

PRODUCTIVITY COMMISSION

CULTURAL RIGHTS LEGISLATION WEBINAR

COMMISSION: **JOANNE CHONG, Commissioner**
 CLARE SIBLY, Assistant Commissioner
 MIRIAM VEISMAN-APTER, Assistant Commissioner
 BONNIE NGUYEN

DATE: **WEDNESDAY, 31 AUGUST 2022**

TRANSCRIBED BUT NOT RECORDED BY
VIQ SOLUTIONS AUSTRALIA PTY LTD

MS NGUYEN: All right. Let's get started. Thanks again for making the time to attend our webinar day on cultural rights legislation. So before I begin, I would like to acknowledge the traditional custodians of the lands on which we live and work, and pay my respects to elders, past and present. I am in Melbourne, which is
5 Wurundjeri country, and I'm joined by some of our colleagues, also in Melbourne and in Adelaide. So I will be giving the webinar presentation today, but I'm also joined by one of our Commissioners, Joanne Chong, and if you would like to say anything, Joanne?

10 MS CHONG: Hi, everybody. As Bonnie introduced, I am Jo Chong, and I am calling in from Kaurna country here in Adelaide. I just want to say, I'm a new Commissioner. Joined the commission relatively recently. But I want to thank you all, and we've got a fantastic showing today, and it's really great to have you all here. I'm really looking forward to this webinar, and I just want to say thank you to
15 everybody for joining.

MS NGUYEN: Thanks, Jo. I'm also joined by our two Assistant Commissioners, Clare and Miriam, and Rebecka will be helping me with the technical side of keeping this webinar running. So the way this webinar is going to run is I will give a
20 presentation on our proposed cultural rights legislation for about 40 minutes or so, and that segment will be recorded. So if you could please mute yourselves or stay on mute that would be very much appreciated. And then at the end, there will be an opportunity to ask questions, either by unmuting yourselves or in the chat, and we're not planning on recording that session. So feel free to say whatever you like, I guess.
25 All right. So let's get started.

So just a bit of background on how this proposal came about. So we were asked last year to look into the nature of the visual arts and crafts markets for Indigenous and Torres Strait Islander works. And so as part of that, we looked at a range of different
30 issues, and put out a draft report last month that covered several different recommendations spanning from labelling to the treatment of artists, and to ICIP, which is the focus of this presentation today. So leading up to that draft report, we had meetings with a range of different organisations, including art centres, artists, galleries, retailers, lawyers and academics, and they were all very incredibly valuable
35 meetings, offering us a range of different perspectives which we tried to incorporate in developing our draft report.

And so we're currently in the consultation phase for our final report, and this webinar is part of that consultation phase, so we would love to hear any feedback and
40 suggestions you have in response to the material that you hear about today. So I will start with the basic framework of what we've proposed, and then later in the presentation, I will delve into the individual elements of the broader proposal. So just a bit of background to the problem we're trying to solve. So I mentioned before that the focus of this is an ICIP, or in other words, Indigenous Cultural and
45 Intellectual Property. Now, ICIP refers to all dimensions of Indigenous heritage and culture, from languages and performances to traditional scientific and ecological knowledge.

Now, our analysis for the draft report revealed that there currently are some protections available for ICIP, but those protections are piecemeal and they don't protect ICIP directly. So we think there's a case for protecting ICIP in visual arts and crafts directly. And the reason we reach this view is discussed further in one of the chapters of our report, but for this webinar, I'm proposing to focus on how those protections could be put into practice, so how they could be implemented in legislation.

So what have we proposed? We've proposed dedicated legislation to recognise the cultural rights of Aboriginal and Torres Strait Islander people in relation to visual arts and crafts, or what we're calling cultural rights legislation.

Now, at its core, that legislation would formally recognise the interests of Indigenous groups in their traditional cultural assets. So it would establish a legal framework that sets out the rights and obligations regarding the use of those assets. And then the traditional owners of those assets would be empowered to decide who may use the cultural assets, and in what ways. So although the legislation would not prohibit the use of cultural assets without authorisation per se, it would enable traditional owners to take legal action in relation to such behaviour. And we would expect that this would create stronger disincentives against and hence lower the prevalence of cultural misappropriation.

Now, I want to emphasise that it's not our view that litigation is a panacea to issues around cultural misappropriation. The point of the legislation is that it will give additional clarity around who is allowed to do what, and this will support dispute resolution of these types of issues in general, whether that's in the context of negotiations between the parties or alternative dispute resolution processes. And like any other laws, we would expect the vast majority of disputes would not end up in court. And just to give a bit more context to this, in our report, we go further into the need for a multipronged approach to protecting ICIP, so this would not be the sole measure that we think would solve the whole problem. So we think the multipronged approach would mean there would need to be legislative measures, there would also need to be measures around education and also possibly around voluntary codes and rules or protocols. So what we're proposing is intended to complement the rights of artists and communities under other laws as well, including copyright and native title.

So just to set up the framework of what we're talking about a little, here are some key terms that I will be referring to throughout this presentation. So, first, we have a cultural asset. Now, this refers to the underlying cultural idea or concept that embodies Aboriginal and Torres Strait Islander traditions, then those cultural assets are owned by a traditional owner, so that is a person, group or community who has ownership of a cultural asset. And then that cultural asset can be used, and the use is essentially the act of giving expression to the cultural asset, and in this context, it's the incorporation of a cultural asset into art, craft or another work. And by definition, the use of a cultural asset creates a cultural expression.

So the legislation would work by creating a new cause of action for traditional owners to assert their rights in relation to their cultural assets. In particular, the legislation would specify that a traditional owner's rights are infringed if a person uses a cultural asset to create a cultural expression without the authorisation of the traditional owner, unless an exception applies. So in essence, this would entitle a traditional owner to take court action to enforce their rights and to seek damages and/or other remedies in relation to that infringement. Those of you who are familiar with copyright law might see that there are some parallels here between what we propose and how copyright laws work, in that a person who is the ownership of a copyrighted piece of work is empowered to enforce those rights in court.

So in this way, the legislation would define the circumstances under which protections exist, who can take legal action to enforce these rights, and what constitutes an infringement. And once an infringement has been established, a court would then consider what remedies are appropriate in the circumstances. So you will see the figure on the slide depicts how a court would apply those factors to determine a case, and then eventually determine what remedies are applicable.

So just to recap, I've identified three elements, what is protected, who can take action, and what counts as an infringement. And I will go through each of these elements in more detail later in the presentation. And I'm just flagging from the outset that one of the key design challenges that we face when thinking about how to calibrate each of these elements is striking a balance between protecting cultural assets and the interests of those seeking to access and use them.

So what we will need, is we will need to build checks and balances into each element to make sure that it's operating fairly and along the lines of what community expectations are, and I will discuss this later as we go through each element. So the crux of this regime is the concept of authorisation. So as you can see in the first table, a person who uses a cultural asset and has the authorisation to do so from the traditional owners will not have infringed the rights of those traditional owners. By contrast, a failure to obtain authorisation will make that same use infringing. Now, there are tricky cases when it's not clear who you need to seek authorisation from.

So in the second table, we have a couple of scenarios, and how we think they should play out. Where there is no identifiable traditional owner, we've said that there is no – well, it follows that there is nobody to seek authorisation from, and therefore, authorisation would not be needed to use the cultural asset. Now, where the cultural asset belongs to several different groups, that is, there are multiple traditional owners, we think that authorisation from one of those traditional owners would suffice, and this accords with the, sort of, practical scenario where one clan might own a cultural asset, and they are the traditional owners of that asset, but in order to use that asset, they would not need to seek permission from other clans, who might also be able to claim ownership to that asset.

And I will unpack a little what we mean by authorisation later in this presentation. So let's now turn to the first element that I referred to, what would be protected. And I will get into the nitty gritty details of how we think this might be designed in the

legislation. So, essentially, the question for this part of the presentation is, what sort of things should be in scope for protection under the legislation, and should there be limits on those protections. So the core of our proposal is that cultural assets would be the object of protection.

5

Now, the first question that naturally arises is usually what should count as a cultural asset. And to address this question, we think the legislation should include criteria for determining what counts as a cultural asset. In practice, this would mean that a court would apply those criteria to determine whether something is a cultural asset based on the facts of a case, and so practically speaking, in a court case, it would be for the claimant to show or establish that there is a cultural asset that is eligible for protection. Now, one criterion for assessing whether something should count as a cultural asset, and hence, should be protected, we think is the strength of its connection to tradition or custom. So for those of you familiar with the native title regime, you will see that this echoes the requirements under the Native Title Act for a claimant to provide evidence about traditional laws and customs in relation to lands and waters when making a native title claim.

And like that system, it would be for the courts to determine on a case by case basis whether something is traditional. In the context of our cultural rights legislation, we think that in practical terms, this criterion could be addressed through evidence about a pattern of behaviour in relation to the asset, or intergenerational knowledge transfer. We also have an information request in our report about whether there are other criteria that should be included. So if you have any views about that, we would love to hear from you, whether in a submission or if you would like to reach out to us after this webinar.

The second consideration I alluded to was whether or not there should be limits or conditions on the protection. So we looked at several sorts of limitations that could feasibly apply in this base. The first is whether you should have a registration requirement, and so essentially this is a question of should registration of cultural assets be required similar to what's required for the protection of trademarks or designs. Now, in the draft report, we've suggested there shouldn't be a registration based system, and in reaching this conclusion, we considered several factors. One of which is, a registration regime would provide greater certainty about what is protected, but that certainty wouldn't be absolute.

There's also practical evidence to suggest that a requirement for registration would be burdensome for traditional owners, and hence, dissuade them from pursuing registration, and this would undermine the entire operation of the regime. And the evidence we have for this is the Aboriginal cultural heritage register in Victoria. So that register was set up in 2016, but since its inception, there has only been one item registered. For these reasons, we prefer an unregistered rights approach, whereby protections would attach automatically to cultural assets. So what that means is, rather than requiring all traditional owners to go through the process of registering a cultural asset, cultural assets would be deemed to be protected by virtue of their existence.

In practical terms, this would mean that rather than needing to establish the existence of a cultural asset, and its ownership at the time of registration, these matters would be considered at the time a claim of infringement is made, that is, in a court case.

5 And the second consideration we turned our minds to is whether there should be time limits on protections such as occurs in intellectual property laws. Where we landed on this was no, there shouldn't be. The reasons are that time limited protections for intellectual property are justified because those laws are about protecting things that are new, so in broad terms, the expiry of intellectual property protections after a
10 specified time aligns with the fact that after some time, those ideas or inventions cease to be novel, and should rightly enter into the public domain.

But by contrast, the focus of the new cultural rights legislation would be on protecting things that are traditional or customary. In other words, things that are
15 old. Therefore, if anything, the emphasis should not be on when protection ends, but when it begins. But we think functionally this issue is covered by the requirement for a court to assess the cultural assets connection to tradition or custom. On this basis, we think there's no additional need to specify concrete time requirements for when protections for cultural assets begin or end.

20 And you will see the last infographic on this slide refers to other threshold criteria. We're seeking feedback on whether other threshold criteria should be applied, for example, one thing that was put to us was that there should be a requirement for an asset to be culturally significant in order to attract a protection. We haven't
25 recommended such a thing in our draft report, but we would like to hear your views on whether there should be other threshold criteria, and in particular, on whether that threshold criteria is relevant or useful in this space.

30 Okay, so the second part of the presentation is about our second element, about who could take action, and this is essentially a question of who would have standing to bring a claim. So one of the questions related to who would be a traditional owner, and so when we approached this question, the premise that we started from was the idea that culture is widely regarded as being collectively owned by communities or groups, and not individuals. So to give effect to this principle, we recognise that
35 there's a need to recognise groups or communities as the traditional owners, and one challenge is that, for the most part, the Australian legal system only recognise individuals, corporations and some government agencies as having legal personality.

40 So we've identified two options to deal with this question. The first is to recognise one or more individuals as acting on behalf of a community or group, or in other words, what's called a representative action. So under this option, a court will determine as part of a case whether the claimants are appropriate individuals to bring

a claim on behalf of others. You will recognise that this is how things work under the Native Title Act currently. A second option is to formalise the recognise of a community or groups of a register. That is, communities or groups could seek registration in order to be recognised as having legal personality. This would be
5 similar to the way that corporations are registered with ASIC, and are given legal personality by virtue of their registration in the ASIC register.

But as we discussed earlier, registration can be onerous for traditional owners, so on balance, we think that the former option, representative action, is more likely to have
10 legs. Another option we considered was whether there should be enforcement by a government authority. So this would require nominating a cultural rights regulator to administer the regime. If we went down this route, we think there would be two options for how you would give a regulator power to take cultural rights cases on.

15 The first is separate contravention provisions, essentially, a standalone set of powers for the regulator separate to the cause of action available to traditional owners. But for this very reason, contravention provisions would not be a simple bolt on. In other words, it would require a separate body of work to design that cause of action in addition to what we've already discussed so far. The second option is
20 representative action. So this would enable a regulator to act on behalf of traditional owners. In essence, they would be stepping into the shoes of a traditional owner. This is similar to the powers that the Australian Competition and Consumer Commission has under the Australian Consumer Law, where they can step into the shoes of a consumer who has a cause of action under the Australian Consumer Law.
25 Overall, where we landed on this question is that we think there's still a bit of uncertainty about what the additional benefits are from having a cultural rights regulator over and above the benefits of empowering traditional owners to enforce their rights.

30 So for this reason, we haven't recommended the designation of a cultural rights regulator in our draft report. We think that once the legislation has been in effect for several years, there will be a better evidence base to assess whether there are still gaps or shortfalls in the regime, and what additional mechanisms need to be put in place in response. So as suggested before, we also have an information request about
35 who should have standing to bring cultural rights cases, and the best way to give those parties standing.

And now turning to the third element of a claim, what would count as an infringement. So for this part, we think there would be three limbs that would need
40 to be considered. The first is, was there a use of the cultural asset. The second is, was that use authorised. And the third is, does an exception apply.

So let's turn to the first question. What uses are relevant? So this is a question of what sorts of uses will be within scope for a cultural rights regime. So to address this
45 question, the cultural rights legislation would need to include provisions that set out what counts as a use, that has the potential to be infringing. And why this matters, is that it would govern what uses require authorisation from traditional owners, and therefore, it would define the scope of a traditional owner's ability to control and make decisions about the use of their cultural assets.

So to answer this question, we looked at some model laws, so model laws by the World Intellectual Property Organisation or WIPO, and also model laws for the Pacific Islands. To get some insight into what could be considered a use – and you will see that I’ve extracted some text on screen that’s relevant to this question – so the first question that we looked at relates to should there be a requirement for material form? And you will notice in the text that I’ve extracted on screen, that the model laws specifically do not require a material form. So the use of cultural assets in non-materials form, say live broadcasts or performances, would also be covered. And to some extent, this question is a little bit outside the scope of our study, because our terms of reference require us to focus on viewable arts and crafts, that includes paintings, drawings, sculptures, carvings, or textiles, or in other words, things that do have material form.

But we think likely from a bigger picture perspective, it’s possible that cultural rights legislation should also cover uses in non-material form, so we’re seeking feedback on this question. A second lens is should there be requirements about the extent of the use in order to trigger the cultural rights legislation. For example, in the context of copyright law, an infringement requires the use of a substantial part of the original work, and a similar check is contained in the WIPO and Pacific Island model laws, which specify that there are no infringements for uses that are incidental. So we’re seeking feedback about whether the legislation should include a minimum threshold about the degree or extent of use required, and if so, what that threshold should be.

So the second limb of what would count as an infringement is whether or not the use was authorised. So a key part of proving a claim in court would be establishing that the use had taken place without authorisation. So the underlying premise for how we approach this question was the idea that laws should give effect to or work alongside traditional authorisation processes under customary law. These relate to questions of whether to give authorisation and also how that authorisation is given. So for this reason, we think that the cultural rights legislation should not prescribe valid forms of authorisation, or in other words, it should say that whether authorisation has been granted should be a question of fact and not of form.

In practical terms then, to determine whether a court authorisation was granted, a court should look at the overall facts and circumstances of a case, and not rely solely on whether there is a written agreement in place. And the reason why we’ve taken this approach is that we think it would recognise the reality that authorisation can be given orally or conferred through rights or ceremonies, or implied by a pattern of behaviour. It would also enable a court to consider, based on the evidence, whether a person purporting to grant authorisation had the authority to do so. Overall, we think this will result in increased flexibility which will enable traditional owners to grant authorisation in the form they choose, including through customary law processes.

And, finally, the last limb, whether an exception applies. So to strike the right balance between the interests of traditional owners and the interests of those seeking to access and use cultural assets, the new cultural rights legislation will need to include an exceptions regime. This means that where an exception applies, the use

of the cultural asset will be deemed to be not infringing. We've looked at intellectual property laws and the model laws to identify what sorts of exceptions should be included. There's, broadly speaking, two buckets. First, there's copyright style exceptions, and we think there should be exceptions relating to research, study or
5 education, criticism or review, reporting news, all current events, etcetera.

And the second bucket we've identified are those that originate from the model laws, and those relate to traditional and customary uses. So this sort of exception would reflect the view that any protections we put in place in legislation should not get in
10 the way of Indigenous people practicing their own culture.

So overall, we're seeking feedback on whether these are the exceptions we need, whether there are others that we haven't identified, and whether there should be limits on when these exceptions apply. So, yes, here is our information request that
15 relates to exceptions. And what should be counted as an infringement of a cultural right.

And just lastly, I want to touch on remedies. So we think that it will be necessary for the cultural rights legislation to specify that certain remedies are available for
20 traditional owners, and we've identified here some remedies that we think might be appropriate, depending on the circumstances. So, first, you could have an injunction which would compel or restrain a person from doing a specific thing which can prevent further infringements of cultural rights. The second option is damages, meaning a sum of money is paid to the claimant, typically to compensate them for
25 harm or loss. A third option that we see also in IP law sometimes is an account of profits. Now, this refers to where an infringer has benefited financially from an infringement, they're required to pass on that profit to the rightful owner, or in this case, the traditional owner.

30 So we would love to hear from you if you have any thoughts on if there are other remedies that would be appropriate to apply in a cultural rights case context, and whether we've got the balance right in terms of the remedies we have identified.

So, yes, lots of questions from us. Hopefully this has given you some food for
35 thought, and we would love to hear from you if you do have any thoughts you would like to pass on to us. So on the screen I've got a couple of options in terms of how you can get in contact with us. You can make a submission on our website at pc.gov.au/indigenousarts, and if you would like to just reach out to us and have a chat, you can call us or email us at the address or phone number on the screen, and if
40 you would like to hear how we're going with the finalisation of this report, you can follow us on social media.

RECORDING CONCLUDED