



## **A mirror to collaborative best practice? Revision of the DKCRC Indigenous IP Protocol.**

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**Learning for Desert Futures Stream**

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### **Abstract**

In late 2006 the DKCRC Indigenous Intellectual Property Protocol was subject to a revision exercise. This revision raises a number of critical issues that go to the heart of the nature of collaborative research and ethical practice. The revision process for the Protocol was a collaborative one, in which several different kinds of discourse occurred. These discourses necessitated preliminary preparation, in order to facilitate shared understandings among workshop participants of specialised language and concepts pertaining to intellectual property, and to international legal discourse. This paper will explore some of the challenges and issues in the process of developing these shared understandings.

### **Introduction**

From late 2006 the Desert Knowledge CRC Indigenous Intellectual Property Protocol was subject to a revision exercise. This was managed within the Social Science Program of the DKCRC. The process involved focus group and workshop discussions in Adelaide and Alice Springs with a range of Aboriginal and non-Aboriginal participants, and a textual revision and re-drafting process aided by input from a consultant – Michael Davis.

The process of revising the Protocol – which is now one of several resources that comprise the DKCRC's Aboriginal engagement and ethical 'toolkit' – raises a number of critical issues that go to the heart of the nature of collaborative research and the conduct of social science by, and within the DKCRC. The revision process for

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<sup>1</sup> Note that Ninti One has, where possible, updated references in this document in July 2011.



the DKCRC Protocol was a collaborative one, in which several different kinds of discourse occurred. These discourses necessitated considerable preliminary preparation, in order to facilitate shared understandings among workshop participants, of specialised language and concepts pertaining to intellectual property, and to international legal discourse. This paper will explore some of the challenges and issues in the process of developing these shared understandings. Indeed, the process of engagement advocated by both the revision of the Protocol, and the content and sentiment expressed within it, speak to a bigger picture of a best practise approach to working with Aboriginal people on any issue.<sup>2</sup>

### **Some background**

When the DKCRC began operation in 2003, one of the first pieces of policy it put in place was the Indigenous Intellectual Property Protocol. Embedded within this protocol was a clause stating that it was “able to be updated and improved over time with input from Indigenous stakeholders” to reflect “ongoing development of ethical standards for defining and handling Indigenous IP”. A series of recommendations from the ‘Desert Knowledge for Desert People Project’, one of the earlier projects sponsored, also revolved around updating and revising the Protocol.

So when I was engaged as Social Science Coordinator in early 2006 this was a key priority. By this time, the DKCRC was developing a network of Aboriginal researchers and social science research projects that involved Aboriginal interests. In Central Australia at least, these networks had been expanded through a series of research training workshops for Aboriginal research workers sponsored by DKCRC and hosted by the Waltja Aboriginal Corporation. Waltja, a registered training organization based in Alice Springs, ran the workshops as part of a training program known as ‘research nintiringtjaku’, that is; ‘becoming knowledgeable about research’. So these training workshops became a platform from which to move to the next step of revising the Protocol, with the aim of encouraging a heightened awareness of the complexities of ethical research among all participants in the research process.

In scoping the best way to gain Aboriginal input into updating the original Protocol it was decided that small groups would be the best way to allow people the freedom to speak and share their experiences. The focus

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<sup>2</sup> Such an approach includes free, prior informed consent, socially inclusive community initiated research that respects existing local Aboriginal protocols.



group method was chosen as we sought a collective organised discussion about a specific issue (the Protocol) in a consensus building context. In July 2007 we held three focus groups: at the Uniapon School at the University of SA in Adelaide, in Alice Springs with Tangentyere and finally with Waltja executive members. These focus groups were instructive for gaining Aboriginal perspective on the strengths and weaknesses of the Protocol. However, as anticipated we could not cover the extent of the issues in each one day focus group – so it was decided that a follow up focus group was needed before the larger and final workshop (in Sept 07). Representatives from each group (except Waltja) attended the follow-up focus group (which was more appropriately referred to as a “working group”) – where further specific drafting was done.

The purpose of the one and half day workshop was to enable discussion on and further input into the Protocol that had been re-drafted after the focus groups; now known as the AK and IP Protocol. As the Protocol is a guide to researchers working in this area of Aboriginal knowledge, Aboriginal and non-Aboriginal researchers were invited from across the DKCRC as well as non-DKCRC interests, such as Warpiri Media. The aim was for participants to share their experiences in discussing the issues and challenges of managing Aboriginal knowledge in research projects. So about half of the workshop was directed at presentations with the aim of informing the Protocol revision and thus integrating research experiences, and the other half was aimed at informing the Aboriginal participants who had been the core drafters of the Protocol revision.

### **Preparation and two-way learning**

The processes through which we undertook the Protocol revision in many ways mirrored the process that researchers engage in, to seek free prior informed consent from Aboriginal participants. I have recently realised that this concept should now more clearly articulate the importance of the educative aspect of gaining informed consent. The International Society of Ethnobiologists Code of Ethics describes this as a “principle recognis[ing] that prior informed consent requires an educative process that employs bi-lingual and intercultural education methods and tools, as appropriate to ensure understanding by all parties involved” (2006:6).

The first half of the focus groups and workshops were specifically aimed at being informative about Aboriginal rights and the ethics of research. A foundational element of the focus groups and final workshop was a presentation on the various areas of intellectual property (copyright, patents, trademarks, and designs, etc) and their relevance in managing and/or protecting Aboriginal knowledge. In this way the focus groups and the workshop clarified where formal IP tools were helpful in managing Aboriginal knowledge and when ethical



research practice is a more appropriate management tool. Indeed, the empowerment process for participants was a crucial element of it. Ensuring that Aboriginal participants knew what their rights were in relation to managing and controlling their knowledge and what their reasonable expectations should be about researchers practice and the research outcomes, underpinned the Protocol revision. This is because, ultimately, Aboriginal interests are in the front line in promulgating the Protocol. Just as an Aboriginal person might ask a non-Aboriginal stranger if they have a permit to be on Aboriginal Land, so to might Aboriginal people begin to ask if a researcher has a research agreement.

Casting the net as widely as possible for Aboriginal participants was important to the collaboration for several reasons. One was that we needed a mix of Aboriginal experiences and expertise. Some members of the focus groups and workshops had been engaged in international forums in relation to IP and social justice issues with the UN Standing Committee on Indigenous Issues, for instance. Other participants, such as those from Tangentyere, had been engaged in previous DKCRC sponsored research and had been participants in research projects under the original Protocol. While some individuals in other groups, such as Waltja, had not been exposed to research activity and some of the concepts were new to them. This was going to change, however with the growing DKCRC research footprint. Thus, another obvious reason for such collaboration was to ensure that DKCRC researchers would be as inclusive of Aboriginal interests as possible; recalling that the Aboriginal population comprises over 38% of the Central Australian population<sup>3</sup> and approximately 25% of the broader Desert population.<sup>4</sup> Ensuring that these interests would be informed and enabled to seize, or indeed demand, opportunities that research should bring in relation to training and livelihood pathways was a key focus.

The package of associated resources that were developed just prior to the Protocol revision was also discussed in this regard, as this included a schedule of rates pay for Aboriginal workers in research. This schedule acknowledges the local protocols around expertise or the cultural hierarchies of expertise. The rates

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<sup>3</sup> Mitchell J, Pearce R, Stephens M, Taylor J and Warchivker I. 2005. *Indigenous Populations and Resource Flows in Central Australia: A Social and Economic Baseline Profile*, DKCRC Research Report 05. Desert Knowledge CRC, Alice Springs. (2005: 16). Available from

<http://www.desertknowledgecrc.com.au/resource/DKCRC-Report-5-Indigenous-Population-Resource-Flows.pdf>

<sup>4</sup> Taylor J, Brown D and Bell M. 2006. *Population Dynamics and Demographic Accounting in Arid and Savanna Australia: Methods, Issues and Outcomes*. DKCRC Research Report 16. Desert Knowledge CRC, Alice Springs. (2006:3).

<http://www.desertknowledgecrc.com.au/resource/DKCRC-Report-16-Demography.pdf>



of pay send a strong message that Aboriginal expertise is valued and needs to be rewarded accordingly. Likewise, we also paid the unsalaried participants in the Protocol revision on the basis of the rates of pay guide.

### **The history of research**

In many of the sessions a considerable period of time was spent discussing the past negative research experiences of the participants and the history of research as an arm of colonialism, or as it has been referred; to the history of “measuring people, writing it all down and taking it away” (Scales 2006).<sup>5</sup> Tuwihahi Smith (2003) has argued in ‘decolonising research methodologies’ that one way that Indigenous peoples can recover and articulate their own research agendas is through strategies such as community research (2003: 123–25).

The fact that research can be disempowering, rather than empowering, was an underlining consideration in the strong consensus that emerged for the development of a “Plain Language or Community Guide” for the revised Protocol. As a complex and technical document aimed at academic researchers, ensuring that the Protocol was accessible to all Aboriginal people was a logical and necessary next step. This Guide is currently under development.

### **International discourse**

We were operating in an arena that had many international precedents, but unfortunately very few in Australia. Key concepts discussed were intellectual property, Aboriginal knowledge, benefit sharing, free prior informed consent, ethics and confidentiality.

At the international level, primarily within the United Nations and some of its specialised agencies, there is a growth in the development of standards and other activity directly relevant to discussion of these concepts as they pertain to working with Indigenous peoples. The work being conducted by agencies such as the Secretariat of the Convention on Biological Diversity and its working groups on Traditional Knowledge and on Access and Benefit-Sharing is critical here. The World Intellectual Property Organisation, UNESCO, and the United Nations Conference on Trade and Development (UNCTAD) are also developing standards and resources in this area.<sup>6</sup>

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<sup>5</sup> DKCRC Symposium – Ara Irititja

<sup>6</sup> The discourses introduced and explained by all this international activity do not readily translate into consensus views and debates within Australia. As a consequence, a significant component of the workshops on revising the Protocol



## Changes to the Protocol and issues that emerged

One of the major issues to emerge during the revision process was the enforceability of the Protocol. So there are a number of new clauses to this effect.<sup>7</sup> The Protocol now also more strongly reflects a diversity of perspectives and clarifies how both Aboriginal knowledge and Aboriginal IP are to be managed: they are quite different things. It also refers to other international standards and other newly developed DKCRC research management tools to cross reference the resources.

Importantly the new Protocol recognises that the desire to protect AK also includes the desire to recognise ownership and control. This creates an opportunity for Aboriginal people and communities to utilise a valuable resource. Indeed, the fact that AK has been misappropriated for so long and in so many circumstances is indicative (inter-alia) of the value of it.

There was considerable scope in revising the Protocol and the issue of authorship of research outcomes, such as publications, was of concern for people. So a clause was included, to the effect that “efforts will be made to co-author publications with Aboriginal participants and other researchers ... who have contributed in other ways to the project”. However, as with most research organisations and publication houses, unless specifically arranged otherwise, DKCRC, rather than the authors, holds the copyright. Recently, however, since the Protocol revision, a precedent has been set where the authors of a DKCRC funded project, the Warlpiri Ngurra-kurlu project<sup>8</sup>, negotiated to keep the copyright, only giving the license of the DKCRC to publish the work.

## Other Resources Developed

In preparing for the revision of the Protocol, the need for a number of other associated and support resources were also called for. These included the ‘community guide’ discussed earlier, nine Briefing Papers on various

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necessarily required the dissemination of information about these concepts as they have been elaborated within international discourses. The challenge was then to enable a productive discussion, and revision on the Protocol that drew on shared discourses based on community understandings and experiences, and those flowing through from the international level.

<sup>7</sup> These are: 7. “Monitoring, reporting and implementation” and 8. “Breaches of the Protocol”.

<sup>8</sup> Pawu-Kurlpurlunu W, Homes M and Box A. 2008. Ngurra-kurlu: A way of working with Warlpiri people. DKCRC Research Report 41. Desert Knowledge CRC, Alice Springs.

<http://www.desertknowledgecrc.com.au/resource/DKCRC-Report-41-Ngurra-kurlu.pdf>



aspects of IP law and associated research practise (such as confidentiality, ethics, etc). These are all in plain English and available for download.<sup>9</sup>

The process of revising the Protocol also led to a realisation that the IP resources available were usually inadequate to the task of AK protection. This, along with the considerable interest in the issues and the momentum developed, led us to hosting another working party to respond to a UN report.<sup>10</sup> This “Report of the Secretariat on Indigenous Traditional Knowledge”<sup>11</sup> sought submissions from around the world on whether further research should be conducted to “determine whether there should be a shift in the focus on the protection of Indigenous traditional knowledge away from IP law to protection via customary law”.<sup>12</sup> So late last year a group - with much overlap from the previous focus groups - prepared a submission to this Report, as one of only several from Australia.<sup>13</sup>

### **Shortcomings – the issue of galvanising those already busy people ...**

Like all research seeking to engage Aboriginal people, this project came up against the issue of galvanising the interest of already busy people. So to entice some individuals we assured them that it would be a two way process, where the expertise we had engaged – in this case Michael Davis - would be on hand to answer their questions. Considerable time was spent throughout all of the focus groups and the workshop trouble-shooting issues that people had experienced. Having an external expert there was important to this exercise as it also reassured participants that we were open to potentially critical input and review.

### **Conclusion**

Finally, it seems to me that there were many parallels with the ways in which we undertook the revision of the now Aboriginal Knowledge and IP Protocol and the content it espouses. It was effectively a collaborative form of research where everyone involved learnt a great deal from each other, where networks were fostered and expertise shared. However, importantly, while we were working on the Protocol, revision the Intervention in the

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<sup>9</sup> Search for 'briefing paper' in the keyword search at [www.desertknowledgecrc.com.au](http://www.desertknowledgecrc.com.au)

<sup>10</sup> An exploratory report: advocating further research on the potential to develop an international treaty (or some other mechanism) to elevate customary laws to the status of IP laws.

<sup>11</sup> From the Permanent Forum on Indigenous Issues.

<sup>12</sup> Which would serve to recognise the sui generis (or unique) nature of such laws.

<sup>13</sup> Available from <http://www.desertknowledgecrc.com.au/resource/DKCRC-UN-Submission-Nov-2007.pdf>



NT was just unfolding, in an approach that was antithetical to that which we were advocating. We sent out a media release at the time, suggesting that lessons about collaboration and respect could be learnt from the new Protocol and its revision; lessons, it seems to me, that are still pertinent today.

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