered secret in Ömie culture and supernaturally-charged. Post-independence, Rohatyskyj reported that 'some informants speculated that eventually the anie would become equivalent to the European surname',[282] signifying its demotion in cultural relevance. Given modernisation in some of these communities with the advent of government and missionary infrastructure, such as schools, first-aid clinics and airstrips, the land has now become more of an economic commodity rather than a demonstration of male mystical power, creating intense disputes between family groups in the pursuit of financial compensation. [283]

Pre-independence, the study found, 'Ömie males explained their ability to perform *yam* magic, sorcery and other acts of mystical prowess as a result of *woroe;* a term representing the heat or power that charges the body of the man as he called upon his ancestors to aid him in his daily activities, such as hunting, gardening, sorcery and the like. The *woroe* was said to be balanced by the female's *woroe sise'e* manifesting itself during fertility*;* translated as 'bad power'. Because of these polar powers, many cultural practices were done in isolation of the other sex for containment purposes, such as practice of seclusion during childbirth, or a girl coming into puberty or menses. However, in light of the modern demystification, these powers have fallen into disuse in Ömie communities. The term *woroe* is reported to all but have disappeared from Ömie language. *Daruge,* formerly a term to denote physical strength with mystical connotation of a male, now connotes his material possessions and economic worth, with physical rather than spiritual world connotation.[284]

Rohatsyskyj posits:

> [T]he notion of sex affiliation as underlying a parity in the social and ritual positioning of the genders has given way to the current rendering of social organisation as based on the patrineal uje gemu land-holding unit. This has been accompanied by the conceptual demise of male mystical agency and by the adherence to a strictly economic evaluation of social worth. The hegemony of

[282] Ibid.
[283] Ibid 443.
[284] Ibid.

> values based on Christian beliefs and individual gain in a commodity economy has been promoted in the Ömie effort to give their lives relevance in the contemporary nation-state."[285]

It is reported in Rohatsyskyj's study prior to 1911, the Ömie had experienced intense raids from labour recruiters from its neighbouring enemy, the *Orokaiva*, who had not yet turned to Christianity. However, Mount Lamington erupted in 1951, triggering a common belief amongst the Ömie that the eruption had been sent by God to punish the *Orokaiva* for not accepting Christianity. This did enable Christian missionaries to impress the Word of God deeper into Ömie territory. Ömie informants identified a number of cataclysmic events leading to their present situation:

1. the coming of the mission and Christianity;
2. the arrival of the Summer Institute of Linguistics (SIL) in 1959, and the construction of government infrastructure including, later, an airstrip in 1963 and commercial upgrade in 1974; and
3. Annexation of Papua New Guinea and the Ömie's entry into local government in 1960.[286]

In the mid-1960s, coffee was introduced to the Ömie by government agricultural officers. Coffee shuttles were paid for by the local government in and out of the commercial airstrip. The Christian school closed in 1967, replaced with an Anglican Youth Group in the 1980's, marking a shift to Anglicanism.

4.2.4 Cultural Self-Consciousness

Rohatsyskyj posits:

> [I]ndependence can be seen as a transformative event in Ömie self-perception of themselves as a group in relation to other groups in the region in the manner it has forced them to concede their helplessness in attaining economic goals. As a result of independence, the locus of power has been recognised as forcibly moved from inside the community to the outside.[287]

Independence exposed the inequalities distinguishing them from their closest neighbours, absent tools to influence the larger political scene. Absent education and

[285] Ibid.
[286] Ibid 445–446.
[287] Ibid 448.

with the Australian pacification forcing the Ömie to make peace with their most feared traditional enemy, the *Orokaiva*, the Ömie were faced with turning to the *Orokaiva* for European knowledge, becoming reliant and helpless, their union sealed with intermarriages.[288]

Rohatsyskyj explains cultural self-consciousness as 'the sense of an awareness of the power to manipulate cultural self-preservation'. Rohatsyskyj found, in her study. that 'groups with a comparable contact history in this region of Papua were conscious of being able to transact the cultural presentation of self with outsiders to their own advantage' and that following similar cataclysmic events to those occurring a century prior in the Torres Strait,

> [T]he Ömie became self-aware that certain of their beliefs and practices could be evaluated by powerful outsiders and eventually by themselves as either 'good' or 'bad', worthy of retention, or, for the purposes of self-interest, abandonment … The process of objectification of their culture and evaluation of various customs as either suitable or unsuitable to the promotion of Ömie interests in the changing political and economic contexts of their lives has culminated in the eventual abandonment of sex affiliation.[289]

Rohatsyskyj found that the

> Ömie no longer claim to know their origins or to be able to control events in their lives. Those rituals that were believed capable of assuring success in political and economic life in the pre-independence period have proven to be flawed[290] … Sex affiliation has been abandoned by the Omie because that particular constellation of beliefs about mystical agency, the nature of the male-female opposition, the mystical ties of men to the land of their ancestors, and the strategy of political alliance through marriage have been challenged on all fronts. These challenges to previously held beliefs and the viability of previous practices have caused the Ömie to evaluate choices in these areas and to reach a decision as to how their community should be presented. And these choices have been made in the context of their apprehension of themselves as rather

[288] Ibid.
[289] Ibid 439–440.
[290] Ibid 449.

> insignificant players in the Papua New Guinea nation-state and the larger commodity economy[291]

The pre-independence period of Ömie culture was hidden, not manifested in any public way. In the context of pre and post-independence studies, Rohatsyskyj found that pre-independence 'the core of the cognitive system was intact; it was centred on the identification of ancestral power as the cause and source of history', described as almost in a 'cultural bubble suspended in the flow of work history'. The post-independence study, however, painted a bleak picture of developments once the borders had been breached by outsiders:

> 'Ömie notions of their own place in Australians' ideology egalitarian multiethnic system, gave way to a realisation of the Ömie's real inequality and helplessness in affecting the attainment of their goals within the larger nation-state. In attempting to bolster their position in the current political and economic arena, the Ömie replaced their customs with other customs more in harmony with the larger context.

Ömie now claim that they have lost their customs. Rohatsyskyj found that

> [T]he underlying loss lies in the inability of Ömie to maintain a self-centred understanding of themselves in the world, comparable to the self-view that had proved adequate for their political purposes less than a generation ago[292] … The customs that now constitute the culture of Ömie contain few secrets. The community has externalised its customs for public presentation.[293]

Rohatsyskyj posited in the study that:

> [A] satisfactory explanation of sex affiliation in the pre-independence period could be attained from within the Ömie world, whether in ecological, psychological, social-structural, or other terms. A satisfactory explanation of the absence of sex affiliation today can only be attained by taking into account forces well beyond the immediate borders of the Ömie and must account for commoditization, regional and national political structures and ultimately, class formation and the economic marginalization of peripheral populations.[294]

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[291] Ibid.
[292] Ibid 450
[293] Ibid.
[294] Ibid 450–451.

Sadly, Rohatsyskyj considers that the

> Ömie will never develop an ethnic identity based on their pre-contact culture … The discarding of Ömie customs and the realisation on their part of the impotence of their secrets in controlling their history must be seen as a single moment. Ömie literally gave themselves up to another configuration of power in the control of their lives. The demystification of the presence of the colonizer necessitated the demystification of notions of human agency. Ömie have declared themselves as having no further claim to unique knowledge or practices that might affect their economic well-being, but instead stand helpless in the face of complex political and economic relations.[295]

Rohatsyskyj acknowledges, however, that not all hope is lost following colonisation and independence in Papua New Guinea, suggesting that

> [T]he demystification of human agency is not a uniform process throughout Papua New Guinea. Some groups still cling to an alternate conceptualisation of power and human agency, usually in the form of millenarian beliefs and cult practices. Others have found themselves less disadvantaged in the current political and economic setting, and from this dominant position exact reverence for their [traditional practice] by displaying it politically as an inviolable secret. Others still trade their secrets for material gain with the tourist. Then again, there are those who have no use at all for the secrets of their ancestors.[296]

4.2.5 Secret to Cultural Identity

Bok posits

> [S]ecrecy is as indispensable to human beings as fire, and as greatly feared. Both enhance and protect life, yet both can stifle, lay waste, spread out of all control. Both may be used to guard intimacy or to invade it, to nurture or to consume. And each can be turned against itself; barriers of secrecy are set up to guard against secret plots and surreptitious prying, just as fire is used to fight fire.[297]

A loss of secrecy is a loss of power in controlling the flow of Indigenous knowledge.

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[295] Ibid 451.
[296] Ibid 452.
[297] Bok, above n 196, 18.

> Control over secrecy provides a safety valve for individuals in the midst of communal life – some influence over transactions between the world of personal experience and the world shared with others. With no control over such exchanges, human beings would be unable to exercise choice about their lives … In seeking some control over secrecy and openness, and the power it makes possible, human beings attempt to guard and to promote not only their autonomy but ultimately their sanity and survival itself.[298]

Bok suggests that secrecy and openness evoke four distinct elements of human autonomy: identity, plans, action and property. Identity is the sense of what we identify ourselves as, through and with. The depth of human self-respect has been described by social theorists as 'the sacredness of self'. 'This sense also draws on group, familial, and societal experience of intimacy and sacredness, and may attach to individual as well as to collective identity.'[299] In fact, the International Labour Organisation (ILO) has defined Indigenous peoples as:

> Tribal peoples in independent countries whose social, cultural and economic conditions distinguish them from other sections of the national community, and whose status is regarded wholly or partially by their own customs or traditions or by special laws or regulations.[300]

That is, the very reason they are Indigenous is by reference to their *sui generis* customs, traditions and lore; their practices' form embodies their identity. Furthermore, not only does control over polar forces of secrecy and openness preserve identity, it further guards their changes, growth or decay, progress or backsliding, their sharing and transformation of every kind.[301] Secrecy over plans is needed not only to protect them, but for their very formation, variation, execution and discontinuance. Secrecy protects creativity; a symphony, a scientific experiment, an invention, a surprise birthday party, a game of chess. If explained too soon, the plan fails. Once plans are underway, it is then usual that portions of secrecy are surrendered once the advantage of surprise has been leveraged. Secrecy heightens the

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[298] Ibid 20.
[299] Ibid 21.
[300] *International Labour Organisation Convention 169, Regarding Indigenous and Tribal Peoples, for Diplomacy Training Programme*, [1989], art 1, s A.
[301] Bok, above n 196, 21.

value of its polar concept – revelation.[302] Secrets also tend to evoke the proprietary claim of 'belonging' (both individual and collective) and therefore link to our identity. 'With no capacity for keeping secrets and for choosing when to reveal them. Human beings would lose their sense of identity and every shred of autonomy.'[303] They could not make the simplest of plans, their creativity would be stifled, and they could not retain the most fundamental of belongings.[304]

Alongside the value of secrets, it is important not to ignore its inherent dangers. Secrets can cause harm by debilitating judgement, and adversely affecting character and moral choice; secrets can corrupt.[305] Secrecy can lower resistance to the irrational and pathological. Obsession with secrecy can become debilitating.

> When the freedom of choice that secrecy gives one person limits or destroys that of others, it affects not only his own claims to respect for identity, plans, action and property, but theirs. Because it bypasses inspection and elides interference, secrecy is central to the planning of every form of injury to human beings … all deceit does rely on keeping something secret.[306]

'Secrecy and risk are closely connected. Secrecy engenders risk insofar as concealment entails the possibility of unwelcome revelation; non-circulation also creates risks of its own, such as the breakdown of social relations or cultural reproduction.'[307] The contest between concealment and revelation must be closely managed. The protection and empowerment of cultural identity is paramount as human beings, irrespective of race.[308] To this end, the success of any culture requires a careful balance between concealment and revelation.

Dr. Erica Irene Daes, former special rapporteur and chairperson of the Working Group on Indigenous Populations, commented that the heritage of Indigenous persons is not only a collection of objects, stories and ceremonies, but a complete

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[302] Ibid 23.
[303] Ibid 282.
[304] Ibid.
[305] Ibid 25.
[306]Ibid. 26.
[307] Graham M Jones, 'Secrecy' (2014) 43 *Annual Review of Anthropology*. Citing Erin Debenport, 'The Potential Complexity of "Universal Ownership": Cultural Property, Textual Circulation, and Linguistic Fieldwork' (2010) 30(3) *Language and Communication* 204.
[308] United Nations dDeclaration on the Rights of Indigenous Peoples, GA Res 61/295, 61/295, UN Doc A/RES/61/295, 2007, res 13, art 2.

knowledge system with its own language and with its own concepts of epistemology, philosophy and scientific and logical validity, with unique and continuing links to the ecosystem, language and heritage of Indigenous peoples.[309] In fact, Daes posited in 1993 that 'such legal reforms are vital to fair legal order because Indigenous peoples cannot survive or exercise their fundamental human rights as distinct nations, societies, and peoples without the ability to conserve, revive, develop, and teach the wisdom they have inherited from their ancestors'.[310] Secrets enable cultural variance; the very building blocks of Indigeneity.

Now, armed with the context that we each see the world differently due to our unique life experience and that our conceptions of secrecy and our categorisations as secret may differ between ethnicities (section 4.1) and that our secrets are vital to maintaining our core cultural identity as individuals and as peoples' (section 4.2), we are now equipped to examine in the next section the legal and institutional mechanisms to better support Islanders to maintain their *sui generis* cultural secrets.

[309] Battiste, above n 210, 118.
[310] Erica-Irene A Daes, *Study on the Protection of the Cultural and Intellectual Property of IIndigenous Peoples* (UN, 1993) 13.

4.3 Legal Protection of Cultural Secrets

> [T]he legal position of Indigenous people in jurisdictions whose common law is based on the English system is far stronger than has been believed to date, even without any new legal rights or any special status case for Indigenous citizens.
>
> Martin and Jeffrey, 2007.[311]

4.3.1 Introduction

Armed with the knowledge of the nature and incidents of Islander secrecy, and the secrets sought to be protected by it (4.1), and the value of those secrets in the maintenance of their cultural identity (4.2), this part explores legal and institutional mechanisms which may better support Islanders to maintain their cultural secrets, and, in turn, their cultural identity, Indigeneity and cultural subsistence as an Indigenous people.

4.3.2 Privacy vs. Secrecy

At a behavioural science level, secrecy and privacy are inter-related but remain distinctly separate concepts. Notwithstanding, 'privacy is such a central part of what secrecy protects'.[312] Generally, secrecy serves in areas which privacy fails to protect. As Bok posits, one may claim privacy in the contents of a diary; however, they may actively exercise the practice of secrecy by utilising a methodology of concealment, such as hiding it, writing it in code or locking it up.[313] It is not, however, always the case that both secrecy and privacy may appear in the same scenario. For instance, 'a private garden need not be a secret garden; a private life is rarely a secret life. Conversely, secret diplomacy rarely concerns what is private, any more than do arrangements for a surprise party or for choosing prize winners.'[314] *Privacy* is a legal reply to a social practice of *secrecy.* The link between secrecy and privacy for the purposes of this research, is only relevant in assessing the application of remedies flowing out of the Australian privacy regime in this part. I will not attempt, figuratively speaking, to force a round peg (*Yagasin*) through a square hole (eg. Australian privacy regime) so as to evoke legal protection.

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[311] Martin and Jeffery, above n 168, 3.
[312] Bok, above n 196, 13.
[313] Ibid 13.
[314] Ibid 11.

4.3.3 Secrecy vs. Secrets (revisited)

It is useful, at this juncture, to define the precise nature of Indigenous interests sought to be protected. I will briefly revisit the distinction between secret, and the cultural practice of asserting same; secrecy (*Yagasin*) examined in 4.1. Secrets are not in every instance, in and of themselves, cultural practice or elements thereof. As demonstrated in 4.1, secrecy (*Yagasin*) enables the exercise of cultural practice by controlling the flow of sensitive information by concealment and timely and controlled revelation, which facilitates effective knowledge transfer within a society, enabling the subsistence of *sui generis* culture and cultural identity. It is not in every instance that conceptions of Indigenous cultural practice are directly harmed by widespread dissemination of sensitive Indigenous knowledge at large. Take, for example, the unapproved use of an Islander dance routine at the opening ceremony of a televised sporting event, or the adverse disclosure and identification of traditional hunters and their hunting methods, or Government declaration of a public *ailan* adoption registry. In each example, the respective cultural practices of *ailan* dance, hunting, fishing and *ailan* adoption are not adversely affected *per se* because their nature and incidents are not altered, suppressed or impaired by the intervention. They can often continue to be practiced unfettered by adverse disclosure. It would be an entirely different case, however, if, because of the disclosure, government moved to directly ban the cultural practice or modify allowable techniques/methods/ interactions (external interference). Instead, secrets are revealed, but this does not otherwise interfere with the continued cultural practice by Islanders.

Ordinarily, as I will demonstrate in this part, Australian law responds to such external interference by attempting to apply legal (statutory, common law and equitable) mechanisms to provide recourse for the expropriation of secrets, tangible or intangible, typically including remedies such as seeking to restrain the disclosure (ie, by injunction) or by imposing monetary damages for hurt and harm. Appropriate remedy in the case of customary secrets relies upon such mechanisms having sufficient breadth to encompass both majority and minority ideals, values and belief-systems. The effectiveness of these existing legal mechanisms will be explored in this part. Further, I will introduce a fresh line of enquiry, concerning the distinction between protection of the secret, and protection of the practice of concealment and controlled revelation (secrecy/*Yagasin*). I argue that where secrets are revealed

contrary to *Yagasin*, notwithstanding in circumstances where the continued exercise of the underlying cultural practice is largely unaffected, such would still give rise to legal recourse to restrain or effectively compensate for *sui generis* harm. That is, if one cannot obtain recourse for the revelation of a secret, recourse may be sought at law for the dispossession of the right to assert the *sui generis* cultural practice of secrecy over a secret.

4.3.4 Human Rights: Catalyst and Restraint

I considered international law to the extent that it enables or restricts the domestic protection of Islander cultural secrets in Australia. Human rights, as prescribed by international law, are the catalyst and a restraint for domestic protection of cultural secrets.

In 1948, in response to the atrocities of the Holocaust during World War II, the United Nations promulgated the *Universal Declaration of Human Rights* ('*UDHR*'), providing for civil liberties such as life, liberty, security, recourse to legal tribunals; freedom of movement both within and between nations; and freedom from torture and slavery.[315] Australia is a signatory to the *ICCPR,* being a multi-lateral treaty adopted by the United Nations General Assembly, committing its parties to respecting political and civil rights of the individual. Pursuant to article 17 of the *ICCPR*, it is a requirement that all signatory States ensure its incorporation into their respective domestic legal systems.[316] *The United Nations Declaration on the Rights of Indigenous Peoples* ('*UNDRIP'*) was adopted by the United Nations General Assembly on 13 September 2007 with 143 countries voting for its adoption, 11 abstaining and 4 voting against. Australia was one of the four countries voting against the Declaration,[317] although has now announced its commitment to the Declaration objectives.[318] Further, the Intergovernmental Committee on Intellectual

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[315] William S Logan, *Closing Pandora's Box: Human Rights Conundrums in Cultural Heritage Protection. Cultural Heritage and Human Rights* (Springer, 2007) 33–52.

[316] Des Butler, 'A Tort of Invasion of Privacy in Australia' (2005) 29 *Melbourne University of Law Review* 339, 339.

[317] Australian Human Rights Commission. <http://www.hreoc.gov.au/social_justice/declaration/comments.html>.

[318] The Hon Jenny Macklin MP, Minister for Families, Housing, Community Services and Indigenous Affairs, *Statement on the United Nations Declaration on the Rights of Indigenous Peoples*, 3 April 2009 <http://www.jennymacklin.fahcsia.gov.au/internet/jennymacklin.nsf/content/un_declaration_03apr09.htm> (viewed 7 September 2009).

Property and Genetic Resources, Traditional Knowledge and Folklore of the World Intellectual Property Organisation (WIPO) has drafted revised objectives and principles for protection of traditional cultural expressions and traditional knowledge. Article 5 states relevantly:

> [Alt 1
>
> 5.1 [Member States]/[Contracting Parties] [should]/[shall] safeguard the economic and moral interests of the beneficiaries concerning their [protected] traditional cultural expressions, as defined in this [instrument], as appropriate and in accordance with national law, in a reasonable and balanced manner …
>
> [Alt 2
>
> 5.1 Member States should/shall protect the economic and moral rights and interests of beneficiaries in secret and/or sacred traditional cultural expressions as defined in this instrument, as appropriate and in accordance with national law, and where applicable, customary laws. In particular, beneficiaries shall enjoy the exclusive rights of authorizing the use of such traditional cultural expressions.[319]

Furthermore, the *Nagoya Protocol on Access to Genetic and the Fair and Equitable Sharing of Benefits Arising from their Utilisation to the Convention on Biological Diversity* ('*Nagoya Protocol*'), entered into force on 12 October 2014, to which Australia intends to become a party, sets requirements to ensure that in the collection of information on the sources of genetic resources, Indigenous consent has been given to its use.[320] There are other international conventions and declarations dealing with Indigenous knowledge issues, [321] but these are not directly relevant to the argument being developed in this thesis.

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[319] WIPO/GRTKF/IC/39/5 of 20 December 2018, art 5.

[320] *Nagoya Protocol,* art 17.

[321] *Convention for the Safeguarding of the Intangible Cultural Heritage*, 2003 (International Convention); *Convention (No 169) Concerning Indigenous and Tribal Peoples in Independent Countries*, 1991 (International Convention) (not ratified by Australia); *Rio Declaration on Environment and Development,* 1992 (International Convention); and *The Convention on Biological Diversity,* 1992 (International Convention) arts 8(j) and 10(c) (which was ratified by Australia in 1993, implemented through the *Environment Protection and Biodiversity Conservation Act 1999* (Cth)); *United Nations Declaration on the Rights of Indigenous Peoples*, 1994 (International Convention) ('*UNDRIP*') art 29.

As the catalyst for domestic protection of cultural secrets, the *UNDRIP* prescribes, in the context of cultural practice, the right, free from discrimination, to exercise Indigenous rights,[322] to seek cultural development,[323] to exercise a right to self-determination to self-manage Indigenous affairs,[324] to maintain and strengthen distinct cultural institution,[325] to be free from being subjected to forced assimilation or destruction of culture,[326] to belong in accordance with traditions and customs of the community or nation,[327] to practice and revitalize cultural traditions and customs,[328] to manifest, practice, develop and teach spiritual and religious traditions, customs and ceremonies,[329] and to maintain and strengthen spiritual connection with land and waters.[330]

Unlike treaties and conventions executed by member-States of the General Assembly,[331] declarations are non-binding; however, they set moral principles to be followed and incorporated into the domestic law of each member State, reflecting normative international law. Supported by mechanisms such as the *Nagoya Protocol* regarding the protection of genetic resources, the scope of protection potential becomes clearer. As for restraint that relates to the domestic protection of cultural secrets, the *UDHR* and *ICCPR* set minimum standards of acceptable behaviour, outlawing cultural practice which fall below these standards, such as genital mutilation, child marriage, slavery etc.

Human rights, as prescribed by international law, therefore, provide both the catalyst, and the restraint, for domestic protection of cultural secrets, and cultural practice more broadly. That is, international standards prescribe what *sui generis* interests can and must be protected at domestic law (the catalyst) and what interests cannot (the restraint). It is beyond the scope of this dissertation to assess interest by interest what can and cannot be protected at international law; however, suffice to say that the examples of *Yagasin* provided in 4.1 of this dissertation, with the exception of

[322] *UNDRIP*, art 2.
[323] Ibid art 3.
[324] Ibid art 4.
[325] Ibid art 5.
[326] Ibid art 8.
[327] Ibid art 9.
[328] Ibid art 11.
[329] Ibid art 12.
[330] Ibid art 25.
[331] United Nations Human Rights <http://www2.ohchr.org/english/law/>.

witchcraft and sorcery (*Maid),* would likely qualify for legal protection and should, therefore, be reduced to effective legal protection domestically in Australia. I will consider options for effective legal protection of Islander cultural secrets in the following sub-sections.

4.3.5 Protecting Secrets

> Having been robbed of elements of their culture, language, and artefacts and the power to control the promulgation of their own images, native peoples seek an intellectual property regime in which control is pre-eminent. They seek a system where their need to control knowledge and preserve culture will be respected, as well as one in which they are the beneficiaries of any market-based exploitation of their knowledge and not, as in the past, the victims.
>
> Barry S Mandelker [332]

The sub-section considers legal and institutional mechanisms for the protection of cultural secrets. It is based on doctrinal analysis of legal and institutional mechanisms available in Australia, which are, or may be, applied towards supporting Islanders to better protect their cultural secrets. These mechanisms include the statutory, common law, and equitable regimes of intellectual property (including confidential information and moral rights), privacy and equitable estoppel, misleading and deceptive conduct and unjust enrichment, concluding with a proposed fresh approach founded in Native Title.

4.3.5.1 Intellectual Property

Intellectual property law has been purposefully separated in this sub-section from privacy law. The two concepts are often erroneously conflated but are disparate, particularly in their application to the protection of Indigenous interests.

Australian Statutory Regime

'Western concepts of intellectual property are premised on the notion that ideas, innovations and inventions, expressed through various material forms, can be owned, and that individuals have distinct property rights to these forms of creative

[332] Barry Steven Mandelker, 'Indigenous People and Cultural Appropriation: Intellectual Property Problems and Solutions' (2000) 16 *Canadian Intellectual Property Review.* 367.

expressions and products.'[333] Intellectual property laws aim to protect rights of individuals to literary and artistic property, as well as industrial property. The 1967 Convention Establishing WIPO, article 2(viii) defines 'intellectual property' as rights pertaining to:

1. Literary, artistic and scientific works;
2. Performances of performing arts, phonograms and broadcasts;
3. Inventions in all fields of human endeavour;
4. Scientific discoveries;
5. Industrial designs;
6. Trademarks, service marks, and commercial names and designations;
7. Protection against unfair competition; and
8. All other rights resulting from intellectual property activity in the industrial, scientific, literary and artistic fields.[334]

The majority of intellectual property law protections in Australia are codified in Federal statute.[335] Each will now be briefly canvassed.

Copyright

Copyright law in Australia is based on the *Copyright Act 1968* (Cth) enacted 1 May 1969. Copyright is the right to reproduce or copy a particular form of expression, and the right to prevent others from doing so absent authority of the copyright owner.[336]

The *Copyright Act* seeks to protect copyright, defined by McKeough as 'a form of property, a personal right, or a combination of both'.[337] Copyright law 'protects the form of expression of ideas, or the way in which ideas are expressed in a literary, artistic, dramatic or musical form, as well as in the form of cinematographic films and broadcast signals'. Golvan states that the *Copyright Act*, 'thus founds the basis upon which creators of such forms of ideas can claim monopoly rights in them'.[338]

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[333] Department of Parliamentary Library, 'Indigenous Peoples and Intellectual Property Rights' (Research Paper No. 20 1996-97) 6.
[334] Ibid citing Jill McKenough (ed), below n 337, 1–2.
[335] *Patents Act 1990* (Cth); *Trademarks Act 1955* (Cth); *Designs Act 1906* (Cth); *Plant Breeders Rights Act 1994* (Cth); *Copyright Act 1968* (Cth).
[336] Clive Turner, *Australian Commercial Law* (LBC Information Services, 2001).
[337] Jill McKenough (ed), Blakeney and McKeough, Intellectual Property: Commentary and Materials, (Law Book Company, 2nd ed, 1992) 13.
[338] Colin Golvan, *An introduction to intellectual property law* (Wm Gaunt & Sons, 1992). at p1

Both published and unpublished works are protected. Works do not need to be registered to be afforded copyright protection in Australia. The term of copyright protection is limited to the life of the author, plus 70 years.[339] Copyright subsists in literary, dramatic, musical or artistic work if it is original, and connected with Australia.[340] The work must originate from the author as a result of his/her skill, labour and judgement and is not copied from another.[341] The author must be an individual who is an Australia citizen, an Australian protected person, or a person resident in Australia,[342] although foreign works of member nations are also protected. However, copyright does not require that the works be novel or new ideas.[343] Copyright does not protect ideas as such but only the expression in which they are embodied. That is, an idea must be reduced to an original expression.[344]

The author of work is, at the first instance, the owner of the copyright in the work.[345] Copyright typically precludes communal copyright ownership in an artistic work; however, as will be seen in case examples, equity will restrain infringement where an artist incorporates into his or her artistic work the ritual knowledge belonging to an Indigenous community, where the work is later exploited by others, if the artist or copyright owner fails to take appropriate action to enforce copyright.[346] The remedies for copyright breach include injunction, damages or an account of profits, additional damages, damages for conversion, and delivery up of infringing copies.[347]

Moral Rights

Moral rights are an emerging aspect of intellectual property in Australia, formally introduced in the *Copyright Act* in the year 2000[348] becoming an issue most often in a contractual scenario where one acquires traditional copyright (economic rights) from the author, or at the very least a license to use the works or film, however the author retains three actionable moral rights:

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[339] *Copyright Act* s 33(2).
[340] *Copyright Act* s 32.
[341] *University of London Press Ltd v University Tutorial Press* [1916] 2 CH 601; *Ladbroke (Football) Ltd v William Hill (Football) Ltd* [1964] 1 WLR 273 (HL).
[342] *Copyright Act* s 32.
[343] Turner, above n 336, 844.
[344] *Donoghue v Allied Newspapers Ltd* [1938] 1 Ch 106.
[345] *Copyright Act (Cth)* s 35(2).
[346] *Bulun Bulun v R & T Textiles Pty Ltd* (1998) 86 FCR 244.
[347] *Copyright Act* ss115–116.
[348] *Copyright Amendment (Moral Rights) Act 2000* (Cth)

1. the right to be identified as the author of the work (the right of attribution);[349]
2. the right not to have a person falsely assert or imply that they are the author of a work (the right not to have authorship falsely attributed); [350] and
3. the right not to have their work subjected to derogatory treatment which is prejudicial to their honour or reputation (the right of integrity of authorship).[351]

Only individuals have moral rights.[352] The duration of an author's moral rights in works and performances is the duration copyright subsists in the works. The moral rights of integrity of authorship for film and performership continue until the author dies.[353] Remedy for infringement of moral rights via civil action may include:

- an injunction;
- damages for loss resulting from the infringement;
- a declaration that a moral right of the author has been infringed;
- an order that the defendant make a public apology for the infringement;
- an order that any false attribution of authorship, or derogatory treatment, of the work be removed or reversed.[354]

In such an action, the subsistence of copyright is presumed to exist unless the defendant puts the question in issue.[355]

Designs

The law of designs is regulated under the *Designs Act 1906* (Cth). To be afforded protection, a design must be registered in the Register of Designs. Design law concerns the protection of visual form of articles, not with how they work, which is the focus of Patent protection. A design is defined as meaning features of shape, configuration, pattern, or ornamentation applicable to an article, being features that, in the finished article, can be judged by the eye.[356] The design must be new or

[349] Copyright Act pt IX, div 2 and 2A.
[350] *Copyright Act* pt IX, div 3 and 3A.
[351] *Copyright Act* pt IX, div 4 and 4A.
[352] *Copyright Act* s 190.
[353] *Copyright Act* ss 195AM and 195ANA.
[354] *Copyright Act* ss 195AZA and 195AZGC.
[355] *Copyright Act* ss 195AZE and 195AZGD.
[356] *Designs Act* s 4.

original.[357] The creator of the design is the owner of the design, subject to alternate commission via contract.[358] Statutory protection is permitted for five years with a further five years upon renewal to a maximum of ten years.[359] Remedies for infringement include an injunction, damages or account for profits.

Patents

Patent law is regulated by the *Patents Act 1990* (Cth) and *Patents Regulations 1991* (Cth). Patents are granted to protect inventions, and as with other intellectual property rights, the law grants a limited monopoly to the patent owner in return for the disclosure of the invention. The grantee then receives exclusive right to exploit his or her monopoly for the term of the patent. On expiry of the patent, the invention falls into the public domain and may be used by anyone without infringement. The term of a standard patent is 20 years,[360] and for an innovation patent it is eight years.[361] For a patent to be registrable, it must be a manner of manufacture, novel (new), involve an inventive step, be useful and not have been used secretly before.[362] Remedies for infringement include injunction, damages or account for profits.[363]

Trade Marks

Trade mark is a relatively modern form of legislated intellectual property right, although there were earlier craftsperson's marks, such as those on silver and gold; whereas patent and copyright arose later out of the industrial and print revolutions.[364] Trade marks in Australia are regulated by the *Trade Marks Act 1995* (Cth). A trade mark is a distinctive symbol, distinguishing a trader's goods and services from those of others.[365] Central to trade marks is the requirement for a 'sign', defined in the *Trade Marks Act* as 'any letter, word, name, signature, numerical, device, brand, heading, label, ticket, aspect of packaging, shape, colour, sound or scent'.[366] Trade

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[357] *Designs Act* s 17; *D Sebel & Co Ltd v National Art Metal Co Pty Ltd* (1965) 10 FLR 224.
[358] *Designs Act* s19; *Chris Ford Enterprises Pty Ltd v B H & J R Badenhop Pty Ltd* (1985) 7 FCR 75.
[359] *Designs Act* ss46 and 47.
[360] *Patents Act* ss 65, 67.
[361] *Patents Act* s 68.
[362] *Patents Act* s18(1); *NV Philips Gloeilampenfabrieken v Mirabella International Pty Ltd* (1995) 183 CLR 655.
[363] *Patents Act* s122(1),
[364] Margaret Ann Wilkinson, 'Confidential Information and Privacy-Related Law in Canada and in International Instruments' (2010) 276 citing Ronald V Bettig., *Copyrighting Culture: The Political Economy of Intellectual Property* (Westview Press, 1996).
[365] *The Trade Marks Act* s17.
[366] Ibid s 6.

Marks must be registered in order to attain protection,[367] providing the registered owner the right to use the trade mark, authorise others to use it, and to obtain use from infringement.[368] An application for registration of a trade mark may be rejected if:

- The trade mark cannot be represented graphically;[369]
- The trade mark does not distinguish the applicant's goods or services;[370]
- The trade mark is likely to deceive or cause confusion;[371]
- The trade mark is substantially identical to another for similar goods or services;[372]
- The trade mark contains scandalous matter;[373] or
- The trade mark's use would be contrary to law.[374]

The registration of a trade mark is valid for 10 years, and may be renewed indefinitely in 10-year blocks.[375] Infringement of a trade mark occurs where a person who uses as a trade mark, a sign that is substantially identical with, or deceptively similar to, a trade mark in relation to goods or services in the realm in which the trade mark is registered.[376] Remedies for infringement of trade mark include injunction to restrain the infringement and the option of either damages or an account of profits.[377]

Australian Common Law

Confidential Information

The tort of breach of confidentiality is distinctly an equitable remedy. The remedy exists 'where one person imparts information to another in confidence and the latter uses said information for his or her own purposes or discloses it to third parties without permission'.[378] There is no requirement to register confidential information

[367] Ibid s 19.
[368] Ibid s 20.
[369] Ibid s 40.
[370] Ibid s 41.
[371] Ibid s 43.
[372] Ibid s 44(1), (2).
[373] Ibid s 42.
[374] Ibid s 42.
[375] Ibid s 72(3), 77.
[376] Ibid s 120(1).
[377] Ibid s 126.
[378] Turner, above n 336, 919

(unlike many intellectual property mechanisms already discussed). Generally, confidential information concerns commercial, industrial or scientific 'trade secrets' in business, including such confidential information as manuals,[379] techniques, processes formulae and customer lists. Confidential information has also been used to limit the disclosure of government documents or information of a personal nature,[380] as well as Aboriginal tribal secrets disclosed by an archaeologist.[381] As such, the tort of confidentiality is often considered more aligned to an equitable intellectual property remedy, than a privacy law remedy. That said, I will consider. in the Privacy section of this sub-section, the evolution of the tort of breach of confidence in Australian and the United Kingdom jurisdictions to a new form of tort of invasion of privacy.

In order to succeed in an action for breach of confidence, the plaintiff must prove:

1. The information had the necessary quality of confidence about it; it must be confidential or secret in nature and not public property or public knowledge. Where the plaintiff makes known to the public, in its entirety or in part, the confidential information or secret, protection shall be lost.[382]
2. The information must be imparted in circumstances where the recipient knowns, or ought reasonably to have known, that the information is confidential.[383]
3. An unauthorised use of the information so imparted. [384]

Remedies available for breach of confidence include injunction to restrain the breach, and a choice by the plaintiff of damages[385] or an account of profits.[386] The tort of breach of confidentiality applies to relationships of trust. That is, a fiduciary relationship must exist which is 'founded on trust or confidence reposed by one person in the integrity and fidelity of another'.[387] The breach of confidentiality,

[379] *Warman International v Envirotech Australia Pty Ltd* (1986) 11 FCR 478.
[380] *Argyll v Argyll* [1967] 1 Ch 302.
[381] *Foster and others v Mountford and Rigby Ltd* (1977) 14 ALR 71.
[382] *O Mustard & Son v Dosen* [1964] 1 WLR 109.
[383] *Coco v A N Clark (Engineers) Ltd* [1969] RPC 41.
[384] *Ansell Rubber Co Pty Ltd v Allied Rubber Industries Pty Ltd* [1967] VR37.
[385] *Talbot v General Television Corp Pty Ltd* [1980] VR 224.
[386] *Peter Pan Manufacturing Corp v Corsets Silhouette Ltd* [1964] 1 WLR 96.
[387] Daniel J Solove, 'A Taxonomy of Privacy' (2005) 154 *University of Pennsilvania Law Review* 477, 525 citing *Mobil Oil Corp v Rubenfeld*, 339 NYS 2d 623, 632 (Civ. Ct. 1972).

therefore, goes further than a mere disclosure of information; there must be an element of betrayal. The tort helps promote relationships which depend on trust.[388] The leading common law authority in Australia for the application of the tort of breach of confidentiality (in the Indigenous rights space), is *Foster and Others v Mountford and Rigby Ltd* ('*Foster*).[389]

Foster and Others v Mountford and Rigby Ltd ("*Foster*").[390]
Breach of confidentiality – Indigenous secrets

The 1976 case concerned Mr Charles Pearcy Mountford, author and Rigby the publisher of *Nomads of the Australian Desert.*[391] The book documented details and pictures of secret Aboriginal ceremonies of Central Australian Aboriginal peoples. The details were revealed to Mountford some 35 years prior during his research. Members of the Pitjantjatjara Council on behalf of the communities concerned commenced *ex parte* proceedings seeking injunction in the Supreme Court of the Northern Territory to prevent publication of the book in the Northern Territory. The case applied the equitable doctrine of confidential information.

Charles Pearcy Mountford was an electrical mechanic by trade, working for the Adelaide Municipal Tramways Trust and then for the Postmaster-General's Department in Adelaide from 1913 to 1920. He became interested in Aboriginal culture when appointed as senior mechanic at the Darwin Post Office in 1920, publishing his first paper in 1926 on Aboriginal Rock Carvings with entomologist Norman Tindale of the South Australia Museum. In 1935 Mountford participated in an expedition to the West Australian Warburton Range with Tindale with the support of the Board for Anthropological Research of the University of Adelaide, as well as subsequent expeditions in South Australia, Northern Territory, Western Australia and Queensland over three decades of fieldwork.[392] Mountford retired in 1955 and only then pursued formal qualification in anthropology from the University of Cambridge in 1959 and an MA from the University of Adelaide in 1964, followed by

[388] Ibid 525.
[389] (1976) 14 ALR 71
[390] Ibid.
[391] Charles Pearcy Mountford, *Nomads of the Australian Desert* (Adelaide, Rigby, 1976).
[392] Christoph Antons, 'Foster v Mountford: Cultural Confidentiality in a Changing Australia' (Faculty of Law Papers, Wollongong University, 2009) 111.

many honorary awards and two honorary doctorates from the University of Melbourne in 1973 and University of Adelaide prior to his death in 1976.[393]

Mountford's films and photographs were often used by Anthropologists around the world to describe Aboriginal culture in Australia. Ronald and Catherin Berndt in their works entitled *'The World of the First Australians,'*[394] wrote in their forward:

> In tackling this problem, we have tried to keep in mind two issues; one, the need to provide at least some material of this kind to give breadth and understanding to the study of Aboriginal society and culture, since omission of it could be detrimental to any broader appreciations; and, two, the need to delete those features which could conceivably provide offensive to traditional Aborigines living in situations where their religion is a living reality. To achieve more rapprochement in this respect, between two seemingly incompatible aims, has proved extremely difficult … However, to the best of our ability we have withheld secret-sacred knowledge of a detailed kind, although we have at the same time provided fragmentary glimpses into some of those aspects – but, in our opinion, in such a way as not to give the uninitiated access to them … There seems to be a major difference here between not revealing non-accessible material, and discussing the overall significance of that material. Also, we do not include in this volume any photographs of secret-sacred ritual.[395]

Foster was decided in a changing social climate towards Aboriginal rights, preceded by Aboriginal movements towards obtaining welfare benefits, equal pay for Aboriginal pastoral workers and the right to vote following the national referendum in 1967. The Commonwealth exercised powers to legislate for Aboriginal peoples from the more conservative States and Territories, effectively taking a lead role in the national administration of Indigenous affairs.[396] *Foster* is authority in Australia which departed from traditional conservative application of the equitable doctrine of confidential information in *Prince Albert v Strange,*[397] extending the doctrine beyond mere trade secrets and private secrets of celebrities, to Aboriginal cultural secrets.

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[393] Ibid 112.

[395] Antons, above n 392, 115 citing Ronald Murray Berndt and Catherine Helen Berndt, *The world of the first Australians* (Adelaide: Rigby, 1985) pp XVI–XVII.

[396] Ibid.

[397] (1849) 18 LJ Ch 120.

The case establishes a notion of 'relative secrecy, where the information is known and distributed among "insiders" but remains protected from "outsiders"'.[398] This is the first case in Australia to also find a cause of action on 'breach of cultural privacy' under the tort of breach of confidentiality.

In *Foster,* Muirhead J decided to grant the injunction to prevent the distribution of *Nomads of the Australian Desert* to the Northern Territory. At the time of the decision, it was acknowledged by Muirhead J that limiting distribution to jurisdictional boundaries of the Northern Territory would be insufficient given the scattering of Pitjantjatjara lands over the border. The Pitjantjatjara Council, as applicant, was, however, satisfied with the orders and consented. It is clear that the geographical limits placed in *Foster,* in the digital and technological age, are no longer satisfactory.

An important cloud remains over the decision of *Foster* in that the question of standing of the Pitjantjatjara Council was never answered given the limited injunctive and *ex parte* nature of the proceedings. It is an established principle that the party to whom confidence is owed is the appropriate plaintiff.[399] Muirhead J was satisfied that as some members of the Pitjantjatjara Council remembered Mountford from his visit, indicating that Mountford may have regarded the Pitjantjatjara Council at least partly identical to the Aboriginal Elders who imposed the confidence to keep their tribal knowledge secret on Mountford some 35 years earlier. Muirhead J also found that the plaintiffs were entitled to proceed as individuals who were threatened with damage, and that this was not a case for relator action brought in the name of the Attorney-General to prevent public nuisance.[400] Muirhead J also raised that Mountford could raise the well-established public interest defence, stressing his right to publish and distribute.

The Australian intellectual property regime seeks to provide statutory protection for:

- an original idea embodied in material form, originating from author(s)'s own original expression (copyright);

[398] Antons, above n 392, 116.
[399] Ibid. 119 citing *Fraser v Evans* [1969] 1 All ER 8.
[400] Ibid. 119.

- a new and original visual form of articles, originating from creator(s) (designs);
- a new, inventive, and useful, manner of manufacture (patents);
- a distinctive sign, represented in graphical form, distinguishing a trader's goods or services from those of others (trade marks); and
- unauthorised use of information imparted in circumstances of confidence (confidential information).

All mechanisms, other than copyright and related rights, confidential information and passing off, require the disclosure of the protected property by way of registration, to afford it protection. Trade marks require use in trade and commerce. Much (but not all) Indigenous knowledge is not new, or inventive in the forms required by law. For instance, most Indigenous knowledge is generally not protected at law because:

1. they are not a manner of manufacture (patents);
2. there is no newly invented method (patents), original idea embodied in material form (copyright), or new and original visual form (designs) as traditional methods span thousands of years.
3. they do not distinguish trade (trade marks);
4. circumstances of confidence are difficult to prove (confidential information);
5. they lack novelty and inventive step (patents). Once published, novelty is lost. To this end, Indigenous people have found it difficult to patent genetic resources given in many instances, these form part of the "prior art base" from prior publication by ethnobotanists and ethnopharmacologists. A patent cannot be registered over something already in the public domain,[401] nor if it is in the prior art base.

Apart from trade marks and confidential information, statutory protection is finite. Remedies are roughly the same for each: an injunction to restrain the breach, and either damages or an account of profits. Distinction must be drawn between intellectual property and cultural property and cultural heritage. McRae posits:

> Indigenous people define their cultural heritage as the totality of cultural practices and expressions which belong to them collectively, by virtue of their

[401] Terri Janke, *Our Culture, Our Future: Proposals for Recognition and Protection of Indigenous Cultural and Intellectual Property* (Australian Institute of Aboriginal and Torres Strait Islander Studies, 1997) 65–67.

> birthright. Such cultural practices and expressions are continuously evolving and comprise both intangible and tangible elements. However, legislatively, Australia governments have tended to interpret cultural heritage much more narrowly.[402]

In the context of protection of Indigenous *sui generis* interests, Australia's statutory intellectual property regimes have been criticised for:

1. being commercially-focussed;
2. promoting the commodification of cultural products and expressions at the expense of Indigenous and local cultures;
3. a lack of awareness in Indigenous communities as to Western intellectual property rights;
4. costly enforcement for intellectual property infringement;
5. time-consuming exercise for enforcement of infringement;
6. being highly-technical in nature; and
7. ignoring the complexities of Indigenous systems, eg, individual versus communal ownership.[403]

Australian case law examples demonstrate the limitation of statutory intellectual property law for the protection of *sui generis* Indigenous interests in Australia.

***Yambulul v Reserve Bank of Australia* ('*Yambulul*')[404]**

Copyright – exclusion of communal copyright

The 1991 Federal Court of Australia decision of *Yambulul*, concerned the issue of commemorative bank notes by the Reserve Bank of Australia reproducing the design of a Morning Star Pole created by Terry Yumbulul, an Aboriginal Artist. In addition to the copyright aspects of the case, it was tendered in evidence that Morning Star Poles had a central role to play in Aboriginal ceremonies, commemorating the death of important persons and in inter-clan relationships. The Court found the pole to be an artistic work of Mr Yumbulul under the *Copyright Act,* but that the artist's copyright had been validly assigned by Mr Yumbulul to the defendent. The claim for breach of copyright was dismissed.

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[402] McRae et al, above n 102, 384–385.
[403] Department of Parliamentary Library, above n 333, 9.
[404] (1991) 21 IPR 481.

The Galpu Clan, of which Mr Yambulul was a member, guarded the right of a person to make a Morning Star Pole. Mr Yambulul had to pass many levels of traditional initiation and ceremony to learn the designs and meaning, before he was permitted to reproduce the pole. The reproduction of the pole on the commemorative bank note made Mr Yambulul the subject of much criticism by his tribe as he had a cultural obligation to ensure the reproduction remained private.[405] Mr Yumbulul was unsuccessful in seeking to set aside the assignment of his copyright on the ground of unconscionability.

The importance of the case, in the context of copyright in Indigenous works, was that copyright was found to exist in an individual, but not communally. Furthermore, that individual had the power (at law) to unilaterally assign or license such rights of reproduction to others, notwithstanding that such assignment occurred contrary to Aboriginal traditional *lore* and custom. It was acknowledged by French J presiding, that 'it may be the case that Australia's copyright law does not provide adequate recognition of Aboriginal community claims to regulate the reproduction of use of works which are essentially communal in origin'.[406]

***Milpurrurru v Indofurn Pty Ltd* ('*Milpurrurru*')[407]**

Copyright – extent of damages

The case of *Milpurrurru* concerned the importation into Australia of carpets woven in Vietnam incorporating Aboriginal designs. The applicants were three Aboriginal artists and the Public Trustee claiming on behalf of the estates of five deceased Aboriginal artists. Each of the artists had works which were either reproduced in portfolios of Aboriginal art which were produced for the Australia National Gallery (the ANG) or in portfolios published by the Australia Government Printer for the Australia Information Service (the AIS). Four artists were leading exponents of bark paintings, illustrating legends of peoples of Central Arnhem Land. Three artists painted legends in the *Papunya* style from the western desert areas of Central Australia and the final artist was a lino cut artist who was the first Aboriginal person appointed to the ANG and also to the Board of the Northern Territory Museum and

[405] Ibid, 484 (*Yambulul*).
[406] Ibid, 490 (*Yumbulul*); B A Michael Blakeney, 'Milpurru and Ors V Indofurn Pty Ltd and Ors-Proecting Expressions of Aboriginal Folklore un Copyright Law', (1995) 2 (1) *Murdock University Electronic Journal of Law*.
[407] Unreported, 13 December 1994.

Art Gallery. It was argued that eight reproduced works infringed upon the copyright of the Aboriginal artists as being virtually identical in form and colour. The final artwork was substantially reproduced, albeit in a more simplified form.

Evidence was tendered that the original works were authorised for publication in the ANG portfolio and the AIS publication, designed for education purposes for the non-Indigenous population in Aboriginal culture. In those authorised publications, the descriptions of the works made clear the subject matter of the works and stories of spiritual and sacred significance. It was further argued by the artists that the painting techniques and the use of totemic and other images and symbols were in many instances and invariably in the case of importance, creation stories, strictly controlled by Aboriginal *lore* and custom. It was argued by the applicants that errors in reproduction could cause significant offence to persons of the tribe. It was argued that the right to reproduce artworks depicting creation and dreaming stories and to use pre-existing designs and clan totems resided in the traditional custodies of the stories.[408] It was asserted by the applicants that under Aboriginal *lore*, where unauthorised reproduction occurred, it was the responsibility of traditional owners to take action to preserve the dreaming and to punish those responsible for the breach. Under traditional *lore* and custom, punishment may have historically included death, but in more recent times, preclusion from the right to participate in ceremony and removal of the right to reproduce stories, as well as in some cases spearing or ostracism.[409]

Milpurrurru is authority for the common law position in Australia that where the unauthorised reproduction of works involves a breach of copyright, Indigenous *lore* on the subject may be considered in quantifying the damage suffered to the Aboriginal custodians. The measure of damages in copyright infringement is on a conversion basis for those items not delivered-up.[410] Ordinarily in copyright, the measure of damages is related to the depreciation of the value of the copyright as a chose in action.[411] It was recognised in *Milpurrurru,* that there was little evidence of the likelihood of any monetary loss being suffered due to the infringement of

[408] Department of Parliamentary Library, above n 333.
[409] Ibid.
[410] *Milpurrurru* Transcript, 71.
[411] *Sutherland Publishing Co. Ltd v Caxton Publishing Co. Ltd* [1936] 1 Ch 323 per Lord Wright MR at 336

copyright. Instead, the artists suffered exploitation in the reproduction beyond the scope of license for education publications to commercial products such as carpets. Accordingly, a modest award of damages was made to the artists given the lack of economic loss to reflect the deleterious effect of the carpets on the reputation of the artworks. His honour did recognise, however, that damages sustained by the artists, extended beyond commercial potential for monetary return, acknowledging personal distress and potential exposure of artists to embarrassment and contempt within their communities, if not the risk of diminished earnings and physical harm.[412]

To provide context to the damages sustained to the artists, examples were provided in the case of one of the artists, Ms Marika, who depicted the story of *Djanda* and the Sacred Waterhole. This painting was reproduced without authority on the carpets. The story concerned her ancestral creator *Djang'Kawu* and his two sisters, the *Wagilag* sisters at the end of their journey from *Burralku* to *Yelangbara*. Her right to use the imagery arose from her membership with the *Yolgnu* Clan, the land owner group for the area. Ms Marika stated in her affidavit that 'as an artist, whilst I may own copyright under western law, under Aboriginal law I must not use an image or story in such a way as to undermine the rights of all the other *Yolgnu*'. Reproduction of the artwork in circumstances where the dreaming would be walked on was totally opposed to the cultural use of the imagery in her artwork. Misuse of the artwork, if it came to the attention of her *Yolgnu* family, would have been subject to sanctions ranging from outcast to a prohibition against further artistic production. This damage was to be taken into consideration in the quantification of an award of damages.[413] Applying the United Kingdom case of *Williams v Settle,*[414] his honour found that 'anger and distress suffered by those around the copyright owner constitute part of that person's injury and suffering'.[415]

The names of the deceased artists could not be spoken at trial and instead were referred to by this skin names. Given, for the most part that the deceased artists were unaware of infringements, the trial judge was not prepared to make an award of damages for personal harm suffered. His honour found that 'the statutory remedies

[412] *Milpurrurru* Transcript at 76.
[413] *Milpurrurru* Transcript, 78.
[414] [1960] 1 WLR 1072, 1086–1087.
[415] *Milpurrurru* Transcript, 78.

do not recognise the infringement of ownership rights of the kind which reside under Aboriginal law in the traditional owners of the dreaming stories and the imagery such as that used in the artworks of the present applicant'.[416] However, his honour did apply s115(4) of the *Copyright Act* providing for additional grant of damages in the case of flagrant infringement.[417]

The trial judge awarded an amount of $1500 per artwork against each of the respondents under s115(2) of the *Copyright Act*, reflecting the low quantum of damage attributable to the commercial depreciation suffered, however also awarded $70 000 under s115(4) as exemplary damages to be apportioned $15 000 to each of the living applicants to 'reflect the harm suffered … [by them] in their cultural environment'.[418] Each of the deceased estates were awarded $5000 each.

Milpurrurru recognised traditional Aboriginal concerns in the protection of artistic works against unauthorised use, from purely commercial loss to personal harm suffered. Again, the focus was, however, on the individual artist, and not upon harm suffered by the traditional custodians.

***John Bulun Bulun v R & T Textiles Pty Ltd* ('*Bulun Bulun*')[419]**

Copyright - Trade Practices - Nuisance - Fiduciary Duties - Constructive Trust

Proceedings were commencing in 1996 by Mr Bulun Bulun and the second applicant, Mr Milpurrurru, both Aboriginal artists. The respondents were R & T Textiles Pty Ltd and its three Directors. Mr Bulun Bulun sought remedy for alleged copyright infringement in his works being reproduced without a licence nor assignment on fabric under the *Copyright Act,* misleading and deceptive conduct under the *Trade Practices Act 1974* (Cth), and nuisance. Mr Milpurrurru brought proceedings in his own right against the respondents as representative of the traditional Aboriginal owners of *Ganalbingu* country, Arnhem Land, in the Northern

[416] *Milpurrurru* Transcript, 66.
[417] See also *Williams v Settle* [1960] 1 WLR 1072, a case concerning the sale of photographs by a wedding photographer of a plaintiff whose father had been notoriously murdered, with damages awarded to reflect flagrancy where infringement did not cause economic loss. Award of exemplary damages were appropriate where there was a 'total disregard not only of the legal rights of the plaintiff regarding copyright but of his feelings and his sense of family dignity and pride. It was an intrusion into his life, deeper and graver than an intrusion into a man's property.' (at 1082, per Sellers LJ).
[418] *Milpurrurru* Transcript, p86.
[419] (1998) 41 IPR 513.

Territory of Australia claiming that the traditional owners of *Ganalbingu* country are equitable owners of copyright subsisting in the works.

Upon commencement of Mr Bulun Bulun's proceedings, the respondent accepted infringement, immediately withdrawing the offending fabric from sale, notwithstanding that some 7600 metres had already been exported, and 4231 metres sold in Australia. The respondent went into administration on 27 June 1996 and on 5 July 1996, receivers and managers were appointed. Mr Bulun Bulun subsequently settled the litigation with permanent injunctions agreed and acknowledgement of Mr Bulun Bulun's copyright in the works. However, Mr Milpurrurru continued his claim on behalf of the traditional owners. The amended statement of claim stated that the *Ganalbingu* people were the traditional Aboriginal owners of the corpus ritual from which the artwork is derived, including in the artistic work itself. It was argued by Mr Bulun Bulun that the continuity of his people's traditions and ways including their traditional Aboriginal ownership depends upon their respecting and honouring the things entrusted to them by their creator (*Barda*). Mr Bulun Bulun describes that responsibility is passed down generation to generation, precisely as directed by *Barda*. Unauthorised reproduction of 'at the Waterhole' threatens the whole system and the ways that underpin the stability and continuance of their society.

Mr Milpurrurru's equitable claim was rejected by the Federal Court, although it did find that where there were equitable interests in the work, that might assist in the protection of cultural interests.[420] In fact, his Honour found that had Mr Bulun (as the author) not sought to enforce his copyright in the works, Mr Milpurrurru on behalf of the traditional owners may have an equitable remedy to restrain infringement of Mr Bulun Bulun's copyright. Furthermore, his Honour found the existence of a relationship of trust (fiduciary relationship) as between Mr Bulun and the traditional owners such that he may not exploit the artistic work in a way contrary to the laws and custom of the *Ganalbingu* people. However, this deemed fiduciary relationship does not vest ownership of copyright in the works itself. Instead, their primary right, in the event of infringement of Mr Bulun Bulun's copyright (as fiduciary), was to bring action against the fiduciary to enforce his obligation to enforce his intellectual property rights (in which the traditional owners held an equitable interest). In the

[420] *Bulun Bulun,* 526–532.

present case, however, Mr Bulun Bulun has enforced his rights and successfully restrained infringement via injunction. To this end, Mr Milpurrurru had no further recourse. Absent such a copyright owner's acceptance of such fiduciary relationship, and failure to enforce his copyright, equity may impose a constructive trust upon the copyright owner to strengthen the standing of the beneficiaries to bring proceedings in their own name to enforce the copyright.[421] Interlocutory injunctive relief can be claimed by a party having an equitable interest in copyright.

It is noted with interest that Mr Milpurrurru argued that the rights of the traditional owners were akin to Native Title under the *Native Title Act 1993* (Cth). This was rejected on the basis that no such native title determination has been made in favour of the traditional owners in question over the land in question, and that the Court did not have jurisdiction to hear that question.

Passing Off

An action under the common law tort of passing off may be available to a plaintiff where a business suggests a connection, in the course of trade, with another's goods or services where there is damage, or a threat of damage to the proprietary interests in the reputation or goodwill that the wronged person has built-up.[422] To be successful in the tort, the plaintiff must establish:

1. **Goodwill** – must be associated by consumers with the plaintiff's goods or services and hold a reputation.[423]
2. **Misrepresentation** – the defendant must misrepresent that their goods or services as being that of the plaintiff's, whether implied or express.[424]
3. **Damage** – actual damage must have been sustained, or likely to be sustained, by the plaintiff as a result of the misrepresentation of the defendant.[425]

The tort of passing off provides plaintiffs lacking a registered trademark, a course of action in the protection of their reputation and goodwill, albeit the steep threshold questions of establishing goodwill and assessing actual or likely damage. No such

[421] *Bulun Bulun,* 515–520, 525, 526–532.
[422] *Vieright Pty Ltd v Myer Stores Ltd* [1995] FCA 173.
[423] *Natural Waters of Viti Limited v Dayals (Fiji) Artesian Waters Ltd* [2007] FCA 200 per Bennett J, 59.
[424] *Reddaway v Banham* [1896] AC 199.
[425] *Bodum v DKSH Australia Pty Limited* [2011] FCAFC 98 at 212 and *Reckitt & Colman Products Ltd v Borden Inc* [1990] UKHL 12; [1990] RPC 34, 406; *Reddaway v Banham* [1896] AC 199.

threshold is required to be crossed to enforce an infringement of a registered trademark. Passing off is available to individual plaintiffs seeking to protect their business; however as will be seen later in this subsection when discussing legal remedies available under equity, the statutory regime of misleading and deceptive conduct provides similar, but less burdensome, relief for consumers having been misled or deceived in the course of trade and commerce.[426]

In the next section, I will consider the application of Australian Privacy laws to the protection of Islander secret.

4.3.5.2 Privacy

Defining Privacy

What is 'Privacy'? Solove describes privacy as "a concept in disarray. Nobody can articulate what it means … privacy suffers from "an embarrassment of meanings" … Privacy is far too vague a concept to guide adjudication and lawmaking, as abstract incantations of the importance of "privacy" do not fare well when pitted against more concretely stated countervailing interests'.[427] Moore observes: 'the need for privacy as a socially created need. Without society there would be no need for privacy'.[428] Solove considers that 'privacy is the relief from a range of kinds of social friction. It enables people to engage in worthwhile activities in ways that they would otherwise find difficult or impossible'.[429]

Privacy is a balancing act, weighing up the rights and interests of the individual to retain privacy as against the rights and interests of the public to freedom of expression. Privacy can be violated absent trespass, liberty infringement or contact with the person whose privacy is compromised.[430] 'Privacy is a good that people can enjoy only at the expense of others'.[431] 'The onus of justification for the privacy lies on the advocate of restraint and not on the person so restrained'.[432] Importantly

[426] William Roberts Lawyers, *The Safety Net that Catches Unregistered Trademarks: The Old 'Tort of Passing Off' and Misleading and Deceptive Conduct* (2018).<https://www.williamroberts.com.au/News-and-Resources/News/Articles/The-Safety-Net-That-Catches-Unregistered-Trademarks>.
[427] Solove, above n 387, 477–478.
[428] Ibid 483–484.
[429] Ibid 484.
[430] Kukathas, above n 103.
[431] Ibid.
[432] Ibid, 72 citing Stanley I Benn.

however, 'privacy is not freedom from all forms of social friction; rather, it is protection from a cluster of related activities that impinge upon people in related ways … These activities often are not inherently problematic or harmful. If a person consents to most of these activities, there is no privacy violation. Thus, if a couple invites another to watch them have sex, this observation would not constitute a privacy violation. Without consent, however, it most often would'.[433]

Solove considers that there can be no single definition of privacy:

> Privacy is too complicated a concept to be boiled down to a single essence … The term 'privacy' is an umbrella term, referring to a wide and disparate group of related things … there are many times when using the general term 'privacy' will work well. But there are times where more specificity is required. Using the general term 'privacy' can result in the conflation of different kinds of problems and can lead to understandings of the meaning of 'privacy' that distract courts and policymakers from addressing the issues before them.[434]

Solove has accordingly developed a modern taxonomy of privacy comprising four basic groups of harmful activities:

1. **Information collection** – the collection of an individual's information by people, businesses and the government;
2. **Information processing** – the storage, compilation, manipulation, search and use of an individual's information;
3. **Information dissemination** – data-holders' transferor releases an individual's information to others; and
4. **Invasion** – the impingements directly on the individual, not necessarily involving the individual's information.[435]

Figure 3 illustrates the four groups of privacy violation, and sub-groups and each sub-group is defined by Solove as noted in Table 4.1.

As discussed above, secrecy and privacy inter-relate but are distinctly separate concepts. Even if a secret is considered private by Islanders, it may not be viewed as

[433] Solove, above n 387, 484
[434] Ibid 484–486.
[435] Ibid 488.

such by the governing majority. I reflect again upon the examples of core *sui generis* Islander secrets discussed in this study, namely:

- the speaking about witchcraft and sorcery;
- who may speak language;
- who may engage in *ailan* dance, *ailan* adoption, and hunting and fishing;
- who may share sacred stories, and access sacred sites and artefacts;
- who may disclose sorry business; and
- who may participate in initiation ceremony.

Figure 4.1: Solove Taxonomy of Privacy
(Source: Solove, 490)

Table 4.1: Definitions of sub-groups of Solove Taxonomy of Privacy

Information Collection	
Surveillance	the watching, listening to, or recording of an individual's activities.
Interrogation	questioning or probing for information.
Information Processing	
Aggregation	combination of various pieces of data about a person.
Identification	linking information to particular individuals.
Insecurity	carelessness in protecting stored information from leaks and improper access.
Secondary Use	use of information collected for one purpose for a different purpose without the subject's consent;

Exclusion-	failure to allow the data subject to know about the data that others have about them and to participate in its handling and use.
Information Dissemination	
Breach of Confidentiality	breaking a promise to keep a person's information confidential.
Disclosure	the revelation of truthful information about a person that impacts the way others judge their character.
Exposure	revealing another's nudity, grief, or bodily functions.
Increased Accessibility	amplifying the accessibility of information.
Blackmail	threat to disclose personal information.
Appropriation	use of the data subject's identity to serve the aims and interests of another.
Distortion	the dissemination of false or misleading information about individuals.
Invasions	
Intrusion	invasive acts that disturb one's tranquillity
Decisional Interference	government's incursion into the data subject's decisions regarding their private affairs.[436]

The right to maintain secret is a right deriving from *ailan lore* and *ailan kastom.* However, without such a right being supplemented with one or more rights provided by Australian law by the governing majority (eg. privacy), they will not be adequately protected. It is clear that any and all of these secrets could conceivably fall within one or more categories of Solove privacy. What is not clear is the majority's amenability to accept such *sui generis* assertions as legal concepts affording privacy protection. In the following section, I will consider two of Solove's categories of privacy, and whether these likely have capacity to provide sufficient legal protection for *sui generis* Islander secret, namely:

- *Information Privacy*
- *Invasion*

Information Privacy

Navigating the tensions between polar concepts of privacy and transparency is not simple and, it is for this reason, statutory intervention has occurred in most

[436] Ibid 490–491.

jurisdictions to strike a balance between the private and public spheres.[437] Other forms of individual privacy are also recognised and protected by statute in Australia, including but not limited to private health records,[438] criminal convictions,[439] whistle-blowers,[440] and work-seekers information,[441] or surveillance and monitoring of telecommunications.[442] Privacy of the individual is given statutory protection under the *Privacy Act*. The decision to recognise and protect the rights of individuals in the *Privacy Act* is explained in the Preamble, referring primarily to human rights under the *ICCPR*[443]. The Preamble of the *Privacy Act* also makes reference to Australia's obligations at international law 'to give effect to the right of persons not to be subjected to arbitrary or unlawful interference with their privacy, family, home or correspondence' and to protect 'privacy and individual liberties'.[444] The *Privacy Act* sets up a statutory regime for the protection of personal information of individuals. It defines personal information as 'information or an opinion, whether true or not, and whether recorded in a material form or not, about an identified individual, or an individual who is reasonably identifiable'.[445]

Common examples include an individual's name, signature, address, telephone number, date of birth, medical records, bank account details and commentary or opinion about a person. Less common examples include 'sensitive information',

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[437] *Privacy Act 1988* (Cth) s 14; *Information Privacy Act 2009* (Qld); *Right to Information Act 2009* (Qld); *Information Act 2002* (NT); *Privacy and Personal Information Protection Act 1998* (NSW); *Freedom of Information Act 1991* (SA); *Personal Information Protection Act 2004* (TAS); *Freedom of Information Act 1991* (TAS); *Information Privacy Act 2000* (Vic); *Freedom of Information Act 1982* (VIC); *Freedom of Information Act 1992* (WA).

[438] *Health Records and Information Privacy Act 2002* (NSW); *Health Services (Conciliation and Review) Act 1995* (WA); *Health Records (Privacy and Access) Act 1997* (ACT);

[439] *Criminal Law (Rehabilitation of Offenders) Act 1986* (Qld); *Criminal Records (Spent Convictions) Act 1992* (NT); *Criminal Records Act 1991* (NSW); *Annulled Convictions Act 2003* (Tas); *Spent Convictions Act 1988* (WA); *Spent Convictions Act 2000* (ACT).

[440] *Whistleblowers Protection Act 1994* (Qld).

[441] *Private Employment Agents (Code of Conduct) Regulation 2005* (Qld).

[442] *Telecommunications (Interception and Access) Act 1979* (Cth); *Invasion of Privacy Act 1971* (Qld); *Police Powers and Responsibilities Act 2000* (Qld); *Surveillance Devices Act 2007* (NT); *Telecommunications (Interception) Northern Territory Act 2001* (NT); *Listening Devices Act 1984* (NSW); *Workplace Surveillance Act 2005* (NSW); *Telecommunications (Interception and Access) (New South Wales) Act 1987* (NSW); *Crimes (Forensic Procedures) Act 2000* (NSW); *Listening and Surveillance Devices Act 1972* (SA); *Telecommunications (Interception) Act 1988* (SA); *Listening Devices Act 1991* (TAS); *Telecommunications (Interception) Tasmania Act 1999* (TAS); *Surveillance Devices Act 1999* (VIC); *Telecommunications (Interception) (State Provisions) Act 1988* (Vic); Surveillance Devices Act 1998 (WA); *Telecommunications (Interception) Western Australia Act 1996* (WA); *Listening Devices Act 1992* (ACT).

[443] 16 December 1966, [1980] ATS 23, (entered into force generally on 23 March 1976).

[444] ALRC Report 108, above n 114, 7.3.

[445] *Privacy Act 1988* (Cth).

comprising information or opinion about an individual's racial or ethnic origin, political opinion, religious beliefs, sexual orientation or criminal record.[446]

The *Privacy Act* generally prescribes, by way of 'Australian Privacy Principles', how Australian Government agencies, and private-sector and not-for-profit organisations with an annual turn-over greater than $3 million, private health service providers and some small businesses, must handle, use and manage personal information. These provisions are incorporated into State and Territory law.[447] Media organisations practicing journalism are generally exempt.[448]

Where the information is about an identified individual or about an individual who is reasonably identifiable, who is not deceased, and is handled, used, or managed by a prescribed agency or organisation contrary to the Australian Privacy Principles, the affected individual may bring a privacy complaint with the Office of the Australian Information Commissioner (the OAIC). Possible outcomes of such a complaint include:

- taking steps to address the matter, for example providing access to personal information, or amending records;
- an apology;
- a change to the respondent's practices or procedures;
- staff training;
- compensation for financial or non-financial loss;
- other non-financial options, for example a complementary subscription to a service;
- undertaking by the respondent not to do, or to stop doing, an offending act; or
- civil penalty.

Those regulated agencies and organisations falling within the ambit of the *Privacy Act* (and State and Territory equivalents), handling, using or managing the personal information of individual Islanders, have an obligation to comply with the Australian

[446] *Privacy Act 1988* (Cth), s 6(1).
[447] *Privacy Act 1988* (Cth) s14; *Information Privacy Act 2009* (Qld); *Right to Information Act 2009* (Qld); *Information Act 2002* (NT); *Privacy and Personal Information Protection Act 1998* (NSW); *Freedom of Information Act 1991* (SA); *Personal Information Protection Act 2004* (TAS); *Freedom of Information Act 1991* (TAS); *Information Privacy Act 2000* (Vic); *Freedom of Information Act 1982* (VIC); *Freedom of Information Act 1992* (WA)
[448] *Privacy Act 1988* (Cth), s 7B.

Privacy Principles. Applied to the abovementioned examples of Islander secret, it is conceivable that the breaches of *Yagasin,* such as the disclosure of a person as *ailan*-adopted, or the disclosure of a person as a participant in an initiation ceremony, may amount to a breach of the *Privacy Act,* affording aggrieved individuals recourse to one or more of the remedies via complaint to the OAIC. This does, however, have limited applicability to most Islander secrets. Furthermore, recourse is not possible against those agencies and organisations not regulated under the *Privacy Act* (eg, individuals, small business, media, law enforcement etc).

Invasion

Privacy is distinct from intellectual property because it concerns harm by use of personal information, rather than harm suffered because of misappropriation of intellectual works. Solove's sub-categories of intrusion and decisional-interference are particularly relevant to instances of privacy interference to Islanders.

Intrusion

Blackstone posits that 'the law … has so particular and tender a regard to the immunity of a man's house, that it stiles it his castle'.[449] Solove writes:

> [I]ntrusion involves invasions or incursions into one's life. It disturbs the victim's daily activities, alters her routines, destroys her solitude and often makes her feel uncomfortable and uneasy. Protection against invasion involves protecting the individual from unwanted social invasions, affording people what Warren and Brandeis called 'the right to be let alone'.[450]

Intrusion can occur not only by physical incursion or proximity, but also via other taxonomy sub-categories, such as surveillance (gazes) and interrogation (questioning). Intrusion occurs through the interruption of someone's activities due to the unwanted presence or activities of another person.[451] Intrusion involves an interference with a person's solitude. As a contrary view, Aristotle wrote that 'surely it is strange, too, to make the supremely happy man a solitary; for no one would choose the whole world on condition of being alone, since man is a political creature

[449] Solove, above n 387, 549 citing William Blackstone, *Commentaries on the Laws of England* (Collins & Hannay, vol 2, 1830), 223.
[450] Ibid citing Warren and Brandeis, below n 355.
[451] Ibid.

and one whose nature is to live with others.'[452] Weinstein continues that 'too much of such a freedom from intrusion can lead to a scattered community, where people distance themselves into isolated enclaves'.[453] A balance must be forged between a public life and one of solitude. In balance, 'solitude does not detract from a rich public life, but in fact enhances it'.[454] The category of intrusion has been considered all around the world and provides good insight into its scope for protection of Islander secrets.

United States of America

In 1890, Samuel Warren and Louis Brandis published an article arguing a logical progression to protection at law of personal privacy (the right to be let alone), utilising other causes of action such as copyright, confidentiality and implied contract.[455] Warren and Brandis considered that continued reliance on artificial applications of existing causes of action would limit the scope of dealing with breach of privacy.[456] The article inspired the first recognition of common law right to privacy in Georgia in 1905 in the case of *Pavesich v New England Life Insurance Co*[457], and subsequently throughout the United States.[458] William Prosser, in 1960, reviewed the body of case law and suggested that a right to privacy consisted of four distinct torts:

1. unreasonable intrusion upon the seclusion of another;
2. public disclosure of private facts;
3. displaying another in a false light before the public; or
4. appropriation of another's name and likeness.[459]

These principles were later adapted and applied as United States common law[460] and jurisprudence[461], confirming that invasion of privacy occurs where one person:

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[452] Ingram Bywater, 'Aristotle Ethica Nicomachea' (Cambridge University Press, 1963).
[453] Michael A Weinstein, 'The Uses of Privacy in the Good Life' (1971) 94 *Privacy: Nomos XIII* 91.
[454] Solove, above n 387, 551.
[455] Samuel D Warren and Louis D Brandeis, 'The Right to Privacy' (1890) Harvard law review 193 citing *Prince albert v Strange* (1849) 1 Mac & G 25; 41 ER 1171; *Abernethy v Hutchinson* (1825) 1 H & Tw 28; 47 ER 1313; *Pollard v Photographic Co* (1888) 40 Ch D 345.
[456] Butler, above n 316, 341 citing Warren and Brandeis.
[457] 122 Ga 190 (1905).
[458] Prosser (1977), above n 123.
[459] William L Prosser, 'Privacy' (1960) 48 *Californian Law Review* 383, 389–407.
[460] *Time Inc v Hill,* 385 US 374, 383 per Brennan J (1967); *Cox Broadcasting Corporation v Cohn,* 420 YS 469, 488 per White J (1975).
[461] Prosser (1977), above n 123.

1. intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another (either as to person or private affairs or concerns) if the intrusion would be highly offensive to a reasonable person of ordinary sensibilities;[462]
2. appropriates to his or her own use or benefit the name or likeness of another;[463]
3. gives publicity to a matter concerning the private life of another which is matter of a kind that:
    a. would be highly offensive to a reasonable person; and
    b. is not of legitimate concern to the public;[464] or
4. gives publicity to a matter concerning another which places that person before the public in a false light where:
    a. that false light would be highly offensive to a reasonable person; and
    b. the publisher knew or recklessly disregarded the falsity of the matter and the false light in which the other would be placed.[465].

The tort of invasion of privacy in the United States has, in practice, been found to be largely ineffective due to the operation of the First Amendment (freedom of speech and freedom of the press) in the United States Constitution,[466] although the development of the tort does appear to be tipping in favour of the advocate for restraint,[467] including moves towards privacy in semi-private places, such as restaurants,[468] or workplaces,[469], and moves away from physical intrusion, to electronic.[470] Later in 1984, Prosser and Keeton further refined the privacy principles as:

a. a public disclosure;
b. of private facts;
c. that is highly offensive to a reasonable person; and

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[462] Ibid. 652B.
[463] Ibid. 652C.
[464] Ibid. 652D.
[465] Ibid. 652E; Butler, above n 316, 343.
[466] Harry Kalven, 'Privacy in Tort Law: Were Warren and Brandeis Wrong?'(1966) *Law and Contemporary Problems* 326, 336; *Branzburg v Hayes,* 408 US 665, 707 (White J) (1972); *Campbell v Seabury Press,* 614 F 2d 395, 397 (5th Cir, 1980).
[467] *Dietemann v Time Inc,* 449 F 2d 245, 249 (Hufstedler J) (9th Cir, 1971); *Wilson v Layne,* 526 US 603 (1999);
[468] *Stressman v American Black Hawk Broadcasting Co,* 416 NW 2d 685 (Iowa, 1987)
[469] *Sanders v American Broadcasting Companies Inc,* 978 P 2d 67 (Cal, 1999).
[470] *Miller v National Broadcasting Co,* 187 Cal App 3d 1463 (1986); Butler, above n 307. 344

d. is not newsworthy.[471]

'Newsworthiness' has been defined widely by United States courts as:

- 'determining what is of legitimate public concern by distinguishing between information to which the public is entitled and information that would not be the concern of a reasonable member of the community with decent standards;[472]
- requiring the information to be of public interest and 'decent', together with a logical nexus between the complainant and the matter of public interest;[473]
- taking into account the social value of the information, the depth of the intrusion into private areas and the extent to which the complainant has placed himself or herself in the public eye, subject to the information being 'decent';[474]
- leaving it to the media to decide whether facts are newsworthy;[475] and
- viewing all publications as newsworthy by not recognising a tort of public disclosure of private facts.[476]

New Zealand

The *New Zealand Bill of Rights Act 1990* (NZ) recognised a right to free speech, but not a right to privacy.[477] Many New Zealand courts have, however, adopted the United States position of recognition of an action for public disclosure of private facts.[478] Although New Zealand did not have the context of the First Amendment as in the United States, the New Zealand courts have considered that 'the good sense and social desirability of the protective principles enunciated are compelling'.[479] The

[471] Page Keeton, *Prosser and Keeton on the Law of Torts* (West Publishing Company St. Paul, Minnesota, 1984), 857–7.
[472] *Virgil v Time Inc,* 527 F 2d 395 (Merrill J) (9th Cir, 1975)
[473] *Campbell v Seabury Press,* 614 F 2d 395 (5th Cir, 1980); *Gilbert v Medical Economics Co,* 665 F 2d 305, 308-9 (MaKay J) (10th Cir, 1981).
[474] *Briscoe v Reader's Digest Association Inc,* 483 P 2d 34 (Cal, 1971)
[475] Diane L Zimmerman, 'Requiem for a Heavyweight: A Farewell to Warren and Brandeis's Privacy Tort' (1982) 68 *Cornell Law Review* 291, 353–5; *Jenkins v Dell Publishing Co,* 251 F 2d 447 (3rd Cir, 1958); *Howard v Des Moines Register & Tribune Co,* 283 NW 2d 289, 302 (McCormick J) (Iowa, 1979).
[476] *Hall v Post,* 372 SE2d 711, 714 (Mitchell J) (NC, 1988); Butler, above n 307, 344–5.
[477] s14.
[478] *Tucker v News Media Ownership Ltd* [1986] 2 NZLR 716 ('*Tucker*'); *P v D* [2000] 2 NZLR 591; *L v G* [2002] NZAR 495.
[479] *Tucker* [1986] 2 NZLR 716, 733 per McGrechan J.

tort of invasion of privacy was first recognised in New Zealand in the 2004 decision of *Hosking v Runting* ('*Hosking*'),[480] a case involving attempted restraint by a television personality and his wife of a magazine from publishing photographs their 18-month old twins. The development was based upon an impetus for change based on international concern for human rights.[481] The joint judgement in *Hosking* found two requirements for successful common law claim for interference with privacy:

1. the existence of facts in respect of which there is a reasonable expectation of privacy; and
2. publicity given to those private facts that would be considered highly offensive to an objective reasonable person.[482]

These requirements were consistent with the United States position in the Second Restatement of Torts.[483] The test is one of balancing the interests of the advocate for restraint as against 'public concern'. Statutory rights to individual privacy are also recognised in New Zealand under the *Privacy Act 1993* (NZ) and *Broadcasting Act 1993* (NZ), however neither provide civil remedy for breach of privacy.

United Kingdom

In 1990, the matter of *Kaye v Robertson* ('*Kaye*')[484] was heard involving the unauthorised access and photographs taken by a journalist of a television star recovering in hospital after suffering head injuries. The star sought to restrain publication of the photographs taken on the basis of a number of causes of action, including trespass to the person, defamation, passing off and malicious falsehood. An action in breach of confidence was not raised due to circumstances of confidence not arising on the facts. In making a finding of malicious falsehood in the claim that the star had consented to the publication, the English Court of Appeal stated that there was no support for a standalone tort of invasion of privacy in the United Kingdom, and that such cause of action could only be developed by the legislature and not the judiciary.[485] Bingham LJ in *Kaye* summarised the legal dilemma in remarking:

[480] [2005] 1 NZLR 1 (*'Hosking'*).
[481] *Hosking* 5 per Gault P and Blanchard J.
[482] *Hosking* 32.
[483] Prosser (1977), above n 123.
[484] (1990) 19 IRP 147.
[485] Butler, above n 316, 345 citing *Kaye v Robertson* (1990) 19 IRP 147.

> This case none the less highlights, yet again, the failure of both the common law of England and statute to protect in an effective way the personal privacy of individual citizens … The defendant's conduct towards the plaintiff here was 'a monstrous invasion of privacy' … If ever a person has a right to be let alone by strangers with no public interest to pursue, it must surely be when he lies in hospital recovering from brain surgery and in no more than partial command of his faculties. It is this invasion of his privacy which underlies the plaintiff's complaint. Yet it alone, however gross, does not entitle him to relief in English law.[486]

Following *Kaye* in 1998, the United Kingdom enacted the *Human Rights Act 1998* (UK) c 42, requiring that English courts to consider the *European Convention on Human Rights* when making decisions.[487] In the European Commission of Human Rights matter of *Earl Spencer v United Kingdom* ('*Earl*'),[488] a case concerning publication by the media of photographs of Countess Spencer taken at a private clinic whilst undergoing treatment for bulimia and mental health problems, the Commission ruled that the cause of action in breach of confidence was sufficient, with further development, to encompass cases involving invasion of privacy.[489] The elements of an action for breach of confidence were proposed in *Coco v A N Clark (Engineers) Ltd*,[490] a matter concerning disclosure of trade secrets:

1. the information must have the necessary quality of confidence;
2. the information must have been imparted in circumstances importing an obligation of confidence; and
3. there must have been an actual or threatened unauthorised use or disclosure of the information to the detriment of the confider.[491]

The common law in the United Kingdom further developed in the intellectual property/privacy arena, in evolving to recognise a right to privacy beyond trade

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[486] *Kaye v Robertson* (1990) 19 IRP 147 at 154 ('*Kaye*').
[487] Butler, above n 316, 346 citing *HRA* s2(1); Gavin Phillipson and Helen Fenwick, 'Breach of Confidence as a Privacy Remedy in the Human Rights Act Era'(2000) 63 *Modern Law Review* 660, 664-70; Rabinder Singh, 'Privacy and the Media After the Human Rights Act' (1998) *European Human Rights Law Review* 712.
[488] (1998) 25 EHRR CD 105.
[489] *Earl*, 117-18.
[490] [1969] RPC 40 *('Coco').*
[491] *Coco*, per Megarry J, 47

secrets and business information, to personal information,[492] extending to secrets of a marital relationship as a relationship of clear trust and confidence,[493] or details of sexual relationships.[494] An action for breach of confidence later extended beyond the original confidante, to a third party who knows, or ought to know, that the information received is subject to a duty of confidentiality.[495]

Laws J summarised the right to privacy in the United Kingdom, albeit named an action for breach of confidence in *Hellewell v Chief Constable of Derbyshire*[496] as:

> If someone with a telephoto lens were to take from a distance and with no authority a picture of another engaged in some private act, his subsequent disclosure of the photograph would … surely amount to a breach of confidence as if he had found or stolen a letter of diary in which the act was recounted and proceeded to publish it.

Notwithstanding on appeal Sedley LJ's comments in *Douglas v Hello! Ltd*,[497] a case concerning unauthorised photographs taken at the private wedding of Michael Douglas and Catherine Zeta-Jones, namely that 'the law no longer needs to construct artificial relationship of confidentiality between intruder and victim: it can recognise privacy itself as a legal principle drawn from the fundamental value of personal autonomy'.[498] The other members of the Court of Appeal did not agree. Instead, they found a breach of confidence. The action in breach of confidence has been extended to be available to protect the identity (and thus lives) of convicted murderers on release from prison.[499]

On the question of a stand-alone tort of invasion of privacy, the Court of Appeal in *A v B plc*[500] held that:

> It is most unlikely that any purpose will be served by a judge seeking to decide whether there exists a new cause of action in tort which protects privacy. In the

[492] *Prince Albert v Strange* (1849) 1 Mac & G 25; 41 ER 1171.
[493] *Duchess of Argyll v Duke of Argyll* [1967] ch 302.
[494] *Stephens v Avery* [1988] ch 449.
[495] *Campbell v MGM Ltd* [2004] 2 AC 457, 464 per Lord Nicholls ('*Campbell*'); *A-G (UK) v Guardian Newspapers Ltd [No. 2]* [1990] 1 AC 109, per Lord Goff, 281
[496] [1995] 4 All ER 473, 476
[497] [2001] QB 967 *('Douglas*').
[498] *Douglas* 1001.
[499] *Venables v News Group Newspapers Ltd* [2001]Fam 430.
[500] [2003] QB 195.

> great majority of situations, if not all situations, where the protection of privacy is justified … an action for breach of confidence now will, where this is appropriate, provide the necessary protection. This means that at first instance it can be readily accepted that it is not necessary to tackle the vexed question of whether there is a separate cause of action based upon a new tort involving infringement of privacy.[501]

In contrast, in *Peck v United Kingdom,*[502] Mr Peck was filmed in a compromising position on CCTV footage and the film was subsequently distributed several times on television. The Strasbourg Court found that an invasion of privacy occurred contrary to article 8 of the *European Convention on Human Rights,* declaring:

> The relevant moment was viewed to an extent which far exceeded any exposure to a passer-by or to security observation and to a degree surpassing that which the applicant could possibly have foreseen when he walked in Brentwood on August 20, 1995.[503]

This would also extend to the publication of a photograph taken by intrusion into a private plan (for example, by long distance lens), even when there is nothing embarrassing about the image.[504] Lord Mustlii in *R v Broadcasting Standards Commission, Ex p BBC* said 'an infringement of privacy is an affront to the personality, which is damaged both by the violation and by the demonstration that the personal space is not inviolate'.[505]

Australia

Prior to 2001, much like the United Kingdom, the common law in Australia did not recognise an actionable tort of invasion of privacy in Australia. The authority in Australia for such a view was expressed as *obiter dicta* in the High Court of Australia decision of *Victoria.*[506] In *Victoria,* the plaintiff was a company which carried on for profit the business of conducting race meetings at a racecourse in Sydney. There were three defendants: the owner and occupier of nearby land on which a viewing platform was erected, a radio broadcaster, and an employee of the

[501] [2003] QB 195, per Lord Woolf CJ, 205-6.
[502] (2003) 36 EHRR 41,
[503] (2003) 36 EHRR 41, 739.
[504] *Hellewell v Chief Constable of Derbyshire* [1985] 1 WLR 804, 807 and cited in *Campbell,* per Lord Hoffman, para 75.
[505] [2001] QB 885, 900 per Lord Mustlii
[506] 58 CLR 479.

radio broadcaster who utilised the viewing platform to view and broadcast races without the consent of the plaintiff. The action was based on infringement of copyright and common law nuisance. Latham CJ rejected the existence of a right to privacy in the law of nuisance, stating: '[h]owever desirable some limitation upon invasions of privacy might be, no authority was cited which shows that any general right of privacy exists'.[507]

The High Court again considered the question in 2001 in Lenah,[508] where it was decided that *Victoria* did not preclude development of a tort of invasion of privacy in Australia,[509] and further considered the views of the majority Justices in *Victoria* to be 'conservative' and having 'the appearance of an anachronism'.[510]

In *Lenah*, proceedings were originally brought in the Supreme Court of Tasmania. The appellant sought injunctive relief to restrain the broadcasting of a film of the respondent's operations at a brush tail possum processing factory, by delivery up of 'all copies of the video or excerpts from it in its possession, custody or power'. The film was made by Animal Liberation Limited without the consent or knowledge of the respondent by breaking into the processing facility and installing hidden cameras. The film was given to the appellant for broadcasting, which, it was alleged, would cause financial harm to the respondent. There was no evidence indicating illegality in the method of processing of possum meat by the respondent. The mandatory injunction was not granted at first instance by Underwood J. The respondent appealed to the Full Court of the Supreme Court of Tasmania. The appeal was upheld by Wright and Evans JJ and an injunction granted in favour of the respondent. The appellant appealed to the High Court on the basis of Underwood J's decision at first instance, and Splicer J's on appeal (in dissent), rationale that it had not been shown that there was a serious issue to be tried.

One of the matters for consideration by the High Court in *Lenah* was whether there existed a tort of invasion of privacy in Australia to be applied to the protection of the respondent. Notwithstanding that neither party submitted that the processing facility was a secret location, as regularly visited by inspectors or business affiliates and the

[507] *Victoria* per Latham CJ, para 496.
[508] [2001]HCA 63; (2001) 208 CLR 199.
[509] *Lenah* per Gummow and Hayne JJ, para 107, and per Kirby J, para 187
[510] Ibid per Callinan J, para 318

fact that the operations were licensed by a public authority, it was submitted by the respondent that rights to property and privacy had been breached. The respondent contended that:

> The distribution and publication of the film is likely to adversely and substantially affect the [respondent's] business. The film is of the most gruesome parts of the [respondent's] brush tail possum processing operation. It shows possums being stunned and then having their throats cut. It is likely to arouse public disquiet, perhaps even anger, at the way in which the [respondent] conducts its lawful business. This is no different from any animal slaughtering operation in Australia, which is normally hidden from public view.[511]

Gleeson CJ considered it necessary to clarify at the outset of the judgement that the respondent's claim did not assert copyright or other intellectual property right to the film or its reproductions. Further, there were no trade secrets at risk.[512] The respondent's arguments were two-fold:

1. that the appellant in publishing a film known to have been taken as a result of a trespass would on that account alone be unconscionable, and should be restrained; and
2. further in the alternative, a person who comes into possession of confidential information which that person knows to be confidential, may come under a duty not to publish it.[513] Such duty is made out by establishing the following elements
    a. the information is confidential:
    b. the information was originally imparted in circumstances importing an obligation of confidence; and
    c. there has been, or is threatened to be, an unauthorised use of the information to the detriment of the party communicating it.[514]

[511] Ibid (2001) 208 CLR 199, per Gleeson CJ, para 25.
[512] Ibid paras 28–29.
[513] Ibid para 30. Citing also *Prince Albert v Strange* (1849) 1 Mac & G 25 [41 ER 1171]; *Duchess of Argyll v Duke of Argyll* [1967] ch 302; *Attorney-General v Guardian Newspapers Ltd (No 2)* [1990] 1 AC 109 at 260, 268 on the proposition of duty not to publish confidential information.
[514] *Coco* [1969] RPC 41, 47 per Megarry J cited in *Lenah*, para 30.

Although it was not disputed that the nature of the information was not ordinarily confidential, it was asserted by the respondent that it became confidential due to the manner it was obtained, namely through unlawful trespass. On the question of breach of confidence, his honour had regard to the comments of Laws J in *Hellewell v Chief Constable of Derbyshire*:[515]

> If someone with a telephoto lens were to take from a distance and with no authority a picture of another engaged in some private act, his subsequent disclosure of the photograph would, in my judgment, as surely amount to a breach of confidence as if he had found or stolen a letter or diary in which the act was recounted and proceeded to publish it. In such a case, the law would protect what might reasonably be called a right of privacy, although the name accorded to the cause of action would be breach of confidence. It is, of course, elementary that, in all such cases, a defence based on the public interest would be available.

Gleeson CJ adopted Laws J's principle for breach of confidence into Australia Law in *Lenah*, qualified only by the Constitutional freedom of political communication.[516] In *Douglas*[517] it was determined by the Court that a celebrity wedding should be treated as confidential information. In *Douglas,* Sedley LJ on the question privacy construction, stated: -

> What a concept of privacy does, however, is accord recognition to the fact that the law has to protect not only those people whose trust has been abused but those who simply find themselves subjected to an unwanted intrusion into their personal lives. The law no longer needs to construct an artificial relationship of confidentiality between intruder and victim: it can recognise privacy itself as a legal principle drawn from the fundamental value of personal autonomy.*[518]*

The respondent in *Lenah* specifically asked the High Court to depart from old authority[519] and declare the existence of a tort of invasion of privacy. Further, the respondent sought the High Court to declare the applicability of such tort of invasion

[515] [1995] 1 WLR 804 at 807; [1995] 4 All ER 473, 476, cited in *Lenah*, para 34.
[516] *Lenah* para 35.
[517] [2001] 2 WLR 992; [2001] 2 All ER 289.
[518] *Douglas* per Sedley LJ, 320.
[519] *Victoria* (1937) 58 CLR 479.

of privacy not only to individuals, but also to corporations. In regard to general principles of privacy, Gleeson CJ in *Lenah* posited:

> There is no bright line which can be drawn between what is private and what is not. Use of the term 'public' is often a convenient method of contrast, but there is a large area in between what is necessarily public and what is necessarily private. An activity is not private simply because it is not done in public. It does not suffice to make an act private that, because it occurs on private property, it has such measure of protection from the public gaze as the characteristics of the property, the nature of the activity, the locality, and the disposition of the property owner combine to afford. Certain kinds of information about a person, such as information relating to health, personal relationships, or finances, may be easy to identify as private; as may certain kinds of activity, which a reasonable person, applying contemporary standards of morals and behaviour, would understand to be meant to be unobserved. The requirement that disclosure or observation of information or conduct would be highly offensive to a reasonable person of ordinary sensibilities is in many circumstances a useful practical test of what is private.[520]

On the question of corporate versus individual rights to privacy, Gleeson CJ considered that 'the foundation of much of what is protected, where rights of privacy, as distinct from right of property, are acknowledged, is human dignity. This may be incongruous when applied to a corporation'. In rejecting the respondent's claim, Gummow and Hayne JJ in *Lenah* went further to state in the context of the corporate respondent that 'this artificial legal person lacks the sensibilities, offence and injury to which provide a staple value for any developing law of privacy'.[521] Gummow and Hayne JJ in *Lenah* had further regard to the United States decision of *NOC Inc v Schafer* 484 A 2d 729 (1984) ('*NOC*') whereby the Court posited that: -

> The tort of invasion of privacy focuses on the humiliation and intimate personal distress suffered by an individual as a result of intrusive behavior [sic]. While a corporation may have its reputation or business damaged as a result of intrusive activity, it is not capable of emotional suffering.[522]

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[520] *Lenah* per Gleeson CJ, para 42.
[521] Ibid per Gummow and Hayne JJ, para 126
[522] *NOC* 730–731.

Commenting on the application of Prosser's *Restatement*[523], D'Amato comments on this distinction:

> Business firms, as Posner notes,[524] use privacy as a means to produce income. A trade secret is useful to a firm because it provides a monopoly, which of course enhances profits. Any firm would reveal its trade secrets if it could obtain equivalent monopoly rights for a worthwhile period of time; this is in fact what happens when the government awards a firm a patent that makes the former trade secret a matter of public record. The public inspection to which the patent or copyright is open does not annoy the corporation. As an artificial person, the firm suffers no mental distress when the patent reveals its hidden processes; it simply lacks sensitivity to the value of 'privacy'. A corporation does not want privacy for its own sake. Privacy to a corporation is only an intermediate good.[525]

Callinan J made a further observation with respect to the prospective application of such a tort of invasion of privacy to a party other than a natural person in referring to amendments made to the *Privacy Act 1988* (Cth) in 2000 protecting only personal information not extending to corporate remedies, stating:

> It seems to me that, having regard to current conditions in this country, and developments of the law in other common law jurisdictions, the time is ripe for consideration whether a tort of invasion of privacy should be recognised in this country, or whether the legislatures should be left to determine whether provisions for a remedy for it should be made.[526]

Although not discounting the future development of a tort of invasion of privacy, Gummow and Hayne JJ in *Lenah* stated that:

> Whatever development may take place in that field will be to the benefit of natural, not artificial, persons. It may be that development is best achieved by looking across the range of already established legal and equitable wrongs. On the other hand, in some respects these may be seen as representing species of a genus, being a principle protecting the interests of the individual in leading, to

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[523] Prosser (1977), above n 127, 2.
[524] Richard A Posner, 'The Right of Privacy' (1977) 12 *Georgia Law Review.*393, 394.
[525] Anthony D'Amato, 'Comment: Professor Posner's Lecture on Privacy' (1978) 12 *Georgia Law Rev*iew 497, cited in *Lenah* per Gummow and Hayne JJ, 499–500,
[526] *Lenah,* per Callinan J, para 335.

> some reasonable extent, a secluded and private life, in the words of the Restatement, 'free from the prying eyes, ears and publications of others'.[527] Nothing said in these reasons should be understood as foreclosing any such debate or as indicating any particular outcome. Nor, as already has been pointed out, should the decision in Victoria Park.[528]

In *Lenah,* doubt existed as to whether a corporation is apt to enjoy any common law right to privacy.[529] In Australia, this common law distinction between corporation and individual appears to be influenced by the content of universal principles of fundamental rights, Article 17 of the *ICCPR*; relating only to the privacy of a human individual. Gleeson CJ in *Lenah* made two very important distinctions between:

1. personal privacy; and
2. proprietary privacy.

He considered that the latter does not infer the former.

Since *Lenah,* the tort of invasion of privacy has received both support[530] and resistance[531] from the Australian domestic Courts.[532] In 2003, the District Court of Queensland heard the matter of *Grosse*,[533]*,* a civil case concerning allegations of 'stalking' and assertions of 'invasion of privacy' incidental thereto. Skoien J recognised the existence of a common law action in the tort of 'invasion of privacy', for which substantial damages were awarded in the amount of $178 000. In finding a tort of invasion of privacy, Skoien J referred to the High Court of Australia decision of *Lenah,* a case which dispelled the finding in *Victoria* that there could be no actionable right for invasion of privacy.[534] Callinan J in *Lenah,* referred to Professor

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[527] Prosser (1977), above n 123, §652A, Comment *b*.
[528] *Lenah,* per Gummow and Hayne JJ, 132.
[529] *R v Broadcasting Standards Commission; Ex parte British Broadcasting Corporation* [2000] 3 WLR 1327, 1337 [33]; [2000] 3 All ER 989 at 999; *Controlled Consultants Pty Ltd v Commissioner for Corporate Affairs* (1985) 156 CLR 385, 395 referring to *Hale v Henkel* 201 US 43, 74 (1906); *United States v White* 322 US 694, 698–699 (1944).
[530] *Grosse; Victoria* [2003] VSC 368 (Unreported, Osborne J, 2 October 2003) (*'Richards'*); *Gee v Burger* [2009] NSWSC 149; Chan v Sellwood; Chan v Calvert [2009] NSWSC 1335
[531] *Giller v Procopets* [2004] VSC 113 (Unreported, Gillard J,7 April 2004) ('*Giller*'); *Kalaba v Commonwealth* [2004] FCA 763 (Unreported, Heerey J, 8 June 2004); *Kalaba v Commonwealth* [2004] FCAFC (Unreported, Tamberlin, North and Dowsett JJ, 14 December 2004).
[532] Butler, above n 316, 340.
[533] *Grosse* [2003] QDC 151 (16 June 2003).
[534] *Lenah* per Gummow and Hayne JJ, with whose reasons Gaudron J agreed, para 78.

William Prosser's paper[535] which relevantly encapsulated the rationale behind the tort, being:

> It is not one tort, but a complex of four. The law of privacy comprises four distinct kinds of invasion of four different interests of the plaintiff, which are tied together by the common name, but otherwise have almost nothing in common except that each represents an interference with the right of the plaintiff, in the phrase coined by Judge Cooley, 'to be let alone'. Without any attempt to exact definition, these four torts may be described as follows:
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> 1. Intrusion upon the plaintiff's seclusion or solitude, or into his private affairs.[536]
>
> 2. Public disclosure of embarrassing private facts about the plaintiff.[537]
>
> 3. Publicity which places the plaintiff in a false light in the public eye.[538]
>
> 4. Appropriation, for the defendant's advantage, of the plaintiff's name or likeness.[539]

Prosser's categorisation of the law of privacy has been accepted by the United States Supreme Court[540] and the *Restatement.*[541]. In *Cox v Broadcasting Corporation Cohn*[542] White J stated:

> More compellingly, the century has experienced a strong tide running in favor of the so-called right of privacy. In 1967, we noted that '[i]t has been said that a 'right of privacy' has been recognized at common law in 30 States plus the

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[535] Ibid per Callinan J, para 323.

[536] 'One who intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another person or his private affairs or concerns, is subject to liability to the other for invasion of his privacy, if the intrusion would be highly offensive to a reasonable person.'

[537] 'One who gives publicity to a matter concerning the private life of another is subject to liability to the other for invasion of his privacy, if the matter publicised is of a kind that
(a) would be highly offensive to a reasonable person, and
(b) is not of legitimate concern to the public.

[538] One who gives publicity to a matter concerning another that places the other before the public in a false light is subject to liability to the other for invasion of his privacy, if
(a) the false light in which the other was placed would be highly offensive to a reasonable person, and
(b) the actor had knowledge of or acted in reckless disregard as to the falsity of the publicised matter and the false light in which the other would be placed."

[539] Prosser (1960), above n 459.

[540] *Time Inc v Hill* 385 US 374 at 383 (1967); *Cox Broadcasting Corporation v Cohn* 420 US 469 at 488 (1975).

[541] Prosser (1977), above n 123, 652A.

[542] 420 US 469 (1975).

> District of Columbia and by statute in four States'.[543] We there cited the 1964 edition of Prosser's Law of Torts. The 1971 edition of that same source states that '[i]n one form or another, the right of privacy is by this time recognized and accepted in all but a very few jurisdictions'[544] … These are impressive credentials for a right of privacy.[545]

As expressed above, New Zealand has recognised at law, a tort of invasion of privacy in terms developed by Prosser and Keeton.[546] Back in Australia, Skoien J in *Grosse* found that the general principle of privacy was 'one who invades the right of privacy of another is subject to liability for the resulting harm to the interests of the other'.[547]

In finding a tort of invasion of privacy, Skoien J considered that it was a logical step in the development of contemporary common law in Australia, just as the common law tort of trespass morphed into an action in negligence.[548] Skoien J then went on to particularise the elements of an action in the tort of invasion of privacy:

(a) a willed act by the defendant,
(b) which intrudes upon the privacy or seclusion of the plaintiff,
(c) in a manner which would be considered highly offensive to a reasonable person of ordinary sensibilities,
(d) and which causes the plaintiff detriment in the form of mental psychological or emotional harm or distress or which prevents or hinders the plaintiff from doing an act which she is lawfully entitled to do.[549]

A defence of 'public interest' is available.[550]

The remedy for an action for common law breach of privacy are compensatory damages, to which aggravated and exemplary damages are available in extreme cases of 'conscious wrongdoing in contumelious disregard of another's rights',[551] as well as

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[543] *Time Inc v Hill* 385 US 374, 383 (1967).
[544] Keeton, above n 471, 804.
[545] 420 US 469 (1975).
[546] Rosemary Tobin, 'Invasion of Privacy' (2000) *New Zealand Law Journal* 216; *P v D* [2000] 2 NZLR 591.
[547] *Grosse* per Skoien J 431.
[548] Ibid 442.
[549] Ibid 444.
[550] Ibid 447.
[551] Ibid 481 citing *Whitfield v De Lauret & Co Ltd* [1920] HCA 75; (1920) 29 CLR 71, 77.

injunctive relief.[552] An action for harassment was an aggravated form of invasion of privacy.

In 1983, the ALRC recommended a statutory right to privacy should not be implemented in Australia.[553] Such a statutory right had however been implemented overseas.[554] Instead, the ALRC recommended that domestic legislation should be enacted to define the values to be protected, the circumstances of the protection, and the defences applicable.[555] A similar position had been reached in the United Kingdom.[556] Many Courts internationally considered the actionable right for invasion of privacy.[557]

United Kingdom Revisited post *Lenah*

In the 2004 House of Lords Decision of *Campbell v MGN Ltd* ('*Campbell*'),[558] a well-publicised case involving the *Mirror* newspaper reporting on rehabilitation treatments for drug misuse of fashion model Naomi Campbell. Ms Campbell sought damages for breach of confidence and compensation under the *Data Protection Act 1998* (UK) for the unlawful disclosure of private information. Although all five Judges concurred that there was a right to protection of privacy at common law in the United Kingdom, their specific views on construction of the action differed.

Unlike in the United States of America at the time, there was no common law 'right to invasion of privacy' in the United Kingdom.[559] New Zealand had made significant inroads in the 2004 Court of Appeal decision of *Hosking,* motivated by the enactment of the *Human Rights Act 1998* (NZ). The United Kingdom however, long afforded protection to the wrongful use of private information by means of a cause of

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[552] Ibid 492.
[553] ALRC, (Report No 22, vol 2, 1983) 26 [1085].
[554] Privacy Acts providing for a tort of privacy were enacted in British Columbia, Manitoba and Saskatchewan; cf *Lord v McGregor* (2000) 50 CCLT (2d) 206; [2000] BCSC 750.
[555] See also Raymond Wacks, *Law, Morality, and the Private Domain* (Hong Kong University Press Hong Kong, 2000) 262 cited in *Lenah,* per Kirby J, para 187.
[556] Great Britain, *Report of the Committee on Privacy*, (Cmnd 5012, 1972) 202–206 [653]–[666] ('*The Younger Report'*); *R v Khan* [1997] AC 558 at 571, 582-583; cf *Morris v Beardmore* [1981] AC 446 at 464.
[557] cf India: *Govind v State of Madhya Pradesh* (1975) 62 AIR(SC) 1378; Canada: *Aubry v Éditions Vice-Versa Inc* [1998] 1 SCR 591; New Zealand: *Klissers Farmhouse Bakeries Ltd v Harvest Bakeries Ltd* [1985] 2 NZLR 129; *Tucker v News Media Ownership Ltd* [1986] 2 NZLR 716; *Bradley v Wingnut Films Ltd* [1993] 1 NZLR 415; *TV3 Network Services Ltd v Fahey* [1999] 2 NZLR 129; *P v D* [2000] 2 NZLR 591; Tobin, above n 546.
[558] *Campbell.*
[559] Ibid*,* per Lord Nicholls of Birkenhead at 11, citing *Wainwright v Home Office* [2003] 3 WLR 1137.

action known as breach of confidence, being an equitable action to restrain forms of unconscionable conduct, akin to a breach of trust.[560] The breach of confidence arose out of a relationship of confidence.[561] This requirement was dispensed with in 1990 in the House of Lords decision of *Attorney General v Guardian Newspaper Ltd* (No.2),[562] in which Lord Goff of Chieveley found that a person holds a 'duty of confidence' whenever a person receives information he or she ought to know is fairly reasonably to be regarded as confidential.[563] Lord Chieveley formulated the position:

> [A] duty of confidence arises when confidential information comes to the knowledge of a person … in circumstances where he has notice, or is held to have agreed, that the information is confidential, with the effect that it would be just in all the circumstances that he should be precluded from disclosing the information to others.[564]

Lord Nicholls in *Campbell* considered that continuing use of the phrase 'confidential' is not comfortable when information about an individual's private life is not necessarily considered 'confidential' (or secret). He considered the more appropriate phrase would be the information is private, thus creating a tort of misuse of private information.[565] Ms Naomi Campbell's claim, therefore, was construed not as a breach of confidence but rather the wrongful publication by the *Mirror* of private information. All Justices concurred that the existence of the *European Convention on Human Rights* – specifically, articles 8 (respect for private and family life) and 10 (freedom of expression) – provided great motivation for the approach taken by the House of Lords in *Campbell* in redefining the scope of an action in breach of confidence and is the settled position in the United Kingdom.[566]

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[560] Ibid, per Lord Nicholls of Birkenhead at 13, citing *Coco* [1969] RPC 41, per Megarry J, 47–48.
[561] *Prince Albert v Strange* (1849) 2 De F & Sm 293; 1 Mac & G 25.
[562] [1990] 1 AC 109.
[563] *Campbell,* per Lord Nicholls of Birkenhead at 14, citing *Attorney-General v Guardian Newspapers Ltd (No 2)* [1990] 1 AC 109, per Lord Goff of Chieveley, 281
[564] *Attorney-General v Guardian Newspapers Ltd (No 2)* [1990] 1 AC 109, per Lord Goff of Chieveley, 281
[565] *Campbell,* per Lord Nicholls of Birkenhead 14.
[566] Ibid 16; see also *Reynolds v Times Newspapers Ltd* [2001] 2 AC 127, 203–204; see also *Earl Spenser v United Kigdom* (1998) 25 EHRR CD 105; *A v B plc* [2003] QB 195, 202 para 4; Gavin Phillipson, 'Transforming Breach of Confidence? Towards a Common Law Right of Privacy under the Human Rights Act'(2003)' 66 *Modern Law Review* 726, 726–728.

> The new approach takes a different view of the underlying value which the law protects. Instead of the cause of action being based upon the duty of good faith applicable to confidential personal information and trade secrets alike, it focuses upon the protection of human autonomy and dignity – the right to control the dissemination of information about one's private life and the right to the esteem and respect of other people.[567]

Lord Nicholls did, however, qualify such right to privacy arising consistency with articles 8 and 10 of the *European Convention on Human Rights* as not applying to circumstances where intrusion into private and family life or suspension of freedom of expression, may be justified.[568] The question of proportionality thus arises, ultimately reduced to a question as to whether the person in question had a reasonable expectation of privacy, that is 'would disclosure be highly offensive to a reasonable person?'[569] The appeal was allowed in *Campbell* by a slim majority of three Justices (Lords Hope of Craighead, Carswell, Baroness Hale of Richmond) to two (Lords Nicholls of Birkenhead and Hoffman). Disparity in judgements fell not into the legal principles applicable but rather in the construction of what is and what is not considered private and thus subject to protection. Three (3) tests were put forward in *Campbell* for determining what information will be regarded 'private':

1. The reasonable expectation test

Lord Nicholls posited with reference to the applicability of articles 8 and 10 of the *European Convention on Human Rights* that 'essentially the touchstone of private life is whether in respect of the disclosed facts the person in question had a reasonable expectation of privacy'.[570] Similarly, Baroness Hale considered that the 'exercise of balancing article 8 and article 10 may begin when the person publishing the information knows or ought to know that there is a reasonable expectation that the information in question will be kept confidential.[571]

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[567] *Campbell,* per Lord Hoffman at para 51, citing Sedley LJ in *Douglas* [2001] QB 967, 1001.
[568] *European Convention on Human Rights*, art 8(2) and 10(2).
[569] *Campbell,* per Lord Nicholls of Birkenhead 20–2, citing Prosser (1977), above n 119, and *Lenah* per Gleeson CJ13, para 42 .
[570] *Campbell,* per Lord Nicholls, para 21, cited in Nicole Moreham, 'Privacy in the Common Law: A Doctrinal and Theoretical Analysis' (2005) 121 *Law Quarterly Review* 628, 630.
[571] *Campbell,* per Baroness Hale para 134; see also *A v B Plc* [2002] EWCA Civ 337; [2003] Q.B. 195 per Lord Woolf C.J; *Douglas* [2001] QB 967.

2. The highly offensive to a reasonable person of ordinary sensibilities test

Citing a passage from Gleeson CJ's judgement in *Lenah,* Lord Hope in *Campbell* said that 'where information is not "obviously private", the broad test is whether disclosure of the information about the individual would give substantial offence to that person, assuming that the person was placed in similar circumstances and was a person of ordinary sensibilities.[572]

3. The obviously private test

Having set the 'highly offensive' test, Lord Hope considered that 'if the information is obviously private, the situation will be one where the person to whom it relates can reasonably expect his privacy to be respected. So there is normally no need to go on and ask whether it would be highly offensive for it to be published.'[573]

The Justices in *Campbell* rejected the test set by Gleeson J in *Lenah* (that what was 'highly offensive to a reasonable person of ordinary sensibilities' was indicative of what was to be considered private'), considering that such test indicated the proportionality of expectation rather than balancing privacy against freedom of expression.[574] It is clear that internationally, the imperative for development of domestic common law to recognise a right to privacy is premised on basic human rights, specifically for the 'well-being and development of an individual',[575] 'human autonomy and dignity',[576] or 'human dignity'.[577]

Decisional Interference

Solove explains that 'decisional interference bears a similarity to the harm of intrusion as both involve invasions of others. Whereas intrusion involves the unwanted general incursion of another's presence or activities, decisional interference involves unwanted incursion by the government into an individual's decisions about her personal life'.[578] In the 1965 United States decision of *Griswold v Connecticut* ('*Griswold*'), [579] the Supreme Court held that the *Constitution*

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[572] *Campbell* para 92 per Lord Hope.
[573] Ibid para 96 per Lord Hope; see also *A v B Plc* at 11(vii) per Lord Woolf C.J.
[574] Butler, above n 316, 351 citing *Campbell,* per Lord Nicholls, 466, per Lord Hope, 483, and per Baroness Hale, 496.
[575] *Campbell,* per Lord Nicholls, 464.
[576] Ibid per Lord Hoffman
[577] *Lenah,* per Gleeson CJ, 226.
[578] Solove, above n 387, 556.
[579] 381 US 479, 485-86 (1965).

prohibited the Government from banning the use of contraceptives by married couples in light of the *Constitution* providing for a 'right to privacy' in the penumbras of many of the amendments in the *Bill of Rights*, notwithstanding there is not a single reference to such a right in the *Constitution* itself.[580] This was later extended to the use of contraceptives by unmarried couples in *Eisenstadt v Baird* ('*Eisenstadt*').[581] Importantly, the Court in *Eisenstadt* explained that privacy 'is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child'.[582]

Griswold and *Eisenstadt* both demonstrate Solove's decisional interference category of privacy breach – governmental interference with people's decisions regarding certain matters of their lives. Some commentators have argued that Solove's construction of decisional interference is actually more suited to notions of autonomy and liberty, than to privacy.[583] Solove responds, however, by connecting the actions of government to the prejudice of personal information. 'Decisional interference resembles exposure in its focus on those aspects of life which are socially considered to be the most private.'[584] Post support this concept, stating that such a tort of invasion of privacy protects 'territories of the self,' which are critical to remaining 'an independent and autonomous person'.[585]

While it cannot be said that Australia has such a *Bill of Rights*, it can be said that there is no greater threat to the independence and autonomy of Islanders as a people, and, more specifically, as individuals, than the threat posed by government curtailment of their decisions to practice traditional activities as an embodiment of their cultural identity.

In the next section of this section, I will consider the application of equity to the protection of Islander secrets.

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[580] Solove, above n 387, 553.
[581] *Eisenstadt v Baird 405 U.S. 438 (1972).*
[582] Ibid 453.
[583] H Laurence Tribe, *American Constitutional Law: Powers and Liberties* (Foundation Press, 2nd ed, 1988).
[584] Solove, above n 387, 556.
[585] Ibid 557, citing Robert C Post.

4.3.5.3 Equity

Martin and Jeffrey argue that 'the legal position of Indigenous people in jurisdictions whose common law is based on the English system is far stronger than has been believed to date, even without any new legal rights or any special status case for Indigenous citizens'.[586] They argue that 'enforceable rights to protect Indigenous secrets arise from a "cocktail" of long-standing common law principles, combined with statutory instruments which refine and develop long-standing civil rights'.[587] For centuries, the jurisdiction of equity prevailed in instances where the common law proved unable to satisfy the demands of justice. Historically in England, the High Court of Chancery had jurisdiction to determine cases on behalf of the King based on equitable principles of fairness, beyond the scope of the common law.

> Equity is an over-arching (or underpinning) mechanism to ensure just behaviour in relations between citizens. It is not restricted to specific situations, and can move freely into areas where it has not previously been applied.[588]

Typically, equity comes to the rescue when one takes advantage of another under a relationship of dependency to avoid an unfair windfall because of exploiting a position of trust. Such scenarios include fiduciary relationships wherein one is in a position of authority over another, or trustee relationships where one manages the assets of another.

Martin and Jeffrey argue that there are four overlapping means by which Indigenous secrets can be adequately protected:

1. confidential information;
2. equitable estoppel;
3. misleading or deceptive conduct; and
4. unjust enrichment.

The equitable remedy under confidential information has been comprehensively canvassed already in this part (Intellectual Property). Remedy for confidential information may become available via equity or, alternatively, by way of express or implied term under contract stipulating confidentiality. In the context of contract law

[586] Martin and Jeffery, above n 168, 3.
[587] Ibid.
[588] Ibid 5.

pertaining to the protection of *sui generis* Indigenous interests, Martin and Jeffery consider the major pitfall to be in establishing 'privity of contract'[589] and in their general complexity.[590]

Equitable Estoppel

To establish equitable estoppel, one party must show that they relied on an assumption to their detriment and that the other party played such a role in the inducement of that assumption that it would be unconscionable for them not to rectify the detriment.[591] Such a situation may arise in the context of Indigenous knowledge where one is induced to provide secrets to another on assurances of confidentiality only to then publish them. Absent recourse in equity, the inducer may, in many instances pertaining to unlawful use of Indigenous knowledge, avoid a breach of contract claim to the absence of one or more essential elements of contract, namely:

1. offer;
2. acceptance;
3. consideration (value); and
4. intention to create legal relations (privity).

Equity effectively 'estops' the inducer from avoiding justice. Detriment need not be monetary[592] nor the inducement explicit, extending to conduct and even silence,[593] provided reasonably understood by the person to whom it was communicated.[594] Notwithstanding lack of contract, the inducer (and the entity it may represent) may be held to account as if one existed with such a confidentiality provision imported, via equitable estoppel.

Misleading or Deceptive Conduct

Section 52 of the *Trade Practices Act 1974* (Cth) states:

> A corporation shall not, in trade or commerce, engage in conduct that is misleading or deceptive.

[589] Requiring that a contract can only be being upon the parties to it.
[590] Martin and Jeffery, above n 168, 3.
[591] *Waltons Stores (Interstate) Ltd v Maher* (1988) 164 CLR 387.
[592] *Commonwealth v Clark* [1994] 2 VR 333
[593] *Waltons Stores (Interstate) Ltd v Maher* (1988) 164 CLR 387.
[594] *Low v Bouverie* [1891] 3 Ch 82.

To mislead or deceive may take the form of lying to consumers, leading them to a wrong conclusion, creating a false impression, leaving out (or hiding) important information in certain circumstances or making false or inaccurate claims about products or services. One such example in the Indigenous knowledge context may include misleading and deceptive conduct over the authenticity of Indigenous art, exploited for financial gain by unscrupulous corporations absent Indigenous consent. Public bodies, including Government, can be held to be in trade or commerce dependent upon the nature of their activities.[595] Deception does not need to be deliberate, and a mere inadvertent mistake may amount to liability.[596] Remedies may include damages without the need for the claimant to show economic loss, extending also to community service and prohibition orders.[597]

Unjust Enrichment

A remedy in unjust enrichment may be available in instances where one is unjustly enriched as a result of another's asset or labour. Enrichment generally has been defined to include a range of benefits of value to the receiver.[598] An asset is not required to be a material thing or a requirement for a legal proprietary interest,[599] with Indigenous knowledge potentially falling within this category. Indigenous knowledge may, in the alternative, come within the definition of labour.

Remedies

Equitable remedies may include damages, injunction, or specific performance. In situations where an equitable duty is found, a trust is implied. The elements of nature and incidents of a constructive trust were considered in *Pain v Pain & Ors.*[600]

> [26] In Muschinski v Dodds, Deane J described a constructive trust in these terms: 'Viewed in its modern context, the constructive trust can properly be described as a remedial institution which equity imposes regardless of actual or presumed agreement or intention (and subsequently protects) to preclude the

[595] *Firewatch Australia Pty Ltd v Country Fire Authority* [1999] FCA 761; *Paramedical Services Pty Ltd v The Ambulance Service of NSW* [1999] FCA 548.
[596] *Hornsby Building Information Centre Pty Ltd v Sydney Building Information Centre Ltd* (1978) 140 CLR 216
[597] *Trade Practices Act 1974* (Cth) s 86C.
[598] James Edelman and Elise Bant, *Unjust Enrichment in Australia* (Oxford University Press, 2006).
[599] Ibid.
[600] *Pain v Pain & Ors* [2006] QSC 335.

> retention or assertion of beneficial ownership of property to the extent that such retention or assertion would be contrary to equitable principle' …
>
> [34] A recent analysis of the nature of a constructive trust by legal academic John Dewar was in these terms: 'The flexibility of the imputed trust, its capacity to adapt itself to the contours of each relationship, has been made possible by the conceptual break from common intention. It permits the outcome of a case to be informed by the nature of the parties' relationship as evidenced by their own intentions, the reasonable expectations attaching to relationships of a particular type and the flow of gains and losses during it. This avoids the potential unfairness, implicit in the older Australian case law and still present in the English, that recovery depends solely on what the parties agreed or intended: parties may agree to unfair outcomes. The potential for unfairness remains, of course. The circumstances in which a joint endeavour will be found to exist, or in which a claimant will be deemed to have gained as much as he or she have put in, are still matters of some uncertainty.'

The three elements of a constructive trust are:

1. an equitable duty, created through some principle such as confidentiality, fiduciary obligations, or taking of some benefit under a relationship which suggests an equitable obligation;
2. a wrongful breach of the duty such as fraud, mistake, undue influence, duress, breach of confidence;
3. resulting in a benefit to the person who acted in breach of their duty.

Equitable remedies based on constructive trust would enable orders such as injunctions (to prevent further disclosure or use) or *mandamus* (to trace or return profits unjustly gained).[601] Martin and Jeffery, in the context of researchers gaining Indigenous knowledge, suggest the formation of a constructive trust referred to as a 'Knowledge Trust', formalised in a 'Knowledge Trust Agreement', in writing or verbally recorded, between researchers and their Indigenous participants, regularising access and use of the knowledge offered. They argue that this would convert a moral responsibly into a legal responsibility via equitable trust.[602]

[601] Martin and Jeffery, above n 168, 20.
[602] Ibid 29.

4.3.5.4 Inadequacy of normative legal protection regimes

Many challenges have been cited in the application of the aforementioned Australian statutory, common law and equitable legal regimes to the protection of Islander secrets, including but not limited to:

- applicability only to individuals (and not groups);
- mandatory disclosure of secrets as a prerequisite;
- requirements for originality for protection of works dating back some 200 years;
- limited duration of legal protection afforded; and
- the complexity, cost and timeframe in asserting infringement of such rights in a Court of competent jurisdiction.

Intellectual Property and privacy laws are largely fragmented across many difference pieces of legislation and the common law. However, in my opinion, the most fundamental restriction posed by these regimes is not in whether an action can be mounted in these jurisdictions but rather in the ability of any to provide adequate remedy for the *sui generis* harm suffered by Islanders in the event of impairment individually or communally. Under the aforementioned normative legal regimes (intellectual property, privacy and equity), remedies largely range from an injunction to restrain breach, to orders for damages or an account for profits. The common theme is the protection of individual proprietary interests; the right to own, the right to possess, the right to exploit, the right to occupy, the right to use, the right to exclude, protecting against individual physical world economic impairment. None appropriately identify the individual or communal spiritual world impairment central to Islander culture and remediate accordingly. That is, none except a relatively modern statutory legal regime which the author considers poised to emerge as the leading contender in the protection of Indigenous secrets in Australia: Native Title law.

4.3.5.5 Native Title

> The common law of Australia recognises a form of native title which, in cases where it has not been extinguished, reflects the entitlement of the Indigenous inhabitants, in accordance with their laws or customs, to their traditional lands.
>
> Justice Brennan[603]

Prescribed and Subscribed Rights

Yagasin, and the secrets sought to be protected by it under *ailan lore* and *ailan kastom*, do not, in my opinion, lend themselves to construction as a right akin to intellectual property, privacy or equity. Each have, at their core, the legal protection of proprietary rights of the individual. Most concern a degree of expropriation of economic proprietary rights, such as by commercial exploitation (intellectual property/equity) or misuse of personal information (privacy). This entails physical world proprietary expropriation. Civil remedies under each regime then seek to remediate the individual by enabling:

1. injunction to restrain further exploitation or use;
2. damages to compensate loss or hurt from exploitation or use; and
3. account of profits to remediate unjust enrichment from exploitation or use.

When considering that Islander culture is centred around not only the physical world, but also the spirit world, and that monetary wealth and personal privacy plays a limited role in the spirit world (see discussion in section 4.1), it becomes clear that commercial exploitation has only marginal impact on *Yagasin* or, in turn, in the revelation of secret thereunder. That is not to say that Islanders cannot enjoy the protection of laws applying to all Australian citizens, such as under the intellectual property, privacy and equitable regimes, provided such claims fit squarely within the law. However, this may involve a distinctly different (and inherently Western) statutory, common law, or equitable categorisation of secret to those practiced in Indigenous communities pursuant to *ailan lore* and *ailan kastom*.

If *Yagasin* prescribes secrecy in Islander culture upon, for example:

- the speaking about witchcraft and sorcery;

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[603] *Mabo (No. 2)* 1992) 175 CLR 1 per Mason CJ and McHugh J, 15, concurring with the findings of Brennan J.

- who may speak language;
- who may engage in *ailan* dance, *ailan* adoption, and hunting and fishing;
- who may share sacred stories, and access sacred sites and artefacts;
- who may disclose 'sorry business'; and
- who may participate in initiation ceremony.

and the secrets protected are sensitive Indigenous knowledge detailing techniques and participants, for example, enabling preservation of cultural identity involving not only the physical world, but also the spirit world, then these *sui generis* secrets are rarely capable of commercial exploitation, or individual privacy infringement (being a purely physical world construct). To demonstrate this point, let us take the Islander cultural practice of *ailan* dance.

Just as Mr Bulun Bulun was initiated by his Aboriginal community as an artist, able to reproduce sacred images and to sell them in his own right, with a fiduciary relationship owing to the community as beneficiary, Islanders are similarly inducted and authorised to practice and evolve *ailan* dance and may showcase these around the world. The exploitation of such dance by a third party without license or assignment, may evoke a similar claim of copyright (or moral right). However, this is a distinctly Western claim, and does not emanate from *ailan lore* or *ailan kastom.* Instead, *Yagasin* is only affected under *ailan lore* or *ailan kastom* where Indigenous knowledge transfer in the appropriate form and content in the spirit world is interrupted. The right to share knowledge is distinct from the right to exploit it for commercial gain, the first emanating from the Indigenous spirit world, the second from the Western physical world. This becomes clearer on reflection of Islander remedies for breach of *Yagasin,* being a loss of place in the spirit world as well as in social and political standing, and a fear of spiritual reprisal via *pouri pouri. Yagasin* does not concern itself with economic damage or a loss of individual privacy *per se*.

It may be beneficial to describe those rights emanating from traditional laws and customs acknowledged (prescribed rights), from those rights arising from Western legal protection regime (subscribed rights). Prescribed rights are those prescribed according to *sui generis ailan lore* and *ailan kastom* (ie, *Yagasin)*. Conversely, subscribed rights are those to which an ethnic minority may subscribe legal protection (for example, under the Western intellectual property framework), but are

not necessarily of the same nature and incidents of a right exercised in accordance with *ailan lore* and *ailan kastom*. Much effort has been afforded domestically in Australia, and in international law, to combat the exploitation of Indigenous knowledge for commercial gain. Examples include medicinal or botanical knowledge.[604] However, much less focus has been given to the protection of other forms of Indigenous knowledge, such as language, songs, stories and kindship relationships.[605] The focus has been on commercial exploitation and not a loss of place in the spirit world.

Attempts to conflate commercial exploitation or one's own right to be let alone in the physical world, with a restriction on knowledge-sharing and place in the spirit world, as one categorisation of secrecy in order to subscribe to protection under a cocktail of Western intellectual property, privacy and equitable regimes, is disadvantageous to the protection of *sui generis* Indigenous interests. Each of the case examples above[606] demonstrate attempts by Australian law to distort, contort and disfigure *sui generis* Indigenous interests, to fit within a Western paradigm, and the Judiciary's attempt to interpret these through the same lens. *Yagasin* is not in every instance adversely affected by the exploitation of traditional knowledge for commercial gain or by peering into one's physical world. Instead, *Yagasin* is adversely affected whenever Islanders are restrained from controlling traditional knowledge-transfer *their-way*, essential to preservation of their cultural identity.

Notwithstanding variance between the ideals, values and belief-systems of diverse ethnic-groups, there does exist potential for convergence by continuous evolution of culture. Ideas of secrecy and secret and categorisations of instances thereof will converge and diverge throughout time between minority and majority groups in a polity. In the event of such convergence of ideas, the imperative to make the distinction between prescribed and subscribed rights may be lost given the *sui generis* right is adequately protected at law. Notwithstanding, the distinction remains important as prescribed rights are rights arising from traditional laws and customs acknowledged, distinct from Western origin. Notwithstanding commonality, each may have derived from very different worlds (ie, physical vs spiritual). The aim must

[604] Battiste, above n 210. 118.
[605] Ibid.
[606] *Yambulul, Milpurrurru, Bulun Bulun* and *Ward.*

be to recognise Indigenous rights and interests in the form and content prescribed by Indigenous traditional laws and customs, and not merely to seek to blindly subscribe to 'similar' rights provided of Western origin, which may require important Indigenous concession otherwise required to make good Indigenous wrongs (eg, spiritual harm). In my opinion, Native Title law provides the greatest opportunity to bridge the two worlds.

Land Rights

In 1889, Lord Watson in the Privy Council decision in *Cooper v Stuart*[607] attempted to articulate the basis of British sovereignty over Australian shores, stating:

> There is a great difference between the case of a Colony acquired by conquest or cession, in which there is an established system of law, and that of a Colony which consisted of tract of territory practically unoccupied, without settled inhabitants or settled law, at the time when it was peacefully annexed to the British dominions. The Colony of New South Wales belongs to the latter class.[608]

The Privy Council concluded that Australia was a settled colony of the British Empire on the basis of categorisation in accordance with the doctrine of *Terra Nullius*. This conclusion was made on the basis of an observed absence of any settled system of Aboriginal (or Torres Strait Islander) law, absent evidence about the nature of any such society.[609] This position was later confirmed in the 1971 Northern Territory Supreme Court decision of *Milirrpum v Nabalco Pty Ltd*[610] in the first Australian claim for a form of Native Title; however, a statutory regime of Aboriginal land rights followed under the *Aboriginal Land Rights (Northern Territory) Act 1976* (NT) ('*ALR*'). The *ALR* gave standing with the Anglo-Australian legal system to a system of traditional ownership. Justice French posited, with respect to the ALR: 'although statutory land rights provided a legal framework within which traditional owners could exercise the rights and responsibilities which

[607] [1889] 14 App Cas 286 (PC) 291.
[608] Ibid.
[609] Justice Robert French and Patricia Lane, 'The Common Law of Native Title in Australia' (2002) 2(1) *Oxford University Commonwealth Law Journal* 15, 16.
[610] *Milirrpum*

defined their relationship to the land under Indigenous law and custom, it did not operate as a model of that relationship'.[611]

Racial Discrimination Act 1975 (Cth)

The passage of the *Racial Discrimination Act 1975* (Cth) ('*RDA*') gave effect to the *International Convention on the Elimination of All Forms of Racial Discrimination* ('*CERD*') to which Australia is a signatory. The *RDA* declared unlawful, any act involving a distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise on any equal footing of any human right or fundamental freedom.[612] French observes that 'the Act provided a protective framework within which the common law of native title could develop without pre-emptive extinguishment by State legislatures'.[613]

Subsequent to enactment of the *RDA*, in 1982, Eddie Koiki Mabo, Rev. David Passi, Celuia Salee, Sam Passi James Rice, five members of the *Meriam* people from Mer (Murray) Island in the Torres Strait, commenced litigation in the High Court of Australia, seeking declaration as holders of native title in their lands and waters, with Crown sovereignty subject to local custom and their traditional native title.[614] This was later to evolve into the landmark *Mabo (No.2)*[615] decision. In response to the original claim, in 1985, the Queensland government enacted the *Queensland Coast Islands Declaratory Act 1985* (Qld), seeking to declare that, upon the Islands of the Torres Strait becoming part of Queensland (back in 1872), they were vested in the Crown in a right of that State 'freed from all other rights, interests and claims of any kind whatsoever'. The Act was in defence of the Plaintiff's claim, asserting its extinguishing effect on any such claim. The High Court, at first instance in December 1988, found the Act to be invalid as inconsistent with the *RDA* as discriminating against Torres Strait Islanders. It was decided in *Mabo (No.1)* that:

> In practical terms, this means that if traditional native title was not extinguished before the Racial Discrimination Act came into force, a State law which seeks

[611] French and Lane, above n 609, 18
[612] *RDA* s 9(1).
[613] French and Lane, above n 609.
[614] Peter Sutton, *Native Title in Australia: An Ethnographic Perspective* (Cambridge University Press, 2004) xiv.
[615] *Mabo (No.2)*.

> to extinguish it now will fail. It will fail because section 10(1) of the Racial Discrimination Act clothes the holders of traditional native title who are the native ethnic group with the same immunity from legislative interference with their enjoyment of their human right to own and inherit property as it clothes other persons in the community. A State law which, by purporting to extinguish native title, would limit that immunity in the case of the native title group cannot prevail over section 10(1) of the Racial Discrimination Act which restore the immunity to the extent enjoyed by the general community. The attempt by the 1985 Act to extinguish the traditional legal rights of the Miriam people therefore fails.[616]

Common Law Native Title

The *Mabo (No.2)* decision later recognised the substantive matter of survival of pre-existing *sui generis* rights and interests in land and waters surviving annexation of sovereignty in 1770.[617] In a majority judgement, decided 6:1, the High Court of Australia in *Mabo (No.2)* recognised the survival of rights and interests in land and waters under traditional laws and customs. following assertion of sovereignty in 1879. Relevantly, *Mabo* is authority for the legal propositions that native title:

1. embodies traditional Indigenous practice, having survived colonisation;[618]
2. shall be recognised at common law and protected under that law;[619]
3. is susceptible to extinguishment by laws or Executive acts which indicate a plain and clear intention to do so;[620]
4. requires a continuing connection with land and observance of traditional practice which define ownership rights and interests in the land;[621]
5. is communal in character (although can give rise to individual rights),[622] cannot be bought or sold[623] and may be transmitted by one group to another

[616] Ibid.
[617] 1 August 1879 for the Torres Strait where sovereignty was annexed by the passage of *The Queensland Coast Islands Act 1879* (Qld).
[618] *Mabo (No.2)* per Brennan J (with whom Mason CJ and McHugh J agreed), 57, per Deane, 69; and Gaudron JJ, 81; per Toohey J, 184, 205.
[619] Ibid, per Brennan J 60, 61; per Deane and Gaudron JJ, 81, 82, 86–7, 112–113, 119; per Toohey J 187.
[620] Ibid, per Brennan J, 64, per Deane and Gaudron JJ, 111, 114, 119; per Toohey J, 195–196, 205.
[621] Ibid, per Brennan J, 59–60, 70; per Deane and Gaudron JJ, 86, 110; per Toohey J, 188.
[622] Ibid, per Brennan J, 52, 62; per Deane and Gaudron JJ, 85–86, 88, 119.
[623] Ibid, per Brennan J, 60, 70; per Deane and Gaudron JJ, 88, 110.

under their laws and customs,[624] nature of which may change over time;[625] and

6. is subject to existing valid laws and rights created under such laws. [626]

Common law native title in *Mabo (No.2)* aligned the 'expectations of the international community' and the 'contemporary values of the Australian people', with Justice Brennan (with whom Mason CJ and McHugh J agreed) positing:

> [I]t is contrary both to international standards and to the fundamental values of our common law to entrench a discriminatory rule which, because of the supposed position on the sale of social organisation of the Indigenous inhabitants of a settled colony, denies them a right to occupy their traditional lands.[627]

Since *Mabo (No.2),* there has been 22 land-based consent determinations of native title in the Torres Strait region. All 22 relate to over 100 islands, islets and rocks above the high-water mark. In 17 of those determinations, exclusive native title was found in favour of single island communities. In four, native title rights were found to be held collectively by members of two or more islander communities said to belong to a single 'cluster' group of islands with shared rights.[628] Conversely, in *Nona and Ors v Queensland* [2005] FCA 1118, native title rights and interests in four islands (Buru, Warul Kawa, Awial Kawa and Turu Cay) were declared in favour of claimant groups from five island communities who did not belong to a single regional group namely, the peoples of Saibai, Dauan, Boigu, Mabuiag and Badu. Following the *Akiba (No.2)* decision in 2010, finding native title subsisting in most of the seas of the Torres Strait, it may be summarised that the vast majority of the lands and waters within the Torres Strait region are now the subject of a determination of native title, or ongoing native title claim.

Statutory Native Title

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[624] Ibid, per Brennan J, 60; per Deane and Gaudron JJ, 110.
[625] Ibid, per Brennan J, 61; per Deane and Gaudron JJ, 110; per Toohey J, 192.
[626] Ibid, per Brennan J, 63, 69, 73; per Deane and Gaudron JJ, 111–112.
[627] Ibid, per Brennan J, 42.
[628] *Akiba (No.2)* at 78 per Finn J; citing also *Warria v Queensland* [2004] FCA 1572; *Warria v Queensland* [2005] FCA 1117; *Thaiday v Queensland* [2005] FCA 1116; *Nona and Manas v Queensland* [2006] FCA 412.

Native title was codified in 1993 by way of enactment of the *NTA*. This statutory native title system would codify:

a. a mechanism for determining claims to native title;
b. ways of dealing with future Acts affecting native title; and
c. compensation for its extinguishment.[629]

Notwithstanding substantial amendment in 1998,[630] the fundamental definition of native title did not change in the *NTA,* namely:

> The expression native title or native title rights and interests means the communal, group or individual rights and interests of Aboriginal peoples or Torres Strait Islanders in relation to land or waters, where:
>
> a. the rights and interests are possessed under the traditional laws acknowledged, and the traditional customs observed, by the Aboriginal peoples or Torres Strait Islanders; and
> b. the Aboriginal peoples or Torres Strait Islanders, by those laws and customs, have a connection with the land or waters; and
> c. the rights and interests are recognised by the common law of Australia.[631]

It is well established that native title rights and interests, which are recognised by the *NTA* as defined in s 223(1), are those which were held to have survived the acquisition of sovereignty in *Mabo (No.2)*.[632] Gleeson CJ, Gummow and Hayne JJ in *Yorta Yorta* observed with respect to section 223(1)(a) of the *NTA* that:

> To speak of rights and interests possessed under an identified body of laws and customs is, therefore, to speak of rights and interests that are the creatures of the laws and customs of a *particular society* that exists as a group which acknowledges and observes those laws and customs.[633]

To be successful in an initial native title claim under the *NTA*,

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[629] Sutton, above n 614, xiv.
[630] *Native Title Amendment Act 1998* (Cth).
[631] *NTA* s 223(1).
[632] *Manado* per Barker, Perry and Charlesworth JJ at 9 citing *The State of Western Australia v The Commonwealth (Native Title Act Case)* (1995) CLR 373 at 452-453 (Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ); [1995] HCA 47; *Members of the Yorta Yorta Aboriginal Community v State of Victoria and Others* (2002) 214 CLR 422 at [45] (Gleeson CJ, Gummow and Hayne JJ) at [134] (McHugh J); [2002] HCA 58.
[633] *Members of the Yorta Yorta Aboriginal Community v Victoria* [2002] HCA 58 ("*Yorta Yorta")*

> [T]he claimants would thus need to establish that: -
>
> a. the traditional laws they acknowledge and the traditional customs they observe, and on which their rights in land and waters are based, are substantially the same as those of their predecessors in the same area prior to the imposition of British sovereignty; and
> b. those laws and customs have normative content; and
> *c.* the chain of transmission of these traditions are substantially unbroken.[634]

Sutton posits that 'the normative' covers not only explicit rules but may also include the behavioural reflection of the assumption of a norm, and average or typical behaviour as well as ideal norms'.[635] Statutory native title rights and interests are described as a 'bundle of rights'.[636] The definition of native title extended under statute beyond rights in land and waters, extending to a non-exhaustive list of cultural practice, including but not limited to hunting, gathering and fishing rights of Indigenous people.[637] The High Court of Australia found in *Fejo v Northern Territory of Australia* [1998] HCA 58; (1998) 195 CLR 96 ('*Fejo*') that 'Native title is neither an institution of the common law nor a form of common law tenure but it is recognised by the common law. There is therefore an intersection of traditional law and customs with the common law'.[638] Sutton posits that 'native title rights are products of a process in which evidence about Indigenous cultural understandings and practices come under legal scrutiny and is tested, usually by non-Indigenous professionals. It is common for that body of information to be presented in the form of written and oral anthropological evidence, or anthropological evidence combined with that obtained directly from those whose native title application is being determined'.[639]

The *NTA* is now the paramount consideration in finding a common law native title right, more so than *Mabo (No.2)* and *Wik* decisions.[640] *Ward* recognised the difficulty

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[634] Sutton, above n 614, xv citing *Yorta Yorta*
[635] Ibid xvi citing Alan Barnard and Jonathan Spencer, *Encyclopedia of Social and Cultural Anthropology* (Taylor & Francis, 1996).
[636] *Ward* [2002] HCA 28; (2002) 76 ALJR 1098.
[637] *NTA*, s 223(2).
[638] *Fejo v Northern Territory of Australia* [1998] HCA 58; (1998) 195 CLR 96, 128 ('*Fejo*')
[639] Sutton, above n 607, 1
[640] *Ward* 2002) 191 ALR 19 per Gleeson CJ, Gaudron, Gummow and Hayne JJ; *Wik Peoples v State of Queensland* (1996) 187 CLR 1 (HCA) ('*Wik*').

in defining native title in statute, being a pale reflection of the spiritual reality of connection to land and waters, in so far as 'the spiritual or religious is translated into the legal. This requires the fragmentation of an integrated view of the ordering of affairs into rights and interests which are considered apart from the duties and obligations which go with them'.[641] French considered that tying the definition of native title down to statutory words, certainly limits scope for recognition of traditional interests.[642]

Section 225 of the *NTA* then goes further to prescribe that any determination of native title must determine whether native title exists, and if so, who holds it and the nature of the native title rights and interests, specifically providing that:

> A determination of native title is a determination whether or not native title exists in relation to a particular area (the determination area) of land or waters and, if it does exist, a determination of:
>
> (a) who the persons, or each group of persons, holding the common or group rights comprising the native title are; and
> (b) the nature and extent of the native title rights and interests in relation to the determination area; and
> (c) the nature and extent of any other interests in relation to the determination area; and
> (d) the relationship between the rights and interests in paragraphs (b) and (c) (taking into account the effect of this Act); and
> (e) to the extent that the land or waters in the determination area are not covered by a non-exclusive agricultural lease or a non-exclusive pastoral lease—whether the native title rights and interests confer possession, occupation, use and enjoyment of that land or waters on the native title holders to the exclusion of all others.
>
> Note: The determination may deal with the matters in paragraphs (c) and (d) by referring to a particular kind or particular kinds of non-native title interests.[643]

[641] *Ward* 15–16.
[642] Robert French, 'Western Australia v Ward: Devils (and Angels) in the Detail' (2002) 7 *Australian Indigenous Law Report* 1.
[643] *NTA* s 225.

Nature and Incidents of Native Title

A Bundle of Rights

Native title has been described as a 'bundle of rights'*:*

> The metaphor of 'bundle of rights' which is so often employed in this area is useful in two respects. It draws attention first to the fact that there may be more than one right or interest and secondly to the fact that there may be several kinds of rights and interests in relation to land that exist under traditional law and custom. Not all of those rights and interests may be capable of full or accurate expression as rights to control what others may do on or with the land.[644]

Native title rights are distinctly separate from those deriving from the settler:

> [I]t is a mistake to assume that what the *NTA* refers to as 'native title rights and interests' is necessarily a single set of rights relating to land that is analogous to a fee simple. It is essential to identify and compare the two sets of rights: one deriving from traditional law and custom, the other deriving from the exercise of the new sovereign authority that came with settlement.[645]

Ward is authority for the proposition that cultural knowledge was said not to arise from laws and customs by which Indigenous people had a connection to land.[646] Furthermore, the right to protect cultural property was found to be akin to a new kind of intellectual property, with 'the recognition of this right extending beyond denial or control of access to land held under native title'.[647] I disagree with this finding, advancing the alternate argument that Indigenous knowledge, by its very nature, inherently maintains strong spiritual connection with Indigenous land and sea.

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[644] *Ward* 40.
[645] Ibid 37.
[646] Ibid 31–32.
[647] Ibid 31.

Connection with the land or waters

The Akiba Cases[648]
Nature and incidents of native title rights and interests

The decision of *Akiba on behalf of the Torres Strait Islanders of the Regional Seas Claims Group v State of Queensland* (No.2) ('*Akiba (No.2)*')[649] considered the required connection of Islanders to their sea country, by their traditional laws and customs, in order to satisfy the test under section 223(1) of the *NTA* for a declaration of native title. That case concerned an assertion by the native title claimant group of 'reciprocity-based' rights and interests as constituting native title. The case concerned a native title claim seeking determination of native title rights and interests in a major part of the sea country of the Torres Strait. The claimants specifically sought a declaration of native title to:

- enter and remain;
- use and enjoy;
- access the resources;
- take the resources;
- a livelihood based upon accessing and taking resources;
- to protect resources;
- to protect the habitat of resources; and
- to protect places of importance.[650]

The presiding judge, Finn J, went on to make a distinction between occupation-based rights and reciprocal rights:

> To précis the Applicant's own description, the *first* are what may be called 'ancestral occupation based rights' or 'emplacement based rights'. Rights of this kind:
>
> (a) are held by people (a local descent group) who are descendants (usually patrilineal) of the socially recognised prior occupying ancestors (whether themselves members of a family, clan,

[648] *Akiba on behalf of the Torres Strait Islanders of the Regional Seas Claims Group v State of Queensland* (No.2) [2010] FCA 643; 204 FCR 1 ('*Akiba (No.2)*'); *Commonwealth v Akiba and Another* (2012) 204 FCR 260; [2012] FCAFC 25 ('*Akiba FCAFC'*); *Akiba on behalf of the Torres Strait Regional Seas Claim Group v The Commonwealth of Australia* (2013) 250 CLR 209; [2013] HCA 33 ('*Akiba HC'*)

[649] *Akiba (No.2).*

[650] *Akiba (No2),* per Finn J at para 512.

'community' or a group of people of or from more than one 'community') and the wives of members of the group;

(b) are rights because they are enforceable by appeal to the socially recognised history of prior occupation and to the law or custom that makes that the basis for the existence of the rights; and

(c) are 'communal' or 'group' rights.

I will call these 'occupation based rights'.

The *second* are what may be called 'reciprocal relationship based rights' or 'reciprocity based rights'. Rights of this kind:

(a) are held by each person who has, or each group of persons who have, a relevant reciprocal relationship (whether based in kinship or of another kind, such as *tebud/thubud* (eg, hereditary trade friendships)) with an ancestral occupation based rights holder or group of such rights holders;

(b) can be called rights or interests because they are enforceable and sanctioned by appeal to the law or custom that associates the reciprocal obligation with the relationship and the law or custom that sanctions consequences for denial of the reciprocal obligation; and

(c) are 'group' or 'individual' rights.

I will call these 'reciprocal rights'.

Finn J found the existence of laws and customs which regulate rights and obligations between persons in certain reciprocal relationships, creating a network of inter-island relationships, however did not find that such relationships are generative of rights and interests in land and waters for the purpose of s223(1) of the *NTA*.[651] Reciprocity-based rights are rights based upon reciprocal personal relationships with persons who have native title rights in their own land and marine territories. Finn J did find non-exclusive rights of the group members of the respective inhabited island communities, firstly to access, remain in and to use their own marine territories or territories shared with another, or other, communities, and secondly, to access resources and to take for any purpose resources in those territories.[652] The rights in land or waters were found to attach to the claim group members of the island community, or communities in the case of shared areas, which had emplacement-based rights in that area.[653]

[651] *Akiba (No.2),* above n 646 at para 71 per Finn J.
[652] *Akiba (No.2),* at para 11 per Finn J.
[653] *Akiba (No.2),* at para 543 per Finn J.

On appeal to the Full Court of the Federal Court of Australia in *Akiba FCAFC*,[654] the court reconsidered whether rights, which could be exercised in the country of ancestral occupation-based rights holders and arose from a 'reciprocal relationship' between a member of an ancestral occupation-based rights holding ground (the host) and a person outside that group, were properly characterised as native title rights and interests for the purposes of section 223 of the *NTA*. The Full Court of the Federal Court[655] upheld the view of the trial judge that found that under the normative system of the Torres Strait Islanders, reciprocal rights and obligations could properly be described as rights and obligations that were recognised and expected to be honoured or discharged under Torres Strait Islander laws and customs. They were not mere privileges. These rights could be passed down through the generations. However, while holding these rights may provide a "passport" to the host's country and, with permission, may allow the reciprocal rights holder to undertake the same activities there as the host, reciprocal rights were 'relationship-based' and therefore, were properly characterised as personal rights as opposed to rights "in relation to" land or waters within s233(1) of the *NTA*.[656]

Relevantly, their honours in *Akiba FCAFC* held that although the reciprocal rights relate to land and waters, they are not held by reason of the putative holder's own connection with the land and waters but rather were '*dependent on the permission of other native title holders for their enjoyment* and were mediated through a personal relationships with the native title holder'.[657] A clear distinction was made between "status-based" reciprocal rights, being rights in relation to land and waters of another person, as opposed to occupation based rights to access and use land and water under traditional laws and customs such as those concerning descent from an original occupier of the land.[658] This position was subsequently upheld by the High Court.[659]

From the *Akiba* cases, it is clear that:

> Not every identified 'right' or 'interest' arising under the laws or customs of Indigenous peoples will necessarily be found to be 'in relation to' land or waters. Close analysis is

[654] *Akiba (No. 2)*
[655] *Akiba FCAFC* per Keane CJ and Dowsett J (at 130) and Mansfield J (at 148)
[656] *Akiba (No.2),* at 507–508 per Finn J.
[657] *Akiba FCAFC* at 130.
[658] Ibid, *Akiba FCAFC* at 131.
[659] *Akiba HC* at 45 per French CJ and Crennan J and at 47 per Hayne, Keifel and Bell JJ.

> required of the asserted rights or interests in order properly to characterise them for the purposes of s 223(1). They also demonstrate that where the rights are held mediately by reason of a personal relationship only with a native title holder, who may grant of [or] (sic) withhold permission, the rights cannot be said to be native title rights for the purposes of s 223 of the *NTA*.[660]

Finn J in *Akiba (No.2)* found that:

> The evidence in this matter is that reciprocal relationships have existed, and do exist, between members of the claim group and (a) other Torres Strait Islanders who were not members of the native title claim group, ie, the *Kaurareg*; (b) Aboriginal persons on the nearby mainland and elsewhere; and (c) people from the PNG mainland or PNG islands, such as Parama and Daru. Secondly, at least the Islander and Aboriginal persons having the claimed 'rights' must, by the laws and customs, have a 'connection' with the land and waters in question.[661]

It is highly likely that this would be the case equally for most land-based rights, as sea-based in the context of *Akiba (No.2).* Regardless, such rights were found in *Akiba (No.2)* not to be rights in land or waters, but rather rights in persons.[662] 'Merely because rights are to be satisfied in the host's island's areas does not mean that the rights themselves are one in relation to those areas.'[663]

In the context of reciprocal rights, *ailan adoption* was specifically considered by Finn J in *Akiba (No.2).* Finn J was satisfied that the laws and customs on adoption were traditional by nature, and are, essentially the same across the Torres Strait. Ailan adoption was considered in the context of ascertaining relevant connection/ ownership of country in *Akiba (No.2)* in addition to factors such as kinship, marriage affinal relations and totems as to whether there is "one society" or a quilt of united parts. Although on the facts 'one society' was found, Finn J did go on to explain that the distinction was likely not important and the same result would have been found whether one, four or thirteen societies were found.[664]

On appeal to both the Full Court of the Federal Court and High Court, on the question of reciprocal rights, reference was made to the 22 consent determinations

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[660] *Manado,* para 86.
[661] *Akiba (No.2),* per Finn J at para 502.
[662] *Akiba (No.2),* per Finn J at para 508.
[663] *Akiba (No.2),* per Finn J at para 508.
[664] *Akiba (No.2)* per Finn J at 492.

since *Mabo (No.2)* in the Torres Strait, each relating to land above the high water mark, and concerning exclusive native title held by one or more island communities on the basis of descent from particular ancestors who occupied the respective estates at sovereignty. If this were not to be the case and reciprocal rights were accepted, this would create practical inconsistencies where native title could be held not by community members, but other unidentified individuals on the basis of their relationships from time to time with one or more persons in the relevant community.[665]

Manado on behalf of Bingunbur Native Title Claim Group v State of Western Australia ('*Monado*') [666]
Nature and incidents of native title rights and interests

The 2018 decision of *Manado* concerned an appeal by the *Goolaraboolo* native title claim group to the Federal Court of Australia, seeking determination of native title rights and interests. Specifically, the *Goolaraboolo* had argued that they held a right or interest recognised by the *Jabirr Jabirr* (the determined common law holders of native title of the determination area) by way of *rayi* connection (spiritual connection rather than the traditional bloodline/decent/succession held by the *Jabirr Jabirr*), which relevantly maintained their connection to land and waters in the determination area and in turn, is a right or interest *"in relation to land or waters"* for the purposes of s 223 of the *NTA*.[667] The claim was two-fold, namely that rights and interests were held by *Goolaraboolo* individuals by way of:

1. *rayi* connection with part of the determination area; or
2. because of their status as a ritual leader under Aboriginal Tradition.

At first instance, his Honour explained that '*rayi*-derived rights' are contingent upon the 'core' rights of the rights holders by decent. For that reason, just like in *Akiba (No.2), rayi* derived rights were found to be rights in relation to persons, not land or waters.'[668] This was upheld on appeal. Social recognition alone is not sufficient to constitute a right or interest capable of recognition as native title for the purposes of

[665] *Akiba FCAFC,* per Keane CJ and Dowsett J at para 133; *Akiba HC,* per French CJ and Creenan J at para 45.
[666] [2018] FCAFC 238
[667] *Manado* para 25.
[668] Ibid, para 59.

s223(1) of the *NTA*. On appeal, their Honours by way of joint judgement concluded in relation to *rayi* connection that:

> It may be regarded as a *'tool for the social inclusion of strangers on country'*. In that respect, a socially recognised *rayi* connection allows a stranger to country to enter into a relationship of mutual respect with the right holders by decent. We agree, as his Honour plainly found, that such an interest – a socially recognised one- is not a right or interest in relation to land or waters for the purposes of s 223 of the *NTA*.[669]

Distinction is also made in *Manado* between ritual leaders and traditional owners by decent. It was held that:

> The knowledge and status of a person as a ritual leader does not in and of itself result in such a person being possessed of any rights or interests in relation to land or waters under *Jabirr Jabirr* law and custom. [670]

It is very clear from *Manado,* that notwithstanding 'the existence of complex social and religious relationships permitting the holder of a *rayi* interest (who has no decent based rights) to access and use a place associated with the *rayi,* this does not convert a socially recognised cultural relationship into one which can be properly characterised as a right or interest in relation to land or waters.*'*[671] Where the exercise of such claimed rights and interests are 'bestowed' entirely at the discretion of the rights holders by descent (namely the *Jabirr Jabirr* in this case), native title will not be made out for the purposes of section 233(1) of the *NTA*.[672] The appeal judges were careful however to emphasise that "*each cultural setting will dictate how particular asserted and accepted rights and interests arising under the traditional laws and customs of an Aboriginal or Torres Strait Islander community are to be characterised.*"[673]

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[669] Ibid, para 60.
[670] *Manado,* para 102.
[671] Ibid, para 68.
[672] Ibid, para 67. See also *Milirrpum v Nabalco Pty Ltd and The Commonwealth of Australia* (Gove Land Rights Case) (1971) 17 FLR 141; [1972-73] ALR 65; *Gumana v Northern Territory of Australia* (2005) 141 FCR 457; [2005] FCA 50
[673] Ibid, para 69.

Some scholars describe these reciprocal rights and occupation-based rights as primary and secondary rights[674] or core and contingent rights.[675] Nearly all Torres Strait Islanders hold reciprocal/secondary/contingent rights, rather than the few traditional owners who hold occupation-based/primary/core rights and hold necessary traditional connection to land and waters to maintain a claim to native title.[676] Some rights are held by people over country, while others are held over sites within the wider country, still others are held over features that are part of countries; not all rights are made equal.[677] Defining members of a group of people as 'traditional owners' does not in turn define their native title rights flowing out of a determination. This generalisation can cause significant community conflict in approach, as so often occurs when dealing with outsiders seeking native title consent to acts affecting determined/ claimed native title rights and interests.[678]

Sutton then makes further distinction between generic and specific native title rights. He considers generic native title rights to include acts such as a right to use vegetation in an area, with specific rights connected to that generic right to include taking timber to make shelters (*Zar Zar),* making a fire upon which to cook *(Kap Mari)*, or making traditional artefacts. Applied specifically to Islander traditional custom, the generic right to hunt, may break into specific rights on methodology to be used to hunt, even specific to prey type, eg, turtle, dugong, or fish. Sutton considers:

> [O]ne can specify very generic kinds of rights as native title rights, adding that they may be trammelled and qualified in various ways according to local customary law, but one can never go on unravelling the nature of specific rights to some mythical point of 'completeness' where every right, and all conditions under which it might properly be exercised, can be exhaustively described and enshrined on paper.[679]

In native title claims, claimants list the interests they assert. These broadly include:

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[674] Nick Peterson, Ian Keen and Basil Sansom, 'Succession to Land: Primary and Secondary Rights to Aboriginal Estates' (1977) 100214 *Hansard of Joint Select Committee on Land Rights in the Northern Territory*, 1005–1007.
[675] Sutton, above n 614.
[676] Ibid 14.
[677] Ibid 13.
[678] Ibid.
[679] Ibid 18.

- the right to possession of the land and waters to the exclusion of all others;
- the right to occupation, use and enjoyment of the land and waters to the exclusion of all others;
- the right to inherit and bestow native title rights and interests;
- the right to resolve as amongst themselves disputes about land tenure.

However, there are often specific rights and interests listed, such as:

- the right to hunt and fish on the land or in the waters;
- the right to take natural resources from the land and waters, including digging and using minerals, and quarry materials such as flints, clays, soil, sand, gravel, rock and all other resources;
- the right to dispose of such resources by trade or exchange;
- the right to move about on the land or waters, or live on and erect dwellings on the land;
- the right to conduct ceremonies on the land; and
- the right to grant or refuse permission to any other person to do any of the above on the land or waters.[680]

In many instances however, such as in the Torres Strait context, determinations only identify generic rights, such as *"a right to possession, occupation, use and enjoyment of the Determination Area to the exclusion of all others."*[681] It is the specific rights within these generic rights to which this thesis has interest. These specific rights may refer to access rights through country, or more abstract such as right in sacred stories, objects, designs, songs, or ritual performances associated with sites and countries, or as argued in this thesis, a right to cultural secrecy (*Yagasin*), each giving definition to what it means to possess, occupy, use and enjoy the land and waters concerned.

Individual, group and collective rights

Native title is both an individual, group or communal right, and exercisable as such, deriving from the membership of individuals to a collective group asserting similar

[680] Ibid 12.

[681] *Thaiday and Ors on behalf of the Warraber, Poruma and Iama Peoples v State of Queensland and Ors* [2005] FCA 1116 (15 August 2005); *Mye on behalf of the Erubam Le v State of Queensland* [2004] FCA 1573.

rights.[682] Sutton posits that 'proof of its enjoyment by an individual usually entails showing that it derives from the person's membership of or recognition by that group or network, not from a certain form of personal consciousness or ability'.[683] As has been highlighted in this part, eligibility to exercise native title rights and interests arise from factors such as birthplace (of self, of a parent, own one's own child), conception place, burial place of a parent, initiation site, or place of primary habitation and residence.[684] Society can appropriately be analogised to a quilt of united parts. Whilst each islander community can be largely autonomous, they belong to a larger whole. The laws and customs that regulate the internal working, practices and processes and relationships of members of each, largely replicate those of the other Islander communities, though they are not entirely uniform in all respects.[685]

Proprietary and Usufructuary Rights

Justice Brennan in the majority judgement in *Mabo (No.2),* was prepared to categorise native title as a 'proprietary' right, that is a right enjoyed by community in exclusive possession of land. The inalienability of the land did not defeat that characterisation. Separate to the proprietary characterisation, Brennan J also considered that individual members of the relevant Indigenous community might enjoy usufructuary rights which themselves were not proprietary in nature.[686] Deane and Gaudron JJ endorsed the Privy Council approach in *Amodu Tijani v Secretary, Southern Nigeria*[687] and *Adeyinka Oyekan v Musendiku Adele*[688] that native title should not be forced to conform to normative common law concepts and should be accepted as *sui generis* or unique and need not fall into the Eurocentric proprietary category.[689] This position was reiterated in *Yorta Yorta,* where the High Court emphasised that the rights and interests to which s223(1) of the *NTA* refers may not, and often will not, reflect Anglo-Australian conceptions of 'property' and

[682] Section 223(1) of the *NTA*; see also *Manado,* above n 625 at para 72.
[683] Ibid 20.
[684] Ibid 27.
[685] *Akiba (No.2)* at para 170 per Finn J.
[686] *Mabo (No.2),* at 51 per Brennan J.
[687] [1921] 2 AC 399 (PC).
[688] [1957] 1 WLR 876 (PC).
[689] *Mabo (No.2),* 89.

'belonging'.[690] These rights must be looked at from the perspective of the claimants.[691]

Mabo (No.2) recognised that 'the content of native title, its nature and incidents, will vary from one case to another. It may comprise what are classified as personal or communal usufructuary rights involving access to the area of land in question to hunt for or gather food, or to perform traditional ceremonies'.[692] These 'personal or communal usufructuary rights' extend beyond rights to exclusive possession of land, to rights to hunt, fish and gather,[693] extended by statute to encompass 'communal, group or individual rights and interests of Indigenous persons to land and waters where possessed under traditional laws acknowledged and traditional customs observed provided such laws and customs connect the Indigenous persons to lands and waters'.[694]

In the context of hunting and foraging cultural practice, Sutton observed that such practice must be done 'properly'. Cultural practice is prescriptive as to 'how it is done, where it is done, at what time it is done, who is doing it, and with whom'.[695] This has been demonstrated in part 4.1.3 of this thesis. In a joint judgement in *Commonwealth v Yarmirr* ('*Yarmirr*'),[696] Gleeson CJ, Gaudron, Gummow and Hayne JJ rejected any *priori* assumption that the rights and interests with which the *NTA* is concerned are rights and interests of a kind which the common law would traditionally classify as rights of property of interest in property.[697]

Extinguishment

When native title extinguishment occurs, it is permanent and native title rights and interests cannot be revived.[698] Toohey J in *Wik*[699] explained the extent of extinguishment of native title:

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[690] *Yorta Yorta,* at 40.
[691] *Neowarra v State of Western Australia* [2003] FCA 1402 per Sundberg J at 365.
[692] *Mabo (No.2)* per Brennan J, 58.
[693] Ibid per Toohey J, 100; *Ward* (2002) per Gleeson CJ, Gaudron, Gummow and Hayne JJ.
[694] *NTA* s 223(2).
[695] Sutton, above n 614, 31.
[696] (2001) 184 ALR 113 (HCA) ('Y*armirr*').
[697] Ibid 122.
[698] *NTA* s237A.
[699] (1996) 187 CLR 1 (HCA) ('*Wik'*)

> [I]f inconsistency is held to exist between the rights and interests conferred by native title and the right conferred under the statutory grants, those rights and interests must yield, to that extent, to the right of the grantees.[700]

Extinguishment can be considered in two respects:

a. at time of native title claim, considering a past use of the land so claimed; and
b. upon determination of native title, considering a future use of the land determined.

Extinguishment of native title is a much more palatable concept when native title is viewed as a proprietary right (often in the nature of exclusive possession of land); when it is gone, there is no longer the ability of its former owner to assert a proprietary interest in it (at law). It is far more problematic when one considers the extinguishment of underlying usufructuary rights, not of a proprietary nature such as hunting, fishing, and ceremonial rights practiced in accordance with traditional law and custom. In this context, extinguishment not only severs a proprietary connection between owner and resource but in fact severs the very spiritual and traditional connection to concerned land and waters of the person and group of persons. This is not always the case; for instance, in the mandatory conversion of native title rights in exchange for an interest in fee simple (alienable freehold) to enable homeownership, as is presently occurring in Queensland.[701] Although *sui generis* 'proprietary' rights in native title are inconsistent with the grant of a fee simple interest,[702] surely the non-proprietary usufructuary rights are wholly consistent? This is particularly the case where the former native title holder is the subsequent holder of an estate in fee simple; subsequent sales may however be more problematic. Native title may, therefore, no longer be able to be viewed as an atomistic concept, necessitating the metaphorical 'split of the atom' into proprietary and non-proprietary concepts.

Native title rights and interests need not be wholly extinguished by competing interests. In fact, *Ward* recognised native title as a bundle or rights, capable also of partial extinguishment, with Callinan J positing:

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[700] Ibid per Toohey J, 133.
[701] *Aboriginal and Torres Strait Islander Land (Providing Freehold) and Other Legislation Amendment Bill 2014* (Qld).
[702] *Fejo* (1998) 195 CLR 96.

> [T]he Native Title Act ... contemplates the possibility of partial extinguishment by the use of expressions 'partial extinguishment' and 'complete extinguishment' and is therefore to same effect as the concept of native title as a bundle of rights capable of incremental or partial extinguishment as recognised in the passages in ... cases ... referred [to] in *Yanner*.

There need not be a hard and fast rule for extinguishment here. Furthermore, there is no need for extinguishment at all. Instead, native title rights and interests could be wholly or partially suspended while exercise of such remain inconsistent with current use of the land or waters (eg, proprietary vs non-propriety). In the event the land reverts back to the Crown, native title may revive where, under the *NTA*, the statutory non-extinguishment principle has been applied, supressing native title only for the duration of the relevant act inconsistent with the continued exercise of such native title rights and interests.[703]

In *Yamirr,* their honours in joint judgement considered the extent of native title recognition as against competing public and international rights. The case concerned determination of native title in the international shipping channel. Their honours posited that 'the two sets of rights cannot stand together and it is not sufficient to attempt to reconcile them by providing that exercise of the native title rights and interests is to be subject to the other public and international rights'.[704] In this manner, non-exclusive rights could be recognised in the international shipping channel, but not exclusive rights (which were extinguished). This position was accepted in the *Akiba* cases.[705]

Toohey J in *Mabo (No.2)*posited that:

> [T]he specific nature of such a title can be understood only by reference to the traditional system of rules. An inquiry as to whether it is 'personal' or 'proprietary' ultimately is fruitless and certainly is unnecessarily complex … a conclusion that traditional title is in its nature 'personal' or 'proprietary' will not determine the power of the Crown to extinguish the title unilaterally.[706]

[703] *Griffiths v Northern Territory of Australia (No.3)* (2016) FCA 900 ('*Timber Creek*')
[704] *Yarmirr* at 145.
[705] *Akiba (No.2), Akiba (FCACA)* and *Akiba (HC).*
[706] *Mabo (No.2)* at 195.

It is important to note that where native title is extinguished, in whole or in part, this does not necessarily affect the subsistence of traditional rights and interests in accordance with traditional laws and customs in lands and waters, however it will disqualify, in whole or in part, such rights and interests from protection at law under the statutory native title regime.

Remedies

A future acts regime exists in the *NTA* which allows the validation of acts which would affect native title, including the introduction of legislation which would affect native title.[707] In absence of validation under the future acts regime, the future act is deemed invalid. The notion of 'consent' to proposed acts affecting native title is cornerstone to the validation regime set out in the *NTA*. Compensation may be payable to the common law holders of native title for partial loss of their determined rights upon application to the Federal Court.[708] Where validation is not achieved, the future act shall be invalid under the *NTA*. Invalidity will not invalidate the act in entirety, but will to the extent the act affects native title.[709] Remedies under native title for proposed extinguishment and impairment of native title include injunction[710] or compensation.[711] Compensation has until relatively recently, been judicially untested in the native title context.

Griffiths v Northern Territory of Australia (No.3)('Timber Creek')[712]
Native Title Compensation

The 2016 Federal Court of Australia decision of *Timber Creek* provided some clarity on compensation quantification. The case involved a claim for compensation under the *NTA* on behalf of the *Ngaliwurru* and *Nungali* Peoples of Northern Territory. The determination area included land within the boundaries of the township of Timber Creek in the Northern Territory, Australia. Determined native title rights included, the right to:

- travel over, move about and have access to the land;
- to hunt, fish and forage on the land;

[707] *NTA* s 233.
[708] Ibid s 50.
[709] Ibid s 24OA.
[710] *Federal Court of Australia Act 1976* (Cth) ss 22 and 23.
[711] *NTA.*
[712] (2016) FCA 900

- to gather and use the natural resources of the land such as food, medicinal plants, wild tobacco, timber, stone and resin;
- to have access to and use of the natural water of the land;
- to live on the land, to camp, to erect shelters and structures;
- to engage in cultural activities, conduct ceremonies, to hold meetings, to teach the physical and spiritual attributes of the places and areas of importance on or in the land, and to participate in cultural practices related to birth and death, including burial rights;
- to have access to, maintain and protect sites of significance on the land; and
- to share or exchange subsistence and other traditional resources obtained on or from the land (but not for any commercial purpose).

The claim for compensation was for extinguishment or impairment of native title rights involving the granting of development leases under the *Crown Lands Ordinance 1931* (NT). Compensation is to be on 'just terms', 'for any loss, diminution, impairment or other effect' of a compensable act on native title rights and interests.[713] In *Timber Creek,* the Court considered three heads for compensation:

a. economic value of the impairment or extinguishment;
b. interest on economic value; and
c. non-economic value which concerned the loss of spiritual or religious connection with the land.

Economic Value

On the question of economic value, the Court found that it was necessary to have regard to the nature of native title rights and interests affected in order to assess value. His honour started with the freehold value of the property, discounted with regard to the non-exclusive nature of the interest. His honour determined that 80 per cent of the freehold value should be accepted ($512 400), determined as at the date of the doing of the act.

[713] *NTA* s 51(1).

Non-Economic Value

The Court made specific mention that non-economic loss should have no regard to economic value. The challenge was to quantify the intangible spiritual relationship between the Aboriginal people concerned, and their land, and to translate that into monetary terms. His honour had specific regard to the determined native title rights and interests. Anthropological evidence of extreme distress from interference with their connection to land was considered. His honour found damages in the amount of $1.3 million, on the basis of:

- evidence of construction of water tanks on the path of a significant dingo Dreaming story;
- general impairment of native title rights and interests, not necessarily isolated to geographic areas; and
- the diminishing effect of the acts over the geographical area upon which native title rights and interests were determined, affecting the spiritual connection with country.

In making an order of compensation, the Court must set out:

a) the name of the person or persons entitled to the compensation or the method for determining the person or persons; and
b) the method (if any) for determining the amount or kind of compensation to be given to each person; and
c) the method for determining any dispute regarding the entitlement of a person to an amount of compensation.[714]

To this end, orders of Native Title compensation can be made in favour of groups, and individuals.[715] Award of compensation may also be made in favour of Claim Groups or Native Title Prescribed Bodies Corporate on behalf of affected common law holders of native title, to be distributed in accordance with the *Native Title (Prescribed Body Corporate) Regulations 1999* (Cth).[716]

Furthermore, as demonstrated in the following case study, legislation can be invalidated to the point of inconsistency with native title rights and interests. A State

[714] *NTA*, s 94.
[715] *Timber Creek* para 423-429.
[716] *Timber Creek* para 427.

or Territory Government cannot deal with native title in a way inconsistent with the *NTA*.

Yanner v Eaton (‘*Yanner*’)[717]

Invalidity of Acts inconsistent with determined native title rights and interests

The scope of native title hunting rights was first tested in the 1998 High Court decision of *Yanner*.[718] *Yanner* involved one Murrandoo Bulanyi Mungabaya Yanner, a member of the Aboriginal *Gunnamulla* Clan of the *Gangalidda* Tribe who had been charged with an offence under section 54 of the then *Fauna Conservation Act 1974* (Qld) (‘*Fauna Act*’),[719] which relevantly provided at section 54(1)(a):

> A person shall not take, keep or attempt to take or keep fauna of any kind unless he is the holder of a license, permit, certificate or other authority granted and issued under this Act.

Mr Yanner was not the holder of any license, permit, certificate or any authority granted under the *Fauna Act* and had been charged with an offence under section 54(1)(a) for hunting and eating wild estuarine crocodiles. He was summoned to appear before the Magistrates Court of Queensland. In his defence, Mr Yanner contended that section 211 of the *NTA* applied, authorising him to exercise and enjoy his native title rights, which included the right to hunt, fish and gather for personal, domestic and non-commercial needs, free of State prohibition or restriction of requiring a permit to do so.[720] Mr Yanner argued that section 54(1) of the *Fauna Act* was inconsistent with section 211(2) of the *NTA* and that by operation of section 109 of the *Commonwealth Constitution*,[721] the *Fauna Act* was invalid to the point of inconsistency, thereby creating a constitutional immunity to criminal conviction.[722] Mr Yanner’s native title defence succeeded at first instance in the Magistrates Court, but failed on appeal by the prosecution to the Court of Appeal, setting aside the order

[717] [1999] HCA 53.
[718] Ibid.
[719] Repealed and replaced by the *Nature Conservation Act 1992* (Qld) which was given assent on 19 December 1994.
[720] *Yanner v Eaton* [1999] HCA 53 as per Gleeson CJ, Gaudron J, Kirby J and Hayne J, paras 2 and 3.
[721] *Commonwealth Constitution Act 1900* (Cth), s109.
[722] *Yanner* as per Gummow J, 63.

at first instance and remitting the matter back for rehearing according to law. Mr Yanner sought special leave of the High Court to appeal this decision.

In a majority of four Justices to two, the High Court held in *Yanner* that legislative regulation under the *Fauna Act* requiring a person to obtain a permit to traditionally hunt crocodiles 'did not abrogate the native title right [to hunt]. Rather, the regulation was consistent with the continued existence of that right,'[723] thereby ruling out the prospect of extinguishment of determined native title rights and interests. In *Yanner,* it was determined that the regulation in section 54(1)(a) of the *Fauna Act* was directly inconsistent with section 211(2) of the *NTA* and accordingly was invalid to the point of inconsistency. In defining the native title right protected, their Honours said:

> And an important aspect of the socially constituted fact of native title rights and interests that is recognised by the common law is the spiritual, cultural and social connection with the land. Regulating particular aspects of the usufructuary relationship with traditional land does not sever the connection of the Aboriginal peoples concerned with the land (whether or not prohibiting the exercise of that relationship altogether might, or might to some extent). That is, saying to a group of Aboriginal peoples, 'You may not hunt or fish without a permit', does not sever their connection with the land concerned and does not deny the continued exercise of the rights and interests that Aboriginal law and custom recognises them as possessing.[724]

In the context of extinguishment, Gummow J stated: 'the question to be asked in each case was whether the statutory right said to extinguish native title necessarily curtails the exercise of the native title right such that the conclusion is compelled. It must also be considered whether to some extent the title survives or whether there is no inconsistency at all. A statute may regulate the exercise of a native title right without in any degree abrogating it'.[725] In the joint judgement of Cleeson CJ, Gaudron, Kirby and Hayne JJ, expressly adopted the statement of Brennan J in *R v*

[723] *Yanner* per Gummow J, 115; see also Gleeson CJ, Gaudron J, Kirby J and Hayne J, 37.
[724] *Yanner* 373.
[725] Ibid 396.

Toohey; Ex pare Meneling Station Pty Ltd[726] that 'Aboriginal ownership is primarily a spiritual affair rather than a bundle of rights'.

Evolution

It is recognised by the common law that the concept of native title is not stagnant, and may evolve over time and retain its protection at law.[727] Likewise, 'ideas of privacy have shifted and mutated over time'.[728] The ALRC found that 'scientific, agricultural, technical, and ecological knowledge, and knowledge related to and contained in items of moveable and immovable cultural property, also form part of Indigenous laws and customs'.[729]

Native title is determined at common law and administered under the *NTA* and in the Torres Strait (comprising DOGIT land), is held by RNTBCs for and on behalf of individual common law holders of native title.[730] Therefore, there is an inherent recognition at common law and statute of *sui generis* communal rights and interests, held on trust by groups for and on behalf of its beneficiaries, and actionable by such groups with standing for and on behalf of such beneficiaries.

The objective of the *NTA* is to 'provide recognition and protection of native title'.[731] It effectively keeps protected *sui generis* rights and interests out of the grasp of intervention. It effectively ensures the preservation of a minority rights in line with Declaration objectives. Will Kymlicka, a liberal scholar in minority rights, suggests that individual members of a culture have the right to seek to revise it and to integrate into elements which they find admirable in other cultures and should be protected by the State from external attempts to revise culture.[732] He writes:

> [A] liberal view requires freedom within the minority group, and equality between the minority and majority groups. A system of minority rights which

[726] [1982] HCA 69; (1987) 158 CLR 327, 358.
[727] *Mabo (No.2)* per Brennan J, 61; per Deane and Gaudron JJ, 110; per Toohey J, 192; *Yanner* per Gummow J, 68.
[728] Whitman, above n 89, 1154.
[729] ALRC Report 108, above n 114, 7.25 citing Janke, above n 401.
[730] *Native Title (Prescribed Bodies Corporate) Regulations 1999* (Cth).
[731] *NTS* s 3(b).
[732] Will Kymlicka, *Multicultural Citizenship: A Liberal Theory of Minority Rights* (Clarendon Press, 1995) 91–92.

> respects these two limitations is, I believe, impeccably liberal. It is consistent with, and indeed promotes, basic liberal values.[733]

Kymlicka suggests that change in culture should not be forced, but instead 'persuasion and peaceful criticism and inducements should usually be employed to convince those within the self-governing national minority to amend their culture'.[734] Native title demands an explanatory rather than a normative examination of rights and interests of Indigenous people. There must be distinction made between self-determined change and State-imposed change.[735]

Indigenous tradition and custom are not stagnant concepts and may change over time.[736] Subject to the operation of traditional hunting plans in communities, instead of wooden rowing boats, hunters now use aluminium dinghies with outboards. Hunters now have access to fridges and freezers to assist in preserving fresh meats. This gradual 'evolution' does not dilute the traditional nature of the hunt. Mr Yanner hunted estuarine crocodiles using a traditional harpoon-type weapon, known as a '*wock*', using a dinghy powered by an outboard motor. Justice Gummow of the High Court in majority considered this to be 'an evolved, or altered, form of traditional behaviour'.[737] It was acknowledged at first instance that the evolved methods of hunting using technology was consistent with the traditional custom of Mr Yanner's community.[738] It is important to note that such technological evolution may have only been specific to the community to which Yanner was a member and may have been affected by years of increasing Western influence into Indigenous communities. These technological enhancements to traditional hunting practices in Yanner's community were, in all likelihood, self-determined change and not State-imposed change. It would be naïve, however, to suggest that the State had not influenced the self-determined change to some degree over time, whether by Western media

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[733] Ibid 152–153.
[734] Ibid 165–168.
[735] Marine and Coastal Committee (2005) *Sustainable Harvest of Marine Turtles and Dugongs in* National Australia Bank and MLC Ltd, *Submission PR 148,* 29 January 2007.
[736] *Yanner* as per Gummow J 68 citing *Mabo (No.2)* 70, 110; cf Scott Gratton and Luke McNamara, 'The Common Law Construct of Native Title' (1999) 8 *Griffith Law Review* 50, 63–65; see also *Campbell v Arnold* (1982) 56 FLR 382; see also Desmond Sweeney, 'Fishing, Hunting and Gathering Rights of Aboriginal Peoples in Australia' (1993) 16(1) *UNSW Law Journal* 97, 116; *Mabo (No.2)* per Brennan J 61; per Deane and Gaudron JJ, 110; per Toohey J, 192.
[737] *Yanner* per Gummow J, 68 citing *Mabo*, 70, 110; cf Gratton and McNamara, above n 693.
[738] Ibid per Gummow J, 68.

influence or government community awareness campaigns on sustainable hunting practices. On the whole however, self-determined change is consistent with the objectives of the *NTA* and *Declaration*.

Indigenous cultural practice techniques/methodology is inseparable from the protected native title cultural practice, provided that it reflects 'the traditional laws acknowledged by and the traditional customs observed by the Indigenous inhabitants of a territory'.[739] Elders are the 'tree of knowledge' within Indigenous communities and are the guardians and custodians of tradition and custom and, as such, owe a duty on behalf of their ancestors to ensure it is not abused or illegitimated by bogus claims by Indigenous individuals seeking cultural protections for non-cultural behaviour. It was recognised by Justice Gummow in *Yanner* that '[Native Title] is the relationship between a community of Indigenous people and the land, defined by reference to that community's traditional laws and customs, which is bridgehead to the common law'.[740] Native Title is conceptualised by 'ingrained habits of thought and understanding[741] and 'must be adjusted to reflect the diverse rights and interests which arise under the rubric of "native title"'.[742]

Challenges

Only determined native title rights and interests, and those the subject of a registered claim, are enforceable under the *NTA*. As in the *Timber Creek* case, all determinations of native title list the precise native title rights and interests determined. These are then considered when assessing whether or not determined native title rights and interests have been/are to be, impinged. It is arguable that cultural practice in the form of secrets and in the form of a right to protect secrets (*Yagasin*) may fall within a common category such as:

> [T]o engage in cultural activities, conduct ceremonies, to hold meetings, to teach the physical and spiritual attributes of the places and areas of importance on or in the land, and to participate in cultural practices related to birth and death, including burial rights.

[739] Ibid 58.
[740] Ibid as per Gummow J, 72.
[741] *Wik* (1996) 187 CLR 1, 177.
[742] *Yanner*.

This interpretation, however, has not to my knowledge, been tested. Native Title claimants may seek to expressly include such native title rights and interests into native title claims, although it is acknowledged that there have already been 22 determinations of native title in the Torres Strait region post *Mabo (No.2),* with very little land and waters undetermined. To that end, common law holders of native title may seek to vary their determinations by way of application to the Federal Court) so as to preserve their rights to assert such rights at a future time. It is acknowledged that 'a determination of native title once made, should be a final; a "once and for all" resolution of the extent of native title in relation to a particular piece of land, subject only to the possibility of it being varied or revoked on the limited grounds specified in section 13(5) of the *NTA*.'[743] Native title is a judgment *in rem* binding the whole world.[744] There exits limited grounds however, for seeking variation or revocation of a determination of native title outlined in section 13(5) of the *NTA*, namely:

a. that events have taken place since the determination was made that have caused the determination no longer to be correct; or
b. that the interests of justice require the variation or revocation of the determination.[745]

Where a determination is varied by a court of competent jurisdiction, the determination as varied becomes an approved determination of native title in the place of the original. Likewise, where a determination is revoked, the determination is declared no longer an approved determination of native title.[746]

> It is important to appreciate that the grounds for an application to revoke or vary an approved determination of native title in s 13(5) include not only that subsequent events have occurred that cause the determination no longer to be correct, but also that the interests of justice require such a variation or revocation.[747]

Such subsequent events evoking the interests of justice in section 13(5)(b) may include, for example, subsequent proceedings for a determination of native title using in whole or in part, evidence or findings from earlier proceedings, which show that

[743] *Akiba (No.2),* above per Finn J at para 157 citing *Kokatha People v South Australia* [2007] FCA 1057 at 33 and *Munn v Queensland* (2001) 115 FCR 109 per Emmett J at 8.
[744] The *Wik Peoples v Queensland* (1994) 49 FCR 1; *Ward* (2000) 99 FCR 316 at 368–369.
[745] s13(5) of the *NTA.*
[746] s13(4) of the *NTA*.
[747] *Warrie (formerly TJ) (on behalf of the Yindjibarndi People) v State of Western Australia* [2017] FCA 803 per Rares J at 373 ('*Warrie*')

the earlier determination was not correct when it was made.[748] Besides the slip rule allowing appeal for accidental slips or omissions in court judgements, section 13(5)(b) is a statutory exception to the general law principles of finality or *res judicata*[749], issue estoppel and abuse of process.[750] To this end, it is more practical to argue variation or revocation of a native title determination, than many other final decisions given this statutory exemption to *res judicata*.

Furthermore, native title's remedies (injunction, compensation and declaratory relief) and its recognition of non-economic value ensures native title remains in-step with the protection of *sui generis* Indigenous interests, more so than other common law, statutory or equitable mechanisms. Unfortunately, the making of claims, and applications for injunctions, variation of determinations and for declaratory relief, remain complex, costly and can take significant time.

Application of Native Title to Yagasin

As has been demonstrated in this part, it is of critical importance initially to characterise the nature of a *sui generis* right or interest arising from traditional laws and customs acknowledged, so as to assess whether such right or interest sufficiently falls within the definition of native title under section 223(1) of the *NTA.* For all intents and purposes however, if *Yagasin* is found for the purposes of section 223(1) of the *NTA* to arise out of occupation-based rights, constituting rights in relation to land or waters (rather than rights in relation to persons; reciprocal rights), even if held by a single person or shared by one or more group of persons in Torres Strait society, any impairment of such right within their identified lands or waters would evoke remedy under the *NTA*. From the interviews gathered in this thesis, this appears more likely than not. For clarity, two persons (with 'persons' in this context interchangeable with 'groups of persons') may practice *Yagasin* identically within a society, yet person A may obtain their right through bloodline/decent/ succession (an occupation-based right), whereas person B may obtain their right via the permission of person A (a reciprocal right). No matter the target of the impairment of such right,

[748] *Warrie,* per Rares J at 374.
[749] Ordinarily, a final order cannot be revoked or varied except on appeal or, in the case of other Federal Courts, by the High Court under s 75(v) of the *Constitution*, even if a superior court of record made the order without jurisdiction: *Burrell v The Queen* (2008) 238 CLR 218 at 224-225 [19]-[22] per Gummow ACJ, Hayne, Heydon, Crennan and Kiefel JJ.
[750] *Warrie,* per Rares J at 375–376.

whether persons A, B or both, where such impairment affects the unfettered practice of person A's occupation-based right on their land or waters, person A is able to seek remedy under the *NTA* to prevent or compensate for the impairment (whether or not person A is even initially aware of such impairment and is, for example, informed by others). Person B is not.

As an extension to this principle, although person B may not be able to seek remedy under *NTA* due to failing to hold a qualifying 'native title' right as better described as a reciprocal right than an occupation-based right, person B's loss may conceivably be considered as part of the non-economic impact assessment of person A's loss. For example, considering an overall diminution of cultural identity of the impacted society as a whole; by person B being unable to practice their reciprocal right, this may adversely impact person A's occupation-based right forming the very basis of such reciprocal right. That is, by person B being restricted from exercising their reciprocal right, this attacks the very core authority and operation of person A's occupation-based right.

CHAPTER 5: SYNTHESIS OF RESULTS

5.1 Introduction

In answering the thesis question, I sought to address three distinct yet interconnected topics:

a) The Nature of Cultural Secrets (4.1);
b) The Value of Cultural Secrets (4.2); and
c) The Legal Protection of Cultural Secrets (4.3).

As addressed in Chapter 2 (Methodology), the mixed methods observed in sections 4.1 and 4.2, draw on anthropological, ethnographic and behavioural science literature to develop an understanding of and to frame the issues to which legal scholarship has been applied in section 4.3. Effective legal protection can only be achieved where such protections adequately respect and protect the uniqueness of the Indigenous interests, preserving the benefits that exercise of such bring to those concerned. In Chapter 5, I summarise the main points of Chapter 4, synthesising into an answer to the thesis sub-questions.

5.2 Summary: The Nature of Cultural Secrets

Humans have inherent cognitive bias.[751] We each see the world through different, ever-evolving lenses. Just as ethnicities may define privacy differently,[752] it is reasonable to infer that notions of secrecy and specific acts attracting classification as secret may also vastly differ between ethnicities. Accepting our cognitive bias, formed by our distinct histories, knowledge traditions, values, interests and social, economic and political realities,[753] it becomes plausible that the laws and institutions we create may also be flawed by those biases. It logically follows that the ideals, values and belief-systems of law-makers, generally aligned with the majority under the Western Westminster system, will be better protected at law than interests diverse to law-maker ideals, values and belief-systems, such as those held by ethnic minorities.

Overlapping consensus is the notion that we can each support a principle from our own perspective while understanding the perspectives of others.[754] One must,

[751] Kahneman, above n 181.
[752] Whitman, above n 93; Kumaraguru and Sachdeva, above n 185.
[753] Ermine, above n 180.
[754] Rawls, above n 191.

however, be vigilant not to assume minority interests sharing seemingly similar characteristics to majority interests as the former having derived from the latter. There may be a tendency to assume this, for instance, in community where majority and minority ethnicities co-exist, such as in Australia. Further, one should not assume that the legal protections available for advancement of the majority interests are sufficient to advance the minority interests. Substantially similar cultural practices may have derived from vastly dissimilar worlds but converged over time, in whole or in part, continuing to evolve both independently and dependently of one another. Divergence may again occur in the future as part of this ongoing evolution as a response to environmental factors. In this manner, one may accept that Western and Islander notions of secrecy may share a broad definition, such as the practice of concealment and controlled revelation thereof. Likewise, it may be accepted by both ethnicities that 'secrecy is a social practice, that is, a situational, relational and mobile tactic, shaped by permutations of saying and not saying, withholding and disclosing'. [755]

What may differ between ethnicities however, are the acts evoking such classification as secret and, in turn, the legal protection offered under normative regimes. Islanders know the practice of concealment and controlled revelation interchangeably as *Yagasin,* translated in English to mean 'not to say anything'. *Yagasin* is a cultural and relational practice, embedded in a social context with truth-telling and histories of power at its core, distinctly constitutive of sociality.[756]

The Islander variant of Western notions of secrecy derives from Islander traditional law and custom, known as *ailan lore* and *ailan kastom.* Cultural practice of Islanders is the life-blood of Islander culture and indistinguishable from their shared cultural identity, manifesting itself through human expression, including language, song, dance, story, artworks, cooking, and the methods and techniques used therein.[757] Distinct from Western constructs of secrecy and examples of secrets protected thereby, Islander secrets protected by *Yagasin* are not merely constructs of the physical world but also the spirit world, creating the spiritual bridge between

[755] Hardon and Posel, above n 201, S6.
[756] Ibid.
[757] Participant 3.

Islanders and their lands and waters. Every member of Islander community has a spiritual role to play, uninfluenced by material physical world 'things'. Spiritual obligation and expectation and acting upon such in being involved in spiritual callings drives a sense of community-belonging for Islanders.[758]

Yagasin conceals and controls revelation of secret Indigenous knowledge, specifically the building-blocks of Islander cultural identity, comprising the vital skills and talents necessary to sustain themselves within their unique environment.[759] It is primarily a unique form of self-control, self-governance and self-preservation. The obligations of *Yagasin* attach only to Islanders. The primary consequence for breaching *Yagasin* is a loss of place in the spirit world and spiritual retribution via *pouri pouri* (black magic). The physical world consequences are merely a by-product of spiritual ostracism, such as physical banishment from community. This is by no means an exhaustive list of consequences.

Islander cultural practice is not always, in its entirety, secret. Only aspects may be secret; for example the very existence of the practice, the techniques used (content) or the exchange-relation (form).[760] I have specifically considered, in this thesis, the Islander cultural practices of language, *ailan* dance, *ailan* adoption, hunting and fishing, witchcraft/sorcery (*Maid*), sacred stories, sites and artefacts, sorry business and initiation ceremony. There are many, many others and, by no means, is this to be an exhaustive list of Torres Strait Islander cultural practice evoking cultural secrecy. But for witchcraft/sorcery (*Maid*) whose very existence and practice is considered secret, *Yagasin* primarily attaches to either (or both) the techniques used (content), and the exchange-relation (form), prescribing how it is practiced, when, by whom, and to whom it is communicated. Specifically, *Yagasin* seeks to protect the method of knowledge transfer which is vital to the survival of Islander culture.

The principal purpose of Islander cultural practice is maintaining physical and spiritual connection to land and waters. *Yagasin* complements this purpose by ensuring that both the purpose and techniques used to achieve that purpose, remain inextricably-linked to the protection of Islander cultural identity. Attempts to sever

[758] Interview with Participant 4 (Torres Strait, 26 May 2016).
[759] Battiste, above n 210.
[760] Hardon and Posel, above n 201.

the two arguably offend *Yagasin* and place at risk underlying cultural identity of Islanders.

5.3 Summary: The Value of Cultural Secrets

As discussed in Chapter 1 (section 1.1) (The Torres Strait ('Zenadth Kes')), major events shaping modern-day Torres Strait are:

1. the Foreign raiders in 1870;
2. Christianity in 1871; and
3. Annexation in 1879.

This all happened in the Torres Strait approximately a century prior to it playing out again, in a very similar fashion, in Papua New Guinea from the beginning of the 20th Century. As demonstrated in Chapter 4 (section 4.2), the Ömie People and neighbouring Indigenous groups of Papua New Guinea later bore the brunt of the combined consequences of annexation, war and eventual independence. There are common-threads in the stories of Islanders and the Ömie, namely:

- both were historically at war with neighbouring tribes and trading peacefully with others;
- both were converted to Christianity by missionaries, with their communities subsequently 'modernised';
- Christian values were imposed, resulting in the suppression of 'inconsistent' cultural practice or their continued practice in the shadows;
- Catholic teachings were transplanted with Anglican;
- both were subjected to annexation by the Australian colonial Government, administered by the Queensland Government;
- both were subjected to the impacts of World War II;
- both suffered exploitation of their lands and waters at the hands of outsiders for commercial gain;
- both suffered from heated internal land-disputes; and
- both were managed by Local Government, administered on behalf of the Queensland Government.

According to a recent study undertaken in March 2017 by the Torres Strait Island Regional Council, polling 517 adult Islander community respondents,[761] when asked the question whether they believed that over the past 10 years (2008-2017) cultural practice in the Torres Strait had grown stronger (been practiced more often) when compared to the decade prior (1997-2007), 25 per cent agreed, with 44 per cent considering conditions remained unchanged.[762] Less than a third of respondents considered there to have been a decline in cultural practice. The Islander cultural practices described herein and many others are practiced widely and proudly in the Torres Strait today. Torres Strait Islander cultural practice has not only survived a century of oppression but is now seemingly thriving.

In comparison, the Ömie People of Papua New Guinea have been observed to have all but abandoned much of their cultural practice and the secrets sought to be protected and embodied by them, such as sex affiliation, in fear of being perceived negatively by powerful outsiders.[763] This has resulted in conceding their helplessness post-independence, replacement of their customs with those more in harmony with the larger context, and their reliance upon former enemies; they have lost control of their identity, their place in the spirit world, and their destiny. It has been observed that 'they gave themselves up to another configuration of power in the control of their lives, now standing helpless in the face of complex political and economic relations'.[764] That is not to discount the prospect that the Ömie may achieve cultural revival in future generations.

How is it, then, the case that cultural practice remains so prevalent and strong in Torres Strait, yet all but decimated in modern Ömie society? Yet, 55 per cent of Islanders polled by the Torres Strait Island Regional Council consider Government laws to be insufficient in the protection of Islander cultural practice?[765] There is a strong inference that can be drawn from Rohatynskyj's study of the Ömie that the distinction lies not solely in the oppressive environmental factors occurring around them but also in their attitude and response to them. Islanders have, throughout their history, fought hard for relevance and have sought to ensure their cultural practice

[761] All respondents were over the age of 18 at the time of participation in the poll.
[762] Torres Strait Island Regional Council, above n 5.
[763] Rohatynskyj, above n 269.
[764] Ibid.
[765] Torres Strait Island Regional Council, above n 5.

endures (including but not limited to achieving the *Mabo* decision), and that their physical and spiritual worlds are maintained, whereas the Ömie all but abandoned their cultural practice, and the secrets within them, succumbing to dominant values.

Islanders have demonstrated, over the past 200 years, a keen sense of awareness of their power to manipulate cultural self-preservation, transacting the cultural presentation of self with outsiders to their own advantage. Islanders have staked a lifelong claim to their unique Indigenous knowledge and practice that affect their economic wellbeing. They have found themselves less disadvantaged in the current political and economic setting than the Ömie and, from this dominant position, exact reverence for their traditional practice by displaying it politically as an inviolable secret. Islanders derive their strength as a nation of people, through actively asserting and maintaining their cultural secrets vis-à-vis the world at large. The effects of a loss of secrets on ethnic-minority groups have been demonstrated, with reference specifically to the Ömie people of Papua New Guinea, to result in a loss of their power to control their lives, rendering them helpless in the face of complex political and economic relations. Secrecy enables choice in our lives, the promotion of autonomy, our sanity and our survival.[766] Effective legal protection must be available to supplement generational efforts made by Islanders to preserve their cultural identity.

5.4 Argument: The Legal Protection of Cultural Secrets

5.4.1 Sub-question 1: Legal and institutional impediments

Much has been written about the protection of individual cultural secrets, particularly in the context of Indigenous knowledge. Much less has been written about the protection of the Indigenous right to assert concealment and controlled revelation over cultural secrets arising discretely from traditional laws and customs acknowledged. Attempts are made to apply a cocktail of Western common law, statutory and equitable legal regimes, often requiring the distortion, contortion and disfigurement of *sui generis* Indigenous interests sought to be protected in order to subscribe to a Western categorisation of a right protected by law. In such instances, the *sui generis* nature and incidents of Indigenous harm is lost (spiritual world) and

[766] Bok, above n 196.

in its place an entirely different harm (physical world) is sought to be remedied. Legal practitioners and academic scholars alike tend to pride themselves on how they might 'spin' the facts in a given scenario to meet established legal precedent. Ethical protection of Indigenous *sui generis* rights and interests demands quite the opposite – a purity in form and content of the prescribed right being advanced without compromise.

There will of course be limits to how much Australian law shall protect *sui generis* Islander interests. I consider that the parameters should be defined with reference to international human rights law on a case by case basis as both the catalyst for protection of interests falling above, and restraint from protection of interests falling below, standards set by international law and incorporated into domestic law of by ratifying States. This position is supported by Brennan J in *Mabo (No.2),* limiting the ambit of native title recognition to conditional upon non-infringement of core values of the majority (ie. not being 'repugnant to natural justice, equity and good conscience').[767] This principle was then reflected in the definition of native title in section 223(1)(c), recognising only those rights and interests recognised by the common law of Australia. To this end, cultural secrets promoting rights of slavery, child abuse, child marriage, genital mutilation etc, and possibly also the Islander practice of witchcraft/sorcery (*Maid*) to the extent such practice infringes the safety and wellbeing of persons, would likely be refused legal protection in Australia and remain illegal cultural practice.

In the protection of individual cultural secrets, I have considered the effectiveness of the laws of intellectual property, privacy and the equitable doctrines of equitable estoppel, misleading and deceptive conduct and unjust enrichment towards the protection of cultural secrets. Martin and Jeffery acknowledge the very many attempts to utilise intellectual property, contract law and International Conventions and Declarations towards the protection of Indigenous secrets, particularly in the context of the exploitation of Indigenous secrets by academic researchers; however they consider each to be deficient in appropriate protection.[768] With respect to intellectual property law, Martin and Jeffery posit:

[767] *Mabo (No.2)* per Brennan J at 61; see also *Case of Tanistry* (1608) Davis 28; 80 ER 516, 94–9
[768] Martin and Jeffery, above n 168, 2.

> Ideas such as ancient stories that are not 'original' nor 'owned' nor 'material' in the European sense are unable to demonstrate the required novelty, exclusivity and commercial value to fit with the concepts embedded in intellectual property law. In addition, as Indigenous secrets are usually communal property it is hard to find a practical means to identify whose interest is to be protected and what form of protection will be feasible.[769]

Martin and Jeffery consider that *'none of the above approaches has yet proven feasible in Australia'*.[770] I concur with this finding and extend its ambit also to privacy and the equitable regimes of estoppel, misleading and deceptive conduct and unjust enrichment. Many challenges are cited in this thesis across a myriad of identified legal regimes exposing their limited application to the protection of Islander secrets, including but not limited to:

- applicability only to individuals (and not groups);
- mandatory disclosure of secrets as a prerequisite;
- requirements for originality for protection of works dating back some 200 years;
- limited duration of protection afforded; and
- the complexity, cost and timeframe of asserting infringement of such rights in a Court of competent jurisdiction.

The greatest challenge however within these regimes is matching the legal remedies to the *sui generis* harm suffered. Remedies typically range from an injunction to restrain breach and orders for damages or an account for profits. The common theme is the protection of individual proprietary interests; the right to own, the right to possess, the right to occupy, the right to use, the right to exclude, protecting against physical world impairment. None appropriately identify the spiritual world impairment central to Islander culture and remediate accordingly.

I agree with Martin and Jeffrey that 'the legal position of Indigenous people in jurisdictions whose common law is based on the English system is far stronger than has been believed to date, even without any new legal rights or any special status

[769] Ibid.
[770] Ibid 5.

case for Indigenous citizens',[771] and that 'enforceable rights to protect Indigenous secrets arise from a "cocktail" of long-standing common law principles, combined with statutory instruments which refine and develop long-standing civil rights'.[772] However, I qualify this acceptance in so far as any protection of cultural secrets under the regimes cited by Martin and Jeffrey and canvassed in this thesis, will be largely hard fought, complex, costly and take significant time; unfortunately procuring outcomes which likely will not adequately remediate the actual *sui generis* spiritual harm suffered by Islanders, individually or as a community. Notwithstanding, these regimes are available to offer limited legal rights and remedies, to which individual aggrieved Islanders may subscribe.

5.4.2 Sub-question 2: Can Native Title law better support Torres Strait Islanders to protect their cultural secrets?

Native Title law seeks to protect *sui generis* Indigenous interests in their true form and content, providing appropriately tailored (and ever-evolving) remedies of injunction to restrain a breach of native title rights and interests, compensation to remediate not only economic harm, but also non-economic (including spiritual harm) suffered by individuals and community, and declaratory relief to invalidate inconsistent acts of external interference by all levels of Government. Actions can be brought in the Federal Court of Australia by individual or communal applicants, to restrain and compensate for interference. Islander secrets and the practice of asserting concealment and controlled revelation thereof (*Yagasin*) are practices in accordance with their traditional laws acknowledged and maintain their spiritual connection with land and waters. Cultural practice facilitates the very nexus between the physical and spiritual world for Islanders.[773] These rights may be both proprietary and non-proprietary/usufructuary in nature,[774] described as a 'bundle of rights'.[775] The native title regime is neither an institution of the common law nor a form of common law tenure but is nonetheless recognised by the common law.[776] Native title

[771] Ibid 3.
[772] Ibid.
[773] *NTA* s 223(1).
[774] *Mabo (No.2),* per Brennan J, at 51.
[775] *Ward* [2002] HCA 28; (2002) 76 ALJR 1098.
[776] *Fejo* [1998] HCA 58; (1998) 195 CLR 96, 128.

law provides an intersect between Islander traditional law and customs with the common law.[777]

Notwithstanding that *Ward* concluded that cultural knowledge did not arise from the laws and customs by which the traditional owners in question had connection to their land and waters – instead being considered akin to intellectual property rights – as I have demonstrated in this thesis, cultural secrets are the very nexus connecting Islanders spiritually with their lands and waters.[778] There is nothing more fundamental to maintaining connection with land and waters than the maintenance of cultural secrets in areas such as language, dance, adoption, hunting and fishing, sacred stories, sacred sites and artefacts, sorry business and initiation ceremony, and in the preservation of purity in the techniques inherent within each. For some, these rights may be core occupation-based rights attracting native title recognition and in turn statutory protection, whereas for others, the rights may take the form of contingent reciprocal rights which do not attract such.[779]

Native title rights are both Indigenous individual, group or communal rights, and enforceable as such, determined on a case by case basis. Cultural secrets of islanders comprise – and the cultural practice of concealment and controlled revelation thereof (*Yagasin)* are – cultural practice arising from *ailan lore* and *ailan kastom* acknowledged. This cultural practice fundamentally enables spiritual connection between Islanders and their lands and waters. This cultural practice is non-proprietary/ usufructuary in nature. As such, *Yagasin* and cultural secrets intertwined within other cultural practice of Islanders (eg. hunting and fishing, *ailan* dance, *ailan* adoption, sorry business, initiation ceremony, sacred story and sites and artefacts) undoubtedly satisfy the current statutory definition of native title under the *NTA*, namely:

> The expression native title or native title rights and interests means the communal, group or individual rights and interests of Aboriginal peoples or Torres Strait Islanders in relation to land or waters, where:

[777] Ibid.
[778] Interview with Participant 4 (Torres Strait, 26 May 2016).
[779] *Akiba (No2)*

a) the rights and interests are possession under the traditional laws acknowledged, and the traditional customs observed, by the Aboriginal peoples or Torres Strait Islanders; and
b) the Aboriginal peoples or Torres Strait Islanders, by those laws and customs, have a connection with the land or waters; and
c) the rights and interests are recognised by the common law of Australia.[780]

Of course, an infringement of a cultural secret not only affects the secret but also the right of Islanders to protect it through their cultural practice of *Yagasin.* In the event of such infringement, it is my opinion that native title is primed to provide remedy, either in the form of injunction, compensation or declaratory relief rendering invalid, for example, legislative provisions inconsistent with the unfettered exercise of those unique native title rights and interests.

The rights and obligations accompanying *Yagasin* only attach to Islanders. External interference anticipated in this thesis does not thus directly breach *Yagasin* (eg. by Government by legislative degree). Rather, by that external interference, the continued practice of *Yagasin* amongst Islanders is adversely affected, affording them remedy under native title.

There is a myriad of legal and institutional mechanisms in Australia which, to varying degrees, provide for the protection of Islander cultural secrets and the concealment and controlled revelation thereof (*Yagasin*), however I consider that all but native title are presently ill-equipped to adequately protect Islander cultural secrets in their *sui generis* form and content and appropriately remediate for spiritual impact of impairment of a largely non-proprietary nature.

[780] *NTA* s 223(1).

CHAPTER 6: CONCLUSIONS

> [T]he acts and events by which that dispossession in legal theory was carried into practical effect constitute the darkest aspect of the history of this nation. The nation as a whole must remain diminished unless and until there is an acknowledgment of, and retreat from, those past injustices."
>
> Brennan J- *Mabo(No.2)*[781]

[781] *Mabo (No.2)* 42 per Brennan J.

6.1 Thesis Question

In Chapter 6, I summarise the main points in Chapter 5, synthesising these into an answer to the thesis question:

What legal or institutional mechanisms might be proposed to better support Torres Strait Islanders in Australia to maintain their cultural secrets?

There are many legal and institutional mechanisms which go part way, but not all of the way, towards the protection of Islander cultural secrets and the concealment and controlled revelation thereof (*Yagasin*), arising out of *ailan lore* and *ailan kastom*. This is because many remain fundamentally constrained by a preoccupation in those regimes with Eurocentricity and proprietary rights of the individual, unable to understand and provide for the wider non-economic spiritual nature and consequences of impairment of Islander cultural secrets. Native title law, today embedded in the *Native Title Act 1993* (Cth), however provides a fresh outlook for the protection of Islander cultural secrets, provided that the common law can come to grips with the unique nature and incidents of Islander cultural secrets and the cultural practice of asserting concealment and controlled revelation thereof *(Yagasin)*, as being cultural practice its own right, practiced in accordance with recognised traditional laws and customs acknowledged, facilitating the physical and spiritual connection with their lands and waters. Notwithstanding the lack of distinguishable difference in form or content, the source of authority to practice may differ from Islander to Islander, group to group in the Torres Strait. For example, some individuals or groups may obtain authority to practice through bloodline/decent/succession (occupation-based right), whereas others may obtain authority through relationships with those holding occupation-based rights (reciprocal rights)[782]. Only the former right shall be a right sufficiently in relation to land or waters qualifying for native title recognition and protection; the latter being a right in relation to persons.

These rights and interests could be attained by enshrining such rights and interests in individual native title determinations, by way of fresh claim or application to revise[783]. Alternatively, these could be imported expressly into each native title

[782] *Akiba (No.2)*
[783] *NTA,* s13.

determination by way of legislative provision. Such would both restrain attempts to limit the cultural practice of concealment and controlled revelation (*Yagasin)* and the impairment of cultural secrets themselves, both inextricably-linked to the survival of a people, whether by adverse government legislative external intervention, industry exploitation, or media publication, whether such impairment was proprietary or non-proprietary in nature.

Notwithstanding eligibility of justice, accessibility of justice remains a key issue. In the Torres Strait, Native Title Representative Bodies are presently funded by Government to assist common law holders of native title rights and interests to assert and protect such rights. Given the complexity and cost of such enforcement action in Courts and Tribunals of competent jurisdiction, it is imperative that Federal, State and Territory Governments give priority to not only redefining the scope of native title to include protection of cultural secrets and *Yagasin*, but also to reviewing the adequacy of funding to ensure actions are not prioritised based on severity of impairment, because any impairment is unacceptable and actionable. For example, native title interests are presently under fire by Governments considering the enactment of legislation to offer the grant of ordinary Freehold estates in Indigenous communities, mandating the extinguishment of Native Title thereon.[784] This consideration is marketed as a 'trade' of 'like for like': Native title in exchange for a comparative 'Freehold' interest in land recognised under State and Territory land title systems and a step towards economic development and homeownership. I argue, however, that native title is far more valuable than exchange for a grant of an estate in Fee Simple, being an interest not granted by the Sovereign but recognised as pre-dating annexure of sovereignty in Australia by European settlers.

Native title has defeated the Doctrine of *Terra Nullius*, embodied not only proprietary interests but also extended to non-proprietary interests in lands and waters, including but not limited to the right to hunt, gather, fish and conduct ceremony, and arguably the exercise of cultural secrecy therein. Native title rights arise from traditional laws and customs acknowledged and are to be protected free from adverse State intervention, prosecution and regulation.[785] Much commentary

[784] *Aboriginal and Torres Strait Islander Land Legislation (Providing Freehold) Amendment Bill 2013* (Qld).
[785] *Yanner* [1999] HCA 53.

has been had historically on Native Title as principally a proprietary right (land right); however, it is the non-proprietary rights in 'things' (such as in cultural secrecy/*Yagasin*) which receive little to no commentary and are, therefore, little known and rarely applied and even more rarely enforced by aggrieved Indigenous individuals and communities and, in my opinion, provide far greater scope for legal protection of Islander cultural secrets than any other legal mechanism under modern Australian law. The extinguishment of native title rights threatens not only rights to use and occupy land, but more fundamentally threaten the very fabric of indigeneity: their cultural practice.

It is considered that community benefit shall be best realised from the findings and recommendations of this study by Government adopting the recommendations as policy and committing to enshrine such legal protection legislatively in accordance with established international law obligations and commitments, and further or in the alternative, by Islander leadership and Native Title Representative Bodies/ Land Councils advocating, both politically and through the Courts, to achieve such legal protection via fresh claims or applications to vary, determinations.

6.2 Recommendations: Future Research

6.2.1 Aboriginal Cultural Secrets

The principles outlined in this study may, upon careful and considered examination of Aboriginal peoples' tradition and custom in conjunction with Aboriginal people, be directly translatable so as to protect their cultural secrets, whose unique rights and interests are already equally protected under native title law in Australia.

6.2.2 Non-proprietary/Usufructuary Native Title rights

A particularly fascinating area for potential future research is the scope of non-proprietary/usufructuary rights and interests protected under native title law. In the realisation that native title encompasses all rights and interests, whether communal, group or individual of Aboriginal and Torres Strait Islanders in relation to land or waters, possessed under traditional laws and customs acknowledged and observed, creating connection with land or waters, whether proprietary or non-proprietary in nature, the immense potential for legal protection becomes evident.[786] Native title

[786] *NTA*, s 223(1).

extends legal protection far beyond common public misconception as merely a proprietary land right, instead primed to defend against all adverse advances upon core cultural identity and indigeneity. As has been demonstrated in this thesis, continued cultural practice, including that of secrecy (*Yagasin*), in accordance with traditional laws and customs acknowledged and observed is cornerstone to preserving Islander cultural identity. However, it is but one of many cultural practices forming the physical and spiritual connection between Islanders and their lands and waters, also likely to be the case for Aboriginal peoples.

In this thesis I argue that Islander notions of secrecy (*Yagasin*) are capable of legal protection distinctly as cultural practice under native title law without any reference to normative legal protection regimes protecting similar but different Western variants of those interests. If accepted, it is arguable that any other *sui generis* right or interest of Indigenous origin should also be afforded protection under native title law provided not offending international law standards, notwithstanding the existence of normative legal regimes offering similar but inadequate legal protection. Upon careful and considered examination alongside Indigenous Australians, scope for legal protection could conceivably extend rights to areas such as Indigenous knowledge, self-governance or even in asserting the relevance of traditional language and teaching practices into education curriculum within remote Indigenous communities, whether such practice is considered secret or not. My decision to begin this discussion in the cultural secrecy domain had principal regard to the primacy of secrets in maintaining core cultural identity, being reform of potential greatest value and significance to Indigenous Australians. I have no doubt, however, with the proverbial split of the native title atom into its proprietary and non-proprietary elements, that awareness and innovation in this space has only just begun.

6.3 Limitations of the Study

A limitation of this study is its sole focus on the cultural secrets of Torres Strait Islander People of Australia to the exclusions of all other groups, including first-nation Aboriginal peoples, and all other cultural practices not attracting secrecy considerations.

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