

Aboriginal and Torres Strait Islander Peoples' Heritage: A Model for Protection Under the Copyright Act 1968 (Cth)

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* Aboriginal and Torres Strait Islander² readers should be aware that this article contains links to websites that may use images of people who have since passed away.

Introduction

This article examines the shortfalls of the *Copyright Act 1968 (Cth)* (“*Copyright Act*”) in recognising the unique features of Australia’s Aboriginal and Torres Strait Islander (“ATSI”) heritage and also aspects of existing legislation and enforcement structures, which may immediately be utilised to protect some forms of heritage. The author proposes a model, which requires amendment of the *Copyright Act*, by inserting a new Part into the *Copyright Act*, to deal with the features of ATSI heritage not addressed by the current legislation. The model seeks to use, as far as possible, existing enforcement procedures, incorporating in them, features such as the expertise of elders and custodians as expert witnesses, to assist the Court in its determinations.

Background

The issue of how best to protect ATSI heritage has been the subject of detailed investigations, for over the last twenty years.³ In addition, all Australian States and Territories have enacted legislation focusing on the protection of sacred sites, artefacts and sites and objects of archaeological significance.⁴

All efforts to protect elements of ATSI heritage are commendable, however, in the author’s opinion they do not address the critical aspect of the creation of ATSI heritage, such as its ownership, its duration and its enforcement. To this end, the author has examined the *Copyright Act* as a vehicle for protecting important features of ATSI heritage not presently recognised.

For example, the *Copyright Act* recognises an author (or joint authors) as being the creators of a work. That presents no problem when an ATSI artist creates an artistic work, however, many ATSI works are unable to identify an individual as the author because they have been passed down from generation to generation.

Bearing this and other matters in mind, the author has sought to address these unique elements into a new Part in the copyright legislation and utilise the existing enforcement processes.

Aims of this article

This article first considers the nature of ATSI heritage. Then, it identifies, with the aid of determined cases, the aspects of ATSI heritage which fall inside and outside the scope of the protection afforded presently by the *Copyright Act*.

Bearing these matters in mind and taking into account the expressed concerns of the ATSI peoples, the author proposes a model which utilises, as far as possible, existing processes.

The nature of ATSI heritage

A definition

Firstly, consideration should be given as to what constitutes “heritage”.

Relevantly, the United Nations Economic Council sought, pursuant to a decision of the Commission on Human Rights⁵ and through the resolution of the Sub-Commission on the Prevention of Discrimination and Protection of Minorities,⁶ a report on the protection of the heritage of Indigenous people from Mrs Erica-Irene Daes, United Nations Special Rapporteur.

In her final report, Daes considered that the “heritage” of Indigenous peoples is:

*... comprised of all objects, sites and knowledge the nature or use of which has been transmitted from generation to generation, and which is regarded as pertaining to a particular people or its territory. The heritage of an indigenous people also includes objects, knowledge and literary or artistic works which may be created in the future based upon its heritage.*⁷

This was the definition initially adopted in the *Our Culture: Our Future Discussion Paper*⁸ but altered in the final report to include all items of movable cultural property as defined by the United Nations Educational, Scientific and Cultural Organization (“UNESCO”).⁹

The definition of “heritage” proposed later in this article, differs from these definitions, by adding the element of being consistent with the best interests of the relevant community.

Aboriginality

Legal historian, John McCorquodale, has reported that since the time of white settlement, governments have used 67 definitions to determine who is an Aboriginal person.¹⁰

In *Commonwealth v Tasmania*, the High Court of Australia considered the definition of an “Aborigine” for the purpose of s. 51(xxvi) of the Constitution, in relation to laws with respect to “the people of any race for whom it is deemed necessary to make special laws”. Deane J applied a three-part test, stating:

*By ‘Australian Aboriginal’ I mean, in accordance with what I understand to be the conventional meaning of that term, a person of Aboriginal descent, albeit mixed, who identifies himself as such and who is recognised by the Aboriginal community as Aboriginal.*¹¹

The Parliament of Australia recognises two definitions. Predominantly in legislation, an Aboriginal is defined as “a person who is a member of the Aboriginal race of Australia”. The second, defines an Aboriginal as someone “who is a member of the Aboriginal race of Australia, identifies as an Aboriginal and is accepted by the Aboriginal community as an Aboriginal”.¹²

In the author’s opinion, the definition as stated by Deane J is to be preferred, but still falls short for the purpose of ATSI heritage. A person may come within Deane J’s definition, yet act inconsistently with the best interests of the community, and possibly in the best interests of themselves. This article opines that it is fundamental that membership of itself to the Aboriginal race of Australia is not enough to receive the proposed benefits of extending copyright to ATSI heritage. The protection flows both from identification of a person as an Aboriginal person and using a copyright work and other subject matter in a manner consistent with the best interests of the ATSI community.

Literary, performing and artistic works

It is clear that ATSI heritage is intimately connected to obligations to the community.¹³

Some expressions of ATSI heritage are already enforceable under the *Copyright Act*.¹⁴ However, obligations imposed on authors as to how that heritage is to be used are beyond the present scope of the *Copyright Act*.

Literary works, like artistic works and performances, are traditionally the media through which knowledge is transmitted by the community, family or clan, to future generations:

*The traditional owners of heritage must be determined in accordance with indigenous peoples, own customs, laws and practices.*¹⁵

These expressions of heritage are often not mutually exclusive. An artistic work might often be accompanied by a written narrative seeking to impart the meaning behind the artistic work. For example, *Karrakanj*, the brown falcon, is an artistic work of Billy Yalawanga and is accompanied by a narrative imparting traditional knowledge about the fire bird.¹⁶

Languages

Under the *United Nations Declaration of the Rights of Indigenous Peoples*, ATSI peoples have the right to develop, use and transmit ATSI heritage to future generations.¹⁷

ATSI languages are inextricably linked to literary works and oral transmission of stories and Indigenous traditional knowledge.¹⁸ Therefore, without the inclusion of language as heritage, the means for transmission of historic traditional knowledge is likely to be broken.

According to the *National Indigenous Languages Survey Report 2005* (“NILS 2005 report”), at the time the Australian continent was colonised, approximately 250 different Indigenous languages existed, with the larger language groups each having up to 100 related dialects.¹⁹ Colonisation came to represent the greatest single impact endangering the survival of Indigenous languages.²⁰

The NILS 2005 report found that of the original 250 known Indigenous languages, there were 145 languages still being spoken and included a recommendation for a national survey of Indigenous language programs.²¹

In 2014, the results of a further survey were published (“NILS 2014 report”).²² The NILS 2014 report identified 13 languages that could be considered strong and approximately 100 languages were described as severely or critically endangered.

The NILS 2014 report identified that the success of community-led language activities depended upon community members obtaining knowledge, funding and access to resources.²³

Items of moveable and immovable cultural property

These include burial artefacts, ancestral remains, human genetic material and cultural environment resources. It is not usually appropriate to sever elements included in the definition of “heritage”. However, the scope of this article does not extend to these aspects of heritage, save where copyright issues arise.²⁴

Discrete legislation has sought to protect ATSI heritage sites. In 1965, the South Australian Government was the first to enact such legislation and all other States have since done so.²⁵ In New South Wales, Aboriginal sites are protected under Part 6 of the *National Parks and Wildlife Act 1974* (NSW). It is an offence to damage or destroy them or to collect artefacts without prior permission of the Director-

General of the NSW Office of Environment and Heritage. The penalties for harming a protected site are up to an AU\$275,000 fine and one year's imprisonment for individuals and an AU\$1.1 million fine for corporations.²⁶

The Commonwealth legislation describes its purpose as:

*... the preservation and protection from injury or desecration of areas and objects in Australia and in Australian waters, being areas and objects that are of particular significance to Aboriginals in accordance with Aboriginal tradition.*²⁷

Developments regarding Aboriginal heritage laws

On 1 August 2016, the *Aboriginal Heritage Amendment Act 2016* (Vic) amended the *Aboriginal Heritage Act 2006* (Vic) by introducing an extensive regime which includes reporting, registration and auditing requirements.²⁸ The new amendments provide for agreements titled “an Aboriginal intangible heritage agreement”, which relates to registered Aboriginal intangible heritage made between any person or body and a registered Aboriginal party or native title holder or a traditional owner group.²⁹

It is an offence for a person to knowingly use any registered Aboriginal intangible heritage for commercial purposes without the consent of the relevant registered Aboriginal party.³⁰ The penalty is approximately an AU\$280,000 fine for individuals and over an AU\$1.5m fine for corporations.³¹

Similarly, the Senate Standing Committee on Environment and Communications is considering a reference in relation to the *Competition and Consumer Amendment (Prevention of Exploitation of Indigenous Cultural Expressions) Bill 2019* (Cth), which would amend the *Competition and Consumer Act 2010* (Cth) to make it an offence to supply or offer commercial goods to a consumer that include Indigenous cultural expression unless supplied by or in accordance with a recognised arrangement.³²

The author considers that while all steps to protect ATSI heritage are positive and should be encouraged, ultimately, intellectual property (“IP”) - specifically copyright - is the more appropriate medium to deal with the unique nature of ATSI heritage as it can incorporate intangible forms of expression together with material forms and can address works to be created in the future.

Unique features of ATSI heritage

Collective ownership

ATSI heritage is generally not “owned” by an individual. IP law however focusses on the “author”, the “designer” or the “true and first inventor”.³³ For ATSI heritage, each “particular group has ownership rights over particular inherited cultural heritage”.³⁴ ATSI heritage is “owned” by the particular community to which the heritage relates and the caretakers or custodians who act in the best interests of that community:

*Although heritage is communal, there is usually an individual who can best be described as a custodian or caretaker of each song, story, name, medicine, sacred place and other aspect of a people's heritage. Such individual responsibilities should not be confused with ownership or property rights. Traditional custodians serve as trustees for the interests of the community as a whole and they enjoy their privileges and status in this respect **for only so long as they continue to act in the best interests of the community.***³⁵ (emphasis added)

The Federal Court of Australia (the “Federal Court”) has recognised limitations upon an artist of ATSI descent. In *Milpurrurru v Indofurn Pty Ltd*,³⁶ von Doussa J noted that a group of ATSI peoples have the authority to determine whether a story and images may be used and the manner of such use.³⁷

His Honour identified that concepts of responsibility differ between Aboriginal law and the common law. For example, in a case where the traditional owners have given a particular artist permission to create a painting of the “Dreaming” (a word used to explain creation) and the artwork is later inappropriately reproduced by a third party, the artist will be responsible for the reproduction, regardless of whether the artist was aware of the unauthorised use.³⁸

The evidence of the artist Ms Marika was that she considered herself to hold the image she created on trust for the Yolngu clan (the clan of the artist).³⁹ His Honour did observe that as legal owner, the Public Trustee, could have brought such a claim on behalf of beneficiaries of the estates of deceased artists, however no attempt was made along those lines.⁴⁰

Aboriginal law requires traditional owners of heritage to take action to preserve the “Dreaming”, and to punish those considered responsible for any breach.⁴¹ However, where permission has been given by the traditional owners to create a picture of the Dreaming and that artwork is dealt with in a manner which the custodians consider inappropriate, the artist is held responsible for the breach.⁴² It follows that it is expected that ATSI artists acknowledge this “proprietary” aspect of their work.⁴³

Ideas v expression

Copyright protects the expression not the idea behind the expression:

*The requirement that a literary work be “original” is directed not to originality of ideas but to their expression.*⁴⁴

Oral works are not protected by copyright, unless and until there is some form of fixation.⁴⁵ ATSI heritage however contains accumulated knowledge transmitted through generations. For ATSI peoples, the underlying knowledge is likely to be more significant than its expression.

Stories represented in ceremonies of deep significance are often secret or sacred. These stories may be further restricted to a few senior members of a clan, chosen according to age, descendants, gender, initiation, in accordance with aboriginal law and custom.⁴⁶

In addition,

*... [the] artist will encode into the artwork secret parts of the Dreaming that will be recognised and understood only by those who are initiated into the relevant ceremonies, or at least have a close knowledge of the cultural significance of the story.*⁴⁷

In this context, it has been expressed that both the custodian and the artist hold the “knowledge embodied in the work” on trust for the rest of the clan.⁴⁸ It is therefore a tool to educate the next generations as well as a work of visual appeal.⁴⁹

Transmitting culture

At an international level, the heritage of Indigenous peoples is characterised by transmission through the generations:

*The heritage of indigenous peoples is comprised of all objects, sites and knowledge the nature or use of which has been transmitted from generation to generation, and which is regarded as pertaining to a particular people or its territory ...*⁵⁰

The recommendation made in the 1995 Daes Report was that: Indigenous peoples’ heritage should be learned by the means customarily employed by its traditional owners for teaching and that such rules and practices for the transmission of heritage and sharing of its use should be incorporated in the national legal system.⁵¹

The *Report of the Royal Commission into Aboriginal Deaths in Custody* acknowledged that ATSI heritage was a media for transmitting the legacy of knowledge and experience gained throughout generations often by oral transmission.⁵²

The threat to this traditional method of educating future generations however, was recognised by Laurie Baymarrwangga (Gawany) Baymarrwaja, the Senior Aboriginal Traditional Owner of the *Malarra* estate, in the Northern Territory (“NT”) of Australia.

Identifying the deterioration among young people of the *Yan-nhaŋu* language, Baymarrwangga started a bilingual school at Murrunga, which was taken over by NT Education in 1975.⁵³ Then, in 1994, Baymarrwangga commenced a project with fellow *Yan-nhaŋu* speakers and anthropologist Dr Bentley James, which culminated in January 2014, with the creation of a valuable education tool and resource, the *Yan-nhaŋu Atlas and Illustrated Dictionary*.⁵⁴ Dr James was of the opinion that Indigenous languages in Australia are extremely endangered because of the assimilationist powers of the settler state.⁵⁵

This problem has also been recognised at an international level.⁵⁶

In another NT example, Warlukurlangu Artists is one of the longest running and most successful Aboriginal-owned art centres in Central Australia, with a national and international profile. Transmitting culture faithfully has been an aim of the centre from its inception:

*The artists painted Jukurrpa (dreaming story), ensuring appropriate Warlpiri relationships of kirda (owners) and kurdugurlu (guardians) were followed and the images reflected the social and cultural obligations present in ceremonies and day-to-day life in the community.*⁵⁷

Perpetuity

The proposition that ATSI heritage should be perpetual is contrary to the fundamental rationale of IP regimes.⁵⁸ IP rights are granted for a limited duration, following which their subject matter enters the public domain.

Whether the rationale is an individual’s inherent right to their creation or whether it is seen as a contract between the individual and the State,⁵⁹ the result is the same – once the period of the exclusivity ends, the IP subject matter enters the public domain.

It should be stated that IP rights are negative rights in that for a term, they exclude others from doing what has been reserved for the owner.⁶⁰

ATSI heritage occupies a unique position. It has been handed down over thousands of years. It is artificial to now say that the owners of ATSI heritage have that right for the life of the author plus 70 years.

The Referendum in 1967, in which Australians voted overwhelmingly to amend the Constitution, to allow the Commonwealth to make laws for Aboriginal people and include them in the census, resulted in the deletion below from s.51(xxvi) of the Constitution.⁶¹ It would therefore seem to be open to the Australian Government to make laws for the peace, order, and good government of the Commonwealth with respect to:

- ATSI peoples who are “ people of any race, ~~other than the aboriginal race in any State,~~ for whom it is deemed necessary to make special laws under s.51(xxvi) of the Constitution”, and
- copyrights under s.51(xviii) of the Constitution.

The limitation expressly stipulated in the definition of heritage formulated for this article is that the person creating, transmitting or using the heritage does so having regard to the traditional laws and customs with which it is associated. ATSI heritage rights therefore are not only about the form of expression but are constituted by the accompanying obligations attaching to the expression.

Self-determination

Self-determination has been considered fundamental to the rights of ATSI peoples in relation to ATSI heritage.⁶²

ATSI peoples, like Australians of other diverse cultural backgrounds, are entitled to maintain and develop their own culture and knowledge systems and forms of social organisation. Since 2013, legislation has been enacted to formally recognise ATSI peoples as being entitled to continue their culture, languages and heritage.⁶³

This article proposes a model wherein ATSI experts may be involved in the enforcement of ATSI heritage and disputes as to custodianship.

One draft statute proposed in 1981 envisaged a very centralised structure, comprising of a Folklore Commissioner with wide powers and an Aboriginal Folklore Board to provide advice.⁶⁴ ATSI peoples are “the primary guardians and interpreters of their cultures, arts and sciences, whether created in the past, or developed by them in the future”.⁶⁵

Australian Indigenous art is considered amongst the oldest ongoing traditions of art in the world.⁶⁶ Any model recognising the unique position of ATSI heritage must accept this heritage cannot be considered without critical input from ATSI peoples.

The current copyright regime - shortcomings and advantages for ATSI heritage

Relevant provisions and principles

Ideas/expression

As stated in the plurality reasons of French CJ, Crennan and Kiefel JJ in *IceTV Pty Limited v Nine Network Australia Pty Limited* (“*IceTV*”):

*Copyright does not protect facts or information. Copyright protects the particular form of expression of the information, namely the words, figures and symbols in which the pieces of information are expressed, and the selection and arrangement of that information ...*⁶⁷
[Citations not included]

Material form

An idea should find its way into some tangible form.⁶⁸ An action for infringement of copyright includes unauthorised reproductions of a work in a material form.⁶⁹

Originality and authorship

The *Copyright Act* requires a work to be original.⁷⁰ In *IceTV*, French CJ, Crennan and Kiefel JJ saw identifiable human authorship as a critical issue.

*The “author of a literary work and the concept of “authorship” are central to the statutory protection given by copyright legislation, including the Act.*⁷¹

IP is generally about rewarding a person's creativity by having the public tolerate a monopoly for a limited duration. In *IceTV*, their Honours affirmed the historical reward to the author as an encouragement for further advances in human endeavour.⁷²

In *Telstra Corporation Limited v Phone Directories Company Pty Ltd* ("*Phone Directories*"), Keane CJ (as his Honour then was), referred to *IceTV*, which explained that the concept of originality required that the literary work in question *originated* from the author and was not copied from another work.⁷³

On the question of the identification of the author/s, his Honour made the following general observation:

*One may accept that identification by name of each and every author is not necessary in order to make out a claim that copyright subsists under s 32(2)(c): what is necessary, however, is that it be shown that the work in question originates from an individual author or authors.*⁷⁴

The accurate identification of an author of ATSI heritage may in many cases not be possible at all. For example, the painting at Ubirr Rock in Kakadu National Park is a well-known artwork, however a single artist or group of artists is unidentifiable.⁷⁵

The *Copyright Act* does provide for prima facie presumptions to be made in certain circumstances in relation to subsistence, ownership and authorship, unless the contrary is established.⁷⁶ Where the author is known but disputed, there does not appear to be any obstacle to seeking declaratory relief from the Federal Court, for example a dispute about authorship of the First Nation's flag.⁷⁷

It will be necessary to protect ATSI heritage however from challenges, such as the inability to identify an author.

Case studies

There are examples where the copyright system has helped and hindered ATSI peoples protecting their heritage.

John Bulun Bulun⁷⁸

John Bulun Bulun, a Ganalbingu Aboriginal artist born in 1946 near the Arafura Swamp of Central Arnhem Land, was also a respected traditional doctor, songman and senior ceremonial manager. His paintings often described the annual visits over three hundred years (from at least 1720 until 1906) of Macassan traders to Arnhem Land shores to collect and process trepan (sea cucumber) which they sold to the Chinese.⁷⁹

In 1987, a T-shirt manufacturer reproduced one of Bulun Bulun's paintings, known as *At the Waterhole*, on T-shirts without his permission. In the proceedings, it was claimed that the respondent imported and sold fabric that infringed Bulun Bulun's copyright. The T-shirts were sold by the manufacturers to two Darwin tourist shops.

This is said to be the first occasion in which an Aboriginal artist asserted a private right of ownership of artworks under copyright in a court proceeding, which appeared to some to elevate the private right of the artist over the community rights in traditional tribal imagery.⁸⁰

One key issue was whether the works were original for the purposes of copyright protection under the *Copyright Act* as required by s. 32(2). The question was whether the works were copies of other works already created. Colin Golvan (counsel for the applicant) notes:

*The key originality issue in the Bulun Bulun case was whether a contemporary depiction of ancient tribal imagery was entitled to be claimed as “original” for the purposes of copyright protection.*⁸¹

Relevantly, evidence was given by the curator of Aboriginal Art and Material Culture at the Northern Territory Museum of Arts and Sciences, Margaret West. The Museum had one of the largest collections of bark paintings in Australia including Bulun Bulun’s *At the Waterhole*, painted in 1978.⁸²

Ms West gave evidence that:

*While many bark paintings represent traditional designs, it nevertheless remains that particular artists have their own distinctive ways of expressing the traditional designs ...*⁸³

Ms West then identified unique elements of the artist’s work such as the unique depiction of magpie geese, long-necked turtle and water snake at waterholes.⁸⁴ The primary judge, von Doussa J, considered that Bulun Bulun was the author and that ideas for an artistic work did not entitle the originators of those ideas to claim joint authorship:⁸⁵

Bulun Bulun himself gave evidence as to the significance of his work:

Many of my paintings feature waterhole settings, and these are an important part of my Dreaming, and all the animals in these paintings are part of that Dreaming ...

*The story is generally concerned with the travel of the long-necked turtle to Gamerdi, and by tradition I am allowed to paint [that part of the story]. According to tradition, the long-necked turtle continued its journey, and other artists paint the onward journey.*⁸⁶

Although satisfied that the author Bulun Bulun did not copy the work, his Honour noted that copyright did not subsist otherwise than by virtue of the *Copyright Act*.⁸⁷

Justice von Doussa also considered that evidence of the role of community law was admissible as a basis for the foundation of rights within the Australian legal system.⁸⁸

However, after considering a number of publications and cases including *Milpurrurru*,⁸⁹ his Honour acknowledged the inadequacies of the *Copyright Act* in relation to the recognition of communal title.⁹⁰ Justice von Doussa considered Brennan J’s comments in *Mabo v The State of Queensland [No.2]*⁹¹ and said:

*The principle that ownership of land and ownership or artistic works are separate statutory and common law institutions is a fundamental principle of the Australian legal system which may well be characterised as “skeletal” and stand in the road of acceptance of the foreshadowed argument.*⁹² [Citation not included]

Justice von Doussa concluded that customary Aboriginal law relating to group ownership of artistic works, survived the reception of the English common law in Australia in 1788, however, the codification of copyright law by statute prevented communal title being successfully asserted as part of the general law.⁹³ Some beneficial interest in the community was not through copyright but by a relationship, fiduciary in nature.⁹⁴

Milpurrurru

Milpurrurru has been considered by some as “the most comprehensive judgment involving copyright and Indigenous arts and culture”.⁹⁵

This case involved the unauthorised use and reproduction of eight artworks by eight Indigenous artists on 246 carpets made in Vietnam and imported into Australia without the artists' permission.⁹⁶ At the time of the hearing, three artists were alive, and five artists had passed away.

The artworks had been reproduced with the artists' authority in a calendar published by the Australian National Gallery. The artworks reflected creation stories of spiritual and sacred significance to the artists and their communities.

A number of issues, particularly shortcomings of the copyright legislation in its application to ATSI heritage, are exposed by this case.

Originality

Justice von Doussa, the primary judge, considered the problem was whether the works in suit were original so as to attract copyright protection.⁹⁷

The issue ultimately did not arise as the respondents admitted the subsistence of copyright in each of the artworks and ownership of the artists. Although the artworks were based on Dreaming themes, each artwork was one of intricate detail and complexity reflecting great skill and originality.⁹⁸

Ownership

Initially, the respondents put in issue the question of the applicants' entitlements to copyright ownership. His Honour noted:

*A further extraordinary tactical stance was taken by the respondents. From the outset they refused to admit the copyright ownership of the artists in their artworks. Only as the evidence unfolded at trial did the unreasonableness of this stance become fully apparent ... The refusal to admit copyright ownership added greatly to the applicants' costs of the trial as much work was involved in obtaining affidavit evidence to prove copyright ownership, particularly in the case of the deceased artists.*⁹⁹

His Honour found infringement by importation of the copyright works. Counsel for the applicants informed the Court, that Aboriginal law and custom would treat each of the applicants in a case equally, however his Honour considered that the *Copyright Act* did not recognise the infringement of ownership rights of the kind which resided under Aboriginal law.¹⁰⁰

Conclusions on deficiencies and advantages

Unless there is recognition of the unique features of ATSI heritage in the *Copyright Act*, they will continue not to be recognised.

Bulun Bulun identified that copyright did not subsist otherwise than by virtue of the *Copyright Act*.¹⁰¹ Further that the person who paints an image is the author. The fact that ideas for that image derive from traditional knowledge does not entitle the traditional owners to joint authorship of that image.

As a general observation, the codification of copyright law by statute prevented communal title being successfully asserted as part of the general law, although conduct whereby the author personally benefitted was inconsistent with the artist's fiduciary obligations to the community. Finally, the statutory remedies did not recognise the infringement of ownership rights which reside under ATSI law.

In relation to the identification of an "author", the National and State Libraries Australia ("NSLA") refer to the World Intellectual Property Organisation's categorisation of works produced by "authors unknown".¹⁰²

There are also advantages identified. Copyright infringement of Indigenous works has been found: *Milpurrurru*. Also, compensatory loss includes compensation for hurt feelings and anger arising from the infringement: *Milpurrurru*.

Further, additional damages provide a mechanism for accommodating difficulties in apportioning compensatory loss involving applicants of different works and deter similar infringements: *Milpurrurru*. Despite the advantages, current copyright law is unable to deal with core characteristics of ATSI heritage, including community ownership, material form, perpetual duration and inability in certain cases to identify the author.¹⁰³

Assessment and the proposed model

Overview

The author proposes a model directed to addressing a number of perceived deficiencies of the *Copyright Act* in its application to ATSI heritage, within the framework of the *Copyright Act*. An outline provides an overview of the proposed enforcement, registration and heritage elements.¹⁰⁴

The author's definition of ATSI heritage is as follows:

The heritage of the Aboriginal and Torres Strait Islander peoples is comprised of all their literary, performing and artistic works (including music, dance, song, ceremonies, symbols and designs, narratives and poetry), languages and spiritual knowledge PROVIDED ALWAYS that the use of such heritage is consistent with the cultural rights, obligations and duties of the custodian, caretaker or responsible community of the particular item of heritage, so that the actions in question conform to the best interests of the community as a whole.

The proviso is designed to protect against misuse by anyone, including ATSI peoples acting inconsistently with the responsibilities accompanying heritage.

ATSI concerns

These have been identified after a thorough consultation process.¹⁰⁵ The proposed model recognises the current copyright legislation does not provide for ATSI heritage in non-material form, the perpetuity of works, the recognition of community or custodian ownership and the inability, in some cases, to identify an author.

This article does not however support separate sui generis legislation to address the deficiencies. The author considers that completely new laws and structures will limit the prospects of implementation. Secondly, the use of existing structures and laws will have an inclusive rather than exclusive effect on the Australian people.

The amendments to the *Copyright Act* are of course within the power of the Commonwealth.¹⁰⁶

The model – a summary

The author proposes the following:

- The insertion of a discrete part in the *Copyright Act*.
- The creation of a unique right, the “heritage right” substantially defined as proposed herein.¹⁰⁷
- Benefits shall attach to the heritage designation.
- The designation entitles the custodian/s or community to rights including ownership, perpetual duration, exclusive rights of exploitation and the recognition of community ownership¹⁰⁸ These rights may not be assigned.¹⁰⁹
- The rights are defeasible so that a person claiming a better title to custodianship may apply to

- replace another custodial claimant.
- Like copyright, there will not be a grant of rights on registration. The rights will exist because the expression falls within the definition.
- The use of ATSI elders, acting as court experts under the existing *Federal Court Rules 2011 (Cth)* (“*Federal Court Rules*”), to give opinions on heritage status of the expression and custodial entitlement.¹¹⁰
- The introduction of a register administered by IP Australia whereby:
 - The custodian/s *may* apply for registration of the heritage at their option.
 - ATSI experts appointed by IP Australia opine on heritage status and/or the custodian’s entitlement to apply for registration.
 - There is an opposition process contesting entitlement or the status of heritage.
 - The expert opinion is in evidence in an opposition.
 - The register will act as a document of record but does not confer any rights associated with the heritage classification.
 - The register will have benefits but will not give any rights. It will represent a view on heritage status and/or standing of the applicant. It will also provide notice relevant to a defence of innocent infringement under s. 115(3) of the *Copyright Act* and additional damages under s. 115(4) of the *Copyright Act*.

IP Australia is already well familiar with oppositions and competing entitlement claims in patents, designs and trade marks. The authority has also considered the rights of ATSI peoples within the ambit of their jurisdiction.¹¹¹

Under the proposed new part, the custodian or the community may enforce the heritage rights. Heritage will be enforceable simply because it is heritage. The custodian or the community may apply directly to the Court for relief regardless of the progress of any registration application. Following the filing of the application, a case management review might consider appointing an ATSI person as a Court expert to opine on the standing of the applicant and the ATSI heritage.

The relief a Court could give may mirror the relief presently under the *Copyright Act*.¹¹²

Considerations behind the model

Understanding ATSI heritage

The author submits that heritage will always have a far deeper spiritual meaning for ATSI peoples than for others. Accordingly, the model places emphasis on the expertise of ATSI elders. Following on from the wide consultation which resulted in the *Our Culture Our Future Report*, there appears to have been a Government response which took the form of the *Copyright Amendment (Indigenous Communal Moral Rights) Bill 2003* (“ICMR Bill”). A supplementary paper commissioned by IP Australia and the Department of Industry, Innovation and Science (“DIIS”) and produced by Terri Janke and Company noted that the ICMR Bill was criticised as being unfavourable and onerous for Indigenous communities. The ICMR Bill did not proceed to law.¹¹³

Features the proposed model seeks to address

A number of issues are sought to be addressed as attaching to “heritage”.¹¹⁴ These include the right to own and control ATSI heritage; to nominate what constitutes ATSI heritage; to be heard as experts as to what constitutes ATSI heritage; to be recognised as the primary guardians and interpreters of ATSI heritage. It also seeks to provide for protection of ATSI heritage as a community and thereby to authorise or refuse to authorise the commercial use of ATSI heritage.

Renovation v reconstruction

There are two paths which may be taken toward the recognition and enforcement of the ATSI heritage as shown in the outline above.¹¹⁵

Firstly, the option to apply to IP Australia for entry on the register of the heritage.¹¹⁶ This will be filed with IP Australia and involve an examination process. It is envisaged that the examiner/s may be an ATSI expert, who can provide the requisite knowledge and opinion.

Following acceptance of the heritage right application, the acceptance is advertised to establish whether there is any opponent to the registration and, failing opposition, entered upon the heritage register.¹¹⁷

Registration will not attract any rights of itself. It is likely to have evidentiary value and relevance to claims of innocent infringement but will not give the registrant any rights by reason of registration. Copyright in ATSI heritage will, as copyright does now, follow as a result of creation and within the guidelines in the new Part in the *Copyright Act* dealing specifically with ATSI heritage.

In relation to the administration of the proposed ATSI register by IP Australia, the current Administrative Arrangements Order (“AAO”), dated 29 May 2019, identifies the *Copyright Act* as legislation administered by the Minister for Communications and the Arts (“DOCA”). IP Australia, which this article suggests is ideally suited to keep the ATSI register and determine oppositions to registration, deals with legislation, including the *Patents Act 1990* (Cth) and the *Trade Marks Act 1995* (Cth), which are administered by the Minister for DIIS.

There are, however, numerous examples of how legislation may be split between Ministers. It may take the form of an exception to the DOCA copyright administrative power,¹¹⁸ or expressed in favour of DIIS, but limited to refer to specific Chapters or Parts in Acts.¹¹⁹ The second path is the direct enforcement of the ATSI heritage right. ATSI heritage exists because it *is* heritage and not because it is may appear in the proposed ATSI register. Accordingly, like copyright, it, which needs no registration, enforcement may occur upon filing an initiating process in accordance with the *Federal Court Rules*.

The rights attaching to the heritage designation

The rights attaching to ATSI heritage include the existing rights under the *Copyright Act* however, over and above these rights, the heritage right will not be limited to material form or fixed duration and will recognise communal ownership.

ATSI heritage rights set out in a discrete Part of the *Copyright Act* will recognise the unique aspects of ATSI cultural heritage.

The proviso addresses the circumstances where anyone, including the custodian or community, uses the heritage for purposes which do not conform to the best interests of the community as a whole. Any reform must recognise that ATSI heritage does not fall into the neat categories of western IP.¹²⁰

It is “more appropriate and simpler to refer to the collective cultural heritage of each Indigenous people” so that “a song or story is not a commodity or a form of property but one of the manifestations of an ancient and continuing relationship between people and their territory”.¹²¹

Material form is therefore not essential – what is essential is that it forms part of ATSI peoples’ heritage.

It is noted and acknowledged, that the author’s proposed definition for the purpose of this article is too wide. It extends to knowledge concerning medicinal plants, genetic material and traditional medicines. This article is directed toward the arts and cultural expression rather than Indigenous ecological (biodiversity) knowledge.¹²² Such a separation has been identified:

*Several commentators have noted that it might be more practical to separate arts and cultural expression from Indigenous cultural knowledge about biodiversity and the environment.*¹²³

IP Australia is presently conducting a review of the IP areas under its jurisdiction.¹²⁴

The heritage will have a direct connection to ATSI peoples' culture and heritage. It will not need not find expression in a material form but must have substantial consistency. The form of ATSI heritage has identifiable custodians and/or community owners who maintain its integrity and are required to educate and transmit the heritage to subsequent generations. Any of the heritage must be consistent with those duties and the heritage may only be enforced by the custodian/s or community owners.

Custodian/s and Communities

Custodians and communities are required to act in accordance with the best interests of the community:

*The traditional custodians are empowered as caretakers in relation to the particular item of heritage only in so far as their actions conform to the best interests of the community as a whole.*¹²⁵

The custodian or community representative arises in several contexts. The custodian or community may apply for registration of the heritage, act as an expert giving an opinion, prosecute an infringement of the heritage right and authorise use in the best interests of the community.

Self-determination

The right to self-determination includes the right and duty of ATSI peoples to maintain and develop their own cultures, knowledge systems and forms of social organisation.¹²⁶

Self-determination is a critical aspect of the model because ATSI culture considers that non-Indigenous cultures do not comprehend the depth of ATSI heritage on an experiential level:

*It is a feature of the style of the artworks in question that the artist will encode into the artwork secret parts of the dreaming that will be recognised and understood only by those who are initiated into the relevant ceremonies, or at least have a close knowledge of the cultural significance of the story.*¹²⁷

Elders may be appointed for their opinion. Firstly, in the registration process, an expert may be called upon for the following to identify whether the cultural expression is in fact "heritage" and/or provide an opinion on conflicting custodianship claims.

Secondly, the expert or an expert panel may act as a Court appointed expert/panel in enforcement or entitlement issues. The ATSI expertise will provide the Court with evidence on the validity of the heritage claimed or the identification of the proper party or parties to be identified as the rightful custodian/s. This mechanism exists and may be utilised by the Federal Court.¹²⁸

An example of the assistance provided by such an expert was the involvement of Ms Marika, who was an artist involved in the *Milpurrurru* litigation. At the time of the relevant events, Ms Marika was heavily involved in community groups, mainly as a consultant for arts related cross-cultural exchange and as an educator in Aboriginal culture.¹²⁹

Community ownership of ATSI heritage

The community bears the ultimate responsibility for maintaining the integrity of ATSI heritage. The consequences of its misuse may include being outcast from the community or being required to make a payment of money or in days past, spearing. If the use is an unauthorised use of heritage, then the

party who is entitled to bring that action is the relevant community. In the case of ATSI heritage the issue of ownership goes beyond the person usually referred to as the “author”.¹³⁰

The rights of ATSI heritage in perpetuity

IP rights are for a fixed period as the grantee is given an exclusive period to exploit the subject of the IP right and thereafter it is open to the public. Generally, the party entitled to the IP right is given a period of monopoly during which time they (and their authorised users), may enjoy it exclusively but ultimately the rights are open for the public to use.

It would be incongruous to limit a heritage right to the life of the author and 70 years, when the original author may not even be identifiable and the heritage survived many thousand years.

The reason that it is appropriate to provide a perpetual right for ATSI heritage, is that the rationale behind other IP rights does not apply. Heritage is linked, in the author’s proposed definition, to the ongoing “obligations and duties of the custodian, caretaker or responsible community ... so that the actions in question conform to the best interests of the community as a whole.” ATSI heritage cannot therefore fall into the public domain as the public is not charged with these obligations.

Inability to transfer ownership of heritage rights

It follows that if heritage is concerned with a legacy for the descendants of original people, the rights of ownership cannot be assigned. Heritage has been handed down according to traditional law and there is no basis to argue that the heritage may be transferred by willing participants.

A licence of ATSI heritage presents a more complex situation. ATSI communities may have a desire to share some aspects of their knowledge or financially benefit from its use. In such a case, the protocol will require transparency of the licence, an assurance that the community or custodian owns the ATSI heritage, a maximum term of three years inclusive of any option, so that works do not become monopolised and should have regard to the effects of the repeal of s. 51(3) of the *Competition and Consumer Act 2010* (Cth) by the *Treasury Laws Amendment (2018 Measures No. 5) Act 2019* (Cth) Schedule 4.

There should also be a control over the way the ATSI heritage is used and regular accounting.

Material form not essential

The definition of ATSI heritage should transcend the requirement for a material form. The inseparability of the expression from the custodial obligations provides, in the author’s view, justification for the relaxation of rule as to material form.

Material form does inform the test of “substantial part” for infringement purposes, however, the author expects that many expressions of ATSI heritage have crystallised over many years.

Substantial Part

The requirement for substantial part¹³¹ did not appear to be an impediment in *Milpurrurru* where his Honour found no difficulty in finding a substantial part had been taken:

Applying these principles to the snake carpet, I am in no doubt that it constitutes a reproduction of a substantial part of the artwork. There are striking similarities on a visual comparison of the artwork with the carpet. While the Dreaming of the Witiitj is often told in Aboriginal artwork, the particular depiction of the tail and the rarrk used in this artwork is

*original and distinctive. There is, in any view, a substantial use of that part of the artwork in the carpet.*¹³²

In relation to musical works, the principles have been applied along the same lines, namely, objective similarity.¹³³

Moral rights

The article considers that the mechanisms in place presently in relation to moral rights in Part IX of the *Copyright Act* form a sound basis for the addition of a category in relation to the custodian/community. This takes in account the deficiency of the *Copyright Act* (in relation to ATSI heritage), to focus on the identified “creators” of the copyright material.¹³⁴

Applicable to ATSI heritage, these could take the following forms:

- Division 2AA – Right of attribution of custodian/s and the community.
- Division 3AA - Right not to have custodianship or community ownership of a work falsely attributed.
- Division 4AA - Right of integrity of custodian/community of a work to prevent unauthorised and derogatory treatment of heritage.

Consequently, a failure to recognise the custodian, or falsely recognise a person/s as custodians or deal with the heritage in a manner infringing the custodian or community’s right of integrity in the heritage, may sound in additional damages to discourage such conduct.¹³⁵

Heritage held in libraries, museums and universities

Access to archives is important to ATSI people¹³⁶ and is a matter of great concern to ATSI communities. In its *National Position Statement for Aboriginal and Torres Strait Islander Library Services and Collections* (2014), NSLA included a commitment to the following:

- The right of ATSI peoples to be informed about collections that exist relating to their heritage.
- The right of ATSI peoples to determine use and access to ATSI heritage.
- The inclusion of ATSI peoples in decision making processes, at all levels across the library and information sector in relation to ATSI heritage.¹³⁷

The issue of access to or retrieval of ATSI heritage held by these institutions is beyond the scope of this article. However, the NSLA position is not inconsistent with the proposal raised herein.

Conclusion

As a general observation, there have been a number of attempts to address the issue of the misuse of ATSI heritage for commercial gain.¹³⁸ These approach the issue from the very practical position of protecting sacred sites and artefacts and from the perspective of consumer law, respectively. The gravamen of the issue of protecting ATSI heritage, is firstly to accept the product of ATSI creative endeavour cannot be fully understood by non-ATSI peoples but must be respected and acknowledged. This article has recommended that there is no need to wipe the slate clean and start again to address protection of ATSI heritage.

The more inclusive and uniting approach recommended in this article is to endorse the features of the *Copyright Act* which may be utilised such as enforcement procedures, relief and moral rights, whilst

at the same time introducing a dedicated Part, which deals with the unique aspects and exists in respect of ATSI heritage, separately from the current copyright laws. These issues include duration, authorship and originality, all of which are problematic when the current laws are applied to ATSI heritage.

¹ Barrister, Queensland.

² The description of this country's first peoples is not itself without some difference of opinion. See Michael Frankel & Company and Terri Janke, *Our Culture: Our Future Report – Report on Australian Indigenous Cultural and Intellectual Property Rights* (1998) [1.2.2] 6 <<http://www.terrijanke.com.au/our-culture-our-future>> (“*Our Culture: Our Future Report*”). This report was prepared for the Australian Institute of Aboriginal and Torres Strait Islander Studies (“AIATSIS”) and the Aboriginal and Torres Strait Islander Commission (“ATSIC”).

³ *Our Culture: Our Future Report; The Competition and Consumer Amendment (Prevention of Exploitation of Indigenous Cultural Expressions) Bill 2019*; IP Australia *Protection of Indigenous Knowledge in the Intellectual Property System* (Consultation Paper, September 2018) <<https://www.ipaustralia.gov.au/about-us/public-consultations/indigenous-knowledge-consultations>>.

⁴ These include: the *Aboriginal Cultural Heritage Act 2003* (Qld); *Torres Strait Islander Cultural Heritage Act 2003* (Qld); *National Parks and Wildlife Amendment (Aboriginal Ownership) Act 1996* (NSW); *Aboriginal Sacred Sites Act 1989* (NT); *Aboriginal Heritage Act 1988* (SA); *Aboriginal Relics Act 1975* (Tas); *Aboriginal Heritage Act 2006* (Vic); *Aboriginal Heritage Act 1972* (WA); *Heritage Act 2004* (ACT); and the *Heritage Objects Act 1991* (ACT).

⁵ Decision 1994/105.

⁶ Resolution 1993/44.

⁷ Erica Irene Daes, *Final Report on the Protection of the Heritage of Indigenous Peoples* (United Nations Document E/CN.4/Sub.2/1995/26) Annex Guideline 11 (“1995 Daes Report”).

⁸ *Our Culture: Our Future Report* [1.2] 7.

⁹ *Our Culture: Our Future Report* [1.6] 11. The term “cultural property” is defined in Article 1 of the *Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property 1970*: opened for signature 14 November 1970 <<http://www.unesco.org/new/en/culture/themes/illicit-trafficking-of-cultural-property/1970-convention/text-of-the-convention/>>.

¹⁰ Australian Law Reform Commission, *Essentially Yours: The Protection of Human Genetic Information in Australia* (Report 96, 2003) (“ALRC Report 96”) chapter 36 ‘Kinship and identity’ [36.11] referring to Commonwealth of Australia, *Royal Commission into Aboriginal Deaths in Custody* (National Report, 1991) [11.12.5].

¹¹ *Commonwealth v Tasmania* (1983) 158 CLR 1, 274 per Deane J.

¹² Available at

<https://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/Publications_Archive/CIB/cib0203/03Cib10>.

¹³ *Our Culture: Our Future Report* [1.3.5] 8.

¹⁴ *Copyright Act* s.115(1).

¹⁵ *Human Rights of Indigenous Peoples* (Report of the seminar on the draft principles and guidelines for the protection of the heritage of indigenous people: Chairperson-Rapporteur Mrs Erica-Irene Daes, 28 February – 1 March 2000) E/CN.4/Sub.2/2000/26, Guideline 14.

¹⁶ Available at <<https://www.facebook.com/Ethnoornithology/posts/its-not-just-people-who-light-fires-says-aboriginalartist-billy-yalawanga-from-c/969346463119317/>>.

¹⁷ *United Nations Declaration on the Rights of Indigenous Peoples* art. 13(1)

<<https://www.humanrights.gov.au/publications/un-declaration-rights-indigenous-peoples-1>>.

¹⁸ *Community, identity, wellbeing: the report of the Second National Indigenous Languages Survey* (the “NILS 2014 report”) XI.

¹⁹ *National Indigenous Languages Survey Report 2005* 3 <<https://aiatsis.gov.au/publications/products/national-indigenous-languages-survey-report-2005>>.

²⁰ M. Walsh and C. Yallop (eds), *Languages and Their Status in Aboriginal Australia*, (Aboriginal Studies Press, 2005) chapter 1, 2.

²¹ *NILS 2005 report* 68; table 6.5, 79.

²² Available at AIATSIS <https://aiatsis.gov.au/sites/default/files/products/report_research_outputs/2014-report-of-the-2nd-national-indigenous-languages-survey.pdf>.

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- ²³ *NILS 2014 report* 20.
- ²⁴ *Our Culture: Our Future Report*, 11 referring to J C Weiner, ‘Protection of Folklore: A Political and Legal Challenge’ (1987)18 *International Review of Industrial Property and Copyright* 67.
- ²⁵ *Aboriginal and Historical Relics Preservation Act* 1965 (SA); *Aboriginal Sacred Sites Act* 1989 (NT); *Aboriginal Relics Preservation Act* 1967 (Qld); *Aboriginal Relics Act* 1975 (Tas); *Archaeological and Aboriginal Relics Preservation Act* 1972 (Vic); *Aboriginal Heritage Act* 1972 (WA).
- ²⁶ *National Parks and Wildlife Act* 1974 (NSW) s. 86(1).
- ²⁷ *Aboriginal and Torres Strait Islander Heritage Protection Act* 1984 (Cth) (the “*ATSIHP Act*”) s.4.
- ²⁸ *Aboriginal Heritage Amendment Act* 2016 (Vic) (“*AHA Act*”) s. 14.
- ²⁹ *AHA Act* s.79D.
- ³⁰ *AHA Act* s.79G.
- ³¹ Penalty units are set and calculated in the *Monetary Units Act* 2004 (Vic). One penalty unit was AU\$155.46 from 1 July 2016 to 30 June 2017. Under s.79G the penalties are 1800 penalty units and 10,000 penalty units for individuals and corporations respectively.
- ³² Available at <https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Environment_and_Communications/IndigenousCulturalExpression>.
- ³³ *Davies Shephard Pty Ltd v Stack* (2001) 51 IPR 513 [14].
- ³⁴ *The Culture: Our Future Report* [1.3.3] 8.
- ³⁵ *The 1993 Daes Study*, [29] 9; *Our Culture: Our Future Report* [1.3.4] 8.
- ³⁶ *Milpurrurru v Indofurn Pty Ltd* (1994) 30 IPR 209 (“*Milpurrurru*”).
- ³⁷ *Milpurrurru* 214.
- ³⁸ *Milpurrurru* 214.
- ³⁹ *Milpurrurru* 215.
- ⁴⁰ *Milpurrurru* 244.
- ⁴¹ *Milpurrurru* 214.
- ⁴² *Milpurrurru* 215.
- ⁴³ *Milpurrurru* 215.
- ⁴⁴ *Milwell Pty Ltd v Olympic Amusements Pty Ltd* [1999] FCA 63 referring to *University of London Press Ltd v University Tutorial Press Ltd* ([1916] 2 Ch 602, 608 to 610.
- ⁴⁵ James Lahore, *Copyright and Designs* (2004) LexisNexis loose-leaf commentary [2050].
- ⁴⁶ *Milpurrurru* 214.
- ⁴⁷ *Milpurrurru* 215.
- ⁴⁸ The custodian: *Our Culture: Our Future Report* 8; the artist: *Milpurrurru* 215 lines 20 – 25.
- ⁴⁹ United Nations Commission on Human Rights Sub-Commission on Prevention of Discrimination and Protection of Minorities Working Group on Indigenous Populations 14th Session 29 July – 2 August 1996 Document: 96-12980 [35].
- ⁵⁰ *The 1995 Daes Report Annex Guidelines* [11].
- ⁵¹ *The 1995 Daes Report Annex Guidelines* [14].
- ⁵² *Our Culture: Our Future Report* [1.4] 9.
- ⁵³ Inaugural Australian National University Alumni lecture, Charles Darwin University Darwin Alumni Reception.
- ⁵⁴ Available at <<https://drbentleyjames.wordpress.com/>>.
- ⁵⁵ Available at <<https://drbentleyjames.wordpress.com/2016/03/31/thank-you/#respond>>. .
- ⁵⁶ *The 1993 Daes Study* [170] 40.
- ⁵⁷ <<https://warlu.com/about/history/>>.
- ⁵⁸ Excepting trade marks which may be renewed.
- ⁵⁹ James Lahore, *The Legal Rationale of the Patent System* (Speech delivered at the Industrial Property Advisory Committee Seminar, Healesville, Victoria, Australia, 7 November 1980).
- ⁶⁰ *JT International SA v Commonwealth of Australia* [2012] HCA 43 per French CJ [36].
- ⁶¹ Available at <https://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/FlagPost/2017/May/The_1967_Referendum>.
- ⁶² *Our Culture: Our Future Report*, Executive Summary, XX.
- ⁶³ *Aboriginal and Torres Strait Islander Peoples Recognition Act* 2013 (Cth) s.3.
- ⁶⁴ *Our Culture: Our Future Report* 188.
- ⁶⁵ *Our Culture: Our Future Report*, Executive Summary, XXI.
- ⁶⁶ Available at <<https://www.abc.net.au/science/articles/2014/10/09/4102916.htm>>.
- ⁶⁷ *IceTV Pty Limited v Nine Network Australia Pty Limited* [2009] HCA 14 [28].

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- ⁶⁸ *Telstra Corporation Limited v Phone Directories Company Pty Ltd* [2010] FCAFC 149 (“*Phone Directories*”) [72] per Keane CJ (as his Honour then was).
- ⁶⁹ *Copyright Act* s.31(1)(a) as to literary, dramatic or musical works and s.31(1)(b) as to artistic works.
- ⁷⁰ *Copyright Act* s.32(1) and s.32(2).
- ⁷¹ *IceTV* [22] per French CJ, Crennan and Kiefel JJ.
- ⁷² *IceTV* [24] and [25] per French CJ, Crennan and Kiefel JJ
- ⁷³ *Phone Directories* [61] to [74] and [96] per Keane CJ.
- ⁷⁴ *Phone Directories* [57].
- ⁷⁵ *Our Culture: Our Future Report* 53.
- ⁷⁶ *Copyright Act* s.126A as to subsistence; s.126B as to ownership and s.127 as to authorship.
- ⁷⁷ *Thomas v Brown* (1997) 37 IPR 207.
- ⁷⁸ *Bulun Bulun and Another v R & T Textiles Pty Ltd and Another* (1998) 41 IPR 513 (“*Bulun Bulun*”)
- ⁷⁹ A directory of Aboriginal artists is available at <<http://news.aboriginalartdirectory.com/2010/05/death-of-john-bulun-bulun.php>>.
- ⁸⁰ Colin Golvan, ‘The Protection of “At The Waterhole” by John Bulun – Aboriginal art and the recognition of private and communal rights’, Law Articles and Essays <www.colingolvan.com.au/> (“Golvan”). See also Colin Golvan, ‘Aboriginal Art and Copyright: The case for Johnny Bulun Bulun’ (1989) 10 *European and Intellectual Property Review* 346.
- ⁸¹ Golvan 7.
- ⁸² Golvan 3.
- ⁸³ Golvan 3.
- ⁸⁴ Golvan 7.
- ⁸⁵ *Bulun Bulun* 525.
- ⁸⁶ Board of Studies NSW, *Protecting Australian Indigenous Art: ownership, copyright and marketing issues for NSW schools* (2006) <<https://ab-ed.nesa.nsw.edu.au/files/protecting-australian-indigenous-art.pdf>>.
- ⁸⁷ *Bulun Bulun* 525.
- ⁸⁸ *Bulun Bulun* 517.
- ⁸⁹ *Milpurrurru and Others v Indofurn Pty Ltd and Others* (1994) 30 IPR 209 (“*Milpurrurru*”)
- ⁹⁰ *Bulun Bulun* 515.
- ⁹¹ *Mabo v The State of Queensland [No.2]* (1992) 175 CLR 1.
- ⁹² *Bulun Bulun* 524.
- ⁹³ *Bulun Bulun* 524.
- ⁹⁴ *Bulun Bulun* 529-530.
- ⁹⁵ *Our Culture: Our Future Report* 62.
- ⁹⁶ *Milpurrurru*.
- ⁹⁷ *Milpurrurru* 216.
- ⁹⁸ *Milpurrurru* 216.
- ⁹⁹ *Milpurrurru* 224.
- ¹⁰⁰ *Milpurrurru* 239.
- ¹⁰¹ *Copyright Act* s.8; *Bulun Bulun* 525.
- ¹⁰² The submission by the NSLA to the *Finding the Way* Issues Paper (16 October 2014) refers to NSLA, *Position Statement on Indigenous Intellectual Property and Ownership* (2010) which in turn refers to: Molly Torsen and Jane Anderson, *Intellectual Property and the Safeguarding of Traditional Cultures: Legal Issues and Practical Options for Museums, Libraries and Archives* (WIPO paper, 2010) 15 <<https://www.wipo.int/publications/en/details.jsp?id=235&plang=EN>>.
- ¹⁰³ It is noted that these cases were determined before the amendments to the *Copyright Act* were introduced by the *Copyright Amendment (Moral Rights) Act* 2000 (Cth).
- ¹⁰⁴ *Aboriginal and Torres Strait Islander Peoples’ Cultural Property and Copyright Project*, 87, available at D Eliades, *Aboriginal and Torres Strait Islander Peoples’ Cultural Property and Copyright Project* (2016) 87 <<https://deliades.com.au/copyright/>>.
- ¹⁰⁵ *Our Culture: Our Future Report*, Executive Summary, XX and XXI.
- ¹⁰⁶ The *Commonwealth of Australia Constitution Act* s.51(xviii) (“the Constitution”).
- ¹⁰⁷ *Our Culture: Our Future Report*, Executive Summary, XX and XXI [2].
- ¹⁰⁸ *Our Culture: Our Future Report*, Executive Summary, XX and XXI [5], [6] and [13].
- ¹⁰⁹ *Our Culture: Our Future Report*, Executive Summary, XXXVI.
- ¹¹⁰ *Federal Court Rules* 2011 (Cth) r. 23.01. *Our Culture: Our Future Report*, Executive Summary, XX and XXI [4].
- ¹¹¹ IP Australia, *Protection of Indigenous Knowledge in the Intellectual Property System* (Consultation Paper September 2018) <<https://www.ipaustralia.gov.au/about-us/public-consultations/indigenous-knowledge-consultations>>.

¹¹² *Copyright Act* s.115(2).

¹¹³ Terry Janke and Co., *Legal Protection of Indigenous Knowledge in Australia* (2018) 10.
<https://www.ipaustralia.gov.au/sites/default/files/supp_paper_1_legal_protection_in_australia_28mar2018.pdf>.

¹¹⁴ *Our Culture: Our Future Report*, Executive Summary Chapter Four, XX.

¹¹⁵ D Eliades, *Aboriginal and Torres Strait Islander Peoples' Cultural Property and Copyright Project* (2016), 87 <<https://deliades.com.au/copyright/>>.

¹¹⁶ IP Australia is identified as the preferred body as it has a process which it administers which is already in use and reflects principles of natural justice. An aim of this article is to utilise existing structures and processes where possible.

¹¹⁷ This article does not propose that the process is under any particular Registrar or the Commissioner. It is likely that a distinct Registrar role be created ideally which will come under an existing Registrar's auspices. However, the article intends that mechanisms in place are intended to be utilised noting that where possible an examiner or examiners who are Aboriginals or Torres Strait Islanders be trained in conjunction with the use of the expert.

¹¹⁸ For example, the AAO Part 2 identifies the *Native Title Act* 1993 (Cth) as being legislation administered by the Attorney "except to the extent administered by the Minister for Indigenous Australians".

¹¹⁹ For example, the Minister for Home Affairs administers the *Customs Act* 1901 (Cth) ("*Customs Act*"), other than Part XV B and XV C and the Minister for the DIIS administers the *Customs Act*, Parts XV B and XV C and section 9, insofar as that section relates to the administration of those Parts or the *Customs Tariff (Anti-Dumping) Act* 1975 (Cth).

¹²⁰ M Davis, *Indigenous Peoples and Intellectual Property Rights* (1996-97 Research Paper 20)
<https://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/rp/RP9697/97rp20>.

¹²¹ *Our Culture: Our Future Report* 2 referring to the *1993 Daes' study* [22].

¹²² *Our Culture: Our Future Report*, Executive Summary Chapter Eighteen, XXXVI.

¹²³ *Our Culture: Our Future Report* 185.

¹²⁴ IP Australia, *Protection of Indigenous Knowledge in the Intellectual Property System: Consultation Paper*, (September 2018) <<https://www.ipaustralia.gov.au/about-us/public-consultations/indigenous-knowledge-consultation>>.

¹²⁵ *Our Culture: Our Future Report* 8.

¹²⁶ United Nations, *Draft Declaration on the Protection of the Rights of Indigenous Peoples* and the Indigenous Reference Groups *Draft Principles and Guidelines for the Protection of Indigenous Cultural and Intellectual Property* referred to in *Our Culture: Our Future Report* 47

<<https://www.un.org/development/desa/indigenouspeoples/declaration-on-the-rights-of-indigenous-peoples.html>>.

¹²⁷ *Milpurrurru* 30 IPR 209 215.

¹²⁸ *Federal Court Rules* 2011 (Cth) part 23 division 23.1 rule 23.01.

¹²⁹ *Milpurrurru* 30 IPR 209, 213.

¹³⁰ *Milpurrurru* 30 IPR 209, 215.

¹³¹ *Copyright Act* s.14.

¹³² *Milpurrurru* 30 IPR 209, 228.

¹³³ *EMI Songs Australia Pty Limited v Larrikin Music Publishing Pty Limited* (2011) 90 IPR 50, 62.

¹³⁴ Excepting therefrom, broadcasting rights.

¹³⁵ *Copyright Act* s.115(4)(b)(ia).

¹³⁶ *Our Culture: Our Future* [3.10.2] 32.

¹³⁷ The Position Statement is available at <<https://www.nsla.org.au/publication/national-position-statement-aboriginal-and-torres-strait-islander-library-services-and>>.

¹³⁸ *Aboriginal Heritage Amendment Act* 2016 (Vic) and *Competition and Consumer Amendment (Prevention of Exploitation of Indigenous Cultural Expressions) Bill* 2019 (Cth).