2015 Copyright Agency Research Fellowship:

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WARNING: This paper refers to the names of deceased Aboriginal and Torres Strait Islander people[ii] **and also contains links to websites that may use images of Aboriginal and Torres Strait Islander people now deceased. These people include artists, elders, persons taking action to preserve their cultural heritage and also people commencing court proceedings to enforce their rights relating to part of their artistic works and cultural heritage. No offence is intended to be made by the recognition of their contribution.**

Aboriginal and Torres Strait Islander peoples' Cultural Property and Copyright Project

Funded by:

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'It is also essential that, we not only publicly promote diversity, but that that goal is reflected in our individual actions. When combined, and directed collectively in a purposeful manner, there can be great force in individual action.

By your presence this evening, you join those who wish to be a part of embracing diversity in the law, and finding solutions to achieving that outcome. In respect of our goal of promoting and embracing diversity and equality, I close by saying – in one of the indigenous languages that has been spoken for tens of thousands of years in this very location, and now here in this Banco Court:

Kunnar mallera ngalingi meaning "let us be one"'.

(The Hon. Justice A. Philippides Queensland Court of Appeal) [iii]

ABSTRACT

This research is directed to ascertaining the adequacy or inadequacy of the treatment by the *Copyright Act* 1968 (Cth) of Aboriginal and Torres Strait Islander cultural heritage. In particular, whether the heritage is disadvantaged and, if so, to what extent do the disadvantages restrict Aboriginal and Torres Strait Islanders from fully enjoying, protecting or enforcing their rights in their heritage in the manner protection is afforded to works or subject matter other than works in the legislation. The paper commences by considering the nature of Aboriginal and Torres Strait Islander heritage. It then focusses upon unique aspects of the heritage, which are likely to be inconsistent with fundamental concepts in the *Copyright Act.* Having identified the nature of Aboriginal and Torres Strait Islander heritage, the paper considers the copyright regime and identifies benefits and consistencies with the heritage, while also recognising shortcomings. The paper identifies that due to the manner in which Aboriginal and Torres Strait Islander culture and heritage has evolved, the parties beneficially entitled to the rights to the heritage are not recognised under the *Copyright Act.* In addition, there are a number of other aspects whereby the nature of Aboriginal and Torres Strait Islander heritage become problematic under the *Copyright Act.* These include:

(a) the inability to identify an original author for the purpose of determining subsistence;
(b) the question of whether the work is original or copied from preceding generations;
(c) the imposition of a duration of protection for works or subject matter other than works before they become public domain, where the heritage has formed part of the culture for thousands of years;
(d) the requirement for 'material form' creates difficulties in relation to heritage such as Dreamtime stories, which are transmitted by word of mouth;
(e) the ownership of works under the *Copyright Act* initially reside with the author, however in Aboriginal and Torres Strait Islander culture, the owners are the community or the communities' custodian.

The paper considers and proposes a resolution to the problems identified. Specifically, the paper adopts the methodology of proposing a model which, as far as possible, utilises existing structures and frameworks, such as IP Australia, the Federal Court and the Federal Circuit Court, whilst recognising core aspects of Aboriginal and Torres Strait Islander culture. The model is set out in the Schematic in Appendix A. It proposes as its masthead, a simple classification of 'heritage' which entitles it to certain unique rights by reason of amendments to the *Copyright Act,* specifically a chapter dedicated to Aboriginal and Torres Strait Islander heritage. Heritage will be required to have certain indicia, not just in form but also be inextricably linked to the obligations and duties to treat the heritage in a manner consistent with the best interests of the community who owns the heritage or its custodian.

There is in addition, a registration system for heritage through IP Australia. An optional path through a registration process is recommended. The paper identifies that the purpose of the registration process is to be a register of record only, and which does not

confer any rights. Registration will create a record, provide a response to claims of innocent infringement and is another matter for judges to consider in the exercise of their discretion to making an award of additional damages. Aboriginal and Torres Strait Islander elders, custodians and senior Indigenous persons are called upon at critical times in the process of registration, opposition, entitlement claims and enforcement. Their role is to provide an expert opinion on the heritage of the material and/or the entitlement of parties as custodians. The heritage of the Aboriginal and Torres Strait Islander peoples is comprised of all their literary, performing and artistic works (including music, dance, song, ceremonies, symbols and designs, narratives and poetry), languages and spiritual knowledge PROVIDED ALWAYS that the use of such heritage is consistent with the cultural rights, obligations and duties of the custodian, caretaker or responsible community of the particular item of heritage, so that the actions in question conform to the best interests of the community as a whole.

KEYWORDS

Aboriginal – Torres Strait Islander – heritage – community ownership – self-determination – copyright – Indigenous – cultural intellectual property – perpetuity – custodian – *Copyright Act* 1968 (Cth) – communal responsibilities – proposals for reform – languages – traditional knowledge – spiritual knowledge – elders – IP Australia

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APPENDICES

LIST OF ABBREVIATIONS

AIATSIS	Australian Institute of Aboriginal and Torres Strait Islander Studies
ALRC	The Australian Law Reform Commission
ATSIC	The Aboriginal and Torres Strait Islander Commission
Copyright Act	*Copyright Act* 1968 (Cth)
Discussion Paper	Discussion paper, '*Our Culture: Our Future*', 1997
Finding the Way	Issues Paper dated 16 October, 2014 IP Australia and Office for the Arts, Issues Paper '*Finding the Way: a conversation with Aboriginal and Torres Strait Islander peoples*', 2012
heritage	The heritage of the Aboriginal and Torres Strait Islander peoples is comprised of all their literary, performing and artistic works (including music, dance, song, ceremonies, symbols and designs, narratives and poetry), languages and spiritual knowledge PROVIDED ALWAYS that the use of such heritage is consistent with the cultural rights, obligations and duties of the custodian, caretaker or responsible community of

	the particular item of heritage, so that the actions in question conform to the best interests of the community as a whole.
ICIP	Indigenous Culture and Intellectual Property
IP	Intellectual property
IRG	Indigenous Reference Group
Issues Paper	Issues Paper dated 16 October, 2014 IP Australia and Office for the Arts, Issues Paper '*Finding the Way: a conversation with Aboriginal and Torres Strait Islander peoples*', 2012
NILS 2005 report	National Indigenous Languages Survey Report 2005
NILS 2104 report	National Indigenous Languages Survey Report 2014
NISA	The National Innovation and Science Agenda 2015: **http://www.innovation.gov.au/**
NSLA	National and State Libraries Australasia
Schematic	The diagram appearing Appendix A
Stopping the Rip-Offs	The Issues Paper jointly released by the Federal Attorney-General, the Minister for Aboriginal and Torres Strait Islander Affairs and the Minister for Communications and the Arts, at that time, entitled *Stopping the Ripoffs: Intellectual Property Protection for Aboriginal and Torres Strait Islander Peoples*, 1994
TRIPS	Agreement on Trade-Related Aspects of Intellectual Property Rights which is Annexure 1C of the Marrakesh Agreement Establishing the World Trade Organization, signed in Marrakesh, Morocco on 15 April 1994.
The Our Culture: Our Future Report	*'Our Culture: Our Future Report – Report on Australian Indigenous Cultural and Intellectual Property Rights'*. A report prepared for the AIATSIS and ATSIC; Michael Frankel & Company and Terri Janke, 1998.
Yipirinya	Yipirinya School located in Alice Springs, Northern Territory

STATEMENT OF ORIGINAL AUTHORSHIP

The work contained in this paper has not been previously published by the author. It is an original work save where statements and quotations of other persons are made, in which case those persons are identified and referred to.

Signature

Date

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Mr Philippos Demetriou, friend and mentor, who passed away today, 4 September 2016, the day of completion of this paper, Fathers' Day 2016.

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CHAPTER I - ABORIGINAL AND TORRES STRAIT ISLANDER HERITAGE

A. Background

[1.1] As one undertakes an examination of Aboriginal and Torres Strait Islander heritage in order to identify if and how the *Copyright Act*, falls short in protecting their heritage, one soon realises that this heritage has a fundamentally different focus from the rationales which are usually given for the statutory monopolies of copyright, patents, designs and trade marks.

[1.2] The challenge which must be faced and which this paper accepts, is that it is inappropriate for the expression of Aboriginal and Torres Strait Islander culture to be restricted by some of the limitations associated with IP rights.

[1.3] However that does not mean that the existing legislation, structures and provisions have no application. On the contrary, the paper acknowledges there are mechanisms useful in the prosecution of unauthorised exploitation of ICIP. An Aboriginal artist creating an artistic work can certainly conform to the concepts for copyright. If it is an original artistic work and he or she is the author, copyright will subsist and can be the subject of enforcement proceedings.

[1.4] However, the example betrays a failure to understand that the expression is inextricably linked to the community of the creator and more importantly to the land. It is this connection to the community and the land which is one of a number of fundamental characteristics of Aboriginal and Torres Strait Islander heritage. The Australian copyright regime cannot, in its present form, recognise these important heritage characteristics.

[1.5] Further, the paper recognises that the same consideration applies not only within the copyright regime, but may occur between IP regimes. For example, acquired knowledge regarding beneficial healing qualities of certain plants may give rise to rights under the

patent or plant breeder regimes. The focus of this paper however, is the interaction between Aboriginal and Torres Strait Islander heritage and the *Copyright Act*.

B. Aims

[1.6] The aims of the paper are:

[1.6.1] to identify the nature of Aboriginal and Torres Strait Islander heritage.

[1.6.2] to assess the extent to which, if any, the *Copyright Act* recognises, protects and enforces Aboriginal and Torres Strait Islander heritage.

[1.6.3] to assess the extent to which, if any, the *Copyright Act* fails to recognise, protect and reward Aboriginal and Torres Strait Islander heritage.

[1.6.4] to consider and propose a model which impacts upon the *Copyright Act* and would more accurately reflect the core considerations of the Aboriginal and Torres Strait Islander people.

C. Methodology and Scope

[1.7] The methodology of the paper has been to:

[1.7.1] firstly consider the nature of Aboriginal and Torres Strait Islander heritage;

[1.7.2] secondly, identify matters within their heritage which would readily fall within the exclusive rights granted by the *Copyright Act* and those which fall outside the protection afforded by the legislation and why they are not recognised;

[1.7.3] thirdly, identify what matters and issues the Aboriginal and Torres Strait Islander people consider important to them. In this regard, the paper identified the *"Our Culture: Our Future Report* as recording many of those concerns;

[1.7.4] fourthly, consider in closer detail the *Copyright Act* and case studies (both litigated and unlitigated), to distil any inabilities of the legislation to properly protect or reward Aboriginal and Torres Strait Islander heritage.

[1.7.5] fifthly, devise a model which could both accommodate central concerns of Aboriginal and Torres Strait Islander people as well as utilising forums and mechanisms currently in use. In this manner, the paper considers that any amendments to the *Copyright Act* might be more acceptable if they were to both address deficiencies and utilise existing structures and processes.

[1.7.6] finally, to propose a solution which recognises the unique nature of Aboriginal and Torres Strait Islander heritage, yet also recognised the benefits the *Copyright Act* has, such as a body of jurisprudence on the issue of awarding additional damages.

[1.8] In the preparation of this paper consideration was given to previous efforts to address the proper recognition of Aboriginal and Torres Strait Islander heritage. The subject matter of this paper was included in that broader scope to the extent that the *Copyright Act* may or may not accommodate or support the heritage.

[1.9] Identified early in the research was the Discussion Paper *"Our Culture: Our Future*" (1997) and the *"Our Culture: Our Future Report on Australian Indigenous Cultural and Intellectual Property Rights"* (1998), to which substantial consideration has been given.

[1.10] The *Our Culture: Our Future - Report* was considered in some detail and the following general observations were made:

[1.10.1] firstly, considerable time and expense had been invested in the formulation of the *Our Culture: Our Future* Discussion Paper and the *Our Culture: Our Future Report*.

[1.10.2] secondly, the *Our Culture: Our Future* Discussion Paper generated over 70 submissions, which were carefully considered in the compilation and completion of the report.

[1.10.3] thirdly, the *Our Culture: Our Future Report* was compiled as a result of considerable reference to the following:

[1.10.3.1] the "*Stopping the Rip-Offs* Discussion Paper";

[1.10.3.2] the House of Representatives Standing Committee on Aboriginal and Torres Strait Affairs Inquiry into Culture and Heritage;

[1.10.3.3] Social Justice Reports and findings from the consultation process conducted by ATSIC, the Office of the Aboriginal and Torres Strait Islander Social Justice Commissioner, and the Council for Aboriginal Reconciliation;

[1.10.3.4] Reference to an international standard by reference, and to some extent, dependence upon the formulation of a definition of the nature of indigenous culture and intellectual property in the work '*A Study on the Protection of the Cultural and Intellectual Property of Indigenous Peoples'*, by United Nations Special Rapporteur, Erica Irene Daes, of the Economic and Social Council's Sub-Commission on Prevention of Discrimination of Minorities.[iv]

[1.11] The *Our Culture: Our Future Report* is therefore a repository of considerable expert opinion on the subject matter of this paper. Although the report was compiled in 1998, the paper identifies that certain fundamental issues remain unchanged.

[1.12] The *Our Culture: Our Future Report* identified two aims:

[1.12.1] the recognition of Indigenous Cultural Tradition;

[1.12.2] the protection of the interests of Aboriginal and Torres Strait Islander people including economic interests.[v]

[1.13] Throughout the *Our Culture: Our Future Report,* the importance of self-determination was identified as an essential requirement.[vi] In this regard, this paper's attention was directed to a model which would achieve (as far as possible) essential requirements for the protection of Aboriginal and Torres Strait Islander heritage, which include:

[1.13.1] the identification of ownership of cultural and intellectual property rights and traditions;

[1.13.2] the recognition of the unique role of custodians;

[1.13.3] the elements of culture and intellectual property to be protected;

[1.13.4] the appropriateness of use of of Aboriginal and Torres Strait Islander heritage;

[1.13.5] the element of self-determination;

[1.13.6] the ability to transmit Aboriginal and Torres Strait Islander heritage to future generations.

[1.14] It should be expressly noted at the outset, that the *Our Culture: Our Future Report* has been a work considered extensively in preparing this paper. It has provided a number of insights, particularly as to the nature of Aboriginal and Torres Strait Islander heritage. The *Our Culture: Our Future Report* is considered by the author to be a unique resource to which many prominent and informed Aboriginal and Torres Strait Islander people contributed valuable comment, particularly in respect of the core issues important to the Aboriginal and Torres Strait Islander people.

[1.15] In particular, by reason of the fact that such persons were in many or most cases representatives of larger Aboriginal and Torres Strait Islander communities, the *Our Culture: Our Future Report* provides the result of a filtration process which would be quite inappropriate to ignore.

D. Aboriginal and Torres Strait Islander heritage *(Chapter II)*

[1.16] Chapter II will consider what is meant by the term Aboriginal and Torres Strait Islander heritage. The *Our Culture: Our Future* Discussion Paper initiated a working definition of ICIP drawing from the 1993 Daes' Study.[vii]

[1.17] Essentially, Daes' views are that it is artificial to seek to make a distinction between indigenous 'cultural property' and indigenous 'intellectual property' as commodities or rights of property.[viii] Rather, it was 'more appropriate and simpler to refer to the collective cultural heritage of each Indigenous people' so that 'a song or story is not a commodity or a form of property but one of the manifestations of an ancient and continuing relationship between people and their territory'.[ix]

[1.18] It was specifically noted that the term 'heritage' was the terminology used by Daes in her Draft Principles and Guidelines for the Protection of the Heritage of Indigenous People.[x] Further, of significance was the acknowledgement of a debate concerning the fact that 'property' denoted commercialisation and protection of commercial rights, whereas 'heritage' implied preservation and maintenance consideration.[xi]

[1.19] Ultimately, there are some core concepts associated inextricably with Aboriginal and Torres Strait Islander heritage. These are:

> [1.19.1] that cultural heritage is not in a historically stagnant state but rather is a living and evolving tradition. In order for it to survive, 'there is an urgent need, then, for measures to enable indigenous peoples to retain control over their remaining cultural and intellectual, as well as natural, wealth, so that they have the possibility of survival and self-development';[xii]
>
> [1.19.2] that Aboriginal and Torres Strait Islander heritage is not severable into categories independent of other indigenous rights, but rather bound together in a manner which is 'intimately connected to the traditional lands and territories of each people';[xiii]
>
> [1.19.3] Aboriginal and Torres Strait Islander heritage is collectively owned and socially based.[xiv]
>
> [1.19.4] despite a communal concept of ownership of evolving traditions, custodians often act in a caretaker capacity taking into account the interests of the broader community. The custodian may be an individual or a group.[xv] Implicit in the custodian must be an uncontroverted recognition of the expertise of the custodian/s in identifying the heritage and such conduct which is consistent with that heritage in the interests of the group;
>
> [1.19.5] it follows, that if heritage is communally owned, then the indicia which accompany ownership must be exercised by the community. One aspect of the indicia is the requirement to have the community consent to 'sharing' the heritage. This will depend on the nature of the cultural item;[xvi]
>
> [1.19.6] it must also be recognised that there will be a small minority of Aboriginal and Torres Strait Islander people, who do not follow the traditional ways. For example, an artist might use a heritage item or expression inconsistently with the views of the relevant community, or disregard the process of consultation with a custodian as to the manner in which the artist proposes to use the heritage;
>
> [1.19.7] any proposal should not extend unique benefits of the characterisation of of Aboriginal and Torres Strait Islander heritage, to the expression only of the heritage but rather to those expressions of heritage which are used in a manner consistent with the obligations and duties of the custodian and the community from which the heritage emanates;

[1.19.8] heritage will therefore be a two edged sword, protecting the expression if it is consistent with the traditions associated with the heritage and passing on certain benefits, but also declining them if it merely utilises the expression without the traditional constraints imposed by the custodian or community.

E. Unique features of Indigenous Culture and IP *(Chapter III)*

[1.20] The uniqueness of Aboriginal and Torres Strait Islander heritage is to be considered in the context of copyright specifically.

[1.21] Aboriginal and Torres Strait Islander heritage is seen as a living and developing body of acquired knowledge which finds expression in ways including:

[1.21.1] literary, artistic works, (including music, dance, song, ceremonies, symbols and designs, narratives and poetry);

[1.21.2] languages;

[1.21.3] scientific, agricultural, technical and ecological knowledge;

[1.21.4] spiritual knowledge.

[1.22] There are undoubtedly unique features of Aboriginal and Torres Strait Islander heritage, which have developed before and independently of the rationales behind the intellectual property statutory monopolies, relevant the exclusive rights created by the *Copyright Act*.

[1.23] Some of the more obvious are:

[1.23.1] that the expression of the Aboriginal and Torres Strait Islander heritage is considered to be an extension of the community from which it is based. Accordingly, the community considers, and in most cases the author understands and accepts, that the community is the owner of the heritage. Accordingly, indigenous law requires that the owners be consulted in relation to the expression and the question of sharing or publishing the expression;

[1.23.2] that it is an evolving heritage, perpetual in nature, relying upon a cultural transmission process to survive;

[1.23.3] there exists an overarching consideration that the expression must be:

[1.23.3.1] consistent with traditional values of the community; and

[1.23.3.2] shared (if it is to be shared at all), in a manner consistent with traditional values of the community which may be reflected in the view of the custodian/s.

[1.24] The expression of the heritage is inextricably linked to the land and to other forms of Aboriginal and Torres Strait Islander heritage. For example, on a website URL http://www.savanna.org.au/nt/ah/altraditionalfire.html there is a page headed 'Traditional use of fire in central Arnhem Land'. There appears on that page, an artistic work depicting a bird, the Karrakanj bird which is attributed to Aboriginal artist Billy Yalawanga.[xvii]

[1.25] There is also a statement relating to the witnessed practises of the Karrakanj bird in starting fires. The statement changes the visual appearance of the work into a work which incorporates acquired traditional knowledge of the burning practices of the Karrakanj bird.

[1.26] An image of the firebird artwork is not included in this paper. Under the *Copyright Act*, one could argue reproduction of the artistic work for the purpose of this paper with the appropriate attribution is a fair dealing under s 40. However, that is to some extent not helpful as it identifies and also exacerbates the perceived problem – using the *Copyright Act* to effectively acquire an unauthorised use.

F. The Current Copyright Regime - shortcomings and advantages *(Chapter IV)*

[1.27] The appropriate place to commence this topic is to consider the rationales behind the *Copyright Act* and whether those rationales are shared by other IP regimes.

[1.28] In relation to copyright, it has been said that the natural rights rationale is the basis for copyright and that there are two core rationales for copyright behind the natural rights rationale, which may become intertwined and indistinguishable:[xviii]

> [1.28.1] that people have an absolute right to all the fruits of their labour. This rationale was enunciated by Willes J in *Millar v Taylor*[xix] — 'It is not agreeable to the natural justice that a stranger should reap the pecuniary produce of another's work';
>
> [1.28.2] that people deserved the returns from their labour if it was an attempt to do something worthwhile. These were the beginnings of the saying 'that something worth copying is worth protecting'. This view held that an individual was entitled, by right, to capture all of the returns from his or her intellectual endeavor.[xx]

[1.29] The view is also set out in Article 27(2) of the *Universal Declaration of Human Rights* that "[e]veryone has the right to the protection of the moral and material interests resulting from scientific, literary or artistic production of which he is the author."

[1.30] In patent law, the 'Natural Law' theory bears a marked resemblance to the natural rights rationale in copyright.

[1.31] The natural law theory in relation to patents, assumes that a person has a natural property right in their own ideas and that society has a moral obligation to recognise and protect this property right, so that anyone taking it is in effect stealing.[xxi] The 'natural right' concept is considered particularly important in those countries where the rights of the

individual have been forged at great expense through revolution, such as in the United States of America and France.

[1.32] It is not surprising that, if this rationale is accepted, the copyright legislation presents an inherent difficulty in its application to Aboriginal and Torres Strait Islander heritage. The natural right theory fortifies the rights of the individual not only against the world, but also against persons who may constitute the community, for whom no allowance is made.

G. Assessment and the Proposed Model *(Chapter V)*

[1.33] Aboriginal and Torres Strait Islander heritage and the statutory regime for copyright have rationales which are quite different. Aboriginal and Torres Strait Islander heritage has a connection with the community and with the land. These values are confronted by a regime which supports and recognises a much narrower interest, the owner of the IP, usually the author.

[1.34] The rationale of the copyright legislation, as with patent and design statutory regimes, is to allow the creator a period to exploit the work or invention or design. Once that period has expired the work or invention will form part of the public domain. This position is inconsistent with the traditional practice of successive inheritance of the Aboriginal and Torres Strait Islander heritage, which is never intended to flow into the public domain.

[1.35] Notwithstanding, Aboriginal and Torres Strait Islander artists or authors may enforce these statutory rights as has been shown.

[1.36] Recognition of Aboriginal and Torres Strait Islander heritage must have the following elements:

> [1.36.1] the community ownership must be recognised.
>
> [1.36.2] the unique nature of indigenous heritage must be acknowledged and in this regard, self-determination is a key issue. The expertise of the particular community or custodian must play a role in a determination of an entitlement to the classification of Aboriginal and Torres Strait Islander heritage'.
>
> [1.36.3] recognition of a perpetual right to Aboriginal and Torres Strait Islander heritage.

H. Conclusion (*Chapter VI*)

[1.37] This will contain a summary of the findings and proposals identified by this paper. In particular, the author proposes a model which recognises many matters which have been expressed by Aboriginal and Torres Strait Islander people as being important for recognition and resolution.[xxii]

[1.38] The model proposes *inter alia* to:

[1.38.1] insert a specific chapter in the *Copyright Act* with a suggested title entitled 'Aboriginal and Torres Strait Islander Culture';

[1.38.2] create a right of 'heritage', such right identified by an expert panel as being entitled to that designation:

> [1.38.2.1] as an expression of heritage; and
>
> [1.38.2.2] as having associated to it, duties and obligations by the custodian and the community responsible for its transmittal.

[1.38.3] identify the heritage designation as the key to the entitlements flowing from the designation. Like copyright, there will be no registration system creating the benefits of the designation. It will be heritage because it *is* heritage and bears the indicia of heritage;

[1.38.4] recognise the benefits of the 'heritage' designation which are quite different from the exclusive rights already set out in the *Copyright Act*;

[1.38.5] use an expert panel to scrutinise the entitlement to claim that designation;

[1.38.6] expert scrutiny will take place where enforcement action is commenced. It will be conducted by the expert panel and upon confirmation as to the subject matter being heritage will raise other issues;

[1.38.7] a second path of recognition is one of registration. This process will involve an examination of the heritage and be open to opposition, but will not impart any rights upon registration. The register will act as a register of record. The register will also act as a mechanism of notice to defeat an innocent infringement defence and as a matter relevant to the exercise of the discretion to award additional damages under the *Copyright Act* s 115(4).

CHAPTER II – THE NATURE OF ABORIGINAL AND TORRES STRAIT ISLANDER CULTURE AND INTELLECTUAL PROPERTY

A. Definitions

[2.1] In her final report Ms Daes considered that the 'heritage' of indigenous peoples is:

> *'comprised of all objects, sites and knowledge the nature or use of which has been transmitted from generation to generation, and which is regarded as pertaining to a particular people or its territory. The heritage of an indigenous people also includes objects, knowledge and literary or artistic works which may be created in the future based upon its heritage.'*[xxiii]

[2.2] In the light of the Daes' findings the following definition of the ICIP was adopted for the purpose of the *Our Culture: Our Future Discussion Paper*:

> *'"Indigenous Cultural and Intellectual Property" refers to Indigenous peoples' rights to their heritage. Heritage comprises all objects, sites and knowledge, the nature or use of which has been transmitted or continues to be transmitted from generation to generation, and which is regarded as pertaining to a particular Indigenous group or its territory. Heritage includes:*
>
> - *Literary, performing and artistic works (including songs, music, dances, stories, ceremonies, symbols, languages and designs).*
> - *Scientific, agricultural, technical and ecological knowledge (including cultigens, medicines and the phenotypes of flora and fauna).*
> - *All items of movable cultural property as defined by UNESCO.*[xxiv]
> - *Human remains and tissues.*
> - *Immovable cultural property (including sacred and historically significant sites and burial grounds).*
> - *Documentation of Indigenous peoples' heritage in archives, film, photographs, videotape or audiotape and all forms of media.*

The heritage of an Indigenous people is a living one and includes objects, knowledge and literary and artistic works which may be created in the future based on that heritage.'

[2.3] This definition, which appears to be a definition of 'heritage', was varied after research, a consultation process and submissions responsive to the *Our Culture: Our Future Discussion Paper*.

[2.4] The revised definition, took account of a number of concerns as to matters omitted, which included:

[2.4.1] Indigenous cultural and spiritual identities which are expressed via song, music, dance, stories;

[2.4.2] all land, soil and bodies of water which contain cultural and spiritual significance to Indigenous Australians.[xxv]

[2.4.3] cultural and intellectual property to include unwritten and perhaps unrecorded historical materials of significance to Indigenous people.[xxvi]

[2.4.4] Indigenous people to attribute meanings and interpretation to their cultural properties; that is, Indigenous people should have the right to define their own cultures.[xxvii]

[2.5] Other submissions expressed concerns regarding:

[2.5.1] the breadth of the definition,[xxviii] and its implications;[xxix]

[2.5.2] the terminology, specifically the interchangeable use of the expressions 'culture' and 'heritage'. The Yunggorendi Centre noted:

> *'Culture and heritage seem to be used interchangeably here. Culture differs from heritage. Culture encompasses both the explicit, implicit actions of a community. The explicit culture consists of the observable behavioural and physical signs of culture, that is, the content and the structure. The implicit culture is more abstract, referring to the underlying organisation and transmission systems of a community. The current definition only covers the observable behaviour and the physical and it needs to include the non-physical and the non-behavioural. Heritage can be viewed by some as conservation of culture and not culture itself'.*[xxx]

[2.6] The amended definition of ICIP based on the findings arising from the consultation process and the IRG *Draft Principles and Guidelines for the Protection of Indigenous Cultural and Intellectual Property* was expressed as follows:

'"Indigenous Cultural and Intellectual Property Rights" refers to Indigenous Australians rights to their heritage. Such rights are also known as "Indigenous Heritage Rights". Heritage consists of the intangible and tangible aspects of the whole body of cultural practices,

resources and knowledge systems that have been developed, nurtured and refined (and continue to be developed, nurtured and refined) by Indigenous people and passed on by Indigenous people as part of expressing their cultural identity, including:

- *Literary, performing and artistic works (including music, dance, song, ceremonies, symbols and designs, narratives and poetry);*
- *Languages;*
- *Scientific, agricultural, technical and ecological knowledge (including cultigens, medicines and sustainable use of flora and fauna);*
- *Spiritual knowledge;*
- *All items of moveable cultural property, including burial artefacts;*
- *Indigenous ancestral remains;*
- *Indigenous human genetic material (including DNA and tissues);*
- *Cultural environment resources (including minerals and species).'*

[2.7] The legal historian, John McCorquodale, has reported that since the time of white settlement, governments have used no less than 67 classifications, descriptions or definitions to determine who is an Aboriginal person.[xxxi]

[2.8] In *Commonwealth v Tasmania*, the High Court considered the definition of an 'Aborigine' for the purpose of s 51(xxvi) of the Constitution, in relation to laws with respect to 'the people of any race for whom it is deemed necessary to make special laws'. Deane J applied a three-part test, stating:

> *'By 'Australian Aboriginal' I mean, in accordance with what I understand to be the conventional meaning of that term, a person of Aboriginal descent, albeit mixed, who identifies himself as such and who is recognised by the Aboriginal community as Aboriginal'*.[xxxii]

[2.9] The ALRC Report 96 noted that only a small number of judicial decisions in Australia have considered this issue of the definition of Aboriginality.[xxxiii]

[2.10] The ALRC concluded:

> *'…the Commonwealth government appeared to apply the three-part test of Aboriginal descent, self-identification and community recognition for determining eligibility for certain programs and benefits. The courts, in interpreting statutory definitions in federal legislation, have emphasised the importance of descent in establishing Aboriginal identity, but have*

recognised that self-identification and community recognition may be relevant to establishing descent, and hence Aboriginal identity, for the purposes of specific legislation'. [xxxiv]

[2.11] In the case of *Shaw v Wolf,*[xxxv] the questions which arose involved the Aboriginal and Torres Strait Islander Commission Regional Council Elections where candidates were required to be an "Aboriginal person". Specifically, it considered whether each of the first eleven respondents was an "Aboriginal person" as defined in the *Aboriginal and Torres Strait Islander Commission Act* 1989.

[2.12] Relevantly, the following observations of Merkel J in *Shaw v Wolf* [xxxvi]are particularly significant:

'It is unfortunate that the determination of a person's Aboriginal identity, a highly personal matter, has been left by a parliament that is not representative of Aboriginal people to be determined by a court which is also not representative of Aboriginal people. Whilst many would say that this is an inevitable incident of political and legal life in Australia, I do not accept that that must always be necessarily so. It is to be hoped that one day if questions such as those that have arisen in the present case are again required to be determined that that determination might be made by independently constituted bodies or tribunals which are representative of Aboriginal people'.[xxxvii]

B. Literary, performing and artistic works

[2.13] It is inappropriate to attempt to characterise one area of the definition of ICIP which was adopted from another area, as being of greater significance. It is clear that the nature of Aboriginal and Torres Strait Islander heritage or ICIP as it is referred to, comprises various elements that make up heritage which are all inter-related and do not exist as free standing expressions without a strong connection to the other forms of heritage.

[2.14] The observation is made however, that some identified elements of heritage are more readily understood in the *Copyright Act*.[xxxviii] For example, an original artistic work would be recognised under the *Copyright Act.* However, such things as the traditional relevance of the work and the obligations imposed on the author as to the manner in which that heritage is used are beyond the scope of the *Copyright Act,* save in a limited sense by the moral right not to have the work subjected to derogatory treatment.[xxxix]

[2.15] Literary works, like artistic works and performances, are traditionally reflective of the culture handed down through generations. They are mediums through which the knowledge may be transmitted by the custodians and the community to future generations:

'Every element of an indigenous peoples, heritage has traditional owners, which may be the whole people, a particular family or clan, an association or society, or individuals who have been specially taught or initiated to be its custodians. The traditional owners of heritage must be determined in accordance with indigenous peoples, own customs, laws and practices'.[xl]

[2.16] These are often not mutually exclusive. An artistic work might often be accompanied

by a narrative seeking to impart the meaning behind the artistic work. For example:

> [2.16.1] Karrakanj, the brown falcon, is depicted in an artistic work of Billy Yalawanga, whilst an accompanying narrative imparts traditional knowledge that the fire bird, Karrakanj picks up a smoldering stick from a burned patch of ground and dropping it into dry grass on lights a new fire so he can get more food."[xli]

> [2.16.2] The artistic work Vaughan Springs Dreaming by Ivy Napangard Poulson is accompanied by a description which describes a waterhole and natural spring called Pikilyi and two ancestral heroes who live there as man and wife.[xlii]

> [2.16.3] The artistic work of Maryanne Nungarrayi Spencer titled 'Birds that live around Yuendumu' is accompanied by a narrative of the particular varieties of birds in that area around Yuendumu. An extract of that narrative indicates acquired knowledge beyond recognition of the species:

> > *'A number of bird species tell people messages. Several species tell people when rain is coming, including the 'jintirr-jintirrpa' (willy wagtail) and 'kalwa' (crane). The cries of other birds, like the 'kirrkalanji' (brown falcon) and 'ngamirliri' (bush stone curlew), can make children sick. The 'paku-paku' (crested bellbird) and 'kurlukuku' (diamond dove) are messengers of love songs.'*[xliii]

[2.17] Literary works recording information about the lives and works of Aboriginal and Torres Strait Islander writers and storytellers and the literary cultures and traditions that formed and influenced them are held in a database by Austlit titled 'BlackWords'.[xliv] Blackwords is licensed under a Creative Commons Attribution and Non-commercialisation licence, which permits copying distributing and transmitting the work provided the work attributes the work in a manner specified by the author and not be used for commercial purposes. A model would have to affect the consequences of persons acting outside the licence at the suit of the custodian or community in addition to the rights of the licensor for misuse by licensees.

C. Languages

[2.18] Aboriginal and Torres Strait Islander languages are heritage. Notably:

[2.18.1] it is an important component in the necessary process of recognising the unique identity of Aboriginal and Torres Strait Islander peoples:

> > *'I believe that if we were to revive our sleeping language, we could not only gain recognition in the Aboriginal and wider*

community but we could also regain our sense of identity, we could start to become a strong community and family again.'[xlv]

[2.18.2] it is inextricably linked to literary works and oral transmittal of stories and indigenous traditional knowledge. Therefore, without protection of the language as heritage, the means for transmittal of the historic traditional knowledge is likely to be broken.

[2.18.3] Aboriginal and Torres Strait Islander peoples have the right to revitalise, use, develop and transmit to future generations their histories**, languages**, oral traditions, philosophies, writing systems and literatures, and to designate and retain their own names for communities, places and persons.[xlvi] (emphasis added)

[2.18.4] It has been included in the definition formulated by Ms Irene Daes in the 1995 Daes Report and adopted in the *Our Culture: Our Future Report*.[xlvii]

[2.19] It has been suggested that governments, with international co-operation, should provide the necessary financial resources and institutional support to ensure that every indigenous child has the opportunity to achieve full fluency and literacy in his/her own language, as well as an official language.[xlviii]

[2.20] According to the NILS 2005 report, at the time the Australian continent was colonised, approximately 250 different Indigenous languages, with the larger language groups each having up to 100 related dialects.[xlix]

[2.21] The NILS 2005 report found that of the original 250 known Indigenous languages there were 145 languages which were still being spoken, of which:

[2.21.1] 19 languages had more than 500 speakers.

[2.21.2] 2 languages had between 201-500 speakers.

[2.21.3] 15 languages had between 51-200 speakers.

[2.21.4] 46 languages had between 10-50 speakers.

[2.21.5] 63 languages had less than 10 speakers.[l]

[2.22] The NILS 2005 report noted that language shift and endangerment were the critical factors in languages which had less than 50 speakers.[li] In 2014, the results of a further survey were published, which followed on from the NILS 2005 report. The NILS 2005 report had a broader scope than the NILS 2014 report.[lii] The NILS 2005 report included a recommendation for a national survey of Indigenous language programs. The NILS 2014 report provided, in essence, this survey.[liii]

[2.23] The NILS 2014 report identified that there were only approximately 120 languages still spoken, of which:

[2.23.1] there were 13 languages that could be considered strong. The languages previously in the strong category in the NILS 2005 report had moved to the moderately endangered group, while some languages from that group have moved into the severely/critically endangered category.

[2.23.2] Approximately 100 languages were described as severely or critically endangered. However, a fair number of languages in this category, perhaps 30 or more, were seeing significant increases in levels of use as a result of language programmes.

[2.24] Although there was an overall decline in the number of languages used, the respondents to the survey were also virtually unanimous regarding the importance of using traditional language.[liv]

[2.25] In this regard:

[2.25.1] 98% agreed that it was important to know and use traditional language.

[2.25.2] Approximately the same number, also agreed that it was important for their children to learn and use traditional language and for the following reasons:

[2.25.2.1] 46% explained that traditional languages should be passed down to the next generation.

[2.25.2.2] 41% also attributed their response to the fact that traditional language was their identity, who they were: it was part of their heritage and it allowed them to connect with their culture and their people.[lv]

[2.26] The survey data indicated that most of the survey respondents felt the key to keeping their traditional languages strong was to ensure their use (52%) and their transmission (40%).[lvi]

[2.27] The NILS 2014 report identified three key elements for the success of community-led language activities:

[2.27.1] having community members involved and committed, particularly, skilled people with language knowledge;

[2.27.2] funding;

[2.27.3] access to language resources.[lvii]

[2.28] In answer to the question as to why there was a trend for Indigenous languages to decline, the impact of colonisation and the attitude of the colonists would represent the greatest single impact endangering the survival of indigenous languages:

> *'From the earliest days of European contact there was often an assumption that Aboriginal languages were of less value than English and this view soon hardened into government policy, which was reinforced through education and employment practices. Aboriginal people were positively discouraged from speaking their ancestral languages and made to feel ashamed of using them in public. Eventually the link between generations of speakers was broken, so that young children had little or no knowledge of ancestral languages, their parents were partial speakers of these languages and their grandparents were the only remaining speakers of languages that may have been passed on from generation to generation over hundreds of years.*
>
> *Once this intergenerational link is broken an unwritten language may disappear very quickly…[it is reported] that varieties of English have taken over within forty years of significant white contact on Mornington Island in the Gulf of Carpentaria. One of the traditional languages, Kaiadilt, now has no fluent speakers under forty-five years of age. Younger speakers retain active command of a small vocabulary, but speak Kaiadilt with varying degrees of fluency'.*[lviii]

D. Items of moveable and immovable cultural property - including burial artefacts; Aboriginal and Torres Strait Islander ancestral remains; human genetic material and Cultural environment resources

[2.29] Consistent with statements in this paper, it is not usually appropriate to sever an aspect of the adopted definition of 'heritage' from other elements of the definition. However, it is not considered that the scope of this paper extends to these aspects of heritage, save where there are copyright issues arising.[lix]

[2.30] It is more appropriate that the protection of these sites be the subject of provisions within existing State legislation relevant to the protection of Aboriginal heritage.

[2.31] Before 1965, there was no State legislation protecting Aboriginal sites, with the minor exception of certain regulations in the Northern Territory. In 1965, the South Australian Government was the first to enact such legislation, and all other States have since done so.[lx]

[2.32] In New South Wales, Aboriginal sites are protected under Part 6 of the *National Parks and Wildlife Act* 1974 (NSW). It is an offence to damage or destroy them or to collect artefacts without prior permission of the Director-General of the NSW Office of Environment and Heritage. The penalties for harming an Aboriginal site are up to $275,000 and one year's imprisonment for individuals and $1.1 million for corporations.[lxi] In addition, harming an Aboriginal object attracts a maximum penalty of $55,000 for individuals and $220,000 for Corporations.[lxii]

[2.33] In Queensland there are similar provisions relating to the ownership of human remains[lxiii] and secret and sacred objects[lxiv] as well as penalties similar to New South Wales save that it is 2 years' imprisonment if an Aboriginal cultural heritage area is not clamed.[lxv]

[2.34] The Commonwealth legislation has as its purpose 'the preservation and protection from injury or desecration of areas and objects in Australia and in Australian waters, being areas and objects that are of particular significance to Aboriginals in accordance with Aboriginal tradition'.[lxvi] The legislation for both offences[lxvii] as well as indictable offences.[lxviii] Under this legislation an Aboriginal or group of Aboriginal people may apply to the Minister seeking a declaration for the preservation or protection of a specified object or class of objects from injury or desecration.[lxix]

E. Recent developments regarding Aboriginal heritage laws

[2.35] On 1 August 2016, new Aboriginal heritage laws that come into force in Victoria. The *Aboriginal Heritage Amendment Act* 2016 amends the *Aboriginal Heritage Act* 2006 (Vic) by the introduction of an extensive regime which includes reporting obligations by universities,[lxx] accounting, registration and auditing.

[2.36] The new amendments provide for agreements titled 'an Aboriginal intangible heritage agreement' which is an agreement the registration of 'registered Aboriginal intangible heritage' relating to registered Aboriginal intangible heritage made between any person or body and:

> [2.36.1] a registered Aboriginal party; or
>
> [2.36.2] a registered native title holder; or
>
> [2.36.3] a traditional owner group entity.[lxxi]

[2.37] It is an offence for a person to knowingly use any registered Aboriginal intangible heritage for commercial purposes without the consent of the relevant registered Aboriginal party, registered native title holder or traditional owner group entity.[lxxii] The penalty is approximately $280,000 for an individual and over $1.5m for a corporation.[lxxiii]

[2.38] The paper became aware of the amendments upon their announcement immediately prior to their implementation. It is not proposed to address or compare the model proposed in this paper with the effect of the amendments introduced. Both the proposed model and the extensive amendments recognise that Aboriginal and Torres Strait Islander heritage is unique in a number of ways, the least of which is not communal ownership.

[2.39] The paper however takes the following position:

> [2.39.1] any step toward respectful recognition and protection of Aboriginal and Torres Strait Islander heritage is a positive step, which is to be applauded and encouraged.
>
> [2.39.2] ultimately, intellectual property laws are more appropriate to deal with the unique nature of Aboriginal and Torres Strait Islander heritage. The creative

> thoughts and expressions of the human heart and mind, defy rigidity and any system which will protect original people's heritage is one which has a good dose of pliancy rather than rigidity.

[2.40] In this respect, the proposed model in this paper, which works within the *Copyright Act*, whilst relatively simple, is inherently suited to protect Aboriginal and Torres Strait Islander heritage. Heritage in this proposed model comprises not only the expressions which include dances, stories, songs and artistic works but adds a proviso that such use is consistent with the rights and duties of the custodian, caretaker or responsible community of a particular item of heritage, so that the actions in question conform to the best interests of the community as a whole.

[2.41] In this manner, an Aboriginal and Torres Strait Islander artist or even a custodian, who acts outside that proviso, will fall within the framework of the existing *Copyright Act.* There is therefore an existing structure which may underpin and work compatibly with the protection of heritage under the model.

CHAPTER III - UNIQUE FEATURES OF INDIGENOUS CULTURE AND IP RIGHTS

A. Collective Ownership

[3.1] Aboriginal and Torres Strait Islander heritage is collectively owned where each 'particular group has ownership rights over particular inherited cultural heritage'.[lxxiv] This 'community' ownership derives from the fact that generations have contributed to its development, refinement and expression.

[3.2] Aboriginal and Torres Strait Islander heritage is owned by the particular community to which the particular heritage relates. Traditionally there are caretakers or custodians who act in the best interests of the community:

> *'Although heritage is communal, there is usually an individual who can best be described as a custodian or caretaker of each song, story, name, medicine, sacred place and other aspect of a people's heritage. Such individual responsibilities should not be confused with ownership or property rights. Traditional custodians serve as trustees for the interests of the community as a whole and they enjoy their privileges and status in this respect for only so long as they continue to act in the best interests of the community'.*[lxxv]

[3.3] The Federal Court has recognised that an artist of Aboriginal and Torres Strait Islander descent is not independent of the community from which he or she comes where traditional knowledge and heritage are concerned. In *Milpurrurru*,[lxxvi] von Doussa J noted from the evidence at trial that:

> *'The right to create paintings and other artworks depicting creation and dreaming stories, and to use pre-existing designs and well recognised totems of the clan, resides in the traditional owners (or custodians) of the stories or images. Usually that right will not be with only one person, but with a group of people who together have the authority to determine whether the story and images may be used in an artwork, by whom the artwork may be created, to whom it may be published, and the terms, if any, on which the artwork may be reproduced.'*[lxxvii]

[3.4] Further, by reason of Aboriginal law, unauthorised reproduction of a story or imagery places the onus upon the traditional owners to take action to preserve the Dreaming, and to punish those considered responsible for the breach.[lxxviii]

[3.5] However, where permission has been given by the traditional owners to a particular artist to create a picture of the Dreaming, and that artwork is later reproduced by a third party or dealt with in a manner which the custodians consider inappropriate, the artist is held responsible for the breach which has occurred, even if the artist had no control over, or knowledge of, what occurred.[lxxix]

[3.6] There is a shift of responsibility to take action which moves onto the artist, and which carries potentially serious consequences. In *Milpurrurru* one artist endeavoured to conceal from her community the unauthorised use of the work 'Djanda and the Sacred Waterhole' by the respondents. The use of the work was on carpets and she feared if the community became aware, she would be held responsible.[lxxx]

[3.7] Evidence was given in *Milpurrurru* that one consequence in the past for the misuse of artworks depicting creation and Dreaming stories involved the offender being put to death. Contemporary sanctions include exclusion from the right to participate in ceremonies; removal of the right to reproduce paintings of that or any other story of the clan, being outcast from the community, or being required to make a payment of money. There was evidence also given of the possibility of spearing, where the victim is speared in the leg, as a continuing sanction in serious cases.

[3.8] The contrast of Aboriginal law and copyright law is highlighted by the following evidence of an indigenous artist in *Milpurrurru*:

> *'As an artist, while I may own the copyright in a particular artwork under western law, under Aboriginal law I must not use an image or story in such a way as to undermine the rights of all the other Yolngu (her clan) who have an interest whether direct or indirect in it. In this way I hold the image on trust for all the other Yolngu with an interest in the story'.*[lxxxi]

B. Ideas v Expression

[3.9] A fundamental principle of copyright is that it protects the expression not the idea behind the expression. As a matter of practical application, disputes over intangible ideas obviously are reduced when a concept is reduced to material form:

> *'The originality which is required relates to the expression of the thought.'* [lxxxii]
>
> And further:
>
> *'The requirement that a literary work be "original" is directed not to originality of ideas but to their expression'.* [lxxxiii]

[3.10] Oral works are not protected by copyright, unless and until they are reduced to some material form. It is noted in the Lahore, Copyright and Designs Commentary, that:

> *'There is no copyright in a purely oral work or in a piece of improvised music or drama not reduced to writing or some other material form. Some form of fixation is required before*

copyright can subsist in a work. Some form of fixation is required before copyright can subsist in a work'.[lxxxiv]

[3.11] As noted in the commentary, the *Copyright Act* s 22(1) provides that a literary, dramatic, musical or artistic work is 'made' at the time the work is first reduced to writing or to some other material form.

[3.12] This distinction is relevant in identifying the differences between the approach under the copyright legislation and the Aboriginal and Torres Strait Islander view of the artwork. ICIP contains knowledge acquired and transmitted throughout generations, which has also primary importance, even to the extent that it overshadows the importance of the particular expression.

[3.13] ICIP points not to itself but rather to generations of accumulated and often secret knowledge in respect of matters which include creation stories and Dreaming, in the cultures of the clans to which they relate.

[3.14] Further the stories were represented in ceremonies of deep significance and were often secret or sacred. These stories were also restricted to a few senior members of the clan chosen according to age, descendants, sex, initiation, experience in the learning of the Dreaming and ceremonies, and the attainment of skills which permit the faithful reproduction of the stories in accordance with aboriginal law and custom.[lxxxv]

[3.15] Justice von Doussa also identified another unique characteristic of the style of the artwork of the original people. The 'artist will encode into the artwork secret parts of the Dreaming that will be recognised and understood only by those who are initiated into the relevant ceremonies, or at least have a close knowledge of the cultural significance of the story.'[lxxxvi]

[3.16] The conclusion is that the ICIP represents the knowledge behind the expression. This is of paramount importance, overshadowing the expression itself. It follows that the use and reproduction of images relating those stories on mediums such as carpets to be worked on, would understandably be deeply offensive to the clan and the community from which the knowledge is derived.

[3.17] In this context, it has been expressed that both the custodian and the artist hold the 'knowledge embodied in the work' on trust for the rest of the clan.[lxxxvii]

[3.18] It could therefore be said, that the nature of ICIP is that it presents a three dimensional perspective to the viewer with eyes to see, as opposed to a two dimensional interaction between the artist and the viewer.

[3.19] ICIP is also inseverable from the land. In a working paper by the Chairperson-Rapporteur, Ms Erica-Irene A. Daes on the concept of 'indigenous people', Ms Daes noted the Aboriginal and Torres Strait Islander Social Justice Commissioner, Mr. M. Dodson's comment on the importance of individuality as opposed to a general identification of 'indigenous people' and the connection with the land:

'there must be scope for self-identification as an individual and acceptance as such by the group. Above all and of crucial and fundamental importance is the historical and ancient connection with lands and territories.'[lxxxviii]

C. Transmitting culture

[3.20] At an international level, the heritage of a particular indigenous people is considered to be characterised by transmittal down through the generations. Relevantly, the 1995 Daes Report stated:

'The heritage of indigenous peoples is comprised of all objects, sites and knowledge the nature or use of which has been transmitted from generation to generation, and which is regarded as pertaining to a particular people or its territory…'[lxxxix]

[3.21] The recommendation made in the 1995 Daes Report, was that:

[3.21.1] indigenous peoples' heritage should be learned by the means customarily employed by its traditional owners for teaching; and

[3.21.2] such rules and practices for the transmission of heritage and sharing of its use should be incorporated in the national legal system.[xc]

[3.22] ICIP involves mediums for transmitting the legacy of knowledge and experience gained throughout generations often by oral transmittal. The *Our Culture Our Future Report* referred to an acknowledgement of this practice in the *Report of the Royal Commission into Aboriginal Deaths in Custody*:

'Aboriginal societies have always had a means of transmitting knowledge about the land, history, kinship, religion and the means of survival even if this knowledge was never written in books or stored in libraries as non-Aboriginal people have done. Younger generations learn from older generations by participation, observation or imitation. Much learning is unstructured and takes place in social contexts amongst kin. Certain types of knowledge, such as religious and ritual knowledge, are imparted at specific times and in an organised and managed way, often as part of initiation ceremonies'.[xci]

[3.23] The threat to this traditional method of educating future generations and the dangerous impact upon the continuation of her clan's Yan-nhaŋu language and culture, was recognised by Laurie Baymarrwangga (Gawany) Baymarrwaŋa.

[3.24] Baymarrwangga was the Senior Aboriginal Traditional Owner of the Malarra estate, which includes Galiwin'ku, Dalmana, Murruŋga, Brul-brul and the Ganatjirri Maramba Salt Water surrounding the Crocodile Islands of North-East Arnhem Land, in the Northern Territory (NT) of Australia and numerous other named sites.

[3.25] Initially identifying the deterioration among young people of the Yan-nhaŋu language, Baymarrwangga started a bilingual school at Murruŋga, which was taken over by NT Education in 1975.[xcii]

[3.26] In 1994, Baymarrwangga commenced a project with fellow Yan-nhaŋu speakers and anthropologist Dr Bentley James, which culminated in January 2014 with the creation of a valuable education tool and resource, the Yan-nhaŋu Atlas and Illustrated Dictionary.[xciii]

[3.27] In relation to language, Dr James has stated that '[a]ll around Australia indigenous language is extremely endangered where life on the homelands and bilingual education has been destroyed by the assimilationist powers of the settler state'.[xciv]

[3.28] The observation that assimilationist powers have interfered with the right of indigenous peoples to pass on to future generations the knowledge, culture and intellectual property acquired from past generations has been recognised at an international level:

> *'In most parts of the world, indigenous peoples have already been subjected to extreme hardships and interference with their social and cultural life. This has undermined the ability of indigenous peoples to transmit their knowledge and arts from generation to generation, by disrupting families and traditional systems of education and training'.*[xcv]

[3.29] Further, it has been suggested that the integrity of indigenous peoples' heritage depends on recognition and strengthening of the rights:

> *'The future integrity of indigenous peoples' heritage therefore depends fundamentally and inescapably on recognition and strengthening of the right of each indigenous people to control, and develop, its own forms of education.'*[xcvi]

[3.30] Warlukurlangu Artists is one of the longest running and most successful Aboriginal-owned art centres in Central Australia, with a national and international profile. Warlukurlangu Artists has had its art featured in numerous exhibitions and publications in Australia and around the world.[xcvii]

[3.31] Transmitting culture is a core consideration for the artists at the centre:

> *'The maintenance of Warlpiri culture and its transfer to the next generation of Warlpiri people is a key element of Warlukurlangu Artists mission which states:*
>
> > *"Warlukurlangu Artists Aboriginal Association is the guardian of the Jukurrpa, the law and culture of the Warlpiri and Anmatyerre people living at Yuendumu.*
> >
> > *Warlukurlangu aims to 'keep the culture strong'.*
> >
> > *Warlukurlangu provides a forum and support base for cultural and social activities within the community.*

> *Warlukurlangu provides a means for the economic empowerment of the Yuendumu community, through the provision of services to its member artists for the production, marketing, and distribution of their visual arts and crafts."'*

[3.32] There may exist a tension where the traditional values are not respected and Aboriginal and Torres Strait Island artists do not respect the traditional values.

[3.33] There is possibly another tension between transmitting culture and which may be introduced by commercial success:

> *'Frequently, the men, or older more knowledgeable women sketch in the kuruwarri (design), leaving the dotting in of colour for younger members of their family to complete. Many of the more renowned artists recognise that paintings completed by themselves attract greater prices and more interest from the public, and have therefore discouraged family members from painting on their work'.*[xcviii]

D. Perpetuity

[3.34] The proposition that Aboriginal and Torres Strait Island heritage should be perpetual is contrary to the fundamental rationale of western IP regimes. A common denominator among the copyright, patent and design regimes, is that there is an ultimate benefit to the public following the period of exclusivity.

[3.35] The period of protection is given for a term. The ultimate attraction for the government is that access to the information behind the invention, the design, the published works or subject matter other than works will be made available immediately from the disclosure and ultimately (save in the case of trade marks), be fully available to the public.

[3.36] It does not matter whether you characterise the rationale as an inherent right in an individual to reap the benefit of their creative output or whether it is seen as a trade between the individual and the State. The same result is reached, which is that the period of exclusivity ends and the IP becomes public domain.

[3.37] It should be stated that all people, indigenous and non-indigenous, have the right to exploit their creations without the need for statutory monopolies. The IP owner may do that at any time without a patent or a registered design. IP rights are not positive in the sense that people are given these rights. They already have them, albeit, they would not be able to prevent others from also exploiting them without the rights.

[3.38] They are negative rights. They exclude others for a period from exploiting the invention or reproducing or communicating a copyright work.[xcix]

[3.39] Aboriginal and Torres Strait Island heritage has a unique position, having been handed down for tens of thousands of years. It is artificial to now say, for example, that in relation to your heritage, you have that right for the life of the author plus 70 years or due to

your traditional knowledge being instrumental in obtaining a patent, that patent may be exclusively used for 20 years.

[3.40] To permit perpetual exclusivity in relation to heritage, to which no other Australians may lay claim, is simply a recognition of that unique position.

[3.41] The proviso must be that culture and IP must maintain its connection to heritage. If it does, it should have the benefit of perpetuity. If contemporary Aboriginal and Torres Strait Island artists do not have regard to the traditional laws and customs associated with the heritage, then there is no reason for the benefit of perpetuity to apply in those instances.

E. Self-determination

[3.42] Self-determination has been considered fundamental to the rights of Aboriginal and Torres Strait Island people in relation to their ICIP. Relevantly, they need to:

> *'Ensure that any means of protecting Indigenous Cultural and Intellectual Property is based on the principle of self-determination, which includes the right and duty of Indigenous peoples to maintain and develop their own cultures and knowledge systems and forms of social organisation'.*[c]

[3.43] The principle of self-determination is a concept with which Australia has been very familiar since colonisation. The author is from Greek descent and has seen 5 generations of Australians. Notwithstanding, people of Greek descent, as do other people in Australia from diverse cultural backgrounds, have a right and many consider a duty, to maintain and develop their own cultures and knowledge systems and forms of social organisation. In the example of Greek heritage, this is done through Greek schools, where Greek culture is taught as well as language and through Festivals where the culture including food, dance and music is shared and put on show.

[3.44] Aboriginal and Torres Strait Islander peoples are entitled to no less, and by their unique standing, as the first people of this country, should be entitled to more. Since 2013, legislation has been enacted to formally recognise Aboriginal and Torres Strait Islander Peoples as being entitled to continue their culture, languages and heritage. It is identified as a step towards Constitutional recognition and provides:

> *'The Parliament, on behalf of the people of Australia, acknowledges and respects the continuing cultures, languages and heritage of Aboriginal and Torres Strait Islander peoples'.*[ci]

[3.45] The paper will propose a model whereby Aboriginal and Torres Strait Islander peoples are the experts identifying and confirming what is heritage and thereby entitled to the unique rights. The model is discussed in Chapter V.

[3.46] For the purpose of self-determination, one draft statute proposed in 1981 envisaged a very centralised structure. It comprised a Folklore Commissioner with wide powers and an Aboriginal Folklore Board to provide advice.[cii] Relevantly it stated:

> *'The establishment of an independent Indigenous authority would be consistent with notions of Indigenous self determination.'*[ciii]

[3.47] As 'the primary guardians and interpreters of their cultures, arts and sciences, whether created in the past, or developed by them in the future',[civ] Aboriginal and Torres Strait Islander people are the experts and must be recognised as such. Further, their unique situation places upon them an obligation which must be recognised:

> *'Under customary law, Indigenous custodians are collectively responsible for ensuring that important cultural images and themes are not reproduced inappropriately. The Indigenous creator must be careful not to distort or misuse the cultural knowledge embodied in a work'.*[cv]

[3.48] Australian Indigenous art is considered the oldest ongoing tradition of art in the world, with the initial forms of artistic Aboriginal expression found in rock carvings, body painting and ground designs dating back more than 30,000 years.[cvi]

[3.49] Any model incorporating the unique position of Indigenous people in an existing framework or embodied in *sui generis* legislation, must accept that the nature, extent and 'proprietorship' of heritage cannot be considered without critical determinations from Aboriginal and Torres Strait Islander people.

CHAPTER IV - THE CURRENT COPYRIGHT REGIME - SHORTCOMINGS AND ADVANTAGES

A. Relevant provisions and principles

Idea/expression

[4.1] Copyright law does not protect a person's ideas. An idea for a great murder mystery novel or lyrics for a song have no protection while they remain in the mind of the authors. Copyright does however, protect the form which those ideas take, such as the manuscript and notes where the lyrics have been written down.

[4.2] This principle is not written into the *Copyright Act* 1968 (Cth). The courts in Australia have applied the principle, even though it is not expressly contained in the legislation. It does appear however, in Art 9.2 of the TRIPS Agreement and Art 2 of the WIPO Copyright Treaty, both of which state:

> *"Copyright protection extends to expressions and not to ideas, procedures, methods of operation or mathematical concepts as such".*

[4.3] 'If an idea can only be expressed in one particular way, that expression will not be protected since conferring copyright protection would effectively grant a monopoly in the idea'.[cvii]

[4.4] As stated in the plurality reasons of French CJ, Crennan and Kiefel JJ in *IceTV*:

> *'Copyright does not protect facts or information. Copyright protects the particular form of expression of the information, namely the words, figures and symbols in which the pieces of information are expressed, and the selection and arrangement of that information…The information/expression dichotomy, in copyright law, is rooted in considerations of social utility. Copyright, being an exception to the law's general abhorrence of monopolies, does not confer a monopoly on facts or information because to do so would impede the reading public's access to and use of facts and information'.*[cviii]
>
> (Citations not included)

Material form

[4.5] An idea should find its way to some tangible form.[cix] An action lies for infringement of copyright when someone does or authorizes the doing of an act reserved for the copyright owner.[cx] This may be the unauthorised reproduction of a work in material form.[cxi]

[4.6] An explanation for the need for material form is that the extent of the exclusive rights

become defined. A court may then ascertain from a fixed and tangible form whether a substantial part has been taken.

[4.7] Television and sound broadcasts do not come under this rule, however, as there is no requirement for the subject matter of a broadcast to be reduced into material form so that it attracts copyright protection.

Originality and authorship

[4.8] The *Copyright Act* requires a work to be 'original'.[cxii] For a number of years the Full Court decision in *Desktop*[cxiii] established a lower threshold for the degree of originality required for copyright to subsist in a compilation of factual data. This aligned originality with work and expense incurred, or through 'sweat of the brow'.

[4.9] The issue in *Desktop* was whether Telstra's published white pages and yellow pages directories were original literary works protected by copyright. Could copyright subsist in a collection of factual data?

[4.10] The Full Court approved the approach taken by the primary judge holding (at [160] and [407]), that originality may be found in industrious collection, rather than the application of intellectual effort.

[4.11] The High Court however in obiter, as subsistence had been admitted in relation to the TV guides, had a word of caution about the *Desktop* approach:

> *'However, a reason to treat the decision in Desktop Marketing with particular care appears from the reasons of the trial judge. Finkelstein J had observed [153]:*
>
> > *"There are literally hundreds of appropriately trained or qualified employees who make some contribution towards the production of a telephone directory. When the nature of the work they do is described, there arise three relevant questions to the subsistence of copyright: (a) Must a copyright work have an author? (b) Does a telephone directory have an author? (c) Is every employee who contributes to the final product a joint author of the directory? These are difficult questions for which there are no ready answers."*
>
> *Finkelstein J went on to explain that the parties had sought to elucidate none of those issues in the litigation, with the consequence that, as here, the relevant author or authors of the work in suit remained unidentified'.*[cxiv]

[4.12] Both the primary judge in *Desktop* and their Honours French CJ, Crennan and Kiefel JJ in *IceTV*, saw human authorship and the identification of the party or parties providing the human authorship as a critical issue.

[4.13] Authorship is a central concept in copyright law:

> *'The "author" of a literary work and the concept of "authorship" are central to the statutory protection given by copyright legislation, including the Act'.*[cxv]

[4.14] It is central because intellectual property is, to a substantial degree, rewarding an individual's creativity by having the public tolerate a monopoly for a limited time, so that ultimately the public will benefit. It was expressed in *IceTV* in this manner:

> *'In assessing the centrality of an author and authorship to the overall scheme of the Act, it is worth recollecting the longstanding theoretical underpinnings of copyright legislation. Copyright legislation strikes a balance of competing interests and competing policy considerations. Relevantly, it is concerned with rewarding authors of original literary works with commercial benefits having regard to the fact that literary works in turn benefit the reading public.*
>
> *In both its title and opening recitals, the Statute of Anne of 1709 echoed explicitly the emphasis on the practical or utilitarian importance that certain seventeenth century philosophers attached to knowledge and its encouragement in the scheme of human progress. The "social contract" envisaged by the Statute of Anne, and still underlying the present Act, was that an author could obtain a monopoly, limited in time, in return for making a work available to the reading public'.*[cxvi] (citations omitted)

[4.15] Similarly in patents, the concern that the 'true inventor' be rewarded by the grant, resulted in the revocation of a valuable patent, where the grant had been made to only one of two inventors.[cxvii]

[4.16] In *Phone Directories*, Keane CJ (as his Honour then was) referred to the High Court authority as to the authorship by individuals:

> *'The reasons of the High Court in IceTV authoritatively establish that the focus of attention in relation to the subsistence of copyright is not upon a general concern to prevent misappropriation of skill and labour but upon the protection of copyright in literary works which originate from individuals…'* [cxviii]

[4.17] On the question of the identification of the individual author/s, Keane CJ made the following general observation:

> *'…it may be accepted, for the sake of argument, that there is force in the appellants' criticism of the trial judge's insistence on the identification of all the "authors". One may accept that identification by name of each and every author is not necessary in order to make out a claim that copyright subsists under s 32(2)(c): what is necessary, however, is that it be shown that the work in question originates from an individual author or authors'.*[cxix]

[4.18] The Full Court in *Phone Directories* however, was predominantly focused on the issue of human authorship versus authorship by a machine. That is not this issue with Aboriginal and Torres Strait Islander heritage. However, Perram J considered that the trial judge had not required the identity of each individual author, but rather whether an author could be identified at all:

> *'The appellants submitted that the learned primary judge had erred by holding that they failed because they had not identified each individual author. I do not believe her Honour made such*

a finding. To the contrary, her Honour said "[i]f an author or authors...cannot be identified at all, *in contradistinction to a situation where the author's or authors' exact identity cannot be identified, copyright cannot subsist": Telstra Corporation Ltd v Phone Directories Co Pty Ltd [2010] FCA 44; (2010) 264 ALR 617 at [37]. I do not read her Honour, therefore, as having required that the appellants literally name the authors but only that they demonstrate that the authors existed'.*[cxx]

[4.19] What is the relevance of authorship to Aboriginal and Torres Strait Islander heritage? The relevance is that the identification of an author of Aboriginal and Torres Strait Islander heritage may not be possible at all and, in that case, copyright would not be deemed to subsist. One example of this is stated as follows:

> *'There must be an identifiable author, or authors, for copyright to exist in a work. Given the nature of Indigenous arts and cultural expression, an individual person or group of people will not always be identifiable. The author of many important works of Indigenous art cannot be readily identified. For example, a painting at Ubirr Rock in Kakadu National Park is a well-known artwork, but a single artist or group of artists is unidentifiable and therefore copyright cannot be asserted. Works of this kind are being reproduced in an increasing variety of ways, many of them considered inappropriate and offensive'.*[cxxi]

Additional damages

[4.20] The paper will make a short observation of a perceived shift in the cases as to the exercise of the discretion to award additional damages for copyright infringement. The *Copyright Act* contains a more expansive statement than the *Patents Act* 1990, the *Trade Marks Act* 1995 or the *Designs Act* 2003, of the matters a court may consider in determining whether to award additional damages. Ultimately, it does not differ because each regime enables the court to consider any other relevant matter. As identified in this chapter, additional damages have been used by the Court to address some difficulties in assessing culturally based harm to ICIP under the head of compensatory loss:

> *'If an award of additional damages under s 115(4) is made to reflect culturally based harm, the particular losses of the artists who were alive at the time of the infringement which might otherwise be assessed under s 115(2) can be subsumed within the additional damages'.*[cxxii]

[4.21] Section 115(4) states:

> '(4) Where, in an action under this section:
>
> (a) an infringement of copyright is established; and
>
> (b) the court is satisfied that it is proper to do so, having regard to:
>
> (i) the flagrancy of the infringement; and
>
> (ia) the need to deter similar infringements of copyright; and

(ib) the conduct of the defendant after the act constituting the infringement

or, if relevant, after the defendant was informed that the defendant had allegedly infringed the plaintiff's copyright; and

(ii) whether the infringement involved the conversion of a work or other subject-matter from hardcopy or analog form into a digital or other electronic machine-readable form; and

(iii) any benefit shown to have accrued to the defendant by reason of the infringement; and

(iv) all other relevant matters;

the court may, in assessing damages for the infringement, award such additional damages as it considers appropriate in the circumstances.'

[4.22] The Full Court of the Federal Court identified the unique position of additional damages in *Facton.*[cxxiii] Their Honours distinguished aggravated and exemplary damages from additional damages:

> *'We think s 115(4) is directed to both aggravated and exemplary damages because it addresses the manner in which the infringement occurred and the conduct of the defendant after the infringement (s 115(4)(b)(ib)), together with aspects of punishment (s 115(4)(b)(i) and (ia)).*
>
> *However, the distinction between aggravated and exemplary damages does not need to be considered when considering additional damages under s 115(4) because s 115(4) provides a non-exclusive guide to the matters that are relevant in assessing those damages. Additional damages will be awarded under s 115(4) when the conduct of the defendant is such that an award of punitive damages should be made to mark the Court's recognition of the opprobrium attached to the defendant's conduct. The circumstances which are relevant to an assessment of aggravated damages and exemplary damages will be relevant in some cases in considering additional damages under this section, but in the end result the damages to be awarded are not aggravated or exemplary damages but additional damages, being of a type* sui generis*: Autodesk Inc v Yee (1996) 68 FCR 391'.*

[4.23] Additional damages, which are punitive and a deterrent rather than compensatory in nature, may be awarded independently of any assessment of compensatory loss. This area has seen a clear shift in the last 15 years. It is this shift which is relevant to Aboriginal and Torres Strait Islander heritage as there is no longer a requirement that there must be compensatory damages (other than nominal damages) to justify an award of additional damages. In a case where the Court finds copyright infringement of ICIP, it is immaterial if a substantial amount is not awarded as compensatory loss.

[4.24] Sundberg J in *MJA*, a 1998 decision, considered that additional damages could not be considered as nominal damages were awarded for copyright infringement.

[4.25] His Honour, followed the reasoning that compensatory damages had to first be awarded in order for there to be further or 'additional' damages. As damages under s 115(2) were sought but not awarded in that case, the question of additional damages under s 115(4) did not arise. Relevantly, his Honour found:

> *'There is a question whether "additional damages" under s 115(4) can be awarded when no compensatory damages (ie damages under subs (2)) are awarded because an applicant has proved no loss. In* Polygram Pty Ltd v Golden Editions Pty Ltd *(1997) 38 IPR 451 ; 148 ALR 4 Lockhart J expressed the tentative view that if the owner of a copyright seeks injunctive relief under s 115(2) and conversion damages under s 116, but not compensatory damages under s 115(2), the court can award additional damages under subs (4) provided the necessary preconditions are satisfied. His Honour's view was obiter because he had awarded nominal damages under s 115(2). His Honour did not deal with the case where compensatory damages are claimed but not awarded. He did, however, provisionally reject a submission that "additional" damages are an addition to an award of compensatory damages under subs (2) which must first be awarded. His Honour said (at IPR 461; ALR 14):*
>
> > *"In my view, the word "additional", in conjunction with the word "damages" in subs (4), is descriptive of the kind of damages that may be awarded, namely, additional in the sense of aggravated or exemplary damages which may contain a punitive component.*
> >
> > *Therefore, although I recognise some attraction in counsel's argument, I do not think it is sound. The owner of a copyright may bring an action for infringement of copyright: s 115(1). The court may grant various forms of relief including those mentioned in subs (2), namely, an injunction and either damages or an account of profits. The relief mentioned in subs (2) is by way of inclusion and is not exhaustive of the court's powers. The court may also grant declaratory relief"'.*[cxxiv]

[4.26] Sundberg J concluded:

> *'Since I have awarded MJA nominal damages, I need not decide whether additional damages can be awarded where no compensatory damages are awarded.'*[cxxv]

[4.27] That position would no longer appear to be the case. In *Leica,*[cxxvi] the applicants (Leica), sold software products and provided services to the mining industry including computer and GPS-controlled mining equipment.

[4.28] The first respondent (Mr Koudstaal), was employed by Leica in Australia for approximately 18 months as a software engineer. He concluded employment with Leica and then commenced with a competitor company, Automated Positioning Systems Pty Ltd

(APS). Shortly before he left his employment with Leica, Mr Koudstaal deliberately downloaded and copied approximately 190,000 files, including source code, executable programmes and documentation to an external hard drive owned by him, which he removed from the premises of Leica when he finally left their employment.

[4.29] Initially, APS was named as a respondent, but subsequently the claim against APS was dismissed by consent. Mr Koudstaal admitted having Leica files in his possession, but said that the information was never communicated to, nor made available for, APS or any other party. Additionally, neither he nor APS profited from or made use of any information belonging to the applicants.[cxxvii]

[4.30] It was not in dispute that Mr Koudstaal downloaded and copied Leica's files. A judge of the Court had made orders for search and seizure which resulted in the seizure of a file entitled 'Leica' with a large number of sub-files identified on Mr Koudstaal's desktop computer at his home. The external hard drive had also been seen at Mr Koudstaal's apartment by a co-worker when visiting Mr Koudstaal socially.

[4.31] The applicant sought compensatory damages for infringement of the applicants' copyright pursuant to s 115(2) of the *Copyright Act* 1968 (Cth). Leica also sought damages for breach of the first respondent's employment agreement and compensation for breach of the first respondent's equitable obligation of confidence, in the sum of AU$40,000.00.

[4.32] The amount was opposed as being 'vastly excessive'. After considering the authorities, Collier J said that apart from the inconvenience and 'the natural anxiety officers of the applicants may have suffered at the prospect that source code at the heart of their business had fallen into the hands of a competitor,' her Honour was unable to identify damage other than nominal damage suffered by the applicants in respect of Mr Koudstaal's infringement of their copyright.[cxxviii]

[4.33] In relation to the 'user rule', Collier J noted the comments of Black CJ and Jacobson J observed in *Aristocrat Technologies,*[cxxix] and agreed with the applicant's submission that the licence fee approach was not appropriate. This was because the applicants would never have permitted Mr Koudstaal to copy source code which was, in fact, central to their business, particularly since Mr Koudstaal was leaving their employment to join a competitor.[cxxx]

[4.34] Collier J considered in relation to compensatory damages that:

> [4.34.1] the works were valuable and possibly unique products, but value and uniqueness did not alone entitle the applicants to damages against Mr Koutsdaal;
>
> [4.34.2] there was no evidence that the value of the applicants' source code or associated materials had diminished by the conduct of Mr Koudstaal, such as by an inability to use the works as they did before: (cf discussion of Blackburn CJ in *Australasian Performing Right Association Ltd v Grebo Trading Co*

Pty Ltd (1978) 23 ACTR 30 at 31);

[4.34.3] even though Mr Koudstaal may have used the Leica source code as a reference point, there did not appear to be any loss which occurred to the applicants as a result of the use such as a loss of either profits or market share;

[4.34.4] even if Mr Koudstaal did use Leica's source code as a reference point there is no material before the Court to show the extent of its use or whether that use had any impact at all on Mr Koudstaal's work with APS to Leica's detriment.

[4.35] In relation to additional damages however, Her Honour considered that:

[4.35.1] Mr Koudstaal's conduct was flagrant under s 115(4)(b)(i) of the *Copyright Act*: (See [98]);

[4.35.2] there was a need to deter similar infringements of copyright under s 115(4)(b)(ia) of the *Copyright Act*;

[4.35.3] Mr Koudstaal had been reasonably co-operative with the applicants. Despite his cooperation, the evidence was that he was prepared to continue to access the applicants' material for reasons of his own. Accordingly, s 115(4)(b)(ib), which deals with the respondent's actions after being notified of a claim for infringement, was relevant;

[4.35.4] in relation to s 115(4)(b)(iii), her Honour considered that having the applicants' source code available as a reference point at a time when he was employed by APS was a tangible benefit accruing to Mr Koudstaal, and relevant to a case for additional damages.

[4.36] Her Honour ordered that the first respondent shall pay to the applicants:

[4.36.1] compensatory damages for infringement of the applicants' copyright pursuant to s 115(2) of the *Copyright Act* 1968 (Cth), and breach of the first respondent's employment agreement, and compensation for breach of the first respondent's equitable obligation of confidence, in the sum of $1.00;

[4.36.2] The first respondent shall pay to the applicants additional damages for infringement of the applicants' copyright, pursuant to s 115(4) of the *Copyright Act* in the sum of $50,000.

[4.37] The case of *Halal*[cxxxi] involved the use of a registered mark indicating certain food providers were 'certified halal'. An object or action which is permissible under Islamic law is 'halal'. Accordingly, the slaughter of food must be conducted in accordance with the relevant Islamic rites.[cxxxii]

[4.38] His Honour at [89] looked to copyright cases for analogous circumstances and awarded nominal damages:

> *"It appears established that nominal damages may be awarded for copyright infringement: MJA Scientifics International Pty Ltd v SC Johnson & Sons Pty Ltd (1998) 43 IPR 275 at 281 per Sundberg J; Futuretronics.com.au Pty Ltd v Graphix Labels Pty Ltd (No 2) (2008) 76 IPR 763 ; [2008] FCA 746at [16] per Besanko J. The relevant provision in the Copyright Act 1968 (Cth), s 115(2), uses the same language (damages or an account of profits) as s 126(1)(b) so the analogy is a close fit. And, indeed, in Nokia Corp v Liu (2009) 80 IPR 286 ; [2009] FCA 20 at [21] Jessup J was content to extend the copyright principle to trade marks (varied on other grounds: (2009) 179 FCR 422 ; 82 IPR 452 ; [2009] FCAFC 138). I should follow that decision unless persuaded it is plainly wrong. Without examining the question closely it seems to me, with respect, that his Honour's conclusion is likely to be correct. Accordingly, I must follow it. In this case I propose to do so by awarding a nominal sum of $10."*

[4.39] In *Vertical Leisure*[cxxxiii] the applicants sold poles used for pole dancing known by the name X-Pole. They were the market leader both internationally and in Australia. The respondents were alleged to have persistently and flagrantly sold inferior copies of the applicants' products, damaging their reputation by passing off the inferior copies as the applicants'. Driver J awarded a sum of $50,000 as an appropriate award for damage to reputation.

[4.40] In addition, Driver J awarded an amount for loss of profits. His Honour considered that it could be conservatively estimated that the respondents had sold at least 160 counterfeit poles which equated to a total lost profit of $44,800.[cxxxiv]

B. Case Studies

[4.41] Under this section, the paper considers examples where the system has helped or hindered Aboriginal and Torres Strait Island people protect their heritage.

Terry Dhurritjini Yumbulul

<u>The person</u>

[4.42] Of Terry Yumbulul the following is recorded:

> *'He is the traditional owner to some thirty-six islands, and is a respected tribal elder and prominent community figure…*
>
> *Terry's artworks depict creation stories of these areas, and is the only person within his clan with the authority to paint the sacred designs and certain stories in a special way, according to the tradition passed down by his father and grandfather before him. He believes that his painting will keep the stories of his people alive for the generations to follow, and in the hope of reaching a better understanding between the Indigenous and non indigenous cultures. He says:*

> *"Art is a way of preserving my culture and the pictures I paint are from stories I heard as a child"'.* [cxxxv]

[4.43] French J (as the Chief Justice then was) described Terry Yumbulul in these terms:

> '*Terry Yumbulul is an Aboriginal artist of considerable skill and reputation. He was born on Wessel Island on the north-east coast of Arnhem Land on 11 September 1950. He is a member of the Warimiri clan group and the second eldest son of its leader, David Burrumarra. His mother, who is deceased, was a member of the Galpu clan. Mr Yumbulul began his career as an artist by producing paintings depicting traditional Aboriginal stories which he learnt as part of his schooling in Aboriginal culture. Since he began painting about ten years ago, he has been selling his works. They have been exhibited in the Northern Territory Museum and some have been purchased by the Northern Territory Government as official gifts for visiting foreign dignitaries. He has had a number of exhibitions of his works at private galleries'.*[cxxxvi]

<u>The conduct complained of</u>

[4.44] His Honour summarized the facts as follows:

> *'In 1988, the Reserve Bank of Australia released a special $10 bank note to commemorate the first European settlement of this country. The note incorporated elements of Aboriginal artworks including, in part, a reproduction of the design of a "Morning Star Pole" made by Mr Terry Yumbulul in 1986. The reproduction was made under a sub-licence of the copyright in the work granted to the bank by the Aboriginal Artists Agency Limited. That company in turn, had an exclusive licence from Mr Yumbulul. He now contends that he was induced to sign the licence by misleading or deceptive conduct on the part of the agency'.*[cxxxvii]

[4.45] Relevantly, his Honour noted as to copyright and the sale of the Morning Star Pole:

> *'In the sense relevant to the Copyright Act (1968 (Cth), there is no doubt that the pole was an original artistic work, and that he was its author, in whom copyright subsisted.*
> *Mr Yumbulul sold the pole to Inada Holdings Pty Ltd in 1986 for about $500. He said that he was entitled to sell it because the eventual destination, the Australian Museum, was, in his opinion, an appropriate place for its display. It is nevertheless the fact that he sold the pole without imposing any restriction on its subsequent use. I should add that Mr Yumbulul's reputation as an artist long preceded this sale. In January 1983, the Curator of Anthropology of the Australian Museum, wrote a memorandum recommending the purchase of two of his bark paintings and a pole with the comment that:*
>
> > *"The works are excellent, well documented examples of the output of a young artist who is rapidly becoming famous"'.* [cxxxviii]

[4.46] The *Trade Practices* claim under section 52 survived to trial as the copyright claim was settled. The *Trade Practices* claim was dismissed with his Honour finding:

[4.46.1] the applicant and his wife understood the general nature of the licence and that it went beyond merely conferring the right to inspect his works;[cxxxix]

[4.46.2] there was no basis for concluding that the $1,000 licence fee was inadequate consideration because, unlike the manager-performer agreement cases, this licence was terminable by the applicant on three months' notice;[cxl]

[4.46.3] there was no basis for finding misleading or deceptive conduct.[cxli]

Observations

[4.47] The copyright claim was settled and a consent order made in the proceeding. The case is one marked particularly by the issue of the applicant's understanding of the license to the Aboriginal Artists Agency Limited.

[4.48] His Honour made the following observations in relation of the cultural implications. His Honour also made the following comments in relation to:

[4.48.1] Mr Yumbulul's authority:

> *'Mr Yumbulul has authority within his own clan to paint certain sacred designs. He has passed through various levels of initiation and revelatory ceremonies in which he has gradually learnt the designs and their meanings. The authority to paint them derives from his father. During the last initiation rite in which he participated, he was presented by the elders of his clan with two sacred bags. Their presentation reflected the power and title he has been given to paint the sacred objects of his people. It is from his mother's clan group, however, that Mr Yumbulul has inherited the right to make Morning Star Poles, one of which is the subject of these proceedings'.*[cxlii]

[4.48.2] the Morning Star Pole:

> *'The poles have a central role in Aboriginal ceremonies commemorating the deaths of important persons, and in inter-clan relationships. They are wooden, decorated with painted designs, feathers and string. Different clan groups make them in different ways, and the identifying attributes of the Morning Star Pole of a particular group may be maintained jealously. Traditional belief has it that the Morning Star Pole is imbued with the power to take the spirits of the dead to the Morning Star, which will return them to their ancestral home'.*[cxliii]

[4.48.3] the exposure of the Morning Star Pole (and Indigenous cultural expressions) noting the evidence of Dr Ian Keen:

> *'Dr Ian Keen, an anthropologist who is a senior lecturer at the Australian National University, the pole and banyan fibre string that goes with it, is made as a gift. A*

Morning Star ceremony is commissioned by one group who may send various objects belonging to, or associated with particular persons, to be incorporated in the pole or string. The ceremony is said to be a way of establishing ties of friendship and gift exchange between groups which are geographically, and in kin terms, distant. While a pole intended for ceremonial use is displayed in public as part of the ceremony, it is made in secret in a men's ceremonial shelter. According to Dr Keen, the making of the pole must be done in accordance with religious rules. There is nothing inconsistent with this tradition and the making of a Morning Star Pole specifically for public display in a museum. Aboriginal people often believe that it does not matter if some such designs or objects are revealed to non-Aboriginal people because they will not know their meanings'.[cxliv]

And further:

'Mr Yumbulul's evidence on affidavit. In 1985 he created five Morning Star Poles, on commission from a company called Inada Holdings Pty Ltd. They were sold to five different museums, one of which was the Australian Museum in Sydney…
Mr Yumbulul sold the pole to Inada Holdings Pty Ltd in 1986 for about $500. He said that he was entitled to sell it because the eventual destination, the Australian Museum, was, in his opinion, an appropriate place for its display. It is nevertheless the fact that he sold the pole without imposing any restriction on its subsequent use.'

[4.48.4] Although the copyright claim was settled, his Honour in *obiter* commented on the defence claimed by the respondents, arising from sections 65 and 68 of the *Copyright Act*, for works on public display. The provisions state:

Section 65
Sculptures and certain other works in public places *'*

(1) This section applies to sculptures and to works of artistic craftsmanship of the kind referred to in paragraph (c) of the definition of artistic work in section 10.

(2) The copyright in a work to which this section applies that is situated, otherwise than temporarily, in a public place, or in premises open to the public, is not infringed by the making of a painting, drawing, engraving or photograph of the work or by the inclusion of the work in a cinematograph film or in a television broadcast.'

Section 68
Publication of artistic works
'The copyright in an artistic work is not infringed by the publication of a painting, drawing, engraving, photograph or cinematograph film if, by virtue of section 65, section 66 or section 67, the making of that painting, drawing, engraving, photograph or film did not constitute an infringement of the copyright'. [cxlv]

[4.48.5] His Honour *in obiter* foreshadowed a significant flaw in the *Copyright Act's* treatment of Indigenous sculpture:

> *'By its defence, the agency invoked ss 65 and 68 of the Copyright Act 1968, contending that the Morning Star Pole is either a sculpture or a work of artistic craftsmanship on display other than temporarily at the Australian Museum. On this basis, it was said, the allegation that the Reserve Bank had infringed Mr Yumbulul's copyright, and that the infringement was authorised by the agency, could not be made out. In the event, it is not necessary for me to make any finding on the validity of this defence. But if it be correct, then it may be the case that some Aboriginal artists have laboured under a serious misapprehension as to the effect of public display upon their copyright in certain classes of works. This question and the question of statutory recognition of Aboriginal communal interests in the reproduction of sacred objects is a matter for consideration by law reformers and legislators. For what it is worth, I would add that it would be most unfortunate if Mr Yumbulul were to be the subject of continued criticism within the Aboriginal community for allowing the reproduction of the Morning Star Pole design on the commemorative banknote. The reproduction was, and should be seen, as a mark of the high respect that has all too slowly developed in Australian society for the beauty and richness of Aboriginal culture.'* (Underline added)

Johnny Bulun Bulun

The person

[4.49] John Bulun Bulun was a Ganalbingu Aboriginal artist born in 1946 near the Arafura Swamp of Central Arnhem Land. John Bulun Bulun was also a respected traditional doctor, songman and senior ceremonial manager. His paintings often described the annual visits over three hundred years (from at least 1720 until 1906) of Macassan traders to Arnhem Land shores to collect and process trepan (beche de mer or sea cucumber) which they traded with the Chinese.[cxlvi]

[4.50] Makjassar (sometimes spelt Macassar) is the provincial capital of South Sulawesi, Indonesia. In 1993 Bulun Bulun led a group including dancers, songmen and didgeridoo players to perform the Marayarr Murrukunddjeh ceremony over three nights at the Galigo Museum in Macassar (Ujung Pandang), Sulawesi. John Bulun Bulun had a joint exhibition with Zhou Xiaoping in Beijing and Melbourne, called "Trepang: China & the Story of Macassan - Aboriginal Trade".

[4.51] Mr Colin Golvan SC[cxlvii], appeared for John Bulun Bulun and another leading artist George Milpurrurru in a copyright infringement action. The action arose out of the importation and sale in Australia of printed clothing fabric which, it was claimed, infringed the copyright of the first applicant Mr Bulun Bulun, in the artistic work known as "Magpie Geese and Water Lilies at the Waterhole".

[4.52] Mr Golvan has since written:

'Bulun Bulun has been amongst the best known bark painters in Australia over a period of many years, and his work is widely admired by western art critics and curators of the major Aboriginal art collections. His work is represented in most major public collections of bark painting'.[cxlviii]

The conduct complained of

[4.53] In 1987, a T-shirt manufacturer reproduced one of Bulun Bulun's paintings, known as "At the Waterhole" (the artistic work), on T-shirts without his permission. In the proceeding, it was claimed that the respondent imported and sold fabric that infringed the copyright in the artistic work. The T-shirts were sold by the manufacturers and two Darwin tourist shops.

[4.54] The applicants brought a court proceeding against the respondents for copyright infringement:

[4.54.1] Bulun Bulun as legal owner of the copyright in the artistic work.

[4.54.2] Milpurrurru in his own right and as representative of the Ganalbingu people. Milpurrurru claimed that the Ganalbingu people were the equitable owners of the copyright in the artistic work. This equitable interest arose as an incident of the Ganalbingu people's ownership of, and relationship to, the land.[cxlix]

[4.55] The respondents admitted infringement and the shops in question undertook not to sell the T-shirts, the subject of the proceeding. On the importance of the case Mr Golvan wrote:

'In 1989, Bulun Bulun, and the other artists concerned, took the unprecedented step of bringing an action for infringement of copyright and breaches of the Trade Practices Act 1974 in the Federal Court in Darwin, arising from these unauthorised reproductions…

The case was the first occasion on which Aboriginal artists had successfully litigated to protect their imagery from unauthorized reproduction, and provided a foundation for later authority in which the Federal Court confirmed the copyright foundations for the protection of Aboriginal artistry from illegal copying (see, in particular, Milpurrurru v. Indofurn Pty. Ltd. *(1994) 30 IPR 209). It was also a first occasion on which Aboriginal artists asserted a private right of ownership of artworks under copyright in a Court proceeding, a step which was met with a degree of criticism concerning the claim of private, rather than communal, rights in traditional works of tribal imagery'.*[cl]

The issues

[4.56] *Bulun Bulun* touched upon a number of critical matters including:

[4.56.1] the question of originality;

[4.56.2] the issue of communal ownership as opposed to private ownership and whether specifically:

> [4.56.2.1] customary Aboriginal laws relating to the ownership of artistic works survived the introduction of the common law of England in 1788;[cli]
>
> [4.56.2.2] those Aboriginal laws could create binding obligations on persons outside the relevant Aboriginal community, either through recognition of those laws by the common law, or by their capacity to found equitable rights in rem;[clii]

[4.56.3] equitable principles of trust and fiduciary obligations.

<u>The determination on originality</u>

[4.57] One of the principal issues in the case was whether the works were original for the purposes of copyright protection under the *Copyright Act* 1968 (Cth) as is required by sub-section 32(2). This question centred on the issue of whether the works were copies of other works handed down. Mr Golvan notes:

> *'The key originality issue in the Bulun Bulun case was whether a contemporary depiction of ancient tribal imagery was entitled to be claimed as "original" for the purposes of copyright protection. The evidence in the proceeding put the issue beyond doubt, but at the time there was a divergence of opinion on the issue, in particular as expressed in the report of an enquiry into the issue'.*[cliii]

[4.58] In this regard, an important witness for the applicants was Margaret West, the curator of Aboriginal Art and Material Culture at the Northern Territory Museum of Arts and Sciences. The Museum had one of the largest collections of bark paintings in Australia including the work known as 'At the Waterhole', painted by Bulun Bulun in 1978. Important aspects of her evidence are contained in Mr Golvan's paper.[cliv]

[4.59] Ms West gave expert evidence on the issue of originality:

> *'While many bark paintings represent traditional designs, it nevertheless remains that particular artists have their own distinctive ways of expressing the traditional designs…*[clv]
>
> *That the works are clearly products of considerable skill, and reflect facets of the Applicant's distinctive style. I note, for example, the fineness and detail of the crosshatching, which is one of the most important features in any Aboriginal bark painting. I also note the particular depiction of the figures and composition, which are unique to the Applicant. For example, I am not aware of any other artist who depicts magpie geese, long-necked turtle and water snake at waterholes in the fashion of the Applicant. I would describe the works as very decorative, very busy and very nicely composed. I note that they share a number of important features in common, such as the rarrk, or crosshatching, the placement of the figures relative to the waterholes, the depiction of large footprints, the depiction of the waterholes, the striping on the magpie geese figures, the depiction of the geese figures in a red ochre, the depiction of*

the snake figures and the use of leaves. These are all distinctive features of the Applicant's work'. [clvi]

[4.60] On the question of originality, his Honour considered that Bulun Bulun was the author and that ideas for an artistic work did not entitle the originators of those ideas to claim joint authorship:

> *'In this case no evidence was led to suggest that anyone other than Mr Bulun Bulun was the creative author of the artistic work. A person who supplies an artistic idea to an artist who then executes the work is not, on that ground alone, a joint author with the artist: Kenrick & Co v Lawrence & Co (1890) 25 QBD 99. Joint authorship envisages the contribution of skill and labour to the production of the work itself: Fylde Microsystems Ltd v Kay Radio Systems Ltd (1998) 39 IPR 481 at 486'.*[clvii]

[4.61] Bulun Bulun gave an insight into the significance of his work in a deposition filed:

> *'Many of my paintings feature waterhole settings, and these are an important part of my Dreaming, and all the animals in these paintings are part of that Dreaming...*
>
> *The story is generally concerned with the travel of the long-necked turtle to Gamerdi, and by tradition I am allowed to paint [that part of the story]. According to tradition, the long-necked turtle continued its journey, and other artists paint the onward journey'.*[clviii]

[4.62] Although satisfied that the work in suit was original in that the author Bulun Bulun did not copy the work, his Honour noted that copyright subsisted within the legislative framework of the legislation:

> '*The exclusive domain of the* Copyright Act *1968 in Australia is expressed in s 8 (subject only to the qualification in s 8A) namely that "copyright does not subsist otherwise than by virtue of this Act".*[clix]

<u>The determination on ownership</u>

[4.63] His Honour considered:

[4.63.1] evidence as to the role of community law from which the work or works in suit arose, was admissible:

> *'Evidence of customary law may be used as a basis for the foundation of rights recognised within the Australian legal system. Native title is a clear example. In* Milpurrurru v Indofurn *the Court took into account the effect of the unauthorised reproduction of artistic works under customary Aboriginal laws in quantifying the damage suffered. In my opinion the evidence about Ganalbingu law and customs is admissible.'*[clx]

[4.63.2] however, after considering a number of publications and the cases of *Yumbulul* and *Milpurrurru* his Honour acknowledged the inadequacies of the *Copyright Act* in relation to communal title:

> *'These proceedings represent another step by Aboriginal people to have communal title in their traditional ritual knowledge, and in particular in their artwork, recognised and protected by the Australian legal system. The inadequacies of statutory remedies under the Copyright Act as a means of protecting communal ownership have been noted in earlier decisions of this Court…and "Stopping the Rip-Offs: Intellectual Property Protection for Aboriginal and Torres Strait Islander Peoples" (1994, National Capital Printing) where it was said at p 6:*
>
> > "While joint authorship of a work by two or more authors is recognised by the Copyright Act, collective ownership by reference to any other criterion, for example, membership of the author of a community whose customary laws invest the community with ownership of any creation of its members is not recognised."'[clxi]

[4.64] His Honour considered the effect of the High Court decision in *Mabo*[clxii] and said:

> '*In* Mabo (No 2), *Brennan J said (at CLR 43; ALR 29):*
>
> *"However, recognition by our common law of the rights and interests in land of the indigenous inhabitants of a settled colony would be precluded if the recognition were to fracture a skeletal principle of our legal system.*
>
> *In order to be successful, the applicants' foreshadowed argument that a right of ownership arises in artistic works and copyright attaching to them as an aspect of native title would appear to require that the court accept that the inseparable nature of ownership in land and ownership in artistic works by Aboriginal people is recognised by the common law.*
>
> *The principle that ownership of land and ownership or artistic works are separate statutory and common law institutions is a fundamental principle of the Australian legal system which may well be characterised as ``skeletal'' and stand in the road of acceptance of the foreshadowed argument."'*[clxiii]

[4.65] Von Doussa J concluded that customary Aboriginal law relating to group ownership of artistic works survived the reception of the English common law in Australia in 1788. However, whether or not communal title in artistic works were recognised by the common law, the codification of copyright law by statute prevented communal title being successfully asserted as part of the general law.[clxiv]

The determination on an express trust and fiduciary obligations

[4.66] Ms West also deposed:

> *'Tribal groupings will have the right to depict particular designs by virtue of Aboriginal custom. Members of a tribal group will be entitled to depict particular designs in their artwork, with some inheriting the right to depict a complete version of a design by virtue of their proficiency and skill as artists. The artists will have the right to deal with the works as they consider appropriate, including the right to sell the works*."[clxv] (Underline added)

[4.67] Mr Golvan noted that Ms West also gave evidence that most artworks have religious significance to the artists and their communities and added that the artists would not deal in their works in such a way as to undermine the dignity and significance of their work.[clxvi]

[4.68] Notwithstanding, his Honour considered there were factors which militated against the finding of an express trust:

> *'There is no usual or customary practice whereby artworks are held in trust for the Ganalbingu people. In the present case neither Mr Bulun Bulun's djungaye or Mr Milpurrurru suggest that the commercial sale of the artwork by Mr Bulun Bulun was contrary to customary law, or to the terms of the permission which was given to him to produce the artwork. In these circumstances, the fact of the sale and the retention of the proceeds for his own use is inconsistent with there being an intention on the part of Mr Bulun Bulun to create an express trust. Further, the fact that the artwork was sold commercially, and has been the subject of reproduction, with the apparent permission of those who control its reproduction, in Arts of the Dreaming -- Australian Living Heritage forecloses any possibility of arguing that the imagery in the artwork is of such a secret or sacred nature that it could be inferred that the artist must have had the intention in accordance with customary law to hold the artwork for the benefit of the Ganalbingu people.'*[clxvii] (Underline added)

[4.69] Von Doussa J considered a number of authorities relating to the circumstances and indicia of a fiduciary relationship:

> [4.69.1] 'In *Breen v Williams* (1996) 186 CLR 71 at 82, Brennan CJ identified two sources of fiduciary duties, the first being the circumstances in which a relationship of agency can be said to exist, and the other is founded in a relationship of ascendancy or influence by one party over another, or dependence or trust on the part of that other'[clxviii]…'The critical question is whether the transaction satisfies criteria which justify the characterisation of the relationship between the parties as fiduciary'.[clxix]

[4.69.2] His Honour identified from the decision of Mason J in *Hospital Products* the essential feature of an undertaking or agreement to act on behalf of the interests of another:

> 'The essential characteristics of fiduciary relationships were referred to by Mason J in *Hospital Products* at CLR 96-7: [clxx]
>
> > *'The critical feature of [fiduciary] relationships is that the fiduciary undertakes or agrees to act for or on behalf of or in the interests of another person in the exercise of a power or discretion which will affect the interests of that other person in a legal or practical sense. The relationship between the parties is therefore one which gives the fiduciary a special opportunity to exercise the power or discretion to the detriment of that other person who is accordingly vulnerable to abuse by the fiduciary of his position ... It is partly because the fiduciary's exercise of the power or discretion can adversely affect the interests of the person to whom the duty is owed and because the latter is at the mercy of the former that the fiduciary comes under a duty to exercise his power or discretion in the interests of the person to whom it is owed'.*[clxxi]

[4.69.3] In *Wik Peoples v Queensland* (1996) 187 CLR 1 at 95 Brennan CJ said with respect to the asserted existence of a fiduciary duty owed by the Crown to the indigenous inhabitants of the leased areas under consideration:

> *'It is necessary to identify some action or function the doing or performance of which attracts the supposed fiduciary duty to be observed: Breen v Williams (1996) 186 CLR 71 at 82 ; 138 ALR 259. The doing of the action or the performance of the function must be capable of affecting the interests of the beneficiary and the fiduciary must have so acted that it is reasonable for the beneficiary to believe and expect that the fiduciary will act in the interests of the beneficiary (or, in the case of a partnership or joint venture, in the common interest of the beneficiary and fiduciary) to the exclusion of the interest of any other person or the separate interest of the beneficiary [some footnotes omitted]'.*[clxxii]

[4.70] Von Doussa J concluded that the relationship between Mr Bulun Bulun as the author and legal title holder of the artistic work and the Ganalbingu people was one that did not treat the law and custom of the Ganalbingu people as part of the Australian legal system.

[4.71] Rather, it was a set of facts characterised by reference to mutual trust and confidence:

> *'The ``transaction'' between them out of which fiduciary relationship is said to arise is the use with permission by Mr Bulun Bulun of ritual knowledge of the Ganalbingu people, and the embodiment of that knowledge within the artistic work. That use has been permitted in accordance with the law and customs of the Ganalbingu people.*
>
> *The grant of permission by the djungayi and other appropriate representatives of the Ganalbingu people for the creation of the artistic work is predicated on the trust and*

confidence which those granting permission have in the artist. The evidence indicates that if those who must give permission do not have trust and confidence in someone seeking permission, permission will not be granted.

The law and customs of the Ganalbingu people require that the use of the ritual knowledge and the artistic work be in accordance with the requirements of law and custom, and that the author of the artistic work do whatever is necessary to prevent any misuse. The artist is required to act in relation to the artwork in the interests of the Ganalbingu people to preserve the integrity of their culture, and ritual knowledge.

This is not to say that the artist must act entirely in the interests of the Ganalbingu people. The evidence shows that an artist is entitled to consider and pursue his own interests, for example by selling the artwork, but the artist is not permitted to shed the overriding obligation to act to preserve the integrity of the Ganalbingu culture where action for that purpose is required.

In my opinion, the nature of the relationship between Mr Bulun Bulun and the Ganalbingu people was a fiduciary one which gives rise to fiduciary obligations owed by Mr Bulun Bulun.

The conclusion that in all the circumstances Mr Bulun Bulun owes fiduciary obligations to the Ganalbingu people does not treat the law and custom of the Ganalbingu people as part of the Australian legal system. Rather, it treats the law and custom of the Ganalbingu people as part of the factual matrix which characterises the relationship as one of mutual trust and confidence. It is that relationship which the Australian legal system recognises as giving rise to the fiduciary relationship, and to the obligations which arise out of it'.[clxxiii]

The 'carpet case'

[4.72] The carpet case has been considered by some to be 'the most comprehensive judgment involving copyright and Indigenous arts and culture'.[clxxiv]

[4.73] This case, also before von Doussa J of the Federal Court, involved the unauthorized use and reproduction of eight (8) artworks by eight Indigenous artists.[clxxv] At the time of the hearing, three artists were alive and five artists had passed away. The author understands that one artist is alive today.

[4.74] The case, known as the 'carpet case', involved the reproduction of artworks or a substantial part of those artworks on 246 carpets made in Vietnam and imported into Australia without the artists' permission.

[4.75] The artworks had been reproduced in publications being a portfolio of Aboriginal art published by the Australian Information Service (AIS) and a calendar published by the Australian National Gallery (ANG). These reproductions of the artworks were authorised by the artists and appeared above the name of the artist. The artworks reflected creation stories of spiritual and sacred significance to the artists and the cultures of the artists' community.

[4.76] A number of issues, particularly shortcomings of the copyright system in its application to ICIP, are exposed by this case. These may be listed as follows:

Originality

[4.76.1] his Honour noted:

> *'…a problem [is] perceived to exist at one time in relation to the application of the Copyright Act to Aboriginal artworks based on pre-existing tradition and images. That problem was whether works incorporating them satisfied the requirement of originality so to attract copyright protection'.*[clxxvi]

[4.76.2] the issue did not arise in *Milpurrurru* as the respondents ultimately admitted copyright ownership of the artists in each of the eight works. Although the artworks follow traditional Aboriginal form and are based on Dreaming themes, each artwork is one of intricate detail and complexity reflecting great skill and originality'.[clxxvii]

Ownership

[4.76.3] at the beginning of the trial, the respondents had taken the position that put in issue the question of the applicants' entitlement to copyright ownership. His Honour noted:

> *'A further extraordinary tactical stance was taken by the respondents. From the outset they refused to admit the copyright ownership of the artists in their artworks. Only as the evidence unfolded at trial did the unreasonableness of this stance become fully apparent… The refusal to admit copyright ownership added greatly to the applicants' costs of the trial as much work was involved in obtaining affidavit evidence to prove copyright ownership, particularly in the case of the deceased artists.'*[clxxviii]

[4.76.4] His Honour found infringement by importation of the copyright works.

[4.76.5] Counsel for the applicant informed the court that Aboriginal law and custom would treat each of the applicants in a case equally so that the fruits of the action would be shared equally between the named parties.[clxxix]

[4.76.6] His Honour however was mindful of the provisions as to ownership:

> *'In the event of an established infringement the Copyright Act relevantly provides remedies to the copyright owner.* ***The statutory remedies do not recognise the infringement of ownership rights of the kind which reside under Aboriginal law in the traditional owners of the dreaming stories and the imagery such as that used in the artworks of the present applicants.*** *That is a matter which has been commented on in the course of the trial, as the evidence discloses the likelihood that the unauthorised reproduction of the artworks has caused anger and offence to those owners, and the potential for them to suffer humiliation and repercussions in their cultural environment.'*[clxxx] (Emphasis added)

Additional damages

[4.76.7] His Honour, identified that compensatory loss arising out of anger and hurt feelings might be problematic where there were various authors. Instead, his Honour considered that the mechanism of additional damages might be a way to more equitably deal with the loss and at the same time dissuade such conduct:

> *'If these matters of personal and cultural hurt are to be the subject of compensatory damages assessed under s 115(2), the damages awarded would vary from artist to artist. In the case of the artists who died before the infringement occurred I do not think the copyright owner, the Public Trustee, has suffered any losses beyond the commercial considerations arising from the depreciation in the value of the copyright… In the case of the artists who were alive when the infringement occurred but died at about the time that the proceedings were commenced or shortly thereafter, the damages would cover the harm actually suffered by them up to the date of death. In the case of the other applicants the damages would be considerably higher, covering harm already suffered and the potential for further harm in the future.* ***Assessments along these lines, artist by artist, would not be in accordance with the principles of equality which the court has been invited by the applicants to follow.***
>
> *There is in the circumstances of this case another avenue by which damages over and above the depreciation in the commercial value of the copyright can be awarded, namely as additional damages for flagrant infringement under s 115(4).'*
>
> (Emphasis added)

[4.76.8] Additional damages was therefore the mechanism adopted to address the difficulties associated with compensatory loss in the circumstances of the case.

[4.77] The case studies of the *Wandjina Sculpture* and the *Winter Olympics* 2010 are noted in the submission by the legal firm Terri Janke and Company Lawyers (the Janke submission), in response to the Issues Paper of IP Australia in 2012.[clxxxi]

The Wandjina Sculpture

[4.77.1] Ms Janke describes the issues arising from a misuse of the sacred creator spirit 'Wandjina' in these terms:

> *'The Worrora, Wunumbal and Ngarinyin Aboriginal people from Western Australia have painted the sacred creator spirit 'Wandjina' for thousands of years. Under Customary Law, they are the only people entitled to produce the image. Unauthorised reproduction is believed to destabilise the natural balance of the world and undermine the culture, spirituality and identity of the local people.*
>
> *In 2010 a gallery in the Blue Mountains erected a sculpture for public display depicting a crudely drawn Wandjina figure with a mouth, whereas the traditional Wandjina is considered too powerful to be depicted with mouths. Both the Kimberley*

Aboriginal communities and the local Darug people of the Blue Mountains were extremely offended by this unauthorised misappropriation.

The gallery also exhibited a number of other Wandjina paintings by non-Indigenous artists, published a book containing the images and a thesis which argued that Aboriginal people are a dying race suffering from spiritual atrophy'.[clxxxii]

[4.77.2] The Janke submission identifies the following deficiencies in the copyright law in its application to the Wandjina Sculpture:

'Copyright law was unable to prevent the offensive reproduction of the Wandjina image for a number of reasons. The sculpture, while instantly recognisable as a Wandjina figure, was not a direct copy of an existing Wandjina artwork and therefore may have met the requirement of originality. Also, Wandjinas were first painted thousands of years ago, so there is no identifiable author and artwork more than 70 years old does not attract copyright as it is considered part of the public domain.'

[4.77.3] The deficiencies in the *Copyright Act* may be stated as follows:

[4.77.3.1] the sculpture complained of was an original work as it was not directly copied from an existing Wandjina artwork;

[4.77.3.2] Wandjinas were painted thousands of years ago and so the author is unable to be identified. It follows as subsistence also depends on the identification of the author, the inability to identify the author militates against subsistence; and

[4.77.3.3] even if the author were able to be identified, the duration of copyright had long expired.

[4.77.4] Relief of a practical nature came in the form of a planning approval requirement for the sculpture which, after lobbying, was refused by the Blue Mountains City Council. That decision was upheld when a representative of the Ngarinyin traditional owners persuaded the Land and Environment Court that the display of the sculpture, created by a non-Aboriginal without any consultation, was in breach of those laws and was deeply distressing and offensive to the Ngarinyin people.[clxxxiii]

The European Championships and Winter Olympics 2010

[4.78] A performance at the 2010 European Ice Skating Championships and the Winter Olympics, by a Russian ice-skating duo attracted criticism for its routine 'inspired' by Australian Aboriginal dance and culture.

[4.79] The performers wore dark skin-toned body suits with bright red loin cloths, white body paint and eucalyptus leaves. During the performance, the male skater led the female around by her ponytail, they stuck out their tongues and mimicked the hand over mouth gesture that was once associated with American Indians.[clxxxiv] The performance drew heavy

criticism from Aboriginal leaders as there was no Aboriginal input in the development of the music, costumes or routine and no legal recourse for Indigenous people.

Yipirinya

[4.80] Yipirinya is an Indigenous school in Alice Springs, Northern Territory with approximately 200 students attending. The school teaches literacy and numeracy and western skills following the Northern Territory/National Curriculum framework, and also teaches Indigenous languages and culture.

[4.81] In May 2016, a dispute arose over the copyright ownership and use of Indigenous cultural stories. Specifically, a series of Aboriginal readers were produced at the school and the dispute related to the copyright ownership of the books.

[4.82] Margaret James, wife of the former principal Ken Langford-Smith is the sole shareholder of Honey Ant Readers Pty Ltd. Honey Ant Readers is a company which continues to market the readers to Aboriginal schools in Australia and overseas.

[4.83] The Yipirinya School Council claimed Ms James obtained grants from government and private persons, of approximately $434,000 which the school spent on the project. The school claimed Ms James was employed by the school to work on the readers. In the course of her employment, it was claimed she sat with Indigenous elders and took down the stories they imparted to her.

[4.84] Ms James said she was always the owner of the copyright and that she secured the grants to produce the readers, even though the grants were paid to the school. Ms James says she was motivated by a desire to produce a series of culturally appropriate books in Aboriginal English that became English. Further, Ms James said that only four of the readers used traditional stories and that the rest of the series were her creations and that copyright was always hers.

Yan-nhangu Atlas and Illustrated Dictionary

[4.85] Laurie Baymarrwangga (Gawany) Baymarrwaŋa was born in approximately 1920 on Murruŋga Island, the largest of the outer Crocodile Islands of North-East Arhnem Land, in the Northern Territory (NT) of Australia. Together with the assistance of anthropologist Dr Bentley James, Baymarrwangga fulfilled her vison to leave a legacy for the economic, social and cultural wellbeing of her people by providing the opportunity for employment and education through language and cultural programs.

[4.86] Ms Baymarrwangga and Dr James have put together the trilingual *Yan-nhangu Atlas and Illustrated Dictionary of the Crocodile Islands* in English, Yan-nhangu and Yolngu. Ms Baymarrwangga wanted to provide it as a gift to Yolngu children in homelands schools across north-east Arnhem Land because it is their ancestral inheritance.

[4.87] Funding came from Ms Baymarrwangga and others. Ms Baymarrwangga was the traditional owner of the Malarra estate, which included Galiwin'ku, Dalmana, Murruŋga, Brul-brul and the Ganatjirri Maramba Salt Water surrounding the islands. Funds also came

from volunteers and donations to create a legacy in the form of an atlas and illustrated dictionary. The dictionary and atlas were not openly for sale, but for use in the education and preservation of Ms Baymarrwangga's homelands:

> *"Laurie used her own money to establish the Crocodile Island Rangers—a volunteer organisation which looks after the land and keeps culture and language strong. In 2010, after a struggle stretching back to 1945, Laurie received back payments for rents owed to her as the land and sea owner of her father's estate. She donated it all, around A$400,000, to improve education and employment opportunities on the islands and to establish a 1,000 square kilometre turtle sanctuary on her marine estate. [...] She wants us all to remain courageous and undaunted in our recognition of the value of cultural differences in creating a future and a nation of which we can all be proud".*[clxxxv]

[4.88] Baymarrwangga passed away in August 2014 but has left a tangible and spiritual legacy to turn the tide in the gradual disappearance of the culture, language and history of the Crocodile Islands.

William Barton

[4.89] At a recent event of the Hellenic Australian Lawyers Association, the theme of the presentations was cultural diversity. The attendees were fortunate to witness and enjoy the talents of William Barton, acclaimed didgeridoo player. Mr Barton was born in Mount Isa, Queensland in 1981 and learned to play from his uncle, an elder of the Wannyi, Lardil and Kalkadunga tribes of Western Queensland.

[4.90] Whilst Mr Barton was playing, there was a young man taking a film recording of the performance on his phone. An interesting hypothetical presented itself. If the performance were uploaded by the taker of the recording to YouTube or a social media site, it is unlikely that the terms upon which Mr Barton agreed to perform, would include such an action. More so if the film were to have some commercial appeal, such as being visited and attracting advertisers, it is questionable whether Mr Barton, would obtain any remuneration.

[4.91] If the recording was a sound recording of the live performance, Mr Barton would be entitled as the performer and 'maker' of the sound recording to a proprietary interest.[clxxxvi] However, sounds embodied in a sound-track associated with visual images forming part of cinematograph film are not deemed to be a sound recording.[clxxxvii] The owner, the maker of the cinematograph film is the person by whom the arrangements necessary for the making of the film were undertaken and does not, as in a sound recording, include the performer.

Wicked

[4.92] Some time ago, litigation had been commenced in the Federal Magistrates Court, as the court was then known, by an Indigenous artist who claimed infringement of an artistic work by its application onto a Wicked Camper van. The matter was resolved on confidential terms without the need for a trial. There were no issues precluding the artist from prosecuting the claim and the operation of the *Copyright Act* was fully available to both parties without any advantage or impediment to either.

Joanne Brooker

[4.93] From a submission to the *Finding the Way Issues Paper*:

> *'Copyright infringing activity impacts directly on specific artists. Joanne Brooker a freelance indigenous artist wrote:*
>
> > *In October 2005, I received a postcard from Ireland. The postcard was a copy of my artwork. The original work had been printed in The Courier-Mail some years before. The copy had been changed using Photoshop to the detriment of my original artwork, including the replacement of my signature with the copier's signature. The postcard was printed by the Illustrators Guild of Ireland (IGI) of which he was a member. I had a friend email the copying artist, offering to buy the artwork. The artist said he had the artwork and it was available for sale. I then contacted the artist who admitted that he downloaded my artwork and had "put his own spin on it".'*[clxxxviii]

[4.94] The author is unaware which particular work is being referred to. Joanne Brooker appears to be a renowned caricature artist particularly of political figures.

C. Conclusions on deficiencies and advantages

Disadvantages

[4.95] The parameters of the rules are identified by the following statement:

> '*The exclusive domain of the* Copyright Act *1968 in Australia is expressed in s 8 (subject only to the qualification in s 8A) namely that "copyright does not subsist otherwise than by virtue of this Act'.*[clxxxix]

[4.96] The operation of sections 65 and s 68 of the *Copyright Act* is problematic for indigenous artists who may be under the 'serious misapprehension as to the effect of public display upon their copyright in certain classes of works' as in *Yumbulul.*

[4.97] The question of whether a work is an original work or copied from prior traditional expressions has been raised as in *Bulun Bulun*; *Milpurrurru*. In *Bulun Bulun*, his Honour considered that:

[4.97.1] Bulun Bulun was the author and that ideas for an artistic work, did not entitle the originators of those ideas to claim joint authorship.

[4.97.2] copyright did not subsist otherwise than by virtue of this *Copyright Act.*

[4.97.3] the codification of copyright law by statute prevented communal title being successfully asserted as part of the general law.

[4.97.4] conduct whereby the author personally benefits is inconsistent with an express trust in favour of the author's community.

[4.98] The statutory remedies do not recognise the infringement of ownership rights of the kind which reside under Aboriginal law. They fail to acknowledge the traditional owners of the Dreaming stories and the imagery such as that used in the artworks of the applicants in *Milpurrurru.*

[4.99] Originality may be argued in defence to infringement as an issue due to:

> [4.99.1] the arguable inability to identify the traditional first author may impact detrimentally on subsistence: see *Wandjina sculpture; IceTV; Phone Directories*.[cxc]
>
> [4.99.2] the argument that the work is a copy of something which has previously be done and handed down: *Bulun Bulun*.

[4.100] The National and State Libraries refer to the World Intellectual Property Organisation (WIPO) identification of a difference with Indigenous IP being that it is produced by 'authors unknown'.[cxci]

[4.101] The presumption of ownership in favour of the author may operate unfairly in the recording of heritage stories. Without passing any view of the legal position in relation to the copyright issue in relation to Yipirinya, the examples of Yipirinya and the Yan-nhangu Atlas and Illustrated Dictionary provide potentially polarising examples of the effects of assuming the author as prima facie copyright owner in relation to Aboriginal and Torres Strait Islander heritage.

[4.102] In a similar example, there may be issues of copyright ownership in the written transcript when a reporter conducts a verbal interview. Is it the interviewer or the interviewee who own the copyright? Clearly, unless the interviewee is a joint author or there has been an agreement to vary the prima facie position, the interviewer (or the s 35 employer) is the owner of the copyright.

[4.103] The case of *Lenah Meats*[cxcii] involved the unauthorised entrance after hours by persons onto the premises of an abattoir who placed hidden cameras at the site. A film was taken of Lenah Meats' operations at a "brush tail possum processing facility" where possum meat was processed for export. In the context of seeking to restrain the broadcasting of the film by the ABC, ownership of the film was discussed.

[4.104] No argument was advanced in that case that copyright in the film unlawfully taken through a trespass belonged to Lenah Meats. Lenah simply argued that it was unconscionable to allow the film's owner to publish a private act obtained through unlawful means and sought an interlocutory injunction to restrain broadcasting.

[4.105] Gleeson CJ did not consider the manner in which a licenced possum abattoir conducted its lawful processing, was confidential.[cxciii]

[4.106] In the joint reasons of Gummow and Hayne JJ, their Honours were speaking of copyright in a cinematographic film and said*:*

'...copyright is personal property (s 196(1)). Ownership of that copyright vests, in general, in the maker (s 98). The Copyright Act confers the exclusive right, among other things, to make copies of the film and to broadcast it (s 86).

A cinematograph film may have been made ...in circumstances involving the invasion of the legal or equitable rights of the plaintiff or a breach of the obligations of the maker to the plaintiff. It may then be inequitable and against good conscience for the maker to assert ownership of the copyright against the plaintiff and to broadcast the film. The maker may be regarded as a constructive trustee of an item of personal (albeit intangible) property, namely the copyright conferred by s 98 of the Copyright Act. In such circumstances, the plaintiff may obtain a declaration as to the subsistence of the trust and a mandatory order requiring an assignment by the defendant of the legal (ie statutory) title to the intellectual property rights in question. Section 196(3) of the Copyright Act provides that an assignment of copyright does not have effect unless it is in writing signed by or on behalf of the assignor.' (Underline added)[cxciv]

[4.107] The paper advocates that it would be unconscionable to allow someone to record Aboriginal and Torres Strait Islander heritage and commercialise it, without the informed consent of the owners or custodians of the heritage.

[4.108] Another deficiency is the limitation created by the requirement for material form as Aboriginal and Torres Strait Islander heritage involves intrinsically heritage passed on by word and mouth.

[4.109] Heritage has been handed down for centuries. It is artificial to then limit its exclusivity for the life of the author (the identification of whom is a separate issue in itself) plus 70 years and allow that work to pass to the public domain.

[4.110] Advantages can be seen in that:

[4.110.1] copyright infringement of indigenous works has been found: *Milpurrurru.*

[4.110.2] compensatory loss includes compensation for hurt feelings and anger arising from the infringement: *Milpurrurru.*

[4.110.3] additional damages provide a mechanism for accommodating difficulties in the assessment of compensatory loss involving several authors of different works: *Milpurrurru.*

[4.110.4] additional damages can be used to deter others from similar infringements.

[4.111] Although it is acknowledged that there are advantages, the advantages are unable to deal with the proper protection of Aboriginal and Torres Strait Islander heritage, save in a manner which cannot recognise the true nature of the heritage.

CHAPTER V – ASSESSMENT AND THE PROPOSED MODEL

A. Overview

[5.1] In this section, the paper sets out a model which is directed to addressing a number of key deficiencies of the *Copyright Act* in its application to Aboriginal and Torres Strait Islander heritage.

[5.2] Those issues are informed by:

> [5.2.1] a summary of concerns after a thorough consultation process.[cxcv]
>
> [5.2.2] the exposed weaknesses exemplified by the case studies of the manner in which the *Copyright Act* deals with Aboriginal and Torres Strait Islander heritage.
>
> [5.2.3] an acceptance of the unique nature of Aboriginal and Torres Strait Islander heritage.
>
> [5.2.4] the interaction between Aboriginal and Torres Strait Islander heritage and the *Copyright Act*.
>
> [5.2.5] existing bodies and forums together with mechanisms at the court's disposal within their jurisdiction.

[5.3] The purposes of the model proposed by the paper are to:

> [5.3.1] recognise a number of central issues important to the Aboriginal and Torres Strait Islander people.
>
> [5.3.2] acknowledge the different perspective of Aboriginal and Torres Strait Islander peoples and to utilise existing mechanisms or variations of existing mechanisms, with a view to making acceptance of the *sui generis* treatment of Aboriginal and Torres Strait Islander heritage an easier transition.

[5.4] The key aspects of Aboriginal and Torres Strait Islander heritage sought to be addressed are as follows:

> [5.4.1] the element of self-determination;
>
> [5.4.2] the recognition of community ownership of Aboriginal and Torres Strait Islander heritage;

[5.4.3] the rights attaching to Aboriginal and Torres Strait Islander heritage are to be in perpetuity;

[5.4.4] control over the manner of use of Aboriginal and Torres Strait Islander heritage;

[5.4.5] equitable remuneration for exploited Aboriginal and Torres Strait Islander heritage;

[5.4.6] deterrents to unauthorised use and exploitation of Aboriginal and Torres Strait Islander heritage;

[5.4.7] the ability to resist challenges to originality on basis of an inability to identify a particular 'author';

[5.4.8] the requirement for material form – the idea v expression dichotomy.

[5.5] The paper does not support the implementation of a separate *sui generis* statute for reasons which are set out in this chapter.

[5.6] The paper does however, seek to address deficiencies of the current system as they apply to as much of the Aboriginal and Torres Strait Islander heritage as possible within the framework of the *Copyright Act.*

Constitutional basis

[5.7] As the proposed model proposes the introduction of a discrete chapter within the *Copyright Act* and consequential amendments, the paper submits that this is within the power of the Commonwealth to make laws for the peace, order, and good government of the Commonwealth with respect to copyrights.[cxcvi]

[5.8] As a result of a referendum held on 27 May 1967, an overwhelming majority of Australian voters agreed to change the Constitution to give the federal parliament the power to make laws in relation to Aboriginal and Torres Strait Islander people, [cxcvii] and to allow for Aboriginal and Torres Strait Islander people to be included in the census.[cxcviii]

The model – a summary

[5.9] The model is set out in the Schematic attached to the paper. It proposes:

[5.9.1] a discrete chapter in the *Copyright Act* titled 'Indigenous Culture';

[5.9.2] the creation of a unique right, the 'heritage right';

[5.9.3] that the benefit of being identified as 'heritage' is that it gives rise to certain indicia which accompany that status including:

[5.9.3.1] perpetual entitlement;

[5.9.3.2] recognition of the standing of the custodian and the beneficial entitlement of the community to the heritage rights;

[5.9.4] that the question of determining whether Aboriginal and Torres Strait Islander

heritage acquires that status is a matter of self-determination. This is implemented by an appointed panel of Aboriginal and Torres Strait Islander experts, giving the Court an opinion on the heritage status of the expression as expert witnesses under the existing *Federal Court Rules* 2011.[cxcix]

[5.9.5] a registration system through IP Australia whereby:

> [5.9.5.1] an application is made by the custodian/s or the community which owns it, for registration of the heritage;
>
> [5.9.5.2] an Aboriginal and Torres Strait Islander person suitably qualified with expertise and experience in the area of heritage, is an examiner, or provides an expert opinion to IP Australia examiners, on whether the form of heritage is in fact heritage;
>
> [5.9.5.3] there is an acceptance of the application;
>
> [5.9.5.4] the acceptance may be opposed, by the public, but presumably in cases of opposition by a contestant to the entitlement to make the application;
>
> [5.9.5.5] the expert opinion is in evidence automatically;
>
> [5.9.5.6] after either a successful resistance of the opposition or proceeding unopposed, the registration occurs;
>
> [5.9.5.7] the registration will act as a document of record and does not create the rights associated with the heritage classification;
>
> [5.9.5.8] the register will serve several purposes including notice relevant to a defence of innocent infringement under s 115(3) of the *Copyright Act* and additional damages under s 115(4) of the *Copyright Act;*

[5.9.6] quite apart from the non-compulsory registration of the heritage, there will be a direct path to enforcement of the heritage. Heritage will be enforceable simply because it is heritage.

[5.9.7] the custodian or the relevant community may apply directly to the Court for relief regardless of the progress of any registration application or even where an application has not been applied for.

[5.9.8] that following an application for relief to the Court, an expert panel shall be appointed by the Court to opine on relevant issues including:

> [5.9.8.1] the entitlement of the applicant; and/or
>
> [5.9.8.2] the confirmation of heritage;
>
> [5.9.8.3] the subject matter of any licence arrangement; and/or
>
> [5.9.8.4] damages including additional damages and other relief the Court is empowered to grant under the *Copyright Act.*

B. Background considerations

Understanding Aboriginal and Torres Strait Islander heritage

[5.10] The starting point has been to identify the various forms of Aboriginal and Torres Strait Islander heritage. Although the various forms may be identified, the depth of meaning behind the forms is impossible to grasp unless the person is an Aboriginal and Torres Strait Islander.

[5.11] The best which may be hoped for is to appreciate the expressions for what they are and to respect that they have a far deeper spiritual meaning for Aboriginal and Torres Strait Islander people than they have for non-indigenous people. It is for this reason, the model places great emphasis either in the registration process or in enforcement of heritage rights, on the expertise of Aboriginal and Torres Strait Islander peoples.

The core elements

[5.12] The paper considers the following are essential in law reform in relation to Aboriginal and Torres Strait Islander heritage. This is not because these matters are claimed to be what the original people require in relation to their heritage,[cc] but because they are inseparable from the heritage and their existence is unrecognised in the *Copyright Act.*

[5.13] Accordingly, the paper proposes:

> [5.13.1] a single classification, 'heritage', which must be defined and will include matters which transcend barriers such as material form, inability to identify authorship and the idea v expression dichotomy;[cci]
>
> [5.13.2] self-determination must be factored into the model, as it is inappropriate for determinations to be made on what is heritage, without the expert opinions of individuals with a personal understanding of the expressions of Aboriginal and Torres Strait Islander heritage;[ccii]
>
> [5.13.3] the mechanism of expert opinion introduces an aspect of self-determination which recognises original people in this country as the primary guardians and interpreters of their culture;[cciii]
>
> [5.13.4] community proprietary rights in the Aboriginal and Torres Strait Islander heritage will go beyond the scope of authorship or joint authorship. The recognition of custodians to authorise use within their authority and take action for infringement, which will include derogatory or offensive use of the heritage right;[cciv]
>
> [5.13.5] a commercial benefit should flow to the owners/custodians of the heritage right from the authorised use of ICIP including the right to negotiate these terms;[ccv]
>
> [5.13.6] the implementation of a national register, the effect of which shall be:
>
> > [5.13.6.1] a record of the existence of the heritage right;
> >
> > [5.13.6.2] notice for the purpose of innocent infringement claims and as a matter for consideration in the exercise of the discretion to award additional

damages;

[5.13.6.3] separate from the rights which flow directly to the heritage from the amendments.

[5.13.7] 'heritage' and the rights attaching to that designation are to be inalienable and perpetual.[ccvi]

C. Features the proposed model seeks to address

[5.14] The following matters have been identified after extensive consultation to be the key issues Aboriginal and Torres Strait Islander peoples sought to have recognised:[ccvii]

'What rights do Indigenous people want recognised?

The rights Indigenous peoples need in relation to their Cultural and Intellectual Property include the right to:

1. Own and control Indigenous Cultural and Intellectual Property.

2. Define what constitutes Indigenous Cultural and Intellectual Property and/or Indigenous heritage.

3. Ensure that any means of protecting Indigenous Cultural and Intellectual Property is based on the principle of self-determination, which includes the right and duty of Indigenous peoples to maintain and develop their own cultures and knowledge systems and forms of social organisation.

4. Be recognised as the primary guardians and interpreters of their cultures, arts and sciences, whether created in the past, or developed by them in the future.

5. Apply for protection of Indigenous Cultural and Intellectual Property rights which, where collectively owned, should be granted in the name of the relevant Indigenous community.

6. Authorise or refuse to authorise the commercial use of Indigenous Cultural and Intellectual Property according to Indigenous customary law.

7. Require prior informed consent or otherwise for access, use and application of Indigenous Cultural and Intellectual Property, including Indigenous cultural knowledge and cultural environment resources.

8. Maintain the secrecy of Indigenous knowledge and other cultural practices.

9. Benefit commercially from the authorised use of Indigenous Cultural and Intellectual Property, including the right to negotiate terms of such usage.

10. Full and proper attribution.

11. Protect Indigenous sites and places, including sacred sites.

12. Control management of Indigenous areas on land and sea, conserved in whole or

part because of their Indigenous cultural values.

13. Prevent derogatory, offensive and fallacious uses of Indigenous cultural and intellectual property in all media including media representations.

14. Prevent distortions and mutilations of Indigenous Cultural and Intellectual Property.

15. Preserve and care, protect, manage and control Indigenous cultural objects, Indigenous ancestral remains, Indigenous cultural resources such as food resources, ochres, stones, plants and animals and Indigenous cultural expressions such as dances, stories, and designs.

16. Control the disclosure, dissemination, reproduction and recording of Indigenous knowledge, ideas, and innovations concerning medicinal plants, biodiversity, and environmental management.

17. Control the recording of cultural customs and expressions, the particular language which may be intrinsic to cultural identity, knowledge, skill and teaching of culture.'

D. Renovation v Reconstruction.

[5.15] Once the source of the Aboriginal and Torres Strait Islander heritage is identified, the Schematic identifies that there are two paths which may be taken toward the recognition and enforcement of the rights attaching to heritage.

[5.16] Firstly, it may be the subject of an application to IP Australia for ultimate registration.[ccviii] This will be filed with IP Australia and undergo an examination process. It is envisaged that examiner/s shall be an Aboriginal or Torres Strait Islander or have access to an Aboriginal or Torres Strait Islander expert, who may provide the requisite knowledge to give an opinion. The person shall be an elder with sufficient experience to determine from the application and accompanying evidence, the entitlement to the classification of heritage. It is understood traditions vary across different areas, however there is a general cultural approach based on family, community and affinity with the land and the sea which will transcend borders.

[5.17] The application will be accepted or an adverse report issued, although it would be expected to be only in unusual circumstances where an application would receive an adverse report.

[5.18] Thus a path similar to that of a trade mark is being taken. The system of trade mark registration is analogous, as a trade mark may be perpetual and can 'live' before registration. The emphasis here is that it is not registration which will attach the rights to heritage. Registration is for recording of the existence of the heritage, the custodian or community responsible to protect and transmit the heritage and provide public notice.

[5.19] As is the case with contested IP rights on entitlement, there is a mechanism whereby the applicant, the party claiming to be entitled to be the custodian, may be challenged. Unlike trade mark applications, and in this respect similar to patent applications,[ccix] it is not necessary for a person/s who claims to be the custodian or claims entitlement to the heritage to wait until

acceptance before challenging the application. IP Australia will consider with the benefit of the expert Aboriginal or Torres Strait Islander opinion, such contests to determine how the application proceeds.

[5.20] IP Australia's mechanisms are not unaccustomed to the procedures outlined. The acceptance process will take into account the advice of a panel of experts, suggested as being three, who are indigenous persons and who are elders with sufficient knowledge of the claimed heritage right to determine in accordance with the traditions, the true custodian.

[5.21] The expert panel's opinion impacts upon acceptance of the right, or determination of conflicting custodian rights. Conflicts of interest will disqualify a person from a particular panel determining rights which are the cause of the conflict. In the majority of cases, the expert panel shall opine as to the authenticity of the heritage right.[ccx]

[5.22] Following acceptance of the heritage right application, the acceptance is advertised to establish whether there is any opponent to the registration and, failing opposition, entered upon the heritage register.[ccxi]

[5.23] The second path is the direct recognition of the heritage without registration. It is heritage and entitled to the rights which are associated with that designation because it is the heritage of the original people. Provided it is heritage, not just in form but in substance, it will attract the particular benefits which the paper proposes are attributed to it.

[5.24] It is necessary for a number of reasons which include:

> [5.24.1] it is impractical to require registration as any pre-requisite to identification of the heritage;
>
> [5.24.2] enforcement should not be delayed by an application process;
>
> [5.24.3] there may be confidentiality issues surrounding the heritage and requires control through the court process.

[5.25] Thus registration is not a requirement for enforcement action to protect the heritage. It is a recording system for those who wish to avail themselves of it and shall serve at least the following purposes:

> [5.25.1] it will remove any argument of innocent infringement.
>
> [5.25.2] it will be a relevant factor for additional damages.
>
> [5.25.3] it will build a valuable resource of heritage.
>
> [5.25.4] it serves the purpose for publicly available material and provides the ability to control access in the same way IP Australia presently controls access to files in relation to trade marks, patents and designs.[ccxii]

[5.26] Heritage therefore may be the subject of an enforcement action regardless of what stage of registration it has reached or regardless of whether registration has even been sought. That process will only impact on relief a court may grant informed by notice of the existence of the

heritage. It should be noted, that the situation exists and has existed under the current patent, trade mark and design laws that in few cases proceedings are instituted in IP Australia and in the Federal Court. This situation is less complex as the registration does not impart substantive rights.

The rights attaching to the heritage designation

[5.27] The heritage right, or more accurately, the rights which it is proposed will accompany a designation of Aboriginal or Torres Strait Islander heritage, is an encompassing right which is recognised in some respects but not defined by existing forms of works under the *Copyright Act.* The heritage will include artistic works, musical works, literary works, dramatic works, performances, cinematographic films and sound recordings.

[5.28] However that is where the similarity ends. The heritage right for the same kind of work will have entitlements by reason of its cultural significance, history and as a repository of traditional knowledge passed down from generations all of which combine and contribute to its designation. It is critical to note that an expression of heritage will not be heritage by virtue only of its form. It is a combination of three conjunctive elements:

> [5.28.1] its form;
>
> [5.28.2] its history of transmittal within an identified community or through identifiable custodians; and
>
> [5.28.3] has attaching to it, a person or persons recognized as the parties responsible for maintaining its integrity and transmittal for future generations of Aboriginal and Torres Strait Islander peoples.

[5.29] It will therefore not be heritage if it has the form and also has a history of transmittal but is being dealt with in a manner inconsistent with the responsibilities attaching to the heritage. This will have the effect of the expression not constituting heritage and accordingly:

> [5.29.1] not being entitled to the benefits of that classification;
>
> [5.29.2] open to penalties including an award of additional damages.

[5.30] Heritage will also include ideas, secret and sacred knowledge, information, sites, objects and areas as well as their religion, spirituality and cultural rights.[ccxiii] Any reform must recognize that ICIP does not fall into the neat categories of western IP:

> *'In conventional western legal terms, intellectual property rights refers to copyright, patents, trademarks, designs and trade secret laws, and breach of confidence. To Aboriginal and Torres Strait Islander peoples, however, the cultural products, forms and expressions for which protection is sought do not strictly conform to the limited provisions of intellectual property laws. This is because it is not only the material forms and created or invented products for which protection is sought'.*[ccxiv]

[5.31] The paper agrees with the proposition that it is 'more appropriate and simpler to refer to the collective cultural heritage of each Indigenous people' so that 'a song or story is not a commodity or a form of property but one of the manifestations of an ancient and continuing relationship between people and their territory'.[ccxv] Material form is therefore not essential – what is essential is that if forms part of the original people's heritage.

[5.32] The 'heritage' designation of:

[5.32.1] Erica Irene Daes adopted in the *Our Culture: Our Future Report* is:

> *'comprised of all ...objects, sites and knowledge the nature or use of which has been transmitted from generation to generation, and which is regarded as pertaining to a particular people or its territory. The heritage of an indigenous people also includes objects, knowledge and literary or artistic works which may be created in the future based upon its heritage.'*[ccxvi]

[5.32.2] of the author

> *'comprised of all ...objects, sites and knowledge the nature or use of which has been transmitted from generation to generation, and which is regarded as pertaining to a particular people or its territory. The heritage of an indigenous people also includes objects, knowledge and literary or artistic works which may be created in the future based upon its heritage PROVIDED ALWAYS that such use is consistent with the right and duties of the custodian or caretaker of a particular item of heritage so that the actions in question conform to the best interests of the community as a whole.'*

[5.32.3] the author addresses the circumstances where someone of the community or the custodian may use the heritage for purposes outside the proviso added.

[5.33] This definition for the purpose of this paper is too wide. It extends to knowledge concerning medicinal plants, genetic material and traditional medicines. These aspects of traditional knowledge are not considered in this paper, nor does the author consider the proposed designation in the *Copyright Act* is the appropriate legislation to deal with this subject matter. Those elements have been considered in the context of patents rights and plant breeders' rights, neither of which are considered in this paper.[ccxvii] This paper is directed toward the arts and cultural expression rather than Indigenous ecological (biodiversity) knowledge.[ccxviii]

[5.34] The author agrees with the separation between the arts and science which has already been identified:

> *'Several commentators have noted that it might be more practical to separate arts and cultural expression from Indigenous cultural knowledge about biodiversity and the environment'.*[ccxix]

[5.35] Further, the author supports the position that those matters dealing with medicinal plants, genetic material and traditional medicines be the subject of amendments to the patent and plant breeder legislation.

> *'However, if for any reason the specific legislation should focus only on arts, there may be scope for another separate Act to protect traditional ecological knowledge. It is important that laws be developed to address concerns over appropriation of biodiversity knowledge, human genetic material and scientific knowledge.'*[ccxx]

[5.36] The heritage right is one which complies with the following indicia:

> [5.36.1] it has a direct connection to the original people's culture and heritage;
>
> [5.36.2] it need not find expression in a material form but its expression must have substantial consistency;
>
> [5.36.3] the particular expression of Aboriginal and Torres Strait Islander heritage has identifiable custodians and/or community owners, in the sense that there is a clear understanding that a particular person, family or community have the responsibility as the persons who are entrusted to:
>
> > [5.36.3.1] maintain the integrity of the heritage;
> >
> > [5.36.3.2] educate primarily their community in the heritage with a view to transmit the heritage to subsequent generations;
> > (together the duties)
>
> [5.36.4] the use or proposed use of the heritage must be consistent with the duties.
>
> [5.36.5] The heritage may only be enforced by the said custodians or community owners.

Custodian/s -Community

[5.37] The best interests of the community are paramount and custodians are required to act in accordance with those interests:

> 'The traditional custodians are empowered as caretakers in relation to the particular item of heritage only in so far as their actions conform to the best interests of the community as a whole.'[ccxxi]

[5.38] The role of the custodian in this model is particularly relevant to:

> [5.38.1] any application for registration of the heritage;
>
> [5.38.2] participation in the expert panel for non-conflict situations;
>
> [5.38.3] prosecution directly for infringement of the heritage right;

[5.38.4] acting on non-conflict expert witness panels for the Federal Court;

[5.38.5] granting permission for actions consistent with the best interests of the community and authorizing appropriate use of the heritage.

[5.39] A process of information to acquaint original peoples with the ability (but not the compulsion) to register the heritage should be undertaken.

Self-determination

[5.40] It is the right to ensure that any means of protecting ICIP is premised on the principle of self-determination, which includes the right and duty of Aboriginal and Torres Strait Islander peoples to maintain and develop their own cultures, knowledge systems and forms of social organisation.[ccxxii]

[5.41] The condition of self-determination appears in the model at the most critical times. One basis for the call for self-determination is that Aboriginal and Torres Strait Islander culture considers that non-Indigenous culture does not comprehend ICIP and lacks the capacity to do so:

> *'It is a feature of the style of the artworks in question that the artist will encode into the artwork secret parts of the dreaming that will be recognised and understood only by those who are initiated into the relevant ceremonies, or at least have a close knowledge of the cultural significance of the story'*.[ccxxiii]

[5.42] The effect of that belief is that non Indigenous people should not therefore make determinations on critical aspects of heritage, particularly what constitutes heritage. The model recognizes this situation and introduces the experts and expert panel concept at critical times. The panel appointed as the Court expert, shall ideally comprise of three persons acting in an expert capacity providing an opinion. It ideally will comprise, acknowledged Aboriginal and Torres Strait Islander persons elder or elders with extensive experience and where no conflict of interest arises.

[5.43] There are two important times the expert panel shall be called upon to provide their expertise.

[5.44] Firstly in the application for registration process, to:

[5.44.1] identify whether the cultural expression is heritage, from which flow the unique benefits; and

[5.44.2] provide his or her opinion on conflicting entitlements of persons claiming custodianship of the heritage.

[5.45] The expert shall be called to give an opinion on the authenticity of the heritage claimed. The benefit of the register is that it becomes a repository of recorded heritage and has the additional benefit of acting as a means of notification of the right. Thus, heritage rights do not arise by reason of registration as they already exist. Like trade marks, the use rights already

exist, but by registration there are benefits obtained by being registered on the record.

[5.46] Secondly, the expert or expert panel acts as a Court appointed expert in enforcement or title issues. It provides the Court with expert evidence on the validity of the heritage claimed or the identification of the proper party or parties who may be recognized as the custodian/s. This mechanism exists and may be utilised by the Court.[ccxxiv]

[5.47] In 2013, the author published a paper in two parts, proposing that patent litigation could be made more affordable for small to medium enterprises by introducing a Court appointed expert panel of officers from IP Australia on the sole question of validity.[ccxxv] The opinion would not constitute a judicial decision and thereby offend the Constitution,[ccxxvi] but would inform the Court by its expertise.

[5.48] The parties, as they are entitled to now where the Court appoints an expert, may appoint their own expert to contradict the opinion of the Court expert panel. A panel of three persons is recommended, as the likelihood of successful challenge should be reduced. It will also address a perception whether accurate or not, that parties' experts reflect the position of their respective parties rather than operate to assist the Court.[ccxxvii]

[5.49] The benefit is that the model utilises both the expertise of Indigenous people on the issues of heritage and entitlement, which provides an element of self-determination, as well as utilising the existing framework for enforcement.

[5.50] A person such as Banduk Marika would be most suitable as an expert on the panel. Ms Marika was an artist involved in the *Milpurrurru* litigation. At the time of the relevant events, Ms Marika was heavily involved in community groups, mainly as a consultant for arts related cross-cultural exchange and as an educator in Aboriginal culture.[ccxxviii]

Community ownership of Aboriginal and Torres Strait Islander heritage

[5.51] The community bears the ultimate responsibility for maintaining the integrity of Aboriginal and Torres Strait Islander heritage. Its abuse is a matter for the community not the author of a work in question. The consequences of its abuse are reflected in the following extract:

> *'The evidence of Ms Marika, which I accept without hesitation, illustrates the severe consequences which may occur even in a case where plainly the misuse of the artwork was without permission, and contrary to Australian statute law. In times past the ``offender'' could be put to death. Now other forms of punishment are more likely such as preclusion from the right to participate in ceremonies, removal of the right to reproduce paintings of that or any other story of the clan, being outcast from the community, or being required to make a payment of money; but the possibility of spearing was mentioned by Mr Wangurra as a continuing sanction in serious cases'.*[ccxxix]

[5.52] The model does not distinguish between the author and the community. If the basis of the claim is an unauthorised use of heritage, then the party who is entitled to bring that action is the relevant community, who may be represented by a custodian. The ownership

consideration is not tied to the issue of authorship but rather to the entitlement and duties of the community, who have the right to protect the heritage as well as the obligation to pass it down to their successors. Accordingly, the difficulties in recognising the ownership of the community are alleviated. As Ms Marika gave evidence:

> *'As an artist, while I may own the copyright in a particular artwork under western law, under Aboriginal law I must not use an image or story in such a way as to undermine the rights of all the other Yolngu (her clan) who have an interest whether direct or indirect in it. In this way I hold the image on trust for all the other Yolngu with an interest in the story'.*[ccxxx]

[5.53] There may, of course, be disagreements as to who is the entitled custodian, however that is a matter for the opinion of the panel. It is also for the panel to advise IP Australia or the Court, depending on the circumstance for which the opinion is called, in enforcement proceedings, the registration process or in entitlement issues in either of those forums.

The rights of ICIP to be in perpetuity

[5.54] The paper considers the inability of the *Copyright Act* to respond in a satisfactory manner to certain ICIP issues, such as originality, ownership, infringement, duration of protection and the nature of the exclusive rights, required a practical approach.

[5.55] It would, for example, be incongruous to limit a heritage right to the life of the author and 70 years, when the original author may not be identifiable and the expression has survived for thousands of years.

[5.56] The reason that it is not inappropriate to provide a perpetual right for expressions designated 'heritage', is that the fundamental rationale of IP does not apply. This rationale is that the entitled party is given a period of monopoly during which others may enjoy it but ultimately in exchange for that period of exclusivity, the rights are open for the public to use.

[5.57] ICIP is not created for a period of commercial exploitation where research and development costs are recouped over the period of monopoly. They are a legacy which may be enjoyed by others upon the authorization of the custodians or community, however, their passing on and evolution cannot be interfered with by persons who are not intended to be the direct beneficiaries of the heritage.

Inalienable

[5.58] It follows that if the core concept of heritage is a legacy for the original people's descendants, it must be inalienable. Heritage has been handed down according to traditional law and there is no basis to argue that the heritage may be transferred by willing participants.

[5.59] No doubt there may be attempts to do so, by Aboriginal and Torres Strait Islander people who may not feel the traditional obligation to the community. In such a case the third

element of heritage would be missing where the proposed use is contrary to the duties of the custodian and community. In such a case, even the custodian, if they were acting in a manner which was in breach of their duties to the community in relation to the heritage, would be acting outside the scope of their custodianship and the rule *nemo dat quod non habet* would apply.

[5.60] A licence of the use of the heritage right presents a more complex situation. Aboriginal and Torres Strait Islander communities may have a desire to share some aspects of their knowledge or financially benefit from its use. However, the difficulty may unsurprisingly arise by reason of uninformed consent. The model consistent with its rationale considers this topic should be addressed by:

> [5.60.1] a protocol which requires transparency of the licence;
>
> [5.60.2] a requirement that licences must be given by the custodian or representative if the community involved;
>
> [5.60.3] a requirement that licences must be accompanied by a certificate of a solicitor who certifies that the terms and effects of the licence have been explained to the licensor. The effect of the failure to obtain a certificate is the unenforceability by the licensee and substantial penalties where the licensee has knowingly avoided that procedure;
>
> [5.60.4] a maximum term of the licence of three (3) years inclusive of any option to extend the term, to prevent abuse by licensees;
>
> [5.60.5] a requirement that licences contain compulsory provisions which are read into the licence agreement. In this regard, these compulsory terms would include:
>
> > [5.60.5.1] control over the manner of use of ICIP;
> >
> > [5.60.5.2] regularity of accounting to the licensor;
> >
> > [5.60.5.3] strict pecuniary penalties for failure to comply with the mandatory terms, which act as deterrents to unauthorised use and exploitation of ICIP.

[5.61] Ideally, licenses should be made the subject of an application and approved by the FCC or the Copyright Tribunal. However, there may be an impracticality in making the agreements subject to scrutiny by the FCC or the Tribunal. Instead, it is expected that, the solicitor's certificate (or the failure to obtain one) will act as a deterrent to uninformed consent. The Tribunal presently entertains applications for approval of agreements, such as the application to the Tribunal under Part VA in relation to reviews of distribution agreements relating to broadcasts by educational and other institutions. [ccxxxi]

[5.62] The author has made a submission to government in relation to the Productivity Commission's Report recommending the abolition of the utility patent model, the innovation patent and on a proposed extension of the 'safe harbour' provisions of the *Copyright Act*.[ccxxxii]

[5.63] The submission recommended certain procedural amendments to streamline and encourage enforcement by small and medium enterprises. In circumstances where the *Raising the Bar* legislation[ccxxxiii] has extended the jurisdiction of the FCC to include trade mark and design matters, the author recommended that:

> '[c]onsideration be given to appoint to the Federal Circuit Court specialist practitioners in Intellectual Property matters who might on his or her docket take the copyright, trade mark and design cases. The author in this regard speaks to 'Information request 18.1' in the Report.'[ccxxxiv]

[5.64] A referral to the FCC in such a specialist environment seeking approval of a licence agreement, would be consistent with the increased jurisdiction of the FCC in Intellectual Property matters and that Court's long jurisdiction in copyright matters.

Material form not essential

[5.65] The definition of heritage should transcend the requirement for a material form. Of course one benefit of material form is the ability to delineate the extent of the protection and provide a marker from which a test of 'substantial part' would be undertaken.

[5.66] Having said that heritage will have crystallised into a form of expression which is capable of identifiable boundaries or having essential characteristics. Those boundaries would not be incapable, subject to restrictions imposed by the requirement of secrecy, of reduction into a descriptive form for the purpose of enforcement.

[5.67] In this regard, the Court's mechanisms which enable it to receive and order undertakings as to confidence and limit exposure to legal advisers and experts, provide yet another existing mechanism with use in these circumstances.

Equitable remuneration for exploited ICIP

[5.68] What is required to make the remuneration in respect of license of heritage equitable?

[5.69] As broad headings, transparency and fairness. There may be dealings where the proposed licensee does not pay an equitable amount for use of the heritage. There may also be dealings where the custodian of the heritage is uncommercial in the remuneration sought. In the latter case, the proposed licensee makes a commercial decision. In the former, the decision to knowingly fail to have the licence approved should at the Court's discretion, sound in additional damages.

Substantial Part

[5.70] As to what constitutes infringement of the heritage, the question as to whether a substantial part has been taken by the alleged infringer of the heritage does not seem inappropriate.[ccxxxv]

[5.71] It did not appear to be an impediment in *Milpurrurru* where von Doussa J found:

> *'Whether the carpets which are not exact reproductions of the artwork infringe the relevant artwork and the requirements in s 37 as to knowledge in relation to those carpets if they constitute substantial reproductions, raise more difficult questions'.*[ccxxxvi]
>
> …
>
> *In Ravenscroft v Herbert & New English Library [1980] RPC 193, Brightman J in the passages referred to by Lockhart J observed that the first question is whether there has been copying, and then secondly whether the copying is substantial. In the present there can be no question that parts of the Wititj have been copied on to the snake carpet. The depiction of the tail portion of the snake, the rarrk, the border and the colouring itself are all aspects of that copying.*
>
> *In determining whether the copying is substantial Brightman J accepted the submissions of counsel for the defendants that there are four principal matters to be taken into account in deciding whether copying is substantial (at 203):*
>
> *First, the volume of the material taken, bearing in mind that quality is more important than quantity; secondly, how much of such material is the subject matter of copyright and how much is not; thirdly, whether there has been an animus furandi on the part of the defendant; this was treated by Page-Wood VC in Jarrold v Houlston (1857) 3 K&J 708 as equivalent to an intention on the part of the defendant to take for the purpose of saving himself labour; fourthly, the extent to which the plaintiff's and the defendant's books are competing works'.*[ccxxxvii]

[5.72] His Honour found no difficulty in finding a substantial part had been taken so as to suggest such a test could not be applied to heritage:

> *'Applying these principles to the snake carpet, I am in no doubt that it constitutes a reproduction of a substantial part of the artwork. There are striking similarities on a visual comparison of the artwork with the carpet. While the Dreaming of the Wititj is often told in Aboriginal artwork, the particular depiction of the tail and the rarrk used in this artwork is original and distinctive. There is, in any view, a substantial use of that part of the artwork in the carpet'.*[ccxxxviii]

[5.73] In relation to musical works, the principles have been applied along the same lines, namely, objective similarity:

> '*When dealing with the word* ***substantial*** *in the context of infringement of copyright in a musical work, it is appropriate to consider whether or not the amount of the copyright musical*

work that is taken is so slender that it would be impossible to recognise it (see Hawkes & Son (London) Ltd v Paramount Film Service Ltd [1934] 1 Ch 593 at 604). However, even though the alleged infringement is not very prolonged in its reproduction, there will nevertheless be infringement if what is reproduced is a substantial, vital and essential part of the original (Hawkes v Paramount at 606). Further, there will be infringement if the bars of a musical work that are taken contain what constitutes the principal air or melody of the copyright work, which anyone who heard the alleged infringing work would recognise as being the essential air or melody of the copyright work (see Hawkes v Paramount at 609)'. [ccxxxix]

Moral rights

[5.74] The paper considers that the mechanisms in place presently in relation to moral rights in Part IX of the *Copyright Act* form a sound basis for the addition of a category in relation to the custodian/community. This bears in mind the deficiency of the *Copyright Act* (in relation to Aboriginal and Torres Strait Islander heritage), which focusses on the authorship as the commencement of the rights granted in relation to works and the identified 'creators' of subject matter other than work, save in the case of broadcasting rights.

[5.75] These could take the following form, to be fleshed out in a similar manner as the rights which exist presently. They would add:

[5.75.1] Division 2AA – Right of attribution of custodian/s and the community.

[5.75.2] Division 3AA - Right not to have custodianship or community ownership of a work falsely attributed.

[5.75.3] Division 4AA - Right of integrity of custodian/community of a work to prevent unauthorised and derogatory treatment of heritage.

[5.76] Consistent with the proposed model, in particular the perpetuity of heritage, there would be no duration of these rights. However, it would be expected that as the model requires authorisation of the use of heritage, the identification of the custodian or community would be ascertainable.

[5.77] Accordingly, the failure to so recognise the custodian, or falsely recognise a person/s as custodians or deal with the heritage in a manner infringing the custodian or community's right of integrity in the heritage, should sound in additional damages at least on the basis of discouraging others from similar conduct.[ccxl]

[5.78] However, difficulties experienced by the author in ascertaining the proper custodian or community in relation to an artistic work referred to in this paper, raise the practical difficulty that despite reasonable inquiry, the custodian or community may not be identified. There should be a mechanism equivalent to the innocent infringement provision in the *Copyright Act* s 115(3) to limit the damages to an account of profits. It is for this reason, the registration system grows in appeal to Aboriginal and Torres Strait Islander peoples, as registration has the effect of reducing the likelihood of being limited to an account of profits.

Heritage held in libraries, museums and universities

[5.79] Access to archives is important to Aboriginal and Torres Strait Islander people.[ccxli]

[5.80] Access to heritage held in archives is a matter of great concern to Aboriginal and Torres Strait Islander communities. In its submission, the NSLA,[ccxlii] identified its *National Position Statement for Aboriginal and Torres Strait Islander Library Services and Collections* (2014) and a commitment to the following:

> [5.80.1] the right of Aboriginal and Torres Strait Islander peoples to be informed about collections that exist relating to them, their culture, language and heritage;
>
> [5.80.2] the right of Aboriginal and Torres Strait Islander peoples to determine use and access provisions for heritage materials which reflect Aboriginal and Torres Strait Islander history, culture, language and perspectives;
>
> [5.80.3] the inclusion of Aboriginal and Torres Strait Islander peoples in decision making processes, at all levels, to achieve informed and appropriate directions and agendas across the library and information sector;
>
> [5.80.4] the development of strategies to increase employment and retention of Aboriginal and Torres Strait Islander staff within the library and information sector;
>
> [5.80.5] the development of strategies to strengthen cultural competency across our workforce, including knowledge and awareness of issues for Aboriginal and Torres Strait Islander library users;
>
> [5.80.6] the development of strategies to return usable copies of collection material to cultural owners to support cultural and language maintenance or revitalisation;

[5.81] The issue of access to or retrieval of heritage held by these institutions is beyond the scope of this paper, however the NSLA position statement's stated commitment is not inconsistent with the proposal raised by the paper.

CHAPTER VI – CONCLUSION

A. Recognition of the unique characteristics of heritage

[6.1] In concluding this paper, it is appropriate to reproduce a conclusion written by Ms Terri Janke, Solicitor, whose name repeatedly arose in papers, submissions and by referral from respected colleagues. Ms Janke wrote:

> *'In conclusion, recognising Indigenous cultural and intellectual property is at the heart of the reconciliation process. Indigenous Australians must have the right to control uses of their cultural and intellectual property in order to maintain their unique cultural identities. Government, industry and all those who seek to make use of Indigenous cultural and intellectual property other than in traditional or customary ways, must proceed on the basis of the principles of respect, informed consent, negotiation, full and proper attribution, and the sharing of benefits.'*[ccxliii]

[6.2] One definition of the word 'reconciliation' is the 'action of making one view or belief compatible with another'.[ccxliv] To the present time, the treatment of Aboriginal and Torres Strait Islander heritage in the *Copyright Act*, has been, to make one view or belief compliant with another.

[6.3] Albert Einstein is attributed as having said '[t]he more I learn, the more I realise how much I don't know.' That saying is appropriate following the preparation of this paper.

[6.4] The paper identifies that Aboriginal and Torres Strait Islander heritage, raises considerations which generally do not sit comfortably with the perspective encapsulated in the *Copyright Act.* The subject of Dreamtime stories, dances and artistic works have been transmitted for thousands of years and are the property of communities and/or custodians with responsibilities to protect and transmit those intangible cultural expressions to future generations.

[6.5] The perspective of the *Copyright Act* is to reward the individual for their creative effort. What the individual author/s does/do after that prima facie position is a matter for them. However, the legislation has, if you adopt the 'contract' rationale, completed its protection of exclusivity for a fixed term by allowing the short term use of published material before the work ultimately contributes to the public pool of usable resources.

[6.6] The ALRC concluded:

> *'…the Commonwealth government appeared to apply the three-part test of Aboriginal descent, self-identification* ***and community recognition*** *for determining eligibility for certain programs and benefits. The courts, in interpreting statutory definitions in federal legislation, have emphasised the importance of descent in establishing Aboriginal identity, but have recognised that self-identification and community recognition may be relevant to establishing descent, and hence Aboriginal identity, for the purposes of specific legislation.'*[ccxlv]

And further:

> *'there are good arguments for recognising Aboriginal customary laws, including in particular:*
>
> - *the need to acknowledge the relevance and validity of Aboriginal customary laws for many Aborigines;*
> - *their desire for the recognition of their laws in appropriate ways;*
> - *their right, recognised in the Commonwealth Government's policy on Aboriginal affairs and in the Commission's Terms of Reference, to choose to live in accordance with their customs and traditions, which implies that the general law will not impose unnecessary restrictions or disabilities upon the exercise of that right;*
> - *the injustice inherent in non-recognition in a number of situations'.*[ccxlvi]

B. Some overlap but in form only

[6.7] Aspects of heritage come within the domain of the *Copyright Act*. Infringement proceedings in respect of artistic works have been successfully brought. Literary works, performances, dramatic and musical works are recognised. However, the substance of heritage is not recognised.

[6.8] The standing of the community as owners of the heritage is not recognised and so they are not compensated in accordance with that recognition. The thrust of IP statutory regimes is to reward the inventor, the designer and the author. However, acknowledging and remunerating others beyond assignees, legal personal representatives and those in identifiable relationships recognised in the legislation, such as employers in certain cases, becomes problematic.

C. Heritage largely ignored by the Copyright Act

[6.9] An issue arises because expressions of Aboriginal and Torres Strait Islander heritage are inseparable from traditional culture. This is not fundamentally an issue of ethics. It is an issue of law - Aboriginal and Torres Strait Islander law.

[6.10] The question is inevitable – why does the legislation have to recognise that law? The answer should include these considerations:

> [6.10.1] the rationale of the IP regime is to strike a balance between rights of the author/creator and the rights of the public, a broad concept, but for the moment the paper accepts an abhorrence of monopolies as being as good a reason as any;
>
> [6.10.2] the balance is based upon a premise that the author is given a period of exclusivity. Where the rights associated with the exclusivity is/are used by a party enjoying a right limited to the copyright owner, the owner will be compensated. In the case of Aboriginal and Torres Strait Islander people and their heritage, the owners are not recognised and neither is a proper basis for them to be compensated.

[6.11] The obligations attaching to heritage extend to:

> [6.11.1] being authorised to create the expression of heritage;
>
> [6.11.2] the manner in which the expression is intended to be used or shown.
>
> [6.11.3] sanctions against the author, for misuse either by the author or by unrelated persons, to whom the community or custodians attribute blame to the author.

[6.12] The author under the *Copyright Act* does not have analogous obligations. The system identifies a single or joint owner of the copyright and grants those rights for a fixed term.

[6.13] The duration of copyright protection, generally for the life of the author plus seventy years, is far longer than patents or registered designs. However, it is inconceivable that Aboriginal and Torres Strait Islander heritage, which has existed for tens of thousands of years, should be available for use by anyone upon the end of the exclusive term provided for in the *Copyright Act*.

[6.14] The *Copyright Act* provides for the ownership of the copyright to begin with the creator or author of the tangible expression.[ccxlvii] It moves thereafter in accordance with the provision or by assignment. Aboriginal and Torres Strait Islander heritage, however, is owned by the community before the expression takes on any form, not just material form.

[6.15] The idea of the story, which has been passed down through the Dreaming is owned by the community, but the community cannot commence proceedings or have standing to do so, as that right belongs to the author. The artificiality is that the law recognises and rewards someone as the owner who does not understand themselves to be the owner or have the rights of ownership.

[6.16] UK patent law has interpreted a grant to the inventor, as placing a strict requirement that the 'first and true inventor' was the only one to be able to enjoy the monopoly granted. In many instances, a patent would be revoked if either there was a non-inventor joined in

the grant or a true inventor was not joined in the grant. The Full Court has followed that reasoning:

> *'It follows that one of two inventors each responsible for a part of the invention cannot claim a patent over the total invention. That is because such a patent would confer upon him or her the benefit of that part of the invention for which he or she was not responsible. A grant of a patent to such a person is liable to be set aside at the suit of any person against whom the patentee seeks to enforce it.'*[ccxlviii]

[6.17] It is a fundamental aspect of the IP rationale, that the inventor or author for that matter, be the recipient of the benefits under the relevant statutory regime. However, the achievement of this purpose falters in relation to the true owners of Aboriginal and Torres Strait Islander heritage.

D. Matters which incline the paper towards conjunctive approach

[6.18] In the submissions to the *Finding the Way* Issues Paper of 2012, almost all participants called for *sui generis* legislation. This is understandable as the perspectives on the expressions of Aboriginal and Torres Strait Islander heritage which exist in forms unrecognised by the legislation, such as oral transmission of stories, are conceptually different from some fundamental copyright principles and conceptually different from the reward for disclosure rationale.

[6.19] The paper has taken the view that a model which recognises the unique position of Aboriginal and Torres Strait Islander heritage and utilises as many as possible of the existing processes or forums, is a preferred option for several reasons.

[6.20] Firstly, a system which addresses many of the deficiencies in the *Copyright Act* towards Aboriginal and Torres Strait Islander heritage, is a positive result, whatever the form it takes.

[6.21] Secondly, in theory, it would be easier in its passage if a model did not to require totally new structures or processes which have not been tried and tested. There are bound to be disputes, for example, as to the proper custodian. A model which has a body or jurisprudence guided by the expertise of Aboriginal and Torres Strait Islander people, can benefit in a more streamline conduct of the administration of these new rights.

[6.22] Thirdly, recognition of unique Indigenous IP rights is a step in reconciliation which recognises and respects Aboriginal and Torres Strait Islander traditions.

[6.23] Finally, it is a major step which may thereafter be refined or modified, rather than a 'boots n all' approach in unchartered waters.

E. The key elements of the proposed model

[6.24] As stated in this chapter and in the paper, a goal of the model proposed by this paper is to find a middle ground whereby:

[6.24.1] fundamental deficiencies in the *Copyright Act* are addressed;

[6.24.2] the manner in which they are addressed provides a satisfactory recognition, of some fundamental matters of priority to Aboriginal and Torres Strait Islander peoples.

[6.24.3] existing mechanisms are utilised to reduce costs and delays, without compromising the preceding two considerations.

[6.25] Key elements will include:

[6.25.1] recognition of community ownership;

[6.25.2] overcoming the requirement that an author be identified;

[6.25.3] providing for heritage rights to be perpetual;

[6.25.4] reliance upon Aboriginal and Torres Strait Islander peoples for their expertise to identify heritage and provide expert opinion on surrounding issues such as custodian disputes;

[6.25.5] informed consent to licensing rights;

[6.25.6] equitable remuneration and substantial penalties for misappropriation through the mechanism of additional damages under s 115(4) of the *Copyright Act*.

[6.26] The proposed model introduces a registration system. The registration of heritage will create a register of record. However, it will not be a registration which grants rights by registration. Heritage is heritage because it is heritage. That is, it is not only for the expression of heritage, but that it is inextricably linked to obligations and duties of the custodian to use the expression in accordance with the standards and approval of the community owners.

[6.27] As a register of record, it will militate against innocent infringement defences under s 115(3) of the *Copyright Act* and add a consideration for the exercise of the discretion of the court on the issue of additional damages.

[6.28] The importance of self-determination has been recognised in the proposed model.

[6.29] The proposed model also recognises and respects the expertise of Aboriginal and Torres Strait Islander peoples to determine what constitutes their heritage and bestow the benefits which that classification attracts upon the heritage owners.

[6.30] Specifically, it is proposed that Aboriginal and Torres Strait Islander expertise is introduced at three critical times:

[6.30.1] in the registration process, upon examination of an application;

[6.30.2] in the registration process, where there may be a dispute as to the party entitled to proceed with the application;

[6.30.3] in the Court process, as Court experts constituted by a panel of Indigenous custodians, owners, specialists in Indigenous law and community elders to determine heritage and entitlements.

[6.31] The heritage owners may however, commence an infringement action at any time and are not required to undergo any registration process for their rights to be recognised.

[6.32] The paper has considered the matter of an independent tribunal. The following observations of Merkel J in *Shaw v Wolf*[ccxlix] are particularly relevant:

> *'It is unfortunate that the determination of a person's Aboriginal identity, a highly personal matter, has been left by a parliament that is not representative of Aboriginal people to be determined by a court which is also not representative of Aboriginal people. Whilst many would say that this is an inevitable incident of political and legal life in Australia, I do not accept that that must always be necessarily so.* ***It is to be hoped that one day if questions such as those that have arisen in the present case are again required to be determined that that determination might be made by independently constituted bodies or tribunals which are representative of Aboriginal people.***'[ccl]

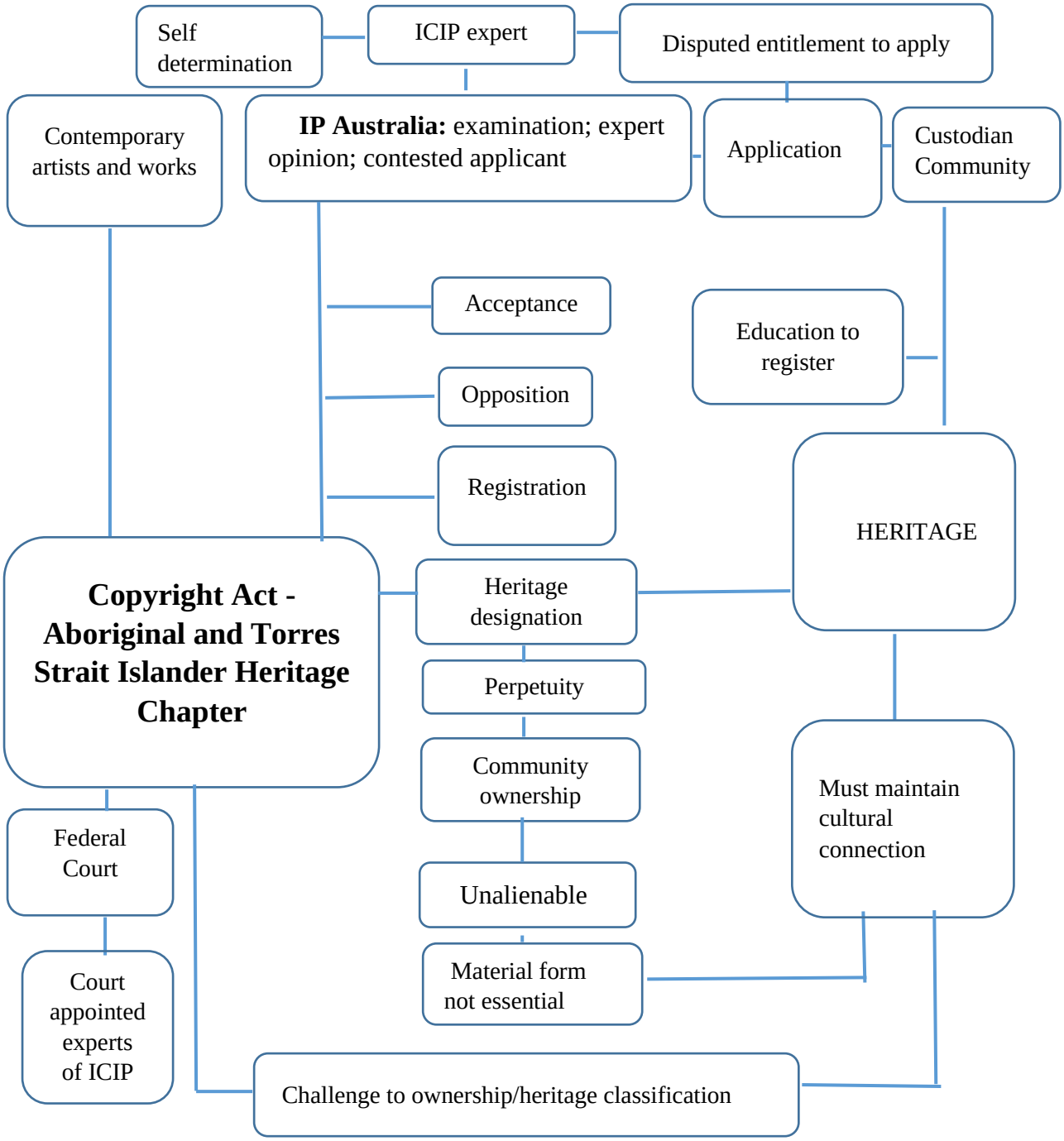
[6.33] Consistent with those comments, the following structure has been suggested:

> 'An Indigenous Cultural Tribunal should also be established to mediate disputes. The tribunal should be made up of Indigenous custodians, owners, specialists in Indigenous law and community elders. Use of ADR procedures with culturally sensitive mediators. There must be avenues to the Federal Court for determinations.'[ccli]

[6.34] The paper takes the position that whilst it fully supports the mediation process and that culturally sensitive mediators conduct these ADR procedures, the establishment of a tribunal is inconsistent with a fundamental position taken by the paper to utilise existing mechanisms where at all possible.

[6.35] A further consideration, not offended by the ADR role to be played by any proposed tribunal, is the Constitutional issue that arises under s 71 if there were subsequent proposals to utilise the tribunal for determinations. These may be viewed as an exercise of judicial power to make decisions.

APPENDIX A


Self determination
ICIP expert
Disputed entitlement to apply
Contemporary artists and works
IP Australia: examination; expert opinion; contested applicant
Application
Custodian Community
Acceptance
Education to register
Opposition
Registration
HERITAGE
Copyright Act - Aboriginal and Torres Strait Islander Heritage Chapter
Heritage designation
Perpetuity
Community ownership
Must maintain cultural connection
Federal Court
Unalienable
Court appointed experts of ICIP
Material form not essential
Challenge to ownership/heritage classification

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UNESCO, *'Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property'*, UNESCO Cultural Property Convention, 1970

[i] http://deliades.com.au/experience/

[ii] The author is aware that the terminology about how this country's first peoples are described is not itself without some difference of opinion. For example, the majority of submissions to the IP Australia 2012 reference paper, refer to 'Indigenous people'. The *Our Culture: Our Future Report* also asks the question 'What is Indigenous cultural and intellectual property?' The report identifies it as a reference to 'Indigenous Australians rights to their heritage': *Our Culture Our Future*, Executive Summary page XVII. However, the author having spoken to a number of elders of this country's first people has come to understand that the term 'indigenous' may offend some Aboriginal and Torres Strait Island people. As stated, the paper notes that the term 'Indigenous' has been used in numerous sources referred to in this paper by descendants of the original people. It seems that the safest course is to refer to the original people in this paper as 'Aboriginal and Torres Strait Island people' where possible, without abbreviation.

[iii] "Embracing Diversity in the Law – Solutions and Outcomes", the Hon Justice A. Philippides Queensland Court of Appeal, presented at a meeting of the Hellenic Australian Lawyers Association on 10 June 2016 at p. 3.

[iv] Daes, E I, Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities, and Chairperson of the Working Group of Indigenous Populations, *Study on the Protection of the Cultural and Intellectual Property of Indigenous Peoples*, E/CN.4/Sub.2/1993/28,28 July 1993 (the '1993 Daes Study').

[v] *The Our Culture: Our Future Report*, Executive Summary at p. XV.

[vi]*The Our Culture: Our Future Report*, Executive Summary at p. XX.

[vii] The 1993 Daes' Study above, n iii at p.8 [24].

[viii] "*Our Culture: Our Future Report*: page 2.

[ix] The *Our Culture: Our Future Report* at page 2 referring to the 1993 Daes' study p. 8 [22].

[x] The *Our Culture: Our Future Report*: p.7

[xi] *Ibid.*

[xii] The 1993 Daes' Study p. 7 at [20].

[xiii] The *Our Culture: Our Future Report* p. 8 referring to the submission of the Centre for Indigenous History and the Arts, October 1997.

[xiv] *The Our Culture: Our Future Report* p. 8.

[xv] *Ibid.*

[xvi] The *Our Culture: Our Future Report* p. 9.

[xvii] http://www.savanna.org.au/nt/ah/altraditionalfire.html .

[xviii] Australian Government Industry Commission, Office of Regulation Review: *'An economic analysis of copyright reform', http://www.pc.gov.au/research/supporting/copyright-reform/ecoanala.pdf* (1995) at page 11.

[xix] *Millar v Taylor* (1769) 98 ER 201 at 223.

[xx] *Walter v Lane* [1900] AC 539.

[xxi] The Sub-Committee on Patents, Trademarks, and Copyrights, Commission on Judiciary, 85th Congress, 2d Session, United States of America, 1958, Study No. 15, 1 (referring to Fritz Machlup, '*An Economic Review of the Patent System'*) noted:

> Letters patent are official documents by which certain rights, privileges, ranks, or titles are conferred. Among the better known of such "open letters" are patents of appointment (of officers, military, judicial, colonial), patents of nobility, patents of precedence, patents of land conveyance, patents of monopoly, patents of invention. Patents of invention confer the right to exclude others from using a particular invention. When the term "patent" is used without qualification, it nowadays refers usually to inventors' rights;

Machlup, noted at p. 21 of '*An Economic Review of the Patent System'*:

> The 'natural-law' thesis assumes that man has a natural property right in his own ideas. Appropriation of his ideas by others, that is, their unauthorized use, must be condemned as stealing. Society is morally obligated to recognize and protect this property right. Property is, in essence, exclusive. Hence, enforcement of exclusivity in the use of a patented invention is the only appropriate way for society to recognise this property right;

Professor J. Lahore has said that '[t]he "natural law" thesis presupposes that a person has a natural property right in his or her inventive ideas': James Lahore, '*The Legal Rationale of the Patent System'* (Speech delivered at the Industrial Property Advisory Committee Seminar, Healesville, Victoria, Australia, 7 November (1980)) 8.

[xxii] *Our Culture: Our Future Report*, Executive Summary Chapter Four p. xx.

[xxiii] Mrs Erica Irene Daes, *Final Report on the Protection of the Heritage of Indigenous Peoples*, United Nations

Document E/CN.4/Sub.2/1995/26). Annex Guideline 11 (the '1995 Daes Report').

[xxiv] *Cultural property* is defined in Article 1 of the UNESCO Cultural Property Convention 1970 as property which, on religious or secular grounds, is specifically designated by each state as being of importance for archaeology, prehistory, history, literature, art or science and which belongs to the following categories:

a. Rare collections and specimens of fauna, flora, minerals and anatomy, and objects of palaeontological interest;
b. Property relating to history, including the history of science and technology and military and social history, to the life of national leaders, thinkers, scientists and artists and to events of national importance;
c. Products of archaeological excavations (including regular and clandestine) or of archaeological discoveries;
d. Elements of artistic or historical monuments or archaeological sites which have been dismembered;
e. Antiquities more than 100 years old, such as inscriptions, coins and engraved seals;
f. Objects of ethnological interest;
g. Property of artistic interest, such as:
    i. pictures, paintings and drawings produced entirely by hand on any support and in any material (excluding industrial designs and manufactured articles decorated by hand);
    ii. original works of statuary art and sculpture in any material;
    iii. original engravings, prints and lithographs;
    iv. original artistic assemblages and montages in any material;
h. Rare manuscripts and incunabula, old books, documents and publications of special interest (historical, artistic, scientific, literary, etc) singly or in collections;
i. Postage, revenue and similar stamps, singly or in collections;
j. Archives, including sound, photographic and cinematographic archives;
k. Articles of furniture more than 100 years old and old musical instruments.

[xxv] *The Our Culture: Our Future Report* p. 4 referring to the Indigenous Reference Group, *Draft Principles and Guidelines for the Protection of Heritage of Indigenous People*, September 1997.

[xxvi] *The Our Culture: Our Future Report* p. 4 referring to the submission from Yunggorendi First Nation Centre for Higher Education and Research, Flinders University of South Australia: October 1997.

[xxvii] *The Our Culture: Our Future Report* p. 4 referring to the submission from City of Wanneroo, October 1997.

[xxviii] *The Our Culture: Our Future Report* p. 5 referring to the submission of Daki Budtcha Pty Ltd, October 1997.

[xxix] *The Our Culture: Our Future Report* p. 5 referring to the submission of the Queensland Museum, October 1997.

[xxx] *The Our Culture: Our Future Report* p. 5/6 referring to the submission of the Yunggorendi First Nation Centre for Higher Education and Research, Flinders University, October 1997.

[xxxi] Australian Law Reform Commission Report 'Essentially Yours: The Protection of Human Genetic Information in Australia' (ALRC Report 96) published 30 May 2003, Chapter 36 Kinship and identity ('ALRC Report 96') at [36.11] referring to the Royal Commission into Aboriginal Deaths in Custody, *National Report* (1991), Commonwealth of Australia, Canberra [11.12.5].

[xxxii] *Commonwealth v Tasmania* (1983) 158 CLR 1, 274 (per Deane J).

[xxxiii] ALRC Report 96 at [36.17] referring to *Attorney-General (Cth) v Queensland* (1990) 94 ALR 515; *Gibbs v Capewell* (1995) 128 ALR 577; *Shaw v Wolf* (1998) 163 ALR 205. See also *In the Matter of the Aboriginal Lands Act 1995 and In the Matter of Marianne Watson (No 2)* (Unreported, Supreme Court of Tasmania, Cox CJ, 27 August 2001). The following analysis draws on a discussion in an unpublished paper: L de Plevitz and L Croft, *Proving Aboriginality: Legal and Genetic Constructs of Aboriginal Descent* (2002) unpublished.

[xxxiv] ALRC Report 96 at [36.28].

[xxxv] *Shaw v Wolf* (1998) 163 ALR 205, 211–212.

[xxxvi] *Shaw v Wolf* (1998) 163 ALR 205, 211–212.

[xxxvii] Ibid at 268.

[xxxviii] Enforcement of copyright subsisting in a 'literary work' or an 'artistic work' as defined in the *Copyright Act* s 10, may be commenced by the owner of copyright in the literary work under s 115(1) of the *Copyright Act* or the exclusive licensee under s 119(a) of the *Copyright Act*; Performers' protection provisions are contained in Part XIA (ss 248A – 248V of the *Copyright Act*.

[xxxix] *Copyright Act* s 195AI(2).

[xl] 'Human Rights of Indigenous Peoples', Report of the seminar on the draft principles and guidelines for the protection of the heritage of indigenous people: Chairperson-Rapporteur Mrs Erica-Irene Daes, 28 February – 1 March 2000, E/CN.4/Sub.2/2000/26 – Guideline 14.

[xli] See http://www.savanna.org.au/nt/ah/altraditionalfire.html

[xlii] http://www.aboriginal-art-australia.com/artworks/ivy-napangardi-poulson-vaughan-springs-dreaming-2/

[xliii] http://www.aboriginal-art-australia.com/artworks/maryanne-nungarrayi-spencer-birds-live-around-yuendumu/
[xliv] AustLit is a non-profit collaboration between a network of researchers from Australian universities and the National Library of Australia, led by The University of Queensland: http://www.austlit.edu.au/austlit/page/6939348
[xlv] Jenna Richards Barngala descendant: referred to in the NILS 2014 report at p. xi.
[xlvi] United Nations Declaration on the Rights of Indigenous Peoples Article 13(1): see https://www.humanrights.gov.au/publications/un-declaration-rights-indigenous-peoples-1
[xlvii] See above niii.
[xlviii] The 1995 Daes Report: Guideline 18.
[xlix] National Indigenous Languages Survey Report 2005 – a report submitted to the Department of Communications, Information Technology and the Arts by the Australian Institute of Aboriginal and Torres Strait Islander Studies in association with the Federation of Aboriginal and Torres Strait Islander Languages at p. 3. See http://aiatsis.gov.au/.
[l] NILS 2005 report p. 68 and Table 6.5 at p. 79.
[li] Ibid.
[lii] The 'Community, identity, wellbeing: the report of the Second National Indigenous Languages Survey' 2014. Available at AIATSIS http://aiatsis.gov.au/.
[liii] The NILS 2014 report at p. x – The Executive Summary.
[liv] The NILS 2014 report at p. 31.
[lv] Ibid.
[lvi] Ibid.
[lvii] The NILS 2014 report said that these reasons concurred with some of the characteristics of successful language activities identified by the House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs (HORSCATSIA 2012, p. 199): the NILS 2014 report at p. 20.
[lviii] 'Languages and Their Status in Aboriginal Australia', Walsh & Yallop, Aboriginal Studies Press. Chapter 1 at p. 2.
[lix] *The Our Culture: Our Future Report* p. 11 referring to J.C. Weiner, Protection of Folklore: A Political and Legal Challenge (1987), vol 18, *International Review of Industrial Property and Copyright,* p 67.
[lx] *Aboriginal and Historical Relics Preservation Act* 1965 (SA); *Aboriginal Sacred Sites Act* (NT); *Aboriginal Relics Preservation Act* 1967 (Qld); *Aboriginal Relics Act* 1975 (Tas); *Archaeological and Aboriginal Relics Preservation Act* 1972 (Vic); *Aboriginal Heritage Act* 1972 (WA).
[lxi] *National Parks and Wildlife Act* 1974 (NSW) s. 86(1).
[lxii] Section 86(2).
[lxiii] *Aboriginal Cultural Heritage Act* 2003 (Qld) s 15.
[lxiv] *Aboriginal Cultural Heritage Act* 2003 (Qld) s 19.
[lxv] *Aboriginal Cultural Heritage Act* 2003 (Qld) s 24.
[lxvi] *Aboriginal and Torres Strait Islander Heritage Protection Act* 1984 s 4.
[lxvii] Ibid s 22.
[lxviii] Ibid s 23.
[lxix] Ibid s 12.
[lxx] Aboriginal Heritage Amendment Act 2016, the new s 14.
[lxxi] Aboriginal Heritage Amendment Act 2016 s 79D.
[lxxii] Aboriginal Heritage Amendment Act 2016 s 79G.
[lxxiii] Penalty units are set and calculated in the Monetary Units Act 2004 (Vic). One penalty unit is currently $155.46 from 1 July 2016 to 30 June 2017. Under s 79G the penalties are 1800 penalty units and 10,000 penalty units for individuals and corporations respectively.
[lxxiv] *The Our Culture: Our Future Report* [1.3.3] p. 8.
[lxxv] The 1993 Daes Study at [29] at p.9; *The Our Culture: Our Future Report* [1.3.4] p. 8.
[lxxvi] *Milpurrurru v Indofurn Pty Ltd* (1994) 30 IPR 209 (*Milpurrurru*).
[lxxvii] *Milpurrurru* at p. 214.
[lxxviii] Ibid.
[lxxix] Ibid.
[lxxx] *Milpurrurru* at p. 215.
[lxxxi] Ibid.
[lxxxii] *Telstra Corporation Limited v Phone Directories Company Pty Ltd* [2010] FCAFC 149 at [74] (*Phone Directories*)referring to the decision of Peterson J in *University of London Press Ltd v University Tutorial Press Ltd* ([1916] 2 Ch 602 at 608 to 610).

[lxxxiii] The decision of the Full Court of the Federal Court in *Milwell Pty Ltd v Olympic Amusements Pty Ltd* [1999] FCA 63 referring to the decision of Peterson J in *University of London Press Ltd v University Tutorial Press Ltd* ([1916] 2 Ch 602 at 608 to 610) where it was said:

> *"Copyright Acts are not concerned with the originality of ideas, but with the expression of thought and, in the case of "literary work', with the expression of thought in print or writing. The originality which is required relates to the expression of the thought. But the Act does not require that the expression must be in an original or novel form, but that the work must not be copied from another work - that it should originate from the author"*

[lxxxiv] Lahore, *Copyright and Designs*, LexisNexis loose-leaf commentary, 2004 at [2050]. The only exception to the general fixation requirement in the *Copyright Act* is in relation to a broadcast, which is protected when the broadcast is 'made' in Australia.

[lxxxv] *Milpurrurru* at p. 214.

[lxxxvi] *Milpurrurru* at p. 215.

[lxxxvii] As to the custodian: *The Our Culture: Our Future Report* p. 8; as to the artist: the evidence in *Milpurrurru* reproduced at p. 215 lines 20 – 25.

[lxxxviii] United Nations Commission on Human Rights Sub-Commission on Prevention of Discrimination and Protection of Minorities Working Group on Indigenous Populations 14th Session 29 July – 2 August 1996 Document: 96-12980 at [35].

[lxxxix] The 1995 Daes Report, Annex Guidelines at [11].

[xc] Ibid at [14].

[xci] *The Our Culture: Our Future Report*: [1.4] p. 9.

[xcii] Inaugural Australian National University Alumni lecture, Charles Darwin University Darwin Alumni Reception.

[xciii] https://drbentleyjames.wordpress.com/

[xciv] https://drbentleyjames.wordpress.com/2016/03/31/thank-you/#respond

[xcv] The 1993 Daes Study [170] p.40.

[xcvi] Ibid.

[xcvii] http://warlu.com/.

[xcviii] Submission on the Inquiry into Australia's Indigenous visual arts and craft sector, by Alex Malik

[xcix] 'It is a common feature of the statutory rights asserted in these proceedings that they are negative in character. As Laddie, Prescott and Vitoria observed:
"Intellectual property is ... a purely negative right, and this concept is very important. Thus, if someone owns the copyright in a film he can stop others from showing it in public but it does not in the least follow that he has the positive right to show it himself."' *JT International SA v Commonwealth of Australia* [2012] HCA 43 (5 October 2012) per French CJ at [36].

[c] *Our Culture: Our Future Report*, Executive Summary p. XX.

[ci] *Aboriginal and Torres Strait Islander Peoples Recognition Act* 2013 s. 3

[cii] *Our Culture: Our Future Report* p. 188.

[ciii] *Our Culture: Our Future Report* p. 191.

[civ] *Our Culture: Our Future Report*, Executive Summary p. XXI.

[cv] *Our Culture: Our Future Report* p. 55.

[cvi] http://www.australia.gov.au/about-australia/australian-story/austn-indigenous-art

[cvii] 'IP Nutshell', A. Fitzgerald and D. Eliades, Thomson Reuters 4th ed., 2015 at p. 29; *Kenrick & Co Ltd v Lawrence & Co* (1890) 25 QBD 99.

[cviii] *IceTV Pty Limited v Nine Network Australia Pty Limited* [2009] HCA 14 at [28] (*IceTV*).

[cix] *Telstra Corporation Limited v Phone Directories Company Pty Ltd* [2010] FCAFC 149 at [72] per Keane CJ (as his Honour then was).

[cx] In relation to a 'work' (defined in the *Copyright Act* s 10 to mean a literary, dramatic, musical or artistic work) they are contained in the *Copyright Act* s 31 as to a 'work' and Part IV Division 2 as to the nature of copyright in subject matter other than works, namely, sound recordings, cinematographic films, television and sound broadcasts and making a facsimile copy of published editions of works.

[cxi] *Copyright Act* sub-section 31(1)(a) as to literary, dramatic or musical works and sub-section 31(1)(b) as to artistic works.

[cxii] *Copyright Act* s 32(1) and s 32(2).

[cxiii] *Desktop Marketing Systems Pty Ltd v Telstra* (2002) 55 IPR 1 (*Desktop*).

[cxiv] *IceTV* at [134] per Gummow, Hayne and Heydon JJ.

[cxv] *IceTV* at [22] per French CJ, Crennan and Kiefel JJ.

[cxvi] *IceTV* at [24] and [25] per French CJ, Crennan and Kiefel JJ

[cxvii] *Stack v Davies Shephard Pty Ltd* (1999) 47 IPR 525 (Trial Judge); *Davies Shephard Pty Ltd v Stack* (2001) 51 IPR 513 (Full Court).

[cxviii] See *Telstra Corporation Limited v Phone Directories Company Pty Ltd* [2010] FCAFC 149 (*Phone Directories*) at [61] to [74] and [96],where Keane CJ (as his Honour then was) refers to the *IceTV* decision of the High Court.
[cxix] *Phone Directories* at [57].
[cxx] *Phone Directories* at [127] per Perram J.
[cxxi] *Our Culture: Our Future Report* p. 53.
[cxxii] *Milpurrurru* 30 IPR 209 at p. 246.
[cxxiii] *Facton Ltd v Rifai Fashions Pty Ltd* [2012] FCAFC 9 (20 February 2012) (*Facton)* at [35] and [36].
[cxxiv] *MJA Scientifics International Pty Ltd and Another v SC Johnson & Son Pty Ltd* (1998) 43 IPR 275 at p. 284 (*MJA)* at pp. 283-284.
[cxxv] *MJA* at p. 284 (dealing with subsequent submissions on the issue of damages).
[cxxvi] *Leica Geosystems Pty Ltd v Koudstaal (No 3)* [2014] FCA 1129 at [48] per Collier J (*Leica*).
[cxxvii] *Leica* at [18].
[cxxviii] *Leica* at [90].
[cxxix] *Aristocrat Technologies Australia Pty Ltd v DAP Services (Kempsey) Pty Ltd* (2007) 157 FCR 564; [2007] FCAFC 40 (*Aristocrat Technologies*) at [27].
[cxxx] *Leica* at [91].
[cxxxi] *Halal Certification Authority Pty Limited v Scadilone Pty Limited* [2014] FCA 614 (Perram J, 13 June 2014) (*Halal).*
[cxxxii] *Halal* at [1].
[cxxxiii] *Vertical Leisure Limited & Anor v Skyrunner Pty Ltd & Anor* [2014] FCCA 2033 (Driver J, 5 September 2014) (*Vertical Leisure*).
[cxxxiv] *Vertical Leisure* at [29].
[cxxxv] http://www.diggins.com.au/artist/terry-dhurritjini-yumbulul/ .
[cxxxvi] *Yumbulul v Reserve Bank of Australia and Others* (1991) 21 IPR 481 (*Yumbulul*) at p. 482.
[cxxxvii] *Yumbulul* at p. 481.
[cxxxviii] *Yumbulul* at p. 484.
[cxxxix] *Yumbulul* at p. 491.
[cxl] *Yumbulul* at p. 492.
[cxli] *Yumbulul* at p. 491 as to the primary case under section 52 on the claimed misunderstanding of the effect of the license agreement.
[cxlii] *Yumbulul* at p. 492.
[cxliii] Ibid.
[cxliv] *Yumbulul* at p. 492-3.
[cxlv] At the time of writing a copy of the 1990 version of the legislation was not available, however the 1973 version of the relevant provisions substantially accord with the current provisions. It is assumed therefore that there was no relevant change to the iteration of the legislation applicable in the case.
[cxlvi] http://news.aboriginalartdirectory.com/2010/05/death-of-john-bulun-bulun.php
[cxlvii] Mr Golvan has the distinction of appearing for the applicants in *Yumbulul v Reserve Bank of Australia and Others* (1991) 21 IPR 481 ('*Yumbulul*'); *Bulun Bulun and Another v R & T Textiles Pty Ltd and Another* (1998) 41 IPR 513 ('*Bulun Bulun*'); *Milpurrurru and Others v Indofurn Pty Ltd and Others* (1994) 30 IPR 209 (*Milpurrurru*).
[cxlviii] Golvan, C. D. "The Protection of "At The Waterhole" by John Bulun Bulun – Aboriginal art and the recognition of private and communal rights": www.colingolvan.com.au/ *'Law Articles and Essays'.* Also see ``Aboriginal Art and Copyright: The case for Johnny Bulun Bulun'', Colin Golvan, [1989] 10 European and Intellectual Property Review 346;
[cxlix] *Bulun Bulun* at p. 513.
[cl] Golvan at p. 2.
[cli] *Bulun Bulun* at p. 524.
[clii] Ibid.
[cliii] Golvan at p.7.
[cliv] Golvan at p. 3.
[clv] Ibid.
[clvi] Golvan at p. 7.
[clvii] *Bulun Bulun* at p. 525.
[clviii] Protecting Australian Indigenous Art: ownership, copyright and marketing issues for NSW schools. Published on the internet in 2006 by the Board of Studies NSW, GPO Box 5300, Sydney 2001, Australia.
[clix] *Bulun Bulun* at p. 525.
[clx] *Bulun Bulun* at p. 517.
[clxi] *Bulun Bulun* at p. 515.

[clxii] *Mabo v The State of Queensland [No.2]* (1992) 175 CLR 1.
[clxiii] *Bulun Bulun* at p. 524.
[clxiv] Ibid.
[clxv] Golvan at p. 3.
[clxvi] Ibid.
[clxvii] *Bulun Bulun* at p. 527.
[clxviii] Ibid.
[clxix] *Bulun Bulun* at p. 528.
[clxx] *Hospital Products Ltd v United States Surgical Corp* (1984) 156 CLR 41.
[clxxi] *Bulun Bulun* at p. 528.
[clxxii] Ibid.
[clxxiii] *Bulun Bulun* at pp. 529/530.
[clxxiv] *Our Culture: Our Future Report* p. 62.
[clxxv] *Milpurrurru and Others v Indofurn Pty Ltd and Others* (1994) 30 IPR 209.
[clxxvi] *Milpurrurru* at p. 216.
[clxxvii] Ibid.
[clxxviii] *Milpurrurru* at p. 224.
[clxxix] *Milpurrurru* at p. 239.
[clxxx] Ibid.
[clxxxi] 'New Tracks - Indigenous knowledge and cultural expression and the Australian intellectual property system' Terri Janke and Company, 31 May 2012 (the 'Janke submission') in response to the Issues Paper '*Finding the Way: a conversation with Aboriginal and Torres Strait Islander peoples*', (the *Finding the Way* Issues Paper) conducted by IP Australia and Office for the Arts.
[clxxxii] The Janke submission at p. 30.
[clxxxiii] See Arts Law Centre of Australia: http://www.artslaw.com.au/articles/entry/protecting-the-sacred-wandjina-the-land-and-environment-court-goes-to-the-b/
[clxxxiv] The Janke submission at p. 31.
[clxxxv] "News for Seniors", Australian Government Department of Human Services. Issue 87, May 2012. p. 13.
[clxxxvi] *Copyright Act* section 22(3A).
[clxxxvii] *Copyright Act* section 23.
[clxxxviii] Submission on the Government Inquiry into Australia's Indigenous visual arts and craft sector, by Alex Malik, undated but believed *circa* 2006.
[clxxxix] *Bulun Bulun* at p. 525.
[cxc] *Telstra Corporation Limited v Phone Directories Company Pty Ltd* [2010] FCAFC 149 at [127] per Perram J.
[cxci] The submission by the National & State Libraries Australasia (NSLA) to the *Finding the Way* Issues Paper dated 16 October, 2014 refers to the NSLA *Position Statement on Indigenous Intellectual Property and Ownership* (2010) which in turn refers to: *'Intellectual Property and the Safeguarding of Traditional Cultures: Legal Issues and Practical Options for Museums, Libraries and Archives*', a paper written for WIPO by Molly Torsen and Jane Anderson, 2010 p.15 -http://www.wipo.int/export/sites/www/tk/en/publications/1023.pdf .
[cxcii] *ABC v Lenah Game Meats Pty Ltd* [2001] HCA 63 (*Lenah Meats*).
[cxciii] *Lenah Meats* at [54] and [55] per Gleeson CJ: A film of a man in his underpants in his bedroom would ordinarily have the necessary quality of privacy to warrant the application of the law of breach of confidence. Indeed, the reference to the gratuitously humiliating nature of the film ties in with the first of the four categories of privacy adopted in United States law, and the requirement that the intrusion upon seclusion be highly offensive to a reasonable person. For reasons already given, I regard the law of breach of confidence as providing a remedy, in a case such as the present, if the nature of the information obtained by the trespasser is such as to permit the information to be regarded as confidential. But, if that condition is not fulfilled, then the circumstance that the information was tortiously obtained in the first place is not sufficient to make it unconscientious of a person into whose hands that information later comes to use it or publish it. The consequences of such a proposition are too large.
[cxciv] *Lenah Meats* at [101] and [102].
[cxcv] *Our Culture: Our Future Report*, Executive Summary p. XX and XXI.
[cxcvi] The *Commonwealth of Australia Constitution Act* s 51(xviii) (the Constitution)
[cxcvii] The Constitution s 51(xxvi): *The people of any race, ~~other than the aboriginal people in any State,~~ for whom it is necessary to make special laws.*
[cxcviii] The Constitution s 127: ~~*In reckoning the numbers of the people of the Commonwealth, or of a State or other part of the Commonwealth, aboriginal natives should not be counted.*~~
[cxcix] *Federal Court Rules* 2011 r. 23.01.
[cc] Ibid.
[cci] *Our Culture: Our Future Report*, Executive Summary p. XX and XXI at point 2.

[ccii]*Our Culture: Our Future Report*, Executive Summary p. XX and XXI at point 3.
[cciii]*Our Culture: Our Future Report*, Executive Summary p. XX and XXI at point 4.
[cciv] *Our Culture: Our Future Report*, Executive Summary p. XX and XXI at point 5, 6 and 13.
[ccv] *Our Culture: Our Future Report*, Executive Summary p. XX and XXI at point 9.
[ccvi] *Our Culture: Our Future Report*, Executive Summary p. XXXVI.
[ccvii] *Our Culture: Our Future Report*, Executive Summary Chapter Four p. xx.
[ccviii] IP Australia is identified as the preferred body as it has a process which it administers which is already in use and reflects principles of natural justice. An aim of this paper is to utilise existing structures and processes where possible.
[ccix] *Patents Act* ss 32 and 36.
[ccx] *Our Culture: Our Future Report* at p.195 stated:
'An Indigenous Cultural Tribunal should also be established to mediate disputes. The tribunal should be made up of custodians, owners, specialists in Indigenous law and community elders. Use of ADR procedures with culturally sensitive mediators. There must be avenues to the Federal Court for determinations.'
[ccxi] The paper does not propose that the process is under any particular Registrar or the Commissioner. It is likely that a distinct Registrar role be created ideally which will come under an existing Registrar's auspices. However, the paper intends that mechanisms in place are intended to be utilised noting that where possible an examiner or examiners who are Aboriginals or Torres Strait Islanders be trained in conjunction with the use of the expert.
[ccxii] *Our Culture: Our Future Report* relevantly stated at 22.3.4:
'After analysing the feedback received, it appears there is scope for registers or databases to be of use in so far as they relate to material that is already publicly available in some material form. New material or secret and sacred knowledge would need greater rights protection.
Furthermore, Indigenous people should have control over the content of any databases and registers established, as well as who can access and use the knowledge and related information on the register.
If the register is to act as a clearance system, it must be appropriately designed and operate on the premise of prior authorisation rather than under a blanket authorisation.'
[ccxiii] *Our Culture: Our Future Report* p. 183.
[ccxiv] 'Indigenous Peoples and Intellectual Property Rights', Research Paper 20, M. Davis, 1996-97.
[ccxv] *Our Culture: Our Future Report* at page 2 referring to the 1993 Daes' study p. 8 [22].
[ccxvi] Mrs Erica Irene Daes, *Final Report on the Protection of the Heritage of Indigenous Peoples*, United Nations Document E/CN.4/Sub.2/1995/26). Annex Guideline 11.
[ccxvii] *Our Culture: Our Future Report* Chapter 11 p. 135.
[ccxviii] *Our Culture: Our Future*, Executive Summary Chapter Eighteen p. xxxvi.
[ccxix] *Our Culture: Our Future Report* p. 185.
[ccxx] Ibid.
[ccxxi] *Our Culture: Our Future Report* p. 8.
[ccxxii] United Nations *Draft Declaration on the Protection of the Rights of Indigenous Peoples* and the Indigenous Reference Groups *Draft Principles and Guidelines for the Protection of Indigenous Cultural and Intellectual Property* referred to in *Our Culture: Our Future Report* p.47.
[ccxxiii] *Milpurrurru* at 30 IPR 209 at p. 215.
[ccxxiv] *Federal Court Rules* Part 23 Division 23.1 r 23.01.
[ccxxv] les Nouvelles, Journal of the Licensing Executives Society International, Vol. XLVIII, No. 2, June 2013 (ISSN 0270-174X) les Nouvelles, Journal of the Licensing Executives Society International, Vol. XLVIII, No. 3, September 2013 (ISSN 0270-174X).
[ccxxvi] The *Commonwealth of Australia Constitution Act* s 71.
[ccxxvii] See Practice Direction of the Federal Court on experts CM7 relevantly, 'Additionally, it is hoped that the guidelines will assist individual expert witnesses to avoid the criticism that is sometimes made (whether rightly or wrongly) that expert witnesses lack objectivity, or have coloured their evidence in favour of the party calling them'.
[ccxxviii] *Milpurrurru* 30 IPR 209 at p. 213.
[ccxxix] Ibid at p. 215.
[ccxxx] Ibid.
[ccxxxi] *Copyright Act* s 135SA.
[ccxxxii] The Productivity Commission Draft Report, Issued April 2016: http://www.pc.gov.au/
[ccxxxiii] *Intellectual Property Laws Amendment (Raising The Bar) Act 2012* - Schedule 6.
[ccxxxiv] The Submission is at www.deliades.com.au/ at [113].
[ccxxxv] *Copyright Act* s 14.
[ccxxxvi] *Milpurrurru* at 30 IPR 209 at p. 226.

[ccxxxvii] Ibid at p. 228.
[ccxxxviii] Ibid.
[ccxxxix] *EMI Songs Australia Pty Limited v Larrikin Music Publishing Pty Limited* [2011] FCAFC 47 (31 March 2011) at [49].
[ccxl] *Copyright Act* s 115(4)(b)(ia).
[ccxli] *Our Culture: Our Future* [3.10.2] at p. 32.
[ccxlii] The members of the NSLA are the State libraries of NSW, Qld, SA, Vic, Western Australia, the NT library, Libraries ACT, LINC Tasmania, the National Library of Australia and the National Library of NZ: http://www.nsla.org.au/memorandum-understanding
[ccxliii] Janke, T, '*Respecting Indigenous Cultural and Intellectual Property Rights*' [1999] UNSW Law Jl 16; (1999) 22(2) University of New South Wales Law Journal 631.
[ccxliv] http://www.oxforddictionaries.com/definition/english/reconciliation
[ccxlv] ALRC Report 96 at [36.28].
[ccxlvi] ALRC Report 31 at Chapter 8, [127].
[ccxlvii] *Copyright Act* s 35.
[ccxlviii] Stack v Davies Shephard Pty Ltd 51 IPR 513 at [21].
[ccxlix] *Shaw v Wolf* (1998) 163 ALR 205, 211–212.
[ccl] Ibid at 268.
[ccli] *Our Culture: Our Future Report* page XXXVII at [18.10].