



Australian Government

Productivity Commission

# **Cultural Rights Legislation: a possible model for protecting ICIP in visual arts and crafts**

Productivity Commission study on Aboriginal and Torres Strait  
Islander Visual Arts and Crafts

31 August 2022

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# We want to hear your feedback



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# The basic framework



Artwork: Luke Penrith's 'River of Knowledge'

# What is the policy problem?

## Current forms of legal protection for ICIP

**Intellectual property laws**  
including copyright, designs,  
trade marks and passing off.



**Opt-in obligations** including  
contracts and soft law  
mechanisms (protocols, codes of  
conduct and codes of practice)



**Native title laws**



**Heritage laws**

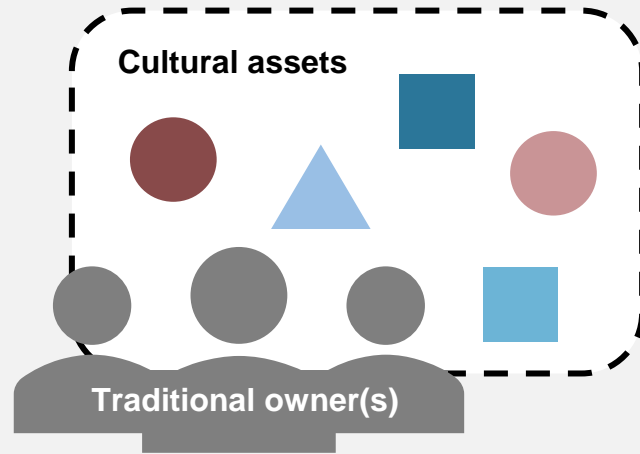


**Consumer law**

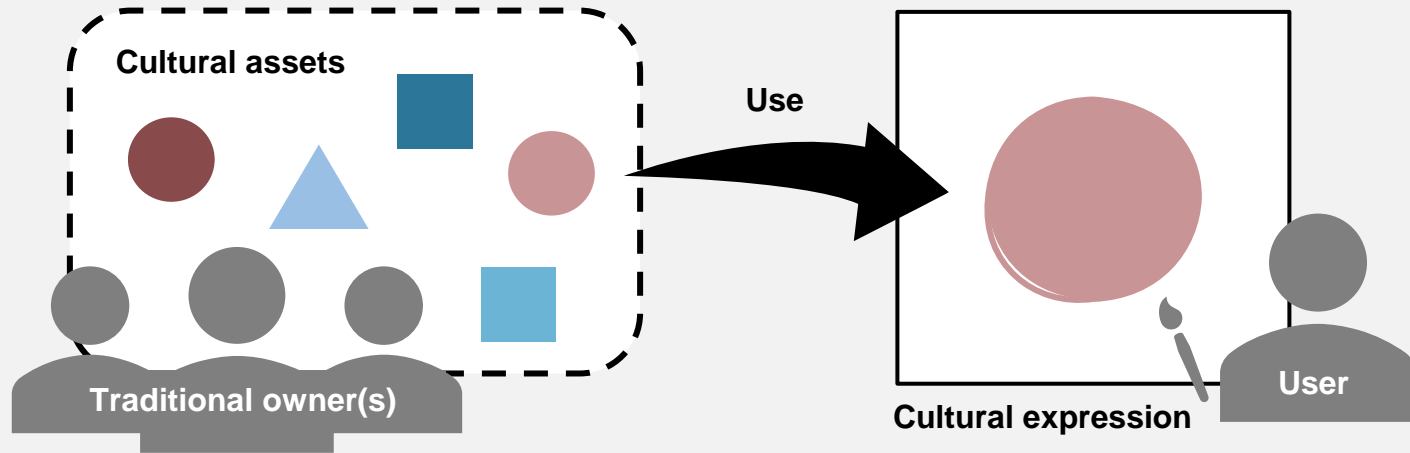


**... but no direct protections**

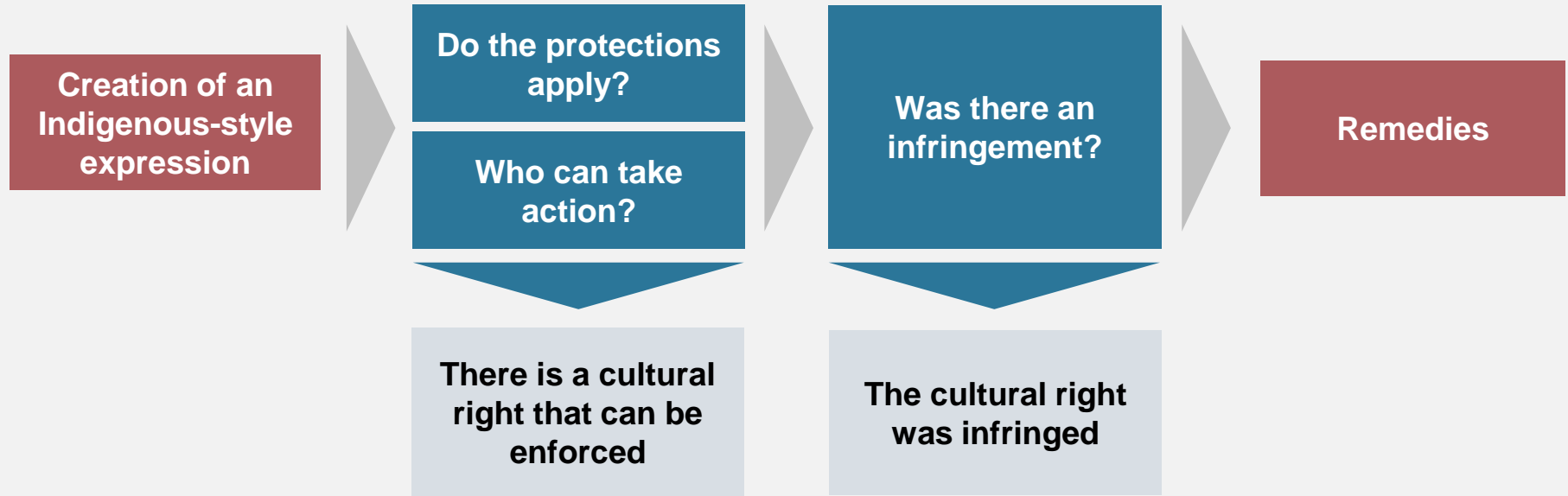
# What is the proposal?



# Key terms



# How would a case be decided?



# How would it work in practice?

An artist uses a cultural asset ...

Scenario	Outcome
Authorisation given	No infringement
No authorisation given	Infringement

Scenario	Outcome
No identifiable traditional owner(s)	No authorisation needed
Multiple traditional owners	Authorisation from at least one traditional owner needed



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# What would be protected?



Artwork: Luke Penrith's 'River of Knowledge'

# Cultural assets



Protection for  
'cultural assets'



Connection to  
tradition or custom

# Limits or conditions on protection?



Registration  
requirements?



Time  
requirements?



Other threshold  
criteria?

# Information request

What should be protected by the new cultural rights legislation?

- What is the best way to define what should be in scope for protection?
- Should there be limits on protection, such as conditions on when protections apply or threshold criteria for what is protected? If so, what should they be?





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# Who could take action?



Artwork: Luke Penrith's 'River of Knowledge'

# Traditional owner



# Enforcement by a government authority?



Two options to for regulatory enforcement

- Separate contravention provisions
- Representative action



More evidence is needed

- Uncertainty about what the benefits would be
- We are seeking feedback on this matter

# Information request

How should the legislation deal with the issue of standing to bring a cultural rights action?

- What criteria should determine whether a claimant has standing?
- What is the best way to recognise communities or groups as having standing?
- What are the merits, drawbacks and challenges of giving a government regulator the power to bring cases in relation to cultural misappropriation?





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# What would count as an infringement?



Artwork: Luke Penrith's 'River of Knowledge'

# What uses?

## WIPO model laws

(i) verbal expressions, such as folk tales, folk poetry and riddles;

(ii) musical expressions, such as folk songs and instrumental music;

(iii) expressions by action, such as folk dances, plays and artistic forms or rituals;

whether or not reduced to a material form; and

(iv) tangible expressions, such as:

- (a) productions of folk art ...
- (b) musical instruments
- (c) architectural forms.

## Pacific Islands model law

(a) to reproduce the traditional knowledge or expressions of culture;

(b) to publish the traditional knowledge or expressions of culture;

(c) to **perform** or display the traditional knowledge or expressions of culture in public;

(d) to **broadcast** the traditional knowledge or expressions of culture to the public by radio, television, satellite, cable or any other means of communication;

(e) to translate, adapt, arrange, transform or modify the traditional knowledge or expressions of culture;

(f) to fixate the traditional knowledge or expressions of culture through any process such as making a photograph, film or sound recording;

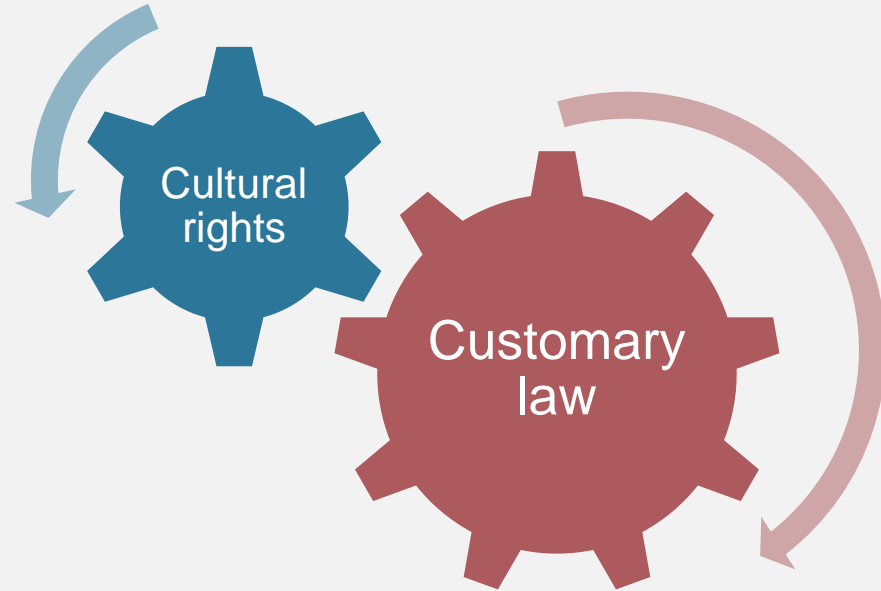
(g) to make available online or electronically transmit to the public (whether over a path or a combination of paths, or both) traditional knowledge or expressions of culture;

(h) to create derivative works;

(i) to make, use, offer for sale, sell, import or export traditional knowledge or expressions of culture or products derived therefrom;

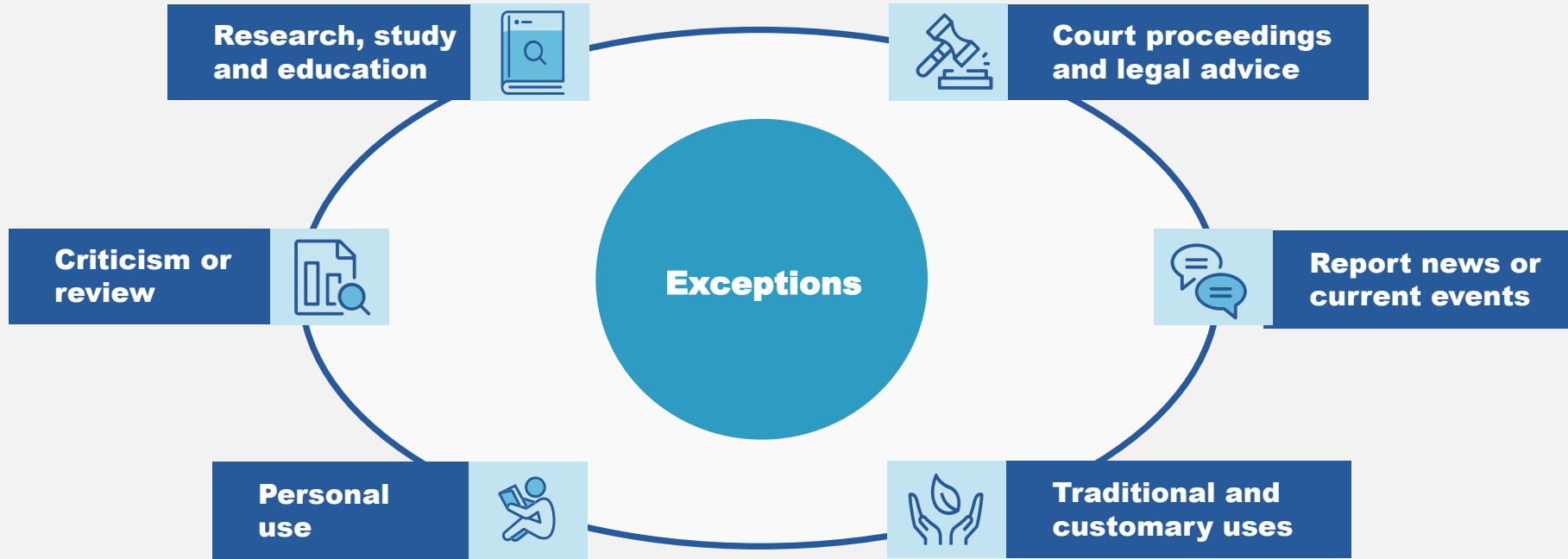
(j) to use the traditional knowledge or expressions of culture in any other material form

# Authorisation



< whether permission is given  
how permission is given

# An exceptions regime



# Information request

What types of conduct should be considered an infringement of a traditional owner's cultural rights?

- What types of uses of cultural assets should be recognised as having the potential to be infringing? For example, should there be a requirement for the use to be in material form or a substantial use?
- How should a court determine whether a user has been granted authorisation to use a cultural asset in a certain way?
- Should there be exceptions when cultural assets are used for certain purposes? If so, what should those exceptions be?





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# What remedies should be available?



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# Remedies



Injunction



Damages



Account of  
profits



Others?

# Information request

What should the legislation say about remedies for infringements of cultural rights?

- What suite of remedies are needed to achieve fair and just outcomes?
- What should the new cultural rights legislation say about how remedies are awarded?



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