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Foster v Mountford: cultural confidentiality in a changing Australia

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Abstract
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Foster v Mountford: cultural confidentiality in a changing Australia

Christoph Antons

Introduction

Foster v Mountford\(^1\) is a case belonging to the period in which Australian courts were finding their identity in deciding intellectual property disputes. As the first decision in Australia taking into account Aboriginal customary rights to culturally defined notions of secrecy, it is a landmark case. It symbolises a shift from assimilation policies based on the notion of Australia as *terra nullius* at the time of 'discovery'\(^2\) towards a growing understanding of Aboriginal customs and associated rights. As a case dealing with anthropological publications, it has to be seen against its contemporary background of anthropological paradigms and the emergence of the academic discipline of anthropology in Australia. The case also has significance beyond Australian borders. In an ongoing debate about violations of indigenous cultural secrecy and 'rights to cultural privacy', the case has been regarded as one of the few legal actions examining such violations.\(^3\)

The facts of the case are straightforward and well known. Charles Pearcy Mountford was the author and Rigby the publisher of *Nomads of the Australian Desert*,\(^4\) a book containing details and pictures of secret ceremonies of Central Australian Aborigines. The details had been revealed to Mountford some 35 years earlier during the course of his research in the area. Members of the Pitjantjara Council, an unincorporated body, on behalf of the communities concerned sought and obtained an *ex parte* injunction in the Supreme Court of the

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1 Foster and Others v Mountford and Rigby Ltd (1976) 14 ALR 71.
Northern Territory to prevent the publication of the book in that territory. The equitable doctrine of confidential information was applied in the case decision.

In this chapter, I will approach the topic from various angles. First, I would like to explain the social and political context of the case, both at the time when Charles Mountford undertook his research, and the confidence to keep the secrets revealed to him was allegedly imposed, and at the time when the decision in the case was made. The case has implications for anthropologists and other researchers working within Indigenous communities as a particular group of actors not usually targeted in confidential information cases. In the second part of the chapter, I will discuss the significance of the case and more importantly, the questions it leaves open. In the final part, I will look at various extended interpretations of the doctrine of confidential information, which have been suggested over the years, and their usefulness in this context. In particular, US anthropologists such as Michael F Brown in his famous book *Who Owns Native Culture?* have discussed the problems associated with an extension of the US-style right to privacy to cover 'cultural privacy'.

The social and political background of the case: *Foster v Mountford* and the emergence of anthropology as an academic discipline

In his discussion of *Foster v Mountford* as one of the few cases worldwide that have dealt with violations of indigenous secrecy by outsiders, Michael Brown speaks of the 'distinguished anthropologist' Charles Mountford and his work with the Pitjantjara. This requires further explanation. South Australian Charles Pearcy Mountford worked at first as an electrical mechanic 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 he was appointed as senior mechanic at the Darwin Post Office in 1920. He continued this interest after his return to Adelaide. In 1926 he published his first paper on Aboriginal rock carvings together with the entomologist Norman Tindale of the South Australian Museum. In the same year, he became a foundation member of the Anthropological Society of South Australia. His career as a gifted fieldworker, photographer and ethnographer began in 1935 on an expedition to the West Australian Warburton Range, again with Tindale and with support from the Board for Anthropological Research of the University of Adelaide. Many expeditions and further work in South Australia, the Northern Territory, Western

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5 Brown, op. cit.
6 ibid., p. 33.
Australia and Queensland followed during three decades of fieldwork, which ended only in 1965 when Mountford reached the age of 75.

In spite of his growing reputation as an ethnographer and his prolific output of books and films about his expeditions, Mountford continued to work in government service until 1946 in the Postmaster-General’s Department, and from then on until his retirement in 1955 as lecturer in the Commonwealth Department of Information. It was only after retirement that Mountford embarked on a formal education in anthropology, acquiring a diploma in anthropology from the University of Cambridge in 1959 and an MA from the University of Adelaide in 1964. Apart from many other honorary awards, two honorary doctorates followed; from the University of Melbourne in 1973 and from the University of Adelaide shortly before his death in 1976.

Mountford belongs to the first generation of gifted Australian ethnographers who began their work without much formal education in anthropology. Although two of the founding fathers of modern British social anthropology, Malinowski and Radcliffe-Brown, wrote influential classics on Australian Aborigines,9 anthropology as an academic discipline in Australian universities only began in 1926 with the establishment of a Chair in Anthropology at the University of Sydney and the appointment of Alfred Radcliffe-Brown as its first holder. The Australian Government and colonial administrators initially were by no means convinced of the necessity and usefulness of university training in anthropology.10 A number of factors, however, combined to affect a change in attitude. A few years after the proclamation of the Commonwealth of Australia, Britain had handed over the administration of Papua (British New Guinea) to Australia in 1906. The Commonwealth of Australia further governed the former German Colony New Guinea from 1914 as a League of Nations Mandated Territory from 1921, and it had acquired the Northern Territory from South Australia in 1911.11 The sudden responsibility for many different groups of ‘natives’ within Australian territory led to a division at the second Pan Pacific Science Congress in Sydney in 1923, under which Australia became responsible for ethnographic research in Australia itself and (jointly with Britain and France) in Papua, New Guinea and Melanesia.12 Funding for the Sydney Chair was secured from the Australian states and from the US American Rockefeller Foundation, whose funds where distributed via the Australian National Research Council (ANRC).13

The choice of the University of Sydney came as disappointment for the University of Adelaide and South Australian researchers. After a visit of a delegation of the Rockefeller Foundation to Adelaide in 1925, Adelaide-based researchers

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11 Gray, op. cit., p. 31.
12 ibid., p. 8.
13 ibid., pp. 11–13.
with an interest in anthropology had come to believe that the city was a contender for the chair or at least as a separate centre for anthropological research, none the least because of its proximity to significant Aboriginal communities in Central Australia. After the chair had been awarded to Sydney, the committee set up to liaise with the Rockefeller Foundation delegation, continued as Board for Anthropological Research. The board continued to apply successfully for ANRC grants and for funds from foundations and other private sources such as the US American Carnegie Foundation. Unlike Sydney, however, there was a lack of trained anthropologists in Adelaide and research on Aboriginal communities was largely carried out by academics in the medical department of the University of Adelaide and by natural scientists like Tindale in the Museum of South Australia. This led to a concentration on physical anthropology. The social anthropologists in Sydney had little interest in this kind of research, while the Adelaide Board largely controlled research that was being carried out in Central Australia. This rivalry in anthropological research between Sydney and Adelaide continued until the early 1950s. With the Rockefeller Foundation throwing its weight firmly behind the social anthropologists, however, and with a further anthropology department opened at the Australian National University in Canberra in 1951, the Adelaide researchers found it increasingly difficult to find sources of funding for their expeditions.

Charles Mountford was at a particular disadvantage for not only was he not anthropologically trained, but he had no academic qualification at all. His career in anthropological research was, therefore, marked by a persistent struggle with the academic establishment of the discipline. In particular Professor AP Elkin, successor to Radcliffe-Brown and Raymond Firth on the Sydney chair since 1933, was influential not just within academic circles, but also as an ordained Anglican cleric with missionary bodies. Elkin promoted the anthropologist and scientific expert as an intermediary between colonial official and Indigenous communities and usually insisted on academic training in anthropology for these experts. He did not recommend amateur ethnographers such as Mountford and even referred to Donald Thomson, who acquired a diploma in anthropology after his training in scientific disciplines as 'a mixture of zoologist, anthropologist and journalist'. Elkin dissuaded the Carnegie trust from funding the particular expedition, which Mountford undertook in 1940 and the results of which were later included in Nomads of the Australian Desert, on the ground that Mountford was an amateur ethnographer. Similarly, he wrote to the American National Geographic Society, a financial backer of Mountford's 1947 expedition to Arnhem Land, stating that 'Mr Mountford, who is a good photographer, especially of still subjects, and who has done valuable work in the recording and copying of native

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14 ibid., pp. 49–51.
15 ibid., pp. 58–9.
16 McGregor, op. cit., p. 194.
17 ibid., pp. 216–17.
18 Gray, op. cit., p. 124.
19 Jones, op. cit.
art, is not a trained anthropologist, much to his own regret.\textsuperscript{20} Elkin's student Catherine Berndt was even more unequivocal, describing Mountford in a letter as knowing 'just enough really to prevent him from realising his ignorance'. She wrote that 'there are so many details that can't be discovered by casual expeditions such as his, obliged always to use an interpreter and never becoming intimate with the people.'\textsuperscript{21}

Mountford, according to his biographer, shrugged off Elkin's criticism with the following remark: 'In Australia, there is so much to do that there is ample scope for everyone ... So much information must be gathered before it is gone forever.'\textsuperscript{22} The remark shows that Mountford, in accordance with the prevailing thinking among many ethnographers at the time, whether trained anthropologists or not, believed that he was recording a dying culture virtually at the last moment. This was a point particularly often stressed in funding applications and Mountford was no exception. In support of his funding application to the Board of Anthropology of the University of Adelaide for the 1940 expedition, he wrote to the Vice-Chancellor of the university as follows:

The Aborigines are rapidly drifting into civilised areas, and in a short time all opportunity of ascertaining the significance of cave paintings and the associated myths in the desert will be lost for ever. The symbolism of the central Australian native is the most primitive in the world, and I feel that it is in this area that many of the puzzling questions as to the origins of art can be answered.\textsuperscript{23}

The National Geographic Society grant and support from the American Smithsonian Institute came after visits to the US as lecturer of the Commonwealth Department of Information in 1945 and 1948, during which his presentations of films and photographs became a great success. A few anthropologists of this period, such as Olive Pink, objected to the showing of film footage of ceremonies including secret-sacred material in overseas institutions as a matter of principle.\textsuperscript{24} Other researchers on the margins of Australian anthropology, such as the linguist TGH Strehlow, on occasion made disparaging remarks about Mountford's use of his footage,\textsuperscript{25} but Strehlow himself used footage of his research to promote it among audiences in Europe in 1951.\textsuperscript{26}

At a time when travel between the continents was still by steamship and the 'tyranny of distance' was still firmly in everyone's mind, researchers probably thought it unlikely that harm could be done by such film and photo presentations. Overseas university audiences, in particular, were seen as a different matter, and book and journal publications overseas revealing secret and/or sacred material were not regarded as impacting on Aboriginal communities back home. This

\textsuperscript{20} Gray, op. cit., p. 192.
\textsuperscript{21} Cited in ibid., p. 193.
\textsuperscript{22} M Lamshed, 'Monty: The Biography of CP Mountford', Rigby Ltd, Adelaide, 1972, p. 73.
\textsuperscript{23} ibid., p. 74.
\textsuperscript{25} ibid., p. 609.
\textsuperscript{26} ibid., pp. 484–5.
attitude was still firmly entrenched when Foster v Mountford was decided in 1976. During the late 1960s and early 1970s there were several publications that became controversial because of secret-sacred content, such as Yiwara by the American anthropologist Richard A Gould, published in 1969. Ronald Berndt carefully removed such content from early editions of The World of the First Australians but left it in a book published in 1974 in Denmark. After the Foster v Mountford decision, a further major controversy along similar lines involved the publication in 1978 in the German magazine Stern of colour photographs taken at secret-sacred Aranda ceremonies by TGH Strehlow. In spite of assurances from Stern that the material was not to be passed on to any Australian magazine, it was published only a few months later in Australia in the magazine People. As in Foster v Mountford, Aboriginal communities in the Alice Springs region joined by the Australian Institute of Aboriginal Studies considered applying for injunctions against People. In this case, however, further legal steps were considered unnecessary after People agreed not to distribute the magazine in Alice Springs.

As Barry Hill explains, Strehlow had published secret-sacred material in the past and he did so in this case to raise funds for his research after his retirement from the University of Adelaide. However, 'the simple fact was that the ground of acceptability in these matters had been changing and was still hard to define with clarity.' Seven years later, Ronald and Catherine Berndt wrote the following with regards to secret-sacred material in the foreword to the 1985 edition of The World of the First Australians:

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 appreciation; and, two, the need to delete those features which could conceivably prove 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.

It is against this background of changing attitudes to what is appropriate in carrying out research in Aboriginal communities and publishing the results of such research that Foster v Mountford was decided. Changing attitudes in the academic

28 Hill, op. cit., p. 743.
29 ibid., pp. 741–9.
30 ibid., p. 744.
31 Berndt and Berndt, op. cit. n. 27, 'Foreword to the 1985 Edition', pp. XVI–XVII.
community, however, are only part of a much wider change in Australian society that had become visible during the 1960s. The Aboriginal movements had fought for and obtained welfare benefits, equal pay for Aboriginal pastoral workers and the right to vote. After the national referendum of 1967, the Commonwealth took over the power to legislate for Aboriginal people from the more conservative state governments. Aboriginal writers, artists and academics began to present their versions of Aboriginal life in Australia and multiculturalism began to replace the previous policies of assimilation.\textsuperscript{32}

The significance of Foster v Mountford, then and now

Today, Foster v Mountford is usually cited as a case that demonstrates the diversity of the subject-matter that has come to be protected by the equitable doctrine of confidential information.\textsuperscript{33} It places Aboriginal cultural secrets next to the more familiar cases on commercial or trade secrets and private secrets of famous persons going back to the case of Prince Albert v Strange.\textsuperscript{34} It treats the information as sufficiently developed to qualify for protection and not as mere ‘trivial’ private information.\textsuperscript{35} The case is also quoted as an example of ‘relative secrecy’, where the information is known and distributed among ‘insiders’ but remains protected from ‘outsiders’.\textsuperscript{36} Beyond that, it is achieving wider significance as a case where an appropriate remedy was provided for breaches of ‘cultural privacy’\textsuperscript{37} via flexible, judge-made doctrines such as breach of confidence.\textsuperscript{38} It has been included in what is regarded as Australia’s ‘groundbreaking body of case law located at the intersections of indigenous interests and intellectual property’ where ‘a growing pattern of creative lawmaking and dicta shows that judges are beginning to recognize the need for such reconfiguration.’\textsuperscript{39} Nor should

\textsuperscript{32} Macintyre, op. cit., pp. 229–30.
\textsuperscript{37} Brown, op. cit.
this be surprising since the judge who handed down the decision, Muirhead J of the Supreme Court of the Northern Territory, is well known in Australia as 'a leading advocate for reconciliation both in what he practised as well as preached'.

A closer examination of Foster v Mountford reveals the usefulness as well as the limitations of the breach of confidence action in this context. As an ex parte injunction, its status as precedent is obviously limited. Equally limited was the geographical scope of the measure. The injunction prevented the sale, display for sale or distribution of Nomads of the Australian Desert only in the Northern Territory. This included Alice Springs as the regional centre of greatest concern to the Pitjantjara Council. Even at the time of the decision it was obvious, however, that Australian state and jurisdictional boundaries did not coincide with the boundaries of the Pitjantjara lands. Muirhead J pointed out that the plaintiffs represented Aboriginal people identifiable by their use of the Pitjantjara language, but that more than one tribal group may be involved and that the lands of these communities were to be found in the south-west corner of the Northern Territory, a large area of the north-west of South Australia and a portion of central Western Australia adjacent to the eastern border of that state. Mountford, in fact, made a distinction between tribal groups in his book and referred to the study of the 'art, myth, and totemic geography' not only of the Pitjantjara but also of the Jukandjara, whose tribal lands he located in the Musgrave Ranges and around the missions station of Ernabella from where Mountford started his expedition. Muirhead J's careful distinction between tribal groups and people speaking Pitjantjara in this regard acknowledged the difficulties anthropologists associate with distinguishing between major and smaller tribal groups and between major languages and dialects, especially in central Australia, which means that they have regarded tribal territories and boundaries as 'relatively flexible'.

In spite of these various overlaps of communities and territories, the Pitjantjara Council at the time apparently was satisfied with the prevention of the publication in the main regional centre frequented by Pitjantjara speaking people. A limited injunction of this nature was also in line with the prevailing thinking, outlined in the previous part of this chapter, that it was first of all important to prevent the return of the material into a geographical area where uninitiated people from

41 Sackville, op. cit. n. 38.
42 Foster and Others v Mountford and Rigby Ltd (1976) 14 ALR 71, 72.
43 Mountford, op. cit., p. 40.
44 Berndt and Berndt, op. cit. n. 27, p. 33 and more generally pp. 28-40. Peter Sutton speaks of similar problems with the now popularly used term 'Aboriginal community', which may refer to 'a place, a population of residents (in some cases shifting about, in other cases very sedentary), a collection of subsets of ethnic, territorial and other groups, a focal concentration point in a regional system of overlapping egocentric social networks, a local cultural milieu, a mini-economy, a rallying badge of identity in competitive and combative contexts such as football and fighting, a political unit both formal and informal, and a unit of local governance'. P Sutton, Native Title in Australia: An Ethnographic Perspective, Cambridge University Press, Cambridge, 2003, p. 98.
'traditional' communities could come into contact with it. Mountford himself had included the following caveat in his book prior to his acknowledgements:

Where Australian Aborigines are concerned, and in areas where traditional Aboriginal religion is still significant, this book should be used only after consultation with local male religious leaders.

The restriction is important, it is imposed because of the concept of what is secret or may not be revealed to the uninitiated in Aboriginal religious belief and action, varies considerably throughout the Australian Continent and because the varying views of Aborigines in this respect must on all occasions be observed.45

In spite of the limited geographical scope of the injunction, however, the publisher Rigby finally decided to withdraw the book from circulation. For this chapter, a copy available in the library of the University of New England was consulted, which in addition to a note that the book had been withdrawn from circulation included an exchange of letters between the deputy librarian of the university and the publisher Rigby as well as the Aboriginal Arts Board of the Australia Council. Due to the note accompanying the publication, the library had restricted access to the book by placing it in a protected area of its collection. The deputy librarian inquired about the status of the publication after the library received request from users who wanted to consult the book. Rigby responded that about 2000 copies of Nomads of the Australian Desert had been sold by the time it was withdrawn. Several hundred more were destroyed in a warehouse fire and the remainder of the edition was purchased by the Aboriginal Arts Board.46 The Aboriginal Arts Board in turn confirmed that placement in the protected area of the library and restriction of access was appropriate, but that researchers should be given the opportunity to refer to the book for special study purposes. The letter concluded that ‘the Pitjantjatjara people do not wish the book to be freely available and seen by women and children. The steps you have taken are adequate to meet their requirements.’47

In view of the increasing distances travelled by ‘traditional’ people in the following years and the increasing interaction of their communities with outsiders such as tourists, teachers and various government personnel, such simple safeguards as Mountford’s cautionary note were soon to become inadequate to protect the secrets of what may then still have been regarded as relatively secluded living groups. Geographical limitations as in the Foster v Mountford injunction appear even more inadequate in the current internet age, when attempts are being made to bring communications technology to remote areas to assist with educational needs and foster local development.48

45 Mountford, op. cit.
46 Letter from Rigby Ltd to Karl G Schmude, Deputy Librarian (Reader Services) of the University of New England, Armidale, 9 November 1979.
47 Letter from the Director of the Aboriginal Arts Board, Robert Edwards, to Schmude, 3 March 1980.
There were other limitations to this particular action for breach of confidence in *Foster v Mountford*, which the judge either circumvented or declined to discuss within the limited scope of an injunction and in view of the urgency of the matter. It has been correctly pointed out that there could be a question here as to whether the Pitjantjara Council actually had standing to sue. In general terms, the party to whom the confidence is owed will be the appropriate plaintiff. Muirhead J quoted this principle from the relevant case of *Fraser v Evans*, but seemed to be satisfied that it was met in spite of the many years that had passed between Mountford's visit and the application for the injunction. Earlier in the decision, the judge mentioned that some members of the Pitjantjara Council still remembered Mountford's visit, indicating that he may have regarded the Pitjantjara Council as at least partly identical to the Aboriginal elders who imposed the confidence to keep their tribal knowledge secret on Mountford some 35 years earlier. Alternatively, he may have regarded the obligation of confidence as being directly owed to the various Pitjantjara communities represented by the plaintiff council. Such an approach may create difficulties where, as mentioned above, community boundaries are difficult to establish. The judge further found that the plaintiffs were entitled to proceed as individuals who were threatened with damage, and that this was not a case for a relator action brought in the name of the Attorney-General to prevent public nuisance.

A further matter, which Muirhead J raised briefly towards the end of the decision but declined to discuss further within the limited scope of this injunction, was the potential for the defendant Mountford to raise a public interest defence/exception, in particular by stressing his right to disseminate the results of his scientific and anthropological research. The public interest defence is well accepted in English law but has been used sparingly by Australian courts and largely confined to government information and so-called disclosures of iniquities. Even statements implying a broader exception, such as that of Mason J in *Commonwealth v John Fairfax & Sons*, have been narrowly construed as necessary 'to protect the community from destruction, damage or harm' or as a reflection of the implied constitutional freedom of political discussion. This broadening of the scope is of relatively recent origin. Even if a broad defence of this nature had been available at the time of the decision, however, and the

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49 McKeough et al, op. cit., p. 85.
50 Meagher et al, op. cit., p. 1125; McKeough et al, op. cit., p. 85, with reference to *Fraser v Evans* [1969] 1 All ER 8.
51 (1976) 14 ALR 71, 75.
52 Ibid., p. 73.
53 Ibid., p. 75.
54 Ibid., p. 76.
57 *Commonwealth v John Fairfax & Sons Ltd* (1980) 147 CLR 39, 57.
58 *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199, 224 (Gleeson CJ), cited in Ricketson and Richardson, op. cit. n. 55, p. 643.
case would have moved beyond the stage of injunctive relief, it seems difficult to imagine that a judge would have upheld a public interest defence. Muirhead J examined the argument of a dying and vanishing culture raised typically by anthropologists and also by Mountford in this case, but he was not persuaded by it:

Despite Mr Mountford’s prognosis that their life and beliefs ‘are so quickly vanishing’, there is still an urgent desire in these people to preserve those things, their lands and their identity, and the existence of the council itself illustrates these objectives. 59

Muirhead J also stressed the undermining of the social and religious stability of the Pitjantjara community and gave more weight to all of these arguments than to the research interests of Mountford. It seems difficult to imagine with the improved understanding of indigenous cultural secrecy today that a current court in a similar situation would elevate the interests of anthropological research above that of an Aboriginal community in its cultural secrets, especially considering the emergence of codes of conduct that regulate the balancing of such interests.

As Sackville J has pointed out, however, this does not necessarily mean that cultural information of this nature imparted on a confidential basis will necessarily be confined to the recipient. 60 In an interesting decision 10 years after Foster v Mountford, the Federal Court was asked to conduct a judicial review of a decision by the Aboriginal Land Commissioner of the Northern Territory, who had ordered the Aboriginal Sacred Sites Protection Authority to produce documents prepared by anthropologists and others in connection with a land claim to have secret sites in the area recorded. 61 In this rather unusual case, Aboriginal interests were represented on both sides, since the production of the documents helped to finalise a long-running land claim. The Federal Court (Bowen CJ, Woodward and Toohey JJ) was satisfied that the order required disclosure of the documents only to the Commissioner sitting in camera, his associate, counsel assisting, counsel for the Attorney-General of the Northern Territory, possibly a consultant anthropologist and the researcher who had gathered the material. This restricted use of the material and the interest of the Central Land Council in a swift decision of the land claim tipped the balance in favour of the order made by the Commissioner and dismissal of the application for review.

For the requirement that the information given to Mountford was imparted in confidence, an anthropologist expert witness and a staff member from the Aboriginal Legal Service were heard to confirm the affidavit of the chairman of the Pitjantjara Council. The anthropologist gave evidence that in his experience the information revealed could only have been supplied and exposed in confidence. 62 The judge took Mountford’s own caveat at the beginning of the book

59 (1976) 14 ALR 71, 73.
60 Sackville, op. cit n. 38, p. 738, fn. 144.
61 Aboriginal Sacred Sites Protection Authority v Maurice; Re: The Warumungu Land Claim (1986) 10 FCR 104.
62 (1976) 14 ALR 71, 72.
as confirmation that the author was well aware that the book contained secret-sacred material. It was this understanding rather than ‘evidence by document or conversation or indeed by recognized legal relationship’ that persuaded the judge to grant the injunction based on breach of confidentiality. Neither Nomads of the Australian Desert nor the description of the 1940 expedition in Mountford’s biography expressly refer to restrictions imposed on Mountford at the time the knowledge was revealed. However, Nomads of the Australian Desert contained detailed sections on ‘sacred objects’. Further, both Nomads of the Australian Desert and the Mountford biography mention that during the expedition Mountford and his young companion Lauri Sheard were allotted totems and tribal relationships within the organisation of the Pitjantjara; they became totemically associated with the land. This association, in the view of the Pitjantjara, would have brought him rights as well as responsibilities and obligations towards maintaining and observing their customs and laws. Thus, it would not have been inappropriate for the judge to regard confidentiality here as flowing simply from Mountford’s particular relationship with the Pitjantjara community.

The Foster v Mountford case also indicates a more restricted role for the anthropologist as expert, and a shift from the central role of earlier years in representing Aboriginal life in a ‘scientific’ manner to that of an expert witness merely confirming court statements and affidavits of Aboriginal parties to the proceedings. It has been the practice, in land rights disputes as well as other proceedings, in recent years to combine Aboriginal evidence and the statements of expert witnesses. Gary Edmond finds that ‘most of the leading native title and heritage protection judgments devote considerably more space to the evidence of anthropologists, historians and archaeologists than the evidence of Aborigines’. As an example, he contrasts about five pages of Aboriginal evidence in the case of Ward v Western Australia with over 20 pages on ‘Historical evidence’, ‘Linguistic evidence’, ‘Anthropological evidence’ and ‘Genealogical evidence’.

The relationship between lawyers and anthropologists, however, is also not always unproblematic. While lawyers have expressed difficulties ‘in coming to terms with the language and ideas of anthropologists’, anthropologists such as Ronald Berndt have warned colleagues not to fall ‘into the trap of over-simplifying data for legal consumption’. Berndt described the problematic relationship in the following way:

In a sense, and perhaps being deliberately a little unfair, one could say that the legal practitioners regard anthropologists, when they do not consider them to be obstructive, as being ‘raw’ material; or to put it more kindly, as a kind of resource. To follow

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63 ibid., p. 73.
64 Mountford, op. cit., p. 86; Lamshed, op. cit., pp. 93–4.
Levi-Strauss, legal practitioners, in contrast, are ‘cooked’ – they have the final say, irrespective of anthropological opinion and irrespective of Aboriginal views.⁶⁸

More recently, anthropologists have complained that their heterogenous approaches are difficult to represent within the confines of legal proceedings.⁶⁹ As a final point on the complicated relationship between law and anthropology, it is perhaps ironic that the earlier detailed ethnographic studies conducted by people like Mountford are now important again for a younger generation of anthropologists and Aboriginal claimants in the context of native title claims because they can be used to demonstrate the continuing traditional link to the land required by native title legislation.

*Foster v Mountford* and the wider debate on indigenous knowledge and cultural secrecy

Michael F Brown has pointed to the frequent use, mainly in the US and Canada, of an as yet undefined ‘right of cultural privacy’ within the indigenous movement and in policy documents dealing with indigenous issues.⁷⁰ If this right is regarded as a desirable extension of current privacy principles, its adoption in Australia faces considerable legal and factual obstacles. While privacy rights have been given statutory protection in most US states and some Canadian provinces,⁷¹ the US protection of privacy tort first advocated in 1890 by Warren and Brandeis in the *Harvard Law Review*⁷² has been overshadowed by freedom of speech considerations based on the First Amendment.⁷³ In *Australian Broadcasting Corporation v Lenah Game Meats*,⁷⁴ Gummow and Hayne JJ quoted David Anderson as follows:

> But privacy is not the only cherished American value. We also cherish information, and candour, and freedom of speech … The law protects these expectations too – and when they collide with expectations of privacy, privacy almost always loses. Privacy law in the United States delivers far less than it promises, because it resolves virtually all these conflicts in favour of information, candour and free speech. The sweeping language of privacy law serves largely to mask the fact that the law provides almost no protection against privacy-invading disclosures.⁷⁵

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⁶⁹ Edmond, op. cit., p. 215.
⁷⁴ *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199.
While the New Zealand Court of Appeal has been prepared to accept a public disclosure tort in *Hosking v Runting*, British courts following the European Convention on Human Rights and the UK *Human Rights Act* were careful to couch a right to privacy in the familiar language of the breach of confidence doctrine, a development that Lindsay and Ricketson refer to as 'a creative, but potentially fraught, fusion of a “rights-based” conception of privacy, reflecting the influence of the European Convention on Human Rights, with the traditional incremental approach of the English common law.' In Australia, the High Court in *Australian Broadcasting Corporation v Lenah Game Meats* did not take up the opportunity to shift decisively towards a privacy right, although the possibility of such a right within the Australian context was extensively discussed and explicitly advocated in the minority opinion of Callinan J. Even if a right to privacy was established, it would seem difficult to extend it to something as elusive as ‘culture’ and ‘cultural communities’. In *Australian Broadcasting Corporation v Lenah Game Meats*, three of the judges held that a right to privacy could not be claimed by a corporation. Gummow and Hayne JJ with Gaudron J concurring quoted US decisions focusing on ‘the humiliation and intimate personal distress suffered by an individual’, while Kirby J quoted the International Covenant on Civil and Political Rights, which appeared to relate only to the privacy of the human individual. It seems difficult to transfer these individual rights to entire cultural communities. As Brown has pointed out:

> From the perspective of anthropology, cultural privacy flirts with self-contradiction. The salient features of culture are, by definition, shared and therefore public. Yet the collective nature of culture does not mean that its elements are uniformly distributed. Information is nearly everywhere held differentially along lines of age, gender, social class, kinship, and occupation. It may be acquired through interactions with other people. Through selective borrowing, cultures come closer together; through dialectical contrast, they mark themselves as different. We are left with interweaving and to some extent paradoxical visions of culture: as shared yet differentiated, as segmented yet intrinsically free-flowing, as something that exists unto itself yet which is also defined by opposition. At first glance, this intricate bundle of dichotomies is hard to reconcile with a concept as deceptively simple as privacy.

On the other hand, there is arguably scope for a greater use of other doctrines of equity in cases involving indigenous cultural property. Von Doussa J’s decision

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77 Lindsay and Ricketson, op. cit. n. 75, p. 137.
78 Barendt, op. cit. n. 71, p. 13.
80 (2001) 185 ALR 1, 37.
81 ibid., pp. 55–6.
82 Brown, op. cit., p. 28.
in *Bulun Bulun v R & T Textiles*, with its discussion of a fiduciary relationship between the individual artist and his clan in appropriately representing the symbols of his community, is a frequently cited example. Both the Canadian and New Zealand courts have occasionally found a fiduciary obligation to exist between their respective governments and indigenous peoples. Australian courts, however, have cautioned against imposing prescriptive duties via the doctrine of the fiduciary relationship, preferring instead to focus on the exaction of loyalty. In the specific case of Mountford, who had been allotted a totem and a tribal relationship, it would be difficult to see why his responsibilities to his community should be judged differently than those of Bulun Bulun with regard to his Arnhem Land–based clan. In a more general sense, it could also be argued that many anthropologists at the time of Mountford’s research were in a fiduciary relationship because of the vulnerability of the Aboriginal communities and the paternalistic role of the anthropologist in representing them. It would be much more difficult, however, to apply the same argument to current relationships between Aboriginal communities and researchers.

Some of the difficulties outlined above, especially with regards to standing to sue, could be avoided if the courts were to adopt a view of information as property or regard breach of confidence as a *sui generis* action. Thus far, however, Australian courts have not been prepared to adopt a proprietary analysis and are continuing to base confidentiality on the equitable principle of good faith. Apart from availability of the equitable doctrine of breach of confidence, a case of research such as Mountford’s would under current circumstances also most likely be covered by protocols, which have been developed for research activities in various Aboriginal communities.

At the international level, the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore of the World Intellectual Property Organisation (WIPO) has drafted separate sets of ‘revised objectives and principles’ for the protection of traditional cultural expressions (TCEs) and traditional knowledge (TK) respectively. Among its various measures to prevent misappropriation of the material, the revised objectives and principles for the protection of TCEs foresees in particular in Art 3(c) that


*Bulun Bulun v R & T Textiles Pty Ltd* [1998] 1082 FCA (3 September 1998).

Gibson, op. cit.; Antons, op. cit. n. 65; Antons, op. cit. n. 83.


*Breen v Williams* (1996) 186 CLR 71, 113, cited in Dal Pont and Chalmers, op. cit., pp. 84–5. Dal Pont and Chalmers quote Sir Anthony Mason in a speech delivered to the Canadian–Australian legal–judicial exchange in 1988, in which he observed that ‘all Canada is divided into three parts: those who owe fiduciary duties, those to whom fiduciary duties are owed, and judges who keep creating new fiduciary duties!’ cited in Dal Pont and Chalmers, p. 85, fn. 19.


McKeough et al, op. cit. n. 33, pp. 78–9. See also Cornish and Llewelyn, op. cit., pp. 332–4.
there shall be adequate and effective legal and practical measures to ensure that communities have the means to prevent the unauthorized disclosure, subsequent use of and acquisition and exercise of IP rights over secret traditional cultural expressions/expressions of folklore.\textsuperscript{91}

The commentary attached to Art 3(c) seeks to clarify that existing protection for confidential and undisclosed information covers TCE-related subject-matter, ‘building also upon case law to this effect’. In a footnote to this commentary, *Foster v Mountford* is explicitly mentioned as example for relevant case law.\textsuperscript{92}

\section*{Conclusion}

In sum, *Foster v Mountford* is the first of a number of cases dealing with Aboriginal secret information. At the time of the decision in the mid-1970s, Australian courts had become sensitised to these issues and placed the welfare of Aboriginal communities over the research interests of anthropologists documenting what they believed were vanishing cultures. The decision appears eminently sensible, even more than 30 years later, and has inspired other courts to turn to equitable principles when dealing with Aboriginal cultural items. It is also included as a still relevant example in the commentary to the revised objectives and principles drafted by the WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore for the protection of traditional cultural expressions. While the court in *Foster v Mountford* declined to comment on a few issues, such as the standing of the plaintiffs to sue, in the context of an \emph{ex parte} injunction the results were satisfying for the Aboriginal plaintiffs at the time. Today, however, and in view of the internet and other new media reaching remote Aboriginal communities, limited injunctive relief of this nature would no longer be sufficient. In view of the difficulties in precisely delineating cultures and communities, a right to ‘cultural privacy’ seems difficult to realise. Established doctrines of equity such as confidential information, fiduciary obligations and unconscionability combined with protocols and other forms of contracts may not always offer ideal answers to the problems surrounding Aboriginal cultural secrecy. If used in a pragmatic manner, however, as in the case of *Foster v Mountford*, these doctrines may lead to reasonably acceptable and practicable solutions.

\textsuperscript{91} WIPO/GRTKF/IC/12/4(c) of 6 December 2007, Art 3(c).
\textsuperscript{92} ibid., Annex, p. 22.