

Australian Government Poised to Introduce a New *Sui Generis* Legislative Regime to Protect and Enforce Rights in Indigenous Cultural Intellectual Property

Jane Owen, Partner (Bird & Bird), examines the new Revive policy and the impact it is likely to have on indigenous cultural intellectual property.

Introduction

After numerous reports and recommendations through successive governments regarding the need to protect the valuable cultural assets of Australia's indigenous population,¹ the Australian Government has announced its intention to introduce a standalone legislative regime for the protection of indigenous cultural and intellectual property (ICIP). The decision was announced in February 2023 as part of the Australian Council for the Arts' 5 year plan, "Revive"². While at the time of writing, no Bill has been presented to Parliament, the promised introduction of the legislation is an endorsement of the comprehensive framework for fit-for-purpose standalone legislation, as part of a wider plan to protect ICIP.

The proposal in Revive is to adopt the recommendations proposed by the Productivity Commission in its study report, *Aboriginal and Torres Strait Islander visual arts and crafts*, Study Report, Canberra 2022 (**Productivity Commission Report**), released in November 2022. The recommendations of the Productivity Commission responsive to its Terms of Reference extend beyond those addressing the problems of inauthenticity in the arts and craft markets for indigenous product, to a broader recommendation that specific legislation be introduced as part of a multipronged approach to protecting ICIP.³ Through such legislation Australia would move to meet its obligations to implement principles outlined in the United Nations Declaration on the Rights of Indigenous Peoples (**UNDRIP**) in Australian law.⁴

Following the publication of "Revive", IP Australia also released its final report, *Scoping Study on Standalone Legislation to Protect and Commercialise Indigenous Knowledge*, published in July 2023 (**IP Australia Report**). In the IP Australia Report, IP Australia endorses the recommendations of the Productivity Commission Report for standalone legislation to protect ICIP, and IP Australia makes some additional recommendations, in particular

directed to protection of genetic resources embodying indigenous cultural knowledge.

This article explores the background to the drive to develop a new legislative regime for ICIP through a brief examination of some of the earlier attempts of Australian courts and regulators to address the protection of ICIP in Australia's current intellectual property legal framework. It also explains the drivers behind the recommendation of standalone *sui generis* legislation and summarises the key features of the proposed new legislative framework proposed by the Productivity Commission and endorsed by the Arts Council of Australia, as adopted and modified in the IP Australia Report.

The nature of ICIP and its incompatibility with the current legislative regime

From reviewing the series of Australian cases concerning cultural appropriation of indigenous assets in Australia, it is demonstrably clear that the current intellectual property regime in Australia is inapt to capture and protect within it, by providing suitable recourse against unauthorised use, all of the aspects of the property rights comprising ICIP.

Comparing the broad notion of ICIP and the ways in which it may be distilled into a material form, copyright is the most closely aligned protection system which might provide some assistance in enforcing rights against incidents of appropriation. However, copyright is unable to adequately assist in the prevention and forced cessation of unauthorised use of ICIP.

Firstly, the subject matter in which copyright will subsist is not on all fours with ICIP. The notion of ICIP extends beyond the definitions of artistic and literary works enshrined in the *Copyright Act 1968* (Cth)⁵: it encompasses a wider notion of cultural expression which may extend to languages, dance, knowledge, knowledge systems, foods and fibres, stories, narratives, designs, iconography, song, music, medicines,

1 Australian Law Reform Commission's Report on Recognition of Aboriginal Customary Laws 1986; Attorney General's Department "Stopping the Rip-offs" Issues Paper 1994; Report of the Senate Standing Committee on Environment Communications and the Arts: 'Securing the Future: Australia's Indigenous Visual Arts and Crafts Sector' 2006; and House of Representatives Standing Committee on Indigenous Affairs inquiry: The Growing presence of inauthentic Aboriginal and Torres Strait Islander "style" art and craft products and merchandise for sale across Australia' 2018.

2 Commonwealth of Australia 2023, Revive: a place for every story, a story for every place – Australia's cultural policy for the next five years.

3 Productivity Commission Report, p 161.

4 Australia formerly supported the UNDRIP in 2009.

5 *Copyright Act 1968* (Cth), s 10.

cultural protocols, dreaming and creation.⁶ However, the boundaries of ICIP have not been defined or its limits appropriately explored.

Even for the World Intellectual Property Organisation (WIPO), the definition of the assets encompassed by the term “cultural asset” is not yet the subject of agreement. In its current working definition of traditional cultural expression, WIPO’s Intergovernmental Committee has not settled on a definition and in the current draft has retained square brackets for matters which are not the subject of agreement or fixed definition:

*Traditional Cultural Expressions are any forms in which traditional culture practices and knowledge are expressed, [appear or are manifested] [the result of intellectual activity, experiences, or insights] by indigenous [peoples], local communities and/or [other beneficiaries] in or from a traditional context, and may be dynamic and evolving and comprise verbal forms, musical forms, expressions by movement, tangible or intangible forms of expression, or combinations thereof.*⁷

Added to the complexity of identification of the subject of the rights, the term of protection is also inconsistent with copyright protection. In many ways it is the ancient foothold of traditional cultural expression which is intrinsic to its value to Indigenous populations. While copyright is time limited (to the reference point of the life of the author or date of publication),⁸ it is incongruent to limit the term of protection of ICIP by reference to a publication date or the lifespan of any individual. It is not one individual author who can lay claim to ownership of such assets.

The association of cultural assets to a community at large is directly connected to the vexed issue of identification of a specific owner or author with the appropriate proprietary rights to have standing to sue for misuse of the property. By their very nature, cultural assets are the “property” of communities as custodians, and in the case of indigenous communities in Australia, arise directly from the community members’ relationship with, or traditional ownership of, the land with which the cultural asset or community custom is associated⁹.

How have Australian Courts grappled with this incompatibility?

The case of *Bulun Bulun & Anor v. R & T Textiles Pty Ltd*¹⁰ exemplifies the inability of copyright law to provide solutions for the appropriation of cultural assets of a community, distinct from an artist’s individual allegations of copyright infringement.

This case arose from of the importation and sale in Australia of printed clothing fabric which infringed the copyright of the Aboriginal artist, Mr. John Bulun Bulun, that subsisted in his artistic work “Magpie Geese and Water Lilies at the Waterhole”.

The applicants in the Federal Court proceedings were both the artist, Mr Bulun Bulun and Mr George Milpurrruru as a member of the Ganalbingu people, of Arnhem Land in the Northern Territory. Mr Bulun Bulun sued in his capacity as legal owner of the copyright subsisting in the artistic work under the *Copyright Act 1968*, while Mr. Milpurrruru brought the proceedings in his own capacity and as a representative of the Ganalbingu people, claiming that the Ganalbingu people were the equitable owners of the copyright subsisting in the painting.

Mr. Milpurrruru’s action was in essence a test case as to whether the Australian courts and legal system would recognise the notion of communal ownership in traditional ritual knowledge and in particular their artwork intellectual property rights (the respondents admitted infringement of Mr. Bulun Bulun’s copyright, and that claim was not in contest in the judgment).

The basis for Mr Bulun Bulun’s claim to standing and connection of the waterhole (the subject matter of the infringed artwork), to the traditional ritual knowledge embodied in the artwork was explained on the following basis. The Ganalbingu people are divided into two groups according to their geographic distribution. Mr. Bulun Bulun was the most senior person of the “bottom” Ganalbingu. He was second in seniority to Mr. Milpurrruru, who was a “top” Ganalbingu. The waterhole depicted in Mr. Bulun Bulun’s painting was Djulibinyamurr which was the principal totemic well for the artist’s clan. It was described as the place from which Barnda, the long-necked turtle creator ancestor of the Ganalbingu people, emerged. In his evidence Mr. Bulun Bulun explained that his ancestors were granted responsibility by Barnda to maintain and preserve all of the Mayardin (corpus of ritual knowledge) associated with the Ganalbingu land. Part of the artist’s responsibility as “Djungayi” or manager of the Mayardin, was to create paintings in accordance with the laws and rituals of the Ganalbingu people.

Mr Bulun Bulun asserted that the unauthorised reproduction “threatens the whole system and ways that underpin the stability and continuance of [the artist’s] society. It interferes with the relationship between people, their creator ancestors and the land given to the people by their creator ancestor.”¹¹ He explained further in his evidence that all of the traditional owners of the Ganalbingu land would have to agree on any exploitation of art works depicting sacred sites such as the waterhole.

The Court did not find that a trust was established, so that the Ganalbingu people could be the owners of equitable title in the copyright in the artwork. It did however find that a fiduciary relationship existed between Mr Bulun Bulun, the artist, and the Ganalbingu people, arising from the trust and confidence by his people that his artistic creativity would be exercised to preserve the integrity of the law, custom, culture and ritual knowledge of the Ganalbingu.

6 Dreaming Art Creative Consultancy submission to Productivity Commission p 8, cited at page 170 of the Productivity Commission Report.

7 WIPO, The Protection of Traditional Cultural Expressions: Draft Articles Facilitators’ Rev. (June 19, 2019).

8 *Copyright Act 1968* (Cth), s 33.

9 See the in-depth explanation of the manner in which the rights of the traditional owners of Ganalbingu country in *Bulun v Bulun v R & T Textiles Pty Ltd* [1998] 1082 FCA (3 September 1998), explained further in this article.

10 [1998] FCA 1082 (3 September 1998).

11 Ibid

The fiduciary obligation imposed on Mr. Bulun Bulun was “not to exploit the artistic work in such a way that is contrary to the laws and custom of the Ganalbingu people, and, in the event of infringement by a third party, to take reasonable and appropriate action to restrain and remedy infringement of the copyright in the artistic work.”

However, the Court ruled that the rights of the Ganalbingu people were confined to a right in personam against Mr. Bulun Bulun to enforce his copyright in works against third party infringers. Had Mr. Bulun Bulun failed to take action to enforce his copyright, the beneficiaries might have been able to sue the infringer in their own names as the beneficiaries of the fiduciary obligations owed to them by Mr. Bulun Bulun. As Mr Bulun Bulun had taken the infringement action, the Court dismissed the representative action of Mr. Milpurrru against the respondents.

None of the *Copyright Act*, *Patents Act 1990* (Cth) or *Designs Act 2003* (Cth) provides for the concept of this type of communal ownership. Rather, each requires a human inventor or creator (an issue most recently explored in full in respect of whether an artificial intelligence system could be named as an inventor of the invention the subject of a patent application, with the Australian Courts holding that that a “person” under s 15 of the *Patents Act* excluded such entities).¹²

How bodies or principles of use have been developed as an attempt to fill the void of express legislation for dealing with traditional ownership and rights ICIP

Given this misalignment, the amorphous concept of “cultural appropriation” has been asserted in relation to unauthorised use of cultural assets, but not often pursued in the litigious forum. For example, whilst there was outcry in the press regarding the use of indigenous art work by major commercial figures such as Villeroy & Boch¹³ and Berlei,¹⁴ these matters did not appear to progress past this expression of outrage. No direct claims of copyright infringement appear to have been filed suggesting that, in these circumstances, there was little available recourse in respect of this appropriation other than public expressions of disapproval. The term “cultural appropriation” is used as a catchall to express the socially unacceptable nature of such acts, but perhaps this lack of exactitude is indicative of the inability to label the acts with a specific infringement or tortious wrongdoing.

To fill this legislative void, and to foster respectful, consensual and appropriate use of ICIP, the Arts Council of Australia has developed and published guidelines for obtaining consent and appropriate terms of consent for use of ICIP.¹⁵

The New South Wales government has likewise produced its own guide.¹⁶ The rationale for its “ACIP” protocol was expressed in the following way:

In the absence of protection for cultural and intellectual property rights under Australian laws, Aboriginal Affairs NSW (AANSW) has developed an Aboriginal Cultural and Intellectual Property Protocol as part of its commitment to upholding Aboriginal peoples’ rights to their heritage, knowledge and cultural expressions.

This Protocol sets a standard for how AANSW engages with Aboriginal people and communities in regard to their cultural and intellectual property, and what we expect from the organisations we fund and suppliers we engage in this respect.¹⁷

The fundamental tenant of the protocols is to embody the following 10 principles¹⁸ in any dealing with ICIP subject matter:

- Respect
- Self-determination
- Communication, consultation and consent
- Interpretation and authenticity
- Cultural integrity
- Secret, sacred and privacy
- Attribution
- Benefit sharing
- Maintaining Aboriginal culture
- Recognition and protection

One of the key principles is obtaining free and prior informed consent for use of ICIP from Aboriginal peoples. This involves collaboration and co-design, negotiation and informing owners and custodians about the implications of consent.

Do these declarations of guidelines for use and respect of ICIP work in practice?

While the guidelines published by governmental and other bodies directing appropriate use of cultural assets, as they do not rise above a recommendation of good practice, their application is ad hoc and even following appropriate guidelines gives rise to the risk of falling foul of cultural rights.

For example, as there is no blueprint for obtaining free and prior informed consent for use of ICIP from Aboriginal peoples, there can be a risk that any such consent is not given in accordance with specific Indigenous custom or by someone authorised to give the consent.

¹² *Commissioner of Patents v Thaler* [2022] FCFC 62.

¹³ ‘Devoid of any type of cultural value’: Villeroy & Boch criticised for ‘misuse’ of Aboriginal art’, Sydney Morning Herald 4 August 2019.

¹⁴ ‘Berlei Australia apologises for cultural appropriation’, National Indigenous Times 9 April 2021.

¹⁵ Protocols for using First Nations Cultural and Intellectual Property in the Arts, Arts Council of Australia 2019.

¹⁶ Aboriginal Affairs NSW Aboriginal Cultural and Intellectual Property Protocol, 2019.

¹⁷ <https://www.aboriginalaffairs.nsw.gov.au/our-agency/staying-accountable/aboriginal-cultural-and-intellectual-property-acip-protocol/>.

¹⁸ These are the ten True Tracks® Principles were created by Terri Janke and Company Lawyers.

An example of the potential failure of seeking appropriate consents to use is *Jabree Ltd v Gold Coast Commonwealth Games Corporation* (the Borobi trade mark case).¹⁹

“Borobi” was the official mascot of the 2018 Gold Coast Commonwealth Games. ‘Borobi’ originates from the indigenous Australians Yugambeh language and translates into English language to mean ‘koala’. The Yugambeh community is from the Gold Coast region in Queensland.

The “Borobi” mascot design was created by an Indigenous artist from the Kalkadoon people from the Mount Isa area in Queensland, represented graphically (and the subject of a distinct trade mark application) in this form (and other forms): the form depicted on the right (and other forms).

The Gold Coast Commonwealth Games Corporation (the trade mark applicant) promoted the Commonwealth Games by means of a “faux” dreamtime story revolving around the Borobi character, which regaled the reader with Borobi’s special characteristics, including his unusual paw markings and his missing second thumb, which caused him to spend more time on lower branches where he watched surfers ride waves, “and the more he watched the more he dreamed of learning to surf”, and indeed he did learn to surf according to the story.

The story went on:

*“As he walked up the beach, an elder approached Borobi. He explained that he’d been following Borobi’s pawprints, which had intricate patterns that spoke of a great gathering. The circles represented a large meeting place the dots were spectators and the lines symbolised the athletes’ journey”.*²⁰

The opponent of the trade mark application for BOROBI in this case (Jabree Ltd) was a registered cultural heritage body for the Gold Coast region under the *Aboriginal Cultural Heritage Act 2003* (Qld). Jabree Ltd was established in 2010 to support the Gold Coast Native Title Claim Group and traditional owner community for the purpose of assisting with the most recent Gold Coast native title claim, and as the Aboriginal cultural heritage body for the Gold Coast region, to manage and protect the Yugambeh people’s cultural heritage.

The Applicant gave evidence that it had conferred with Yugambeh community elders in both formal and informal meetings about the use of the proposed mascot and the use of an Aboriginal word as the name of the mascot, and that the members with which it conferred fully supported the use of the work “Borobi” as the name of the mascot.

The Opponent however claimed that the Applicant had failed to observe the decision-making process of the claim group to be followed with the Yugambeh community. The Opponent also claimed that the use of a word belonging to an Aboriginal language without proper consultation is a misappropriation of Aboriginal intangible cultural heritage.



The key ground of opposition was under Section 42(a) and (b) of the *Trade Mark Act 1995* (Cth): the trade mark consists of scandalous matter or that its use would be contrary to law.

Given the mark being a single word, albeit in Yugambeh language, outside of the difficulties of establishing an author or a work from which a reproduction was made, copyright subsistence could not have been established to form the basis of a copyright work and its misuse comprising copyright infringement, “contrary to law”, pursuant to Section 42(b). The single word would be too insubstantial to attract the protection of copyright, and even if this was not the case, the term of protection would have long since expired.

Rather the argument was put on the basis of the use of the mark the subject of the application would give to representations of approval or association amounting to a contravention of section 19(1)(h) of the *Australian Consumer Law*.²¹

While the Delegate was sympathetic to the opponent’s claims, she was not satisfied that the adoption of BOROBI was in any way shameful, offensive or shocking, or that there were any representations of approval or association that would give rise to a contravention of section 19(1)(h) of the *Australian Consumer Law*. In relation to the latter finding, the Delegate noted specifically that she was “empathetic with the Opponent’s position and the sensitivity of this matter, however, this area of law is clear that the filing of a trade mark application does not require consultation with any party.”²²

¹⁹ *Jabree Ltd v Gold Coast Commonwealth Games Corporation* [2017] ATMO 156 (14 December 2017).

²⁰ *Ibid* paragraph 17.

²¹ *Competition & Consumer Act 2010* (Cth) Schedule 2.

²² [2017] ATMO 156 at paragraph 50.

The Borobi trade mark case demonstrates that, absent specific regulation governing both the appropriate subject matter for trade mark registration, and a protocol which is known and followed for consultation with the *accepted* cultural custodians of the subject matter, there is limited ability for indigenous challenge to the appropriation of Indigenous language, or other cultural assets, as trade marks.

Of note in this respect is that pursuant to the New Zealand trade mark process, the New Zealand *Trade Marks Act 2002* contains provisions that prohibit the registration of trade marks where it would be likely to offend the Māori community.²³ An advisory committee has also been established, consisting of members who have knowledge of te ao Māori (Māori worldview) and tikanga Māori (Māori protocol and culture). Any trade mark application with Māori words or design elements is referred by the examiner to a Māori committee which has been established to advise whether a trade mark is derivative of a Māori sign or likely to be offensive to Māori, and for that reason refused.²⁴

Why not amend the current IP legislation to provide for the specific protection of ICIP Assets?

In the Productivity Commission Report, the Productivity Commission mused as to the options available for legislative change to strengthen ICIP protection as part of a framework to improve the gap in protection of ICIP. The options discussed were threefold: minor amendment to existing legislation, more extensive amendments or the introduction of dedicated *sui generis* legislation.

However, its finding was that while “minor amendments to existing laws could improve protection”, “amendments of this type fill specific and narrow gaps in existing laws, rather than addressing broader objectives”.²⁵ Further, the Productivity Commission concluded that larger scale amendments are likely to be incompatible with the framework’s or objectives of existing legislation:

*Overall, in contrast to relying on amendments to the patchwork of existing legal mechanisms, dedicated legislation to protect tangible expressions of ICIP in visual arts and crafts has the potential to provide stronger, more fit-for-purpose protection for ICIP in visual arts and crafts and greater clarity around cultural rights for the broader Australian community, thus facilitating third party use and collaborations. It would also enable Australia to demonstrate its commitment to meeting its international obligations to recognise and protect ICIP.*²⁶

Given the diametrically different construct of origination, term of protection and “ownership” of cultural assets, intuitively, the “going back to the drawing board” approach for the protection of ICIP is the correct course for Australia to take. Through this route, other intellectual property rights of individuals can be maintained or enforced contiguously to the enforcement of ICIP.

The concept of cultural assets, and their community ownership, and the appropriate identification of an “owner” vested with authority to grant consent can be enshrined in new legislation, to give all parties more clarity regarding dealings with ICIP.

The proposed “new cultural rights legislation”

The foundation of the new legislation proposed by the Productivity Commission and endorsed in “Revive” is a formal recognition of the interests of Aboriginal and Torres Strait Islander groups in their cultural assets and ensuring they are empowered to control the use of the assets. The legislation is not proposed to prohibit use of cultural assets *per se* but to enable cultural owners to take action in relation to use without authorisation.

This legislation is proposed to be but part of the package of amendments which will be made to ensure that cultural assets are protected. No further exploration or elucidation of these amendments has been published.

How will the legislation address the concept of “Cultural Asset”?

Distinct from traditional copyright notions of “works” being the subject of protection, the Productivity Commission’s proposal is that the concept of cultural assets to be protected will be driven by the determination of cultural input into the asset or work. This is a different way to look at the subsistence of a proprietary right. Rather than focussing on the protection of the creative output or expression, as in copyright works, the cultural content or idea behind an expression of the idea in an artwork will attract the protection of the new legislation.²⁷ Copyright law will continue to assist the artist or author in the protection of the creative output in the form of a copyright work.

Applying this in practice, if the circumstances of *Bulun Bulun & Anor v. R & T Textiles Pty Ltd* were litigated in the era of this new legislation, Mr Milpurrruru’s claim against the infringer could have been run as an infringement of the ICIP in the cultural asset embodied and communicated in Mr Bulun Bulun’s artwork.

This notion of “cultural assets” gives the subject matter of the proposed legislation wide scope: the intention is that the phrase is inclusive rather than exclusive in definition. The recommendation is that the legislation set out criteria for assessing whether something is a cultural asset, such as strength of its connection to tradition or customer, akin to the concepts tested in cases under lands rights legislation.²⁸

Key recommendations of the Productivity Commission in relation to the nature of the cultural assets and their identification include these characteristics:

- The asset must be inalienable – because the assets cannot be alienated from the traditional owners, consistent with the notion of custodianship rather than individual proprietorship.

23 *Trade Marks Act 2002* (NZ), s 17(1)(c).

24 *Trade Marks Act 2002* (NZ), s 177-199.

25 Productivity Commission Report, p 151.

26 Productivity Commission Report, p 159.

27 Productivity Commission Report, p 177.

28 Productivity Commission Report, p 177, referencing the *Native Title Act 1983* (Cth).

- They would not be the subject of the requirement of registration in any form.²⁹
- The protection of a cultural asset would be unlimited by time: the consideration being the asset's connection to tradition and custom and the existence of the asset not being determined by when it begins or ends.³⁰

Who has standing to take action to enforce ICIP rights under the proposed legislation?

The Productivity Commission proposes that the traditional owner is vested with standing to take action in respect of misuse of a cultural asset. However, this concept of owner is a broad one: a person, group or community who has ownership or custodianship of the cultural asset.

A key concept to be enshrined in the proposed legislation is the recognition of the ability of a community, comprising a group of individuals not necessarily organised into a known legal structure or legal identity such as a corporation or association, to own the cultural asset and take enforcement action against its misuse.

The Productivity Commission's recommendation is that the actions to enforce ICIP can be brought by individual(s) on behalf of the community in the form of a representative action, analogous to the standing granted under the *Native Title Act*³¹. It eschews a formal register of interests for community groups, to give them legal identity under the law, as the recommended approach, because of cost of establishment and maintenance and doubt as to the full participation of all communities in the registration activity³².

Standing would be demonstrated to the relevant Court or tribunal by the strength and nature of the claimant's connection with the cultural asset.

While numerous submissions are discussed in the Productivity Commission Report supporting the establishment or empowerment of a "cultural rights regulator" which could bring representative actions for misuse of ICIP, the conclusion of the Productivity Commission was that there was "insufficient evidence" to support the merit of this proposal at this time, over and above the grant of standing to representative members of the community connected to the cultural asset.³³

The proposed route to enforcement of ICIP rights

The types of actions which may give rise to an infringement of a cultural asset are proposed in a very general way by the Productivity Commission.

The actionable "use" giving rise to infringement is described broadly as a use that comprises the "giving expression to a cultural asset". For example, the incorporation of a cultural asset into an artwork or product would result in a cultural expression would be an infringement.³⁴

An actionable use is a use of a cultural asset without authorisation, and this is a matter of fact to be determined in the circumstances of any impugned use.³⁵ Implicit in this concept is a necessary examination of the scope of any authorisation and whether the purported grantor had the necessary authority to confer the authority for use. This is the very issue which vexed the trade mark application in the Borobi trade mark case. The recommendation is that this issue be determined by a consideration of how authorisation is ordinarily granted in the community.³⁶

Issues which will require close consideration in the drafting of the proposed legislation include the need for reproduction in a material form and thresholds of appropriation which will give rise to an infringement.

The Productivity Commission refers to and advocates the approach taken in the WIPO and Pacific Islands model laws, which specify that no infringement occurs for uses that are 'incidental'. The caveat in the WIPO model laws provides:

The provisions of Section 3 [which require authorisation to be sought] shall not apply also where the utilization is incidental.³⁷

Proposed exceptions to infringement by use of a cultural asset

The Productivity Commission tentatively recommends exceptions for fair use: study, research or education; criticism or review; reporting news or current events; court proceedings or legal advice; personal and private use. However, it is queried whether these fair use exemptions are on all fours with closely guarded cultural assets, the dissemination of which is not generally approved of by the cultural custodians. Clearly more thought will need to be given to a blanket adoption of these copyright style fair use exemptions.

Less controversially, the Productivity Commission recommends an introduction of the defence of use for traditional and customary purposes and for individuals attempting to reconnect with culture. In the report, the draconian effect of the forced removal of Aboriginal and Torres Strait Islander children in the period from 1910 to 1970 and their consequent removal from their cultural heritage is explained as the logical driver for this defence to allow those displaced from their cultural centres to reconnect.³⁸

29 Discussion pages 180-181 of the Productivity Commission Report

30 Productivity Commission Report, p 182.

31 Productivity Commission Report, p 183.

32 Productivity Commission Report, p 184.

33 Productivity Commission Report, p 187.

34 Productivity Commission Report, p 187.

35 Productivity Commission Report, p 190.

36 Productivity Commission Report, p 190.

37 WIPO 1985.

38 Productivity Commission Report, p 193.

How the new *sui generis* regime would exist within the existing and any future framework

The Productivity Commission recognised that there are existing protocol frameworks³⁹ and regulatory measures⁴⁰ around the use of ICIP, and that the proposed ICIP legislative reform must necessarily be but part of a broader and coherent “ICIP regime”.⁴¹ This was in response to its acceptance that “it is unclear whether all-encompassing ICIP laws are feasible or practicable”.⁴²

In support of this view, the Productivity Commission provides examples of legislation internationally which have focused on specific aspects of ICIP only⁴³. The *sui generis* legislation proposed would form one element of the strategy to be implemented.

Concurrent work of IP Australia to enhance protection of ICIP

Concurrently with the review and report of the Productivity Commission, IP Australia was performing a scoping study in respect of indigenous knowledge legislation. This scoping study was overseen by the cross-department Indigenous Knowledge Working Group (IKWG) on potential elements of stand-alone legislation that would support Aboriginal and Torres Strait Islander peoples to protect and commercialise their indigenous knowledge.⁴⁴

The IP Australia scoping study was part of a comprehensive work plan developed by IP Australia with 6 work streams in respect of indigenous knowledge to be undertaken during 2022-2023.⁴⁵ The development of a scoping study into stand-alone legislation for indigenous knowledge was but one stream of this comprehensive work plan.

In September 2022, IP Australia released its Consultation Report “Enhance and Enable Indigenous Knowledge Consultations 2021”. As already mentioned, the IP Australia Report was the final report published in July 2023⁴⁶. The IP Australia Report states that weight was given to the Productivity Commission Report but that that report was focussed on the visual arts and crafts sector and the IP Australia report has a wider focus.

The key differences between this IP Australia Report and the Productivity Commission Report are that the IP Australia Report makes 2 further recommendations: the first dealing with genetic resources and the implementation of the Nagoya Protocol,⁴⁷ which is an internationally accepted

model for the fair and equitable sharing of the benefits arising from the utilisation of genetic resources and includes protections for indigenous knowledges associated with genetic resources; the second being the recommendation of the creation of a national statutory body with the power to initiate enforcement action for infringement of ICIP.

These are the full set of recommendations made in the IP Australia Report:

1. That the Australian Government enact standalone legislation creating a new intellectual property right in respect of traditional cultural expressions and traditional knowledge.
2. That the Australian Government undertake a co-design process for the development of such standalone legislation in partnership with First Nations peoples.
3. That legislation to protect the rights of First Nations peoples in respect of the genetic resources of native flora and fauna continue to be implemented nationally through a coordinated framework of state and federal laws based on the rules for the fair and equitable sharing of the benefits of biodiversity that are contained in the Nagoya Protocol.
4. That the Australian Government ratify the Nagoya Protocol.
5. That consideration be given during the co-design process to the inclusion of the elements and features suggested in the IP Australia Report.
6. That the Australian Government enact legislation, whether as part of new standalone legislation or by amendment to the Australian Consumer Law, prohibiting the commercial supply of goods or services featuring or purporting to feature traditional cultural expression which are not produced by Aboriginal or Torres Strait Islander people or with the permission of rights holders, unless labelled as inauthentic. This is a key recommendation of the Productivity Commission Report.
7. That implementation of new standalone legislation be undertaken in conjunction with the accompanying additional measures and policies, to be developed in consultation with Indigenous stakeholders and through shared decision-making.

³⁹ See eg, the Australian Council for the Arts’ extensive *Protocols for using First Nations Cultural and Intellectual Property in the Arts*.

⁴⁰ Native title and heritage laws eg *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth) can protect areas and objects that are of particular significance to Aboriginal and Torres Strait Islander people or communities under threats of injury or desecration.

⁴¹ Productivity Commission Report, p 159.

⁴² Productivity Commission Report, p 161.

⁴³ Eg, in New Zealand, section 17 (1)(c) of the *Trade Marks Act 2002* (NZ) prohibits the registration of trade marks where it would be likely to offend the Māori community - an advisory committee has been established to advise on whether a trade mark is derivative of a Māori sign or likely to be offensive to the Māori community.

⁴⁴ The scoping study was undertaken by consultancy Ninti One in consultation with the IKWG, and an Indigenous Expert Reference Group working with IP Australia.

⁴⁵ IP Australia Indigenous Knowledge Work Plan 2022-2023.

⁴⁶ Published on IP Australia’s website: *Scoping Study On Standalone IK Legislation* | IP Australia.

⁴⁷ *The Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization* (ABS) to the *Convention on Biological Diversity* is a supplementary agreement to the Convention on Biological Diversity. The Nagoya Protocol on ABS was adopted on 29 October 2010 in Nagoya, Japan and entered into force on 12 October 2014.

8. That, in parallel with the co-design process, the Australian Government progress the development of a strategic business case that includes a more detailed cost-benefit analysis and a primary research project surveying Australians to estimate their willingness to pay for reform options and including reliable estimates of the total benefits (both non-market and market benefits).

In respect of recommendation 7, the additional package of policies and measures recommended in the IP Australia Report spans the following ambit:

- creation of a national collecting agency to assist in negotiating licences and rights agreements and collect and distribute royalties for the permitted use of indigenous knowledge;
- the establishment of a database system, managed in accordance with cultural protocols, that can be used by rights users to identify and contact protected indigenous knowledge and its owners;
- support to rights holders to understand, access, use and enforce the new cultural rights;
- a program of public education and a marketing and communication strategy to inform potential users of the necessity to seek the permission of rights holders and to encourage the public to seek out goods and services that are ethically sourced and produced with the free, prior and informed consent of rights holders;
- enhanced border protection measures to deter trade in inauthentic product;
- capacity-building programs to support First Nations enterprise and business development including, in particular, in commercialisation to generate economic returns for, and to benefit, First Nations communities; and

- the additional recommendations of the Productivity Commission Report which looked across the broader cultural industries rather than just the visual arts and crafts industry including a national Indigenous Cultural and Intellectual Property strategy, strengthening the Indigenous Art Code and artist support services, an evaluation of existing funding arrangements, supporting First Nations workforce development and increased opportunities within the nation's public cultural institutions.

While the IP Australia Report endorses the approach to separate standalone legislation advocated in the Productivity Commission Report, importantly it proposes that the approach to protection of genetic resources must be a different legislative approach to the protection of indigenous knowledge and indigenous cultural expression generally. It takes endorsement from the position of the WIPO's Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (IGC). The IGC's longstanding approach is that the protection of genetic resources and associated traditional knowledge requires a different legal framework from that suited to the protection of traditional cultural expression and other aspects of traditional knowledge.

The road to implementation of the new legislation

At this stage, there has been no further public steps towards implementation of the foreshadowed standalone ICIP legislation. However, the commitment of the current government to reconciliation and recognition of indigenous rights, and particularly its support for indigenous arts expressed through *Revive* suggests that progress can be expected. The detailed considerations of the scope of the ICIP legislation made in the Productivity Commission Report and the IP Australia Report provide a framework for the next steps to be taken to for the introduction of *sui generis* legislation protecting ICIP into Australian law.



2023 CAMLA Annual Oration

To be delivered by

NICK McKENZIE

Investigative journalist, The Age and Sydney Morning Herald

- 14 times Walkley winner
- 4 times Australian Journalist of the Year

Date: Thursday, 16 November 2023

Registration: 6:00pm. Keynote address 6:30pm, followed by a cocktail reception

Venue: Ashurst Ballroom, 4/5 Martin Pl, Sydney NSW 2000

Attire: Semi-Formal

Further details and registration link to follow

