

## Kimberley Land Council

# Intellectual Property and Traditional Knowledge Policy

KLC Research, Ethics and Access Committee  
(REAC)  
Kimberley Land Council Aboriginal Corporation  
(KLC)

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## Introduction

Aboriginal people have the right to claim Intellectual Property in their Heritage, Traditional Knowledge and Traditional Cultural Expressions. This is an important right set out in Article 31.1 of the Declaration on the Rights of Indigenous Peoples. The Kimberley Land Council (KLC) has adopted this Intellectual Property and Traditional Knowledge Policy (the “IP and TK Policy”) in recognition of this right.

Over a number of years, Kimberley Aboriginal People have become concerned about the use of their Aboriginal Cultural and Intellectual Property in research. This use has been without proper acknowledgement of the contributions of Traditional Owners, and without their prior informed consent. In many cases, Aboriginal Cultural and Intellectual Property has been used inappropriately and in demeaning ways. In response to these concerns, and the developing international recognition of traditional knowledge rights, the KLC has developed this IP and TK Policy.

This IP and TK Policy is intended to cover Aboriginal Cultural and Intellectual Property, Confidential Information, Traditional Knowledge and Traditional Cultural Expression. It should be read in conjunction with the KLC’s Research Protocol which outlines the process for submitting research proposals.

## About KLC’s Research Ethics and Access Committee

The IP and TK Policy was initiated by the KLC’s Research Ethics and Access Committee (REAC). The REAC assesses proposals for research with Kimberley Aboriginal people on behalf of the Prescribed Body Corporates (PBCs) and Native Title claimants. The REAC meets regularly to discuss and make recommendations on research proposals and consider KLC library access requests.

## Aims of this Policy

This document aims:

1. to inform researchers of the IP and TK Policy;
2. to advise researchers of what standards must be met in their research projects and what information they must disclose in their research proposals to demonstrate implementation of the IP and TK Policy;
3. to guide the REAC and KLC staff in reviewing research proposals, and post-approval management; and
4. to establish best practices in IP and TK protection for research on and about Kimberley Aboriginal people, and their land and waters, and Kimberley plants and animals.

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## Relevant standard-setting documents

The IP and TK Policy aims to set best practice by reference to the following standard-setting documents:

- Australian Institute of Aboriginal and Torres Strait Islander Studies' Guidelines for Ethical Research in Indigenous Studies 2000 (revised 2011)
- United Nations' Declaration on the Rights of Indigenous Peoples, including Article 31.1 as follows:

Indigenous people have the right to maintain, control, protect and develop their cultural heritage, Traditional Knowledge and Traditional Cultural Expressions, as well as the manifestations of their sciences, technologies and cultures, including human and genetic resources, seeds, medicines, knowledge of the properties of fauna and flora, oral traditions, literatures, designs, sports and traditional games and visual and performing arts. They also have the right to maintain, control, protect and develop their Intellectual Property over such cultural heritage, Traditional Knowledge, and Traditional Cultural Expressions.

- Convention on Biological Diversity: Article 8(j):

Subject to its national legislation, respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity and promote their wider application with the approval and involvement of the holders of such knowledge, innovations and practices and encourage the equitable sharing of the benefits arising from the utilization of such knowledge, innovations and practices.
- the Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization (2010).
- the World Intellectual Property Organisation's Draft Provisions for the Protection of Traditional Cultural Expressions/Folklore (TCEs) and for the protection of Traditional Knowledge (TK) against misappropriation and misuse.
- The KLC requires all research projects to comply with this Policy as a condition of their research agreement, during the research project, and in the management of Intellectual Property created as a result of the research.

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## 1. Preliminary

- 1.1. This Policy is referred to as the KLC's *Intellectual Property and Traditional Knowledge Policy* ("the IP and TK Policy").
- 1.2. The Policy applies to all researchers conducting or wishing to conduct research with Kimberley Aboriginal people and/or on traditional Aboriginal lands and/or waters in the Kimberley, and on plants and animals on Kimberley land and/or waters, or using their Traditional Knowledge and Traditional Cultural Expression. It also must be followed by Researchers including government officers, filmmakers and all people who collect, record or deal with Kimberley Aboriginal people's Intellectual Property, Heritage, Traditional Knowledge and Traditional Cultural Expression.
- 1.3. The aims of the policy are:
  - 1.3.1. to manage Intellectual Property rights where access to research is granted;
  - 1.3.2. to prevent the unauthorised disclosure and dissemination of the Traditional Knowledge and Traditional Cultural Expressions of Kimberley Aboriginal people;
  - 1.3.3. to promote the sharing of benefits with Kimberley Aboriginal people arising out of the authorised use of their Intellectual Property, Traditional Knowledge, Traditional Cultural Expression and Biological Resources;
  - 1.3.4. to promote respectful use of the Traditional Knowledge, Traditional Cultural Expressions and Biological Resources of Aboriginal people of the Kimberley; and
  - 1.3.5. to establish best practice standards for Free, Prior and Informed Consent.
- 1.4. The Policy covers dealings with a range of Aboriginal Heritage, including but not limited to:
  - 1.4.1. Reports, publications, books, maps, novels and literary content, databases and digitally stored information;
  - 1.4.2. Traditional Cultural Expression: Art, craft and designs and rock art;
  - 1.4.3. Performing arts such as dance, drama and song and music;
  - 1.4.4. Traditional Knowledge, innovations and practices relating to things such as bush food, medicine, weather patterns, plants and animals;
  - 1.4.5. Photographs, films and sound recordings;

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- 1.4.6. Languages, and use of Aboriginal names commercially as trade marks; and
  - 1.4.7. Deposited materials in archives, research institutions and libraries.

## 2. Definitions

- 2.1. “Aboriginal” means people of Aboriginal descent; who identify as Aboriginal; and are accepted as such in the community where he or she lives or comes from.
- 2.2. “Aboriginal Cultural and Intellectual Property Rights” means the rights of Kimberley Aboriginal people to protect, control and manage their heritage which includes all materials, sites and knowledge, the nature of use of which has been transmitted or continues to be transmitted from generation to generation, and which is regarded as pertaining to a particular Aboriginal group or its territory. Kimberley Aboriginal people have a living heritage which includes Traditional Cultural Expression and Traditional Knowledge, which may continue to be developed in the future. Heritage includes (but is not limited to):
  - 2.2.1. Literary, performing and artistic works (including songs, music, dances, stories, ceremonies, symbols, languages and designs);
  - 2.2.2. Scientific, agricultural, technical and ecological knowledge (including cultigens, medicines and the phenotypes of flora and fauna);
  - 2.2.3. All items of movable cultural property;
  - 2.2.4. Ancestral remains and human genetic material;
  - 2.2.5. Immovable cultural property (including Sacred and historically significant sites and burial places);
  - 2.2.6. Languages;
  - 2.2.7. Genealogical information and kinship relationships; and
  - 2.2.8. Documentation of Aboriginal peoples’ heritage in archives, film, photographs, videotape or audiotape, databases and all forms of media including digital files.
- 2.3. “Access and Benefit Sharing Agreement” means a written agreement providing for the fair and equitable sharing of benefits derived from the use of Biological Resources and any associated Traditional Knowledge with the persons, or groups (or suitable representative) providing access to the Biological Resources and Traditional Knowledge. Such an agreement must be established upon mutually agreed terms with the Free Prior Informed Consent of the relevant Indigenous person(s) or group(s) and should include, *inter alia*:

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- 2.3.1. A dispute settlement clause;
  - 2.3.2. Terms on benefit-sharing, including in relation to intellectual property rights;
  - 2.3.3. Terms on subsequent third-party use, if any; and
  - 2.3.4. Terms on changes of intent, where applicable.
  - 2.4. “Biological Resources” means genetic resources, organisms or parts thereof, populations, or any other biotic component of an ecosystem with actual or potential use or value for humanity.
  - 2.5. “Confidential Information” means information obtained by a Researcher in the course of conducting Research, from or about Kimberley Aboriginal people, including Traditional Owners, which is reasonably regarded as confidential, is marked as confidential or is of a commercially or culturally sensitive nature to the KLC or Traditional Owners. It also includes Restricted Material.
  - 2.6. “Copyright” means the rights attaching to: literary works such as novels, poems and reports; musical works; dramatic works such as plays; artistic works such as drawings, paintings, photographs, sculptures and architectural designs; sound recordings; broadcasts, radio and television programs; films and published editions, as included in the *Copyright Act 1968* (Cth).
  - 2.7. “Culturally Authorised Work” refers to the work of an Aboriginal creator that incorporates designs and stories, or reproduces dances or songs, to which the Aboriginal creator has some connection or belonging. Cultural appropriation from other Aboriginal traditions is not authorised. Aboriginal creators should follow Aboriginal cultural protocols by seeking Free, Prior and Informed Consent from the relevant Traditional Owners of that cultural material.
  - 2.8. “Free, Prior and Informed Consent” means consent given when all relevant information has been provided to Aboriginal people to allow them to make decisions freely, without coercion. This means having the right to say ‘no’ to a project.
  - 2.9. “Intellectual Property” includes Copyright, patents, plant breeders rights, designs, trade marks (including geographical indications), Confidential Information, and all other rights resulting from intellectual activity in the industrial, scientific, literary or artistic fields.
  - 2.10. “Knowledge Holder” means a person accepted by the Kimberley Aboriginal community as having the responsibility for Traditional Knowledge and whose role it is to participate in Traditional Knowledge activities relating to their connection to land and waters.
  - 2.11. “Moral Rights” means the personal rights that connect creators to their works, filmmakers to their films and performers to their performances under Part IX of the *Copyright Act 1968* (Cth).

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- 2.12. “Performer’s Rights” refer to the performer protection rights under Part XIA the *Copyright Act 1968* (Cth) which allows performers to control the recording, broadcast and dissemination of their performance.
- 2.13. “Research” means any research or recording (including photography, film and scientific research) conducted on traditional Aboriginal lands or waters in the Kimberley, with Kimberley Aboriginal people and/or the Kimberley Land Council (KLC) involving the use of traditional knowledge or access to biological resources including plants and animals.
- 2.14. “Researcher” means any person conducting Research.
- 2.15. “Restricted Material” is material that is restricted in some way according to the customary law and practices of Kimberley Aboriginal people. For instance, information may be specific to gender as women’s business or men’s business. Restricted Material must not be used by Researchers in a way that is contrary to the customary laws and practices of the Kimberley Aboriginal community.
- 2.16. “Traditional Cultural Expression” means any way in which Aboriginal cultural knowledge appears or is manifested, irrespective of content, quality or purpose, whether tangible or intangible, and, without limiting the preceding words, includes:
- 2.16.1. names, stories, histories and songs in oral narratives;
  - 2.16.2. art and craft, musical instruments, sculpture, paintings, carvings, pottery, terra-cotta mosaic, woodwork, metalware, painting, jewellery, weaving, needlework, shell work, rugs, costumes and textiles;
  - 2.16.3. music, dances, theatre, literature, ceremonies, ritual performances and cultural practices;
  - 2.16.4. photographs, recordings, and films;
  - 2.16.5. the delineated forms, parts and details of designs and visual compositions; and
  - 2.16.6. architectural forms.
- 2.17. “Traditional Knowledge” means the know-how, skills, innovations and practices that form the knowledge systems embodying the traditions, observances, customs, beliefs and lifestyles of Kimberley Aboriginal people, or are contained in knowledge systems passed between generations and continuously developed following any changes in the environment, geographical conditions and other factors. It is not limited to any specific technical field, and may include agricultural, environmental and medicinal knowledge, and any knowledge associated with Traditional Cultural Expressions and Biological Resources.
- 2.18. “Traditional Knowledge (TK) Recording Release” is a written agreement that deals with rights to film and/or sound-record, giving consent from the Researcher to the make a film or sound-recording of the Knowledge Holder.



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2.19. “Traditional Owners” refers to those Kimberley Aboriginal people who have, in accordance with their Aboriginal tradition, a social, ancestral, economic and spiritual affiliation with, and responsibilities for, all or any part of the lands and waters in the Kimberley, and Aboriginal Cultural and Intellectual Property, as recognised by their Native Title Claim Group or Native Title Holding Group.

### 3. Principles

The following principles are the foundations for this policy:

- 3.1. Self-determination: Researchers must recognise that Kimberley Aboriginal people have the right to self-determination concerning the way research is conducted and the research outcomes, and will appropriately acknowledge and respect such rights by seeking Free, Prior and Informed Consent of Traditional Owners. Kimberley Aboriginal people have the right to say ‘no’ to Research about them and their land and waters.
- 3.2. Consultation and Negotiation: Consultation and negotiation should aim to achieve mutual understanding, which is on-going.
- 3.3. Confidentiality: Kimberley Aboriginal people have the right to keep confidential any information concerning their cultural practices, traditions and beliefs and to exclude this information from publication.
- 3.4. Interpretation: Kimberley Aboriginal people have the right to be the primary interpreters of their culture.
- 3.5. Cultural Integrity: Kimberley Aboriginal people have the right to Cultural Integrity over their Aboriginal Cultural and Intellectual Property.
- 3.6. Mutual arrangements: The use of, and access to, research results should be mutually agreed. A researched community should not be disadvantaged by the research project.
- 3.7. Benefit sharing: Where authorised use occurs, Aboriginal people have the right to licence and negotiate terms for the use of their Traditional Knowledge, Traditional Cultural Expression and their Biological Resources.
- 3.8. Formal agreement: negotiation should result in a formal agreement, based on good faith and Free, Prior and Informed Consent.
- 3.9. Cultural maintenance: the culture of Indigenous people is not static. Provision should be made for the long term access to any research reports and materials that are created for future generations of Kimberley Aboriginal people.

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#### 4. Respecting value of Traditional Knowledge

- 4.1. The Researcher must acknowledge the value of Traditional Knowledge in Research and seek the Free, Prior and Informed Consent of Traditional Owners at every stage of the project, including at the concept stage in the project methodology.

#### 5. Stating IP Arrangements in a research proposal

- 5.1. In the research proposal, the Researcher must the following information regarding Intellectual Property:
  - 5.1.1. What materials will be created to which Copyright will subsist;
  - 5.1.2. Whether the project will involve the creation of sound recordings, films, DVDs or other multimedia, audio or audio-visual materials or other Copyright and Intellectual Property;
  - 5.1.3. The ownership of Copyright and other Intellectual Property rights to be created during (or as a result of) the Research;
  - 5.1.4. Proposals for the sharing of Copyright in reports, books, films, sound recordings, DVDs and other materials with the relevant Kimberley Aboriginal people;
  - 5.1.5. Whether the materials will be published (and if so when, how and where they will be published); and
  - 5.1.6. If published, whether there will be commercial returns generated from the publication (eg: sale of book, or film distribution).
- 5.2. In the research proposal, the Researcher must disclose the following information on how Kimberley Aboriginal people will be involved in the project:
  - 5.2.1. Details of arrangements for participants to be paid at rates that represent fair and equitable payment;
  - 5.2.2. Where the contribution is likely to be significant, whether Kimberley Aboriginal people in the research will be acknowledged as co-author(s); and
  - 5.2.3. If intending to film, photograph or sound record, the means by which the Researcher will obtain the Free, Prior and Informed Consent of participants in writing
- 5.3. The Researcher must disclose if any registered Intellectual Property rights will be generated as part of the project, including any trade marks, designs, patents and plant breeders' rights. The Researcher must also:
  - 5.3.1. Discuss and negotiate ownership with Kimberley Aboriginal people prior to registration of Intellectual Property rights;

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- 5.3.2. Provide details of a commercialisation plan (if any). If a commercialisation plan has not been developed, details should be provided when developed; and
  - 5.3.3. Where Traditional Knowledge is the source of patent or plant breeders' rights, negotiate and enter an Access and Benefit Sharing Agreement with the Kimberley Aboriginal people.
- 5.4. The Researcher must disclose information of any contractual or other rights, interests, obligations or restrictions that relate to Intellectual Property arising out of a research project, including:
- 5.4.1. Any rights, interests, obligations or restrictions imposed upon or granted by the Researcher under an agreement with a supporting university or research institution. This should include details of whether the Researcher is a student or employed by an institution and the arrangements for Intellectual Property ownership in the results of the research. For example, is the Research to be submitted for academic qualifications? Does the university own Copyright or take a licence in the resulting Copyright or other Intellectual Property? The Researcher should provide copies of relevant Intellectual Property clauses, employment agreements, funding agreements and/or Intellectual Property policies of the relevant institution.
  - 5.4.2. Any of the above imposed upon or granted by the Researcher under an agreement with a funding body. For example, does the funding body seek an assignment of Copyright or require a licence in the resulting Intellectual Property? (For example, the Researcher should advise if government funding agreements require a wide non-exclusive, perpetual, royalty-free licence with rights to sub-licence, and adapt).

## **6. New Uses require Free, Prior and Informed Consent**

- 6.1. If Aboriginal Cultural and Intellectual Property is to be used for any purposes other than those originally approved in a Research Agreement, the Researcher must submit a new research proposal to the KLC. The KLC will refer the research proposal for the new use to the relevant Claim Group or Prescribed Body Corporate for their Free, Prior and Informed Consent.

## **7. Traditional Cultural Expression and Artistic Works**

- 7.1. The use of Traditional Cultural Expression requires the Free, Prior and Informed Consent of Kimberley Traditional Owners. This includes photographing and filming rock art, and any re-interpretations or adaptations of rock art from the Kimberley region.
- 7.2. Artistic works, dance, stories and craft used in research, art and film projects should be Culturally Authorised Works.

## **8. Research on ancestral remains**

- 8.1. Research using or involving Kimberley Aboriginal ancestral remains is not authorised.

## **9. Confidentiality**

- 9.1. The Researcher should be aware that in conducting the research, he or she may be privy to Confidential Information. The following procedure is recommended for dealing with concerns regarding Confidential Information:
- 9.1.1. The researcher will keep confidential all Confidential Information, including personal or sensitive information and Restricted Material;
  - 9.1.2. Any complaints concerning infringement of confidentiality will be reported to the Research Ethics and Access Committee (REAC);
  - 9.1.3. The REAC will investigate the complaint to consider whether it has substance; and
  - 9.1.4. Further action may be taken by the KLC, and/or the Traditional Owners, and/or specific individuals affected by the breach of Confidential Information.

## **10. Restricted Material**

- 10.1. Researchers will not publish Restricted Material under any circumstances.
- 10.2. Researchers should avoid recording Restricted Material in any form (including as written notes or records, films, sound recordings and any other media).
- 10.3. If Restricted Material is recorded inadvertently or if the restricted nature is revealed after recording, consultation with Traditional Owners via the KLC is required, and the Traditional Owners may set conditions on the management, storage or destruction of the recording.

## **11. Dealing with Copyright works created in the course of research**

- 11.1 Copyright works and materials may be created in the course of a Research Project including, but not limited to:
- 11.1.1 Literary works including books, reports and written materials, databases, field notes;
  - 11.1.2 Artistic works including designs and craft, photographs, sculpture, performing arts, musical works and dramatic works;

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- 11.1.3 Films in any format, including film footage taken by mobile phones, personal cameras and commercial cameras;
- 11.1.4 Sound recordings, including recorded conversations and performances; and
- 11.1.5 Published editions.
- 11.2 For literary works in which a significant contribution of Traditional Knowledge is imparted by a Knowledge Holder for the production of a book, report or other written materials, the Knowledge Holder should be:
- 11.2.1 Given an opportunity to review and comment of the draft of the book, report or other written materials; and
- 11.2.2 Attributed as a co-author, and share the Copyright in the book or publication.
- 11.3 For films:
- 11.3.1 TK Recording Releases must set out terms for use and archiving, and state the requirement of re-consultation with the performer for uses not covered in the research proposal, and must be signed by all performers including interviewees; and
- 11.3.2 Free, Prior and Informed Consent from Copyright owners of art, music, and cultural material must be obtained from the people in whom Copyright vests.
- 11.4 For sound recordings:
- 11.4.1 TK Recording Releases must set out terms for use and archiving, and requires re-consultation with the performer for uses not covered in the research proposal and must be signed by all performers including interviewees; and
- 11.4.2 Free, Prior and Informed Consent from Copyright owners of music, and cultural material must be obtained from the people in whom Copyright vests.
- 11.5 For artistic works:
- 11.5.1 Written permission and negotiated usage rights must be obtained from the Copyright owner (including provisions for licence fees); and
- 11.5.2 Attribution should be given to the artists, including cultural attribution to the Aboriginal artists' language or clan group.

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## 12. Filming and Photography

- 12.1 Permission is required from the KLC by Researchers to photograph, film, depict in art or otherwise capture the images of any natural landscape owned by Traditional Owners who are represented by the KLC. Depending on the nature of the project, the KLC may request a fee for administration.
- 12.2 Some areas are Restricted and other sites are limited to certain uses according to customary laws. Wider dissemination may not be desired by Aboriginal people, and in general, the commercial use of an image of a particular site may be seen as detrimental to cultural life, at a particular time.
- 12.3 Consent must be obtained from KLC for the filming and photography of sites. If a Researcher wishes to photograph and/or make a recording (film or sound) and/or an artistic work (including sculpture and art) of Aboriginal sites or protected areas for the purposes of commercial publication or reproduction, permission is required under section 18 of the WA Heritage Act. Permission must be obtained by application to the Registrar of Aboriginal Sites, and the relevant Aboriginal people should be consulted. Refer to the WA Department of Indigenous Affairs' website.
- 12.4 Where films and photographs are used for new purposes in the future that were not disclosed in the Research Proposal, the Researcher, and any other person wishing to use these films and photographs, must re-apply to the KLC for consent.
- 12.5 Whilst taking photographs and filming is permitted for reasonable personal use and research records, the Researcher should not upload these on Facebook, Twitter and other social media sites, where there is a likelihood of wide dissemination, and potential for copying of images. Reasonable care should be taken by the Researcher to deal with these images in an appropriate and respectful manner.
- 12.6 Access to archived films and photographs of Kimberley Aboriginal people and their land, and the traditional knowledge contained therein, requires the prior informed consent of the Traditional Owners. Some archives require the prior consent of the Aboriginal community before allowing publication and have Indigenous Collection Policies, including the Australian Institute of Aboriginal and Torres Strait Islander Studies and the National Film and Sound Archive. However, Researchers should undertake to consult and seek consent even if the requirements of access from the Archive or Library does not require consent from Aboriginal people.
- 12.7 Permission is required from individual Kimberley Aboriginal people before taking photographs or filming them for research. The Researcher must obtain the Free, Prior and Informed Consent in writing before including any images in publications and media. Permission to photograph or film children requires consent from parents.

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### **13. Use of Kimberley Aboriginal Languages**

- 13.1 Researchers should consult the Kimberley Language Resource Centre about the use of Aboriginal language words including checking the correct spelling, orthography, linguistics and meanings.
- 13.2 If a Kimberley Aboriginal language word is used commercially such as for a brand or trade mark, Free, Prior and Informed Consent is required from the Traditional Owners, and the commercial rights should be the subject of a licence and benefit sharing agreement.

### **14. Biological Resources and associated Traditional Knowledge**

- 14.1 The KLC is concerned about past practices which have resulted in the collection of plants and animals taken in the course of research, and the use of Traditional Knowledge, without the consent of Kimberley Aboriginal people, or the sharing of benefits for the use of the associated Traditional Knowledge.
- 14.2 Researchers will not collect or conduct research on Biological Resources, including plants and animals occurring on Kimberley lands or waters, without first obtaining the relevant Traditional Owners' Free, Prior and Informed Consent (in addition to other relevant licences or permits).
- 14.3 The Researcher must disclose the sites, areas and places to be visited and:
- 14.3.1 arrangements must be made for accompaniment by Traditional Owner cultural heritage guides, and payments made at reasonable rates;
  - 14.3.2 permission must be obtained from the KLC before accessing land and waters for the purpose of research; and
  - 14.3.3 permission from Traditional Owners via the KLC must be obtained for photography and filming of sites.
- 14.4 The Researcher must disclose if any Biological Resources such as plants and/or animals are to be collected, accessed or removed and if so:
- 14.4.1 Written permission is required from the KLC, in addition to any permits required by the Department of Environment and Conservation (WA) and Department of Indigenous Affairs (WA); and
  - 14.4.2 The KLC, or the Traditional Owners, may require the Researcher to sign a non-disclosure agreement or a specimen's agreement with the relevant Traditional Owners or their prescribed body corporate.
- 14.5 Researchers will not commercially use the Traditional Knowledge of Kimberley Aboriginal people (whether accessed directly from Kimberley Aboriginal people or from any other source) as the basis for research on Biological Resources (regardless of where the Biological Resources were

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sourced including via Herbariums) without the Free, Prior and Informed Consent of the Traditional Owners.

14.6 Where relevant Traditional Owners cannot be identified (for example because the Traditional Knowledge was accessed from a book in the public domain), the Researcher must obtain the Free, Prior and Informed consent of the KLC.

14.7 A Researcher must enter into an Access and Benefit Sharing Agreement for the commercial application of Traditional Knowledge of associated Biological Resources collected in the course of research, with:

14.7.1 the Traditional Owners of the lands or waters from which the Biological Resources were accessed (if accessed from Kimberley lands or waters); and

14.7.2 the Traditional Owners and Knowledge Holders of any Traditional Knowledge used in the Research; or

14.7.3 if neither of the above can be identified with reasonable enquiry, the KLC.

14.8 If the Researcher becomes aware that the Traditional Knowledge to which an Access and Benefit Sharing Agreement refers is held by more than one community or group in the Kimberley, each Kimberley Aboriginal group should be included in the Access and Benefit Sharing Agreement. If agreed to by the relevant Kimberley Aboriginal group(s) and the KLC, the Researcher may enter an Access and Benefit Sharing Agreement with the KLC as the single representative of those groups.

14.9 In reaching mutually agreed terms for Benefits Sharing Agreement, the parties should consider:

14.9.1 the nature of the Biological Resource and the nature of the Traditional Knowledge being sought (eg, is it for identification, location, use, or preparation); and

14.9.2 the nature of the benefits that might flow from the use of the Traditional Knowledge, particularly considered in strategic terms of “a total benefits package”. This may comprise a mix of monetary and non-monetary benefits, including:

- access fees and milestone payments;
- upfront payments;
- licence fees;
- special fees to be paid to trust funds supporting knowledge conservation and sustainable use of biodiversity;
- salaries and preferred terms;
- education and training opportunities;
- use of facilities and databases;



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- transfer of technical knowledge back to Kimberley Aboriginal people;
  - access to scientific data for conservation and sustainable use;
  - research for social, economic and health and wellbeing;
  - joint ownership of relevant Intellectual Property rights;
  - share in royalties from licensing of Intellectual Property rights;
  - participation in product development;
  - institutional capacity building;
  - joint ventures;
  - contributions to the local economy and cultural development; and
  - publicity and social recognition.

14.10 Any Biological Resources collected from Kimberley lands or waters by the Researcher and deposited in a herbarium, university collection, government department or other storage facility must include a written term requiring future users of the Biological Resources to obtain the Free, Prior and Informed Consent of the Traditional Owners of the lands or waters from which the Biological Resources were accessed.

## **15. Deceased person's images and references**

- 15.1 Special care should be taken when dealing with references to, and images of, deceased Aboriginal people.
- 15.2 The Researcher should consult representatives of the family to use the deceased person's name and image.
- 15.3 If permission to use the name and/or image is given, this should be recorded in writing, outlining any conditions for use. Such conditions might include using it for limited purposes, using other names, covering or obscuring the face of the deceased person and using appropriately worded deceased person's warning notices.
- 15.4 In the event that an Aboriginal person passes away after their image has been recorded, written consent to the continued use and distribution of the Publication and Recordings (including my name, image and voice) must be obtained, through the KLC, from the family and/or community in relation to the continued use and distribution of the Publications and Recordings, unless this has been previously authorised with the individual Aboriginal person in writing.
- 15.5 Publications, books and films should include a deceased warning notice where appropriate. Researchers should consult the deceased person's family and Kimberley Aboriginal people concerning the wording of deceased warning notices. Some examples are included at Appendix A.

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## **16. Aboriginal Cultural and Intellectual Property Rights- Cultural Integrity**

- 16.1 Researchers should respect the rights of Traditional Owners to preserve the cultural integrity of their Aboriginal Cultural and Intellectual Property by maintaining the cultural context and spirit of the Traditional Knowledge and Traditional Cultural Expression.
- 16.2 The Researcher should consult with Kimberley Aboriginal people and include within the Research Project timeframe, opportunities for the review of research findings, including at important milestones of the Research Project, and especially before the publication and dissemination of Research Project results.
- 16.3 The KLC and/or the Traditional Owners may restrict publication or dissemination of Research Project results that may adversely impact upon Kimberley Aboriginal research participants and/or misrepresent their cultural values, knowledge and management systems.
- 16.4 Once clearance is obtained, the Researcher should not make any substantial changes or changes without the prior written consent of the Kimberley Aboriginal Traditional Owners.

## **17. Aboriginal Cultural and Intellectual Property Rights - Attribution and Acknowledgement**

- 17.1 Traditional Owners have the right to be attributed for their Traditional Knowledge and Traditional Cultural Expressions.
- 17.2 The Researcher should consult Kimberley Aboriginal people and Traditional Owners for the appropriate wording and manner of the attribution, including about any references to their biographical material and uses of their image.
- 17.3 The Researcher should include a Notice of Traditional Knowledge in publications that incorporate Traditional Knowledge. An example Traditional Knowledge Notice is attached in Appendix A.
- 17.4 Acknowledgements should be given to any Kimberley Aboriginal people and organisations that assisted or contributed to the Research project, subject to them being consulted about the wording of the acknowledgement.
- 17.5 Notwithstanding 17.4, Kimberley Aboriginal people and organisations may not wish to be acknowledged, and should have the right to remove their names from any publications.
- 17.6 Kimberley Aboriginal people have the right to withdraw their support for a research project and can ask for a notice to be inserted in the publication advising of no reflection of KLC or Traditional Owners' views. For a guide to wording see Appendix A.

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## **18. Ethical practices in Research**

- 18.1 Researchers should not engage in unfair or unethical practices which exploit Kimberley Aboriginal people and bring disrepute.
- 18.2 Researchers are encouraged to join associations that promote fair and ethical conduct and have adopted codes of ethics or codes of practice, and to follow best practice in Indigenous research protocols including the following:
- 18.2.1 the Australian Institute of Aboriginal and Torres Strait Islander Studies who have adopted the Guidelines for Ethical Research in Indigenous Studies.
- 18.3 Researchers should familiarise themselves with ethical clearance processes, and obtain clearances from their University Ethics Committee (if applicable).
- 18.4 The commercial terms of a proposed relationship between a commercial entity and a Kimberley Aboriginal community should be based on fair and ethical practices and comply with all laws. The following is a non-exhaustive list of practices that support this principle:
- 18.4.1 All terms and conditions to be explained in plain English, including commercialisation policy and potential income derives, and the benefits to be returned to Kimberley Aboriginal people as a result of the commercial activity;
- 18.4.2 The disclosure of perceived risks, as well as the potential benefits; and
- 18.4.3 The opportunity for Kimberley Aboriginal People to obtain legal advice (at the cost of the Researcher or entity proposing the commercial arrangement) before signing an agreement for commercial use of their Traditional Knowledge and Traditional Cultural Expression, or access and benefit sharing.

## **19. Working together with Kimberley Aboriginal organisations**

- 19.1 The IP and TK policy was approved by the KLC Board with an aim to work in coordination with the following Kimberley Aboriginal organisations:
- 19.1.1 Kimberley Aboriginal Law and Culture Centre; and
- 19.1.2 Kimberley Language Resource Centre.

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## **20. Disputes and non-compliance**

20.1 In the event of a dispute relating to the use of Aboriginal Cultural and Intellectual Property, the KLC will refer the matter to a panel of senior Kimberley Aboriginal cultural advisors (selected by the REAC) who may:

20.1.1 attempt to resolve the dispute;

20.1.2 direct that the dispute be mediated; and

20.1.3 make recommendations about what should be done.

20.2 The REAC has the absolute discretion to reject a research proposal.

20.3 In the event of non-compliance of this Policy by the Researcher, the KLC may terminate the Research Agreement.

## **21. Return of research results to Traditional Owners and KLC**

21.1 The Researcher must provide a report in plain English to Traditional Owners and the KLC, which reports of the outcomes of a Research Project. The KLC copy of the report will be deposited in the KLC Library.

21.2 The Researcher must provide copies of materials such as reports, books, field notes, data, film and photographs to the Traditional Owner groups, and to the KLC Library, who will manage the materials in accordance with the KLC Library Access Policy. As part of the return of the material, the Researcher must provide a licence to the Prescribed Body Corporate, and the Traditional Owners, and the KLC, to copy and use the materials, including digitisation.

21.3 For all deposits of materials at other archives and libraries, the Researcher must note the interests of the KLC on the deposit form and specify that consent from the KLC is required before publication of this material, and, if necessary, before accessing the materials. "Publication" includes digitisation and/or making the material available on the internet.

## **22. Use of KLC name and logos**

22.1 Consent is required for all uses of the KLC's name, logo and trade mark.

## **23. Implementation of this Policy**

23.1 The KLC, through the REAC, will oversee the implementation of this Policy.

23.2 Approved Researchers will be required to sign research agreements agreeing to comply with this policy.

**24. Review of policy**

- 24.1 The KLC will review this Policy every three (3) years, or as required, to ensure that it remains relevant to the interests of Kimberley Aboriginal Traditional Owners.
- 24.2 The KLC reserves the right to update this Policy and to develop additional guidelines for, but not limited to, IP and TK, including:
- 24.2.1 Rock Art;
  - 24.2.2 the making of feature films and advertising campaigns;
  - 24.2.3 filming and photography;
  - 24.2.4 interpretive signs; and
  - 24.2.5 social media sites and the uploading of images and information incorporating Aboriginal Cultural and Intellectual Property.
- 24.3 The KLC will publish any amendments of this Policy on its website [www.klc.org.au](http://www.klc.org.au), and it is the responsibility of the Researcher to keep up to date with policy amendments.

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## APPENDIX A: Notices and Warnings

### Deceased warning notices

The following are examples of Deceased Warning Notices for reference only:

*This publication contains names and images of deceased Kimberley Aboriginal people, and may cause distress to some Aboriginal viewers.*

*Kimberley Aboriginal people are advised that this publication contains images of deceased Kimberley Aboriginal people.*

### Traditional Knowledge notices

*The images in this artwork embody traditional ritual knowledge of the (name) community. It was created with the consent of the Traditional Owners. Dealing with any part of the artwork for any purpose that has not been authorized by the Traditional Owners is a serious breach of the customary law of the (name) community, and may also breach the Copyright Act 1968 (Cth).*

*For enquiries about permitted reproduction of these images contact (insert community name).*

The following is a broader notice that can be used to cover all aspects of Aboriginal Cultural and Intellectual Property:

*The language and information contained in this publication includes Aboriginal Cultural and Intellectual Property of the [name of group] people. This Aboriginal Cultural and Intellectual Property is published with the consent of the [name of group] people.*

*Aboriginal Cultural and Intellectual Property (including languages, Traditional Knowledge and Traditional Cultural Expressions) should not be used in any way including: in tourism, food technology (including bush tucker applications) or storytelling; in the development of medicines, pharmaceutical products, health and beauty products; or as the basis for trade marks, patents and designs, without observing the laws and customs of the owners of the Aboriginal Cultural and Intellectual Property, obtaining their prior informed consent to use the Aboriginal Cultural and Intellectual Property, attributing the relevant people and/or communities, and ensuring the sharing of benefits (monetary or non-monetary) with the owners of the Aboriginal Cultural and Intellectual Property.*

### **Acknowledgement of an Aboriginal organisation**

*The authors acknowledge the assistance of the Kimberley Land Council in making available research materials.*

### **Wording where independent research not view of TOs**

*This report does not reflect the views of the KLC or Kimberley Aboriginal Traditional Owners. Information was contributed only, and not the drawing of any conclusions or assumptions.*

### **More examples and case studies**

For acknowledgement case studies see Terri Janke, *Writing up Indigenous Research: authorship, copyright and Indigenous knowledge systems*, Terri Janke and Company Pty Ltd, Sydney, 2009,

[http://www.terrijanke.com.au/documents/WritingupIndigenousresearch\\_14Sep09.pdf](http://www.terrijanke.com.au/documents/WritingupIndigenousresearch_14Sep09.pdf)

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## APPENDIX B: Traditional Knowledge (TK) Recording Release

(sample only - subject to negotiation on a case by case basis)

### TK RECORDING RELEASE

**GIVEN BY:** ..... (TO name and address)

**To:** THE RESEARCHER

#### Permission to record in a research project

1. I give my permission to the Researcher to film, record, and photograph me for research purposes in return for:
  - a. a copy of the Recordings; and
  - b. assignment of the copyright in the Recordings to me in accordance with this Deed.
2. The film footage, sound recordings, and photographs of me (including edited versions) taken by the Researcher will be referred to in this Deed as 'the Recordings'.
3. I understand that the Recordings will be used by the Researcher and its assignees and sub-licensees to conduct and publish the Research (subject to my prior consent).

#### Copyright and Aboriginal Cultural and Intellectual Property ownership

4. I declare that the Recordings do not infringe on the rights (being any copyright, intellectual property rights or other legal rights) of any other person.
5. In exchange for my participation in the Research, the Researcher agrees to assign all the copyright in the Recordings to me, including the rights in any performance, film footage, audio recordings, transcripts and photographs of me.
6. I will be acknowledged for my participation in the Research.

#### Licence to the Researcher to use the Recordings

7. I give the Researcher a worldwide, perpetual non-exclusive licence to edit, publish, copy, sub-licence and reproduce the Recordings for the following purposes:
  - a. To fulfil the objectives of the Research Project (as outlined in Schedule 1 – writing a report/thesis etc);
  - b. To reproduce, communicate and publish the Research Project (as outlined in Schedule 1)
  - c. To archive and deposit the Recordings with (name of archival deposit).
8. Where the Researcher wants to use the Recordings for a purpose that is not listed in this Release, they must consult with me and the KLC and seek my prior written permission to use the Recordings.
9. The Researcher agrees to use the Recordings in accordance with the KLC IP and TK Policy.



10. In the event that I am unable to grant that permission, or should consent be required after my death, I authorise the following person to make decisions about the use of the Recording.

**Name of representative:**

**Address:**

**Telephone/ email:**

**Cultural Mourning Protocol**

11. In the event of my death, I advise that the following mourning protocol should be followed (please tick one box only):

The Researcher may continue to use the Recordings of me for the purposes listed

The Researcher is to discontinue using the Recordings of me

The Researcher is to consult with my family representative about the continued use of the Recordings of me

**Name of representative:**

**Address:**

**Telephone/ email:**

(If you do not elect a protocol option above, the preference 1 will apply)

**EXECUTED AS A DEED:**

SIGNED by me in the presence of:

.....  
Participants Name Name of Witness

.....  
Participants Preferred name for acknowledgment

.....  
Participant's Signature Witness Signature Date

SIGNED for and on behalf of the Researcher in the presence of:

.....  
Representative Name Witness Name

.....  
Representative's Signature Witness Signature Date

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## APPENDIX C: Useful resources

The following references are suggested as useful guides:

### Artistic and cultural expression

Australia Council, Aboriginal and Torres Strait Islander Arts Board, Artform Protocols booklets available for download at [www.australiacouncil.gov.au](http://www.australiacouncil.gov.au)

- *Visual Cultures: Protocols for producing Indigenous Australian visual arts and craft* (Terri Janke, with peer reviewer Doreen Mellor, booklet also based on NAVA, *Valuing Art, Respecting Culture*)
- *Performing Cultures: Protocols for producing Indigenous Australian visual arts and craft* (Robynne Quiggin, with peer reviewer Wesley Enoch)
- *Media Cultures: Protocols for producing Indigenous Australian visual arts and craft* (Terri Janke, with peer reviewer Jenny Fraser)
- *Writing Cultures: Protocols for producing Indigenous Australian visual arts and craft* (Terri Janke, with peer reviewer Anita Heiss)
- *Song Cultures: Protocols for producing Indigenous Australian visual arts and craft*, (Robynne Quiggin, with peer reviewer David Milroy)

National Association for the Visual Arts commissioned Indigenous visual arts protocols written by Doreen Mellor (ed.) and Terri Janke (legal section), *Valuing Art, Respecting Culture: Protocols for Working with the Australian Indigenous Visual Arts and Craft Sector*, National Association for the Visual Arts, Sydney, 2001 - available at [www.nava.org.au](http://www.nava.org.au)

### Payments to Indigenous artists and creators

See the Arts Law Centre of Australia's Solid Arts website, <http://www.solidarts.com.au/working-ethically/income-and-pricing/>

### Film

- Screen Australia, *Pathways and Protocols: A filmmaker's guide to working with Indigenous people, culture and concepts*, [http://www.screenaustralia.gov.au/about\\_us/pub\\_indig\\_protocols.asp](http://www.screenaustralia.gov.au/about_us/pub_indig_protocols.asp), Screen Australia, May 2009 (Terri Janke under commission of Indigenous Branch)

### Declaration on the Rights of Indigenous Peoples

- Human Rights Commission, *Community Guide to the Declaration on the Rights of Indigenous Peoples*, [http://www.hreoc.gov.au/declaration\\_indigenous/declaration\\_full\\_4.html](http://www.hreoc.gov.au/declaration_indigenous/declaration_full_4.html)

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## Access and Benefit Sharing

- The Convention on Biological Diversity  
<http://www.cbd.int/convention/text/>.
- The Convention on Biological Diversity- *ABS Information Kit*- available at [www.cbd.int/abs/information-kit](http://www.cbd.int/abs/information-kit).
- Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization , 2010  
<http://www.cbd.int/abs/doc/protocol/nagoya-protocol-en.pdf>.

## Kimberley Aboriginal Community

- Kimberley Land Council, [www.klc.org.au](http://www.klc.org.au)
- Kimberley Aboriginal Law and Culture Centre, [www.kalacc.org.au](http://www.kalacc.org.au)
- Kimberley Language Resource Centre,  
<http://www.ourlanguages.net.au/language-centres/item/kimberley-language-resource-centre-klrc-2.html>

## Aboriginal Health Research

- National Health and Medical Research Council Guidelines, *Values and Ethics - Guidelines for Ethical Conduct in Aboriginal and Torres Strait Islander Health Research*  
<http://www.nhmrc.gov.au/guidelines/publications/e52>
- Kimberley Aboriginal Medical Services Council, (KAMSC), [www.kamsc.org.au](http://www.kamsc.org.au)

## Intellectual property

- Australian Copyright Council, [www.copyright.org.au](http://www.copyright.org.au)
- Arts Law Centre of Australia [www.artslaw.com.au](http://www.artslaw.com.au)
- Copyright Agency Limited, [www.copyright.com.au](http://www.copyright.com.au)
- Viscopy, [www.viscopy.org.au](http://www.viscopy.org.au)
- Solid Arts - Indigenous intellectual property tool kit [www.solidarts.com.au](http://www.solidarts.com.au).
- IP Australia - information on patents, designs, patents, plant breeders rights  
[www.ipaustralia.gov.au](http://www.ipaustralia.gov.au)

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- Dreamshield - *A guide to protecting designs, brands and inventions for Aboriginal and Torres Strait Islanders*, IP Australia:  
[http://www.ipaustralia.gov.au/resources/dream\\_shield.shtml](http://www.ipaustralia.gov.au/resources/dream_shield.shtml).

### Indigenous cultural and intellectual property rights

- Terri Janke, *Our Culture, Our Future*, Michael Frankel and Company, Sydney, 1999. <http://www.frankellawyers.com.au/media/report/culture.pdf>.
- United Nations, Declaration on the Rights of Indigenous People,  
[http://www.hreoc.gov.au/social\\_justice/declaration/assembly.html](http://www.hreoc.gov.au/social_justice/declaration/assembly.html)

Terri Janke and Robynne Quiggin, 'Indigenous cultural and intellectual property and customary law,' Background Paper 12, *Aboriginal Customary Laws*, WA Law Reform Commission, January 2006,  
<http://www.terrijanke.com.au/img/publications/pdf/21.BP-12.pdf>

### World Intellectual Property Organisation

- World Intellectual Property Organisation, Traditional Knowledge, Genetic Resources and Traditional Cultural Expressions/Folklore - [www.wipo.int/tk](http://www.wipo.int/tk)
- World Intellectual Property Organisation, Draft Provisions for the Protection of Traditional Cultural Expressions/Folklore (TCEs) and for the protection of Traditional Knowledge (TK) against misappropriation and misuse  
[http://www.wipo.int/tk/en/consultations/draft\\_provisions/draft\\_provisions.html](http://www.wipo.int/tk/en/consultations/draft_provisions/draft_provisions.html).

### Free, Prior and Informed Consent

- Desert Knowledge Centre for Cooperative Research, *What is Free Prior Informed consent?*  
<http://www.desertknowledgecsrc.com.au/resource/DKCRC-SS-BP7-Free-Prior-Informed-Consent.pdf>

### Archives

- Australian Institute of Aboriginal and Torres Strait Islanders Studies, *Guidelines for Ethical Research in Indigenous Studies*, 2000 (revised 2011)  
<http://www.aiatsis.gov.au/research/docs/ethics.pdf>
- Australian Institute of Aboriginal and Torres Strait Islanders Studies, Audio-visual Archive Code of Ethics, [www.aiatsis.gov.au/ava/ethics.html](http://www.aiatsis.gov.au/ava/ethics.html)
- National Film and Sound Archives, Indigenous Collection Protocols,  
<http://www.nfsa.gov.au/collection/indigenous-collection/#protocols>

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## WA Government Permits

- Department of Environment and Conservation, [www.dec.wa.gov.au/content/section/29/2035/](http://www.dec.wa.gov.au/content/section/29/2035/)
- Department of Indigenous Affairs (WA), [www.dia.wa.gov.au](http://www.dia.wa.gov.au)

## Photography permits for commercial use

<http://www.dia.wa.gov.au/en/Section-18-Applications/Heritage-management/Photographs-or-recording-Aboriginal-sites-for-commercial-use/>

## Ecological Knowledge Management

- Sarah Holcombe, *Guidelines for Indigenous Ecological Knowledge Management (including archiving and repatriation)*, commissioned by the Natural Resources Management Board, 2009, <http://www.territorynrm.org.au/sites/default/files/ICIP-IEK%20best%20practice-datamanagementGuidelinesAprilFinal.pdf>
- Michael Davis, *Maintain & Strengthen your Culture, Handbook for Working with Indigenous Ecological Knowledge & Intellectual Property Handbook for Indigenous Ecological Knowledge Management*, commissioned by the Natural Resources Management Board, 2009, [http://www.territorynrm.org.au/sites/default/files/ICIP-Practitioners%20Handbook\\_V4\\_HR%5B1%5D.pdf](http://www.territorynrm.org.au/sites/default/files/ICIP-Practitioners%20Handbook_V4_HR%5B1%5D.pdf)
- Terri Janke, *Report on the Current Status of Indigenous Intellectual Property*, commissioned by the Natural Resources Management Board, 2009, [http://www.territorynrm.org.au/sites/default/files/ICIP-NTIEK-current%20status%20of%20IP\\_Janke\\_7April09.pdf](http://www.territorynrm.org.au/sites/default/files/ICIP-NTIEK-current%20status%20of%20IP_Janke_7April09.pdf)