

Submission to the Productivity Commission
The impact of inauthentic First Nations visual arts and crafts
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PRELIMINARY COMMENTS

The protection of Indigenous knowledge ('IK') and Indigenous cultural and intellectual property ('ICIP') is a multifaceted and expansive issue which has been explored by multiple government inquiries and committees as far back as 1974. However, very little has been done to actively assist with the protection of First Nations artists and their works, especially those in regional and remote communities, in a way that provides long term security and stability to some of our most vulnerable Australians.

KEY ISSUES

Extant literature over the past decade reveals numerous suggestions on ways in which First Nations artists could be better protected – whether it be through amendments to current legislation, the creation of new legislation, or greater funding and more resources for those organisations which are already providing much needed support and education. A review of the literature reveals that two key areas of focus emerge: education and legislative reform.

Education

Artist education is of paramount importance. For example, when a piece of artwork is produced, copyright ownership is retained by the author.¹ This is a fact that many First Nations artists are uninformed of, and many hold the misconception that once a piece of artwork is sold, they as the artists no longer have any rights over that artwork.²

Legislative reform

IP laws in Australia 'do not have specific provisions to protect Indigenous cultural expression'.³ Due to the collaborative nature of many First Nations artworks and stories, which are passed down through the generations,⁴ many works are deemed to be owned by the community or "mob" rather than by one person. It has been recognised that 'our legal system remains centred around individual personhood'⁵ and therefore the concept of 'community ownership remains largely unrecognised and unprotected'.⁶ This issue was also noted as part of a House of Representatives Standing Committee Report; 'Neither the ACL nor copyright law were designed to protect First Nations cultural expressions, and therefore each is inadequate to do so'.⁷

DISCUSSION QUESTIONS

IP laws

What are the limits of the existing intellectual property protections?

Looking at this in a global context, a 2017 article by J. Janewa Osei-Tutu discussed some of the issues that traditional knowledge holders face when seeking protection under IP laws.⁸ The vast majority of IK and ICIP cannot be adequately protected as there is a requirement for the knowledge or property

¹ *Copyright Act 1968* (Cth) s 35(2).

² House of Representatives Standing Committee on Indigenous Affairs, The Parliament of the Commonwealth of Australia, *Report on the impact of inauthentic art and craft in the style of First Nations peoples* (2018) 4.58.

³ *Ibid* 4.57.

⁴ Terri Janke, 'Protecting indigenous cultural expressions in Australia and New Zealand: Two decades after the "Mataatua Declaration and Our Culture, Our Future"' (2018) *Intellectual Property Forum: Journal of the Intellectual and Industrial Property Society of Australia and New Zealand* 22.

⁵ Lee Elsdon, 'Protecting the intellectual and cultural property of Aboriginal art' (2019) 41(3) *Bulletin (Law Society of South Australia)* 20.

⁶ Janke (n 4) 22.

⁷ House of Representatives Standing Committee on Indigenous Affairs (n 2) 4.83.

⁸ J. Janewa Osei-Tutu, 'What do traditional knowledge and traditional cultural expressions have to do with intellectual property rights?' (2017) 9(4) *Landslide*.

to be new or original; 'given that traditional knowledge is passed down through generations, it is unlikely to meet [this] criteria for intellectual property protection'.⁹

In a 2020 article, Nopera Dennis-McCarthy discussed three significant cases, amongst others, which recognised the shortfalls in Australia's legislation when it comes to the protection of IK and ICIP.¹⁰ The first case, *Yumbulul v Reserve Bank of Australia*,¹¹ was an appeal against a decision concerning the licencing of artwork. While the appeal was unsuccessful, the Federal Court did acknowledge 'that Australia's copyright law did not provide adequate recognition of Aboriginal community claims to regulate the reproduction of works that are essentially communal in origin'.¹²

The second case, *Milpurrruru v Indofurn Pty Ltd*,¹³ saw indigenous artists allege that the defendant was manufacturing, and importing into Australia for sale, woollen carpets which were reproductions of their artwork, which had been copied without licence or consent. Dennis-McCarthy noted that 'while this case appears to indicate some recognition of a localised and holistic approach to dealing with misappropriation, it is constrained within the IP regime'.¹⁴ This is because misappropriation can still occur due to loopholes such as originality requirements or copyright time periods.¹⁵

The third case, *Bulun v R & T Textiles Pty Ltd*,¹⁶ was similar to *Milpurrruru*, in that artistic works were being reproduced on fabric, which was then imported and sold in Australia. Von Doussa J held that while 'customary Aboriginal law relating to group ownership of artistic works survived the reception of English common law...the codification of copyright law by statute now prevents communal title being successfully asserted as part of the general law'.¹⁷ In his article, Dennis-McCarthy reflected on Kathy Bowery's observation of this fact; that 'the Court's apparent openness to indigenous customary law and collective ownership was moderated by its obligation to preserve the integrity of "mainstream" copyright law'.¹⁸

These three cases are prime examples of the shortcomings of current IP legislation in Australia and its inability to provide adequate protection for our First Nations artists.

How can existing intellectual property laws be amended to improve protections for Indigenous Cultural and Intellectual Property or do we need standalone legislation?

Currently, legislative protections for IK are 'piecemeal at best'.¹⁹ For example, the *Native Title Act 1993* (Cth) recognises 'communal, group or individual rights and interests'²⁰ but only in relation to 'land or waters, where the rights and interests are possessed under the traditional laws acknowledged, and the traditional customs observed'²¹ and 'the rights and interests are recognised by the common law of Australia'.²² Therefore, while a claim could be made with regards to "traditional customs", this term is ambiguous and is not in the spirit of the provision which is to demonstrate 'evidence of an

⁹ Ibid.

¹⁰ Nopera Dennis-McCarthy, 'Indigenous customary law and international intellectual property: ascertaining an effective indigenous definition for misappropriation of traditional knowledge' (2020) *Victoria University of Wellington Law Review* 597.

¹¹ (1991) 21 IPR 481.

¹² Dennis-McCarthy (n 10) 631.

¹³ (1994) 54 FCR 240.

¹⁴ Dennis-McCarthy (n 10) 629.

¹⁵ Ibid 630.

¹⁶ (1998) 157 ALR 193.

¹⁷ (1998) 157 ALR 193, 194.

¹⁸ Dennis-McCarthy (n 10) 631 citing Kathy Bowrey "Alternative Intellectual Property?: Indigenous Protocols, Copyleft and New Juridifications of Customary Practices" (2006) 6 *Macquarie Law Journal* 65.

¹⁹ Professor Natalie Stoianoff, 'Garuwanga: Forming a Competent Authority to Protect Indigenous Knowledge – A Project supported by the Australian Research Council Linkage Scheme' (2017) *Intellectual Property Forum: Journal of the Intellectual and Industrial Property Society of Australia and New Zealand* 73, 74.

²⁰ *Native Title Act 1993* (Cth) s 223(1).

²¹ Ibid s 223(1)(a).

²² Ibid s 223(1)(c).

applicant's connection to the land and waters in question'²³ when disputing native title rights, not the protection of IK and ICIP.

Lee Elsdon, a solicitor with the Arts Law Centre of Australia, published an article in 2019 which focused on the protection of ICIP.²⁴ He eloquently describes how First Nations art 'can express complex beliefs, stories, histories, and depictions of places'²⁵ and why, as a nation, Australians should 'be doing all we can to protect the rights of cultural custodians and knowledge holders'.²⁶ Elsdon believes that new legislation, similar to the *Aboriginal Heritage Act 2006* (Vic), may offer some protection, but only for items which have been registered.²⁷ This would place an additional burden on artists 'to register their cultural property before it is protected'²⁸ and is therefore not ideal. His suggestion is that ICIP should be automatically protected 'by virtue of its existence'²⁹ in the same way that copyright protects "works" upon their creation.³⁰

Some articles have taken this idea one step further and advocate for the creation of *sui generis*³¹ legislation to protect IK and ICIP. In 2015, Natalie Stoianoff and Alpana Roy published an extensive report on the protection IK and ICIP,³² identifying the need for 'stand-alone legislation for the protection of traditional or Indigenous knowledge and/or culture'.³³ Stoianoff and Roy came to this conclusion after the consideration of many different factors, including that 'Western intellectual property laws'³⁴ are not able to provide adequate protection of Indigenous culture. One significant reason for this conclusion was that 'If Indigenous knowledge is considered by an Indigenous community as their common heritage, then conflict may arise if the information is commodified by intellectual property laws'.³⁵ Therefore, legislation that is carefully worded and crafted with these aspects in mind, would provide the best protection for First Nations artists.

These sentiments were echoed last year in an article by Stephanie Parkin and Dr Kylie Pappalardo,³⁶ who believe that 'a comprehensive, standalone legislative framework to protect Indigenous cultural expression in Australia'³⁷ is the best solution to prevent further exploitation and the harms that are 'multifaceted and include emotional and spiritual impacts'.³⁸ However, as identified by Terri Janke and Company, 'the difficulty with this option is that new laws take time and require significant political will and support'.³⁹

In December 2018, the House of Representatives Standing Committee on Indigenous Affairs tabled a report on the impact of inauthentic art and craft in the style of First Nations peoples ('the 2018 Report').⁴⁰ Recommendation 8 of the 2018 Report was that the Federal Government should begin 'a

²³ Natalie Stoianoff and Alpana Roy, 'Indigenous knowledge and culture in Australia - the case for sui generis legislation' (2015) 41(3) *Monash University Law Review* III Australia's International Obligations.

²⁴ Lee Elsdon, 'Protecting the intellectual and cultural property of Aboriginal art' (2019) 41(3) *Bulletin (Law Society of South Australia)*.

²⁵ *Ibid* 20.

²⁶ *Ibid* 21.

²⁷ *Ibid*.

²⁸ *Ibid*.

²⁹ *Ibid*.

³⁰ *Ibid*.

³¹ Unique. *Butterworths Concise Australian Legal Dictionary* (3rd ed, 2004) 'sui generis'.

³² Natalie Stoianoff and Alpana Roy, 'Indigenous knowledge and culture in Australia - the case for sui generis legislation' (2015) 41(3) *Monash University Law Review*.

³³ *Ibid* I Introduction.

³⁴ *Ibid*.

³⁵ *Ibid* V The Case for Sui Generis Legislation in Australia.

³⁶ Stephanie Parkin and Dr Kylie Pappalardo, 'Protecting indigenous art and culture: How the law fails to prevent exploitation' (2020) 159 *Precedent* 32.

³⁷ *Ibid* 36.

³⁸ *Ibid* 33.

³⁹ Terri Janke and Company (Commissioned by IP Australia & the Department of Industry, Innovation and Science), 'Indigenous Knowledge: Issues for protection and management: Discussion Paper' (2017) 50.

⁴⁰ House of Representatives Standing Committee on Indigenous Affairs (n 2).

consultation process to develop stand-alone legislation protecting Indigenous Cultural Intellectual Property, including traditional knowledge and cultural expressions'.⁴¹ The Committee noted that while 'introducing stand-alone legislation...is a complex task that is not likely to be achieved in the short term', that it 'is achievable and should be considered'.⁴²

The idea to create a new, specific legislation is not a new concept. In 1974, the Commonwealth government formed a working party to investigate the different ways in which aboriginal folklore could be protected.⁴³ The working party published their findings in 1981 and 'noted the inadequacies of the Copyright Act, but rather than recommending an amendment of the statute, it advocated the enactment of sui generis legislation to address the deficiencies'.⁴⁴ This did not occur. Other past attempts to introduce new legislation, or amend existing legislation include the *Copyright Amendment (Indigenous Communal Moral Rights) Bill 2003* (Cth) and the National Indigenous Arts Advocacy Association ('NIAAA') 'Label of Authenticity' (authenticity marks were registered under the *Trade Marks Act 1995* (Cth)).

Other countries

What can we learn from other countries' efforts to protect First Nations people's legal rights over their arts and cultures?

The Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization to the Convention on Biological Diversity 2010 (the 'Protocol'), specifically Article 13, 'sets out criteria for the establishment of what is termed a "Competent Authority" ...to ensure that Indigenous communities are properly consulted and can provide free, prior and informed consent when their traditional knowledge is accessed'.⁴⁵ However, for such a program to work within Australia, 'its design, development and operation must incorporate participation from Indigenous Australians'.⁴⁶

In order for the Protocol to function, signatories need to create at least one Competent Authority 'to govern and administer a legal framework...responsible for granting access or providing evidence that access requirements have been complied with'.⁴⁷ Unfortunately, 'the Australian federal government has not established a Competent Authority and has treated its obligations...as being met through environmental protection and biodiversity conservation systems already in place'.⁴⁸

The Garuwanga Project⁴⁹ was a comparative study conducted by Evana Wright, Natalie Stoianoff and Fiona Martin, which examined the relevant laws from 69 different countries with a focus on legislation which contains provisions for the protection of traditional knowledge.⁵⁰ Of the 69 countries, only 20 had laws 'relating to access and benefit sharing and a form of a Competent Authority'.⁵¹ However, of those 20, only two had formed a Competent Authority that was independent of a government department or ministry; Cook Islands and Vanuatu.⁵² These nations 'have made significant attempts

⁴¹ Ibid 5.47.

⁴² Ibid 5.33.

⁴³ Stoianoff and Roy (n 32) II An Overview of Past Attempts to Protect Indigenous Knowledge and Culture in Australia.

⁴⁴ Joseph Githaiga, 'Intellectual Property Law and the Protection of Indigenous Folklore and Knowledge' (1998) 5(2) *Murdoch University Electronic Journal of Law*.

⁴⁵ Fiona Martin, Ann Cahill, and Evana Wright and Natalie Stoianoff, 'An international approach to establishing a Competent Authority to manage and protect traditional knowledge' (2019) 44(1) *Alternative Law Journal* 48.

⁴⁶ Ibid 49.

⁴⁷ Ibid.

⁴⁸ Ibid 50.

⁴⁹ Evana Wright, Natalie P Stoianoff and Fiona Martin, 'Comparative Study - Garuwanga: Forming a Competent Authority to protect Indigenous knowledge' (2017) University of Technology, Sydney - Indigenous Knowledge Forum.

⁵⁰ Fiona Martin et al (n 45) 50.

⁵¹ Fiona Martin et al (n 45) 50.

⁵² Ibid.

to incorporate traditional community involvement in the decision-making process for protection of traditional knowledge'.⁵³

In the Cook Islands, they have introduced legislation which 'provides legal recognition of the rights in traditional knowledge of its traditional communities'.⁵⁴ The *Traditional Knowledge Act 2013* 'applies to all traditional knowledge, whether it existed before the commencement of this Act or was created, developed, inspired, or adapted later'.⁵⁵ In Vanuatu, a National Cultural Council has been formed in accordance with the *Vanuatu National Cultural Council Act 2006*.⁵⁶ There are also a number of provisions in their existing IP legislation which protects IK and ICIP, including vesting power in 'the National Cultural Council to institute proceedings, at the request and on behalf of customary owners of expression in cases of alleged infringement'.⁵⁷

The study also recognised countries where there was 'some Indigenous and local community participation in the Competent Authority'.⁵⁸ One such country is Brazil, where the Competent Authority is comprised of 20 people, nine of which are from "civil society" and include 'entities and organisations representing indigenous peoples, traditional communities and traditional farmers'.⁵⁹ This speaks volumes of a country attempting to work with its indigenous community on the preservation of IK and ICIP, even though they only make up 0.4% of the Brazilian population.⁶⁰

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⁵³ Ibid 54.

⁵⁴ Ibid 52.

⁵⁵ *Traditional Knowledge Act 2013* (Cook Islands) s 6(1).

⁵⁶ Fiona Martin et al (n 45) 53.

⁵⁷ Ibid.

⁵⁸ Ibid 54.

⁵⁹ Ibid.

⁶⁰ 'World Directory of Minorities and Indigenous Peoples – Brazil', *UNHCR The UN Refugee Agency* (Web Page) <<https://www.refworld.org/docid/4954ce5a23.html>>.