



**Submission to the Consultation
on proposed Fake Art and broader
Indigenous Cultural and Intellectual Property Legislation**

On behalf of the Federation of Victorian Traditional Owner Corporations (**Federation**), we are pleased to put forward the following submission.

The Federation is the State-wide body that convenes and advocates for the rights and interests of Traditional Owner groups and their communities.

The Federation was established by Traditional Owners in 2013 to advance shared interests towards systemic reform in government policy engagement and in creating economic opportunities and caring for Country.

As an Aboriginal controlled organisation, with a board derived from Traditional Owner Corporations, our success is determined by and grounded in the strategies and aspirations of Traditional Owners. Capacity support and resource sharing is a central provision of the Federation to its members in the areas of policy and regulatory change required to move forward with real self-determination for Traditional Owners and raising the voices of its member corporations on national and international stages.

1 Preliminaries

1.1 Introduction

Aboriginal and Torres Strait Islander peoples have cared for and protected their Countries for over 65,000 years. Their unique relationship to Country, and all that is on and contained by it, is almost unimaginable to the non-First Nations community.

The associated knowledge and cultural associations of place and intangible rights are therefore deep and ever present. Material such as dance, language, story and artistic design are important manifestations of these intangible rights. It is essential that any protections of such knowledge provides a basis for appropriate economic development for Traditional Owners, who continue to experience the ongoing effects of colonisation. The vast gap in life expectancy, health outcomes and generalised rates of violence and incarceration, is testament to the stymying of Aboriginal and Torres Strait Islander peoples' rights.

Economic development forms a fundamental pillar in closing these gaps. It provides a means for Aboriginal and Torres Strait Islander peoples to begin to rectify the brutal impacts of ongoing colonisation and self-determine their futures and not be defined by the deficit framework within which they are discussed now.

Based on this recognition of ongoing connection to country and culture, and respect for the rights and responsibilities that this determines, we must therefore include protections for all the manifestations of this intellectual property.

1.2 Submission Overview

As Minister Bourke has made clear, this first stage of legislative reform around Indigenous Cultural and Intellectual Property (**ICIP**) is focussed on ‘fake art’. However, the ‘fake art’ issues necessarily involve many of the same broader policy considerations of process and ownership that must necessarily be addressed in establishing a broader ICIP regime.

Central to this regime must be the principle that ICIP that springs from Traditional Knowledge (TK) is necessarily generated and “owned” by the community that gives rise to that Traditional Knowledge (**TK**)¹. When this principle is given effect in a Western legal system it requires that the legal entity ‘owning’ the ICIP is controlled by, and representative of, the Traditional community that generated the TK that led to the ICIP.

To this end, the ultimate recognition of Traditional Owner rights in native foods and botanicals, cultural knowledge, intangible cultural heritage, environmental knowledge and bioprospecting must be managed by the same structures that are given that responsibility with respect to Traditional design as a result of the current legislative development process.

Under international law, the ICIP rights of Australia’s First Nations are recognised in the *United Nations Declaration on the Rights of Indigenous People (UNDRIP)*, the *Convention for the Safeguarding of Intangible Cultural Heritage (CSICH)* and the *Nagoya Protocol - Convention on Biological Diversity (CBD)*. Each of these instruments has relevance to the broader management of ICIP. However, as discussed further below, it is UNDRIP that provides the foundational principles for the structures necessary to manage ICIP derived from TK.

In the *Stand-alone legislation to protect Indigenous Cultural and Intellectual property Fact Sheet*, published by the Department of Infrastructure, Transport, Regional Development, Communication and the Arts (**DITRDCA**), there are 12 topics for consideration.

These can be divided into several key areas of consideration that we will discuss below.

- The first goes to the nature of cultural rights and who has ownership of these rights. This naturally flows into a consideration of who can speak for a collectively held rights and so grant permissions and hold legal responsibility.
- The second examines what these rights are over, the method and material manifestations of the Intangible Cultural Heritage.
- The third consideration looks at the principles and enforcement of any new legislation.

¹ In this context TK extends to include the notion of Traditional Cultural Expression.

The submission proceeds in three stages after this Introduction. The first examines the principles of collective ownership of TK giving rise to important aspects of ICIP. The second considers manifestations of ICIP beyond that involved in ‘fake art’. The third section before the conclusion discusses the structures necessary for the implementation of the principles identified earlier in the submission. This section draws upon the ‘case study’ of the Aboriginal intangible heritage (**AIH**) provisions of Part 5A of the *Aboriginal Heritage Act 2006* (Vic) (**AHA**) to inform recommendations in respect of the proposed Commonwealth legislation. Those recommendations are summarised below.

1.3 Submission Recommendations

The recommendations made in this submission are that:

- Ultimately, a complete understanding of ICIP is embraced, providing protections for TK and including Traditional Environmental Knowledge (**TEK**), predominantly in its manifestation in all physical aspects of culture including song, dance, visual arts, music and performance; and
- In the immediate context of “fake art”, rights associated with ICIP stemming from TK are collectively owned and managed. Art stemming from traditional design is a clear manifestation of such TK. Any fake art legislation needs necessarily to develop a process for recognition of the ownership of such traditional design by the legal entities established and controlled by the Traditional communities giving rise to the relevant TK. Utilising the terminology of UNDRIP (Art 18) these are referred to as “Traditional Owner Representatives Institutions” (**TORIs**).
- Implementation of the legislation will necessarily involve the work of a First Nations led administrative body as an initial determinant of the scope of application of the legislation and competition between competing ‘owners’ of rights created under the legislation.

2 Communal Ownership and Collective Decision Making

2.1 Ownership of Rights

Central to any protections will be the identification of those who ‘own’ the property. The concept of collective ownership, whilst not unknown, sits uncomfortably in Western law.

A key element of collective rights is the nature of the collectivity.

The UNDRIP utilises the concept of ‘collective rights’. These are rights held by ‘indigenous communities themselves’ and not by ‘individuals in community with others’. Throughout UNDRIP the distinction between the rights of “Indigenous peoples” (collective rights) and “Indigenous individuals” is highlighted.

Individuals can enjoy the culture of their society and contribute to it. However, culture itself can only exist as a community construct. It can be said that only a society (community) can give rise to laws and customs. The same is even more true of culture. Language, dance, and art only have meaning in a social context. Whilst access to culture can be a right held by an individual, the rights inherent in that culture must be held collectively.

In the jurisprudence emanating from Committee on Economic, Social and Cultural Rights (CESR), regarding the right of everyone to take part in cultural life, there is reference to the 'community or group'. This supports collective participation and ownership approach to cultural rights detailed in the UNDRIP.

Now that collective ownership of rights has been established, consultation and decision making on use of those collective rights necessarily is considered.

2.2 Jurisprudence

As we note, Traditional Owner interests have this dual individual and collective character as such it is necessary for any consideration of ICIP protections to address this issue.

The foregoing assertion (regarding the dual character of Traditional Owner interests) may require some supporting analysis. The fact that Traditional Owner rights arise and exist collectively but can be enjoyed individually is a well-established concept in Australian jurisprudence. This is most commonly explored in the context of rights to land, but as discussed above the same principle applies to other social constructs such as TK. In the context of rights to land the most authoritative statement in the issue is that of Brennan J in *Mabo No 2*² when his Honour states at [68]:

... so long as the people remain as an identifiable community, the members of whom are identified by one another as members of that community living under its laws and customs, **the communal native title** survives **to be enjoyed by the members** according to the rights and interests to which they are respectively entitled under the traditionally based laws and customs, as currently acknowledged and observed. (Emphasis added)

The point regarding rights under traditional law and custom arising from the collective identity but taking a form as both individual and collective rights is made quite explicit by his Honour in the following paragraph:

[69] Thirdly, where an indigenous people (including a clan or group), as a community, are in possession or are entitled to possession of land under a proprietary native title, their possession may be protected or their entitlement to possession **may be enforced by a representative action brought on behalf of the people or by a sub-group or individual who sues to protect or enforce rights or interests which are dependent on the communal native title. Those rights and interests are, so to speak, carved out of the communal native title.** A sub-group or individual asserting a native title dependent on a communal native title has a sufficient interest to sue to enforce or protect the communal title. A communal native **title enures for the benefit of the community as a whole and for the sub-groups and individuals within it** who have particular rights and interests in the community's lands. (Footnotes omitted, emphasis added.)

² *Mabo & Ors v Queensland & Ors* (No 2) (1992) 175 CLR 1.

To be clear it is not suggested here that Traditional Owners rights to TK necessarily equate directly to native title rights. Rather, as identified in the *Mabo No. 2* jurisprudence, that TK rights have a similar character as rights which enure “for the benefit of the community as a whole and for the sub-groups and individuals within it”.

2.3 Self-Determined Representative Structures

Article 18 of UNDRIP provides for “the right to participate in decision making in matter which would affect their rights through representatives chosen by themselves in accordance with their own procedures...”. Therefore, we see that a collectively held right to culture, and therefore ownership of that cultural knowledge, is ‘managed’ by a collectively determined representative of the Traditional community that gave rise to the TK.

Under existing Australian law there is an extensive range of Traditional Owner organisations that satisfy the representative requirements of UNDRIP Article 18. The Prescribed Body Corporates (PBCs) and Native Title Representative Bodies (NTRBs) established under the *Native Title Act 1993 (NTA)* are two examples of these. However Traditional Owner organisations established under other legislation such as the Victorian Registered Aboriginal Parties under the *Aboriginal Heritage Act* or Tasmanian Aboriginal Land Council under the *Aboriginal Land Act* provide further examples

Utilisation of the system of recognised TORIs must be a central feature of the proposed legislation. The existence and recognition of TORIs is essential to give effect to the collective rights, including the right self-determination, land rights and the right to protect and enjoy cultural heritage.

Where there is no relevant TORI, a mechanism can be developed to provide advice on who the appropriate Traditional Owners are to engage with in determining issues of ownership of ICIP stemming from TK.

Currently, structures for appropriate recognition of collective rights holding institutions like that described above, are being considered under commonwealth environmental and cultural heritage reforms. Particularly, in regard to a proposed First Nations Engagement and Participation in Decision Making Standard.

3 Material Manifestations

3.1 Traditional Ecological Knowledge

In Victoria, the Federation facilitated the *Traditional Owner Native Foods and Botanicals Strategy (TONFABS)* to strengthen cultural practice and enable Traditional Owners’ rights and interests, regarding biocultural species and their associated knowledge and practices, to be properly considered by government, researchers and the commercial industry.

Traditional Owners have cultivated and managed Country for millennia – developing processes for sustainable food and medicinal plant production, as well as holistic cultural and ecological land management.

These approaches reflect an enduring, deep connection to Country through complex kinship associations that are physical, spiritual and economic. That deep connection is reflected in Indigenous TEK, which is the foundation of Australia's native foods and botanicals industry.

Similarly, TEK is the basis of rights associated with bioprospecting. Protection of that knowledge as ICIP is critical.

A formative strategy under the TONFABS has been the development of information on ICIP and the development of Standard Form Access and Benefit Sharing (**ABS**) agreements. This seeks to establish the connection of users of the ICIP (eg growers, researchers) with the Traditional Owners of those species. Traditional Owners consider that this supports an authentic native foods industry.

However, it is also recognised that identifying, regulating and enforcing standards on such use, which are critical to maintaining authenticity and ensuring appropriate recognition is observed, can be accomplished through a legislative framework to protect against misuse of the ICIP.

3.2 Commercial Agreements

Regarding TEK, there has been some minor international movement towards its appreciation through ABS Agreements. Encouraged by the economic development benefits during the Research and Development phase, occurring through basing research on pre-existing knowledge of benefits and effects of the botanicals.

Whilst not a discussion about the collective nature of cultural rights, a notable example of an TEK agreement is that of Merck.

In 1991, Merck, a multinational pharmaceutical company, entered into a bioprospecting agreement with the Costa Rican Association Instituto Nacional de Biodiversidad (INBio) a non profit organisation. Under the agreement, over a two year period, Merck received 10,000 plant samples. The samples were supplied with information about their traditional use. Merck has paid a reported US \$1.35 million for the 10,000 samples, and has agreed to pay a royalty of between 2% - 3%. [At 1991], three of the drugs that Merck sells earn over US \$1 billion each. If one of the 10,000 samples becomes a billion dollar drug then Merck has agreed to pay 20 - 30 million dollars in royalties. Conceivably, the royalties from the 10,000 samples could earn Costa Rica well in excess of US \$100 million per annum.³

³ Blakeney, M., *What Is Traditional Knowledge? Why Should It Be Protected? Who Should Protect It? For Whom?: Understanding The Value Chain*, (1999) Centre for Commercial Law Studies, Queen Mary and Westfield College, University of London, p.9

3.3 Further manifestations

The manifestation of ICIP must also be found in all physical aspects of culture including song, dance, visual arts, music and performance.

The limitation of ICIP is necessarily in its intangibility. The protections it affords are to the knowledge, so that knowledge can be protected whether it manifests in carpet designs, music samples or novels. Protection must be made across all knowledge, meaning that it must be at a commonwealth level and have jurisdictional application.

4 Principles and Enforcement

The application of ICIP to the production of ‘fake art’ needs be considered in the following way. The ICIP rests in the intangible knowledge that manifests in the design and its necessary storytelling and meaning. Permission for the use of this ICIP must be sought and granted for the manifested product to be accepted under whatever system of labelling or licensing that is in turn developed. Therefore, the ABS agreements that flow from this permission will provide the economic development opportunities that underline industries based on inauthentic products.

The use of a test for authenticity based on a reasonable person, or the application of any test of indigeneity, is negated through the application of a TORI model with whom definitive control and approvals for use can be sought.

It should be considered that this legislation apply internationally, in whatever manner is advisable, so that Indigenous communities can pursue their rights afforded under UNDRIP where breaches of those rights occur offshore.

4.1 Case Study – Victorian Aboriginal Intangible Heritage Provisions

Description of Part 5A⁴

Part 5A of the AHA is contained in only twelve sections (ss.79A - 79L). These were inserted by amendments to the AHA made in 2016. Section 79A exempts from the operation of the Part anything done by an Aboriginal person in accordance with Aboriginal tradition.

Section 79B AHA gives the following definition of Aboriginal intangible heritage:

- (1) For the purposes of this Act, Aboriginal intangible heritage means any knowledge of or expression of Aboriginal tradition, other than Aboriginal cultural heritage, and includes oral traditions, performing arts, stories, rituals, festivals, social practices, craft, visual arts, and environmental and ecological knowledge, but does not include anything that is widely known to the public.
- (2) Aboriginal intangible heritage also includes any intellectual creation or innovation based on or derived from anything referred to in subsection (1).

⁴ A more complete analysis of this provision is contained in Storey M, *Tangible Progress in the Protection of Intangible Cultural Heritage in Victoria* (2018) 20 Australian Indigenous Law Review 108-122. This section of the submission draws heavily upon that article (with the author’s consent).

Section 79C provides that (only) a Registered Aboriginal Party, under the AHA; a registered native title holder under the *Native Title Act 1993* (Cth); or, a Traditional Owner Group Entity under the *Traditional Owner Settlement Act 2010* (Vic)⁵ can apply to the Secretary to have details of AIH recorded on the (Aboriginal heritage) register under the AHA. In determining whether to register AIH pursuant to an application the Secretary may request additional information and consult with the applicant and any Aboriginal person or body they consider relevant.

Section 79D then provides for the registration of agreements between a RAP and any person regarding (*inter alia*): “the management, protection... conservation... research... publication... development or commercial use of Aboriginal intangible heritage” and “the compensation to be paid for the research, development and commercial use of Aboriginal intangible heritage.” Pursuant to s 79E an Aboriginal intangible heritage agreement must be in the prescribed form and identify:

- The parties;
- The term; and,
- A description of the intangible heritage to which it relates.

A copy of the agreement must be provided to the Secretary for recording in the register (s 79F). However, there is no suggestion that this is other than an administrative function of the Secretary. The parties to the agreement would appear to be at complete liberty to determine its content. In the event the RAP is deregistered or ceases to be a body corporate the agreement is terminated (s 79I(1)).

Section 79G creates an offence of knowingly or recklessly using registered AIH for commercial purposes without the agreement of the registered owner unless authorised by an agreement. The maximum penalty (for a corporation) is 10000 penalty units.⁶ An offence is also created under s 79H if a party to a registered agreement knowingly, recklessly or negligently breaches the conditions of an agreement.⁷ An AIH agreement begins and ends on the date (or on the occurrence of a specified event) as specified in the agreement.⁸

Unfortunately, since the commencement of these provisions that register of AIH contains only two entries. A fact which highlights the need for ‘at large’ protection of ICIP rather than a system reliant on registration to provide the necessary protections.

⁵ In this discussion the abbreviation “RAP” will be used to collectively refer to Registered Aboriginal Parties under the AHA, registered native title holders and Traditional Owner Entities. (Under the AHA the latter two classes of organisations are automatically appointed Registered Aboriginal Parties).

⁶ Currently \$155.46 per unit, so \$1,554,600. This penalty applies to a corporation *knowingly* using registered intangible heritage for commercial purposes. The penalty for an individual recklessly using registered intangible heritage reduces to 1200 units. Note the provision of 79G(3) appears to inadvertently prevent the operation of the section in any circumstances where the registered heritage in question is the subject of a registered agreement. Presumably it was intended to only apply to the party to the agreement.

⁷ With a maximum penalty (corporation, knowingly) of 3000 penalty units - \$466,380 - reducing to 60 units (individual, negligently).

⁸ Sections 79J and 79K.

Consideration of the AHA as a case study

The example of Part 5A is hugely useful in considering the shape of standalone Commonwealth fake art and broader ICIP legislation. Even the practical failure of the legislation (in the form of the very limited number of registrations) can provide guidance. It should also be noted that the prospect of stand alone Commonwealth fake art and broader ICIP legislation also highlights the constitutional uncertainty surrounding the Victorian legislation discussed by Storey in the article the summary above was adapted from.

These matters noted, the Victorian example highlights several key issues:

- The statutory definition of ICIP, or in the more limited context of ‘fake art’ - the material the subject of the initial legislative scope.
- The potential identity of the ‘owner’ of any rights created by the legislation.
- The authority by which statutory definitions are applied in practice and the rights created assigned to legal owners.
- The mechanisms available for enforcement of those rights by their owners.

To briefly consider each of these matters in turn.

Definitions for fake art purposes

Lurking within this heading are two matters. The first is the overall scope of the legislation. The main issue here is defining the scope of the legislation in a way that practically dovetails with existing Intellectual Property legislation. That is (for example) what are the circumstances that some art is potentially protected under the *Copyright Act* and other under the new legislation.

The second issue is to resolve the matter of whether there are artistic works by First Nations artists that *are* covered by the new legislation that would not be broadly considered as representative of Traditional Knowledge (in this case Traditional design). This is a nuanced issue. It is one that is unlikely to be resolved solely by statutory definitions. Rather, a more likely resolution lies in establishing the statutory definition and in empowering an legislative authority of some character to determine application of this definition in particular cases. Obviously in our society the Courts are the ultimate arbiter of such contests. However, the example of the Victorian legislation suggests that an initial determination of this matter should be made by an administrative body. An example in the context of the *Patents Act* is IP Australia. The practical failure of the Victorian legislation also suggest that body should be comprised of First Nations decision makers. No non-Indigenous person should be determining whether a piece of art is ‘an expression of Aboriginal tradition’ (to use the Victorian definition).

The identity of the First Nations led administrative body charged with this function should be the subject of further broader consultation during the subsequent stages of legislative development.

Potential Owner of Rights

As should be apparent from the earlier discussion in this submission, the “owner” of rights derived from “an expression of [First Nations] tradition’ must be the relevant Traditional Owner Representative Institution (TORI) as described earlier. Any other conclusion would effectively establish a ‘rights grab’ by individuals or entities asserting rights to TK. Such a result is completely counterproductive.

A subsequent question arises when considering the identity of the body who may be charged with determining competing claims between TORI’s asserting ownership of rights derived from “an expression of [First Nations] tradition”. In this regard similar issues apply to those considered under the previous heading. This again points to the desirability of a First Nations led administrative body with the cultural competence to consider and determine these matters - subject to ultimate judicial determination is necessary.

The authority by which statutory definitions are applied in practice

The discussion under the previous two heading effectively addresses this matter.

The mechanisms available for enforcement of those rights by their owners.

In our submission rights in any ‘artistic expression of [First Nations] tradition’ or any other rights created under the proposed legislation (that is; any rights in artistic expression *not* covered by existing legislation and *not* an expression of tradition) would assume the character of legal property rights under law. They would necessarily be rights derived from statute and not (necessarily) recognised by the common law.⁹ Despite this common law ambivalence, as “statutory property rights”¹⁰ the rights created by the proposed legislation could be enforced by the TORI (or other First Nations artist) owner could be enforced and licenced for use in a similar fashion to that enjoyed by the owner of any other statutory property right. One caveat on this general proposition may be that an assignment or other dealing in a traditional design by a TORI may be the subject to a requirement for the satisfaction of traditional or another adoptive decision making processes similar to that contained in the NTA with respect to ‘native title decisions by PBCs under that Act.

⁹ This point will not be explored here. An exploration of the nature of common law rights in design and the statutory nature of IP rights generally (see for example *Yumbulul v Reserve Bank of Australia* (1991) 21 IPR 481, *Milpurruru v Indofurn* (1994) 54 FCR 240 and *JT Int’l SA v Commonwealth (Tobacco Plain Packaging Case)* [2012] HCA 43) is beyond the scope of this submission.

¹⁰ See, Storey M, *Not of this Earth: The Extraterrestrial Nature of Statutory Property in the 21st Century* (2006) 25 AERLJ 51

5 Conclusion

Through this discussion, we have explored the collective nature of cultural rights and the appropriate self-determined structures that hold those rights. A model of structured representative institutions or TORIs would provide a clear and appropriate way to consider consultation and approval processes.

We have also explored the breadth of areas in which ICIP could be applied. The potential for economic development within communities, as highlighted by the revenue generated by the 'fake art' market, shows that protections must be enforced.

We support the development of stand-alone ICIP legislation. We have proposed concrete mechanism, informed by current legislative examples to facilitate this to occur.

We must emphasise, the legislative project cannot be allowed to stall after the development of the first tranche, be that of 'Fake Art'. In order for genuine protections, it must extend to the areas of bioprospecting, native foods and botanicals (including bioceuticals and pharmaceuticals). Our TK must be recognised as ours and in which we have more than a proprietary interest but that we own it within the full understanding of western law.

The Federation would be keen to participate in further discussions with the Department to further development the recommendations contained in this submission. We look forward to the opportunity to do so in the near future.



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