

Time for Change:

A discussion about Aboriginal Cultural Heritage laws

Dr Terri Janke

Hosted by the
Office of Victorian Aboriginal Cultural Heritage

Thursday 26 November 2020, 1.00 – 4.25pm
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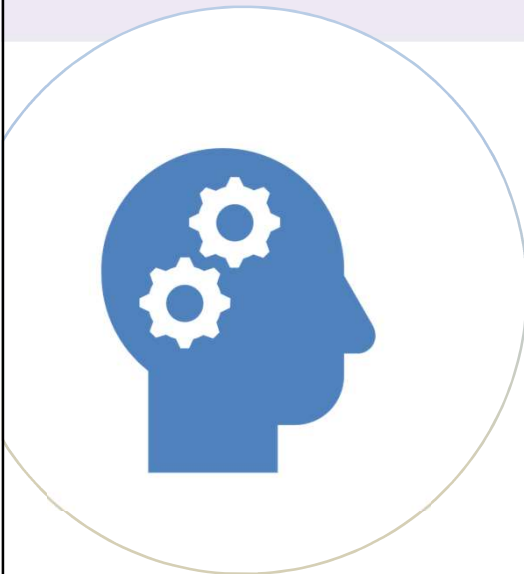
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Scope of Problem

- Heritage focused on physical sites not intangible.
- Misappropriation of Indigenous Cultural and Intellectual Property – Indigenous Knowledge and Indigenous Cultural Expression
- Occurs without consent and without benefit sharing.
- This misappropriation demeans cultural practices and distorts meanings. (HARM)
- Sacred and secret knowledge disrespected.
- Unfair copycats and unjust enrichment, no benefit sharing (ECONOMIC)

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Key developments for Indigenous Cultural and Intellectual Property

Australia

Wandjuk Marika calls for copyright protection of Aboriginal Art 1974
\$1 note & David Malangi 1975
Report of the Working Party on the Protection of Aboriginal Folklore 1981
Reserve Bank v Yumbulul (\$10 note case) 1991
Establishment of National Indigenous Arts Advocacy Association (1992)
Cth Government Issues Paper, Stopping the Ripoffs 1996
Mipurruru v Indofurn, the Carpets Case 1996
Bulun v R & T Textiles 1998
NIAAA Label of Authenticity 1999 – 2003
Arts Law Centre – Artists in the Black
Senate Standing Committee Report, Indigenous Art - Securing the Future Australia's Indigenous visual arts and craft sector 2007
Resale Royalty Rights for Artists Act 2009
Katter Bill of Fake Arts 2017
Aboriginal Heritage Act 2016 (Vic)
Return of Albert Namitjira copyright to family 2017
House of Representatives Fake Arts Inquiry 2018
IP Australia Indigenous Knowledge discussion paper 2018

International

Tunis Model Law 1976
UNESCO WIPO Model Provisions for National Laws on the Protection of Folklore 1985
ILO Convention 169 (1986)
Study on Indigenous Cultural and Intellectual Property prepared by Erica Irene-Daes for the United Nations Sub-Commission on Prevention of Discrimination and Protection of Minorities 1994
Word Forum on Folklore Thailand 1996
Convention on Biological Diversity 1992
GATT and TRIP Uruguay Round 1994
Pacific Model Law
WIPO IGC established 2000
Indigenous TK database 2001
Draft Articles TK and TCE 2007 – current.
UN Declaration on the Rights of Indigenous People 2008
Nagoya Protocol on Access and Benefit Sharing 2010
WAI 262 (NZ) 2011
Draft Articles TK and TCE current.

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1999 - Our Culture: Our Future



Our Culture : Our Future
Report on Australian Indigenous Cultural and Intellectual Property Rights

- Written in 1999, *Our Culture: Our future* recommended legal and non-legal measures for better recognition of Indigenous Cultural Intellectual Property rights.
- Called for sui generis laws.
- Changes to existing IP laws.
- Resale Royalty.
- Certification mark and labelling system.
- National Indigenous Cultural Authority.

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Indigenous cultural and intellectual property rights are Indigenous peoples' rights to their cultural heritage



Our Culture: Our Future

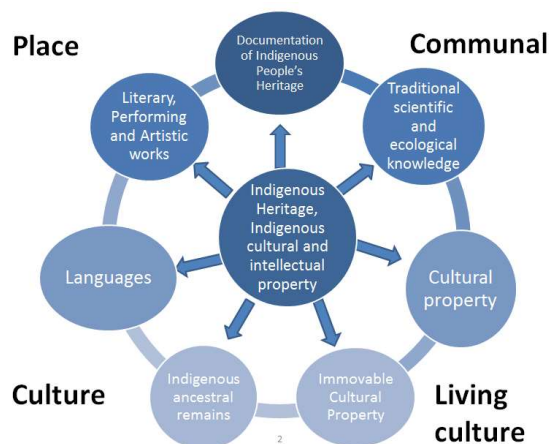
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Our Culture: Our Future



Linked to people, land and identity
Constantly evolving
Handed on through the generation
Roles and responsibilities to look after the knowledge and pass it on
Consultation and consent processes according to customary laws –
mens/women's business, sacred
Cultural connections remain forever

Rights to control and manage (FPIC)
Right of integrity
Right of attribution
Right of benefit sharing

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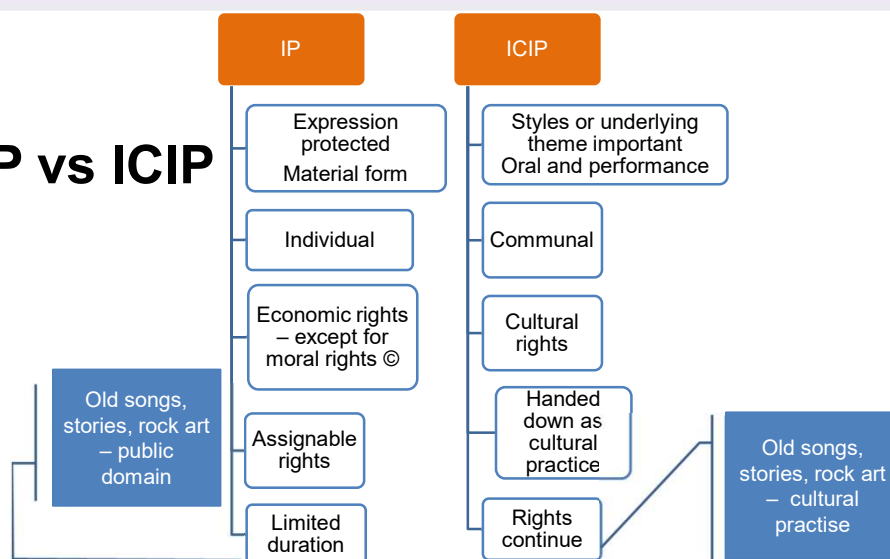
United Nations Declaration on the Rights of Indigenous Peoples:

Article 31(1):

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



IP vs ICIP





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Fake Arts Harm Culture Campaign



In 2016, the 'Fake Art Harms Culture' campaign was created to address the concern of widespread sale of works that have the 'look and feel' of being Indigenous but actually have no connection to Aboriginal and Torres Strait Islander communities. The Campaign was created by the Arts Law Centre of Australia, Indigenous Art Code and Copyright Agency who continue to do great advocacy work for the rights of Indigenous artists. <https://indigenousartcode.org/fake-art-harms-culture/>

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Milpurrurru v Indofurn

Copyright Law recognised Indigenous pre-existing clan designs are copyright protected as they are created with skill, labour and effort .

Banduk Marika, *Djanda at the Sacred Waterhole*, 1984

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Bulun Bulun v R & T Textiles

- The artist owned a fiduciary (special) duty to the clan to look after the copyright in his artwork because it included clan owned traditional ritual knowledge.
- The artist was copyright owner of the artwork and could exploit the copyright in his art but he had to take steps to protect the communal interests of the clan in the art work.

Maggie Geese and Water Lilies at the Waterhole © Johnny Bulun Bulun
Ganalbingu clan



Case study: Wandjina sculpture

Wandjina are the sacred creation spirits and source of cultural law for the Worrora, Wunumbal and Ngarinyin Aboriginal peoples of the Kimberley

Source: ABC <http://www.abc.net.au/news/2017-09-05/wandjina/8875434>

Unauthorised and offensive sculpture in the Blue Mountains.

Wanjina Watchers in the Whispering Stone, Ben Osvath.
Source: Sydney Morning Herald <http://www.smh.com.au/nsw/gallery-loses-fight-to-keep-controversial-spirit-statue-20110623-1ghme.html>



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**Griffith University,
John Watson and
the Jarlmadangah
Community**

**University of South
Australia and the
Chuulangun
Aboriginal
Corporation**

**Spinifex Project -
University of Queensland
and the Indjalandji-
Dhidhanu People**

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Victorian Aboriginal Heritage Act 2016

Part 5A allows Aboriginal groups to register intangible cultural heritage.

Permission required for commercial use.

Anything widely known to the public not included.

Allows Aboriginal people to make Aboriginal intangible heritage agreements with users.

Fines up to \$1.5 million.

Under the Act intangible heritage means any knowledge or expression of Aboriginal tradition other than cultural heritage – but all heritage is linked!

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The State of Victoria's Aboriginal Cultural Heritage Report, Office of the Victorian Aboriginal Heritage Council

Every 5 years the Aboriginal Heritage Act 2006 (Vic) requires a report on the State of Victoria's Aboriginal Cultural Heritage.

The Victorian Aboriginal Heritage Council and TJC will prepare the report and reflect on:

1. What is Cultural Heritage?
 2. What rights do Aboriginal people want to Cultural Heritage?
 3. How are Aboriginal people able to exercise these rights to Cultural Heritage currently?
 4. What stops Aboriginal people from exercising their rights?
 5. How well does the wider Victorian community understand Culture?
 6. **What is the vision for the future?**
- Discussion paper published December 2020
 - Discussion paper open for comment until 31 March 2021
 - Final report due for publication 31 August 2021

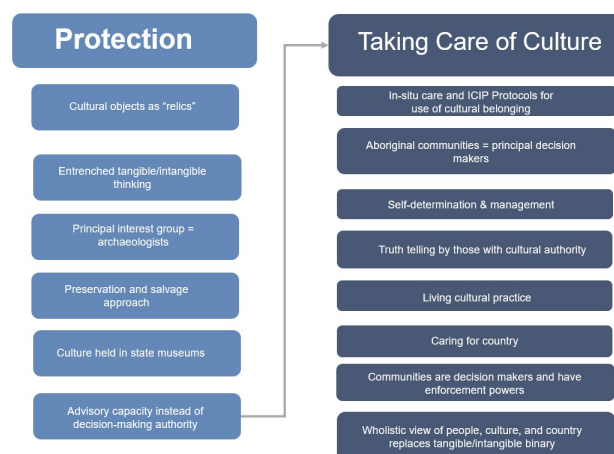
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A shift in thinking and approach to caring for culture



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Key dates

- Discussion paper published December 2020
- Discussion paper open for comment until 31 March 2021
- How to feedback?
You can respond to the discussion paper via the Aboriginal Heritage Council's website or by attending a consultation meeting
- Final report due for publication 31 August 2021

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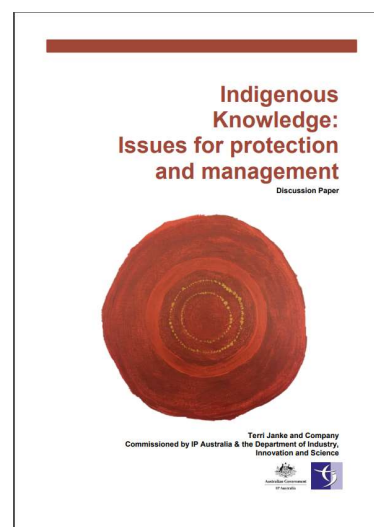
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2018 - Indigenous Knowledge: Issues for protection and management

Issues of protecting and managing Indigenous knowledge:

1. Misappropriation of Indigenous arts and crafts
2. Misuse of Indigenous languages, words and clan names
3. Recording and digitisation of Indigenous Knowledge
4. Misappropriation and misuse of Traditional Knowledge
5. Use of Indigenous genetic resources and associated Traditional Knowledge
6. Misuse and derogatory treatment if secret or sacred knowledge



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World Intellectual Property Organisation (WIPO)

Draft articles on:

- Protection of Traditional Knowledge
- Traditional Cultural Expressions, and
- IP & Genetic Resources



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Thank you

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