



Legal protection of Indigenous Knowledge in Australia

Supplementary Paper 1





Legal Protection of Indigenous Knowledge in Australia

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WARNING

The document contains names of deceased persons of Aboriginal and Torres Strait Islander. It also contains some language that might be considered offensive.

Important legal notice

The laws and policies cited in this book are current as at August 2017. They are generally discussed for the purposes of providing this report. No person should rely on the contents of this report for a specific legal matter but should obtain professional legal advice from a qualified legal practitioner.





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Introduction

This supplementary paper provides an overview of the Australian laws that are currently used to recognise and protect Indigenous Knowledge.

The Australian Constitution grants the Commonwealth Parliament power to enact laws that specifically deal with Indigenous peoples' rights to their Indigenous Knowledge.¹ State governments in Australia may also make laws relating to Indigenous people.² The Australian federal system of government means that the legal rights afforded to Indigenous people in relation to their Indigenous Knowledge will vary significantly depending on which level of government is involved.

Australia does not have a *sui generis* system for Indigenous Knowledge protection so Indigenous people work within the framework of existing intellectual property, biodiversity and cultural heritage laws. However Indigenous people have also been able to assert their rights in Indigenous Knowledge, to varying degrees, under a number of other laws, including laws related to native title, trade practices, customs, resale royalty, geographic names and succession.

1. Intellectual Property Laws

1.1 Copyright

The *Copyright Act 1968* (Cth) grants automatic rights to the creators and owners of literary, dramatic, artistic or musical works and other subject matter such as films and recordings. There is no need for registration of rights, but relevant requirements must be met in order for copyright to exist –the work must be original, have an identifiable author, and be in a tangible form.

Copyright protection lasts for a period of time, and this period varies among the types of copyright.³ For instance, the copyright in an artistic work generally last for 70 years after the death of the artist. When the copyright term ends, the work is freely available for use, adaptation and exploitation.

A copyright owner can control the use or exploitation of their works, films and recordings, with some limited fair dealing exceptions. Indigenous people who are the copyright owners of their works have the exclusive right to prohibit or do certain acts such as publish, reproduce, communicate and adapt⁴ their work. Similarly, where Indigenous people are the owners of copyright in films or sound recordings, they can prevent or permit reproduction of the film and sound recording. Being the holders of these rights allows them to control their own individual creative works and outputs.

¹ *Commonwealth of Australia Constitution Act 1900* ss 51(xxvi) and 51(xviii).

² Subject to *Commonwealth of Australia Constitution Act 1900* s 109.

³ *Copyright Act 1968* (Cth) for works with identified author (s. 33), for works with an anonymous or pseudonymous author (s.34), for sound recordings (s.93), for films (s.94), for broadcast (2.95), and for published editions of works (s.96).

⁴ For literary, dramatic and musical works.





1.1.1 Originality

To obtain copyright protection, a work must be original.⁵ Copyright is not afforded if the work is copied from another work.⁶ This is different to Indigenous Knowledge, which is communal rather than individual in nature and is collectively and incrementally developed over time based on already existing traditions. For example, there have been questions raised as to whether Indigenous artists create new works when they follow in tradition and keep very close to the original design of old works handed down through generations. However, in *Milpurrurru v Indofurn*,⁷ Justice von Doussa found that the Indigenous artists of pre-existing clan designs based on dreaming themes did impart skill, labour and effort to create a new copyright work.

1.1.2 Author unknown and ancient works

The *Copyright Act 1968* (Cth) also requires that there be an identifiable author of the work. Ownership of copyright vests in the individual owner of the work, who is generally the person who created or authored the work. This poses difficulties for communities seeking to protect ancient or very old artwork, out of copyright, where the specific author may not be known.

Indigenous clan designs, stories and rock art that first existed in material form thousands of years ago and remain part of the particular Indigenous culture in perpetuity are not protected by copyright. For example, the *Wandjina* and *mimi* figures that first appeared on ancient rock art do not fit within the copyright legislative scheme. The images were produced too long ago, the author cannot be identified and in any case passed away some time ago.⁸ Works of this kind are able to be reproduced, despite causing deep offence to the Indigenous people of that region who are the cultural owners of such images.

In addition, the communal nature of Indigenous Knowledge means that often, there is no singular individual who can be identified as the creator or author of a work.

1.1.3 Requirement of material form

Copyright protects expressions and not the underlying idea; works must be written down or recorded. Indigenous Knowledge is largely transferred through the spoken word and survives in intangible form.

Copyright law's material form requirement creates problems for Indigenous people in relation to a large body of their orally transmitted knowledge. For instance, Indigenous people cannot use copyright to prevent their oral dreaming stories, songs or dances from being misappropriated. Instead, the Indigenous Knowledge must be condensed into a material form – such as a film or sound recording - which is owned by an Indigenous person bound by contract or customary law. If Indigenous individuals and legal entities are the copyright owners, then they may manage their Indigenous Knowledge by negotiating the observance of cultural protocols that may limit or set conditions on dissemination or adaptation. However, there are

⁵ *Copyright Act 1968* (Cth) s 32.

⁶ *Sands & McDougall Pty Ltd v Robinson* (1917) 23 CLR 49.

⁷ *Milpurrurru v Indofurn* (1994) 54 FCR 240.

⁸ Terri Janke and Robynne Quiggin, 'Indigenous Knowledge and Customary Law' (Background Paper, No 2, Law Reform Commission of Western Australia, 2005).



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some limits - obligations to clan groups and compliance with cultural protocols may not be able to be negotiated in licensing rights to third parties.

If a work, film, or sound recording embodies or incorporates Indigenous cultural expression or Indigenous Knowledge but is not owned by Indigenous people, then there is little recourse available if the copyright owner is not aware of or willing to follow cultural limitations or protocols. Indigenous people who are the traditional owners of the Indigenous Knowledge in the work have no rights as they are not the copyright owner. Further, the law does not recognise a right of authorship in the underlying Indigenous Knowledge recorded in the work.

For example, many Indigenous communities are already documenting their oral histories, languages and culture. If a community organisation with fiduciary obligations to the holders of traditional knowledge undertakes the documentation, Indigenous owners and custodians of culture can ensure their knowledge is only used for the benefit of the community in accordance with their protocols. However, if works, films and recordings are made under the direction and control of the Crown, copyright vests in the Crown unless there is a specific contractual agreement which provides otherwise. Indigenous groups make the point that intellectual property clauses contained within many government funding agreements grant the government perpetual rights to use, adapt and sub-licence any project material, which may include recordings, film and reports which contain Indigenous knowledge.

One of the advantages of maintaining oral transmission of knowledge is that uninitiated members of the community are only told stories and can hold stories only once they go through law. The material form requirement may undermine the use of knowledge as a rite of passage under Indigenous customary law. Most models for Indigenous traditional cultural expression and knowledge advocate for non-material form protection.⁹ French copyright law, for example, protects works in intangible forms.

The requirement of material form means that Indigenous people and communities must condense their oral Indigenous Knowledge into works that attract legal rights under the *Copyright Act*. In addition, such works must be owned by a community organisation or individual with customary obligations. Otherwise, Indigenous people cannot control the ways in which their cultural property is used by others. Finally, recording culture may have impacts on transmission of culture and the dynamic nature of Indigenous Knowledge. Non-material form protection, such as that available under French copyright law, may be of greater assistance to individuals and communities seeking to assert rights to Indigenous Knowledge.

1.1.4 Indigenous copyright cases

Copyright laws and their application for Indigenous art has been the subject of several significant Federal court judgements.

In 1991, Warimiri artist Terry Yumbulul took action against the Aboriginal Artists Agency and the Reserve Bank of Australia over a licence which permitted the reproduction of his *Morning Star Pole* sculpture and the sacred clan designs embodied within it. His action was ultimately dismissed, however in *Yulumbul v Reserve Bank of Australia*,¹⁰ Justice French considered that

⁹ See Secretariat of the Pacific Community, *Guidelines for developing national legislation for the protection of traditional knowledge and expressions of culture based on the Pacific Model Law 2002*, <http://www.wipo.int/wipolex/en/text.jsp?file_id=184667>.

¹⁰ *Yulumbul v Reserve Bank of Australia* (1991) IPR 481.





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Australia's copyright law does not provide adequate recognition of Aboriginal community claims to regulate the reproduction and use of works which are essentially communal in origin.¹¹

In 1994, *Milpurruru v Indofurn*,¹² Justice von Doussa found that the Indigenous artists of pre-existing clan designs based on dreaming themes, did impart skill, labour and effort to create a new copyright work.

The case of *Bulun Bulun v R & T Textiles* in 1998 recognised, in part, the communal nature of the ownership of copyright, by acknowledging that the copyright owner owes a fiduciary duty to the clan, to exercise his or her copyright in ways that are consistent with customary laws or protocols. The limitation however, is that there must be a copyright work in order for this fiduciary duty to exist.

Mr Bulun Bulun had previously brought an action in 1989 against Flash T-Shirts, who had reproduced his work *Magpie Geese and Water Lilies at the Waterhole* without his knowledge or permission. The matter was settled before hearing; however evidence collected for the hearing challenged previously held notions that copyright did not exist in Indigenous artwork.

1.1.5 Performers' rights

Under the *Copyright Act*, Aboriginal and Torres Strait Islander performers have rights to control their performances of cultural expression. While more limited than those held by copyright owners, performers' rights allow performers to permit or prohibit the recording of their performance, and to prevent certain uses, such as the sale and distribution of unauthorised recordings or filming of their live performance. Interviewees who disclose Indigenous Knowledge for documentaries can also use these rights to negotiate appropriate cultural treatment. Performers' rights do not extend to still photography.¹³

There are some factors which limit the effectiveness of performers' rights for Indigenous people who are filmed as performers. Once a performer consents to being filmed, they have no control over how the recording or film is used, unless this is specifically negotiated in the performers' release agreement. Therefore, due to a lack of access to legal advice on performers' releases, Indigenous people may sign their consent to being filmed without knowing they can negotiate. There may also be unequal bargaining power in favour of the filmmaker. Consent by a performer to a recording may also be implied. Finally, although performers' releases commonly include clauses that give Indigenous people the right to be re-consulted for use of the film in a new context, archives and libraries of film content do not recognise this.

Increased education of the existence and nature of performers' rights and legal assistance with contract negotiation would increase the effectiveness of these provisions for Indigenous people.

1.1.6 Copyright in sound recordings of live performances

Copyright laws automatically grant performers a share of the copyright in sound recordings of

¹¹ *Yulumbul v Reserve Bank of Australia* (1991) IPR 481, 490 [21].

¹² *Milpurruru v Indofurn* (1994) 54 FCR 240.

¹³ *Wik Apelech Dancers* case study. See Terri Janke, 'The protection of Indigenous Dance', *Minding Culture* (World Intellectual Property Organisation, 2003) 87.





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their live performances.¹⁴ Since 1 January 2005, copyright in non-commissioned sound recordings of live performances is shared between the owner of the recording medium (such as the person who owns the disc) and the performers who contributed the sounds to the performance.¹⁵ If the performer is providing services under an employment contract then the copyright share in the sound recording will belong to the employer.¹⁶ These provisions provide rights to Indigenous performers including when they perform 'expressions of folklore'.¹⁷ For example, an Indigenous person who performs cultural songs or dances, will jointly own the copyright of the sound recording, with the maker of the recording. This is an important right because this means that the Indigenous performer has the right to control all future uses of the recording. This right only applies to sound recordings and not films.

1.1.7 Moral Rights – Indigenous communal moral rights

Moral rights of attribution, against false attribution and integrity are granted to:

- (a) authors of copyright in artistic, literary, musical, or dramatic work;
- (b) filmmakers to their film; and
- (c) performers, to their performances.

Moral rights are important for Indigenous creators as not only do they provide acknowledgement for continuing custodianship and continuum of the work, but such rights to integrity also address obligations under customary laws to guard against derogatory treatment.¹⁸

As current laws focus on individual ownership and authorship, current moral and attribution rights also focus on providing rights only to individual legal owners. As such, moral rights under the *Copyright Act 1968* (Cth) only protect individual moral rights of the creators of works, filmmakers and performers.¹⁹

Indigenous Knowledge is held for the benefit of a community or group as a whole and there can be strict protocols governing the use of Indigenous Knowledge, directed at gaining community approval. Indigenous artists and creators often feel uncomfortable about identifying as the 'creator' of Indigenous knowledge, not wanting to undermine their community's traditions and customs.²⁰ The communal nature of Indigenous Knowledge ownership means that there is a difference between the role of the authoring artist 'having the right to depict story in art form and the communal right of the clan group as the cultural owner'.²¹ While there has been some judicial recognition of communal ownership,²² it has been held that notions of communal ownership cannot affect the outcome of a case or the

¹⁴ *Copyright Act 1968* (Cth) s 22(3A)(b).

¹⁵ *Copyright Act 1968* (Cth) s 97.

¹⁶ Australia Council for the Arts, *Protocols for Producing Indigenous Australian Music* (Commonwealth of Australia, 2nd ed, 2007) 22-23.

¹⁷ The definition of 'performance' in section 248A of the Copyright Act includes 'a performance of an expression of folklore.'

¹⁸ Terri Janke, 'Guarding ground: a vision for a National Indigenous Cultural Authority' in Robert Tonkinson (ed) *The Wentworth Lectures: Honouring Fifty Years of Australian Indigenous Studies* (Aboriginal Studies Press, 2015) 258, 268.

¹⁹ *Copyright Act 1968* (Cth), s190.

²⁰ Christine Nicholls, 'Aboriginal Art: What is Authorship?' (2000) 25 *Alternative Law Journal* 4, 188.

²¹ Terri Janke and Company, 'New tracks: Indigenous knowledge and cultural expression and the Australian intellectual property system' (2012) Submission to *Finding the Way*, IP Australia Indigenous Knowledge Consultation, 12.

²² *Yumbulul v Reserve Bank of Australia* (1991) 21 IPR 481, 490.





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award of a remedy for breach of Indigenous copyright.²³

Increasing copyright protection for Indigenous performance through moral rights has not yet been fully examined. In 2003, the *Copyright Amendment (Indigenous Communal Moral Rights) Bill 2003* was proposed in an attempt to recognise Indigenous communal moral rights. Former Senator Aden Ridgeway highlighted the fact that it was concerning that moral rights laws in Australia did not take into consideration Indigenous communal moral rights.²⁴

However, the Bill did not proceed to law. It was criticised by Patricia Adjei as being unfavourable and ‘onerous’²⁵ for Indigenous communities, who were required under the Bill to satisfy many confusing requirements to be afforded protection. The protections offered by the Bill were so limited as to be largely ineffective.

There is no recognition under existing laws of communal moral rights to Indigenous Knowledge and as Lisa Strelein indicates when talking about copyright in native title reports, ‘cultural or moral ownership of materials is not easily identified or taken into consideration when material is created, stored or shared’.²⁶

Moral rights allow Indigenous creators to meet customary obligations in relation to the integrity and correct customary treatment of their works. However, as moral rights focus on individual ownership, they have limited use in relation to Indigenous Knowledge that is communally owned, particularly where a single author is not easily identified.

1.1.8 No special protection of secret and sacred knowledge

Secret and sacred knowledge refers to knowledge that is strictly controlled under customary laws. It may be made available only to the initiated, or used at a particular time or for a specific purpose. It may be information that is restricted to particular genders or people with certain knowledge.

In *Milpurrurru v Indofurn* the court considered that the sacred Indigenous Knowledge embodied in the work was evidence that a substantial reproduction of the work had occurred. The Indigenous Knowledge in the work was secret men’s business; when this evidence was given the court was cleared of all women so as to uphold the cultural integrity of the Indigenous Knowledge. Further, in accordance with Indigenous custom, throughout the case Justice Von Doussa referred to deceased artists involved in the case by their appropriate skin names.²⁷ *Milpurrurru v Indofurn* demonstrates that Australian courts have been willing to recognise and accommodate Indigenous secret and sacred cultural practices in the cases that come before them.

Copyright could be used to provide indirect protection by controlling access to and use of Indigenous Knowledge in a recorded form. However, copyright does not recognise the continuing right of traditional custodians to limit the dissemination of secret or sacred images

²³ *Milpurrurru v Indofurn Pty Ltd* (1994) 30 IPR 209, 239 (von Doussa J).

²⁴ NSW Education Standards Authority, *Moral rights*, <<https://ab-ed.bostes.nsw.edu.au/go/aboriginal-art/protecting-australian-indigenous-art/background-information/mechanisms-for-protection-in-australia/moral-rights>>.

²⁵ Patricia Adjei, Submission to *Finding the Way*, IP Australia Indigenous Knowledge Consultation, <https://www.ipaustralia.gov.au/sites/g/files/net856/f/submission_-_patricia_adjei.pdf>.

²⁶ Dr Lisa Strelein, AIATSIS Submission to *Finding the Way*, IP Australia Indigenous Knowledge Consultation (2016), 3.

²⁷ *Milpurrurru v Indofurn Pty Ltd* (1994) 30 IPR 209, 209 [3] (Von Doussa J).





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or Indigenous Knowledge after the term of copyright has expired.

1.1.9 Licensing

Copyright owners may exercise any of their exclusive rights; alternatively, they may permit others to do so. Copyright owners may grant a licence to allow others to exercise certain copyrights in the work. This may be subject to conditions such as the payment of a fee; alternatively, the licence may be granted only for a certain time or purpose.

Collecting agencies such as Viscopy | The Copyright Agency can systematically manage copyright licensing requests for the use of its member artists' works.²⁸ As the representative, they will negotiate a licence and collect a fee. Often the fees are standard charges and artists are not necessarily consulted before the licence is granted. Some art centres have taken to organising their own licensing requests as it gives them more flexibility and the chance to negotiate creative outcomes for members.

Case Study: Martumili Artists

Martumili Artists was established by Martu people living in the communities of Parnpajinya (Newman), Jigalong, Parnngurr, Punmu, Kunawarritji, Irrungadji and Warralong.²⁹ Martumili Artists has been doing its own licensing for some time, using licence agreements developed with Arts Law.³⁰ The centre has found that being responsible for licensing has given it:

- Greater control over the types of licensing arrangements that the artists' work is used in;
- opportunities to earn additional income for project management; and
- the ability to negotiate different rates, taking into consideration the benefits to the profile of the artists and art centre from certain licensing opportunities.³¹

1.1.10 'Fair use' and Australian copyright law

Fair use is a defence to copyright infringement that is law in countries such as the United States. The Australian Law Reform Commission and the Productivity Commission have each recommended³² the introduction of a 'fair use' exception to Australian copyright law.³³ A 'fair use' exception would ask of any particular use of copyright material:

- Does this use unfairly harm a market the rights holder alone should be able to exploit, and so undermine the incentive to create?
- Is this use for an important public purpose, or for a different purpose than that for which the creator or rights holder intended?³⁴

²⁸ Artists in the Black, Copyright Licensing for Art Centres & Intellectual Property Licensing Toolkit, <<https://www.aitb.com.au/information-sheets/entry/artwork-licensing-toolkit-for-indigenous-art-centres/>>.

²⁹ Martumili Artists, *About Martumili Artists*, <<http://www.martumili.com.au/about-us.html>>.

³⁰ Artists in the Black, Copyright Licensing for Art Centres & Intellectual Property Licensing Toolkit, <<https://www.aitb.com.au/information-sheets/entry/artwork-licensing-toolkit-for-indigenous-art-centres/>>.

³¹ Adapted from Artists in the Black, Copyright Licensing for Art Centres & Intellectual Property Licensing Toolkit, <<https://www.aitb.com.au/information-sheets/entry/artwork-licensing-toolkit-for-indigenous-art-centres/>>.

³² Australian Law Reform Commission, *Copyright and the Digital Economy*, Report No 122 (2013); Productivity Commission, *Intellectual Property Arrangements: Productivity Commission Inquiry Report*, Report No 78 (2016).

³³ *Copyright Act 1968* (Cth), Division 3.

³⁴ Adapted from Australian Law Reform Commission, *Copyright and the Digital Economy*, Report No 122 (2013), 88 [4.4].





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If the use does not harm the right holder's economic interests, it will be permitted, in the name of 'facilitating the public interest in accessing material, encouraging new productive uses, and stimulating competition and innovation.'³⁵

There have been strong objections to the introduction of 'fair use' in Australia. Indigenous artists and creators have argued that fair use exceptions to copyright infringement would widen the scope for people to use copyright works without having to pay a licence fee. This would undermine the economic empowerment Indigenous artists and communities gain from the sale and reproduction of their works under Australian copyright law.³⁶

In August 2017, the Australian Government released its *Response to the Productivity Commission Inquiry into Intellectual Property Arrangements*, noting the recommendation for a fair use exception and confirming that further public consultations would take place.³⁷

There is some merit to the introduction of a principles based approach to copyright infringement such as fair use. The case by case assessment and lack of prescriptive rules provides flexibility to respond to changing conditions. Such an approach might influence the implementation of *sui generis* Indigenous Knowledge law in Australia.

1.1.11 Resale Royalty Right for Visual Artists Act 2009 (Cth)

Under the *Resale Royalty Right for Visual Artists Act 2009 (Cth)* ('Resale Royalty Act'), visual artists are entitled to 5% royalties for the second (and onwards) sale of their artworks that are valued at least \$1,000, if the sale is through auctioneers, galleries, museums, art dealers, or other art market professionals (the Scheme).³⁸

The Scheme was introduced to provide further recognition of visual artists' contributions to Australia's identity and economy,³⁹ and also to address particular disadvantage faced by Indigenous visual artists.⁴⁰ Collection of resale royalties under the Resale Royalty Act is administered by the Copyright Agency Limited.⁴¹ Since the introduction of the Scheme in 2010, the Copyright Agency has done a significant amount of work in educating Indigenous artists and organisations about the scheme, registering artists and getting payments to them, as well as streamlining the reporting and payments process for dealers.

As of June 2017, the Scheme has generated over \$5.27 million in royalties for 1,440 artists from 14,897 resales. 63% of artists receiving a payment are Indigenous.⁴²

³⁵ Australian Law Reform Commission, *Copyright and the Digital Economy*, Report No 122 (2013) 88, [4.4].

³⁶ Copyright Agency, 'Productivity Commission's recommendations attack Australian creators', (2016) <<https://www.copyright.com.au/2016/12/productivity-commissions-recommendations-attack-australian-creators/>>.

³⁷ Commonwealth of Australia, *Australian Government Response to the Productivity Commission Inquiry into Intellectual Property Arrangements* (Commonwealth of Australia, 2017), 7.

³⁸ *Resale Royalty Right for Visual Artists Act 2009 (Cth)* s 8 .

³⁹ Office for the Arts, *2013 Review of the Resale Royalty Scheme: Review Consultation* (12 June 2013)

Department of Regional Australia, Local Government, Arts and Sport

<<http://content.webarchive.nla.gov.au/gov/wayback/20160615103337/http://arts.gov.au/sites/default/files/visual-arts/Discussion%20Paper%20-%202013%20Review%20of%20Resale%20Royalty%20Scheme.pdf>>.

⁴⁰ Department of Communications, Information Technology and the Arts, 'Report of the Contemporary Visual Arts and Craft Inquiry', (2002) 158.

⁴¹ Copyright Agency, *Resale Royalty* (3 July 2017) <<http://www.resaleroyalty.org.au/>>.

⁴² Email from Department of Communication and the Arts to Terri Janke and Company, 18 July 2017.





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The Resale Royalty Act was reviewed in 2013, receiving 74 submissions.⁴³ Some stakeholders acknowledged that the Act has been invaluable in allowing benefits to flow back to artists, particularly remote Indigenous artists.⁴⁴ However, other stakeholders, in particular Ninti One Limited, in their submission summarises the problems with the current resale royalty framework for Indigenous artists:⁴⁵

- Complexity and cost of administrative requirements, even when a sale did not result in profit;
- Little awareness by artists that a resale royalty scheme exists, and difficulty in understanding the laws;
- Ineffective for most Indigenous artists, as galleries (to get around the need to pay resale royalties when they sell an artwork) are replacing upfront cash payments to artists with consignments, resulting in no payments to the artist until a sale is made; and
- More consignments greatly impacts emerging Indigenous artists as it decreases cash flow.

Despite the issues surrounding cash flow, consignment is now the industry standard used by most commercial galleries nationally and largely by Indigenous owned art centres. The increase in this mode of selling has had a side benefit of increasing transparency in sales arrangements between dealers and Indigenous artists.

There are differing opinions within the art community about the effectiveness of the Resale Royalty Act. However, there have been no changes made to the Scheme since the review.

1.1.12 Importation provisions

Owners of copyright in literary, dramatic, musical and artistic works have the right to control importation of copyright-infringing items imported into Australia for commercial purposes.⁴⁶

Division 7 of Part V of the Copyright Act 1968⁴⁷ establishes a procedure where a person who is the owner of copyright material may lodge an objection with the ACS in relation to the importation of copies of that material.⁴⁸

In the 'Carpets Case', a claim of infringement under section 37 of the *Copyright Act 1968* (Cth) was established. Von Doussa J was satisfied that the importer knew, or ought reasonably to have known that if the imported carpets were made in Australia, it would have constituted an infringement of the copyright.

The *Intellectual Property Laws Amendment (Raising the Bar) Act 2011* (Cth) introduced provisions which compel Australian Customs to seize imported shipments of goods suspected to be an infringement of copyright or a registered trade mark, if the relevant copyright or trade

⁴³ Department of Communication and the Arts, *Review of the Resale Royalty Scheme*, <<http://webarchive.nla.gov.au/gov/20160615103337/http://arts.gov.au/visual-arts/resale-royalty-scheme/review>>.

⁴⁴ Arts Law, Submission No 57 to Department of Communications and the Arts, *Review of the Resale Royalty Scheme*, (12 July 2013).

⁴⁵ Ninti One, Submission No 54 to Department of Communications and the Arts, *Review of the Resale Royalty Scheme*, (11 July 2013).

⁴⁶ *Copyright Act 1968* (Cth) s 37.

⁴⁷ Division 7 of Part V of the Copyright Act 1968 establishes a procedure where a person who is the owner of copyright material may lodge an objection with the ACS in relation to the importation of copies of that material.

⁴⁸ Australian Institute of Criminology, *Intellectual property crime and enforcement in Australia* (Research and Public Policy Series No 94, 2008), 44.





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mark owner has lodged a notice of objection.⁴⁹

The implementation raises the possibility for Indigenous copyright holders and trade mark holder to control over infringing works. However, for Australian Customs to act and seize goods, the relevant owner has to lodge a notice of objection. This does little to provide any protection for Indigenous people's knowledge as they would need to be aware of the importation of these goods and the process for lodging an objection.

1.1.13 Summary - Copyright

Indigenous creators have operated within the boundaries of copyright law to protect their works. Copyright legislation affords both economic and moral rights to the owner. Whilst there has been some judicial acknowledgment of communal ownership in equity, copyright is based upon notions of individual authorship. Indigenous groups do not have communal moral rights to their Indigenous Knowledge.

Copyright protection of intangible forms of Indigenous Knowledge and Traditional Cultural Expression is limited as the criteria for protection is rarely met. Works must be original and in material form. Indigenous people who hold traditional knowledge and are recorded generally do not own the copyright in the recording nor the underlying knowledge of their oral information. Researchers and recorders who interview Indigenous people may not cover the issue, or be willing to follow cultural protocols. No authorship rights for Indigenous holders of knowledge are recognised by the law. Performer's rights can provide some control to the performer, but a lack of legal assistance and knowledge of how rights are assigned and transferred limits the effectiveness of utilising copyright to ensure legal ownership and culturally appropriate use of Indigenous Knowledge.

Australia's copyright system has been largely effective in creating legally enforceable rights in Indigenous Knowledge. Under copyright law, Indigenous artists and creators have been able to commercially benefit from their works and be properly attributed for material expressions of cultural material. However, Indigenous artists and communities have struggled to safeguard the cultural integrity of the underlying knowledge in copyright works, as this intangible element of the work remains unprotected.

Extending the ambit of copyright law to non-material form works, and further education for Indigenous people surrounding the creation and assignment of legal rights, would significantly increase the effectiveness of copyright law in allowing Indigenous people to own, manage and benefit from their cultural heritage.

1.2 Patents

Patents protect invented products and methods of manufacture which are novel and include an inventive step.⁵⁰ The *Patents Act 1990* (Cth) grants an inventor a commercial monopoly over the use of their invention. It gives a patentee exclusive rights over their patented material to exploit the invention, or to authorise another to exploit the invention, for the term of the patent.⁵¹ In Australia, there are two types of patents:

- (i) a standard patent, which lasts for up to 20 years; and
- (ii) an innovation patent, a relatively quick, inexpensive way to obtain protection,

⁴⁹ *Intellectual Property Laws Amendment (Raising the Bar) Act 2011* (Cth), Schedule 5.

⁵⁰ *Patents Act 1990* (Cth) s 18.

⁵¹ *Patents Act 1990* (Cth) s 13.





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lasting up to eight (8) years. Innovation patents are for inventions with a shorter market life such as new technology inventions.

As patents are a form of personal property, they may also be licensed to others.

1.2. Is Indigenous Knowledge patentable?

The Aboriginal inventor David Uniapon registered ten patents including a shearing tool patent filed in 1910. However, much Indigenous Knowledge concerning agricultural, pharmaceutical and scientific practices, passed down through generations, is not generally patentable because it cannot meet the necessary legislative criteria.

1.2.1 Novelty

To have a patent application approved, an inventor or organisation needs to demonstrate that the invention is new and involves an inventive step.⁵² However, the collective or cumulative way that inventions involving Indigenous Knowledge are made 'may not correspond directly with the notions of inventorship and inventive step that are embedded in the patent system'.⁵³

Patents apply to inventions or processes – a good idea or a mere discovery is not patentable. Therefore, Indigenous people have no intellectual property rights in resources that exist naturally on their land. To be patentable under the *Patents Act 1990* (Cth) there must be some newly invented method of using the material, or a new adaption of it that serves a new purpose.⁵⁴

1.2.2 Patent life

Patents are made public on registration, but grant the owner an exclusive monopoly over the invention for twenty years. Upon expiration of the patent, the invention becomes freely available to use. Indigenous people, however, seek to hold rights in their medicinal and plant knowledge in perpetuity. This makes patent registration unsuitable as a method of enforcing rights in Indigenous Knowledge.

1.2.3 Prior art base

Assessments of whether the subject matter is novel are made against the background of knowledge in the professional field, known as the 'prior art base'.⁵⁵ Indigenous people across the world have been prevented from being able to patent their traditional medicinal remedies because much of this knowledge has been published by researchers or by Indigenous people

⁵² *Patents Act 1990* (Cth) s 18(1).

⁵³ World Intellectual Property Organisation Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore, *Recognition of Traditional Knowledge within the Patent System*, 13th sess, WIPO/GTRKF/IC/13/7 (18 September 2008), annex, 4 [10].

⁵⁴ *National Research Development Corporation v Commissioner of Patents* (1990) 102 CLR 252.

⁵⁵ *Patents Act 1990* (Cth) s 7(1).





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themselves.⁵⁶ Once the information is published, it becomes part of the 'prior art base', and is no longer patentable.

1.2.4 Opposition

Indigenous people can stop other people from claiming rights in their Indigenous Knowledge by opposing a patent application. A notice of opposition to the grant of a standard patent application must be filed within three months of IP Australia publishing the acceptance of an application in the Australian Official Journal of Patents.⁵⁷ An innovation patent may be opposed at any time after it has been certified.⁵⁸

Indigenous people may oppose the grant of patent on the grounds that the invention claimed in the application is not new and/or inventive. A patent application filed by Mary Kay in 2007 which included the use of extracts of Kakadu Plum, an Indigenous bush food, for skin care purposes, was rejected by IP Australia for lack of novelty and obviousness.⁵⁹ The company then withdrew this application from IP Australia.⁶⁰ Opponents to the patent argued that the historical use of the Kakadu plum by the Mirarr people for medicinal purposes meant that the patent was not novel, and that the documentation of such traditional uses of the Kakadu plum was evidence of prior art.⁶¹

1.2.5 High cost of creating and patenting inventions

Patent costs are substantial; there are various evidentiary, scientific and legal stages to patent applications that require significant funding. An application involves the drafting of specifications – technical details of the patent inventiveness and the monopoly claimed. Maintenance of a patent for a 20 year term is estimated by IP Australia costs about \$8,000. Furthermore, applying for a patent in respect of a biotechnological invention requires significant and specific technical knowledge and material that is not readily available to Indigenous communities.

1.2.6 Pharmaceutical patenting and traditional knowledge

Many pharmaceutical and research companies engage in what is known as bioprospecting. This involves the search for useful plant related substances that can be developed into marketable commodities such as pharmaceuticals, pesticides and cosmetics.⁶² As a patent

⁵⁶ Michael Blakeney, 'Bioprospecting and the Protection of Traditional Medical Knowledge' (1997) 6 *European Intellectual Property Reports* 298, 300.

⁵⁷ IP Australia, *Opposing a patent*, <<https://www.ipaustralia.gov.au/patents/managing-your-patent/enforcing-your-patent/opposing-a-patent>>.

⁵⁸ IP Australia, *Opposing a patent*, <<https://www.ipaustralia.gov.au/patents/managing-your-patent/enforcing-your-patent/opposing-a-patent>>.

⁵⁹ Dr Daniel Robinson, Finding the Way submission: <https://www.ipaustralia.gov.au/sites/g/files/net856/f/submission_-_daniel_robinson.pdf>, 15.

⁶⁰ Dr Daniel Robinson, Finding the Way submission: <https://www.ipaustralia.gov.au/sites/g/files/net856/f/submission_-_daniel_robinson.pdf>, 15.

⁶¹ Emma Bathurst, 'Patent over plum in a pickle', *King & Wood Mallesons IP Whiteboard* (13 December 2010) <<http://ipwhiteboard.com.au/patent-over-plum-in-a-pickle/>>.

⁶² Michael Davis, 'Biological Diversity and Indigenous Knowledge' (Research Paper No 17, Parliamentary Library, Parliament of Australia, 1998), 5.





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is not granted in respect of a naturally occurring resource, most patent applications in the area of biotechnological inventions relate to a new compound, or a process for producing a new compound. Scientists can extract the pharmaceutical components of medicinal plants, and then isolate the active ingredients. Thus, while it may not be possible for Indigenous people to patent their medicinal and plant knowledge, it is possible to patent products and substances derived from nature.

Davis notes that the ethical concerns regarding the collection and use of such biological products relate to the lack of informed consent or equitable participation of Indigenous communities who claim rights in the products and knowledge.⁶³ There has been historical tendency to view Indigenous participants in research as informants rather than collaborators.⁶⁴ However, with the growing appreciation for the value that Indigenous researchers bring, more patent collaborations are emerging. For example, the Chuulangun Aboriginal Corporation sought out and worked with university-based researchers to produce a research collaboration; the collaborators filed a joint patent application in 2010 for a medicine developed from Indigenous Knowledge in the Uncha plant.⁶⁵ In 2004, John Watson, an Indigenous elder who was central to research on the analgesic properties of the marjarla plant, was certified as a co-owner of a patent with Griffith University.

The issue now for Indigenous communities is ensuring that companies and researchers that collect biological knowledge and products are required to return financial benefits to the Indigenous communities,⁶⁶ and controlling access to land so that those who seek to avoid Indigenous protocols are restricted from accessing biological resources.

1.3 Plant Breeder's Rights

The development of plant varieties with desirable traits can ensure the conservation and sustainable use of native plant species. This is encouraged by creating economic opportunities for breeders and growers under the *Plant Breeder's Rights Act 1994* (Cth) ('PBR Act') whereby they may apply for exclusive proprietary rights over plant varieties that they develop.

Plant breeders' rights protect new plants or varieties of an existing plant that have been bred, either independently or jointly, by a plant breeder who can demonstrate their distinctness, uniformity and stability⁶⁷ within a growing trial.⁶⁸ If a plant breeder can successfully meet this test they are granted exclusive rights over the registered plant variety for a term of 20 years, or 25 in the case of tree or vine species.⁶⁹

Indigenous people face many of the problems in accessing the PBR Act as they do under patent law. Applications are expensive and require the applicant to provide extensive information, which could only come from considerable labour, expense and expertise. Under the PBR Act, the applicant must provide descriptions of the plant sufficient to establish a prima

⁶³ Michael Davis, 'Indigenous peoples and intellectual property rights' (Research Paper No 20, Parliamentary Library, Parliament of Australia, 1997), 4.

⁶⁴ Expert Working Group Report, 'Indigenous Engagement with Science, towards Deeper Understanding, *Inspiring Australia*, August 2013. p. iv.

⁶⁵ 'Anti-inflammatory compounds', (2010), Patent No. 2009905498.

⁶⁶ Michael Davis, 'Indigenous peoples and intellectual property rights' (Research Paper No 20, Parliamentary Library, Parliament of Australia, 1997), 4.

⁶⁷ *Plant Breeder's Rights Act 1994* (Cth) s 43.

⁶⁸ *Plant Breeder's Rights Act 1994* (Cth) s 37.

⁶⁹ *Plant Breeder's Rights Act 1994* (Cth) s 22.





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facie case that the variety is distinct from other varieties of common knowledge; particulars of the way in which the variety was bred; particulars of the names (including pseudonyms) by which that variety is known and sold in Australia; and particulars of any previous applications and plant breeders rights granted in that variety in Australia.⁷⁰

There is currently no existing legal requirement to recognise Aboriginal ownership of plant materials or Aboriginal ecological knowledge in the development of varieties registered under the PBR Act.⁷¹ Further, there is evidence to suggest that plant breeders avoid using Indigenous Knowledge due to the legal, ethical and monetary complications involved.⁷²

1.4 Designs

The *Designs Act 2003* (Cth) aims to encourage innovation by giving designers the exclusive right to exploit their designs for a limited time and the right to stop rival designers free-riding on their innovations. Another policy objective of designs law is to stimulate further creative activity by providing access to a register of existing designs to disseminate the creative ideas of designers. Designs laws protect the way an object looks, and not its function.⁷³

An industrial design is the overall appearance of a manufactured product, resulting from one or more visual features of the product.⁷⁴ The design is distinct from the product itself. The visual features that form the design include the shape, configuration, pattern and ornamentation which, when applied to the product, give it a unique appearance.

In light of industry concerns with the designs system, the Australian Law Reform Commission ('the Commission') reviewed the *Designs Act 1906* (The Act) and published its final report in August 1995. It found the designs system provided ineffective protection with registration being too easy to obtain and infringement being too difficult to prove.

Design applications must be lodged with IP Australia. To be registrable, the design must be new and distinctive.⁷⁵ This test is assessed against the 'prior art base', namely, the designs used previously in Australia and those that have been published anywhere in the world.⁷⁶

A registered design can be a valuable commercial asset, giving the owner rights to prevent others from copying the visual appearance of the product. Indigenous jewellery, fashion and furniture designers have registered their independent creative designs, some of which draw on cultural imagery.

Some commentators have suggested that designs laws could be useful to allow Indigenous clan owned designs or styles to be owned by groups and recorded in the designs register.⁷⁷ However, the focus of the *Designs Act* is industrial designs and after 10 years, the registered

⁷⁰ *Plant Breeder's Rights Act 1994* (Cth) s 26.

⁷¹ Jen Cleary, 'It would be good to know where our food goes': Information Equals Power?', in Peter Drahos and Susy Frankel (eds), *Indigenous peoples' Innovation: Intellectual Property Pathways to Development* (Australian National University ePress, 2012) 57-76, 73.

⁷² Sarah Laird and Rachel Wynberg, *Access and Benefit-sharing in Practice: Trends in Partnerships Across Sectors* (Convention on Biological Diversity, 2009), 29, cited in Kylie Lingard, 'Legal support for the interests of Aboriginal and Torres Strait Islander peoples in commercial development of new native plant varieties' (2015) 26 *Australian Intellectual Property Journal* 39-57, 45.

⁷³ Explanatory Memorandum, *Designs Bill 2002* (Cth), clause 7.

⁷⁴ *Designs Act 2003* (Cth) s5.

⁷⁵ *Designs Act 2003* (Cth) s 15(1).

⁷⁶ *Designs Act 2003* (Cth) s 15.

⁷⁷ Australian Law Reform Commission, *Designs*, Report No 74 (1995), 84.





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design will fall into the public domain. This is insufficient for Indigenous people who seek to connect with clan owned 'designs' or 'styles' in perpetuity.

Internationally, some countries like South African have included traditional cultural expression parts to their designs register, which act more as a defensive database.⁷⁸ In the WIPO IGC discussion about designs, some countries in Africa called for the disclosure provisions to be included in the Designs process which would require applicants who incorporate traditional cultural expression in their design to identify these sources on application.

Case Study: Saltwater Jewellery Collection

In 2003, a group of Indigenous artists based in Queensland registered their jewellery designs with IP Australia under the *Designs Act 2003* (Cth). The designs included Indigenous symbols and motifs like platypuses, echidnas and Torres Strait Islander drums. It was registered by the group prior to the jewellery products being released commercially. In this way, the group was able to use the *Design Act 2003* (Cth) to claim commercial ownership of their designs before they were sold and produced in large quantities for consumers.

1.4.2. Designs - summary

The industrial and commercial focus of Australian designs law means that Indigenous people are unlikely to use it as a system of registering Indigenous Knowledge to access the legal rights granted by the law. Firstly, a registerable design must relate to the appearance of a product; it does not include Indigenous techniques or styles. Further, designs are registered for a maximum of ten (10) years, after which, they are publicly accessible. Such time limits are suitable for commercial development and exploitation of designs but are not appropriate for Indigenous people who wish to be able to have legal ownership of their designs and underlying Indigenous Knowledge in perpetuity so that they may be passed on to future generations.

1.5 Trade Marks

The *Trade Marks Act 1995* (Cth) defines a trade mark as:

a sign used, or intended to be used, to distinguish goods or services dealt with or provided in the course of trade by a person from goods or services so dealt with or provided by another person.⁷⁹

The owner of a trade mark has the exclusive right to use it, authorise others to use it and obtain relief when unauthorised use is made of it. The Act describes unauthorised use as the use of a mark that is identical or deceptively similar to the trademark without permission.⁸⁰

Indigenous owners of registered trade marks are awarded certain economic rights, allowing them to take action against competing traders who attempt to use the same or similar marks. Trade marks may also be a useful way of ensuring authenticity and culturally appropriate use of cultural expression and Indigenous Knowledge, particularly given the constantly growing

⁷⁸ *Designs Act 1993* (South Africa).

⁷⁹ *Trade Marks Act 1995* (Cth) s17.

⁸⁰ *Trade Marks Act 1995* (Cth) s 20.





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commercial demand for Aboriginal art and craft.

1.5.1 Can Indigenous Knowledge be registered as a trade mark?

There is scope under the *Trade Marks Act 1995* (Cth) for Indigenous registered owners to prevent their names and symbols from being used by competitors in related classes of goods and services. Trade marks may also be owned collectively, which is consistent with notions of communal ownership of Indigenous Knowledge and cultural expression that exists within Indigenous groups within Australia.

More Indigenous community organisations and government bodies working in Indigenous affairs are making use of the trade mark registration system. Indigenous businesses also utilise trade marks, particularly to promote their products and services as authentic. This has been aided by IP Australia's *Nanga Mai Arung Dream Shield: A guide to protecting designs, brands and inventions for Aboriginal and Torres Strait Islanders*.⁸¹

Indigenous business owners in the arts are able to use the trade mark system in conjunction with contracts, copyright and protocols, to set commercial and cultural terms, and promote source and origin of their products.

However, more information and guidance on the specific legal aspects of trade mark registration could be utilised ensure Indigenous trade mark applications have a higher success rate.

1.5.2 Unauthorised use

When an applicant attempts to register a trade mark, they are not required by the Act to obtain any permission from traditional owners if the mark contains Indigenous cultural material. There is also nothing within the Act that would allow the Registrar to reject an application on the grounds that it uses an Indigenous word, symbol or design. As such, businesses may use Indigenous words and names without the prior informed consent or even the knowledge of the traditional owners. For example the word 'Monaro' is the name of a clan group but has been trademarked several times without consultation of the Monaro people.

Arguably, to name a business the name of a clan group implies some connection. While there is no recourse under trade mark law, there may be scope to prevent such use under trade practices provisions of the Australian Consumer Law concerning misleading sponsorship, connection or affiliation.

Due to the lack of provisions relating to Indigenous Knowledge, Indigenous groups cannot use Australian trade mark law to prevent others from using their cultural property to sell goods and services.

1.5.3 Scandalous or contrary to law

The Trade Marks Act 1995 (Cth) allows third parties to oppose the registration of a trade

⁸¹ IP Australia, *Nanga Mai Arung Dream Shield: A guide to protecting designs, brands and inventions for Aboriginal and Torres Strait Islanders*, Commonwealth of Australia, 2010, <http://www.ipaustralia.gov.au/uploaded-files/2973/Dream_Shield.pdf>.



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mark.⁸² One of the grounds for opposition is that the mark is scandalous or contrary to law.⁸³

Indigenous people may be able to make use of these grounds to challenge culturally offensive trade marks. There may be scope for an Indigenous community to challenge marks that make use of sacred material as scandalous. At the very least, it may be possible to draw offensive use to the attention of the registrar.

1.5.4 Advertising and Oppositions

Once a trade mark is accepted by the trade mark examiner, it is advertised in the Trade Mark Journal, and anyone may challenge the mark within a two month period. Indigenous people may make use of this provision to challenge marks that are filed by others.

Case Study: Utopia Batik Trade Mark

In 2003, a group of Aboriginal artists successfully opposed a trade mark application by the company Utopia Batik Pty Ltd, who sought to register the trade mark 'Utopia Batik'. The artists argued that the word 'Utopia' should not be the subject of a trade mark monopoly and that it should be available to all artists from the region.⁸⁴ The artists opposed the trade mark on the grounds that the applicant was not the owner of the trade mark.⁸⁵

1.5.5 Certification marks

Certification marks are trade marks that denote some type of quality or characteristic of the products and services. Use of the certification marks can be licensed to approved users, who must use the mark in accordance with the rules of the mark.

Applications for certification marks are examined by IP Australia and the Australian Competition and Consumer Commission (ACCC). The ACCC ensures that the rules to use the certification mark do not mislead consumers or raise issues relating to competition, unconscionable conduct, unfair practices, product safety and/product information.⁸⁶

Case Study: Australian Made, Australian Grown

An example of a certification trade mark in Australia is the 'Australian Made, Australian Grown' logo certification trade mark, consisting of the well-known green and gold triangle logo featuring an image silhouette of a kangaroo.⁸⁷ This was created by the Australian Government in 1986 as part of its Australian Made, Australian Grown campaign to promote Australian made products in export both domestically and overseas. It is owned by the Australian Made Campaign Ltd, a not-for-profit organisation.

Those who wish to use the 'Australian Made', 'Australian Grown', 'Product of Australia', 'Australian Seafood' or 'Australian' certified logo marks on their products must meet certain criteria set out in the Code of Practice, which includes meeting requirements under the Australian Consumer Law.⁸⁸ These logos can be found on over 10,000 products in Australia and overseas.⁸⁹

From July 2016, the use of these logos has expanded following the Australian Government's introduction of new food labelling and information requirements under the Australian Consumer Law.⁹⁰ By 1 July 2018, businesses selling food products in stores, markets, online or vending

⁸⁴ Terri Janke and Robynne Quiggin, 'Indigenous Knowledge and Customary Law' (Background Paper, No 2, Law Reform Commission of Western Australia, 2005).

⁸⁷ IP Australia, *Australian Made, Australian Grown Trade Mark*,





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machines have to change their food labels to comply with the standards to show:

- Where the food was produced, grown, made or packaged; and
- The percentage of Australian ingredients contained in a food product.

As a result, consumers are able to clearly understand where a food product comes from, allowing them to make a clear and informed decision in their purchases.

Other examples of the Australian certification trade mark system used by Indigenous people include the Supply Nation supplier certification mark that certifies a business as being Indigenous owned, managed and controlled, and the former National Indigenous Arts Advocacy Association's (NIAAA) Label of Authenticity.

1.5.6 Geographical Indications

Geographical Indications ('GIs') are a sign that identify goods as originating in a country, or in a region or locality in that country, where a given quality, reputation or other characteristic of the goods is essentially attributable to their geographical origin.⁹¹

Australia does not have a *sui generis* system for GIs. However, under the *Agreement on Trade-Related Aspects of Intellectual Property Rights* (TRIPS), Australia is obliged to provide a mechanism to protect GIs in Australia.⁹² There are two ways to do so:

- For wine or grape products, through the provisions of the *Australian Grape and Wine Authority Act 2013*;
- For all other products, registration of the GI as a certification trade mark.

Under the *Trade Marks Act 1995* (Cth) registered owners of trade marks, including GIs that are registered as certification marks, can give the Australian Border Force a Notice of Objection, which is a notice that objects to the importation of goods that infringe the registered GI. The Australian Border Force has powers to seize goods that are imported to Australia and, in the opinion of the Comptroller-General of Customs, is 'substantially identical with, or deceptively similar to' a trade mark that has provide notice to the Australian Border Force.⁹³

GIs benefit Indigenous communities by facilitating the commercial exploitation of Indigenous Knowledge.⁹⁴ GIs provide Indigenous artists or regional communities with a means to benefit

<<https://search.ipaustralia.gov.au/trademarks/search/view/451318?q=australian+made>>.

⁸⁴ Terri Janke and Robynne Quiggin, 'Indigenous Knowledge and Customary Law' (Background Paper, No 2, Law Reform Commission of Western Australia, 2005).

⁸⁵ *Trade Marks Act 1995* (Cth) s 58.

⁸⁶ Australian Competition and Consumer Commission, *Certification Trade Marks*, <<https://www.accc.gov.au/business/applying-for-exemptions/certification-trade-marks>>.

⁸⁷ IP Australia, *Australian Made, Australian Grown Trade Mark*, <<https://search.ipaustralia.gov.au/trademarks/search/view/451318?q=australian+made>>.

⁸⁸ Australia Made Campaign Limited, *Australian Made, Australian Grown Trade Mark Code of Practice* (1 July 2014) <https://www.ipaustralia.gov.au/sites/g/files/net856/f/certification_rules/451318.pdf>.

⁸⁹ Australia Made Campaign Limited, *Using the logo*, <<http://www.australianmade.com.au/for-business/using-the-logo/>>.

⁹⁰ Australian Competition and Consumer Commission, *Country of origin*, <<https://www.accc.gov.au/consumers/groceries/country-of-origin>>.

⁹¹ *Trade Marks Act 1995* (Cth) s 6; *Agreement on Trade-Related Aspects of Intellectual Property Rights* 33 ILM 1197 (1994) Article 22(1).

⁹² *Agreement on Trade-Related Aspects of Intellectual Property Rights* 33 ILM 1197 (1994) Article 22(2).

⁹³ *Trade Marks Act 1995* (Cth) s133.

⁹⁴ World Intellectual Property Organisation, *Geographical Indications: An Introduction*, <http://www.wipo.int/edocs/pubdocs/en/geographical/952/wipo_pub_952.pdf>.





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from their Indigenous Knowledge in products such as Indigenous bush foods, arts and crafts⁹⁵ by differentiating them in the market. GIs also allow regional groups to be properly attributed for their Indigenous Knowledge.

GIs could be used by Indigenous people to identify certain products or their clan names, artistic designs, motifs, language words in relation to particular regions.

Case Study: Darjeeling Tea

The widely known Darjeeling tea is native to the Darjeeling town in the Indian state of West Bengal. The tea has been cultivated, grown and produced in the Darjeeling area dating back to the 1840s.⁹⁶ Most of Darjeeling tea that is produced is exported overseas to markets such as Japan, Russia, the United States, UK, Netherlands, Germany and France.⁹⁷ In 2010, 4067 million kilograms of Darjeeling tea was exported worldwide.⁹⁸

As the tea began to gain recognition overseas, fake Darjeeling tea produced in other countries like Nepal, Kenya and Sri Lanka was being labelled, passed off and sold as 'Darjeeling tea'.⁹⁹ This affected the profits and livelihood of the Darjeeling communities producing the tea.¹⁰⁰

In 1983, to prevent the misuse of the Darjeeling tea's reputation and brand, the Tea Board of India¹⁰¹ created the Darjeeling logo and registered it as a certification mark in India and across the UK, US, Canada, Japan and Egypt.¹⁰² In 2004 when GI laws were introduced in India, Darjeeling was registered as a GI and was the first GI label in India. Now, the Darjeeling word and logo is a well-known GI internationally,¹⁰³ including in Australia as a certification mark.¹⁰⁴

The Tea Board of India has appointed the World Wide Watch agency CompuMark to monitor all incidents of unauthorised use and attempted registrations of Darjeeling worldwide.¹⁰⁵ The Tea Board of India has fought numerous cases against infringement and misuse of Darjeeling, including luxury brand BVLGARI in its attempt to trade mark the phrase 'Darjeeling Tea fragrance for men'.¹⁰⁶

This demonstrates how GIs can be used to identify products that are native to particular regions or localities, or made using native or Indigenous processes and characteristics associated with particular regions that is commercialised in products.

⁹⁵ Terri Janke and Company, 'New tracks: Indigenous knowledge and cultural expression and the Australian intellectual property system' (2012) Submission to *Finding the Way*, IP Australia Indigenous Knowledge Consultation, 16 [3.2.3].

⁹⁶ Sudhir Ravindran and Arya Matew, 'The Protection of Geographical Indication in India – Case Study on Darjeeling Tea' (2009) *Intellectual Property Rights Index*, 60.

⁹⁷ *Ibid*, 61.

⁹⁸ World Intellectual Property Organisation, *Darjeeling Tea – A Geographical Indication*, <http://www.wipo.int/edocs/mdocs/geoind/en/wipo_geo_lim_11/wipo_geo_lim_11_11.pdf>.

⁹⁹ 'Darjeeling tea growers at risk', *BBC News* (online), 21 July 2001, <<http://news.bbc.co.uk/2/hi/business/1456988.stm>>.

¹⁰⁰ *Ibid*.

¹⁰¹ The relevant government agency established to promote the cultivation, trade and export of tea in India.

¹⁰² World Intellectual Property Organisation, n 98.

¹⁰² 'Darjeeling tea growers at risk', *BBC News* (online), 21 July 2001, <<http://news.bbc.co.uk/2/hi/business/1456988.stm>>.

¹⁰³ *Ibid*.

¹⁰⁴ IP Australia, *Australian Trade Mark 998592*, <<https://search.ipaustralia.gov.au/trademarks/search/view/998592?q=998592>>.

¹⁰⁵ S.C. Srivastava, 'Protecting the Geographical Indication for Darjeeling Tea', (World Trade Organisation, Case Study, 2003).

¹⁰⁶ Sudhir Ravindran and Arya Matew, n 96.





1.5.7 Collective trade marks

A collective trade mark is a sign used in relation to goods and services provided in the course of trade by members of an association to distinguish their goods and services in the market.¹⁰⁷ The association representing the collective members is the registered owner of the mark. Collective trade marks do not require specific rules in the same way that certification marks, and neither is there a separate stage for checking by the Australian Consumer and Competition Commission. Once registered, only the association's members may use the collective trade mark. Members cannot stop other members from using the collective trade mark. However, if the member does not comply with the association's rule, rights to use the mark can be revoked.¹⁰⁸ A collective trade mark cannot be assigned.

An association refers to 'an organisation of people with a common purpose and formal structure'.¹⁰⁹ This may include incorporated associations and potentially unincorporated associations, and maybe even Aboriginal and Torres Strait Islander Corporations. As noted by Terri Janke and Robynne Quiggin, Indigenous associations could develop collective trade marks to be used by members when marketing their goods and services. Members would be required to comply with the rules of the association, including cultural protocols.¹¹⁰

Examples include the ASPA collective mark of the Australian Social Policy Association registered for training, education and advisory services¹¹¹ and the Kimberley Group Training Incorporated's collective mark owned registered for career counselling and employment training for Indigenous and non-Indigenous people in the Kimberley region.¹¹²

It is possible that collective marks could be used by Aboriginal artists association, or bush food alliance entities. In the United States, the *Indian Arts and Craft Act 1935* (US) allows native American collective association to apply for a collective membership design mark that 'promotes the preservation of the Native American or American Indian culture, tradition, art and related activities'.¹¹³ It is unlawful for a person to display or sell a good 'in a manner that falsely suggests it is Indian produced'.¹¹⁴ There may be scope for Indigenous Australian arts and cultural associations to develop similar marks for use by their members to promote their cultural expression.¹¹⁵ Similarly, the collective mark could be used to denote geographic regions. A great example for use by Indigenous people is the Peruvian Potato Park trade mark, used by Indigenous members of the Association 'trading in local products steeped in an area's biocultural heritage'.¹¹⁶

¹⁰⁷ *Trade Marks Act 1995* (Cth) s 162.

¹⁰⁸ *Trade Marks Act 1995* (Cth) s 165.

¹⁰⁹ Macquarie Dictionary, *Trade Mark Manual*, <http://manuals.ipaustralia.gov.au/trademarks/Part_33_Collective_Trade_Marks/33.1_What_is_a_collective_trade_mark.htm>.

¹¹⁰ Terri Janke and Robynne Quiggin, 'Indigenous Knowledge and Customary Law' (Background Paper, No 2, Law Reform Commission of Western Australia, 2005).

¹¹¹ IP Australia, *Australian Trade Mark 1289368*, <<https://search.ipaustralia.gov.au/trademarks/search/view/1289368?q=1289368>>.

¹¹² IP Australia, *Australian Trade Mark 1534556*, <<https://search.ipaustralia.gov.au/trademarks/search/view/1534556?q=1534556>>.

¹¹³ Title 25 of the *United States Code*, s 205(c).

¹¹⁴ Title 25 of the *United States Code*, s 205(c).

¹¹⁵ Terri Janke and Robynne Quiggin, 'Indigenous Knowledge and Customary Law' (Background Paper, No 2, Law Reform Commission of Western Australia, 2005).

¹¹⁶ Alejandro Argumedo, *Collective trademarks and biocultural heritage*, (International Institute for Environment and Development, London, 2013), 6.



1.5.8 Defensive trade marks

Defensive trade marks can be registered where an existing trade mark is so well-known that even where the mark is used by someone else in a different class of goods or services, it still indicates to the consumer that there is a connection to the famous mark.¹¹⁷

Registration of a defensive trade mark allow for the owners of well-known marks to extend the scope of their trade marks to other, unrelated classes of goods and services they do not intend to use, but where use by others (in any class), could confuse consumers.¹¹⁸ An example of an Australian defensive mark is the word 'Telstra'.¹¹⁹

To register a defensive mark, the applicant will need to have an already registered well-known trade mark. The defensive trade mark application will be based on this trade mark.¹²⁰ They can only be registered, and owned, by the owner of the existing trade mark.¹²¹

Defensive trade marks cannot be removed for non-use by other people wanting to use the same trade mark. There is no need to show that you intend to use the mark in those other classes the defensive trade mark is filed for.¹²²

The Indigenous owners of registered famous trade marks could apply to have their trade mark become a defensive mark so that they could stop other business traders from using the word or logo in any class of good and services. For example, in the US, the Navajo Nation has several registered trade marks in a range of classes including clothing, accessories and jewellery. It is arguable that that Navajo trade mark has become well known that any use is considered to be linked back to the Navajo Nation. In this way, Indigenous peoples' representative organisations such as prescribed body corporates could be the guardians of clan names and cultural emblems. Fundamentally, the trade mark has to have already been registered, and names and emblems would need to meet the requirements of registration. Also, the names and emblems would need to be well-known. There is also the issue that the entity that is the registered owner should be agreed upon by the clan group as being the representative owner. It would also be up to the registered owner to enforce the trade mark rights by taking action against infringers.

Whilst the scope of the protection is narrow, it is worthwhile educating Indigenous people about the potential for defensive trade marks to assist, particular if the strategy is to commercial products and services themselves.

1.5.9 Importation provisions

The registered owner of a registered trade mark may give to the Comptroller-General of Customs a notice in writing objecting to the importation of goods that infringe upon the trade mark.¹²³ The Australian Border Force (ABF) administers a customs seizure scheme which

¹¹⁷ *Trade Marks Act 1995* (Cth) s 185(1).

¹¹⁸ *Trade Marks Act 1995* (Cth) s 185(1).

¹¹⁹ IP Australia, *Australian Trade Mark 1038720*,

<<https://search.ipaustralia.gov.au/trademarks/search/view/1038720?s=48f0632a-6985-474b-a596-a4cfd5fe6dd3>>.

¹²⁰ *Trade Marks Act 1995* (Cth) s 185.

¹²¹ *Trade Marks Act 1995* (Cth) s 185(1).

¹²² *Trade Marks Act 1995* (Cth) s 185(2).

¹²³ *Trade Marks Act 1995* (Cth) s 132(1).



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controls the import of counterfeit goods into Australia. The ABF has powers to seize infringing goods under the Trade Marks Act 1995 (Trade Marks Act).¹²⁴

After the *Raising the Bar*¹²⁵ reforms, a Notice of Objection now provides ‘a simpler and more effective means of identifying potentially counterfeit goods entering Australia’.¹²⁶ The onus is now upon an importer to claim any seized goods. This will mean that a trade mark holder will not have to send a letter of demand to ensure the goods are forfeited to and destroyed by the ABF. Trade mark holders who lodge a Notice of Objection may also be able to obtain additional information about the importer of the seized goods.¹²⁷ The amendments will enable rights holders to better identify the participants in the manufacture and distribution of counterfeit goods.¹²⁸

1.5.10 Trade Marks – Summary

Indigenous businesses have been granted economic rights in Indigenous Knowledge by registering trade marks. The law enables Indigenous Knowledge owners to use their cultural property for their own benefit – to promote their goods and services. There is also scope for Indigenous people to make use of collective or certification marks to assist consumers to identify authentic Indigenous products and services. However, the specific application of trade mark law, and the lack of statutory recourse available to Indigenous people if their words and symbols are used without consent, limits the effectiveness of the law. There is some scope for the development of trade mark legislation to be more effective in responding to the needs of Indigenous communities in relation to their Indigenous Knowledge. For example, an advisory body who is concerned with the use of cultural property in trade mark applications could help to prevent derogatory treatment of Indigenous Knowledge or use of Indigenous Knowledge without consent.

1.6 Confidential Information

Breach of confidence laws have been used to redress the harm caused to communities through unauthorised dissemination of sacred and secret Indigenous Knowledge. To establish a case, the applicant must show that:

- (a) The information has the necessary quality of confidence, or secrecy, about it
- (b) The information was conveyed in circumstances where there was an obligation of confidence
- (c) There was an unauthorised use of that information to the detriment of the party who communicated it.¹²⁹

¹²⁴ Australian Customs and Border Protection Services, Information Sheet: Intellectual Property Rights, Trade Mark & Copyright Seizures, <<https://www.border.gov.au/Forms/Documents/Information-Sheet-Trade-Mark-and-Copyright-Seizures-April-2013.pdf>>.

¹²⁵ *Intellectual Property Laws Amendment (Raising the Bar) Act 2011* (Cth).

¹²⁶ Davies Collison Cave Intellectual Property, *Trade mark and copyright owners benefit under new Australian Customs seizure procedures*, <<http://www.davies.com.au/ip-news/trade-mark-and-copyright-owners-benefit-under-new-australian-customs-seizur>>.

¹²⁷ *Trade Marks Act 1995* (Cth) s 134(4).

¹²⁸ Davies Collison Cave, Intellectual Property, *Trade mark and copyright owners benefit under new Australian Customs seizure procedures*, <<http://www.davies.com.au/ip-news/trade-mark-and-copyright-owners-benefit-under-new-australian-customs-seizur>>.

¹²⁹ *Coco v AN Clark (Engineers) Ltd* (1969) RPC 41 (Ch).





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Unlike copyright, breach of confidence laws extend to confidential communication that is in oral form. However, to bring a breach of confidence action, it is necessary to prove that a relationship of confidence existed at the time the information was imparted. It is arguable that this requirement might prevent Indigenous communities from establishing a cause of action due to the fact that the information in question might be known to a group of individuals or even an entire community. Finally, not all Indigenous knowledge is of a confidential nature. For example, ecological knowledge and knowledge expressed through artwork do not contain the requisite quality of secrecy. Thus, breach of confidence laws have limited application for Indigenous people who seek to ensure their Indigenous Knowledge is shared in culturally appropriate ways.

1.6.1 Non-Disclosure Agreements

In business dealings, confidentiality laws are often applied and put in writing through non-disclosure agreements (NDAs). NDAs are commonly used when individuals or businesses wish to protect their ideas, including intellectual property and Indigenous Knowledge. This is particularly during preliminary meetings, early negotiations for commercialisation, and in looking for potential business partners.

1.7 Passing Off

Indigenous artists and businesses can protect their business reputation and goodwill through an action over passing off.¹³⁰

The classic passing-off situation is where one trader represents his or her goods or services as those of another. However, a range of representations are now actionable, including:

- Misrepresentation as to the source of goods and services.¹³¹
- Misrepresentation that there is some sort of connection or association with another person's business, whether by way of partnership, sponsorship or licensing.¹³²
- Misrepresentation that there is a connection or association with another person's images, character and personalities.¹³³
- Deceptive or confusing use of names, descriptive terms and other indications to persuade purchasers to believe that goods or services have an association, quality or endorsement which belongs or would belong to goods or services of, or associated with, another or others.¹³⁴

To establish a cause of action in passing off, an Indigenous person or business would need to establish that the goods or business has acquired a certain goodwill and reputation.

As Indigenous interest groups are gaining reputations as producers from specific regions, it may be possible for Indigenous art and cultural material dealers and producers to demonstrate they have an established goodwill or reputation. Consumers have become more discerning and are purchasing Indigenous arts and cultural products on the strength of this reputation. However, establishing an action in passing off also requires proof that the damage or likely damage to goodwill or reputation was caused by the deception of the defendant in 'passing

¹³⁰ *Reddaway v Banham* [1896] AC 199, 204 (Lord Halsbury LC).

¹³¹ *Bollinger v Costa Brava Wines Co Ltd* (1960) RPC 16.

¹³² *Hogan v Koala Dundee Pty Ltd* (1988) 12 IPR 508.

¹³³ *Hogan v Koala Dundee Pty Ltd* (1988) 12 IPR 508, (Pincus J).

¹³⁴ *Moorgate Tobacco Co Ltd v Phillip Morris Ltd* (1984) 156 CLT 414, 445, 214, 516.





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off' the goods.¹³⁵ This evidential requirement is costly and a likely barrier to successful litigation.

1.7.1 Summary – Intellectual Property Laws

Intellectual property rights are based upon 'western notions of property that emphasise individual ownership and alienability.'¹³⁶ There are a number of intellectual property laws under which Indigenous people have been granted rights in their cultural products and expressions. However, the knowledge that gives rise to outputs protected by IPRs is a significant element of Indigenous culture. This intangible aspect of culture is extraneous to the scope of existing intellectual property laws in Australia.

Indigenous people may have access to intellectual property laws, but they are often inadequately informed about IPRs and lack the resources to bring costly and time consuming legal action to enforce them.

2. Trade Practices Laws

It is an offence under the *Competition and Consumer Act 2010* (Cth) to engage in misleading and deceptive marketing. Although no specific protections of Aboriginal and Torres Strait Islander traditional culture and knowledge are included in the Act, there is some scope under the law to restrict the sale and marketing of inauthentic Aboriginal art, products and services.

In the past, the Australian Consumer and Competition Commission (ACCC) have prosecuted traders who falsely marketed products as 'Aboriginal made' or 'authentic Aboriginal merchandise'.¹³⁷ In the *Carpets Case*¹³⁸, Justice Von Doussa found that the company who reproduced Aboriginal artworks onto carpets had engaged in misleading conduct by labelling the product with tags that stated 'Royalties are paid to Aboriginal artists'. The company was misleading the consumers into believing that the copyright in the artworks belonged to the company or had been licensed to it, or that the carpets were approved by the Aboriginal artists. It is in this way that there is scope under trade practices law to restrict the sale and marketing of Indigenous works that are not authentic.

The proliferation of inauthentic arts and crafts has an effect on the market for authentic Aboriginal products; Aboriginal artists lose sales as they are unable to compete with mass produced products. The Competition and Consumer Act cannot prevent the sale of inauthentic art where it is clearly labelled as such. However, there have been some attempts to use protocols to benefit Indigenous arts producers. These responses are voluntary, and unless incorporated into contracts, provide no avenue for legal recourse.

For example, the Indigenous Art Code sets standards for how to ethically deal with Indigenous artists.¹³⁹ The Indigenous Art Code provides that:

¹³⁵ *ConAgra Inc v McCain Foods (Aust) Pty Ltd* (1992) 23 IPR 193, 233.

¹³⁶ Michael Davis, 'Indigenous peoples and intellectual property rights' (Research Paper No 20, Parliamentary Library, Parliament of Australia, 1997), 1.

¹³⁷ See, for example *Australian Competition and Consumer Commission v Australian Dreamtime Creations Pty Ltd* (2009) 263 ALR 487.

¹³⁸ *Milpurruru & Ors v. Indofurn Pty Ltd & Ors* (1994) 130 ALR 659.

¹³⁹ Indigenous Art Code Ltd, Indigenous Art Code: A code to promote fair and ethical trade in works of art by Indigenous artists, <<http://www.indigenouartcode.org/>>.





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Dealer members must not make false and misleading representations or engage in conduct which constitutes misleading or deceptive conduct or conduct that is likely to mislead or deceive, when dealing with a person in connection with an artwork.¹⁴⁰

The Code then lists exemplary scenarios where misleading and deceptive conduct may occur including statements about authenticity or provenance, place of origin and whether the artwork was produced by an Indigenous artist.

However, the Code is ethical and voluntary - galleries and dealers have the option to take part. This may limit the Code's effectiveness if there is no perceived benefit for galleries and dealers that do subscribe. There have been calls to introduce the Code as mandatory but there has been little progress in this area. Art Code dealers and galleries could be more extensively marketed to art consumers so that there are economic incentives for use of and compliance with the protocols.

Inauthentic Indigenous art and craft

With the active support of the production of Indigenous art in Australia, a market in inauthentic arts products and merchandise, aimed at tourists, has also emerged.¹⁴¹ Arts Law estimates that up to 80% of items being sold as legitimate Indigenous artworks in tourist shops around Australia are inauthentic.¹⁴²

In 2017, Bob Katter introduced the Competition and Consumer Amendment (Exploitation of Indigenous Culture) Bill 2017 which looks at making amendments to the Competition and Consumer Act to stop the import of commercially produced works, made to look and feel like authentic Indigenous creations but made and imported from overseas. The Bill makes it an offence to supply or offer commercial goods to a consumer that include Indigenous cultural expression unless:

- it is supplied by, or in accordance with an arrangement with, each Indigenous community and Indigenous artist with whom the Indigenous cultural expression is connected; and
- it is made in Australia.

While organisations such as Arts Law commend Bob Katter for bringing the issue formally to the attention of the Australian Parliament, they have recommended a different approach regarding the criterion that art be exclusively produced in Australia:

[It does] not seem appropriate to restrict the methods by which authorised Indigenous art [can] be produced in a way that [does] not apply to the rest of the Australian arts community or which might have unintended adverse financial consequences for Indigenous artists and creators.

This option would draw on the regulatory power and expertise of the Australian Competition and Consumer Commission without requiring a new administrative regime.

¹⁴⁰ Indigenous Art Code Ltd, *Indigenous Art Code: A code to promote fair and ethical trade in works of art by Indigenous artists*, clause 2.2, <<http://www.indigenouartcode.org/>>.

¹⁴¹ ArtsLaw, 'Fake Art Harms Culture', (Discussion Paper, 15 February 2017), 2.

¹⁴² ArtsLaw, *Bob Katter MP Takes Fake Art Harms Culture to Parliament* (30 January 2017) <<https://www.artslaw.com.au/news/entry/bob-katter-mp-takes-fake-art-harms-culture-to-parliament/>>.





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In August 2017, the House of Representatives Standing Committee on Indigenous Affairs announced that it would inquire into the 'growing presence of inauthentic Aboriginal and Torres Strait Islander 'style' art and craft products and merchandise for sale across Australia.'¹⁴³

Summary – Trade Practices

Trade Practices laws have been effective in preventing misleading and deceptive trading practices where works have been falsely attributed to Indigenous artists. However, the ACCC lacks the ability to prosecute against culturally inappropriate treatment of Indigenous artwork or the sale of inauthentic arts where the seller makes it clear that the work is not authentic.

3. Land Rights and Native Title

3.1. Land Rights Act (Northern Territory)

The *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) (ALRA) was the first attempt by an Australian Government to legally recognise the Aboriginal system of land ownership. The ALRA was born in 1963 out of push for land rights by the Yolngu peoples in 1963. The Yolngu people sent a bark petition (Yirrkala Bark Petition) to the federal government requesting that they respect their land rights in relation to the construction, and lack of consultation, of a bauxite mine on their country. A further push came in 1966 in the form of the Gurindji peoples strike action at Wave Hill cattle station for increased wages and for portions of their land to be returned to them.¹⁴⁴

In 1972, as part of the Labour party's campaign, Labour leader Gough Whitlam made Aboriginal lands rights part of its policy. Shortly after, the ALRA was passed with the purpose of allowing grants of land to Traditional Aboriginal owners. The ALRA provided key features that enabled Aboriginal people the ability to control and protect their land. The ALRA defines traditional Aboriginal Owners as:

a local descent group of Aboriginals who:

- (a) have common spiritual affiliations to a site on the land, being affiliations that place the group under a primary spiritual responsibility for that site and for the land; and
- (b) are entitled by Aboriginal tradition to forage as of right over that land.¹⁴⁵

The ALRA establishes land councils to provide direction to the land trusts on the wishes of the traditional owners which then the land trust must carry out. The role of the land council is to consult and comply with traditional owners' decisions on the use of their land. The land council then directs the land trust on these proposals.¹⁴⁶ The ALRA has recently undergone some changes to allow Traditional Owners to permit a land trust to lease communities to government bodies.

¹⁴³ House of Representatives, 'Proliferation of inauthentic Indigenous art', (Media Release, 11 August 2017).

¹⁴⁴ National Museum Australia, *Defining Moments in Australian History: Aboriginal Land Rights Act*, <http://www.nma.gov.au/online_features/defining_moments/featured/aboriginal_land_rights_act>.

¹⁴⁵ *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) s 3(1).

¹⁴⁶ Central Land Council, 'The Land Rights Act and Changes Made Simple', (Central Land Council, Alice Springs, 2007), 3.





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The ALRA allows for the maintenance of cultural practises and knowledge through customary law. Section 71 of the ALRA grants Aboriginal people the right to enter onto Aboriginal land and use or occupy that land where the entry, occupation or use is 'in accordance with Aboriginal tradition governing the rights...with respect to that land'.¹⁴⁷ By granting legal title to land, the Act allows Aboriginal groups in the Northern Territory who can prove their traditional relationship to the land, to maintain their cultural identity through the practise and transmission of Indigenous Knowledge.

The ALRA also establishes a system of regulated access to Aboriginal land. People who wish to enter Aboriginal land require a written permit to do so.¹⁴⁸ Permits are issued only if the traditional owners or the Land Councils grant approval, and they have the legal right to grant or refuse permission. People who propose to conduct research, environmental activities, filming or commercial projects on Aboriginal land or with Aboriginal communities first require a permit to enter the land, and also require a permit to undertake such activities. By making such permits conditional upon the observance of cultural protocols, Aboriginal landowners can ensure that they have continuing legal rights to their Indigenous Knowledge and biological resources.

Case Study: Central Land Council Special Purpose Permits

The Central Land Council (CLC) was established under the ALRA. It is a Commonwealth corporate entity which represents Aboriginal people in Central Australia by helping them to manage their land and by representing their rights and interests.¹⁴⁹

The CLC makes the grant of special purpose permits conditional upon the applicant complying with protocols on the use of Indigenous Knowledge and Indigenous biological resources. The CLC outlines on its website the matters that an applicant should address in their applications for a special purpose permit. It includes requirements that:

- All projects must have the informed consent of Aboriginal landowners and Aboriginal participants;
- Aboriginal people should be involved in projects as far as practical;
- Applications should be accompanied with evidence of community support for the project;
- Applicants must ensure Aboriginal people have rights to control the publication and other uses of project outcomes. Applications must provide full details of any plans for future publications;
- Agreements to protect cultural and intellectual property rights and commercial rights must be made where appropriate; for example:
 - If an applicant seeks to use or take biological resources, they will require a benefit sharing agreement with the relevant Aboriginal landowners according to the *Biological Resources Act 2006* (NT); and
 - For ethnobotanical publications, applicants need to provide for Aboriginal control over all material produced or collected or otherwise negotiate an appropriate licensing arrangement.¹⁵⁰

¹⁴⁷ *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) s 71(1).

¹⁴⁸ *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) s 48H.

¹⁴⁹ Central Land Council, *About Us*, <<http://www.clc.org.au/articles/cat/about/>>.

¹⁵⁰ adapted from Central Land Council, *Application for a Special Purpose Permit*, <<http://www.clc.org.au/articles/cat/special-purpose-permits/>>.





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What are the problems with the ALRA?

Although the ALRA provides Aboriginal landowners in the Northern Territory with the ability to enforce protocols, there are some factors which reduce the effectiveness of the legislation.

It is often unclear what the role of the land councils are in relation to other bodies such as prescribed body corporates (PBCs), and the community. The process of consultation with traditional owners can be unclear – particularly as many PBCs are not yet fully functioning. For now, the land councils may play a gatekeeper role. However, given that there may be a number of bodies who are capable of making decisions in respect of particular land, there may be confusion over who to go to for consultation and consent. Other parties may see these overlapping structures of governance as a chance to forum shop in order to get a more favourable outcome.

3.2 Native Title

The *Native Title Act 1993* (Cth) ('NTA') codified the *Mabo v Queensland* decision which recognised the existence of native title in Australia. The NTA protects pre-existing Aboriginal and Torres Strait Islander rights and interests in lands and water according to traditional laws and customs.

The NTA establishes principles for protection of traditional knowledge when such knowledge informs the communal, group or individual rights and interests of Aboriginal peoples or Torres Strait Islanders in relation to land or waters, though the scope in which the NTA grants rights to Indigenous Knowledge continues to be unclear. The courts provide some guidance on this.

In *Bulun Bulun*¹⁵¹ the claimants argued that they had a native title right to paint; however, the judge did not make any comment on that point, and a similar argument was not raised before the court again until 2002 in *Western Australia v Ward*.¹⁵²

3.2.1 Commonwealth v Yarmirr

The High Court in the *Croker Island Case*¹⁵³ acknowledged that the claimants held a non-exclusive native title right to access the sea and sea bed for the purpose of safeguarding their cultural and spiritual knowledge. Although such a right is based on access, the case demonstrated some capacity of the common law to recognise Indigenous peoples' rights to maintain and transmit their culture.

3.2.2 Western Australia v Ward

The High Court in *Western Australia v Ward* held that native title rights are rights in relation to land; as such, native title may only grant Indigenous people legal rights in their Indigenous Knowledge in so far as it relates to land and waters.

The scope of the NTA looked as though it might expand after the judgment of Justice Lee in *Western Australia v Ward*.¹⁵⁴ At first instance, Justice Lee listed the rights which constituted

¹⁵¹ *Bulun Bulun v R & T Textiles Pty Ltd* (1998) FCA 1082; (1998) 86 FCR 244.

¹⁵² *Western Australia v Ward* (2002) 213 CLR 1.

¹⁵³ *Commonwealth v Yarmirr* (2001) 208 CLR 1.

¹⁵⁴ *Ward v Western Australia* (1998) 159 ALR 483.





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native title in the case as including 'the right to maintain and protect places of importance under traditional laws, customs and practices in the determination area' and 'the right to maintain, protect and prevent the misuse of cultural knowledge of the common law holders associated with the determination area'.¹⁵⁵

However, this finding was overturned on appeal. Following the High Court decision in 2002,¹⁵⁶ although it is still the case that native title rights may include a right to protect cultural resources, the scope for the application of those rights has been severely narrowed.

Section 223(1) of the Native Title was interpreted in *Ward* as not extending to recognition of rights to protect Indigenous Knowledge.¹⁵⁷ The section reads:

- (1) The expression native title or native title rights and interests means the communal, group or individual rights and interests of Aboriginal peoples or Torres Strait Islanders *in relation to land or waters, where....*
- (b) the Aboriginal peoples or Torres Strait Islanders, by those laws and customs, have a connection with the land or waters.¹⁵⁸

The majority judges in the Federal Court did not think that a right to maintain and prevent the misuse of Indigenous Knowledge was a 'right in relation to land' of a kind that could be the subject of native title.¹⁵⁹ If claims to Indigenous Knowledge 'go beyond denial or control of access to land or waters', they are not rights protected by the NTA.¹⁶⁰ The High Court further suggested that recognition of such a right would amount to something akin to a new kind of intellectual property right.¹⁶¹

The Court's determination that native title rights must be directly related 'to an interest in land'¹⁶² indicates that only those native title holders with exclusive rights to land will ever be able to assert legal ownership of their Indigenous Knowledge under the NTA.¹⁶³

In dissent, Justice Kirby saw the language of the NTA as broad enough to include rights in Indigenous Knowledge. His Honour saw the right to maintain and transmit Indigenous Knowledge as sufficiently connected to the native title area to be a right 'in relation to' the land or waters for the purpose of s 223(1).¹⁶⁴ He further stated:

It has been accepted that the connection between Aboriginal Australians and 'country' is inherently spiritual and that the cultural knowledge belonging to Aboriginal people is, by Indigenous accounts, inextricably linked with their land and waters.¹⁶⁵

The broad view of the NTA taken by Justice Kirby may be more in line with recent developments, such as the case of *Akiba*.¹⁶⁶

¹⁵⁵ *Ward v Western Australia* (1998) 159 ALR 483, 639-40.

¹⁵⁶ *Western Australia v Ward* (2002) 213 CLR 1.

¹⁵⁷ *Western Australia v Ward* (2002) 213 CLR 1, 183 [468].

¹⁵⁸ *Native Title Act 1993* (Cth) s 223.

¹⁵⁹ *Western Australia v Ward* (2000) 99 FCR 316, 483 [666]. A challenge on this point failed in the High Court.

¹⁶⁰ *Western Australia v Ward* (2002) 213 CLR 1, [468].

¹⁶¹ *Western Australia v Ward* (2002) 213 CLR 1, 32 [59].

¹⁶² *Western Australia v Ward* (2002) 213 CLR 1, 66, [84]-[85].

¹⁶³ Gary Meyers and Olasupo Owoeye, 'Intellectual Property Law and the Protection of Indigenous Australian Traditional Knowledge in Natural Resources' (2013) 22(2) *Journal of Law, Information and Science* 56.

¹⁶⁴ *Western Australia v Ward* (2002) 213 CLR 1, 229, 580 (Kirby J).

¹⁶⁵ *Western Australia v Ward* (2002) 213 CLR 1, 229, 580 (Kirby J).

¹⁶⁶ *Akiba on behalf of the Torres Strait Regional Seas Claim Group v Commonwealth* (2013) 300 ALR 1.





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3.2.3 Akiba v Commonwealth

In *Akiba on behalf of the Torres Strait Regional Seas Claim Group v Commonwealth*¹⁶⁷ ('*Akiba*'), the High Court held that native title rights and interests could comprise a right to access resources in the native title claim area, and to take such resources for any purpose. This decision extends the scope of native title rights and interests. Although the decision focused upon whether the native title holders could take resources for commercial purposes, *Akiba* proposes that native title rights may be broadly defined.

The broad approach to defining the scope of native title rights in *Akiba* seems to be in accordance with Justice Kirby's dissent in *Ward*.

3.2.4 Western Australia v Willis

This case concerned the right of the Pilki people right to take and use resources from the determination area for any purpose, including commercial purposes. The Full Court of the Federal Court upheld the Pilki's rights to take resources for commercial purposes, although along different lines.¹⁶⁸

3.2.5 ALRC Native Title Review

In 2015, the NTA was reviewed by the Australian Law Reform Commission ('the Review'). The Review looked at scope of native title rights and interests and considered whether rights to Indigenous Knowledge are within the scope of the NTA. The Review found that there continues to be issues with identifying this scope such as:

1. The Review echoes the overarching problem that there is a lack of definition of Indigenous Knowledge (referred to in the Review as 'cultural knowledge') and what it encompasses;
2. Some respondents to the Review have expressed concerns that affording rights to Indigenous Knowledge under the NTA might cause problems and overlaps with protection under intellectual property laws,¹⁶⁹ though also noting the limitations of protection afforded under intellectual property regimes.

Though the Review recognises that there is now a greater understanding of Indigenous Knowledge and its interconnectedness with land and waters,¹⁷⁰ it was inconclusive in its findings. It recommends further inquiry into how laws can be reformed to address the issues that Indigenous people have raised in relation to their Indigenous Knowledge, and that this should be addressed in a separate, independent review.

3.2.6 Who owns copyright in Native Title documents?

Under the NTA, Indigenous people must prove their 'ongoing' connection to the land they want to claim native title for. Thus, the native title claims process generates a large number of native title connection reports written by anthropologists, to be submitted as evidence. These reports contain Indigenous cultural and intellectual property – the anthropologist will have

¹⁶⁷ *Akiba on behalf of the Torres Strait Regional Seas Claim Group v Commonwealth* (2013) 300 ALR 1.

¹⁶⁸ *State of Western Australia v Willis on behalf of the Pilki People* [2015] FCAFC 186.

¹⁶⁹ Australian Law Reform Commission, *Connection to Country: Review of the Native Title Act 1993 (Cth)* Report 126 (2015), vol.1, 263 [8.172].

¹⁷⁰ Australian Law Reform Commission, *Connection to Country: Review of the Native Title Act 1993 (Cth)* Report 126 (2015), vol.1, 266-267 [8.190].





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incorporated the clan-owned knowledge of traditional owners as evidence in support of the claim.¹⁷¹

While the native title claim is evaluated, the connection reports are governed by the rules of evidence. However, after the process is over, there are questions as to who owns the reports – and who may access, reproduce or publish the information contained within them.¹⁷²

Under Australian intellectual property laws, and as previously discussed, the author of a literary work holds copyright in it.¹⁷³ However, this does not necessarily make the anthropologist the author – particularly if they have created the report while employed under a contract of service.¹⁷⁴ At times this may be disputed – the author may assert that they were engaged as a contractor rather than as an employee, and a legal assessment of the nature of the contract is required.¹⁷⁵ If anthropologists who write connection reports while employed by an organisation such as the Native Title Registered Body (NTRB), the NTRB owns copyright in the material. The NTRB will often hold the report and restrict access to the information contained within it to only those who have been nominated by the traditional owners of that information.¹⁷⁶ Otherwise, Indigenous people who share their knowledge for the purposes of establishing a native title claim have little control over how this information may be used once the proceedings are over.

Regardless of who is the copyright owner, there may be other restrictions on how the information contained within a connection report can be used. Anthropologists may have an equitable obligation to keep confidential Indigenous knowledge imparted to them, because of the special relationship they have with members of the community.¹⁷⁷ This equitable obligation might arise as a fiduciary duty not to exploit the information for profit or for any other reason than to compile the connection report – unless the anthropologist obtains free, prior and informed consent. Alternatively, if the information is given in circumstances of confidence, it may be covered by breach of confidence laws.

It is a contradiction within Native Title law that Indigenous groups must demonstrate their Indigenous Knowledge to prove a native title claim – yet they aren't given the rights in the knowledge. However, although Aboriginal and Torres Strait Islander cannot prevent the dissemination and publication of connection reports containing Indigenous Knowledge under copyright law, there may be fiduciary duties owed by authors of the reports to the clans whose knowledge is contained in the works.

3.2.7 Indigenous Land Use Agreements

An Indigenous Land Use Agreement (ILUA) is a voluntary agreement between a native title group and other parties about the use of land and waters. ILUAs are a way that Indigenous people may negotiate flexible and practical agreements that suit their circumstances, and can cover a range of matters including development agreements, access to an area, compensation and economic opportunities for native title groups. Michael Davis suggests that ILUAs have

¹⁷¹ Eamon Ritchie and Terri Janke, 'Who owns copyright in native title connection reports?', 8(20) *Indigenous Law Bulletin* 8, 8.

¹⁷² *Ibid.*

¹⁷³ *Copyright Act 1968* (Cth) s 35.

¹⁷⁴ *Copyright Act 1968* (Cth) s 35(6).

¹⁷⁵ *Redrock Holdings Pty Ltd v Hinkley; Hotline Communications Ltd v Hinkley* (2001) 50 IPR 565.

¹⁷⁶ Aboriginal & Torres Strait Islander Social Justice Commissioner, 'Native Title Report 2008', (Australian Human Rights Commission, 2009), 220.

¹⁷⁷ *Hospital Products Ltd v United States Surgical Corporation* (1984) 156 CLR 41.





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the capacity to provide recognition of Indigenous rights in knowledge.¹⁷⁸

A regional agreement may include negotiated arrangements covering virtually any aspect of government, delivery of services, access to, and management and control of areas, resources and sites... They may also include negotiated arrangements for the integration of Indigenous knowledge, and customary uses and practices regarding land, environment, and biological materials into land and environment management plans and strategies.¹⁷⁹

Ciaran O’Faircheallaigh argues that negotiated agreements do have the potential to incorporate appropriate use of Indigenous Knowledge and benefit sharing when parties wish to use Indigenous land and waters. However, this is only possible where the underlying weaknesses in the bargaining power of Aboriginal and Torres Strait Islander people are addressed – particularly when it comes to negotiating ILUAs or other agreements with mining companies.¹⁸⁰

Case Study: Cape York Heads of Agreement

The historic 1996 Cape York Land Use Heads of Agreement between pastoralists, conservationists and the traditional Aboriginal owners of the Cape York Peninsula is an example of an ILUA that addressed Indigenous Knowledge. Clause 10 of the agreement provided that Aboriginal people have rights of access to pastoral properties to protect and conserve their cultural heritage, to access significant sites and to conduct ceremonies under traditional law.¹⁸¹

Case Study: Arakwal National Park ILUA

In 2001, as a result of many years of negotiation between the Bundjalung People of Byron Bay, a range of community groups, the Byron Shire Council and the NSW Government, including the National Parks and Wildlife Service (NPWS),¹⁸² the Arakwal ILUA was lodged. The agreement created the Arakwal National Park and designated its co-management to the Bundjalung People of Byron Bay and the NPWS. The ILUA gave native title holders access to the park for protecting and conserving areas of cultural heritage, conducting ceremonies under traditional law and custom, and gathering material for traditional medicines and ceremonies.

Summary – Land Rights and Native Title

Australian land rights and native title legislation recognises the interconnectedness between land and culture; access to land is integral to the maintenance and transmission of Indigenous Knowledge. However, a successful land claim under the ALRA or the NTA requires the Aboriginal landowners to prove their traditional relationship to the land under claim.¹⁸³ Both land rights legislation and native title provide some ancillary rights to the practise of culture and therefore in Indigenous Knowledge, through access to land. Indigenous people also have rights to take resources for any purpose from native title areas.

¹⁷⁸ Michael Davis, ‘Biological Diversity and Indigenous Knowledge’ (Research Paper No 17, Parliamentary Library, Parliament of Australia, 1998), 17.

¹⁷⁹ Ibid.

¹⁸⁰ Ciaran O’Faircheallaigh, ‘Negotiating Cultural Heritage? Aboriginal–Mining Company Agreements in Australia’ (2008) 39 *Development and Change* 25, 30.

¹⁸¹ Cape York Heads of Agreement, 1996, Clause 10.

¹⁸² Now a part of the Office of Environment and Heritage (OEH).

¹⁸³ Central Land Council, *The Aboriginal Land Rights Act*, <<http://www.clc.org.au/articles/info/the-aboriginal-land-rights-act/>>.





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Land rights legislation goes further; the right to permit or deny other people access to land means that Indigenous people may uphold their rights in Indigenous Knowledge by preventing researchers and people undertaking commercial projects using Indigenous Knowledge without appropriate benefit sharing and other agreements addressing cultural and intellectual property rights.

Native title case law has demonstrated that the Federal Court has a growing appetite for the recognition of unrestrictive native title rights – particularly in relation to the taking of resources from claim areas.

4. Cultural heritage laws

Australia has a very complex set of laws governing the overall protection of Australian heritage. There is separate legislation in all States and Territories and at the Commonwealth level. The Commonwealth Indigenous cultural heritage regime is designed to provide a 'safety net' where State and Territory legislation fails to protect the relevant heritage. The cultural heritage laws in Australia are summarised below:

Commonwealth

- The *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth) was designed to provide intervention where state or territory laws cannot or do not provide for effective protection. A Commonwealth Minister may declare an area of significance to Aboriginal people to be protected from desecration.
- The *Protection of Moveable and Cultural Heritage Act 1986* (Cth) regulates exportation of moveable cultural property so that items of cultural significance to Australia are not lost.
- The *Environment Protection and Biodiversity Conservation Act 1999* (Cth) provides for natural, historic and Indigenous places of varying significance to be registered with National and Commonwealth Heritage Lists and the Register of the National Estate.
- Heritage outcomes have also been negotiated and determined under the *Native Title Act 1993* (Cth).

New South Wales

- *National Parks and Wildlife Act 1974* (NSW) provides blanket protection for Aboriginal 'places and objects and features' in New South Wales. The Act has an archaeological focus; however, it does allow Aboriginal Places to be gazetted as areas of special significance to Aboriginal communities.
- *The Heritage Act 1977* (NSW) also provides some recognition for Aboriginal heritage via the State Heritage Register.

Victoria

- The *Aboriginal Heritage Act 2006* (Vic) covers Aboriginal Cultural Heritage, which it





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defines as 'Aboriginal places, Aboriginal objects and Aboriginal human remains.' Also provides protection for intangible cultural heritage.

South Australia

- The *Aboriginal Heritage Act 1988* (SA) protects Aboriginal sites, objects and remains in South Australia that are of significance to Aboriginal tradition, archaeology, anthropology and/or history.

Western Australia

- The *Aboriginal Heritage Act 1972* (WA) applies to places and objects of archaeological and anthropological relevance, but also to sacred, ritual or ceremonial places of importance to Aboriginal persons past and present.
- The *Environmental Protection Act 1986* (WA) also provides some recognition of Aboriginal heritage, particularly in relation to social use of the environment
- *Museum Act 1969* (WA).

Australian Capital Territory

- The *Heritage Act 2004* (ACT) covers natural and historic heritage. Places and objects 'of particular significance to Aboriginal people because of Aboriginal tradition and/or history, including contemporary history' may be registered and protected.

Northern Territory

- The *Heritage Conservation Act 1991* (NT) covers archaeological remains.
- The *Northern Territory Aboriginal Sacred Sites Act 1989* (NT) covers sacred sites.
- The above two Acts are influenced by the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth).

Tasmania

- *Aboriginal Relics Act 1975* (Tas) provides blanket protection for Aboriginal sites and objects pre-dating European arrival only.
- The *Aboriginal Relics Amendment Bill 2017* was introduced to the Parliament on 15 March 2017. The Bill aims to remove reference to 1876 as being a 'cut off' point for what is considered Aboriginal heritage.

Queensland

- *Aboriginal Cultural Heritage Act 2003* and *Torres Strait Islander Cultural Heritage Act 2003*. Despite being the first Heritage legislation drafted in native title era, very little has changed with respect to protection of Aboriginal heritage and involvement of Aboriginal people in the process.



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4.1 What rights do the laws provide?

While the concept of Aboriginal cultural heritage is moving towards a more holistic acknowledgment of the present and continuing relevance of sites and objects for Aboriginal groups, the protection afforded to Aboriginal intangible cultural heritage is negligible.

The *Environmental Protection and Biodiversity Conservation Act 1999* (Cth) (EPBC Act) and each of the QLD, Victorian and ACT Aboriginal heritage acts, allow Aboriginal people to define what is their cultural heritage. That is, a place with 'Indigenous cultural value' is defined as a place Indigenous people themselves believe to be of cultural heritage value.¹⁸⁴

There is no Commonwealth legislation which currently grants legal rights in the intangible aspects of Aboriginal and Torres Strait Islander cultural heritage. Cultural heritage laws protect areas, objects and sites.

4.1.1 Aboriginal Heritage Amendment Act 2016 (VIC)

Intangible cultural heritage protection in Victoria

Victoria is the only jurisdiction to enact legislative protection for intangible cultural heritage. After amendments to the Act in 2016, Part 5A of the *Aboriginal Heritage Act 2006* establishes a process by which Aboriginal intangible heritage can be registered on the Victorian Aboriginal Heritage Register. Once registered, Traditional Owners may make Aboriginal intangible heritage agreements that outline whether and how their traditional knowledge is used and for what purpose.

The Act makes it an offence to 'knowingly' exploit registered Aboriginal intangible heritage for commercial purposes without the consent of traditional owners. 'Reckless' use of registered intangible heritage is also prohibited.

The Act defines Aboriginal intangible heritage as 'any knowledge of or expression of Aboriginal tradition, other than Aboriginal cultural heritage'¹⁸⁵ and includes oral traditions, performing arts, stories, rituals, festivals, social practices, crafts and visual arts. It also includes environmental and ecological knowledge and 'knowledge of medicinal and other properties of flora and fauna, minerals and other elements of the environment'.¹⁸⁶ The definition also encompasses any intellectual creation or innovation 'based on or derived from' anything defined within the Act as Aboriginal intangible heritage.¹⁸⁷

Aboriginal intangible heritage does not include anything that is widely known to the public.¹⁸⁸ This prevents Aboriginal intangible heritage which has been subsequently adapted and enjoyed by the general population from being subject to retrospective protection.¹⁸⁹ However, there is scope under the Act for Aboriginal people to argue that an aspect of their intangible heritage, which may be in the public domain but not well known, can be the subject

¹⁸⁴ *Environmental Protection and Biodiversity Conservation Act 1999* (Cth) s 528; *Aboriginal Cultural Heritage Act 2003* (Qld) ss 9, 10; *Aboriginal Heritage Act 2006* (Vic) s 4(1); *Heritage Act 2004* (ACT) s 9.

¹⁸⁵ *Aboriginal Heritage Act 2006* (Vic) s 79B(1).

¹⁸⁶ *Aboriginal Heritage Act 2006* (Vic) s 4(1).

¹⁸⁷ *Aboriginal Heritage Act 2006* (Vic) s 79B(2).

¹⁸⁸ *Aboriginal Heritage Act 2006* (Vic) s 79B(1).

¹⁸⁹ Email from Janine Moon, Acting Head of Heritage Strategy, Department of Premier and Cabinet, Victoria, 15 May 2017.





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of protection.¹⁹⁰

Unlike most cultural heritage registers in Australia, which focus on Western notions of 'preservation' of Indigenous culture, the Victorian Aboriginal Heritage Register is primarily focused with ensuring Aboriginal groups may pass their heritage down to next generations. The Victorian Government identifies that the key issue here is ensuring the Register is flexible enough to accommodate the transmission of intangible cultural heritage.¹⁹¹

Registration of Aboriginal intangible heritage

A registered Aboriginal party, registered native title holder or a traditional owner group entity may apply to the Secretary for details of any Aboriginal intangible heritage to be recorded on the Victorian Aboriginal Heritage Register.¹⁹²

In considering the application, the Secretary must consult with, and consider the views of the applicant and any Aboriginal person or Aboriginal body that the Secretary considers relevant to the application.¹⁹³ However, the final decision lies with the Secretary who may refuse the application.¹⁹⁴

The Register is not accessible to the public, because it contains culturally sensitive information. It can only be accessed by people or organisations who need detailed information on cultural heritage places and objects in order to protect and manage them. The Act specifies certain parties who may access the register and for what purpose.¹⁹⁵ This includes any person seeking information as to whether an Aboriginal Intangible Heritage Agreement exists or is required.¹⁹⁶

Further protection is offered for secret or sacred information. The Secretary may, on the recommendation of the Council or a registered Aboriginal party, designate certain information on the register as sensitive Aboriginal heritage information.¹⁹⁷ The Secretary must then not allow any access to the sensitive information without the written approval of the relevant registered party.¹⁹⁸

The Act also provides the right for traditional owners¹⁹⁹ to enter into 'Aboriginal intangible heritage agreements' that may address the protection, management and commercial use of registered intangible information.

The Victorian Aboriginal Heritage Register is the most robust protection of legal rights in Indigenous Knowledge ever seen in Australia. The ability to register communally owned intangible culture gives Victorian Aboriginal groups legal and commercial rights outside of the traditional legal constructs of intellectual property.

¹⁹⁰ Email from Janine Moon, Acting Head of Heritage Strategy, Department of Premier and Cabinet, Victoria, 15 May 2017.

¹⁹¹ Email from Janine Moon, Acting Head of Heritage Strategy, Department of Premier and Cabinet, Victoria, 15 May 2017.

¹⁹² *Aboriginal Heritage Act 2006 (Vic)* s 79C(1).

¹⁹³ *Aboriginal Heritage Act 2006 (Vic)* s 79C(2).

¹⁹⁴ *Aboriginal Heritage Act 2006 (Vic)* s 79C(3).

¹⁹⁵ *Aboriginal Heritage Act 2006 (Vic)* s 146.

¹⁹⁶ *Aboriginal Heritage Act 2006 (Vic)* s 146(1)(o).

¹⁹⁷ *Aboriginal Heritage Act 2006 (Vic)* s 146A(1).

¹⁹⁸ *Aboriginal Heritage Act 2006 (Vic)*, s 146A(2).

¹⁹⁹ Or registered Aboriginal parties or native title holders; *Aboriginal Heritage Act 2006 (Vic)*, s 79D





4.1.2 The Role of Indigenous people in cultural heritage protection

The majority of State and Federal cultural heritage legislation gives Aboriginal groups minimal powers to manage and protect Aboriginal cultural heritage. Most legislative regimes allow for an advisory body to inform the Minister, but the wide ranging Ministerial discretion limits the effectiveness of such bodies. In South Australia, the Minister decides upon the membership of the State Aboriginal Heritage Committee.²⁰⁰ The Minister must take 'reasonable steps' to consult the Committee but has no duty to take its advice into account when making a determination under the *Aboriginal Heritage Act 1988* (SA). At the Commonwealth level, the Minister's decision to make a declaration under the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth) is discretionary.²⁰¹ The Minister is not required to make a declaration at all, even if satisfied that a significant area or object is under threat of injury or desecration.

In jurisdictions where advisory bodies have determinative powers, Aboriginal representation within the groups is not guaranteed. For example, in the ACT, the Heritage Council established under the *Heritage Act 2004* (ACT) is responsible for registering Aboriginal places or objects²⁰² yet is only required to have one Aboriginal member.²⁰³

The NT and Victorian regimes are the best examples of where the expertise of traditional custodians can be used to effectively protect cultural heritage. The Victorian *Aboriginal Heritage Act 2006* (Vic) establishes the Victorian Aboriginal Heritage Council, an independent statutory body with advisory functions. Each member of the Council must be an Aboriginal person and resident in Victoria, with familial or traditional links to an area within the State, and with knowledge of local Aboriginal cultural heritage.²⁰⁴

The *Northern Territory Aboriginal Sacred Sites Act 1989* (NT) is arguably the most effective in granting Indigenous people the ability to protect and manage their cultural heritage. The NT Act established the Aboriginal Areas Protection Authority ('AAPA'), an Aboriginal-only body that has the responsibility of administering the Sacred Sites legislation, including the exclusive power to prosecute for offences against the Act.²⁰⁵ There is only a limited capacity for the Northern Territory Minister to intervene in AAPA decision-making.²⁰⁶

4.1.3 Protection of Movable Cultural Heritage Act 1986 (Cth)

The *Protection of Movable Cultural Heritage Act 1986* (Cth) regulates the import and export of Australia's significant cultural material. It implements Australia's obligations under the *UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property 1970* (the UNESCO Convention 1970). The Act provides two lists in relation to protected objects:

- The National Cultural Heritage Control List. This list contains two classes of cultural objects:

²⁰⁰ *Aboriginal Heritage Act 1988* (SA) s 7.

²⁰¹ *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth) s 9.

²⁰² *Heritage Act 2004* (ACT) s 37.

²⁰³ *Heritage Act 2004* (ACT) s 17(3)(b).

²⁰⁴ *Aboriginal Heritage Act 2006* (Vic) s 131(3)(a).

²⁰⁵ *Northern Territory Aboriginal Sacred Sites Act 1989* (NT), s 5(5). See *Aboriginal Areas Protection Authority v OM (Manganese) Ltd* [2013] NTMC 019.

²⁰⁶ *Northern Territory Aboriginal Sacred Sites Act 1989* (NT) Part III Div I, persons may apply for review to Minister but minister must consult with AAPA.



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- Class A which cannot be exported. This class specifically includes Indigenous objects that cannot be exported such as sacred and secret ritual objects, bark and log coffins used as traditional burial objects, human remains, rock art and dendroglyphs (carved trees) which cannot be exported.²⁰⁷
- Class B which requires permission to be exported. This class recognises Indigenous objects as one of nine categories of heritage material protected under the Act.²⁰⁸
- The Prohibited Exports Register.²⁰⁹ This list contains the cultural objects that have been denied export out of Australia.

Protection under the Act only extends to Indigenous cultural objects that are:

1. Of importance to, or relating to members of the Aboriginal and/or Torres Strait communities;
2. Not created specifically for sale;
3. At least 30 years old; and
4. Not adequately represented in Indigenous community collections or public collections in Australia.²¹⁰

This implies that Indigenous objects that are 'adequately' represented in Australian collections are not protected by the Act.²¹¹

In 2015, the Act was reviewed by Australian lawyer Shane Simpson. He proposes an overhaul of the law, which he described as opaque, unclear and time-consuming.²¹²

Shane Simpson suggests a new model that, amongst other things, protects Indigenous people's connections to the land and heritage by introducing new regulations on Indigenous objects but also putting Traditional Owners at the heart of decision making. He suggests a framework that includes Indigenous consultation and consent provisions that are in line with commitment under the United Nations *Declaration on the Rights of Indigenous People*²¹³.

Summary – Cultural heritage laws

There are a number of shortcomings in cultural heritage legislation that makes most regimes an inadequate form of protection for Indigenous cultural and intellectual property.

Cultural heritage laws are designed to protect areas, sites and objects. Tangible expressions of Indigenous Knowledge are covered by the legislation; for example, rock art and other objects are prevented from being exported or desecrated. However, the legislation does not prevent the misappropriation of Indigenous Knowledge connected with or on display at

²⁰⁷ Schedule 1 National cultural heritage control list, Regulation 4, Part 1 *Protection of Moveable Cultural Heritage Regulations* 1987.

²⁰⁸ *Protection of Movable Cultural Heritage Act 1986* (Cth) s 7(b).

²⁰⁹ See the Prohibited Exports Register: <https://www.arts.gov.au/what-we-do/cultural-heritage/movable-cultural-heritage/exporting-cultural-property-australia/movable>

²¹⁰ *Protection of Movable Cultural Heritage Regulations 1987* (Cth), Schedule 1

²¹¹ Natalie Stojanoff, and Alpana Roy, 'Indigenous Knowledge and Culture in Australia - The Case for Sui Generis Legislation' (2015) 41(3) *Monash University Law Review* 745, 769.

²¹² Shane Simpson, 'Borders Of Culture: Review of the *Protection of Moveable Cultural Heritage Act 1986*' (Commonwealth Government, 2015), 6.

²¹³ *Ibid*, 30.





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important sites; additionally, with the exception of Victoria, intangible cultural heritage goes unrecognised.

Ownership of the cultural heritage is often vested with a government minister or body rather than with the appropriate custodians or community. Additionally, Indigenous involvement in decision making is generally limited, particularly given the wide-ranging ministerial discretions which allow the ultimate decision makers to reject Indigenous advice.

Heritage legislation is moving away from Western notions of protecting 'cultural relics' and towards and allow Aboriginal people to define what is their cultural heritage, providing some recognition of living cultural material. However, most cultural heritage laws are limited in implementation as they fail to recognise the holistic nature of Indigenous cultural heritage. Indigenous Knowledge is embodied in songs, stories and designs as well as the land in the form of areas and sites.²¹⁴

Recent amendments to Victorian cultural heritage laws mean that intangible cultural heritage may now be recorded and placed on the Aboriginal Heritage Register, granting Victorian traditional owner group the exclusive right to deal with the material. This is the most extensive protection of intangible cultural heritage seen to date in Australia and may be the impetus for further updates to cultural heritage legislation.

5. Biodiversity laws

Australia's laws on protecting biological diversity are a major way of protecting Indigenous Knowledge, however the approach taken by Australia is complex and fragmented.

The principles arising from the existing laws are borne out of Australia's obligations as a party to the United Nations Convention on Biological Diversity (CBD). The three objectives of the CBD are:

- the conservation of biological diversity
- the sustainable use of its components, and
- the fair and equitable sharing of the benefits arising from the use of genetic resources.

Australia ratified the Convention on Biological Diversity on 18 June 1993. The Convention provides an important framework for Australia's integration of natural resources and environment and biodiversity management policies. The Convention specifically recognises the role of Indigenous peoples and local communities in the conservation of biological resources. Article 8(j) of the Convention requires Parties to respect, preserve and maintain knowledge, innovations and practices of Indigenous peoples and local communities relevant to the conservation and sustainable use of biological diversity.

In December 2016, the thirteenth meeting of the Convention's decision-making body, the Conference of the Parties, adopted the Mo'otz kuxtal voluntary guidelines for the development of legislation or other appropriate initiatives to ensure the 'prior informed consent, free prior informed consent or approval and involvement' for the use of traditional knowledge for the conservation and sustainable use of biodiversity.

²¹⁴ Terri Janke, *Our Culture: Our Future – Report on Australian Indigenous Cultural and Intellectual Property Rights* (Final Report, Australian Institute of Aboriginal and Torres Strait Islander Studies, 1998), 80.





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The Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization is a global agreement that implements the access and benefit-sharing obligations of the CBD.

As Australia has not yet ratified the Nagoya Protocol, the resulting protections on biological resources and associated Indigenous Knowledge is inconsistent and varies significantly depending on the location of the biological resources and the land tenure.

While all Australian States and Territories endorsed the 'Nationally Consistent Approach for Access to and Utilisation of Australia's Native Genetic and Biochemical Resources', only the Northern Territory and Queensland have laws dealing with access and use of biological resources in their jurisdictions. Codes, strategies and policies have been released by other states and territories that do not have biodiversity or access and benefit sharing laws, such as Tasmania and Victoria.

5.1 Environment Protection and Biodiversity Conservation Act 1999 (Cth)

5.1.1 How does it protect Indigenous Knowledge?

The EPBC Act regulates access to biological resources and associated Indigenous Knowledge in Commonwealth areas. The EPBC Act and Regulations establish a permit system for commercial and non-commercial access to biological resources.²¹⁵

Where access to biological resources on Commonwealth areas is for commercial or potentially commercial purposes, parties seeking access are required to enter into a benefit sharing arrangement with the access provider.²¹⁶ There is no prescribed form for a benefit sharing agreement, but the EPBC Regulations require that it must provide:²¹⁷

- Statement of any use of Indigenous Knowledge;
- Details of source of Indigenous Knowledge;
- Evidence of agreements to use the Indigenous Knowledge (with the access provider, but also with other Indigenous groups, where other groups are involved); and
- Statement of the benefits in return for the use of Indigenous Knowledge.

The access and benefit sharing provisions of the EPBC Act and Regulations protect Indigenous Knowledge only where:

- Biological resources to be accessed are in a Commonwealth-owned area;
- The access sought is for commercial purposes; and
- There is Indigenous Knowledge associated with the access and use of the biological

²¹⁵ *Environment Protection and Biodiversity Act 1999* (Cth) s 310; *Environment Protection Biodiversity Conservation Regulations 2000* (Cth) reg 8A.06.

²¹⁶ *Environment Protection Biodiversity Conservation Regulations 2000* (Cth) reg 8A.07.

²¹⁷ *Environment Protection Biodiversity Conservation Regulations 2000* (Cth) reg 8A.08.





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resources.

Between 2006 and 2015, only three permits listed on the Department of Environment website have been granted for commercial purposes.²¹⁸ The majority of permits that have been issued under the EPBC Act and Regulations have been for non-commercial purposes and as such do not require a benefit sharing agreement, irrespective of whether access sought involved Indigenous Knowledge.

In addition to the provisions in the EPBC Act and Regulations on access and benefit sharing, the EPBC Act also has certain protections for tangible heritage, establishing three heritage lists: the World Heritage List,²¹⁹ the National Heritage List,²²⁰ and Commonwealth Heritage List.²²¹

5.1.2 Consultation and consent to use Indigenous Knowledge

Where the land is Indigenous people's land and the access provider is the owner or native title holder of that land, that land owner must give informed consent to the benefit sharing agreement.²²²

Though the EPBC Act and Regulations list certain criteria for the Minister to determine whether 'informed consent' has been given,²²³ it does not provide any guidance to conducting Indigenous consultation and obtaining consent.

5.1.3 Film and Photography Guidelines

The EPBC Act also controls the capture of commercial images in the Uluru Kata Tjuta National Park (UKNTNP). The UKNTNP has published guidelines which notify photographers and filmmakers of sacred sites. They also state that the images cannot be digitally manipulated or cropped and that no permits will be issued for advertising of cars, fashion and camping equipment.²²⁴

5.2 Biological Resources Act 2006 (NT)

The *Biological Resources Act 2006* (NT) ('NT Act') was introduced with the aim of promoting the conservation of biological resources in the Northern Territory. The NT Act establishes a framework to manage the conduct of people who wish to access biological resources in NT.

5.2.1 How does it protect Indigenous Knowledge?

The NT Act recognises that Indigenous people hold special knowledge about biological

²¹⁸ Two of those permits were granted to the Australian Institute of Marine Science. Department of the Environment and Energy, *Science and Research Permits 2012* <<http://www.environment.gov.au/node/36247>>.

²¹⁹ Department of the Environment and Energy, *Australia's National Heritage List*, <<https://www.environment.gov.au/heritage/places/world-heritage-list>>.

²²⁰ *Ibid.*

²²¹ *Ibid.*

²²² *Environment Protection Biodiversity Conservation Regulations 2000* (Cth) reg 8A.10.

²²³ *Environment Protection Biodiversity Conservation Regulations 2000* (Cth) reg 8A.10(2).

²²⁴ *Uluru–Kata Tjuta National Park: Guidelines for commercial image capture, use and commercial sound recording* (Director of National Parks, 2009), 9 [4.11].



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resources.²²⁵ It seeks to ensure that any benefits arising out of biodiscovery are shared equitably amongst stakeholders.²²⁶

In the same way as the EPBC Act and Regulations, the NT Act sets obligations for parties seeking access to biological resources to state any use of Indigenous Knowledge, details of the source, including a statement of the agreed benefits for the use of Indigenous Knowledge.²²⁷

The access and benefit sharing provisions of the NT Act protect Indigenous Knowledge where:

- Biological resources to be accessed are in NT state lands. The NT Act covers all types of landholding in the state of NT, such as freehold, leasehold, native title and park lands.²²⁸
- The access sought is either commercial or non-commercial;²²⁹ and
- There is Indigenous Knowledge associated with the access and use of biological resources.²³⁰

However, the NT Act limits the definition of 'Indigenous Knowledge' to knowledge that is:

obtained from an indigenous person or persons; and is not indigenous person's knowledge if it was obtained from scientific or other public documents, or otherwise from the public domain.²³¹

This significantly limits the scope of the NT Act and poses concerns, as noted in a statutory review of the *Biodiversity Act 2004* (Qld), that:²³²

- It creates confusion where more than one Indigenous group claims ownership of the Indigenous knowledge; and
- Where Indigenous Knowledge is widely known, there is a need to determine the extent of disclosure of Indigenous knowledge on the public domain in order to determine whether or not it is protected under the NT Act.

5.2.2 Consultation and consent to use Indigenous Knowledge

Benefit sharing arrangements under the NT Act, like in the EPBC Act and Regulations, require consultation and informed consent. The NT Act expands on the requirements of the EPBC Act and Regulation and requires prior informed consent of Indigenous owners, though no further guidance is given on what this means.

There is also specific language in the NT Act that states the Minister will take into consideration

²²⁵ *Biological Resources Act 2011* (NT) s 3(2)(d).

²²⁶ *Biological Resources Act 2011* (NT) s 3(2)(e).

²²⁷ *Biological Resources Act 2011* (NT) s 29.

²²⁸ *Biological Resources Act 2006* (NT) s 6.

²²⁹ *Biological Resources Act 2006* (NT) s 5.

²³⁰ *Biological Resources Act 2006* (NT) s 29.

²³¹ *Biological Resources Act 2006* (NT) s 29(2).

²³² DLA Phillips Fox, *Statutory Review of the Biodiscovery Act 2004 (Queensland)*, (commissioned by the Queensland Government, 2009), 36.





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whether consultation was conducted with the traditional owners of the land in determining whether informed consent was given.²³³ However this is only limited to where the biological resources is in an area that is Aboriginal land, and the responsibility for consulting with the traditional owners is the relevant land council's responsibility and not the party seeking access.²³⁴

5.3 Biodiscovery Act 2004 (QLD)

5.3.1 How does it protect Indigenous Knowledge?

The *Biodiscovery Act 2004* (QLD) ('QLD Act') does not contain any protections for Indigenous knowledge.

However, in addition to the QLD Act, the QLD Government provides the *Queensland Biotechnology Code of Ethics* ('QLD Code of Ethics') which is mandatory for all QLD government agencies, research centres, public hospitals that conduct biotechnology activities, and any organisation or institution that receives financial assistance from the QLD government.²³⁵

The QLD Code of Ethics provides that where traditional knowledge is obtained from Indigenous people in the course of biodiscovery, the relevant organisation will 'negotiate reasonable benefit sharing arrangements with these persons or communities'.²³⁶ However, there are no mechanisms to ensure compliance with this provision.

5.3.2 Consultation and consent to use Indigenous Knowledge

While the QLD Code of Ethics has general provisions on prior informed consent being required when collecting samples from privately owned land.²³⁷ It does not have any specific requirements for consultation and consent where Indigenous Knowledge is involved. The QLD Act also does not have any requirements for Indigenous consultation or consent.

6. Museums and Archives Laws

Museums and archives play an invaluable role in preserving cultural heritage and helping to spread a broader understanding and respect for different cultures.²³⁸ Museums and archives also play a large role in upholding the cultural integrity of sacred and secret information. Below is a summary of a handful of museum and archives laws which recognise the importance of preserving and caring for Indigenous collections, including sacred and secret Indigenous Knowledge, in accordance with Indigenous views.

²³³ *Biological Resources Act 2006* (NT) s (2)(b)(ii).

²³⁴ *Biological Resources Act 2006* (NT) s (2)(b)(ii).

²³⁵ Queensland Government, *Biotechnology Code of Ethics*, (Office of Biotechnology, Brisbane, 2006), 4.

²³⁶ *Ibid*, 8.

²³⁷ *Ibid*.

²³⁸ 'Archives and Museums: Balancing Protection and Preservation of Cultural Heritage', (2005) 5 *WIPO Magazine* 24, 24.





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6.1 Australian Institute of Aboriginal and Torres Strait Islander Studies Act 1989 (Cth)

The *Australian Institute of Aboriginal and Torres Strait Islander Studies Act 1989* (Cth) (AIATSIS Act) established the Australian Institute of Aboriginal and Torres Strait Islander Studies, which is the leading institution of Indigenous studies in Australia.

Section 41 of the AIATSIS Act prohibits certain information from being disclosed in AIATSIS resources and collection if disclosure is inconsistent with the views of sensitivities of Indigenous people.²³⁹

6.2 National Museum of Australia Act

The *National Museum of Australia Act 1980* (Cth) contains specific provisions regarding Indigenous collections. A Gallery of Aboriginal Australia must be established as part of the National Museum.²⁴⁰ The Gallery's council must have policies around developing and maintaining the gallery by Indigenous people.²⁴¹

By mandating policies that see the involvement of Indigenous people in establishing and managing Indigenous collections, the Act attempts to ensure that Indigenous people have responsibility and rights in the management of Indigenous cultural property. The Museum currently has 9 Indigenous staff members.

6.3 Australian Archives Act

The *Archives Act 1983* (Cth) details how Commonwealth government records are to be managed, and who may access them. The Act establishes the National Archives of Australia (NAA), a body which has the purpose of preserving Commonwealth Government records. The NAA also has the role of making records available for research, given that they are an extensive resource for the study of Australian history, society and people.²⁴²

All records subject to the *Archives Acts 1983* (Cth) are to be made available for public access²⁴³, unless they contain information that makes them exempt. There are several categories of exemption.²⁴⁴ There are no specific statutory exemptions for Indigenous knowledge that is of a secret or sacred nature. However, there is scope to protect secret and sacred information under the NAA's Access Examination Policy. The policy set out how the body applies exemptions, including exemptions for information relating to unreasonable disclosure of information relating to the personal affairs of any person.²⁴⁵ In deciding what is unreasonable, the NAA will consider the cultural sensitivities, practices or norms of the Aboriginal or Torres Strait Islander person identified in the record. The policy states that personal involvement in secret sacred matters would make the information exempt.

²³⁹ *Australian Institute of Aboriginal and Torres Strait Islander Studies Act 1989* (Cth) s 41(2).

²⁴⁰ *National Museum of Australia Act 1980* (Cth) s 5(1).

²⁴¹ *National Museum of Australia Act 1980* (Cth) s 5(4).

²⁴² Terri Janke, *Our Culture: Our Future – Report on Australian Indigenous Cultural and Intellectual Property Rights* (Final Report, Australian Institute of Aboriginal and Torres Strait Islander Studies, 1998), 89.

²⁴³ *Archives Act 1983* (Cth) s 31(1A)(1).

²⁴⁴ *Archives Act 1983* (Cth) s 33.

²⁴⁵ *Archives Act 1983* (Cth) s 33(1)(g).





6.4 Strehlow Research Centre Act

The Strehlow Research Centre was set up to maintain Aboriginal cultural objects collected by the late Professor TGH Strehlow. The Centre was established under sui generis legislation, the *Strehlow Research Centre Act 2005* (NT). The Strehlow collection includes objects, film, sound recordings and archival materials, a significant part of which relates to Aboriginal men's sacred and secret ceremonies.²⁴⁶

The Centre has several functions relating to secret and sacred information, including providing 'secure and restricted storage facilities for elements of the collections and objects that are culturally sensitive'.²⁴⁷

In 2007, the Centre developed a collection policy relating to access to secret sacred material and personally sensitive information. A large part of the collection may only be accessed by the relevant traditional Aboriginal custodians, or by people who have been given the appropriate consent and approval.²⁴⁸

If researchers or other interested parties wish to access to the Strehlow Collection, they must make a written request to the Director of the Strehlow Centre Board. Any research on the collection is at the discretion of the Board who will take into account 'the sensitivity of the material involved, and the wishes and views of the Traditional Custodians of that material, in making a determination on access'.²⁴⁹

7. Succession Laws

Many Indigenous people do not make wills and die intestate (without a will).²⁵⁰ Without a will, the inheritance of any property upon death of an Indigenous person is governed by Australia's succession laws. The laws empower the Public Trustee to act as executor of property, this includes copyright, as was the case with Albert Namitjira, whose copyright was given away to Legend Press by the Public Trustee in administration of his estate in 1983, but returned to the family by assignment in 2017 after negotiations.²⁵¹

Property could include things that incorporate Indigenous Knowledge, such as artworks and literary works. For example, under the *Resale Royalty Right for Visual Artists Act 2009* (Cth) an Indigenous artist's estate will include entitlements to resale royalties on all eligible commercial resales of the artist's works within 70 years of the artist's death (for more on resale royalties, see Part 1.1.10 of this Discussion Paper).

In Australia, succession laws are a set of complex state-based laws. Difficulties arise as these laws are based on the United Kingdom's concepts of familial relationships, which are not always in line with Indigenous customary laws and kinship structures as to who is entitled to

²⁴⁶ Northern Territory Government, *Strehlow Research Centre*, < <https://nt.gov.au/leisure/arts-culture-heritage/museums-galleries-art-centres/alice-springs/strehlow-research-centre>>.

²⁴⁷ *Strehlow Research Centre Act 2005* (NT) s 6.

²⁴⁸ Northern Territory Government, *Strehlow Research Centre*, < <https://nt.gov.au/leisure/arts-culture-heritage/museums-galleries-art-centres/alice-springs/strehlow-research-centre>>.

²⁴⁹ *Ibid*

²⁵⁰ New South Wales Law Reform Commission, *Uniform Succession Laws: Intestacy*, Report No 116 (2007), 229 [14.6].

²⁵¹ Isabel Dayman, 'Albert Namitjira's family regains copyright of his artwork after Dick Smith intervenes', (ABC News, 15 October 2017), < <http://www.abc.net.au/news/2017-10-14/albert-namatjira-copyright-returned-to-family/9050550>>.



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a share in a deceased person's estate.²⁵² These laws, identified and summarised in the table below, provide different levels of protections for Indigenous people who die intestate:

Jurisdiction	Legislation	Specific provisions for Indigenous people
NT	<i>Administration and Probate Act 1993</i> (NT)	<ul style="list-style-type: none"> Division 4A contains specific provisions for Aboriginal people who die intestate, allowing persons to claim an entitlement to the estate of an Indigenous person who dies without a will, under the customs and traditions of the community or group to which the deceased belonged. This, however, only applies where the deceased Aboriginal person did not enter into a valid marriage under the <i>Marriage Act 1961</i> (Cth).²⁵³ Courts <u>must</u> into account traditions of the relevant community in making orders.²⁵⁴
NSW	<i>Succession Act 2006</i> (NSW)	<ul style="list-style-type: none"> Adopted the NT approach, and extended it to include <u>married</u> Indigenous people who have died without a will.²⁵⁵ Courts <u>may</u> take into account any relevant customary laws in making orders.²⁵⁶
TAS	<i>Intestacy Act 2010</i> (TAS)	<ul style="list-style-type: none"> Adopted the NT approach, and extended it to include <u>married</u> Indigenous people who have died without a will.²⁵⁷ Courts <u>must</u> take into account any relevant customary laws in making orders.²⁵⁸
QLD	<i>Aboriginal and Torres Strait Islander Communities (Justice, Land and Other Matters) Act 1984</i> (QLD)	<ul style="list-style-type: none"> If an Indigenous person dies without a will and the CEO of Community Enterprise Queensland²⁵⁹ finds it impracticable to ascertain the next-of-kin of that person, the chief executive may determine who will be entitled to that estate. Once the chief executive makes a determination on entitlements, everyone else is excluded from making a claim on the estate.²⁶⁰ No requirement to take into account customary law practices.
WA	<i>Administration Act 1903</i> (WA)	<ul style="list-style-type: none"> No provisions for Indigenous people who die without a will and no requirements to take into account customary laws. Estate is distributed in accordance to the State's intestacy rules and formulas.²⁶¹

²⁵² South Australian Law Reform Institute, 'Cutting the cake: South Australian rules of intestacy', Issues Paper No 7 (2015), 153.

²⁵³ *Administration and Probate Act 1993* (NT) s 71.

²⁵⁴ *Administration and Probate Act 1993* (NT) s 71E(2)(b).

²⁵⁵ *Succession Act 2006* (NSW) s 133.

²⁵⁶ *Succession Act 2006* (NSW) s 60(o).

²⁵⁷ *Intestacy Act 2010* (TAS) ss 34-36.

²⁵⁸ *Intestacy Act 2010* (TAS) s 35(3)(b).

²⁵⁹ *Aboriginal and Torres Strait Islander Communities (Justice, Land and Other Matters) Act 1984* (Qld), s 6R.

²⁶⁰ *Aboriginal and Torres Strait Islander Communities (Justice, Land and Other Matters) Act 1984* (Qld), s 6O.

²⁶¹ From 2012, when the *Aboriginal Affairs Planning Authority Act 1972* (WA) was amended. Previously, the *Aboriginal Affairs Planning Authority Act 1972* (WA) contained provisions that vested intestate estates of



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SA	<i>Inheritance (Family Provision) Act 1972</i>	<ul style="list-style-type: none"> No provisions for Indigenous people who die without a will and no requirements to take into account customary laws. Estate will be distributed in accordance to the Territory's intestacy rules.
VIC	<i>Administration and Probate Act 1958 (VIC)</i>	<ul style="list-style-type: none"> No provisions for Indigenous people who die without a will and no requirements to take into account customary laws. Estate will be distribution in accordance to the State's intestacy rules.

As shown above, the states of WA, SA and VIC do not have special provisions for Indigenous people in relation to intestacy. However, the protections that are afforded in NT, NSW, TAS and QLD are inconsistent with complex processes.²⁶² In NT, only two cases have gone to the courts under those special provisions.

Recognising the limitations of the law, the Arts Law Centre's Artists In the Black service runs a Wills Project, where Arts Law assists Indigenous artists in preparing wills so that they are able to dictate how royalties on their artworks are passed down to their family members in the event of their death. In 2016, Arts Law drafted 113 wills for Indigenous artists.

As copyright generally lasts for 70 years after the death of an author, there may be confusion over who manages copyright after the death of a creator. It is standard for an arts centre or collecting agency to manage the copyright in a work on behalf of the creator's family or the person to whom copyright is bestowed. However, it is often the case that the organisations do not consult with the copyright owner about grants of licences. The copyright owner also has the power to grant or refuse licenses to use the work. This creates confusion about who is the appropriate person to go to for consultation and consent relating to Indigenous Knowledge in a work.

8. Geographical Names Law

Australia has legislative and regulatory procedures that provide guidelines for the naming of geographical places and place names. Each state and territory has established authorities with naming rights and practices and procedures to ensure appropriate name selections. These laws also address selecting Aboriginal language names for places including culturally significant sites. Generally, these laws provide for Indigenous people to be consulted when Indigenous place names are used for land and sites in language and to also stop the out of context use of Aboriginal and Torres Strait Islander language for sites where there is no connection or meaning. This also includes Indigenous languages for naming places such as suburbs, parks and public places.

8.1 Intergovernmental Committee on Surveying and Mapping (ICSM)

The International Committee on Surveying and Mapping (ICSM) has the role to provide national leadership, coordination and standards for surveying, mapping/charting and national datasets.²⁶³ The ICMS manages the work they do through working groups and committees.

Aboriginal persons automatically in the Public Trustee. These were removed in 2012 after the enactment of the *Aboriginal Affairs Planning Authority Amendment Act 2012 (WA)*.

²⁶² Prue Vines, *Aboriginal Wills Handbook: A Practical Guide to making culturally appropriate wills for Aboriginal people*, (NSW Trustee & Guardian, 2nd ed, 2000), 11.

²⁶³ Intergovernmental Committee on Surveying and Mapping, *Home Page*, <<http://www.icsm.gov.au/index.html>>.





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The ICSM has a committee, the Permanent Committee on Place Names, which coordinates, promotes and communicates the consistent use of geographic place names within Australia.

The Permanent Committee on Place Names provides the *Principles for the Consistent Use of Place Names*, which provides a set of national standards and uniformity in the use and collection of Indigenous names, which are to be used as a tool for state and territory naming authorities.²⁶⁴

The principles address the specific issues of consultation, and engagement with Indigenous communities, and recognise that ultimately the right to decide the use of names rests always with the Indigenous people whose language or place names are being used for official naming purposes.²⁶⁵

The principles provide that the use of Indigenous place names represent a gift from these cultures, and the sharing of these impose ethical obligations on users in the form of authorisation for use of name, acknowledgment of sources, and respect for restrictions.²⁶⁶

They further identify that information collected during fieldwork or investigations may involve copyright or ownership of the information by Aboriginal and Torres Strait Islander Peoples and needs to be resolved prior to any survey or activity takes place.²⁶⁷

8.2 State and territory place-naming laws

Each state and territory has developed policies which address the use of Indigenous names, and or the dual usage of European and traditional names. The following table is a summary of the approach taken by each jurisdiction.

Jurisdiction	Legislation	Specific provisions for place names in Indigenous language
NT	<i>Place Names Act 2014 (NT)</i>	<ul style="list-style-type: none"> Establishes the Place Name Committee.²⁶⁸ In order for the Committee to manage the naming of places in the Northern Territory it has developed rules and guidelines which contain guidelines for using Aboriginal names and dual naming.²⁶⁹ Where Federal legislation like the <i>Aboriginal Land Rights Act 1976</i> and the <i>National Parks and Wildlife Act 1975</i> have overriding application in respect of Northern Territory nomenclature, the Committee shall adopt the

²⁶⁴ Permanent Committee on Place Names, *Guidelines for the consistent use of place names* (Intergovernmental Committee on Surveying and Mapping, 9th ed, 2015), 9.

²⁶⁵ *Ibid*, 13.

²⁶⁶ *Ibid*, Appendix A: *Guidelines for the use of Aboriginal and Torres Strait Islander Place Names*, 4.4(c).

²⁶⁷ Permanent Committee on Place Names, *Guidelines for the consistent use of place names* (Intergovernmental Committee on Surveying and Mapping, 9th ed, 2015), Appendix A: *Guidelines for the use of Aboriginal and Torres Strait Islander Place Names*, 4.2(i).

²⁶⁸ *Place Names Act 2014 (NT)*, s 5.

²⁶⁹ Place Names Committee, *Policies, Procedures, Rules and Guidelines*, <<https://placenames.nt.gov.au/policies/rules.>>.





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		<p>names applied in respect of the former original features names.²⁷⁰</p> <ul style="list-style-type: none"> • These include the former Katherine Gorge now the Nitmiluk (Katherine Gorge) National Park; the renaming of the 'Uluru Kata Tjuta National Park under the <i>National Parks and Wildlife Act, 1975</i> in 1993 in lieu of the joint use name Ayers Rock (Uluru-Kata Tjuta) National Park of 1977. The National Parks and Wildlife Act, 1975 provides a naming and renaming process beyond the authority of the Place Names Committee.²⁷¹
NSW	<i>Geographical Names Act 1966</i> (NSW)	<ul style="list-style-type: none"> • Establishes the Geographical Names Board.²⁷² • The Board, require the support from Aboriginal communities and the local Aboriginal land councils of the relevant areas where Aboriginal and European dual names are given.²⁷³
TAS	<i>Survey Co-ordination Act 1944</i> (TAS)	<ul style="list-style-type: none"> • Establishes the Nomenclature Board²⁷⁴ • The Board has the authority to name any place in Tasmania under the <i>Rules for Place Names in Tasmania</i>.²⁷⁵ • Aboriginal place names must be in <i>palawa kani</i> language, which is the revived Aboriginal language of Tasmania Aboriginals.²⁷⁶ • The rules cover dual naming principles and acceptance of the name by the Aboriginal community.²⁷⁷
QLD	<i>Place Names Act 1994</i> (QLD)	<ul style="list-style-type: none"> • Administered by the Department of Natural Resources and Mines. • The Act has specific provisions that include cultural and historical significance of a place, and Aboriginal tradition and Island custom.²⁷⁸

²⁷⁰ Ibid.

²⁷¹ Ibid.

²⁷² *Geographical Names Act 1966* (NSW), s 3.

²⁷³ Geographical Names Board of New South Wales, *Fact Sheet: Dual Naming – supporting cultural recognition*, <http://www.gnb.nsw.gov.au/_data/assets/pdf_file/0004/58837/GNB_Dual_Naming.pdf>.

²⁷⁴ *Survey Co-ordination Act 1944* (TAS) s 20A.

²⁷⁵ *Rules for Place Names in Tasmania 2013* (TAS) authorised by the *Survey Co-ordination Act 1944* (TAS), s 20D(1)(a).

²⁷⁶ *Rules for Place Names in Tasmania 2013* (TAS), s 12(1).

²⁷⁷ *Rules for Place Names in Tasmania 2013* (TAS), s 12(5).

²⁷⁸ *Place Names Act 1994* (QLD), ss 6(2)(b)-(c).





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SA	<i>Geographical Names Act 1991 (SA)</i>	<ul style="list-style-type: none"> The South Australian government has developed guidelines for using Aboriginal names and for engagement with and consultation with the relevant Aboriginal communities.²⁷⁹
VIC	<i>Geographic Place Names Act 1998 (Vic).</i>	<ul style="list-style-type: none"> Establishes a Registrar of Geographical names and a Geographical Places Names Advisory Committee.²⁸⁰ <i>The Naming rules for places in Victoria, Statutory requirements for naming roads, features and localities – 2016</i> provide step-by-step information on naming, renaming or changing the boundaries of roads, features and localities in Victoria.²⁸¹ The naming rules contain specific requirements for the use of Aboriginal names and for dual naming. They require authorities to consult with, and gain consent from the relevant Traditional Owner groups in the use of Aboriginal names.²⁸²
WA	No law	<ul style="list-style-type: none"> There is no relevant law in Western Australia, however, the Western Australian government's '<i>Policies and Standards for Geographical Naming in Western Australia</i>' contains a section on the appropriate use of Aboriginal names and guidelines for dual naming.²⁸³ The policy states that all dual naming proposals need the support of the local native title representation body and elders where relevant.²⁸⁴

²⁷⁹ South Australian Government, *Geographical names Guidelines*, <<https://www.sa.gov.au/topics/planning-and-property/planning-and-land-management/suburb-road-and-place-names/geographical-names-guidelines>>.

²⁸⁰ *Geographic Place Names Act 1998 (Vic)*, ss 7, 12.

²⁸¹ Land Use Victoria, *Naming rules for places in Victoria*, <<https://www.propertyandlandtitles.vic.gov.au/naming-places-features-and-roads/naming-rules-for-places-in-victoria>>.

²⁸² State of Victoria, *Naming rules for places in Victoria: Statutory requirements for naming roads, features and localities 2016* (Land Use Victoria, 2016), 17.

²⁸³ Geographic Names Committee, 'Appropriate use of Aboriginal and dual naming' in *Policies and Standards for geographical Naming in Western Australia* (Landgate, 2017), 64-70.

²⁸⁴ *Ibid*, 8.





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Conclusion

This annexure has identified a number of shortfalls in the current Australian legal system in providing rights that Indigenous people require in relation to their Indigenous Knowledge.

Indigenous people seek to ensure legal ownership of their Indigenous Knowledge so that they may protect and preserve Indigenous Knowledge from debasement or misappropriation, make self-determined decisions about Indigenous Knowledge that promote economic opportunities for Indigenous peoples, and be fully and properly consulted about the use of Indigenous Knowledge by other parties.

Whilst they do provide protection to individual works, and have shown scope to recognise Indigenous cultural systems such as communal ownership, intellectual property laws cannot prevent certain misappropriations of culture. Indigenous people cannot stop non-Indigenous artists from appropriating traditional 'styles'; this has seen the rise in imitation Indigenous souvenirs and crafts passed off as authentic. These practices undermine culture and impact upon the ability of Indigenous people to profit from expressions of their Indigenous Knowledge. Indigenous artists cannot compete with imported mass-produced craft sold cheaply and in large quantities to tourists.

Indigenous clan groups and their representatives cannot control reproductions of cultural expression that are considered to be in the public domain. Similarly, clan groups cannot stop derogatory treatment of Indigenous cultural expressions that are not copyright works. This can result in the alteration and debasement of Indigenous Knowledge, without recourse for traditional custodians who have a cultural responsibility to uphold the integrity of the Indigenous Knowledge embodied in a work.

Indigenous people are concerned that when they are asked to share their Indigenous Knowledge with researchers, writers, scientists, filmmakers, government officers and others, that they cannot control how their Indigenous Knowledge is recorded and interpreted. Copyright is vested with the creator, or author, of a tangible work – a document, or film or sound recording. As the subject of the work, Indigenous people are often not the creators, leaving them with limited avenues to control the use of any disclosed Indigenous Knowledge or even access the recorded Indigenous Knowledge.

Current laws cannot always prevent the misappropriation of environmental and ecological Indigenous Knowledge for commercial purposes. Skills, techniques and cultural practices are not covered by copyright, and the patent and designs systems are for limited length commercial uses of knowledge and inventions, not designed for inter-generational transmission of culture. A related problem is that Australian biodiversity laws only protect Indigenous Knowledge if it is associated with the access and use of biological resources in a Commonwealth owned area sought for commercial purposes.